

**IIPA's 2010  
Special 301 Report  
on  
Copyright Protection &  
Enforcement**



**Submitted to the  
U.S. Trade Representative (USTR)  
on February 18, 2010  
by the  
International Intellectual Property Alliance**

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# INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE®



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February 18, 2010

*Submitted via regulations.gov*

Mr. Stanford McCoy  
Assistant U.S. Trade Representative  
for Intellectual Property and Innovation  
Office of the U.S. Trade Representative  
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Re: Special 301: Comments regarding the Identification of Countries Under Section 182 of the Trade Act of 1974: Request for Public Comment ("Special 301"), and Request to Testify at the Public Hearing, 75 Fed. Reg. 2578 (January 15, 2010)

Dear Mr. McCoy:

The International Intellectual Property Alliance (IIPA) submits this response to the Federal Register notice which invites "written submissions from the public concerning foreign countries' acts, policies or practices that are relevant to the decision whether a particular trading partner should be identified under Section 182 of the Trade Act [of 1974]." That section of the Trade Act is more commonly referred to as "Special 301," and involves the process, led by the Office of the U.S. Trade Representative, of 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 (19 U.S.C. §2242).

IIPA has participated in every Special 301 cycle since the 1988 Trade Act created this process. We have provided public comments on the acts, practices and policies regarding copyright law, piracy, enforcement and market access issues in selected foreign countries for more than two decades. In this year's filing (which includes this cover letter and several appendices), we report on 39 countries or territories, including 35 of which we believe should be ranked on the Special 301 Priority Watch List or Watch List, and monitored under Section 306 of the Trade Act. IIPA has also recommended that out-of-cycle reviews (OCRs) be conducted in five countries. We have found OCRs to be extremely effective in focusing governments' attention on specific shortfalls.

In this cover letter, we also describe the key challenges and initiatives that define the copyright industries' agenda for the coming year and discuss the types, levels, and costs of copyright piracy.

IIPA will also be submitting our request to testify at the March 3, 2010 public hearing on Special 301. We will formally file our "Notice of Intent to Testify" and "Hearing Statement" under separate cover to [www.regulations.gov](http://www.regulations.gov).

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## 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 software (operating systems, Internet enabling software, browsers, search engines, office productivity software, database management software, green technology enabling software, security software and mobile technologies); 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 print and electronic media.

This past July, IIPA released the latest update of our economic report, *Copyright Industries in the U.S. Economy: The 2003-2007 Report*, prepared 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 core copyright-based industries<sup>1</sup> in the U.S. continue to be major contributors to the U.S. economy. For example, this data show that the “core” U.S. copyright industries accounted for an estimated \$889.1 billion or 6.44% of the U.S. gross domestic product (GDP) in 2007. These “core” industries also were responsible for 22.74% of the growth achieved in 2006-2007 for the U.S. economy as a whole. In addition, the “core” copyright industries employed 5.6 million workers in 2007 (4.05% of U.S. workers) in 2007. And the report provides data on the estimated average annual compensation for a worker in the core copyright industries: \$73,554 in 2007. Finally, estimated 2007 foreign sales and exports of the core copyright industries increased to at least \$126 billion, leading other major industry sectors. The report also details results for the “total” copyright industries, which includes the core industries along with additional sectors involved in distribution.

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## OVERVIEW OF THE IIPA 2010 SPECIAL 301 SUBMISSION

**Piracy of U.S. Creative Content Differs by Sector But is a Global Problem:** This report highlights the ways in which U.S. intellectual property is infringed all over the world. While all the copyright industries are united in the global fight against piracy, each industry – business software, motion pictures, music, book publishing, and entertainment software – is confronted with very different types of piracy, often requiring different tools and different strategies. In this submission we highlight and define all these different forms of piracy, their scope, the strategies each industry has chosen to fight them, and the overarching need for increased focus on appropriate enforcement generally by all governments to address the different problems faced.

“Piracy” as we know it today is increasingly occurring in more sophisticated ways of using or supplying to users copyright materials without authorization, rather than simply the duplication and sale of content on physical media in retail shops or on the streets. An example of this is the unauthorized use of software within businesses – organizational end-user piracy of business software – the principal and most damaging form of piracy to the business software industry, causing losses to U.S. software companies that exceed \$31 billion per year globally. While Internet and mobile networks have transformed the way we work, learn and play, they have also, unfortunately, been used by a large number of users to steal music, movies, games, software and other copyrighted works. Such piracy comes in myriad forms, from P2P file sharing, deeplinking sites, BitTorrent sharing, cyberlockers, web bulletin boards, and other similar services.

One of the greatest concerns to the motion picture industry is camcording piracy, in which movies are stolen right off the screen, often just as they open or prior to their opening theatrically. Once the illegal camcord copy is made, “release groups” employ the Internet to move the pirate camcorded copies onto the Internet for onward distribution or for

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<sup>1</sup> The “total” copyright industries include the “core” industries plus those that, under conservative assumptions, distribute such products or other products that depend wholly or principally on copyrighted materials. The “core” copyright industries are those that create copyrighted materials as their primary product. *The 2003-2007 Report* is posted on the IIPA website at <http://www.iipa.com>.



factory or recordable disc duplication to get the product to consumers who do not want to wait, or pay, for the legitimate version. The book publishing industry's biggest piracy problem continues to be the illegal photocopying of books, principally on and around university campuses and with a focus on scientific, technical and medical textbooks, although they too suffer increasingly from illegal digitizations of their works and online piracy. The entertainment software industry suffers from a myriad of issues of increasing sophistication, including the manufacture and sale of circumvention devices used to make and play infringing copies of games, the establishment of pirate online servers for popular multiplayer games, and end-user piracy of their products in Internet café settings.

Traditional forms of physical piracy are still major problems for many of the copyright industry sectors. Factory production of optical disc products, CDs, DVDs, CD-ROMs containing pirated software, movies, games, music and books, is still prevalent in many markets although over time it has been overtaken by local "burning" of CDs, DVDs, and CD-ROMS, often with content obtained from the Internet. The software and music and recording industries continue to suffer from the unauthorized loading of software or music on computers, phones or other mobile devices at the point of sale, (in the software context known as "hard disk loading"). Factory piracy of entertainment software in cartridge format, primarily in Asia, afflicts the entertainment software industry.

The preceding paragraphs describe a non-exhaustive list of various types of piracy which copyright owners face around the world. Piracy harms U.S. right holders, but it also hurts local economies as well. Examples abound and it is well-documented that failure to reduce piracy costs local economies dearly and eliminates high-paying jobs, tax revenues, and contributions to GDP. As piracy in all its forms, the many countries in which it occurs, and the means to combat it, are described in this report, it is important to take into account the enormous economic harm caused to local right holders and their support network as well as to the U.S. economy.

**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. The degree to which we reach this capability is dependent upon the extent to which piracy is reduced. Through the 1990s and these first few years of the 21<sup>st</sup> century, the "core" U.S. copyright industries were adding new workers to our economy at two to three times the rate of the economy as a whole. Today, one out of every 20 workers is 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.

The copyright industries also contribute significantly to our innovation economy and to national productivity and competitiveness as a whole. In 2007, these industries contributed over 22% of the economic growth in the economy, leaving no doubt that the creative industries are a key driver of growth and productivity in the U.S. economy.

**U.S. Trading Partners Must Improve their Enforcement Systems:** The primary challenge faced by these industries globally is that many of our trading partners have not yet established and employed effective and deterrent enforcement mechanisms to combat these various types of 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.

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## A. DEFINING THE TYPES AND SCOPE OF PIRACY BY COPYRIGHT INDUSTRY SECTOR

In this submission we refer to many different types of piracy. Here we briefly explain how each type of piracy relates to each industry sector.

### Piracy of Business Software

- End-User Piracy by Businesses and Governments: The business software industry's most harmful piracy problem traditionally has involved large and small corporate, government and other enterprises that pirate its members' products by making additional copies of software for their own internal usage without authorization. We commonly refer to this activity as "organizational end-user piracy." End-user piracy occurs when someone makes the simple decision to use software (or any other type of protected content) without paying for it. This decision, when repeated millions of times throughout the world by consumers, businesses and, all too often, governments, has a staggering cumulative effect. Globally, four of every ten copies of PC software in use is stolen. That translates into losses to the U.S. software industry of \$31 billion in 2009. Organizational end-user piracy occurs in many different ways. In what is perhaps the most typical example, a corporate entity will purchase one licensed copy of software, but will install the program on multiple computers. Other forms of end-user piracy include copying disks for installation and distribution, in violation of license terms; taking advantage of upgrade offers without having a legal copy of the version to be upgraded; acquiring academic or other restricted or non-retail software without a license for commercial use; and swapping disks in or outside the workplace. Client-server overuse – when too many employees on a network have access to or are using a central copy of a program at the same time, whether over a local area network (LAN) or via the Internet – is another common form of end-user piracy. Organizational end-user piracy goes on in enterprises large and small, public and private. These enterprises receive the productivity benefits that the software provides, while foregoing the expense of licensed copies of the software. Not only do they steal from software producers, these enterprises enjoy an unfair commercial advantage over their law-abiding competitors who must make a choice between paying for software or doing without. This unfair commercial advantage operates at an international level as well. On average, enterprises in countries with high rates of software piracy are competing unfairly with enterprises from countries with low rates of software piracy. To give a particularly stark example, China's 80 percent software piracy rate means essentially that 4 out of 5 enterprises in China can compete unfairly with the 80 percent of enterprises in the US that are paying for the software they use to run their businesses and improve productivity. In many cases, organizational end-user piracy is attributable to negligence and poor asset management practices. Enterprises can also be victimized by unscrupulous computer manufacturers and dealers who install copies of software onto the internal hard drive of the personal computers they sell without authorization from the copyright holder. In some cases, however, organizational end-user piracy is undertaken willfully, with management fully aware and supportive of the conduct.

- Internet Piracy: The Internet is an indispensable part of global communication and commerce. It has opened up opportunities for faster, more efficient and more cost-effective distribution of information, products and services across the globe. Unfortunately, in addition to creating significant social and economic opportunities, the borderless and anonymous character of the Internet makes it an ideal forum to engage in a broad variety of unlawful conduct, including copyright piracy. The business software industry faces all the forms of Internet piracy highlighted below for movies and music, but the primary problems tend to be auction sites, websites (including business-to-business sites for bulk or large-scale distribution of counterfeit software) and P2P file sharing. Auctions sites like eBay, UBid, Mercadolibre in Latin America, Taobao and Eachnet in China,

and QXL in Europe sell hard copies of legitimate products but many pirate products (very often software because of the large price differential) are found there as well. Piracy is also finding its way into the cloud computing/software-as-a-service business model where software is made available under license from very large remote data farms/fileservers and used on desktops or servers without a permanent copy ever being made. Since these services are always protected by technological protection measures, piracy involves not only acts of circumvention but unlawful reproduction (as either temporary or permanent copies) as well. In addition to harming right holders, Internet piracy exposes computer users to serious security risks. Globally, there is significant evidence to link software piracy with the frequency of malware attacks. This is not surprising, since those who use pirated, unlicensed software are typically unable to access or download essential patches and critical updates that ensure their systems remain as secure as possible. This makes them more susceptible to attack over the long term. Moreover, websites that offer access to pirated software often disseminate malware that infects visitors' computers. Compromised computers are much more than a nuisance for individual computer users. In today's connected environment a compromised computer becomes a gateway through which attacks on our vital networks are launched. Consider the case of Estonia a few years ago, when thousands of compromised computers were harnessed to bring down the Internet for the entire country. We may never know for certain how those computers came to be compromised, but we do know that cyber criminals and cyber terrorists exploit precisely the kinds of vulnerabilities created by the use of unlicensed software to launch these sorts of attacks.

- Hard disk loading: This type of piracy involves an OEM manufacturer or a retail computer store loading pirate copies of an operating system and applications software packages directly onto the hard disks of computers that they sell into the marketplace. These computers are then either sold to businesses in large quantities or to consumers directly. In the case of hard disk loading at the retail level, enforcement must occur via the criminal system in order to deter its continuance.

- Other hard goods piracy and counterfeiting: The software industry also experiences the same types of OD piracy at the manufacturing, wholesale and retail level suffered by all other copyright sectors (as described in more detail below) and the same tools must be used to combat it. Pirated software is also exported and imported, often in separate and discrete components (e.g. disks and counterfeit software packaging, labels, holograms, certificates of authenticity all in separate export/import occurrences (thus lowering the risk of detection) with final assembly accomplished in the country of import. Because of the higher cost of software packages (than for other copyrighted products) and the huge profits that can be generated, this pirate/counterfeit trade is a significant problem for the software industry.

- Circumvention of technological protection measures: Virtually all software packages are licensed with some type of technological protection measure (encryption, passwords, registration numbers). Pirates must circumvent these measures to be able to access or copy the software. Increasingly it is critical that countries have strong anti-circumvention legislation and effective remedies

## Piracy of Motion Pictures and Music and Sound Recordings

- Internet piracy: Internet piracy takes many different forms for the music and motion picture industries, threatening the online marketplace to the detriment of all stakeholders, content owners and delivery networks. As can be deduced from the following list, online infringement is constantly changing and evolving with the development of new technologies and consumer preferences. If we are to effectively combat online infringement, governments will need to ensure that content creators, working with ISPs, have the flexibility to use the most effective tools and policies capable of combating online piracy. Recognizing that there is no one silver bullet to eradicate online piracy, governments should encourage the development of dynamic, next generation content protection security technologies and encourage cooperation between ISPs and content owners on implementation of effective ways to combat piracy.

- *Cyberlockers* are sites allowing users to copy their personal music or movies onto a site operator's servers for easy access for viewing or listening at any time. RapidShare, Megaupload, and Hotfile are

examples of sites, where users can upload their content, receive a Web link for it, and then provide that link to others via direct e-mails or ads on other Web sites.

– *P2P file sharing* has become the most popular means of distributing pirate content. This technology connects individual computer users to each other directly, without a central point of management or server-hosting of copies of pirate content. Users download and install a P2P client application, enabling them to search for files on each other's computers and download the files they want. P2P protocols include BitTorrent, eDonkey, Gnutella, and FastTrack. P2P applications include eMule, Kazaa, BearShare, and Limewire. Currently, BitTorrent technology is now the most popular globally since it can easily and quickly allow downloading of large files, like movies, software and games. "Topsites" initially acquire pirate content (from camcords, obtaining pre-release copies) and make them available globally. Websites contain links to "torrent" files and the download process is controlled by tracker sites. Often, services providing the client application will also index the torrent files providing access to the content. P2P traffic in pirate content can consume anywhere between 49 percent and 89 percent of all Internet traffic during the day and up to 99% at night.

– *User-Generated Content (UGC)* sites are a particular problem for the motion picture industry where users upload their favorite feature films or TV programs to a site (like Youku and Tudou in China) which then become accessible to anyone in the world. So-called "leech sites" will contain links to these UGC sites (or to other sites) multiplying this accessibility.

– *Deeplinking* is a particular problem for the music industry, particularly in China (e.g. Baidu). Music services, such as the one operated by Baidu (which does not directly host any content — but may be indirectly associated with it) allow users to bypass another site and link directly to infringing music files for streaming or download. Services like Baidu will frequently create "top 100" charts and indexes making it easy for users to find their favorite (infringing) music and access it for download or streaming without permission or payment.

– *Streaming sites* allow, with or without the downloading client software, the viewing or listening to content directly without making a permanent copy as occurs in a download. This is an increasingly popular form of pirate site causing significant damage to both industries.

- Camcording piracy is the source of 90% of the pirate copies of motion pictures that are made available via topsites and then over the Internet or for hard copy distribution and sale. It involves the pirate copying the video and or audio over camcording devices directly from the screen in a theater. Camcording seriously undermines the theatrical as well as the home video market for motion pictures.

- Industrial optical disk piracy and "burning" continues to be a problem though piracy done in OD factories is declining partly due to the growth of internet piracy, and to some extent to improved enforcement of OD licensing laws in many countries. The "burning" of content on ODs is easy, and now almost as efficient as factory production. It is done in smaller venues and is more difficult to detect. Export of such ODs to other countries is sourced primarily in Asia and in Russia. All industries are affected by this means of producing pirate copies.

- Wholesale, retail and street vendors is a classic form of commercial piracy. Factory produced or "burned" disks are distributed, sold, exported, imported and hawked by street vendors at very low prices. China is a particularly good example of this type of piracy where rates approach 90% of the market or above.

- Bootlegging of music and sound recordings is the making a copy of a live performance of music on a digital device.

- Internet cafés are popular ways in many developing countries for getting access to infringing music, motion pictures and videogames.

- Public performance, broadcast, cable and satellite piracy involves the unlicensed performance or exhibition of music, music videos and motion pictures in restaurants, hotels etc, in video parlors and in Karaoke bars, and the unauthorized broadcast cablecast or satellite delivery of motion pictures, music and sound recordings. In the case of music and sound recordings (and in some cases of retransmission of broadcast signals of motion pictures), authorization and payment is usually accomplished via a collecting society.



- Circumvention of technological protection measures for the movie industry involves the hacking/bypassing of access controls on Pay-TV, premium cable and satellite services as well as the defeating of access controls on Internet services providing legitimate downloads or streaming of motion pictures. DVDs also use SCMS to prevent copying and subsequent distribution or play, directly or over the Internet.

### Piracy of Entertainment Software

- Internet piracy of entertainment software occurs in many of the same ways as described above for movies and music. P2P file sharing is the predominant enforcement concern for the industry, as is the availability of entertainment software via “one click” sites or “cyberlockers,” which continue to account each year for progressively greater volumes of infringing downloads.
- Industrial optical disk piracy and burning occurs in the same manner as with music movies and business software.
- Industrial piracy of cartridge based games is still a problem for developers and publishers of cartridge based games for handheld platforms. This form of counterfeiting occurs almost entirely in China, which exports this pirate product globally.
- Wholesale, retail and street vendors sell and hawk pirate videogames just as they do pirated music, sound recordings, motion pictures, and business software.
- Circumvention of technological protection measures occurs in a unique and very damaging way for the entertainment software industry. Console games are protected by TPMs which involve a “handshake” between the game and the console. There is a global market for modification chips (mod chips) sold on the Internet and in videogame outlets which, when easily installed into a console (by the user or by the pirate retailer) will bypass the handshake and allow the play of pirated games. “Game copier” devices also bypass TPMs to allow for uploading, copying, and downloading of games for handheld platforms. Ensuring that countries have effective legislation and enforcement regimes that make such circumvention, as well as the manufacture and distribution of circumvention devices, illegal and subject to both criminal and civil remedies is a very high priority for the industry.

### Piracy of Books and Journals

- Commercial print piracy is prevalent in many developing countries where unauthorized operations obtain masters or copies of books and run unauthorized editions, in English or via unauthorized translation, off a printing press. In other cases, licensed local distributors or publishers produce print overruns, where they print more copies of a title than permitted by their license.
- Commercial photocopying remains the primary mode of piracy causing the greatest losses to the publishing industry. In many countries, it involves large scale commercial photocopying of entire textbooks by copy shops in and around universities. This is often undertaken on a “print to order” basis, to avoid stockpiling. Orders from students are copied or printed immediately and distributed around campuses using vans or similar delivery vehicles.
- Internet piracy has taken the form of illegal downloads primarily of journals and textbooks. Also growing is the unauthorized digitization of books and journals, as well as the unauthorized sharing of academic textbooks and journal articles. Piracy of ebooks has also grown with the growing popularity of eBook readers.
- Industrial optical disk piracy and burning is not as prevalent as for other works but CD-ROMS and DVDs of reference and professional books are the usual target.
- Circumvention of technological protection measures involves the breaking of encryption or other protections on online journals and e-books.

## B. COPYRIGHT INDUSTRIES' INITIATIVES AND CHALLENGES IN 2010

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, many countries' laws did not protect U.S. works at all, and 90% to 100% piracy levels prevailed in much of the developing world. 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. An effective response to these challenges requires 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, piracy on a commercial scale, whether digital or analog, tangible or over the Internet, combined with the failure of many foreign governments to effectively enforce 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 2010. What is needed is the political will for governments to take the actions necessary to address piracy meaningfully and to lower piracy rates locally and globally. The problem of copyright theft is more pervasive and more complex than it was just a few years ago. The term "piracy" does not even begin to capture the breadth of the problem. This problem has dire implications for America's future well-being.

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

### Securing Effective and Deterrent Enforcement Is the Copyright Industries' Overarching Challenge

U.S. copyright 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 through more effective enforcement. But many other governments still have not meaningfully upgraded their enforcement systems to meet their international obligations or to address today's forms of piracy 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) should impose penalties that remove the monetary incentives that drive the pirate trade. Small fines do 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, companies and some governments continue to evade their obligation to use only legal software, 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 infringers have lined their 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 applied in non-discriminatory manner. Those steps should be supplemented by actions that increase the capacity of willing governments to take effective enforcement 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.
- 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.

These strategies have now become part of the effort by the U.S. government and other like-minded trading partners to forge an “Anti-Counterfeiting Trade Agreement” (ACTA) which, if concluded, we would want to contain all the elements mentioned above. This effort, announced on October 23, 2007, recognizes the critical importance that effective enforcement plays in improving the global trading environment in IPR-based products. The U.S. has been joined by key trading partners in the negotiations, including Japan, the EU, Mexico, Switzerland, Canada, South Korea, New Zealand, Singapore, Australia, and Morocco. Negotiations are ongoing and the goal is to conclude such an agreement by the end of 2010. These negotiations represent an important opportunity to clarify and update the enforcement text of the TRIPS agreement to take into account 20 years of technological development, as well as promote much-needed cooperation among its signatories to fight growing piracy, including Internet piracy. It is essential that such an agreement set out the very highest standards of effective enforcement in a manner not likely to be rendered obsolete as a consequence of technological developments.

IIPA and its member associations applaud the U.S. government for spearheading this effort to bring global attention to the crucial need to improve and coordinate enforcement globally. In recognition of these enforcement challenges, the U.S. Congress passed the PRO-IP Act in 2008.<sup>2</sup> That Act not only strengthened enforcement provisions in U.S. law, but created the position of Intellectual Property Enforcement Coordinator (IPEC) to work out of the White House to spearhead an effort to coordinate the activities of the relevant agencies of the Executive Branch in enforcement capacity building and training in conjunction with our trading partners.

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 their Special 301 placement will not change unless they take the *specific* enforcement actions necessary to actually *reduce* piracy rates (and, conversely, that they will see a change in placement when such actions are in fact undertaken).

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<sup>2</sup> Public Law 110-403, 122 Stat. 4256 (Oct. 13, 2008).



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

**The Scope of the Problem:** Electronic commerce is integral to the 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 other forms of digital copyright piracy have exploded over the past several years. IIPA places a high 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 ways to access, use and enjoy their legitimate content and products. The software industry supplies the very technology that has allowed the Internet and e-commerce to function and grow. Software products have driven huge productivity gains in business and governments in the last 20 or more years, but piracy, including piracy of the very technologies that drive the Internet, threatens those gains.

The motion picture industry works with well over 375 legitimate video-on-demand websites around the world, providing high quality full-length films and television shows 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 60 such sites, including sites offering on-demand catch-up of 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, which provide movies legitimately. Over the past two years, we have seen major developments like the launch of Hulu, a video streaming aggregator, which increased its user base by 11% in 2009 to host the second most video streams – 257 million streams in November 2009 alone – after YouTube. Netflix announced recently that approximately 42% of its 11.1 million subscribers streamed at least one TV episode or movie in the third quarter of 2009 compared to only 22% in 2008. Long-term trends in video viewing from ComScore Video Metrix show that online videos viewed more than tripled between November 2007 and November 2009, while the number of unique video viewers increased to nearly 25%. The U.S. motion picture companies are continually seeking and launching exciting partnerships around the world. In November 2009, Sony launched its online PlayStation Video Store in France, Germany, Spain and the UK, providing High Definition films from MPAA studios and local studios for rental or download to own. Warner Bros launched an on-demand site in Japan, directly offering consumers Warner movies and TV shows for rent, download to own, viewing on PCs and mobile phones. Also, in December 2009, Voddler launched in Sweden, offering Disney and Paramount films to customers of ISP Bredbandsbolaget for streaming on an ad-supported and rental basis.

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. Moreover, there has been a marked increase in the international expansion of gaming device online video and the embedding of online services into consumer electronics devices.

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 2009 the legitimate online music market grew 12% to \$4.27 billion in revenues. The U.S. is the world leader in digital music sales, accounting for 50% of the legitimate global music market. Over 11 million music tracks have been licensed to more than 400 legitimate online and mobile music services. Sadly, legitimate online commerce in music only represents an estimated 5% of global music downloads, with an astonishing 95% of music downloaded without authorization.

More than a quarter of all recorded music industry revenues worldwide are now coming from digital channels, as music companies license music in partnership with ISPs and mobile operators, subscription services, streaming sites

and hundreds of download stores. However, despite the continuing growth of the digital music business, illegal file-sharing and other forms of online piracy are eroding investment and sales of local music in major markets.

Music companies are actively diversifying their revenue streams, offering new ways for consumers to buy and access music. These include: subscription services; music services bundled with devices and broadband subscriptions; streaming services with applications for mobile devices; advertising-supported services that offer premium services; and online music video services. In the last year, music companies have partnered with advertising-supported services such as Spotify, Deezer, MySpace Music and We7; ISPs such as TDC in Denmark, Terra in Brazil and Sky in the UK; mobile operators such as Vodafone; handset makers such as Nokia and Sony Ericsson; and online video channels such as Hulu and VEVO.

Sales of music downloads, the dominant revenue stream in digital music, are seeing steady growth. Single track download sales increased by an estimated 10%, while digital albums rose an estimated 20% in 2009. Recent innovations in this sector include the introduction of variable pricing, which has increased the conversion of track purchases to album sales, as well as the launch of the iTunes LP and the rollout of DRM-free downloads internationally.

Despite this progress, piracy is the major barrier to growth of the legitimate digital music sector and is causing severe damage to the music industry around the world. Providing new evidence of this, three of the world's biggest music markets, all heavily dependent on local repertoire - France, Spain and Brazil - have seen a sharp slump in the fortunes of their local music industries. In Spain, which has one of the highest rates of illegal file-sharing in Europe, sales by local artists in the top 50 have fallen by an estimated 65% between 2004 and 2009. France, where a quarter of the internet population downloads illegally, has seen local artist album releases fall by 60% between 2003 and 2009. The situation in culturally-rich Brazil is similar.

Book and journal publishers have exploded onto the electronic commerce scene in the last few years. Professional and scholarly journal publishers have largely led the way, 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. A recent independent study demonstrates clearly that the book industry is also seriously threatened by online piracy. That study shows that 9 million illegal downloads of copyright-protected books were documented during the closing months of 2009. Conducted by the online monitoring and enforcement service Attributor, the study looked at illegal downloads of 913 popular titles. On average, each of the titles tracked was downloaded approximately 10,000 times.

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.

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.

To demonstrate the specific impact of P2P piracy on the industry, the Entertainment Software Association again undertook a study to estimate the number of copies made of select member game titles through popular P2P

networks during December, 2009. Results were compiled across four major P2P protocols (Ares, BitTorrent, eDonkey, and Gnutella), and involved activity on approximately 200 member titles. Results reflect a total of 9.78 million estimated infringing downloads of ESA member titles globally during the 1-month study period, with year-round impact obviously being many times greater.<sup>3</sup>

Countries with the heaviest unauthorized number of P2P game downloads by volume were Italy (20.3%); Spain (12.5%); France (7.5%); Brazil (6%); and China (5.7%). The heaviest pirate downloading countries per capita were Italy, Spain, Croatia, Portugal and Israel. Network resources provided by Telecom Italia (Italy) were implicated in 10.7% of these downloads, followed by Telefonica de Espana (Spain) (6.3%); France Telecom (France) (3.2%); IUnet (Italy) (2.5%); NIB (National Internet Backbone) (India) (1.7%); Neuf Cegetel (France) (1.7%); Free SAS (France) (1.6%); Jazz Telecom S.A. (Spain) (1.6%); Vodafone Omnitel N.V. (Italy) (1.5%) and Brasil Telecom S.A. (Brazil) (1.4%).

As noted above, IIPA and its members urge governments to adopt laws that will penalize and deter online piracy, and to enforce those laws vigorously. An environment that facilitates 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 exclusive rights in the online world, and 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. Eighty-eight (88) countries and the EU now belong to the WCT, eight-six (86) are now members of the WPPT. With the December 2009 deposit by the remaining member states of the European Union, the momentum for further ratifications continues to build. In short, these treaties are now firmly part of the international legal infrastructure for protecting copyright. 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.<sup>4</sup>

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<sup>3</sup> This figure is representative only of the number of downloads of a small selection of game titles. Consequently, this figure is under-representative of the overall number of infringing downloads of entertainment software made during the period. It is also important to note that these figures do not account for downloads that occur directly from hosted content, such as games found on “cyberlockers” or “one-click” hosting sites which continue to account each year for progressively greater volumes of infringing downloads.

<sup>4</sup> 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.

There are a number of key trading partners that have yet to ratify and implement these treaties. Of particular concern, are Canada, New Zealand and Israel, among developed countries, and India, Malaysia, Indonesia, Thailand among developing countries that have yet to ratify and/or implement the obligations in the two treaties. IIPA has highlighted this issue in the surveys of each of these countries that follow.

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, particularly with respect to protection of content online. The binding obligations that the FTAs create should form the underpinnings of the online enforcement systems in these countries, and eventually in all countries.

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 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.

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 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. In 2009, considerable progress was made in a number of countries to build bridges between right holders and ISPs resulting in voluntary agreements to put into place workable “graduated response” systems to deal with repeat infringers on P2P networks. In some cases, such as France, South Korea and Taiwan, legislation was adopted to mandate such systems or to establish the legal incentives necessary to encourage such mechanisms.

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.<sup>5</sup>

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<sup>5</sup> In 2006, Ministers of the 21 Members of the Asia Pacific Economic Cooperation regional group recommended that “government entities” (which should include educational institutions funded by the State) should ensure that copyright usage, including on P2P networks, is legal. The APEC

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.

### End-User Piracy of Business Software

The unauthorized use and copying of software by businesses resulted in the vast majority of the over \$31 billion in estimated losses to U.S. software publishers in 2009. Losses to software developers outside the U.S. and those in the distribution chain that depend on such developers were also staggering. 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.

The software industry, along with all IIPA members, strongly supports the adoption of pre-established (statutory) damages by countries around the world. The U.S. has the lowest software piracy rate in the world and this is due in large part to the deterrent impact of infringers knowing that right holders will not have to go through the laborious and often impossible task of proving their actual damages resulting from surreptitious infringements. The knowledge that there will be significant financial consequences if these businesses infringe copyright is an essential element of an effective civil copyright enforcement system.

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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.



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 not limited to business software but now affects other 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 (optical disk 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.

As described briefly at the outset of this letter, 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. Some of these operations are highly organized and networked, and technology advances are making the problem worse. The 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. 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.

Book and journal piracy calls for the same kind of aggressive enforcement techniques discussed throughout this submission, accompanied by robust efforts that should be undertaken by universities and other educational institutions to promote the use of legitimate books and journal publications, 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.

### 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. As noted above, 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 continues to identify the key optical disc piracy factory production trouble spots as: China, Russia and to a lesser extent Indonesia. 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. 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 recommend 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.

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. Some of 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.<sup>6</sup> The same study also demonstrated that the mark-up for DVD piracy is higher than that for cocaine and heroine, with the risk of getting caught and receiving deterrent punishment significantly less.<sup>7</sup> A March 2009 study by the RAND Corporation further explored the linkages between organized crime and film piracy detailing 14 case studies of film piracy, providing compelling evidence of a broad, geographically dispersed and continuing connection between piracy and organized crime. As well as documenting cases in North America and Europe, the report outlines the involvement of organized crime with film piracy in South America, Russia and many parts of Asia.<sup>8</sup>

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

- In November 2009, the anti-mafia District Attorney office (DDA) in Naples arrested more than 40 suspects at the conclusion of a three-year investigation into the counterfeiting of copyright protected goods by a major local mafia ring. The investigation was initiated by Fiscal Police (GdF) from Naples and Rome in 2006. During the following three years the GdF dismantled 32 illegal CD burning

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<sup>6</sup> 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.

<sup>7</sup> *Id.*, at 3

<sup>8</sup> See [http://www.rand.org/pubs/monographs/2009/RAND\\_MG742.pdf](http://www.rand.org/pubs/monographs/2009/RAND_MG742.pdf)



laboratories, seizing 2,300 CD burners, arresting 121 people and prosecuting 173 individuals for copyright infringement.

- In September 2009, Thai police raided a disc manufacturing plant being used to produce counterfeit discs. A team from the Economic and Cyber Crime Division of the Thai Police ran the raid on LLI Technology Company Ltd in Nonthaburi province near Bangkok.
- In May 2009, Turkish police conducted major anti-piracy operations against four organized criminal syndicates. The first operation targeted 83 addresses in 17 cities throughout Turkey, resulting in the arrest of 29 people and the seizure of more than seven million pirate and counterfeit items. Police confirmed that much of this product was sold or distributed through internet sites requiring the use of codes and keywords. The second operation on 1st June saw 84 different sales points in Istanbul raided simultaneously. More than two million pirate or counterfeit items were seized and 46 people were suspected of infringing copyright law. 11 people, thought to be the gangs' leaders, were arrested by police. The total estimated value placed on the seizures by Turkish police is more than €75 million. As a result of these operations, the main pirate network was disrupted and its most important members were arrested. In addition, police believe the biggest pirate market, the Tahtakale, is finished.
- In March 2009, Mexican police and military personnel raided a home in Veracruz that was utilized as a major CD and DVD replicating center by a criminal cartel known as "Los Zetas". Police suspect "Los Zetas" of being part of the drug trafficking group known as the Mexican Gulf Cartel. It is alleged that besides providing protection and security to the Gulf Cartel, this group is now producing and distributing pirate music and films across Mexico. It is claimed the group controls distribution of the pirate products by threatening merchants who refuse to sell their branded music and films.
- 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 last quarter of 2009, a major operation was conducted by law enforcement authorities (in coordination with the publishing industry) in Delhi (India) against a printer, binder and distributor producing pirated academic and scientific, technical and medical (STM) books. The perpetrators were caught *in flagrante*, the printer having 80,000 prints and 124 negatives of a publisher's title on hand. Two warehouses owned by the distributor were also searched. A total of 135,000 pirated STM books (belonging to both foreign and domestic publishers) were seized during the raid operation. The distributor's operation appeared to be supplying pirated books to locations in Agra, Kanpur, Delhi, Gwalior, Bhopal, Indore, Kolkata, Cuttack, Bhubaneswar, Guwahati, Chennai, Hyderabad, Bangalore, Mumbai, Pune and Nagpur.
- 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.

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.<sup>9</sup> 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.

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.

### Camcorder 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 2009.

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.

### Game Cartridge Piracy and Circumvention Device Enforcement

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

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<sup>9</sup> 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.



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.

On other fronts, IIPA and ESA have seen successful implementation of WIPO Treaty obligations give rise to effective enforcement actions against distributors of unlawful circumvention devices, such as “mod chips” and “game copiers,” which are manufactured, marketed and purchased to enable use or copying of pirated games. Following critical legal reforms, Hong Kong initiated its first actions against purveyors of circumvention technologies in the Spring of 2008, followed by a series of significant actions in November, 2009. The year 2009 has also seen first-of-their-kind enforcement actions brought in Singapore and Paraguay against mod chip distributors and sellers. The industry is deeply concerned over recent decisions that have stood in the way of achieving effective enforcement against distributors of circumvention devices in Spain, France and Italy, and hope these cases do not contribute to the perception that those who profit from making circumvention devices available are beyond the reach of effective enforcement efforts. As each circumvention device functions as a gateway to multiple infringements, universal adoption and enforcement of effective anti-circumvention laws are a critical factor in preventing the download and/or sale of infringing copies of games.

### 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. economy. 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.

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 long ago been concluded, but Congress has failed to act to complete the ratification process. We urge the Administration to redouble its efforts to obtain Congressional approval of these FTAs.

IIPA commends the Administration for its determination, after a year of careful consideration, to commence the negotiation of a Trans-Pacific Partnership Free Trade Agreement with Singapore, Chile, New Zealand, Brunei, Australia, Peru and Vietnam. IIPA is also pleased that the Administration has indicated its objective to expand on this initial group to include additional countries throughout the Asia-Pacific region. In its public comments submitted on January 25, 2010, IIPA called for maintaining the high standards of protection and enforcement already in place for four of the U.S.’ potential TPP partners -- Australia, Singapore, Chile and Peru -- and extending those protections to the other potential TPP signatories.

The commencement of TPP negotiation this March offers the opportunity to address a number of deficiencies in the legal and enforcement regimes in place in New Zealand and Brunei. We have also highlighted continuing problems in our country surveys of Singapore, Chile, Peru, and Vietnam.

New Zealand is a good candidate for participation in a strong TPP FTA, but we highlight that its current copyright law falls short of standards adopted in existing FTAs that we assume will be replicated in the TPP FTA. In particular, technological protection measures (TPMs) used by copyright owners to control access to or use of their works receive largely inadequate protection under New Zealand law. Major deficiencies include unduly narrow definitions of TPMs; failure to prohibit the act of circumventing access controls; unworkable intent and knowledge requirements for even civil liability of those trafficking in circumvention devices or services; and overbroad exceptions. Such deficiencies may explain why New Zealand has not ratified the 1996 WIPO Internet Treaties, an omission that makes it an outlier among developed country economies. Copyright law amendments adopted by New Zealand in 2008 include provisions regarding ISP liability for online infringements, but the requirement that ISPs implement repeat

infringer policies has not yet been brought into force, due to disagreement about proposals for a “graduated response” system to deal with habitual P2P infringers. We hope that New Zealand will act expeditiously to close the gap between its outdated laws and the kind of accepted global minimum standards that we anticipate will be reflected in the TPP FTA.

Brunei is a member of the original TPP, and has already taken some steps to modernize its law, although more will need to be done to bring Brunei's law up to the standards adopted in existing FTAs that should be replicated in the enlarged TPP FTA. The Emergency Copyright Ordinance addresses key Internet issues, including some of those needed to fully implement the WCT and the WPPT. These include protection of 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 TPMs provisions do not fully implement the WCT and WPPT requirements. Main shortcomings include inadequate coverage of copy controls and no apparent coverage of access controls; failure to prohibit the act of circumvention of a TPM; and overly narrow proof standards for a circumvention device (i.e., that it is specifically designed to circumvent). With respect to dealing with online infringements through the help of Internet service providers, unfortunately, the law in Brunei is weak. 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, and this explains ISPs' relative inaction in taking down or blocking infringing websites. The government of Brunei Darussalam should take needed steps to ensure that this highly developed and prosperous nation is ready for what is anticipated will be the IP obligations of a TPP FTA.

### Market Access

In the experience of IIPA, its member associations and companies, there is a strong connection between a country's ability to foster the entry of legitimate product quickly and efficiently into the 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 as a key component of ongoing efforts to combat piracy. Identifying countries that deny 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.

IIPA is increasingly concerned about policies that mandate particular technologies for government procurement (rather than allowing agencies to purchase the products in the global marketplace that best fit their needs) and policies that attempt to use market access leverage to compel transfers of IP. For example, China recently promulgated government procurement policies that provide significant preferences for “indigenous innovation” products. The criteria to qualify include requirements that the products contain IP that is owned and developed in China and have trademarks originally registered in China. These policies will effectively exclude many products of US and other foreign firms from

the significant China government market unless they transfer IP to Chinese ownership. These market access criteria undermine the IP development of U.S. and other foreign copyright industries.

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 content review 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.
- Maintain technology-neutral procurement and other policies that avoid mandates or preferences based on the model of software development.
- Avoid using market access as leverage to compel transfers of IP to local ownership. This is not a fair or effective means for developing local industries.

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.

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## C. IIPA RECOMMENDATIONS FOR THE 2010 SPECIAL 301 LISTS

This year IIPA has analyzed the copyright law and enforcement problems in 39 countries/territories, and has recommended 35 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 four 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 2010.



- 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 ten (10) countries be placed on the Priority Watch List and fourteen (14) be placed on the Watch List. We also recommend that out-of-cycle reviews be conducted later this year for Spain, Malaysia, the Philippines, Ukraine and Thailand, 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.<sup>10</sup>

PRIORITY WATCH LIST	WATCH LIST	SECTION 306 MONITORING	OTHER COUNTRIES/ TERRITORIES DESERVING SPECIAL MENTION
Argentina Canada Chile Costa Rica India Indonesia Mexico People's Republic of China Philippines (OCR) Russian Federation (GSP)	Belarus Brazil Egypt Greece Hungary Israel Italy Kazakhstan Kuwait Lebanon (GSP) Malaysia (OCR) Pakistan Peru Poland Romania Singapore Spain (OCR) Tajikistan Thailand (OCR) Turkey Turkmenistan Ukraine (OCR) Uzbekistan (GSP) Vietnam	Paraguay	Hong Kong Saudi Arabia Switzerland Taiwan
10	24	1	4

- 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

<sup>10</sup> Country surveys were prepared by counsel to the IIPA, Maria Strong, Michael Schlesinger, Eric H. Smith, Steven Metalitz, and Eric J. 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.



the U.S. Trade Representative must take into account “the history of intellectual property laws and practices in the foreign country, whether the country has been identified as a priority foreign country previously, and U.S. efforts to obtain adequate and effective intellectual property protection in that country.”<sup>11</sup> Under these criteria, these 15 countries/territories named by 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.<sup>12</sup> This submission details copyright developments in 8 of the top 12 countries that received benefits from the GSP program in 2009, specifically: Thailand (\$2.89 billion of U.S. imports under GSP), India (\$2.85 billion), Brazil (\$1.98 billion), Indonesia (\$1.45 billion), the Philippines (\$733 million) Turkey (\$644 million), Argentina (\$510 million), and Russia (\$252 million). As of this filing today, 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.

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#### 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

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<sup>11</sup> Uruguay Round Agreements Act Statement of Administrative Action, *reprinted in* H.R. Doc. No. 103-316, vol. I, at 362 (1994).

<sup>12</sup> Since 1999, IIPA (and in one case, a coalition of 6 of 7 IIPA members) has filed 18 GSP IPR petitions with USTR, requesting the initiation of IPR investigations against the following countries: Poland, Peru, Lebanon, Dominican Republic, Ukraine, Moldova, Uzbekistan, Armenia, Kazakhstan, Belarus, the Kyrgyz Republic, Brazil, Russia, Guatemala, Costa Rica, Uruguay, Thailand, and Pakistan. Of these 18 petitions, USTR initiated reviews in 10 countries: 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 reviews, so far USTR has completed its investigations and terminated its reviews in 8 cases -- Brazil, Armenia, Moldova, Dominican Republic, Ukraine, Pakistan, Turkey (a case which IIPA petitioned for in 1993 and was closed in 2001), and Kazakhstan.

# **APPENDIX A**

## **ESTIMATED TRADE LOSSES DUE TO PIRACY & PIRACY LEVELS (2008-2009)**

**FOR  
IIPA's 2010 SPECIAL 301 RECOMMENDATIONS**



**IIPA 2010 "SPECIAL 301" RECOMMENDATIONS**  
2008 and 2009 ESTIMATED TRADE LOSSES DUE TO COPYRIGHT PIRACY  
(in millions of U.S. dollars)  
and 2008-2009 ESTIMATED LEVELS OF COPYRIGHT PIRACY

	Business Software <sup>1</sup>				Records & Music <sup>2</sup>			
	Losses		Levels		Losses		Levels	
	2009	2008	2009	2008	2009	2008	2009	2008
<b>PRIORITY WATCH LIST</b>								
Argentina	209.0	203.0	71%	73%	63.4	75.1	60%	60%
Canada	710.0	742.0	30%	32%	NA	NA	NA	NA
Chile	113.0	111.0	65%	67%	NA	21.0	NA	66%
Costa Rica	14.0	14.0	58%	60%	NA	14.8	NA	60%
India	1505.0	1384.0	66%	68%	17.7	36.2	60%	55%
Indonesia	355.0	299.0	86%	85%	24.7	20.0	95%	95%
Mexico	497.0	453.0	59%	59%	436.4	419.7	82%	80%
People's Republic of China	3078.0	3005.0	80%	80%	466.3	564.0	90%	90%
Philippines (OCR)	126.0	121.0	71%	69%	112.1	117.0	83%	83%
Russian Federation (GSP)	1869.0	2318.0	68%	68%	NA	NA	NA	NA
<b>WATCH LIST</b>								
Belarus	96.0	NA	88%	NA	NA	NA	NA	NA
Brazil	831.0	905.0	56%	58%	147.0	117.1	48%	48%
Egypt	88.0	87.0	60%	59%	NA	NA	NA	NA
Greece	141.0	131.0	59%	57%	NA	NA	NA	60%
Hungary	79.0	88.0	41%	42%	NA	NA	NA	NA
Israel	84.0	81.0	34%	32%	55.0	NA	55%	NA
Italy	1138.0	1137.0	49%	48%	NA	350.0	NA	25%
Kazakhstan	57.0	69.0	79%	78%	NA	NA	NA	NA
Kuwait	39.0	41.0	59%	61%	NA	NA	NA	NA
Lebanon (GSP)	29.0	27.0	75%	74%	NA	3.0	NA	70%
Malaysia (OCR)	192.0	184.0	59%	59%	23.5	26.2	60%	60%
Pakistan	73.0	80.0	85%	86%	NA	NA	NA	NA
Peru	50.0	46.0	71%	71%	NA	57.2	NA	98%
Poland <sup>4</sup>	362.0	389.0	54%	56%	118.0	100.0	27%	27%
Romania	158.0	149.0	66%	66%	NA	10.0	NA	40%
Singapore	95.0	98.0	35%	36%	4.3	4.2	10%	10%
Spain (OCR)	617.0	617.0	43%	42%	NA	13.4	NA	20%
Tajikistan	NA	NA	NA	NA	NA	NA	NA	NA
Thailand (OCR)	368.0	335.0	77%	76%	15.1	17.8	50%	65%
Turkey	279.0	257.0	66%	64%	NA	NA	NA	NA
Turkmenistan	NA	NA	NA	NA	NA	NA	NA	NA
Ukraine (OCR)	208.0	294.0	85%	84%	NA	NA	NA	NA
Uzbekistan (GSP)	NA	NA	NA	NA	NA	NA	NA	NA
Vietnam	171.0	154.0	84%	85%	NA	NA	NA	95%
<b>SPECIAL 306 MONITORING</b>								
Paraguay	8.0	9.0	82%	83%	NA	NA	NA	NA
<b>SPECIAL MENTION</b>								
Hong Kong	144.0	135.0	49%	48%	0.7	0.8	10%	10%
Saudi Arabia	176.0	155.0	54%	52%	NA	NA	NA	NA
Switzerland	202.0	207.0	25%	25%	NA	NA	NA	NA
Taiwan	112.0	111.0	40%	39%	2.7	2.0	20%	22%
<b>TOTALS</b>	<b>14273.0</b>	<b>14436.0</b>			<b>1486.9</b>	<b>1969.5</b>		

Endnotes:

<sup>1</sup> BSA's 2009 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 Sixth Annual BSA and IDC Global Software Piracy Study (May 2009), available at <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. BSA's 2008 piracy statistics were preliminary at the time of IIPA's February 17, 2009 Special 301 filing and the final 2008 data is reflected above. BSA's final 2009 data will be available later in 2010.

<sup>2</sup> Unless otherwise noted, these losses and piracy levels for music piracy are for physical piracy only. They represent the portion of a shrinking physical market (due to growing online distribution of music) which consists of pirated copies and the losses resulting therefrom.

<sup>4</sup> RIAA estimates for Poland in 2008 and 2009 include losses due to both physical and online piracy of music and sound recordings. Online music piracy there represents about 90% of the annual losses. The estimated piracy level for these years, however, reflects only physical piracy for U.S. repertoire.

"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 2010.

IIPA's members' methodology is described in Appendix B of IIPA's 2010 Special 301 submission.

# **APPENDIX B**

## **METHODOLOGY USED TO CALCULATE ESTIMATED PIRACY LOSSES, PIRACY LEVELS AND OPTICAL DISC PIRACY**

# **APPENDIX B: METHODOLOGY**

## **INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2010 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND 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 IIPA's February submission of its 2010 report to U.S. Trade Representative, BSA's statistics for 2009 are preliminary. Final data for 2009 will be released later in 2010.

## **ENTERTAINMENT SOFTWARE**

In select countries, the Entertainment Software Association has provided estimates of the overall number of infringing game downloads performed by users of the leading peer-to-peer (P2P) protocols during December 2009. The methodology underlying these estimates is as follows:

ESA's online program surveys download activity on all major public P2P networks involving a select number of ESA member game titles. The data is derived by measuring the overall levels of worldwide pirate activity on P2P networks, broken down, by country, based on the country of origin of the ISP. This data is only a subset of the overall infringements during the monitoring period as it accounts only for downloads through P2P file sharing protocols of the selected game titles, such as BitTorrent and eDonkey, but does not include infringing downloads from hosting sites, such as rapidshare.com. Therefore, this data should be viewed as an estimation of the overall levels of piracy on each P2P protocol being monitored and the estimated percentage of infringements detected per country and ISP. All of the data available reflects 100% verified infringements. Each file (hash) included in the results has been downloaded, viewed and verified to be infringing.

## **RECORDS 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:

- Market surveys by anti-piracy personnel and/or third parties;
- Optical disc industry and CD-R burning 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.
- Where possible, legitimate revenue from online and mobile networks.

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 possible, RIAA estimates losses and piracy rates occurring via online and mobile networks and in appropriate cases has so designated this in the text of the country report.

# **APPENDIX C**

## **COUNTRY SURVEYS**

# **PRIORITY WATCH LIST**

# ARGENTINA

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

### 2010 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** IIPA recommends that Argentina remain on the Priority Watch List in 2010.

**Executive Summary:** Last year there were very few positive developments taken by the government to improve the copyright piracy situation in Argentina. Copyright enforcement simply is not a priority, and the pervasive economic theft of piracy, both hard goods and online, is a huge challenge for the legitimate content industries. The copyright industries believe that a comprehensive national strategy aimed at protecting and enforcing the Argentine copyright law is necessary to solve longstanding problems and promote the development of the creative sectors.

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”), remains high. End-user piracy of business software applications, especially in corporate settings, causes serious economic harm. Unauthorized photocopying continues on and near university campuses. Although the copyright industries appreciate the continued cooperation of the police with enforcement raids against piratical hard goods, only a small number of criminal cases result in final judgments with deterrent sanctions. The creation of a specialized IP prosecutors’ office would greatly improve local efforts. Not surprisingly, Internet piracy continues to grow in Argentina. Rights holders are doing their best to take action, but the criminal authorities have yet to get seriously involved. Furthermore, the government should reconsider its “hands off” approach and work with the affected sectors (rights holders and Internet service providers) to find solutions to halt the transmission of illegal copyrighted materials on telecommunications networks. Beyond criminal enforcement efforts, civil infringement actions remain 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, strengthened criminal sanctions and remedies to protect copyrighted materials in the digital age are sorely needed. Two positive developments last year involved improved efforts by the customs authorities and the passage of legislation to extend the term of protection for sound recordings and performances was achieved.

**Priority actions requested to be taken in 2010:** The copyright industries recommend that the following actions be taken in the near term to improve Argentina’s adequate and effective protection of copyrighted materials:

#### Enforcement

- Commit, at the highest levels of the Argentine government, to develop and implement a coordinated anti-piracy campaign that addresses hard goods and online infringements 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 and fairs that distribute these infringing products.
- Provide more resources for police Internet crime units to address illegal downloading and provide enforcement officials high-level political support to undertake these efforts.
- Instruct Argentine prosecutors and courts to consider criminal copyright cases a priority and press for the expeditious resolution of these 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.
- Improve border enforcement, partnering with Paraguayan and Brazilian officials to establish a program to inspect goods in-transit for potential pirate product.



## Legislation

- 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 an office of specialized intellectual property prosecutors.
- Consider introducing and enacting legislation to increase criminal sanctions for copyright piracy.
- Consider clarifying certain elements of the current 1933 copyright law in order to: (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) increase the minimum penalty for piracy (currently 1 month) up to at least 2 years in order to apply deterrent sanctions; (5) create statutory damages provisions in civil infringement cases; and (6) provide clear guidelines regarding liability for ISPs (Internet service providers), and include notice and takedown provisions.

Argentina is a beneficiary country of the U.S. Generalized System of Preferences (GSP) trade program which provides Argentina with preferential market access to the U.S. market. The GSP program requires beneficiary countries to provide “adequate and effective” protection to U.S. copyrighted materials. During 2009, \$505.8 million in Argentine products entered the U.S. under the GSP duty-free code. Argentina has been under Special 301 scrutiny for many years.<sup>1</sup>

## COPYRIGHT PIRACY IN ARGENTINA

**Hard goods piracy, La Salada and end-user piracy:** “La Salada Fair,” is an enormous central market in Buenos Aires that provides pirated and counterfeit merchandise to retailers and re-sellers from Argentina and neighboring countries. The physical area is growing and probably also the total invoicing, but we have not new reliable statistics. One report indicated that this market area covers about 2 million square feet, and approximately 50,000 consumers visiting daily. In fact, local press reports suggest that La Salada may even be expanded, noting that it costs up to US\$80,000 to purchase a stand in the fair itself.<sup>2</sup> There are organized groups operating around La Salada, providing raw materials for piracy and recording, storing and distributing pirate products. This untenable situation is well known by the police. Local government officials and flea market administrators simply do not cooperate with the private sector on raiding actions and refuse to close this market.

These kinds of flea market fairs are appearing in more and more cities across the country. 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. In general, the largest concentration of pirate product of films and music is in the greater Buenos Aires district, but the industries face serious challenges in larger cities throughout the provinces. In addition, blank optical media products, mostly from Southeast Asia, continue to enter the Argentine market via Uruguay and 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 data provided by CAFMO, (Trade Association of Optical Disc Manufacturers) in 2009, 21,566,600 CD-Rs and 72,481,032 DVD-Rs were imported into Argentina.

The Business Software Alliance (BSA) reports that there was no major improvement in the business software piracy situation in Argentina during 2009. Piracy of business software programs among end-users, the most damaging form of

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<sup>1</sup> For more information on Argentina under Special 301, see Appendix D at <http://www.iipa.com/pdf/2010SPEC301USTRHISTORY.pdf> and Appendix E at <http://www.iipa.com/pdf/2010SPEC301HISTORICALSUMMARY.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/2010SPEC301COVERLETTER.pdf>. The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in Appendix B of IIPA's 2010 Special 301 submission at [www.iipa.com/pdf/2010spec301methodology.pdf](http://www.iipa.com/pdf/2010spec301methodology.pdf).

<sup>2</sup> See article in the newspaper La Nación, “En La Salada, el metro cuadrado es más caro que en Puerto Madero,” December 6, 2009 at [http://www.lanacion.com.ar/nota.asp?nota\\_id=1208454](http://www.lanacion.com.ar/nota.asp?nota_id=1208454).



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.<sup>3</sup> There was no positive news to report on any progress made by the government to legalize its software last year. It is still easy to find hardware dealers selling computers with illegal OEM versions or simply illegal copies pre-installed on computer hard disks. BSA's preliminary estimated trade losses due to business software piracy in Argentina in 2009 were \$209 million, with an estimated 71% piracy rate (a slight decline from 73% in 2008).<sup>4</sup>

Piracy of music and sound recordings in both the physical and online environment continue unabated in Argentina. Hard goods (physical) piracy of music accounts for 60% of the music market. CAPIF, the local recording industry group, has noticed an increase in the number of fairs where pirate products are sold, and a slight decline in the level of non-fair-related street piracy. The cities with the highest levels of piracy are Buenos Aires, Capital Federal, Córdoba and Tucumán. Said another way, the level of physical piracy remains the same in 2009 as in 2008, but digital piracy continues to inflict the most harm, accounting for 99% of the digital music market. The latest estimate is that over 800 million songs are being downloaded illegally in Argentina every year. Estimated losses due to physical piracy of music caused an estimated \$63.4 million in losses in 2009. The most recent estimate shows about 20 million units of pirate product in the market, representing close to 60% of all sale units. The local estimate recorded music market is declining; unit sales decreased by 21% in 2009 compared to a 12% decrease in 2008.

The Motion Picture Association (MPA) reports that one full MPA member company film was sourced to an Argentine theater in 2009. Extensive trainings have been conducted for police and theater employees in Argentina after a rash of camcords a couple of years ago.

The book publishing industry reports unauthorized photocopying of compilations and full academic works continues on and around major university campuses. Academic book publishers 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.

**Internet piracy:** Argentina has 20 million Internet users, reflecting about 49% of the population. The growth in internet usage has been remarkable, growing 700% between 2000 and 2009 (according to [internetworldstats.com](http://internetworldstats.com)). The Argentine broadband market remains one of the most developed in South America. 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 digital piracy represents 99% of the entire digital music market (as mentioned above). The digital market represents 7% of the local music market (including CD sales) and is made up of two segments: mobile (66.04%) and Internet (33.96%). Online music piracy occurs via P2P file-sharing, hyperlinks and cyberlockers. As mentioned above, there are now more than 700 million illegal downloads of songs in Argentina per year based on a third party survey that was completed in 2007. A quick estimate of the amount of downloads today would probably show that it is

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<sup>3</sup> According to a January 2008 report issued by BSA-IDC called [The Economic Benefits of Reducing PC Software Piracy](http://www.bsa.org/idcstudy), 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 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>.

<sup>4</sup> BSA's 2009 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 Sixth Annual BSA and IDC Global Software Piracy Study (May 2009), available at [www.bsa.org](http://www.bsa.org). BSA's final 2009 data will be available later in 2010.

at least 25 to 50% higher. Argentina has a most popular "link-sharing" site called TARINGA, with more than 2,577,263 users and 80,800 posts with the tag "music." This site is financed through revenue from banner ads, and fortunately, after significant engagement with the recording industry, it now responds positively to take-down notices. Nevertheless new music links are uploaded to the site everyday in huge numbers.

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 the use of P2P sites is the favored method to access unauthorized copies of software programs; there are a few pirate websites but they are not the largest source of pirated programs. BSA does perform take-down operations with local ISPs and there is a high degree of success. However, for every site removed, more appear.

## **COPYRIGHT ENFORCEMENT IN ARGENTINA**

Federal and state police forces lack sufficient resources to provide expert reports on seized product, which delays processing cases. There is no dedicated police force to handle piracy cases. The music, business software industries report continued good cooperation with the Argentina's police forces, particularly the Gendarmería Nacional (the federal 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. Three overarching problems in the criminal area are: (1) it is difficult to obtain search warrants (costs and time in organizing the investigation and filing complaints); (2) the enforcement authorities do not have enough space to store seized products; and (3) the months it takes the authorities to perform forensic analyses of seized product. Unfortunately, there are very few prosecutions that are completed to final judgment. In addition, civil infringement actions, often brought by the business software community, also faced roadblocks with long delays and non-deterrent damage awards.

**Software actions, both criminal and civil:** The software industry does take criminal actions, although BSA does not. BSA takes a variety of actions in Argentina, ranging from civil claims to non-judicial procedures (such as cease and desist letters, notices to ISPs, and the like). During 2009, the BSA program in Argentina conducted 56 voluntary business audits, obtained 44 preliminary injunctions, took 89 criminal raids to court, and worked on 23 customs actions. BSA notes that the police and customs authorities do take *ex officio* actions in their cases.

In the past, criminal copyright actions in the software area were not widely used by BSA. More recently, 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. In smaller provinces, local police are not trained in computer crimes, and there have been problems caused by pre-raid leaks. In some cases, it is possible to replace local police with the better trained Gendarmería. In addition, 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.

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

The recording industry indicates that both the police and customs authorities are taking *ex officio* actions and industry supports those actions. The recording industry (led by CAPIF) focuses on investigating complex organized crime cases, and planning street piracy actions. They are careful in the selection of targets and work with the proper security forces to obtain the best results. CAPIF also cooperates in the performance of forensic analysis in order to speed up the process.

Unfortunately, the recording industry reports that the number of raids during 2009 is 36% below levels for the same period in 2008. The volume of seizures in 2009 also represents a decrease of 33%. During 2009, CAPIF assisted in 336

raids (include street raids, warehouses, labs),<sup>5</sup> resulting in the seizure of 700 thousand copies of media with infringing content (most of which were CD-Rs) and 312 pieces of equipment. The industry believes that this drop is not entirely surprising and may be explained by the following two points: (1) the industry's local anti-piracy campaign last year was dedicating more time and effort to its internet piracy cases, and (2) the police does not take a proactive stance on hard goods cases unless the rights holders are involved to prompt police intervention. In 2009, 28 criminal piracy cases were initiated, resulting in two arrests and indictments; there was only one conviction in a music piracy case in all of 2009.

**Actions in the Internet space:** The recording industry continues to be very active in Internet piracy enforcement in Argentina. In 2009, APDIF Argentina (the local organization of the recording industry) produced the following take-down results: 74,353 blog posts, 740,014 cyberlocker links, 166,329 forum posts, 16,670 P2P links, 1,981 eDonkey indices, 7 domain names, and 32,378 offline pre-release copies of sound recordings.

There have been a number of high profile actions. In December 2009, CAPIF shut down the first BitTorrent tracker in Latin America. "Siscate" was dedicated to illegal content distribution consisting mostly of music files; there were more than 159,000 monthly views of this site, and they have more than 1,600 torrents available for download. Content included categories dedicated to Argentine and Latin music; most of the users were from Argentina (58%), Mexico (29%) and Chile (14%). In addition, actions have been taken against various social sites allowing registered users to post links to illegal music files. In November 2009, another music forum site ("Tusdecargas") was shut down after CAPIF notified the site administration of massive copyright infringement there; this site had approximately 1,000 music posts with cyberlocker music files available for download. This was the eighth music forum site taken down in just the last half of 2009. Earlier this month, a joint internet anti-piracy operation involving three separate anti-piracy components resulted in the take-down of a major site known as [fileschecker.com.ar](http://fileschecker.com.ar). PROMUSICAE, the Spanish Association of Music Producers, initially detected illegal activity on this site and immediately removed the music content. Since the operator of the site was based in Argentina a follow-up investigation was coordinated with IFPI and the local national group, CAPIF. This site allowed access to a voluminous amount of music through approximately 3,000 download links in Spanish along with access to some of the most recent major pre-releases in Europe and the United States. Prior to being dismantled on February 1, 2010, this illegal site attempted to maximize its traffic by disseminating its links to the most important forums and virtual communities in Argentina.

**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 continue in 2009 (see discussion above).

Since 2007, the local sound recording and film industry sectors have been trying to get broader voluntary cooperation with Argentine ISPs on Internet piracy matters. The P2P file-sharing context, ISPs are not cooperating with rights holders, because they claim they are not responsible for what users do on their networks. To make matters worse, the Argentine authorities have disengaged from these industry talks, claiming that they do not want to take part in what they believe is a problem of private interest. To the contrary, the Argentine government should promote a climate that incentivizes meaningful cooperation between the parties, and that encourages rights holders and ISPs to reach and implement robust solutions to this problem.

There also have been judicial efforts to get more cooperation from ISPs on policing piracy on their networks. In 2007, the local recording industry, led by APDIF Argentina, approached CABASE (the 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. APDIF did not appeal one case, and the other case is still pending.

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<sup>5</sup> Here is the break down of the 336 raids: 187 street actions, 13 warehouses, 14 labs, 67 cybercafes, 8 home delivery actions, 5 jukeboxes, 42 stores and 1 other action.

**Slow prosecutions and non-deterrent judgments:** Very few criminal cases reach final sentencing. Part of this problem is due to the very formalistic structure of Argentina's judicial system. Another part of the problem involves few human resources and poor infrastructure in the court system. The bigger problem appears to be the lack of will by both prosecutors and judges to push these cases through. Most copyright infringement cases finished with a suspension of judgment. The music industry reports that there was only one conviction for music piracy in each of the last two years (2008 and 2009)

Furthermore, 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*b/s* of Act 11.723 (Copyright Act)); 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. Finally, 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.

**Delays and weak damages in civil infringement cases:** 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).

**Border enforcement:** The Custom Service, jointly with the military police and coast guard (the Gendarmería Nacional and Prefectura Nava<sup>6</sup>), are the governmental bodies that have border duties to stop counterfeiting and piracy. Last year, border enforcement was pretty good, and included the implementation of mobile scanners in some frontier/border crossings. The Argentina Customs Code currently provides for *ex officio* actions. There are reports that significant progress was made with the Customs authorities in 2009, who now understand the damage that piracy causes, not only to the owners of intellectual property rights, but also to the State itself, since pirate products evade taxes and do not generate legitimate employment.

Given the extent of the piracy and counterfeiting problems in the tri-border area, Argentina should forge a working plan with Brazilian and Paraguayan customs officials to inspect goods in-transit for potential pirate product.

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 2009, Customs seized about 1.5 million blank optical discs, a 39 percent decrease over 2008. Despite the decrease during 2009, Argentine Customs (*Administración Nacional de Aduanas*) authorities continued to be supportive and alert to piracy and blank media imports. Customs has provided a regular useful forum for exposing the problems with the importation of blank media.<sup>6</sup>

**Industry trainings and public awareness efforts:** The recording industry (APDIF and CAPIF) have developed trainings for police involved in cybercrime and internet cases.

## **COPYRIGHT LAW REFORM AND CERTAIN MARKET ACCESS ISSUES IN ARGENTINA**

Argentina's Copyright Act (1933, as amended), while one of the oldest in the Western Hemisphere, has remained remarkably flexible over the years. Argentina is a member of the two WIPO Internet treaties (the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty), and those provisions are self-executing in national law and actually have

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<sup>6</sup> The government's customs website (AFIP - La Administración Federal de Ingresos Públicos) is <http://www.afip.gov.ar/aduana/foro/foroMarcario.asp>.

a superior rank to national law. This is not so say, however, that further refinements are not necessary; they are. Specificity in national legislation helps to provide clear “rules of the road” for rights holders, consumers and enforcement authorities, including the courts.

For example, IIPA and its members have identified several legal deficiencies (or lack of clarity in the copyright law such as the desired need to provide:

- 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 one month, and this should be increased to a much more deterrent level, such as a minimum of two years). The current maximum penalty is already at a deterrent level (six years);
- establish statutory damages;
- explicitly provide for the seizures of infringing equipment;
- establish provisions on ISP liability and procedures for notice and takedown;
- provide equitable and balanced treatment for all rights holders, including those who are juridical entities.

Given current political concerns, the industries believe that movement on any copyright law-related reforms in 2010 is unlikely.

**2009 Copyright Act amendment:** On November 25, 2009, the term of protection for phonograms and performances was extended to 70 years from publication. Law 26.570 signifies the expansion of 20 years for the protection of juridical entities such as phonogram producers; the recording industry is pleased with this development as it has been working to pass this legislation for several years, and the term is now comparable to that of many other copyrighted works in Argentina.

**Need to increase scope of infringements and criminal sanctions:** Legislative efforts to strengthen criminal enforcement measures in Argentina have not gained much traction in recent years. Five years ago a bill (Bill 1546-S-05) to amend the criminal chapter of the Copyright Act was introduced in the Senate, but it fell off the docket at the end of 2007. In 2007, the recording industry resubmitted a new bill (1987-S-2007) to the Senate, and meetings were held in 2008 along with the motion picture industry to expand some provision of that bill (e.g. adding provision on criminal conspiracy); this bill also fell off the docket at the end of 2008. Since then, no new legislative vehicle has been proposed (and appears unlikely to be proposed this year) that would address the following issues that were in the prior legislation, such as:

- providing for criminal sanctions for the circumvention of technological protection measures (TPMs) and the modification or suppression of digital rights management (RMI);
- creating statutory damages by creating a minimum (1,000 pesos, US\$260) and maximum (1,000,000 pesos, US\$259,240) level for each infraction, depending on a number of factors;
- clarifying the existing remedy of preliminary injunctions by eliminating the onerous requirement to produce evidence before presenting a full case based on arguments of merit; and,
- empowering the courts to impose fines to force the execution of the sentences issued.

**Legislation needed to create specialized IP prosecutors:** Three 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 that pending bill should have been expanded to include the copyright sector. The copyright industries would support legislation that creates specialized IP prosecutors.

**Government software legalization:** Unfortunately no progress was made on this important issue last year, and it is clear that the current government is not going to make any effort in this area. With respect to government legalization efforts, the business software industry continues to call upon the Argentine government (in particular, the *Subsecretaría de la*

*Gestion Publica*—the Undersecretariat for Public Administration) to issue an executive decree that would require government legalization of current business software programs on computers and improve procurement practices. While several “standards” have been issued by the *Subsecretaría*, the Argentine government has 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 2009.

**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.

**Audiovisual Communications Services Law:** The Audiovisual Communications Services bill was signed into law on October 10, 2009. The law has several objectionable provisions, including an unprecedented advertising restriction on pay television, an obligatory registration for international networks, and preferential tax treatment for local Argentine networks. It appears that the government will issue implementing regulations as one package in mid-February or March 2010. MPA recommends that the implementing regulations define any network that has a BIT with Argentina as a “local network” which would address the problematic tax issue. IIPA remains concerned that the law will force programmers, who are the legal rightsholders or licensees of the entire signal that they transmit, and all of the programming on the signal including advertising space, to make advertising space on the channels the “property” of the cable operator with the ability to sell six minutes of advertising on their own proprietary channels. This move would directly interfere into private contractual agreements. The willingness of the Autoridad Federal de Servicios de Comunicacion Audiovisual’s (formerly COMFER) to listen to foreign rights holders is appreciated, and MPA encourages active engagement on this important matter.

# CANADA

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2010 SPECIAL 301 REPORT ON COPYRIGHT ENFORCEMENT AND PROTECTION

**Recommendation:** IIPA recommends that Canada be maintained on the Special 301 Priority Watch List in 2010.

**Executive Summary:** More than thirteen years ago, Canada played an important and positive role in negotiation of the WIPO Internet Treaties. But today, Canada stands virtually alone among developed economies in the OECD (and far behind many developing countries) in failing to bring its laws into compliance with the global minimum world standards embodied in those Treaties. In 2008, its government finally tabled a bill (Bill C-61) that would do part of the job of meeting global standards; but no action was taken on it. In 2009, government pledges to table a new bill went unfulfilled. 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. Canada should be encouraged to enact a new version of the bill, with major flaws corrected and necessary improvements in several areas, this year. 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, and it is fast gaining a reputation as a haven where technologically sophisticated international piracy organizations can operate with virtual impunity. The fact that Canada, home to 0.5% of the world's population, hosts 4 of the top 10 illicit BitTorrent sites in the world, speaks eloquently for itself. 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 maintained on the Priority Watch List in 2010.

### ACTIONS WHICH THE CANADIAN GOVERNMENT SHOULD TAKE IN 2010:

#### 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 operate illicit file-sharing services, or whose actions are otherwise directed to facilitating, encouraging or contributing to widespread infringement
- 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.



- Complete the process of making proceeds of crime legislation applicable to proceeds from the distribution, sale and importation of pirated goods, and make the other legal and policy changes to enforcement called for by parliamentary committees.
- 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 – submitted three years ago – 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 the last of these three areas did Canada take any step forward during 2009, and even that forward motion was of limited significance.

In previous reports, IIPA has 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.<sup>1</sup> It was not until June of 2008 that 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. If Bill C-61 had been enacted, it would 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. In any case, no action was taken on Bill C-61 before Parliament was dissolved for elections.

Although the government announced that it would introduce new copyright reform legislation in the fall of 2009, it did not do so. Instead, it devoted the summer to a nationwide “public consultation” on copyright reform. Focused primarily on online submissions, and supplemented by invitation only roundtables and two town hall meetings, the consultation concluded in September 2009. No legislation has yet been produced. Parliament will not meet again until March 2010, and thus no legislation can be formally introduced until that time. But there is no concrete indication that a bill will be tabled then, either. With the European Union’s recent ratification of the WCT and WPPT, Canada has fallen yet further behind most of the world’s major trading nations.

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<sup>1</sup> 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>.

Despite this disappointing track record, 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 2010.

**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 has either 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, Canada now finds itself one of the world's epicenters for the distribution and export of several categories of tools aimed at circumventing TPMs, such as mod chips and game copiers, that enable pirated and counterfeit video games to be played on videogame consoles. Numerous websites based in Canada are involved in the sale of "mod chips" and other circumvention devices to purchasers in other countries. 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 to 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.<sup>2</sup> 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.<sup>3</sup> 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

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<sup>2</sup> *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>.

<sup>3</sup> Similarly, there is no evidence that the voluntary "notice and notice system" in which some Canadian ISPs participate has had any appreciable impact on online infringements.

could be a useful part of a system that gives ISPs strong incentives to effectively address the dissemination of infringing materials.<sup>4</sup>

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.<sup>5</sup> Bill C-61's safe harbors could have sheltered from liability illegitimate file-sharing services that directly facilitate and profit from the widespread distribution of overwhelmingly infringing material. Indeed, operators of such services publicly called for enactment of these provisions precisely for this purpose. 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."<sup>6</sup>

Bill C-61 also did nothing to clarify liability under Canadian law for those whose actions in the Internet context are directed to promoting massive infringements (for example, illicit p2p services). 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 whose conduct is directed to encouraging, inducing or materially contributing 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. 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." Another provision, proposed section 38.1.(1.3), would have authorized even this meager award 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 prior to the date that the first copyright

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<sup>4</sup> 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 non-compliant ISPs.

<sup>5</sup> The flaws of the Bill C-61 safe harbors were manifold. The Bill seemed to overrule the Supreme Court decision in *SOCAN v. CAIP* which had suggested that a service provider would be liable for authorizing infringement if it had notice of infringing content on systems hosted by it and failed to take steps to remove or disable access to the content. The Bill would also have provided a safe harbor to any service provider who in the course of offering a search capability reproduces, caches or communicates copyright content to the public. This form of exception for information location tools was far broader than the very narrow exceptions for search engines in the few countries which have such a provision in their laws. Further, all of the proposed safe harbors lacked the standard qualifying conditions which exist internationally – notably, that service providers implement effective policies for dealing with repeat infringers.

<sup>6</sup> See WCT, Art. 14.2; WPPT, Art. 23.2.

owner's lawsuit was filed. Although the Government indicated that the act of posting music using the Internet or p2p technology would not be subject to the "private purposes" limitation on liability,<sup>7</sup> the Bill itself failed to define the term. 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. For example, where a defendant uploads a work – or hundreds or thousands of works -- to the Internet without authorization, or places unauthorized copies 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. That gap will rapidly reopen if these infringing activities are treated as having been undertaken for "private purposes," thus replacing statutory damages with a *de facto* \$500 license for unlimited personal infringement by anyone caught uploading any number of infringing copies. 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 appropriate circumstances, Bill C-61's proposed amendments to section 38.1 appear entirely unnecessary and should be eliminated from future copyright law reform proposals. At a minimum, their inapplicability to unauthorized uploading must be made definitive.

**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, taking into consideration both the scope of Canada's existing fair dealing exceptions for research and private study, and applicable international standards.

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 should be clarified, lest it prove to be an exception that swallows the rule.

Bill C-61 also brought forward from its legislative predecessor several other flawed and internationally unprecedented proposals in the area of educational and library exceptions. The distance learning exception contained none of the internationally recognized limitations to the scope of copying for educational purposes, nor any requirements to prevent further dissemination of electronic educational materials. The digital reproduction exception effectively created a compulsory license for digital copying. The inter-library loan exception would have authorized inter-library distribution of digital copies, without any limitations on the scope of such copying, and would have had a significant detrimental impact on publishers of scientific, technical and medical materials in particular. All 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; that they provide ample room for market solutions; and that there are practical enforcement mechanisms for any conditions on these exceptions.

**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

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<sup>7</sup> Government of Canada, Fact Sheet, Limitations on Statutory Damages, June 2008, <http://www.ic.gc.ca/eic/site/crp-prda.nsf/eng/rp01162.html>.

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.

**Legal Reforms Needed to Enforcement Regime:** 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:<sup>8</sup>

- 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.

In 2009, the Canadian government took a step forward on one of these recommendations, proposing a regulatory change that would bring criminal copyright offenses under the Federal Proceeds of Crime regime. While adoption of this change would be a positive step, the full range of Parliamentary recommendations should be acted upon promptly, to repair long-standing defects in Canadian law, and to 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. In large part, this is because in 2010, as in so many prior years, 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.

### **The Piracy Situation in Canada**

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. 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.

**Audio-visual:** Multiple, and often connected, Internet sites in Canada are used as a massive international distribution vehicle for pirated audio-visual material. A number of the world's most notorious and prolific BitTorrent sites for online piracy are hosted or have operators based in Canada. For instance, a compilation of the "25 Most Popular Torrent Sites of 2009" published by TorrentFreak in December 2009, based on widely available worldwide

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<sup>8</sup> See reports cited at footnote 1, *supra*.

traffic data, included seven sites hosted, registered or otherwise connected to Canada, including 4 of the 10 most popular, and 2 of the 3 leading BitTorrent sites in the world.<sup>9</sup> While the specific rankings and traffic figures fluctuate over time, there is no doubt that Canada has become a magnet for sites whose well-understood *raison d'être* is to facilitate and enable massive unauthorized downloading of pirated versions of feature films and other audio-visual materials by users around the world. For example, as determined by a U.S. federal court in the case of Isohunt.com (one of the three most visited torrent sites in the world) and several affiliated Canada-based sites, "evidence of intent to induce infringement is overwhelming and beyond dispute." The court concluded that these sites "engaged in direct solicitation of infringing activity" (such as soliciting uploads of copies of "the top 20 highest-grossing films then playing in the United States"); that their operators "directly assisted users in engaging in infringement"; that their "business model depends on massive infringing use;" and that the website operator "personally engaged in a broad campaign of encouraging copyright infringement."<sup>10</sup> Clearly what has attracted these advertising-supported commercial online piracy sites to Canada is the practical impunity with which they can operate there. The sites themselves trumpet this fact on their websites.<sup>11</sup> As the legal noose tightens around similar pirate services in formerly more sympathetic jurisdictions in Europe, Canada's reputation as a pirate haven for sites that facilitate massive on-line infringement continues to grow.

Online piracy of audio-visual material in Canada damages independent producers as well as the major studios. The Independent Film and Television Alliance (IFTA) reports that, in a worldwide Internet monitoring program it conducted in the last quarter of 2009 for 90 of its members' films, Canada ranked third in the world in the number of p2p infringements detected, far ahead of numerous markets many times its size.

In the offline world, the Motion Picture Association of America (MPAA) reports that the market for infringing DVDs has traditionally been concentrated in the Greater Toronto area (GTA) where illegal distribution and sale of counterfeit DVD was being conducted in a very organized fashion. Previously, stores in three malls and a several large flea markets were openly advertising, displaying and selling their illegal product to consumers coming from all over the GTA. The industry has engaged in active anti-piracy measures throughout GTA, with over 835,000 counterfeit DVD's surrendered in response to service of industry cease and desist letters in 2009. One bright spot in Canada's otherwise gloomy anti-piracy picture for 2009 is that police forces in the GTA have become engaged, making a number of raids and arrests. Targeted criminal enforcement actions against DVD vendors in the malls and large flea markets have caused the illicit sale to move out of malls and into smaller flea markets and corner stores, where it is harder for customers to locate sources for pirate goods. Continued action by law enforcement, along with the imposition of deterrent penalties on violators, will be needed to provide a long-term solution to the problem. The criminal operations view the relinquishment of pirated product as simply an occasional cost of doing business and are undeterred by any civil action.

Entertainment software: In 2009, the Entertainment Software Association's investigations uncovered numerous piracy operations in Québec, 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

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<sup>9</sup>[http://torrentfreak.com/top-25-most-popular-torrent-sites-of-2009-091213/?utm\\_source=feedburner&utm\\_medium=feed&utm\\_campaign=Feed%3A+Torrentfreak+%28Torrentfreak%29&utm\\_content=Google+International](http://torrentfreak.com/top-25-most-popular-torrent-sites-of-2009-091213/?utm_source=feedburner&utm_medium=feed&utm_campaign=Feed%3A+Torrentfreak+%28Torrentfreak%29&utm_content=Google+International). Torrentz.com, the second most visited torrent site in the world, is hosted in Canada, where 6 of its 8 IP nodes are located. Isohunt.com, discussed in the text, was the third most visited torrent site in the world in the torrentfreak.com listing, and seems to be an entirely Canada-based operation. The other Canadian sites listed in the torrentfreak compilation include monova, BTMon, Fenopy, TorrentPortal, and Torrentzap. BTJunkie.org, #5 on the Torrentfreak list, also appears to have Canadian connections.

<sup>10</sup> Columbia Pictures Industries, Inc. v. Fung, CV 06-5578 SVW (JCx), 2009 U.S. Dist. LEXIS 122661, at \* 39-53 (C.D. Cal. Dec. 21, 2009).

<sup>11</sup> "Unless you live in Canada, downloading copyrighted material via P2P may put you at risk for a lawsuit. Canadian users are currently shielded from P2P lawsuits. Canada signed the 1997 World Intellectual Property Organization Internet Treaties, but has not yet ratified them by enacting their provisions into domestic law." <http://www.torrentportal.com/> (visited 1/15/10)

stores, often found in malls, among the most notorious of which are located in the Markham region's Pacific Mall, and increasingly with multiple locations. 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). ESA's 2009 enforcement activities resulted in the seizure of thousands of pirated games as well as equipment used for mass-scale replication. Circumvention devices and modified consoles were often present with the pirated games.

The widespread availability of circumvention devices in Canada, which are not prohibited under Canadian law, is central to the piracy problem. Circumvention devices, such as mod chips and game copiers, enable the playback of pirated games by bypassing technological protection measures (TPMs) used by rights holders. Consequently, as ESA's investigations have revealed, most vendors of pirated games also offer circumvention services or devices for sale, and an increasing number of vendors are beginning to engage only in circumvention activity, which allows them to induce and/or facilitate game piracy without fear of prosecution, due to Canada's lack of anti-circumvention laws. The lack of TPM protections in Canada also enables vendors to import circumvention devices from overseas manufacturers by the thousands. Because these pirates recognize no borders, Canada functions as a safe haven from which they can redistribute circumvention devices around the world.

Canada's lack of TPM provisions also exacerbates the rate of online piracy, because without the aid of circumvention devices, users would be unable to play games that were unlawfully downloaded. It is no surprise, then, that Canadian ISP subscribers rank as some of the most egregious in terms of downloads of unauthorized entertainment software. ESA estimates that, during December 2009 alone, approximately 131,138<sup>12</sup> infringing copies were made of select ESA members' computer and video games through P2P file sharing by ISP subscribers in Canada. These figures do not account for downloads that occur directly from hosted content, such as games found on "cyberlockers" or "one-click" hosting sites, which continue to account each year for progressively greater volumes of infringing downloads.

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. Where ESA has been successful in procuring action on the part of RCMP or local police, it is generally because of one or two interested law enforcement officials, motivated by an ESA training event they attended or a working relationship with one of ESA's outside investigators. Unfortunately, even when criminal prosecutions are pursued, courts have been tepid in their sentencing, typically imposing fines instead of jail sentences, even for recidivists involved with large commercial operations who view the financial penalty as the mere cost of doing business. Until RCMP improves its enforcement efforts and Canadian judges consistently impose sentences that are truly deterrent, piracy in Canada will continue to flourish.

Business software: Although the estimated 2009 piracy rate for business software in Canada crept down from 32% to 30%, it remains well above that of the U.S., Japan, Australia or many Western European countries.

Books: Book publishers report continuing piracy problems in Canada with regard to infringements such as high-volume photocopying, and unauthorized uploading and downloading (especially of textbooks).

Music and Sound Recordings: Internet music piracy remains prevalent in Canada, aided by weak and outdated copyright laws. This uncertain legal environment contributes to the formidable propensity of Canadians to patronize illegal online sources of copyright material, thus stunting the availability and growth of legal alternatives.

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<sup>12</sup> This figure is representative only of the number of downloads of a small selection of game titles, and thus understates the overall number of infringing downloads of entertainment software made via p2p by Canadian ISP subscribers during the period.



For example, according to Nielsen SoundScan Canada, the digital share of total album sales in Canada was 13.6% in 2009, compared with 20.4% in the US.

Furthermore, the rate of digital track sales growth in Canada has slowed steadily and dramatically over the past few years, to 38.3% in 2009 from 60% in 2008, 73% in 2007, and 122% in 2006. This indicates that digital music purchases are gaining considerably less traction in Canada than the US – an unusual divergence given the historical similarity of the markets – and that the Canadian market could plateau at a much lower level.

Overwhelmed by competition from “free” music on the Internet, retail sales of music in Canada have dropped by more than half since 1999. In 2006, research firm Pollara conservatively estimated the number of unauthorized downloads in Canada at 1.3 billion, swamping the number of legitimate downloads that year (20 million) by a factor of 65:1. These statistics bear out the OECD’s 2005 conclusion that Canada has the highest per capita incidence of file-swapping in the world.<sup>13</sup> With the continued decline of recorded music sales in Canada since then, there is no indication that Canada’s piracy problem has abated.

Very few digital music providers have introduced new digital service models in Canada. This stands in sharp contrast with other markets all over the world, where there is a proliferation of new digital consumer choices. The fact is that Canada lacks the marketplace integrity required for innovative digital business models to flourish as they do in other countries.

### The Legal Deficiencies

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 game copiers) whose primary purpose is to circumvent technological protection measures used by copyright owners to fight piracy. Consequently, although organized criminal groups in Canada likely dominate trade in these circumvention devices, RCMP and local enforcement authorities 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 implement 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 counterfeit products as they enter Canada. Unless a court order has been previously obtained<sup>14</sup>, only the RCMP can carry out an *ex officio* seizure, and coordination between the two agencies is generally not effective. As a result, virtually no seizures at the border have occurred, and Canada’s borders are effectively wide open to imports of pirate CDs, DVDs or videogames and other infringing materials. CBSA must be given independent authority to act against any suspected pirate or counterfeit imports. Although the Canadian government has acknowledged this

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

<sup>14</sup> Court orders, however, can only be obtained upon the filing of an application by the right holder, supported by affidavit evidence, including information regarding the identity of the importer, exporter or vendor; country of origin or export; quantity and value of the infringing goods; estimated date of arrival in Canada; mode of importation; identity of the ship, train or truck used to transport the infringing goods, and (if available) the serial number of the container in which these goods may be found. In many instances, a right holder will not have access to this information and the necessity of obtaining the court order is itself unduly burdensome and not designed to prevent pirated and counterfeit imports from entering the country.

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.<sup>15</sup>

As discussed above, 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.

### The Enforcement Shortfalls

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 noted that "the provision of additional resources and training to customs officers and domestic law enforcement personnel would enhance IPR enforcement." 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. The existing arrangement under which CBSA can refer cases to the RCMP through designated RCMP liaison officers is unwieldy and impractical.<sup>16</sup>

Nevertheless, there are a few encouraging signs, such as the increased law enforcement engagement against sales of pirate DVDs in the Greater Toronto Area in 2009. RCMP, Toronto Police, York Regional Police, and other law enforcement agencies have all been involved in this effort. In another example, a November 2009 RCMP operation dubbed Project OACTION disrupted a major burning operation and seized thousands of pirated games when it executed search warrants at two retail units in Pacific Mall, a residence, and two associated vehicles. ESA also reports success working with Canadian police departments, including the Toronto Police Services (TPS). In one such TPS action, authorities discovered a large-scale burning operation, leading to the arrest and sentencing of two individuals to 12 months of probation. On the whole, though, the Canadian law enforcement commitment to enforcement against retail piracy remains generally under-resourced.<sup>17</sup> In particular, the RCMP's efforts are held back by a lack of resources to properly investigate criminal copyright infringements.

The continued prevalence of pirate product in Canada's retail market is reflective of the Canadian government's failure to provide RCMP with adequate enforcement resources, and shows that its record of

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<sup>15</sup> Both parliamentary committees that studied this topic in 2007 called explicitly for such amendments to be enacted.

<sup>16</sup> 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.

<sup>17</sup> 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.

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 always reflected adherence to this commitment. RCMP's response to the Pacific Mall is a case in point. Although vendors at the Pacific Mall have for years openly sold pirated game product, RCMP has not undertaken the kind of coordinated effort and aggressive enforcement that is necessary for a long-term solution. When RCMP does take action, it is often only in the form of issuing cease and desist orders to vendors engaged in the sale of pirated product. As evidenced by a large number of recidivists in the Pacific Mall, however, cease and desist orders are not adequately deterrent. Vendors who receive a cease and desist order often resume their pirate activity in a matter of days or weeks knowing that the likelihood of criminal penalties is remote. The RCMP Enforcement Policy, which reflects a reluctance to target "retail" piracy, does not account for the reality that as technology constantly advances, "retailers" now use ordinary computer equipment to become mass manufacturers, producing literally hundreds of thousands of pirated DVDs, CDs, software and video games.<sup>18</sup> Moreover, there is a demonstrated link between those who sell, manufacture and distribute counterfeit products 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.

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.<sup>19</sup> 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. 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."<sup>20</sup> The weak penalties obtained also discourage prosecutors from bringing cases, and encourage recidivism.

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, particularly jail time, Crown counsel should be encouraged to take on more copyright infringement cases, and should 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.<sup>21</sup>

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<sup>18</sup> RCMP continues to take actions against some producers of high volumes of pirate optical disc products, notably in raids in Montreal in December 2008 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.

<sup>19</sup> 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.

<sup>20</sup> 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.

<sup>21</sup> Numerous recommendations of the parliamentary committees echo these concerns.

# CHILE

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2010 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** IIPA recommends that Chile remain on the Special 301 Priority Watch List in 2010.

**Executive Summary:** The copyright industries remain very concerned about the twin problems of inadequate legal reform and high piracy levels in Chile. Hard goods piracy remains at steady levels and Internet piracy is already a major obstacle for the development of a new digital economy. Although industry cooperation with Chilean criminal enforcement authorities generally is good, especially from the Carabineros, there appears to have been a drop in the number of street actions in 2009. There have been some encouraging actions taken against Internet sites distributing infringing products. At the end of the day, only few copyright prosecutions are undertaken and even fewer result in deterrent sentencing, due largely to inadequate minimum penalties in the law.

Chile was the first U.S. trading partner in Central and South America to sign a Free Trade Agreement (FTA) with the United States, 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 still incomplete. After almost three years of work on copyright- and enforcement-related FTA legislation, the lengthy and rather contentious process, including a presidential veto, is coming to a conclusion, as the Constitutional Court is now reviewing the bill. Unfortunately, the new legislation still contains substantive gaps that may result in confusion and, even worse, undermining the ability of rights holders and enforcement authorities to combat piracy, especially in the online environment. Furthermore, legislation has not even been drafted to implement the FTA obligations on technological protection measures, a deadline long overdue.

The Chilean government needs to elevate national attention to copyright enforcement and develop specific actions to significantly reduce hard goods and Internet piracy. With 2010 being an election year in Chile, there is uncertainty and concern as to whether or not the new government will move forward on full and proper FTA implementation and support a national program that would promote respect and enforcement of copyrighted content.

**Priority actions requested to be taken in 2010:** The copyright industries recommend that the following five groups of 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:**

- Implement copyright and enforcement legislation that would fully satisfy FTA IPR obligations including addressing the industries' longstanding calls to: (a) establish effective internet service provider (ISP) liability provisions to meet its FTA obligations, including notice and take down procedures; (b) increase the level of deterrent civil and criminal sanctions for copyright infringement; (c) provide an effective civil *ex parte* search remedy; and (d) establish statutory damages.
- Implement FTA technological protection measures (TPMs) obligations and enforce FTA anti-circumvention provisions (both criminal and civil).
- Take immediate steps to complete and fully implement its 2001 government software legalization decree, and adopt provisions to regulate the acquisition and management of software by government agencies.

**Improve criminal enforcement:**

- Instruct the police (Carabineros) to give priority to copyright anti-piracy actions, especially in the cities of Santiago, Iquique, Concepción, and Valparaíso.
- Have the police place more emphasis on investigating pirate manufacturing and distribution centers and operations.
- Instruct the civil police and administrative authorities to take actions prohibiting the sale of pirated materials in the streets.
- Pursue more criminal actions against internet piracy
- Have the police 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, coordinate with rights holders to ensure accurate invoicing, limit the entry of blank media, institute a reference price for CD-Rs and DVD-Rs, and create an approved importers' register.

**Announce a national anti-piracy campaign:** The Ministry of the Interior should develop and launch a national anti-piracy campaign with specific action-oriented elements aimed at specific enforcement efforts, improved interagency cooperation, and enhanced public awareness.

## **COPYRIGHT LAW ISSUES IN CHILE**

IIPA and its members strongly support the FTA and for many years have urged Chile to fully and promptly comply with its FTA and international obligations.<sup>1</sup>

**The U.S.-Chile FTA<sup>2</sup> :** While Chile did timely amend its copyright law to implement much of the FTA's first set of substantive copyright obligations (those due upon the FTA's entry into force on January 1, 2004), a series of transition periods (ranging from two to five years) anticipated that additional law amendments were necessary for Chile to meet its bilateral obligations. Chile has failed to meet several of these transition periods and, as a consequence, is out of complication with its FTA obligations.

Chile had a two-year transition period to provide protection to temporary copies (Articles 17.5.1 and 17.6.1). There appears to be no express protection for temporary copies in the law and the reproduction right is very broad. The new 2010 legislation creates certain exceptions to temporary copies. The FTA contains a four-year transition period (due January 1, 2008) for Chile to implement the following enforcement obligations:

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<sup>1</sup> 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/2010SPEC301HISTORICALSUMMARY.pdf> of this submission. For more information on IIPA's 2010 challenges, see the IIPA cover letter to this Special 301 submission, posted at <http://www.iipa.com/pdf/2010SPEC301COVERLETTER.pdf>.

<sup>2</sup> The U.S.-Chile Free Trade Agreement is posted on USTR's website at [http://www.ustr.gov/Trade\\_Agreements/Bilateral/Chile\\_FTA/Final\\_Texts/Section\\_Index.html](http://www.ustr.gov/Trade_Agreements/Bilateral/Chile_FTA/Final_Texts/Section_Index.html). For an earlier review by IIPA 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](http://www.iipa.com/rbi/2003_May8_ChileFTA_ITC.pdf).

- 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 for 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 also has failed to implement its already existing WCT and WPPT obligations regarding protection against circumvention, including preparatory acts, of technological protection measures (TPMs) in accordance with the FTA (see FTA Articles 17.7.5.a and c).

**Copyright law reform in 2009, and adoption in 2010:** Chile has been working on legislation to amend its copyright law (Law No. 17336) since 2007 to address some (not all) of the FTA issues cited above. The new legislation was an effort to comply with the FTA's requirements regarding critical issues such as criminal enforcement, limitations and exceptions to copyright and provisions concerning limited liability for Internet Service Providers (ISP's). The process has been slow and arduous,<sup>3</sup> and the ultimate outcome is disappointing on several key issues.

During 2009, there was a lot of debate and work on the copyright/FTA bill. In early January 2009, several meetings of the joint legislative committee were held but much of the work did not resume until Congress came back into session in March 2009, where a very full agenda of copyright amendments faced them. On September 9, 2009, the Senate passed amendments to the House bill. The bill was then sent to another joint commission to review critical issues involving ISP liability provisions, and it made additional revisions. That package was then sent to the House, which rejected some of the joint commission recommendations, yet left some, not all, of the ISP provisions in place. On November 13, 2009, the final document was adopted by the joint commission and forwarded to the executive.

On December 10, 2009, President Bachelet exercised a presidential veto in which she re-inserted some language on ISP liability provisions which appears to be taken, in part, from the earlier Senate bill. The bill received a final vote at the Senate on January 13, 2009 and is waiting for the President's signature and official publication. The law currently is being reviewed by the Constitutional Court. There remain some very troubling issues with certain elements in this legislative package.

- Provisions on ISP liability. The provisions on Internet Service Providers' liability are essential to ensure the distribution and enforcement of legitimate content over the Internet. This issue demanded a lot of attention during 2009<sup>4</sup> and unfortunately the results are not satisfactory. It seems that the Chilean system has created more problems than solutions; here are a few examples.

<sup>3</sup> To recap the initial legislative efforts, 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. Then, in 2008, a joint Senate committee comprised of officials from the Culture, Education, Technology and Economy Committees was created to review this copyright package. Over 200 more amendments from legislators and the private sector were submitted to this 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 as well as meeting with ministry officials. The committee decided to review all these amendments from the start. By the end of 2008, the joint committee had only held hearings that addressed proposed provisions affecting libraries. The problematic provisions of ISP liability, criminal sanctions and mandatory arbitration on collective management of rights cases were not then discussed.

<sup>4</sup> In fact, much of the controversy in crafting these provisions was started by the inadequate proposals found in the first bill offered by the Administration and passed by the House in 2007, a bill that failed in many respects to track the FTA. For example, it would have effectively created incentives for Internet service providers 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 on notice and takedown procedures was troubling, as it would have 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

- The chapter on “Internet Service Providers Limited Liability Provisions” (Chapter III, articles 85-L to 85-U) generally tracks the safe harbors in the FTA (articles 85-L to 85-Ñ). However, for the voluntary removal of infringing content, the new law requires that ISP’s must have “effective knowledge” of the infringement in order to remove infringing content. The final section of article 85-Ñ requires judicial notification from a court of law to provide such level of knowledge to the ISPs. In other words, rights holders’ notifications are not effective as a source of “effective knowledge,” and for that reason the final section of article 85-Ñ severely limits the possibilities for a voluntary cooperation program between ISPs and right holders in Chile.
  - Article 85-O requires ISPs to have a contractual policy to cancel subscribers’ contracts but only when those subscribers have been convicted twice for copyright infringement. Considering the infrequency of prosecutions in Chile, this condition will likely never be met in reality, and even if someone managed to be caught twice, it is very unlikely that a cancellation sanction would be applied before the passage of many years. This is quite the opposite of a forward looking, flexible and modern approach to deterring online infringement.
  - Article 85-U creates a “stand alone” obligation for ISP’s to inform its subscribers (in five days after reception) about notifications received from rights holders. Since there is no obligation attached to this provision (nor any sanction for non-compliance) it will be very difficult to determine its effectiveness without an additional agreement between the parties involved.
  - Article 84-T establishes a procedure for ISPs to notify customers that are infringing copyright, and that procedure offers three options to the customers: (a) “guilty” (and content is removed by the ISP), (b) remain silent (and the ISP will remove content after ten days), or (c) challenge the notification by “insisting” in maintaining the content on-line. Unfortunately, the provision does not limit and/or define the basis for any such challenge. Hence the customer may just insist in keeping the files online and the ISPs have to do it; this is simply an untenable result. Article 84-T also requires ISPs to notify the customers by “certified mail” which will make such notification lengthy and costly. In sum, it seems that, even with the veto, the Chilean legal landscape has created an incomplete and unworkable notice and takedown system for hosted content, and one that does not comport with either the letter or the spirit of the FTA. Furthermore, it would appear that this provision relates only to content which is hosted on the ISP’s server given that it discusses removal of the content by the ISP--something that can only be accomplished where the content is stored on the ISP’s network. So not only does this fail to deal with P2P, but it creates a “notice plus notice” architecture for hosted content, instead of the “notice and takedown” procedures required by the FTA.
- Civil ex parte remedy and statutory damages: Unfortunately, no provisions are included to strengthen the civil ex parte search remedy nor are there any provisions establishing statutory damages. Some industry colleagues are considering whether further work should be undertaken to approach the Supreme Court to try to obtain an instruction for the civil courts in order to have effective *ex parte* searches.
  - Bonds for injunctions: The veto also includes a bond requirement for all and every application for an injunction that rights holders file. Such requirement will be a big obstacle in practice due to the large number of potential cases.
  - Overbroad exceptions to protection: Many of the objectionable proposed exceptions in the October 2007 bill, such as those for libraries in the digital environment and those involving computer software, remain in the final bill and seem incompatible with the FTA. For example, provisions on reversed engineering are too broad; the 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). Also, the exceptions involving

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would have had to petition a civil court, which then would have 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 would have been limited only to hosted content and would not cover actions needed in peer-to-peer piracy (P2P) situations.



libraries would potentially allow libraries to reproduce entire works in digital form without any restrictions on further use, reproduction or distribution. Finally, 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.

- **Continuing low mandatory minimum criminal sentences:** 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 in-practice. Efforts in a separate legislation (discussed below) may go part of the way toward implementing more deterrent criminal sanctions for piracy. 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.
- **Mandatory arbitration:** The new law contains amendments on mediation and arbitration. The recording industry is concerned that these new proposals on mandatory arbitration (Articles 100 and 100*bis*) would jeopardize the right of the collecting societies to establish their own performance rights rates.

**Bill on illegal commerce and piracy:** 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 bill, the penalty under Article 293 of the Penal Code for criminal association would result in an additional sentence. Another key feature of this bill 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. To be clear, an important element of this initiative was actually addressed by the recent amendments to the Intellectual Property Law (discussed above). The new Article 83 there now includes an aggravated penalty where copyright piracy (as described on Article 81) is committed by an offender making part in a group or “association” specifically created for the purpose of committing copyright piracy.

**Net Neutrality Bill (2008):** There is a bill to establish a “net neutrality” principle protecting consumers and Internet users. This initiative was submitted to Congress in March 2007 by a small group of representatives and is still in the legislative process with no urgency from the government side. The Bachelet Administration gave little attention to this initiative, and it is expected that the proposal will remain pending in 2010.

**Regulation for municipal fines for street piracy (2007):** 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.

**Laws affecting judicial processes (2007):** 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 sum, this created a more agile relationship between prosecutors and judges. 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. 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 Partnership FTA:** Chile is an initial TPP negotiating partner. IIPA views the TPP negotiations as an opportunity to make progress on Chile's outstanding IPR obligations under the U.S.-Chile FTA.

## **COPYRIGHT PIRACY IN CHILE**

**Optical disc piracy, street piracy and border issues:** Widespread "street piracy" remains visible in Chile. 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 continue to 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. Finally, 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.

**Internet piracy is growing:** Chile continues to have one of the highest broadband penetrations in the region. There were over 8.36 million Internet users in Chile in 2009, representing 50.4% of the population (up from 45% the year prior, according to [www.internetworldstats.com](http://www.internetworldstats.com)). This is a 376% rate of growth over the last decade (2000-2009). There has been a large increase in bandwidth in the country which now reaches up to 15 megabits. The growth of broadband and capacity facilitates quick illegal downloading. 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) file-sharing is the most predominant form of Internet piracy in Chile, with the ARES and GNUTELLA networks being the most popular.

The music and 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. 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. The changing nature of the music business can be seen as the largest chain store selling music (Feriamix) closed 11 locations last year due to poor sales; that chain has 43 stores still operating.

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. Two years ago, the recording industry's national group (IFPI Chile) submitted the case to the competent authorities for criminal investigation but the prosecutors did not pursue it. Today Chilewarez (which has reformulated itself under the name "Chilecomparte") remains as the biggest threat to the music industry in Chile because of the thousands of illegal music links posted in its musical communities. The recent creation of cyberlockers and hyperlinks, located on national and international sites, allows direct downloading from hosting sites (Rapidshare, etc.), over P2P sites.

**Business software piracy:** The Business Software Alliance (BSA) reports that there was no improvement in the reducing business software piracy in Chile during 2009. Street piracy, in-house piracy (also known as end-user piracy) and Internet piracy are the primary piracy forms damaging this sector. Preliminary estimated U.S. trade losses due to business software piracy in Chile was \$113 million in 2009, with a 65% level of piracy.<sup>5</sup>

Street piracy for software continued unabated in 2009. Police actions against the street vendors are frequent but do not produce permanent changes; the number of ambulantes selling pirate optical disc products containing software has remained at constant levels. Santiago, Valparaiso, Arica, Iquique, San Antonio and Talcahuano are the cities where piracy of goods is widespread, due to their size and/or because of their location beside ports or border with other countries.

Another kind of piracy is end-user piracy, which not only includes the piracy made in the privacy of the home, but also in companies, offices and educational institutions. The vendors use catalogues distributed by email or in paper, receive requests, accomplish them providing the pirated copies and receiving the corresponding payment. 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. 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. Adopting appropriate provisions to regulate the acquisition and management of software by government agencies is a critical solution, and one required by the FTA. Unfortunately, the software legalization provisions of the 2001 Decree have still not been implemented nor enforced in any measurable way. In 2010, 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.

BSA also is concerned about the rapid growth of internet based piracy in Chile, in all its formats--illegal posted sites, P2P, hyperlinks, cyber-lockers, etc.

**Piracy of music and sound recordings:** The recording industry, led by IFPI Chile, reports no specific change to report in the nature and scope of music piracy during 2009. Physical piracy, primarily in the form of pirate CD-Rs and DVD-Rs, is over 50%, and the cities with highest piracy rates are Santiago, Concepción, Iquique and Valparaiso. The physical piracy is still a problem, but Internet piracy is growing fast as sales of physical product decline. The most common Internet-based piracy is the exchange of illegal music files through P2P networks (especially ARES, Gnutella and Limewire) and cyberlocker links posted on social sites such as Chilecomparte. There are no reports of serious problems involving mobile music piracy yet. IFPI reports that the recording market in Chile suffered an overall 17% decrease in 2009 (this is due to a 27% drop in CD sales but a 13% increase in digital sales, due mostly to mobile-related business done by record companies and telephone companies). Estimated trade losses due to piracy of music and sound recordings in Chile was \$18.4 million in 2009, with a 68% level of piracy. The lack of an effective anti-piracy campaign--both physical and online--as well as the trend in the copyright reform to essentially dilute ISPs' responsibility for Internet piracy, may make Chile a hostile environment to operate a music company.

**Camcord piracy:** In 2008, the Motion Picture Association (MPA) also saw the first camcords come out of Chile, and trainings were conducted for cinema employees on how to spot illegal camcording in theaters. Unfortunately, 2009 saw an increase in full camcords sourced from Chile with three MPA member companies fully camcordered from Chilean theaters.

**Book piracy:** The publishing industry remains concerned about the widespread use of photocopies of textbooks and reference books, primarily at the university level. Private copy shops are conveniently located near universities, copying

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<sup>5</sup> BSA's 2009 statistics are preliminary, and represent the U.S. software publishers' share of software piracy losses in Chile, following the methodology compiled in the Sixth Annual BSA and IDC Global Software Piracy Study (May 2009), available at [www.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. BSA's final 2009 statistics will be available later this year.

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.

## **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.

CONAPI played a useful role in its first years, promoting more anti-piracy actions and calling the attention of the government to major issues affecting copyright industries in Chile. However, in recent years CONAPI lost energy and became just a forum for rhetorical discussions. In particular, CONAPI failed to address the two most relevant issues in the country for copyright industries: the Intellectual Property Law reform and the Internet Piracy problem. Both problems remain unattended by CONAPI.

**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 2009, BSA conducted more civil raids than the prior year, handling almost 50 actions 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 *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. BSA continues to move forward on this issue and are hopeful that with the new copyright law, the judges (including the judicial police's IPR branch, BRIDEPI) will improve their understanding of IP issues and software piracy specifically.

**Criminal anti-piracy enforcement:** The recording industry has an active criminal anti-piracy campaign in Chile, but reports disappointing results in 2009. The business software industry did not bring criminal actions in Chile in 2009, 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 last year. IFPI Chile reports that hard goods 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. There have been more than 20 procedures with direct participation of IFPI. The police taking *ex officio* actions in cases of piracy street and some laboratories. Customs also works on its own but eventually requests a complaint from the right holders. Unfortunately, IFPI reports that the number of street raids decreased significantly in 2009. Compared to 2008, police authorities carried 44% fewer operations in 2009. The decrease shows less interest from the authorities in pursuing

piracy cases and no attention from the Judicial Power because of the lack of prosecutions. Also, the smaller numbers of actions reveals that private sector is trying to invest more resources on Internet actions where new legitimate businesses are trying to flourish. Customs authorities also failed to conduct high scale seizures actions to stop contraband of raw materials destined to piracy. In sum, the recording industry notes that this reflects a significant deterioration in what had previously been good efforts and good support in anti-piracy operations with government authorities. The recording industry also took actions in the Internet space (see below).

MPA reports that it received good cooperation from the authorities on an anti-camcording action against a prolific camcorder in Chile. In May 2009, MPA cooperated with police to catch a well-known and prolific camcorder in Chile that is also a well-known Internet pirate with connections to pirate groups throughout Latin America. The suspect uploads illegal copies of movies to numerous pirate sites in Latin America and has created and synced many illegal Spanish subtitles to the movies he releases on the Internet. The police seized his camera but released him because he was not arrested for a flagrant crime. This case is currently before the local district attorney of Concepcion to prove the existence of a crime against intellectual property.

There are two overwhelming problems in getting effective criminal enforcement in Chile. First, the national police (Carabineros), the Prosecutor's Office and the Judicial Police suffer from a lack of sufficient human resources. The Carabineros, particularly the organized crime investigations department, continue to be a major support for anti-piracy actions in Chile. Second, judges usually impose only the lower range of penalties, which are not deterrent. This lack of deterrent convictions is because the Criminal Procedures Code and the Penal Code gives copyright piracy the treatment of a misdemeanor and that empowers prosecutors to enter into agreements with the accused (specially first-time offenders). Those agreements have the practical effect to substitute the criminal prosecution for community services and a commitment not to violate copyright for a certain period. Due to the application of such policy, none of the 16 people indicted for music piracy in 2009 were convicted. In sum, General Attorney's office needs to prioritize copyright violation cases and instruct Prosecutors to file charges at least in most important cases.

**Few prosecutions and no convictions:** Very few criminal prosecutions were brought in 2009, in either the hard goods or the online environment.

The recording industry reports that 69 raids on physical piracy were carried out during the year and 287,249 pirate copies seized along with 608 CD/DVD burners were seized in the operations. 31 people were arrested but only 16 individuals were indicted in 2009 for music piracy; none of them were prosecuted and instead, plea agreements were signed with the accused to avoid trials.

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 the recent legislative efforts to require higher mandatory minimum sentences were so important, and the fact that these minimums were not increases remains troubling.

**Internet piracy and cybercrime cases:** Chile's Judicial Police created a specialized, dedicated force to investigate Internet crimes. The Cyber Crime Brigade has been active and helpful on many Internet anti-piracy actions. However, prosecutions remain difficult, as exemplified by the prosecutors' refusal to bring a case against Chilecomparte.cl (formerly Chilewarez)

The recording industry maintains an active Internet anti-piracy campaign. During 2009, a total of 252,211 cyberlocker links, 5,699 permalinks on blogs, 3,103 P2P links and 25 forums were removed. 1,739 pirate products were also removed from virtual auction sites. As with physical piracy, the industry hopes to continue fighting piracy through local teams. A major concern in Chile continues to be "Chilecomparte.cl" which is a social site allowing registered users to create communities entirely dedicated to music and audiovisual pirate contents. As happened in the past, Specialized Prosecutor's

Office had shown a very poor interest in the case, not giving attention to the fact that Chilecomparte is the biggest local source for unauthorized distribution of pirate music.

**ISP cooperation:** The new law contains provisions on ISP liability and the liability and cooperation with rights holders will be tested in 2010. It has yet to be finalized and implemented.

The local recording industry group has been urging the attention of Chilean government to set up roundtable negotiations with ISPs to reach agreement that may settle major differences raised during the copyright law reform process. For example, for the past two years 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. Neither of these commissions are actively working today as the legislative process drew to an end last year.

Last year, Chilean ISPs tended to cooperate in those situations that involve hosted content. For example, the music industry specifically notes that it has 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. Much of the infringing content is found on foreign websites. However, during 2009 Chilean ISPs did not cooperate at all regarding P2P networks and links posted on social sites (they had no incentive, as no law was in force regarding their liability). This situation is not expected to improve during 2010 in view of the results obtained in the Intellectual Property Law reform where sanctions will be only imposed by judicial order.

**Inadequate border enforcement:** Chile's Iquique port is a transshipment point for blank media from Asia entering Colombia, Peru and Bolivia. The main problem that occurs is smuggling. In addition, 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.

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 progress at all on these issues last year, and the interested industry will be reevaluating their strategy on this issue in view of the new government in Chile.

**Trainings:** Some of the copyright sectors were able to provide trainings to Chilean enforcement personnel last year. For example, BSA participates in at least two IPR seminars, including educational ones as well as public awareness-building events. The music recording industry, led by IFPI, conducted a training on Internet piracy for the Cybercrime team and the new intellectual property division in the civil police as well as the Carabineros' organized crime unit. In addition, IFPI Chile helped develop a program called "Children for Intellectual Property" sponsored by the U.S. embassy and with the participation of the Municipal Corporation of Viña del Mar, the civil police intellectual property unit, Project ACCESS and the University UNIACC. The program consisted of talks to children in six municipal schools of Viña del Mar to raise awareness at an early age about the dangers of illegal trade and piracy in the country.

# COSTA RICA

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

### 2010 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** IIPA recommends that Costa Rica be elevated to the Priority Watch List in 2010.

**Executive Summary:** The most pressing problem for the copyright industries in Costa Rica continued to be the complete lack of criminal copyright enforcement taken by Costa Rican authorities. This lack of priority given by prosecutors remains a stark reality. While it is true that many criminal procedures and sanctions were amended in late 2008 to make prosecutions easier, the industries did not see any shift toward a more proactive enforcement stance from the Attorney General's office in 2009. Creation of a specialized IP prosecutors office is long overdue. Yet this abdication of enforcement responsibility must not obscure the fact that it remains the responsibility of all branches of the government of Costa Rica to effectively protect and enforce copyright. Furthermore, no progress was made on implementing government-wide software legalization, as required by CAFTA. In addition, the government has taken several recent actions that would limit the rights that should be afforded to sound recording producers, artists and performances. The music industry is also struggling to collect fees for the public performance of its music, as required by Costa Rican law and court decisions. In sum, the copyright enforcement situation in Costa Rica is dire, and especially disturbing given that this country is our CAFTA-DR (the Central America-Dominican Republic-U.S. Free Trade Agreement) partner. The presidential election may prove pivotal. Now that Laura Chinchilla, the former Minister of Justice, won the February 7th election, there is hope that attention will be paid to copyright and intellectual property in her administration.

**Priority actions requested to be taken in 2010:** 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. This continues to be a top priority.
- Implement in practice, the software asset management practices in government agencies called for in the 2002 Decree and required by CAFTA.
- Create a specialized IP unit within the police.
- Reduce unwarranted delays in investigations, prosecutions and sentencing.
- Improve training of enforcement officials on criminal and civil copyright cases (including police, officials from the Judicial Investigation Office (OIJ), prosecutors and judges).

#### Legislation

- Create and fund a Specialized IP Prosecutor Office.
- Pass pending legislation to amend the Ley de Observancia in order to clearly grant criminal protection to the neighboring rights of recording artists and broadcasters.
- Oppose the bill that unfairly aims to regulate the promotion and broadcast of sound recordings and performances of Costa Rican artists and producers by broadcasters.
- Work with rights holders on developing legislation to the remaining CAFTA issue – implementation of liability of Internet service providers – an issue that is still subject to transition.
- Oppose pending legislation that would impose a series of financial duties to all record producers in the country that hire studio musicians and singers on a temporary basis.



## **COPYRIGHT PIRACY IN COSTA RICA**

**Hard goods piracy:** The music industry reports that piracy of sound recordings and music continues to be rampant in Costa Rica. The level of optical disc piracy is approximately 75%, which represents almost 1.5 million illegal units sold every year in this relatively small market. Much of this OD piracy involves CD-R burning. The primary areas of concern are San José and Heredia. 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. Although it is difficult to come up with a precise number of OD importations due to the lack of a specific customs classification for blank media, and confidentiality about details of some of the importations, some local experts estimate that approximately 25 million units of CD-Rs and DVD-Rs enter Costa Rica annually.

**Business software piracy and lack of CAFTA implementation:** 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 it is a CAFTA obligation not yet implemented. BSA reports that it has not seen pirated software products on the streets. At the present time, business software piracy in Costa Rica is among the lowest in Latin America, at an estimated 58% piracy level. This low level, however, is due mostly to cultural reasons rather than effective enforcement actions. Given the challenging financial times, there is a concern that more legitimate businesses may be tempted to use infringing software instead of purchasing legitimate product or licenses. BSA's preliminary estimate of trade losses due to piracy in Costa Rica are \$14 million for 2009.<sup>1</sup>

**Internet piracy:** There are about 1.5 million Internet users in Costa Rica, about 34% of the population in 2009 (according to [www.internetworldstats.com](http://www.internetworldstats.com)). More home and business users now have access to the Internet, and this increases access to pirated products being sold for download or in hard copy from the Internet. Internet piracy, as everywhere else in the region, is a growing problem despite the low penetration of broadband.

Internet cafés continue to offer a forum for consumers to download files containing unauthorized copies of copyrighted materials. For example, internet cafés, especially in the capital city area, offer burning music CDs services to customers; last year the recording industry filed over two dozen criminal complaints, all of which were dropped by the prosecutors. In addition, music is downloaded from the Internet using peer-to-peer (P2P) networks (eDonkey, ARES and Limewire).

Currently there are no discussions between the content community and the internet service providers regarding internet piracy on their networks. Costa Rica still has a transition period under CAFTA to address ISP liability matters.

## **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 main problem for copyright industries is at the prosecutorial level. Prosecutors maintain a poor level of cooperation due to the political decision adopted by Attorney General to not pursue copyright piracy. Hence only some very limited anti-piracy actions are conducted, many of them with the cooperation of the municipality of San Jose. There is no political will to pursue piracy, and the situation worsened during the Arias Administration.

The national police and prosecutors are responsible for the anti-piracy actions in Costa Rica. The sound recording and the business software industries both continue to have anti-piracy operations in Costa Rica, but there are little to no results to report. Beyond the major problem at the prosecutorial level, enforcement authorities lack equipment

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<sup>1</sup> BSA's 2009 statistics are preliminary, represent the U.S. software publishers' share of software piracy losses in Costa Rica, and follow the methodology compiled in the Sixth Annual BSA and IDC Global Software Piracy Study (May 2009), available at [www.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. Final 2009 BSA statistics will be available later in 2010.

(hardware and software) to investigate Internet piracy cases. The Costa Rican judicial system is very weak, and courts, both criminal and civil, lack the expertise and experience necessary to enforce the copyright and criminal laws. Training programs are necessary for prosecutors, judges and the police authorities.

**Police cooperation is positive but need more resources:** Some municipalities with their own police forces have confiscated hundreds and sometimes thousands of music and video CDs from street vendors, in response to pressure from local businesses. These efforts, however, do not go so far as to investigate the supply chain of the pirated and counterfeit merchandise. In addition, BSA is not aware of any pirated business software being seized in such raids.

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 2009, the industry reports 48 raids, resulting in 240,000 music (mostly CD-R) seizures and 350,000 film (mostly DVD-R) seizures and the arrests of 30 individuals. These results, although a little better than last year's numbers, do not represent deterrent levels due to the high volume of piracy.

**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 remains inadequate 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. 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. For example, 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. During 2009, the recording industry filed approximately 30 criminal complaints with Prosecutors' offices in San Jose, Alajuela and Heredia, but all of them were dropped based on "insignificance of the crime" element. As a result of the serious deficiencies in copyright enforcement, no convictions in music cases were issued during 2009. BSA did not seek any criminal actions in 2009.

**The need for complaints and other delays:** 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 as allowed by the Criminal Procedural Code. For example, the municipal police in San José are taking some actions on their own without requiring the presentation of complaints. Most of these operations are aimed at small, street distributors. The police authorities may (but do not have to) bring cases *ex officio*; such actions have largely been used by the authorities as a tool to clean up street piracy of video and music discs. *Ex officio* action is not used for more complex cases involving the use or fixation of unauthorized copies of software.

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 continues. Criminal judges should accept the information and evidence offered by private plaintiffs, and order the raid if such information and evidence is sufficient, without requesting prior investigation reports from the OIJ; this procedure is consistent with Costa Rican legislation.

In addition, long delays in copyright enforcement cases have been a historically 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.

**Need for specialized IPR prosecutors:** 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. The 2008 legislation uses a vague concept of "perjuicio" as a requirement to constitute a crime; prosecutors can then use "insignificance" of economic damage as an excuse to close out a case. Given the significant delays and lack of proficiency observed by prosecutors and judges, the creation of this special office remains a pressing priority.

The creation of a specialized prosecutor's office is extremely necessary to correct the current unacceptable situation with prosecutors. Legislation is needed to authorize budgetary funding for such an office, and pending legislation to accomplish that has fallen off the docket. Although the Attorney General can create this unit internally, specific authority and funding to establish this office is preferred. The industries hope that the new Chinchilla Administration will allocate funds and create this office. For example, even a small start-up of two to three specialized prosecutors (along with the proper media attention surrounding such an action) may have a significant impact on IP crimes.

The business software industry awaits the opening of a specialized IP section in the Attorney General's office. Until it is launched, BSA believes that 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.

**Inadequate civil remedies and long delays.** The civil courts in Costa Rica have practically collapsed; a simple procedure can take months or years. There is no chance at the present time to pursue copyright cases civilly (civil actions are sometimes taken by the software industry, but very rarely by the music or audiovisual sectors).

BSA has submitted civil infringement cases, but the civil courts are in a state of virtual collapse. BSA is waiting for results, and will probably be waiting for a long time. The 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.

**No court results:** Because criminal copyright cases are not investigated by the prosecutors, they do not reach the judiciary. Judges at present do not have the expertise to handle IP cases. We are not aware of any final judgments in criminal or civil copyright cases last year.

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

**CAFTA implementation in 2008 but problems remain:** In 2000, Costa Rica amended its 1982 Copyright Law to comply with TRIPS and some of its WIPO Treaties (WIPO Copyright Treaty and WIPO Performances and Phonograms Treaty) obligations. In order to implement the copyright- and enforcement-related aspects of CAFTA, Costa Rica passed amendments to two separate laws -- its Copyright Law (which was included in a broader intellectual property rights reform package) and its Law on Enforcement. The copyright law amendments Law No. 8686 (2008) accomplished 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.

**Government software asset management not completed yet:** Government legalization of software is a CAFTA obligation that was due upon CAFTA's entry of force. The Costa Rican government commenced efforts on this

issue in 2002.<sup>2</sup> Unfortunately, no real progress on putting such a plan in-place was made in 2009. Last year was a political year and there was a lack of leadership to address government software 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.

**Recent reservations to two treaties affecting the recording industry and pending legislation:** The main source of concern for the music and recording industry in Costa Rica is the government's August 2009 action to adopt reservations to the two international treaties protecting neighboring rights (Rome Convention and WPPT). Those reservations have the immediate effect of exempting broadcasters of performance rights payments to recording artists and record companies. The decision was taken in the middle of judicial battles between right holders and broadcasters and looked as an unfair benefit given by the government to broadcasters. The Ministry of Culture never called copyright sectors to participate in these legislative initiatives. In fact, the reservations made to the Rome and WPPT treaties were decided during secret meetings held between the Ministry of Justice and COMEX (the Ministry of Foreign Commerce) without any consultation process.

Legislation has been introduced to implement the above decision by the government. In October 2009, a bill (Bill No. 17.574) was presented that would "regulate the promotion and broadcast of musical works and performances of Costa Rican artists and authors by broadcasters." This aims to amend Articles 78 and 82 of the 1982 copyright law in order to create a new exception to the communication to the public right of recording companies, artists and performers in favor of traditional over-the-air broadcasters. It looks to reflect in national legislation the reservations made by Costa Rica to Article 12 of Rome Convention and Article 15.1 of the WPPT. The bill is pending before the Science and Technology Commission of the Legislative Assembly. In an environment in which the licensing of signals is largely replacing the sale of recorded music, the government of Costa Rica should refrain from introducing these limitations which will have a very prejudicial impact on Costa Rica's music community. This is hardly an appropriate time to reduce the ability of performers and record companies to obtain compensation for the commercial use of their performances and recordings. The recording industry is considering a constitutional challenge to the August 2009 decision, and also hopes to meet with the Minister of Justice to discuss this situation.

**Continuing problems with the Law on Enforcement (*Ley de Observancia*):** For years, the copyright industries worked 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.<sup>3</sup> 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. For example, this law addressed the following CAFTA points in a generally positive manner:

- *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).

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<sup>2</sup> In February 2002, 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.

<sup>3</sup> 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.

- Statutory damages: It 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 includes other provisions involving injunctive relief, destruction of infringing materials and equipment, and border measures.

Unfortunately, as feared by the industries, other key elements of these 2008 amendments have not gone well. Below is a summary of some of the continuing legal concerns reported to IIPA by its members:

- Criminal penalties: The weak implementation of the revised criminal penalties has caused the most concern. The way Costa Rica structured and applied its criminal sanctions has long been a concern of the copyright industries. The 2008 amendments revised the criminal sanctions for copyright and industrial property infringement, but left open many continuing questions for copyright owners about their effectiveness in practice. In fact, all four fears highlighted below in IIPA's 2009 Special 301 filing remain true.
  - 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. IIPA and its members had hoped that deterrent level sentences would be imposed in practice, but that did not happen.
  - Second, 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.
  - Third, 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.
  - 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.

Apart from the lack of political will by prosecutors, there are several other legal deficiencies that have contributed to the problems with poor copyright enforcement in Costa Rica through 2009. Additional issues not addressed in the CAFTA implementation packages, but long highlighted by the copyright industries, include the following:

- Public officials, not only injured parties, must be able to file criminal actions for IP violations ("*acción pública de instancia pública*"). This means providing for full *ex officio* authority for police. Unfortunately, this situation has not changed; in general, rights holders must still file a complaint (*denuncia*) in order to get a criminal prosecution. (As mentioned above, *ex officio* authority is used sometimes by municipal police for simple street actions.)
- 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.

**New bill to amend the Ley de Observancia:** In January 2009, the government submitted a new bill (Bill No. 17.264) that would amend Article 52 of the Ley de Observancia in order to clearly grant criminal protection to the neighboring rights of recording artists and producers, as required by CAFTA. At last report, this bill was still pending due to the February elections. This bill is supported by the recording and music industry and opposed by broadcasters.

**Court case regarding performance rights of music:** The music industry has been working for seven years to try to obtain the payment of public performance rights in Costa Rica. Last fall the music industry obtained an important legal victory over Costa Rican television stations in a dispute regarding public performance rights. An Administrative Court (TRA) in Costa Rica has recognized FONOTICA (the Costa Rican Producer’s Music Licensing Society) as a legitimate performance rights organization. The verdict was issued on September 21, 2009 and was published on October 5, 2009. The new sentence (#1194-2009) overrides a previous ruling (#551-2009) of June 2009 that blocked FONOTICA from collecting fees for the public exploitation of copyrighted music. The previous decision prompted television stations Repretel, Teletica, Amnet, and Sky to avoid paying royalties for the music that they transmitted for commercial purposes. The copyright and public performance rights law has been in effect in Costa Rica since 1982.

Unfortunately another dispute remains as the National Association of Radio (CANARA) refused to comply with the law (and the precedent of this FONOTICA ruling) because radio and television stations do not recognize the right of performers, musicians and producers to be compensated, and refuse to comply with the law. To make matters worse, CANARA has been running a misleading public campaign against FONOTICA, and insinuates that listeners would have to pay extra for the music they listen to on broadcasts (an untrue assertion). FONOTICA has proposed, as payment, a modest percentage of the stations’ advertising revenues as payment for the unlimited use of its repertoire, which includes both national and international artists and millions of songs. Costa Rican law required that 50% of FONOTICA’s total collections be paid to AIE, whose members include more than 260 Costa Rican musicians and performers and many international artists.

**Bill to regulate labor rights and healthcare coverage for artists and performers:** On July 19, 2009, a small group of representatives submitted a bill (Bill No. 17.521) to the Legislative Assembly that would include all recording artists and performers in the social security system and, in effect, impose a series of financial duties to all record producers in the country that hire studio musicians and singers on a temporary basis. This proposal represents a clear disincentive to the development of music businesses in Costa Rica. The bill currently is pending the International Affairs and Foreign Commerce commission at the Legislative Assembly. Although recording activity in Costa Rica is low, the recording industry opposes this bill because it would become an obstacle for labels (both majors and independent) to record locally.

**More CAFTA implementation issues:** Now that CAFTA-DR is in force in Costa Rica, the trade benefits Costa Rica has received under various U.S. programs have been phased out. During 2009, Costa Rican had \$1.17 billion in exports to the U.S. under the CAFTA-DR.

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.

# INDIA

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

### 2010 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** IIPA recommends that India remain on the Priority Watch List in 2010.

**Executive Summary:** Piracy — physical, Internet and over mobile devices — continues at high levels in India. While there was some enforcement progress in 2009, enforcement is still not effective in deterring piracy. Police should increase the number of *suo moto* (e.g., *ex officio*) raids; and reforms at every level are needed to reduce huge court backlogs, eliminate procedural hurdles, and address long court delays that result in an insufficient number of criminal convictions and damage awards in civil cases. Anti-piracy enforcement continues to be fragmented and the enforcement agencies lack training to effectively undertake Internet piracy cases.

This year a copyright amendment bill is expected to be introduced — after years of delay — into the Parliament. Until the bill is actually introduced, however, we will not know whether it has been modified from prior drafts to fully and properly implement the WIPO Internet treaties. Prior drafts were woefully inadequate and India desperately needs an effective regime to counter growing Internet piracy. 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.

Significant market access restrictions that effect the motion picture, entertainment software and business software industries continue uncorrected.

**Priority actions to be taken in 2010:** 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;
- Continue training police authorities to be more effective in addressing rapidly growing mobile device and Internet piracy;
- Increase the number of *suo moto* raids and raids against corporate end-user piracy;
- Address unauthorized photocopying of books and journals at educational institutions;
- Empower customs to effectuate *ex officio* seizures, followed by 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.

#### Market Access

- Eliminate onerous market access barriers on the motion picture, entertainment software and business software industries;



For more details on India's Special 301 history, see IIPA's "History" appendix to filing at <http://www.iipa.com/pdf/2010SPEC301HISTORICALSUMMARY.pdf>. Please also see previous years' reports at <http://www.iipa.com/countryreports.html>

## **UPDATE ON PIRACY IN INDIA**

The copyright industries report some progress dealing with piracy in 2009, though piracy rates continue at high levels. Hard goods piracy, particularly at the retail level, illicit camcording, and corporate end-user piracy of software are still the biggest problems, with Internet and mobile device continuing to grow as Internet and mobile device penetration deepens.

**Optical disc piracy:** There were a reported 36 OD factories in India in 2009. 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 MIB has made no progress on it largely because the largest OD factory in India, Moser Baer, opposes the inclusion of blank disc licensing in the bill.

Local factory pirate production is reported to be increasing. As reported in past years, imports of pirate discs, from Malaysia and other Asian countries, also continue to be a problem. However, the predominant form of optical disc piracy in Indian markets today continues to consist of burned discs, with content including music compilations in MP3 formats, pre-release music (primarily Indian titles and some international repertoire), 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, entertainment 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.

As in 2008, most of the pirated PC videogame product was limited to informal markets and kiosks, and not found in larger retail stores or chains. Vendors primarily sell burned CD/DVD discs, which are generally copied from pirated versions produced elsewhere in Asia. Pirated console games, on the other hand, appear to largely be in factory-pressed CD format. The high rate of piracy of entertainment software in India is made possible by the widespread availability of circumvention devices used to bypass technological protection measures (TPMs) that ordinarily prevent the illegal copying of games and the playback of pirated copies. Because India has yet to implement the protection for TPMs mandated in the WCT and WPPT, vendors openly sell circumvention devices on the Internet, in retail stores and kiosks, or sell game consoles that are already modified.

**Retail piracy:** The pirate retail trade is vast throughout all big cities in India. Factory-produced, imported and burned discs are sold openly. 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 for legitimate product and pirate rental libraries are ubiquitous. According to a 2008 report "The Effects of Counterfeiting and Piracy on India's Entertainment Industry" published by the U.S. India Business Council and Ernst & Young, the Indian film industry lost an estimated US\$959 million and 571,896 jobs due to piracy. Software piracy at the retail and wholesale level is also prevalent, including hard disk loading and the open sale of pirate software in markets throughout India. Pirated PC and console games are widely and openly available in smaller retail establishments throughout the country.

**Corporate end-user piracy of business software:** Corporate end-user piracy (unauthorized use of business software in a business setting) causes by far the largest losses to the U.S. software industry in India (and globally). Trade losses to the software industry from this and all other types of piracy increased in 2009, to an estimated **US\$1,509** million, while the piracy rate fell from 68% in 2008 to **66%** in 2009. As part of its strategy to

grow the use of licensed software among Indian companies, BSA has successfully partnered with the State Government of Karnataka in executing a state-wide Software Asset Management (SAM) program, including recognizing companies for their compliance efforts in 2009. The State Government of Maharashtra also launched an educational and awareness program directed at companies in December 2009. BSA hopes that other states, and particularly the central government, will join these efforts as well.

**Camcording piracy:** In September 2009, the MPA's President, Dan Glickman, announced the commencement of a major initiative to train theater employees and increase enforcement against camcording piracy, which last year accounted for 14 forensic matches traced back to cinemas in India. This initiative was strongly supported by the theater owners throughout India. Illegal camcording globally accounts for 90% of the newly released movies that end up appearing illegally on the streets and on Internet sites.

**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. Book piracy occurs in a variety of ways in the country: illegal photocopying, unauthorized compilations in the form of course packs, pirated re-prints of trade titles, and unauthorized and digitized books (particularly in the scientific, technical and medical sectors) and the hosting of such copies on sites created and maintained by university students. Photocopying remains a severe problem for the academic and professional sectors of the industry, and continues at educational institutions, sometimes even condoned by the institutions.<sup>1</sup> 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. The overall piracy situation has not improved as law enforcement authorities, in part given their limited resources, do not undertake *suo moto* actions against open and notorious book piracy. They are, however, continuing to be responsive when rights holders file an infringement complaint. The sale of pirate trade books at traffic junctions in New Delhi appears to have lessened; last year it was at epidemic proportions.

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. This is but a small step toward trying to raise awareness of the devastating effects of illicit copying on the academic publishing industry, and it is inexplicable why HRD has not acted on its commitment. 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. It is hoped that 2010 will yield progress in this regard.

The industry reports excellent cooperation in preventing export of South Asian editions of books to neighboring or international markets.<sup>2</sup> Allowing the export of these editions would cause significant harm to foreign and domestic publishers alike. It appears, however, that recent proposed revisions to the long-awaited copyright law amendments may seek to overturn this practice, and in so doing, remove any incentives for publishers to continue to make available high quality academic and professional books for a fraction of the cost of such texts in other markets. Publishers would have no choice but to price such books at the rate for higher-priced markets given the very real danger that the low-priced South Asian editions would now be permitted to be exported from India. If these revisions were to be adopted as part of the copyright law amendments, Indian students and researchers would likewise be disadvantaged as their access to high-quality publisher content (in the scientific, technical and medical fields) through these low-priced editions would inevitably cease. The publishing industry hopes that the government will reconsider

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<sup>1</sup> In 2009, publishers reported the posting of a notice at a prominent college, espoused by the department head, offering photocopying services for students in a particular course. The notice was removed upon publisher complaint.

<sup>2</sup> 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.

the proposed revisions, which if adopted, would not only lead to the loss of the low cost reprint market in India, jeopardize the immense investment foreign publishers have made in the Indian market, but also adversely impact the growing indigenous Indian publishing industry. Publishers utilize local publishing support services (such as printing, page make up, manuscript keying, document scanning, etc.), pouring millions of dollars into such support services, thereby bolstering the domestic economy and helping to create and support the infrastructure now in place for a growing domestic publishing industry.

**Internet and mobile device piracy:** There were an estimated 52 million Internet users in India at the end of 2008.<sup>3</sup> Broadband subscriber statistics are more current and were estimated at 7.4 million, still low by Asian standards.<sup>4</sup> India is the second largest (after China) and one of the fastest growing markets in the world for mobile phones, with total users at 471.7 million at the end of September 2009.<sup>5</sup> As of this date, 127 million of these users are able to access the Internet over their mobile phone.<sup>6</sup> Internet piracy was reported as a growing concern by all copyright industries. The Indian recording industry reported that mobile chip piracy<sup>7</sup> 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. IIPA reported in its 2009 submission that India expected to become second to South Korea in developing a major market for cell phone downloads.<sup>8</sup> This growth path is severely stunted, however, by widespread mobile chip piracy. Piracy losses to the music and recording industry from physical piracy only in 2009 was **US\$17.7 million** in 2009, with piracy levels at **60%**, an increase of 5% from 2008. The piracy rate for music in the online space is estimated at 99%.

In December 2009 the MPA released two studies which demonstrate that online copyright infringement for filmed entertainment is a major and growing problem in India. These studies show that India was among the top 10 countries in the world for illegal filesharing (P2P) activities. Most of this piracy occurs over BitTorrent filesharing networks, via cyberlockers and via web-based file hosts like Rapidshare or HotFile. Video streaming sites are also popular, though usage is lower than BitTorrent and cyberlockers.

The major international BitTorrent portals are heavily used by Indian downloaders. In one survey involving MPA member films, 6.5% of IP addresses were traceable back to Indian users. This made India the fourth largest downloader behind the U.S., Great Britain and Canada. With its smaller Internet penetration, however, India has the highest level of piracy of any English-speaking country. India is one of the largest users of cyberlockers as well. One study found that 8.2% of visitors to the top ten cyberlockers worldwide are located in India.

BSA reports that online software piracy is increasing significantly. Piracy is on auction sites and on websites selling pirate software. In one case pamphlets were being distributed with the morning newspaper offering pirated software and referring readers to the website [www.cd75dvd150.20m.com](http://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. However, the police have yet to even file a charge sheet in this case.

The entertainment software industry reports an alarming rise in online piracy in India, including over eBay India which continues to be a primary point of sale for pirated PC games. The Entertainment Software Association

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<sup>3</sup> [http://www.itu.int/ITU-D/ict/eye/Reporting/ShowReportFrame.aspx?ReportName=/WTI/InformationTechnologyPublic&RP\\_intYear=2008&RP\\_intLanguageID=1](http://www.itu.int/ITU-D/ict/eye/Reporting/ShowReportFrame.aspx?ReportName=/WTI/InformationTechnologyPublic&RP_intYear=2008&RP_intLanguageID=1)

<sup>4</sup> <http://www.broadbandindia.com/> (as of October 2009)

<sup>5</sup> [http://www.trai.gov.in/Reports\\_list\\_year.asp](http://www.trai.gov.in/Reports_list_year.asp)

<sup>6</sup> *Id.*

<sup>7</sup> 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.

<sup>8</sup> Karthik Subramaniam, "Music Business Bounces Back, Thanks to Mobile Phones," *The Hindu*, March 25, 2007.

(ESA) estimates that approximately 328,800 infringing copies<sup>9</sup> were made of select ESA members' computer and video games through P2P file sharing by ISP subscribers in India during December, 2009. This comprises approximately 3.41% of the total number of illegal copies made by P2P users globally during this period. Despite a relatively low level of broadband penetration, these figures place India amongst the top 10 nations in terms of overall volume of P2P game downloads. Moreover, these figures do not account for downloads that occur directly from hosted content, such as games found on "cyberlockers" or "one-click" hosting sites which continue to account each year for progressively greater volumes of infringing downloads. Breakdowns by ISP show that subscribers of National Internet Backbone (NIB), Bharti Broadband, and Mahanagar Telephone Nigam were responsible for approximately 83% of this activity occurring in India — more than 275,000 downloads during the one-month period.

**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 music and sound recording industry and, at this point in time, causes greater losses than Internet piracy.

## **UPDATE ON ENFORCEMENT IN INDIA**

**Criminal Enforcement:** The principle challenge posed by the Indian enforcement system is to make the criminal system work more effectively despite inefficient court procedures, lack of training, very long delays, occasional corruption, and relatively few convictions (and even those are followed by low fines and virtually no significant jail terms). In a welcome development, criminal convictions did increase in 2009 in both the music and video area under the criminal copyright piracy provision of the Copyright Act (Section 63) and under Section 52A, which criminalizes failure to use the required certificate on videos or sound recordings. Criminal convictions under Section 63 are still relatively rare, though the Indian music industry (IMI) reported that they received an unprecedented 60 convictions under Section 63 in 2008 and this section carries far more severe penalties than Section 52A. Fines under this latter section rarely exceed \$1000 but the offense is far easier to prove.

A key element in creating an effective criminal system is increasing the number of *suo moto* raids by the police. While such raids increased in 2009 for the music industry in a number of states, the software, motion picture and publishing industry have not experienced any improvement. 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.

Raid and convictions for the Indian music industry were not available in time to include in this submission report, but did report that the situation improved significantly in 2009 with respect to enforcement against high levels of 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.

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<sup>9</sup> This figure is representative only of the number of downloads of a small selection of game titles. Consequently, this figure is under-representative of the overall number of infringing downloads of entertainment software made during the period.

MPA counted 393 raids taken nationwide in 2009. While convictions have shown a welcome uptick in 2009, the statistics continue to illustrate the problems with the Indian judicial system in the criminal area. For example, MPA has roughly 1,900 pending criminal cases.

BSA reports again that for 2009 the criminal system continued not to work against software piracy, and initiated no criminal cases in 2009. There has never been a criminal conviction for software piracy in India, though BSA is now exploring the possibility of using the plea bargaining provisions in the Criminal Procedure Code (discussed below). 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 again reports good cooperation from authorities in smaller cities such as Jabalpur, Gwalior and others, with less 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 the last quarter of 2009, however, a major operation was conducted in Delhi against a printer, binder and distributor producing pirated academic and scientific, technical and medical (STM) books. The pirate printer/distributor was caught with 80,000 prints and 124 negatives of a publisher's title on hand. Two warehouses belonging to the distributor were also subject to search, and at the first location, upwards of 25,000 academic and STM titles for several publishers (both international and domestic) were seized. A subsequent search of the second warehouse was also conducted following the arrest of one of the distributors. In total, 135,000 pirated STM books were seized during the raid operation. Of those 135,000 pirate copies, only 35,000 were books whose copyright is owned by international publishers. Clearly, this large scale piracy operation was harming not just international publishers but also Indian publishers.

This was the largest ever seizure of pirated academic and STM books in the country. The publishing industry hopes that this matter will be pursued vigorously by the Indian authorities so as to send a strong message against those engaged in book piracy that it will no longer be tolerated. It is of note that there have, to date, been no convictions for book piracy in India, and this case would certainly be an opportunity to demonstrate that the government will no longer tolerate the ruinous activities of large scale piracy operations.<sup>10</sup>

Pretrial detention of up to a one year maximum under the Goondas Act in Tamil Nadu continues to result in some deterrence. This remedy should be expanded to other states.

In order to deal with the continued 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 Delhi, Tamil Nadu and Kerala. BSA reports that they work with the cells in Delhi and Mumbai, as well as with those in Bangalore, Chennai and Hyderabad.<sup>11</sup> 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

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<sup>10</sup> The distributor/book seller appeared to be supplying pirated books to locations in Agra, Kanpur, Delhi, Gwalior, Bhopal, Indore, Kolkata, Cuttack, Bhubaneswar, Guwahati, Chennai, Hyderabad, Bangalore, Mumbai, Pune and Nagpur.

<sup>11</sup> [http://www.mumbaiipolice.org/%5Cspecial%5Corg\\_fun5.htm](http://www.mumbaiipolice.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/](http://indiaedunews.net/Delhi/100_Delhi_Police_officers_get_training_in_Cyber_Crime_at_IP_University_5386/)

effective enforcement. States should set up more trained IP cells and specialized prosecutorial units, trained and unhindered by existing backlogs, to prosecute piracy crimes.

Of late, the Punjab state government proactively took initiatives to tackle video & audio piracy. A state-level anti piracy cell has now been constituted to check and take action against audio and video piracy. BSA has made a representation to the state government to include software piracy under their campaign.<sup>12</sup>

As a result of overly burdensome court procedures, courts are severely backlogged and there are major delays in bringing both criminal and civil cases to final judgment – implicating TRIPS Articles 41, 41(2), 42 and 61. Further problems include the lack of deterrent penalties and the existence of procedural barriers that impede remedies for legitimate rights holder. For example, obstruction of the raiding process is still common — with pirates often being tipped off about impending raids. Once raids are 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.

However, significant court reforms in 2009 may streamline the judicial process in certain regions. The Tis Hazari court in Delhi approved a 2006 Ministry of Home Affairs notice that outlined a plea bargaining system under the Criminal Procedure Code, and appointed a plea-bargaining judge (<http://delhicourts.nic.in/plea%20bargaining.pdf>). In October 2009, IMI was successful in getting a conviction pursuant to this process including a Rs. 12 lakh (US\$26,036) criminal fine (<http://iitrade.ac.in/news-detail.asp?news=1214>). If continued, this would greatly help in clearing backlogged dockets, in expediting the criminal process, and in creating much-needed deterrence.

BSA is also working with specific state governments to encourage the inclusion of piracy of software in the prevention of criminal activities legislations (Goondas Act) which are state specific legislations. Most recently BSA submitted a request urging the state governments of Punjab, Delhi and Maharashtra to include software piracy under the purview of such Acts.

Despite this progress, what continues to be urgently needed in India, and particularly for the Indian copyright industries, is a central government-led initiative to coordinate enforcement with and between the state governments (IPR enforcement is a state, not central government, responsibility). IIPA and the copyright industries have for years sought the creation of a National Anti-Piracy Task Force with a membership that includes judges, prosecutors and police, coupled with significant technical training, and which is given authority to advise the highest levels of the central government on the IPR enforcement system. Further judicial reform is also needed. 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, including judges with plea-bargaining authority.<sup>13</sup> The principal objectives of such courts or judges would be to:

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<sup>12</sup> <http://www.thehindu.com/2009/02/27/stories/2009022752740300.htm>  
<http://www.businessofcinema.com/news.php?newsid=12189>  
<http://www.newkerala.com/news/fullnews-40121.html>  
<http://www.samaylive.com/news/huge-cache-of-pirated-cds-seized-in-punjab/671991.html>  
<http://www.punjabnewslines.com/content/view/22673/143/>  
<http://www.in.com/news/entertainment-news/punjab-police-seized-pirated-dvds-mp3s-cds-worth-lakhs-amritsar-on-a-tipoff-from-the-indian-music-industry-imi-punjab-police-tuesday-conducted-a-major-antipiracy-raid-at-manav-music-centre-baba-deep-singh-marg-amritsar-punjab-and-seized-a-larg-12152139-2937c242e2e3cf9256e42b72f85be127578d20a5-rhp.html>

<sup>13</sup> 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.

- 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 further case management techniques and extend plea bargaining further; and,
- treat piracy as a serious economic crime.

**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. BSA continues to report that the Delhi High Court has been good at issuing *anton pillar* orders (34 *ex parte* search orders were issued in 2009, the most ever) and that these can be served anywhere in India. This has encouraged infringers to settle cases quickly rather than have their computers and other goods seized and face long-delayed court sessions. On July 7, 2009, that court fined a corporate end-user of unlicensed software Rs. 20 lakhs (US\$43,393) as compensatory and punitive damages. BSA has commenced many end-user actions in civil courts, but this is the first that has gone to judgment with a damages award. Similar orders were issued in three other end-user matters as well. It is worthwhile to mention here that these cases proceeded *ex parte* and the courts have yet to award damages in a contested end-user piracy case. Damage awards have been issued against hard disk loading of software (copying software onto the hard disk of a computer which is then sold to consumers). 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, proving actual damages in software cases remains quite difficult. IIPA and BSA urge India to introduce a system of statutory damages in civil cases to provide right holders with an alternative to proving actual damages. This would speed up the civil court process and bring additional deterrence through the civil court system. India should also consider awarding restitution (e.g. damages) to right holders in criminal cases on the basis of per unit seized, given the difficult civil system in India.

MPA had 16 civil actions pending at the end of 2009 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.

As for extrajudicial remedies, BSA has sent over 1,500 takedown notices to ISPs and the Indian recording industry association (IMI) has sent over 1000. IMI reports that occasionally pirate content has been taken down despite the lack of a formal notice and takedown system in the Indian copyright law. Given the growing losses due to Internet piracy, it is essential that the long-pending copyright amendments be approved and that they contain such an effective system. No actions have been taken in India against P2P filesharing. Before this phenomenon spins totally out of control, the Indian government should ensure that ISPs and right holders cooperate in establishing a fair and workable “graduated response” system.

**Enforcement at the Border:** Customs enforcement has improved somewhat in the last few years. Customs should be empowered to seize *ex officio*, 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, while improving, 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 strong action taken in 2008 and 2009 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; however, it does not yet contain the necessary provisions to deal effectively with Internet infringements. IIPA detailed the positive and negative provisions in that law as far back as its 2003 submission.<sup>14</sup>

IIPA reviewed the new draft copyright amendments that were placed on the Copyright Office's website in 2005.<sup>15</sup> IIPA was pleased when the Copyright Office in HRD announced that it had completed its work (after at least 6 years in preparation) and when it finally opened up the process for full public comment in 2006. However, since that time, there has been no movement on introducing a Bill into Parliament until this summer when it was reported that the Bill would be introduced in the winter 2010 session. This has not yet occurred.

IIPA reviewed the public draft in its 2007 submission and noted that there were many positive proposed amendments. However, that draft raised a number of grave concerns, particularly certain provisions which are intended to implement the provisions of the WIPO "Internet" Treaties (WCT and WPPT). It has been rumored that the draft that will be introduced into Parliament in 2010 has changed from the draft made public in 2006. However, neither the U.S. government nor anyone in the copyright industries has been able to confirm this and the draft continues to remain under wraps and will only be made public when introduced into Parliament. For this reason and because of the importance of revising this draft to fully implement those treaties, we summarize our analysis of the 2006 draft, much of which may have survived and be included in the Bill that is expected to be introduced shortly.

- **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 manufacturing, trafficking in, or distributing circumvention devices or services; (c) does not define an "effective technological measure"; (d) contains an exception which would appear to permit circumvention for any purpose that would not amount to infringement under the act (thereby almost completely eviscerating any protection); (e) creates other overbroad exceptions; and (f) provides for only criminal and not civil remedies.
- **Overly broad exceptions:** The proposed changes to Article 52 would create a number of new and overbroad exceptions to protection, some of which are particularly dangerous in the networked environment. These include: (a) a broad "private copying" exception;<sup>16</sup> (b) overbroad exceptions for copying of computer programs, including

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<sup>14</sup> See IIPA's 2003 Special 301 country report on India, pages 122-124, available at <http://www.iipa.com/rbc/2003/2003SPEC301INDIA.pdf>.

<sup>15</sup> 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.

<sup>16</sup> The motion picture industry is concerned that this exception in Section 52(1)(a)(1) can also be interpreted to permit the making of camcorder copies in theaters under the pretext of the copies being for private and personal use. It appears that the HRD has attempted to alleviate

a provision allowing such copying for any “noncommercial personal use” beyond the usual making of a back-up copy; (c) an exception for making transient or temporary copies that goes far beyond what would be permitted, for example, in the EU Copyright Directive, a provision which IIPA considers overbroad in itself; (d) an overbroad exception permitting the performance of films in educational contexts and in “clubs”; (e) an overbroad exception with respect to reproduction of books by libraries; (f) an overbroad exception with respect to making reproductions of books not available for sale in India; and (g) a change in the scope of the rental right.<sup>17</sup> These and certain other exception would violate India’s obligations under the Berne Convention and the TRIPS Agreement.

- **ISP liability and exceptions thereto:** While not 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 is critical that India join other developed and developing countries in creating this legal infrastructure this year to enable a functioning system for electronic commerce.

**India should adopt an optical disc law:** With a reported 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 draft has long been delayed by the controversy over coverage of blank discs. 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:** Last year, IIPA reported that there was a Code of Criminal Procedure (Amendment) Bill, 2006, which has been passed by the Lok Sabha and the Rajya Sabha and was awaiting presidential assent. It contained a disturbing amendment that would allow for issuance of written warnings instead of arrests for crimes with punishments less than seven years. The amendment would leave the decision of arrest or warning to the investigating officer’s discretion. The Criminal Procedure Code (Amendment) Act 2008 came into force with effect from December 31, 2009, but sections 5, 6 and 21b of the Act are still not in force, e.g., the provisions relating to the powers of the police to make arrests and also the power of the court to grant and refuse adjournment of cases. 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.

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industry concerns that the exception for private use could be read to permit video recording or camcording in theaters 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.

<sup>17</sup> The proposed amendment in Section 14(d), which in particular includes substitution of the word “hire” with the words “commercial rental” and the further explanation that “commercial rental” will not include rental for nonprofit purposes by a nonprofit library will only enable the pirate libraries to circumvent the law.

**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 theater, 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 anti-camcording training for over 250 theater managers throughout the country during 2009.

The local recording industry association (IMI) conducted more than 60 police training programs throughout the country in 2009.

In 2009, BSA supported a seminar on harnessing IP awareness for small and medium enterprises organized by the Ministry of Commerce, Ministry of Micro-small and medium Enterprises and FICCI. During the same time period, BSA also released a series of educational advertisements both in print and online media promoting the importance of intellectual property in software.

BSA launched a Software Asset Management (SAM) program promoting the use of genuine software in the industry in Maharashtra in late 2009 along with State Government of Maharashtra and FICCI. BSA also represented the software industry's interests at several forums organized by CII (Confederation of Indian Industry) and FICCI on software piracy and counterfeiting.

BSA conducted a full-day workshop on IP & Law Enforcement for Rajasthan Police Officers in May 2009. Around 40 officials, including Inspectors, Deputy SPs, Addl SPs, SPs (IPS officers) & the Deputy Inspector General (DIG) of Police participated in this workshop. BSA now plans to organize such workshops in other cities as well collaborating with other State Police, CBI & Police Training Schools.

## **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 2009, \$2.8 billion worth of Indian goods entered the U.S. under the duty-free GSP program.

## **MARKET ACCESS**

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

The U.S. motion picture industry faces numerous 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, sometimes refusing to release products into the market in the absence of inflated duty payments. MPA has repeatedly petitioned Indian government officials for the prompt resolution of these concerns.

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.

Entertainment software publishers continue to be 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.

The packaged software industry in India continues to be doubly-taxed – attracting service tax at the central level and value-added tax at the state level due to a discrepancy between central and state level policies of treating software as a service vs. a good. This discrepancy results in non-uniform and higher pricing of packaged software sold to consumers which in turn encourages lack of availability of genuine software by retailers due to lower demand. Indirectly, this also fuels the growth of the illegal software market. India is expected to introduce the GST (goods and services tax) regime in 2010 which will dispel these discrepancies to an extent and will prescribe a uniform central and state goods and services tax code for the country. This is still under government deliberation.

The industry is also concerned about moves by the government to consider mandating the use of open source software and software of only domestic origin. Though such policies have not yet been implemented, IIPA and BSA urge that this area be carefully monitored.

# INDONESIA

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2010 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** IIPA recommends that Indonesia remain on the Priority Watch List.<sup>1</sup>

**Executive Summary:** IIPA congratulates Indonesian President Susilo Bambang Yudhoyono, his Vice President, and his new Cabinet on re-election in July 2009 for a second term (running until 2014). As a result of this election, IIPA hopes that the momentum of May 2009 Trade and Investment Framework Agreement (TIFA) discussions between USTR Ambassador Kirk and Indonesian Trade Minister Mari Pangestu, which included intellectual property rights issues, can be carried forward into 2010. With the establishment of a new Cabinet in October 2009, IIPA also hopes the Indonesian government can follow through on the promise to protect copyright and open the copyright market in Indonesia. WIPO reports that a study is underway to evaluate the contribution of creativity to Indonesia's economy. Other studies in the region have shown high output by creative industries both in terms of contribution to gross domestic product and good jobs. Those studies support the proposition that adequate and effective protection of intellectual property in a country, as well as adequate market access to foreign companies, are vital to ensure continued positive contributions to real and human capital in the country.

Unfortunately, in Indonesia, piracy problems, including end-user piracy of business software,<sup>2</sup> mall piracy including mobile device piracy and CD-R and DVD-R burning, book piracy, illegal camcording, pay TV piracy, some factory optical disc piracy, and emerging Internet-based piracy cause serious economic harm to right holders. In many instances, organized criminal groups engaged in other criminal behavior are suspected of or have been detected engaging in piracy. Piracy levels in Indonesia remained among the highest in the world in 2009. In terms of enforcement, key government enforcement agencies assisted industry in certain respects,<sup>3</sup> for example, with several raids as part of a National IP Campaign instituted against those engaged in end-user piracy of business software.<sup>4</sup> In September 2009, the Task Force extended this National IP Campaign to other sectors, making visits to mall owners and warning them that distribution or fostering distribution of infringing goods could lead to actions against them in 2010. However, IIPA members do not report that this increased focus of attention on piracy problems has led to significant deterrent enforcement actions against all kinds of piracy, increased prosecutions, improvements to the court system, or fighting corruption.<sup>5</sup>

Worse yet, instead of focusing attention on piracy and solutions to the problem, the government retained onerous market access barriers, including the requirement to locally manufacture film prints and home videos in Indonesia (which had been suspended throughout 2009) and added new restrictions. For example, in March 2009, the Ministry of Administrative Reform (MenPAN) issued Circular Letter No. 1 of 2009 to all central and provincial

<sup>1</sup> For more details on Indonesia's Special 301 history, see IIPA's "History" Appendix to this filing at <http://www.iipa.com/pdf/2010SPEC301HISTORICALSUMMARY.pdf>, as well as the previous years' country reports, at <http://www.iipa.com/countryreports.html>.

<sup>2</sup> Preliminary trade losses due to piracy in Indonesia of business software in 2009 were \$354.7 million, with a piracy rate of 86%. This is an increase from \$299 million and 85% piracy in 2008, and continues a trend upward in terms of losses and piracy levels for the third consecutive year. Losses to the record and music industry were US\$24.7 million in 2009, up from US\$20 million in 2008. Piracy levels for recorded music remained at 95% for both years, and the increase is explained by an increase in legitimate sales in 2009. BSA's 2009 statistics are preliminary, representing U.S. software publishers' share of software piracy losses in Indonesia. They follow the methodology compiled in the *Sixth Annual BSA and IDC Global Software Piracy Study* (May 2009), available at <http://global.bsa.org/globalpiracy2008/index.html>. 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 used by BSA and other IIPA member associations to calculate estimated piracy levels, losses, and/or sales is described in IIPA's 2010 Special 301 submission at [www.iipa.com/pdf/2010spec301methodology.pdf](http://www.iipa.com/pdf/2010spec301methodology.pdf).

<sup>3</sup> Chief government organizations with which we have cooperative relationships include MABES - Markas Besar; the Federal Police and their economic crime unit at Bareskrim, at MABES Jakarta Headquarters; the Trade and Industry Crime Unit, KRIMSSUS; and the Department of Industry, Downstream Chemical Division.

<sup>4</sup> In February 2009, the National IP Task Force announced a National IP Campaign targeting corporate-end user piracy. This was followed by the sending of Direct Mailers (on the letterhead of the Task Force) to 20,000 companies followed by corporate visits in some major cities.

<sup>5</sup> Indeed, on December 9, 2009, dubbed "International Anti-Corruption Day," it was reported in many major news outlets that thousands protested alleged corruption in the country (President Susilo Bambang Yudhoyono also reportedly made a speech saying he would lead the "jihad" against corruption). Kathy Quiano, *Thousands March Against Corruption in Indonesia*, December 9, 2009, at <http://edition.cnn.com/2009/WORLD/asiapcf/12/09/indonesia.protests/>.

government offices including State-owned enterprises, endorsing the use and adoption of open source software within government organizations. While the government issued this circular in part with the stated goal to “reduc[e] software copyright violation[s],” in fact, by denying technology choice, the measure will create additional trade barriers and deny fair and equitable market access to software companies. In September 2009, a new Film Law was enacted which would impose a local film quota and strict censorship requirements on local and foreign films. The Film Law is so badly conceived that no one in the film industry to our knowledge, including local and foreign industry, has come out in its support.

**Priority Actions Requested in 2010:** 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:

#### Market Access and Related Issues

- Rescind March 2009 MenPAN circular letter endorsing the use and adoption of open source software which threatens to create additional trade barriers and deny fair and equitable market access to software companies.
- Repeal Film Law that imposes a local film quota and strict censorship requirements on local and foreign films.
- Immediately lift market access restrictions on the 1) 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.

#### Enforcement Issues

- Follow through on the National IP Task Force’s “Campaign” to take deterrent action against piracy, including:
  - Corporate end-user piracy, to protect the local and international business software industry from the use of unlicensed business software for any commercial purpose.
  - Retail and mall piracy, including imposition of landlord liability for mall owners.
  - Mobile device piracy.
  - Illegal camcording of movies in cinemas.
  - Signal theft, i.e., those who engage in decrypting encrypted television or cable/satellite signals, or those that transmit or retransmit signals (whether decrypted with or without authorization).
  - Book piracy, to address and bring enforcement actions against illegal photocopying on and near university campuses, print piracy, and unauthorized translations.
- Bring and conclude more high-profile deterrent criminal piracy cases, including distributors, warehouses, factories, and high-profile cases involving end-user piracy of business software.
- Commit to expand Commercial Courts in Medan, Jakarta, Semarang, Surabaya and Makassar to adjudicate copyright cases, establish special IP courts for criminal cases, and take steps to improve judicial processes by developing a cadre of well-qualified, IP-literate judges and prosecutors.
- Address corruption and transparency issues, for example, by creating a database viewable by right holders on all commenced raid actions and status reports on such cases.
- 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.

#### Legislative Issues

- Enact a modern copyright law fully implementing the WIPO Copyright Treaty (WCT) and WIPO Performances and Phonograms Treaty (WPPT) and providing for effective enforcement, including, among other necessary changes:
  - maintaining *ex officio* powers to raid upon suspicion of infringement;
  - codifying in the copyright law explicit liability against mall landlords;
  - providing minimum criminal penalties for all kinds of copyright infringement, including sellers of pirate goods and pirate end-users of business software;
  - ensuring appropriate cybercrime provisions are in place against Internet-based infringements, and creating incentives for service providers to help enforce against Internet and mobile copyright piracy;



- criminalizing the act of camcording in cinemas;
- properly protecting sound recordings under the law;
- extending term of protection.
- Ensure copyright infringement is included in larger fight against organized criminal behavior (i.e., that infringement is a predicate ground for broader criminal investigation, seizure/freezing of assets, etc.).
- Make optical disc regulations more effective by 1) making inspections routine, unannounced and off-hours; 2) enforcing against SID Code violations, including gouging off or non-use of source identification codes; 3) providing transparency in raids and results; and 4) ensuring that the Department of Industry collects exemplars.

## **MARKET ACCESS AND RELATED ISSUES**

In 2009, the government of Indonesia took backward steps by further closing a market already considered to be one of the least open in the world for copyright businesses. As of 2008, the government had already essentially closed the market to entertainment companies, severely limiting investment in media businesses, and imposing strict restrictions on the kind of foreign content that could be broadcast in the country. The situation considerably worsened in 2008 due to the imposition of a local manufacturing requirement for the replication of film prints and home video/DVDs released in Indonesia. In 2009, the government issued a Circular announcing a government procurement policy for public sector software usage that would if implemented deny software companies of a level-playing field with the public sector and set a very poor example in terms of technology choice and procurement practices for the private sector, and enacted an ill-conceived Film Law which imposes an onerous quota for local film production and strict censorship restrictions that foreign and even local film companies oppose.

**Government Procurement Preference Denies U.S. Software Companies a Level Playing Field:** The government of Indonesia, under its Ministry of Administrative Reform (MenPAN), officially sent to all central and provincial government offices, including state-owned enterprises in Indonesia, Circular Letter No. 1 of 2009 issued on March 30, 2009, endorsing the use and adoption of open source software within government organizations. More specifically, the MenPAN letter, concerning the "Utilization of Legal Software and Open Source Software (OSS)," encourages government agencies to use "FOSS" (Free Open Source Software) with a view toward implementation by the end of 2011, which the Circular states will result in the use of legitimate open source and FOSS software and a reduction in overall costs of software. The letter was followed by subsequent clarification documents, including an April 2009 State Ministry of Research & Technology (RISTEK) document regarding the "Migration to Open Source in Government Agencies."

While IIPA has no issue with one of the stated goals of the circular, namely, "reducing software copyright violation," the Indonesian government's policy as indicated in the circular letter instead simply weakens the software industry and undermines its long-term competitiveness by creating an artificial preference for companies offering open source software and related services, even as it denies many legitimate companies access to the government market. Rather than fostering a system that will allow users to benefit from the best solution available in the market, irrespective of the development model, it encourages a mindset that does not give due consideration to the value to intellectual creations. As such, it fails to build respect for intellectual property rights and also limits the ability of government or public-sector customers (e.g., State-owned enterprise) to choose the best solutions to meet the needs of their organizations and the Indonesian people. It also amounts to a significant market access barrier for the software industry. The "Principles for Technology Choice Pathfinder," adopted by APEC in 2006 (furthering the 2002 "Statement to Implement APEC Policies on Trade and the Digital Economy," to which Indonesia was a participant), recognize that procurement preferences can close markets and stifle innovation and economic development. By implementing this government procurement preference policy, the Indonesian government is not adopting an effective approach to drive down piracy rates, but rather, is creating an additional trade barrier and denying fair and equitable market access to software companies worldwide, which is inconsistent with the APEC Principles.

Rather than start down this path away from innovation and to further promote respect for copyright, the government should abandon the Circular's approach and follow a realistic policy framework that includes adequate education and effective enforcement of IP rights and non-discrimination in business choice, software development, and licensing models. The government of Indonesia promised to legalize the public sector's use of software, e.g., in the January 13, 2006 Indonesian Ministry of Communication and Information (MOCI) and Microsoft Memorandum of Understanding (MOU) in which the government undertakes to legalize government use of its products on government computers. We strongly urge USTR to consider the implications that Indonesia's open source preference policy has on IP protection and access to Indonesia's market for U.S. goods and services.

**III-Conceived Film Law Could Impose Quota and Strict Censorship Requirements:** In September 2009, the Indonesian Parliament hastily enacted a new Film Law. As enacted, this law would continue to seriously limit foreign participation in various film businesses in ways that are inconsistent with the U.S.-Indonesia Letter Agreement on Market Access for Films and Videos. The new Law is so ill-conceived that even Indonesian filmmakers immediately came out vehemently against it upon passage.<sup>6</sup> The law includes a 60% local content quota for local exhibitors that would, if enforced, severely limit local industry's exposure to the expertise and skills of foreign producers, harm local theaters, and foster piracy. Industry has apparently been assured that this quota will not be enforced, but this questions the rationale behind its passage and is generally an unsatisfactory assurance. Similarly, the Law aims to limit the number of imported films to the benefit of domestic films. Implementing regulations are currently being considered, and should in the least recognize international best practices including the ability of right owners to determine whether, how, and where their works are made available. IIPA also objects to Article 44 of the Law which bans the dubbing of imported films, which would clearly violate Paragraph 8 of the Letter Agreement between Indonesia and the United States. The dubbing of imported films into a local language is a commercial decision that should not be unduly restricted.

**Local Printing Requirement:** The new Film Law adds insult to injury, since on November 25, 2008, Indonesia's Minister of 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 in-force date of the regulation was delayed for one year. This regulation, if implemented, would limit or possibly eliminate the importation of films printed outside of Indonesia and have serious negative consequences on the long-term viability of Indonesia's film industry, and most immediately would negatively affect IIPA member companies' 2010 release schedule for the country. 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. Motion picture industry representatives have expressed their opposition to the Minister of Trade, the Director of the Ministry of Culture and Tourism, and the Director of Film of the Ministry of Culture and Tourism. This harmful regulation, which appears to have been incorporated into the Film Law, should be formally and permanently abrogated as soon as possible, and in the least, it should be immediately confirmed that the regulation is suspended for 2010.

**New Withholding Tax:** Recent amendments to Indonesia's tax law broadened the definition of "royalties" in a manner that result in the imposition of a new withholding tax on theatrical exhibition fees. While the full effect of the amendments have not yet been quantified, any potential indirect impact on overseas suppliers could detrimentally impair the further growth of the theatrical sector.

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<sup>6</sup> Liz Shackleton, *Indonesian Filmmakers Condemn New Film Law*, September 10, 2009, at ScreenDaily.com (in addition to the requirements noted above, the law reportedly requires local filmmakers to submit an outline of their projects, including the title, story and production plan, to the Ministry of Culture and Tourism three months before production begins, and also requires licensure requirements for producers and the imposition of censorship, including unspecified limits will be placed on the depiction of drug use, sexual content, and other topics which the government considers controversial). According to the article, local filmmakers say the new law places restrictions on creativity and that the 60% quota, designed to protect the local film industry, could actually harm it. The article quotes director Riri Riza noting that a quota will encourage "the production of low-quality movies to fulfill the 60% quota." The law, according to reports, seems to be a reaction to recent box office growth due to the roll-out of new cinemas (Indonesia now reportedly has only 554 screens with room to grow, and 11 Pay TV stations that are also doing well). According to the new legislation, violating the rules could result in a prison sentence of up to five years and a maximum fine equivalent to about US\$500,000.

**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 products is restricted to wholly-owned Indonesian companies. An annexure to the Decree lists those media sectors 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 house operators and/or film showing services.

However, the Broadcast Law allows foreign ownership up to a 20% cap. IIPA understands that the Broadcast Law overrides the Presidential Decree. 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 (which occurred many years ago).

**Broadcast Law Ban on Broadcasting of Foreign Programming:** The “Broadcast Law”<sup>7</sup> bans the broadcast of most foreign programming in Indonesia.<sup>8</sup> 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.<sup>9</sup> Regardless of which regulations govern, the law is onerous and the various market access restrictions and bans on broadcasting should be lifted.

## **PIRACY AND ENFORCEMENT CHALLENGES IN INDONESIA**

**Indonesia Ranks in World’s Top 12 Highest Business Software End-User Piracy Rates, But Enforcement Cooperation Remains Generally Good:** 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 rose slightly, from 85% to 86%, between 2008 and 2009 and still exceeds the Asia regional average (which was 61% in 2008). For 2008, Indonesia ranked 12th highest in the world in terms of global piracy rate, and 19th highest in the world in terms of global losses. Failure to deal with software piracy harms not only U.S. (and other foreign) software companies but harms Indonesia’s local economy. A January 2008 study done by the International Data Corporation (IDC) with the Business Software Alliance (BSA) 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.

Overall, enforcement against end-user software infringements in businesses did not improve much in 2009. Some police commands who signed memoranda of understanding (MOUs) have been very cooperative when identifying and following through on cases of end-user infringement. The police are normally taking *ex officio* actions, although in many cases the police take these actions without notifying right holders and administer fines without

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<sup>7</sup> Law of the Republic of Indonesia, No. 32 Year 2002, Regarding Broadcasting (in force February 2003).

<sup>8</sup> Specifically, the Law requires that private broadcasting institutions be established initially without any foreign investment. Subsequent foreign investments can then be made, but only up to a 20% ownership cap shared by a minimum of two shareholders. Additional restrictions in the draft legislation include: (1) a restriction on foreign managers, (2) cross ownership limitations, (3) a local content quota of 60% on broadcast television and 10% on pay-television, (4) a 30% dubbing quota on foreign programs, (5) advertising limits of 20% of total broadcasting time for private broadcast stations and 15% for public stations, and (6) a total ban against the establishment of foreign broadcast institutions in Indonesia.

<sup>9</sup> 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., this may simply mean Indonesian talent or resources have to be used). Article 24(6) required foreign advertising to be replaced by domestic advertising, and cross-media and foreign ownership restrictions.

consulting the industry. This lack of transparency raises obvious concerns and also diminishes the deterrent value of such actions. In 2009, there were 42 overall actions against end-user piracy of business software, with police initiating 13 corporate end-user raids based on BSA complaints, and 29 police-initiated raids.

Further exacerbating the end-user software piracy problem in Indonesia has been a generally ineffective judicial system to combat piracy. It often takes an unusually lengthy period for a case to be finalized and there is no indication that IPR cases (especially criminal prosecutions) are being prioritized. In 2009, we understand that criminal trials against corporate end-user piracy in the country were concluded (one decided by the Semarang District Court in Central Java, and two others decided by the South Jakarta District Court). This follows seven criminal convictions in 2008. In the South Jakarta cases, the police successfully investigated and prosecuted two IT managers for using unlicensed software for business purposes. In November 2009, these two defendants were found guilty for end-user piracy by the South Jakarta District Court. They were both sentenced to six months imprisonment, suspended for 10 months probation, and fined IDR10 million (about US\$1,050), which may be substituted with 2 months imprisonment. This sentence was shocking to the local software industry due to the extremely low, non-deterrent fines imposed.

**Camcording Piracy:** Camcording piracy remains a problem in Indonesia, aggravated by the absence of anti-camcording legislation. Illegal camcording of major U.S. movies occurs 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.

**Retail Piracy/Mall Piracy:** In 2009, 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 or claiming to be in BluRay format), software, and published materials. Also problematic are 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, Medan, Makassar, Bandung, and Surabaya have hotspots replete with pirate materials (notorious spots include Ratu Plaza, Pinangia Plaza, Glodok, and Ambassador Mall).

In terms of overall enforcement, some industry sectors continue to receive some cooperation, especially from the police, in raiding activities. The DGIPR submission to USTR in February 2009 appears to list several raids and seizures, e.g., including seizures of 2.6 million pieces in 2008. In 2009, BSA assisted police in investigating seven retail piracy cases (all in Medan, North Sumatra), two additional cases relating to the rental of pirate software (all in Central Java), and two cases involving small illegal software replicators (all in Tangerang City, Banten Province). However, others report a lack of coordinated enforcement effort in 2009 sufficient to provide a deterrent. Those industries generally report sporadic actions by the police against retail establishments engaged in piracy which result in immediate but short-lived closures of stalls. It is even reported that authorities apparently request payment from right holders of operational costs before conducting investigations or continuing prosecutions which is unacceptable.

A couple of bright spots included initial action by the long-awaited National IP Taskforce and an apparent sign that they may be prepared to introduce landlord liability for infringements of copyright by tenants. In September 2009, the National IP Taskforce launched a National IP Campaign targeting the public sector in Jakarta, as well as major cities such as Surabaya, Medan, Bandung, and Batam, in which they warned mall management and urged them to ensure that their malls were clear of pirate optical disc products. The Taskforce leadership has indicated to the mall owners that legal action against malls may be taken in 2010 if no significant improvement is found in keeping the mall clean from pirated product. Industry also understands from DGIPR that a long-awaited Directorate of

Investigation to coordinate enforcement efforts may be established in 2010. In addition, there appear to be potential copyright law changes that will enable DGIPR PPNS officers to conduct enforcement raids without requiring Police support or assistance. Whichever developments occur, industry would be most keen to see greater accountability and coordination efforts by the Taskforce to drive consistent and effective enforcement.

**Book Piracy:** Piracy of published materials in Indonesia, especially academic books and journals, continues to be a major concern. While commercial-scale photocopying (mainly on and near university campuses) remains the primary challenge, print piracy and unauthorized translations are also problematic. Most copy centers provide catalogs to facilitate the business of copying academic texts for students, with shops operating on a “print to order” basis upon customer demand, thus avoiding the stockpiling of illegal copies. IIPA calls upon the government of Indonesia to take swift effective actions against book piracy, whether in the form of illegal photocopying, print piracy, or unauthorized translations. As one step, the Indonesian government should work with right 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. There does appear to be some progress as local representatives report that at least some university lecturers are encouraging their students to purchase legitimate books. This positive development should be supported and university administrations should take a more active role in ensuring that their institutions adopt formal policies mandating use of legitimate materials on campus and undertake campus based anti-piracy campaigns.

**Internet Piracy:** Internet usage in Indonesia has exploded over the past several years, and there are as many as 30 million Internet users throughout Indonesia as of the end of 2009 (according to Asosiasi Penyelenggara Jasa Internet Indonesia, APJII, Indonesia’s Internet service provider association) or roughly 12% of the population. By contrast, only two million Indonesians had Internet access as of 2000. Indonesia ranked first in the world in growth of broadband connections in the third quarter 2009 (with additions of 163,000 broadband connections), and almost 300,000 total broadband connections.

Industry reports that a new Cyber Law was enacted (“Law of The Republic of Indonesia Concerning Electronic Information And Transactions”) which could be helpful in combating unauthorized use of copyright materials in the online space. Article 25 of the Cyber Law provides protection for copyrighted works in electronic formats. Unfortunately, the acts of communicating or making available copyright materials are not included in the “Prohibited Acts” (Articles 27 through 37). These acts should be added as expressly prohibited. While 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 2010, including mechanisms to ensure removal of infringing content and dealing with illegal P2P file sharing. Especially important is to devise strategies to deal with fraud occurring over the Internet, such as the use of fake names, addresses, or identities.

**Organized Criminal Syndicate CD-R “Burning” Operations:** Pirate “burning” of content onto recordable optical discs is the chief form of optical disc pirate production in Indonesia. All indicators suggest that criminal syndicates support illegal production and distribution. 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. With decreased overhead costs, 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 pre-loading 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.

**Signal Theft/Pay TV Piracy:** Signal theft – the unauthorized transmission of broadcast or pay TV signals – has gradually worsened in Indonesia. An estimated 600,000 to 1,000,000 households receive illegal connections.

Additionally, television signals are being pirated from neighboring countries (overspill) or from domestic satellite (DTH) signals to feed illegitimate provincial cable operators. In addition, vendors openly sell illegal decryption devices such as set-top boxes and smart cards in Indonesia's markets.

In 2009, the Indonesian government launched a campaign to deal with signal theft. In August 2009, the Director of Broadcasting in the Ministry of Communications and Information Technology (Depkominfo), observed at the National Seminar on Pay-TV Broadcasting, that the campaign is intended to legalize the Pay TV market by stopping provincial cable companies from operating in the "informal" sector without proper licenses. Indonesia's Director General of Intellectual Property similarly noted that re-distributing channels without authorization from the rights holder was illegal, punishable by fines and potentially prison terms (both the Broadcast Law and the Copyright Law of 2002 provide a degree of protection for broadcast signals but enforcement to date has been virtually non-existent). The government noted that there are estimated to be over 2,700 pay-TV companies in Indonesia, the vast majority of which are small cable companies in provincial areas that lack the licenses required by law. The government noted that it was entering an "outreach" phase, with seminars and discussions planned in seven major provincial centers by the end of 2009 and then would enforce after a "grace" period of several months. IIPA is pleased that the government has committed to legalize the Pay TV market and encourages the government to move expeditiously to enforce the laws, first by sending messages that these provincial cable operators must be legalized and require a contract with an authorized programming distributor in order to distribute pay-TV programming, and then by enforcing against those operators who fail to legalize. Additionally, IIPA hopes that Indonesian police work with Indonesian pay-TV platform companies to repress blatant sale of set-top boxes and smart cards, whose importation and sale are illegal under Indonesian law.

**Indonesian Authorities Need to Address Remaining Enforcement Concerns:** The following are a few of the remaining enforcement needs to be addressed in 2010 by the Indonesian government.

- **Capacity Building for Judiciary Needed; Extend Special IP Courts to Handle Copyright Cases:** It is imperative that steps be taken in 2010 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, 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 problems in copyright cases could be helpful. Issues might include end-user software piracy, mobile device piracy, Internet-based infringements, camcording piracy, book piracy, "mod chip" or other circumvention device manufacture or distribution, and Pay TV theft. IIPA understands that special IP courts have been established to solve cases from civil matters such as cancellation of industrial property and civil claims for injunctions and damage recoveries for IP infringements. These are under the jurisdiction of five commercial courts in Medan, Jakarta, Semarang, Surabaya and Makassar which cover all the provinces in Indonesia. It would be useful to extend these courts to handle copyright matters and to establish special IP courts to adjudicate criminal cases of copyright infringement as well. As has been noted, the results in criminal cases to date in Indonesia have generally been non-deterrent.
- **Transparency Issues Remain Unresolved:** Lack of transparency in the enforcement system hinders effective enforcement and deterrence in Indonesia. In many cases, right holders are not informed about raids when they happen and subsequent court decisions involving their products. In some jurisdictions, end-user software raids do not get reported to right holders, and there are no formal records of criminal convictions. 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. As another example, reporting of cases has tended to focus on aggregate numbers of cases and not results obtained. In its 2009 submission to USTR, the Indonesian government claimed there were 61 new criminal copyright cases in 2008, with 67 criminal convictions. The charts provided listed 162 cases from 2007 and 61 from 2008, representing a major decrease year-on-year. Yet, there is no information on results of these cases, only that convictions were sought. It would be important to know whether these cases

resulted in sentences actually imposed or were suspended. These transparency issues should be resolved so that the government of Indonesia can clarify its enforcement record and increase deterrence.

- **Case Broker Payoffs:** It has been reported on occasion that authorities who initiate certain kinds of raids, for example, end-user software raids, do so on their own without notifying right owners, and then usually settle such cases privately and drop them without notifying right holders. We understand this often happens because “case brokers” working on behalf of defendants seek to influence the police and settle cases without bringing industry into such cases. Nevertheless, there are also police units that play by the rules and apply the law objectively. They reject any ‘approach’ by case brokers. Solving the transparency issue noted above would avoid the problem described.

**Optical Disc Plants:** Industry estimates that Indonesia’s capacity of operating optical disc lines stands at about 20 times the legitimate domestic demand. Unfortunately, notwithstanding that there have been a few key raids and prosecutions,<sup>10</sup> the promise of Indonesia’s Optical Disc Regulations which were implemented some years ago has not led to a significant reduction in piracy. As an example of the problems, notwithstanding the integration of a new optical disc forensics lab installed at the National Police Central Forensic Laboratory (PusLabFor), PusLabFor has informed industry that, because of the lack of funding and manpower, they now expect copyright owners to provide support such as test purchase items.

## **TRAINING AND PUBLIC AWARENESS**

**Various Industry Trainings Provide Capacity Building Assistance in 2009:** In 2009, as in previous years,<sup>11</sup> the copyright industries conducted and participated in various training and public awareness activities in Indonesia. Training has been carried out with police, although more needs to be done. For example, in October 2009, BSA spoke to about a dozen police officers from West Java Regional Police and about 100 students from the Faculty of Law, University of Padjajaran in Bandung, West Java, about legal aspects of corporate end-user piracy. In addition, BSA and the U.S. Commercial Services hosted a mini “software asset management” (SAM) seminar targeting 63 companies in Jakarta in May 2009. IIPA understands that some enforcement seminars have taken place in Lampung, Medan and Bali as part of the National IP Campaign in February 2009. The Motion Picture Association provided training throughout the year for approximately 180 theater employees on anti-camcording investigation and enforcement techniques.

**U.S. Department of Justice Program Lends Positive Support to Industry:** IIPA members continue to support the training program from the United States, the “International Criminal Investigative Training Assistance Program” (ICITAP) which commenced in October 2006. This program, comprising an anti-piracy enforcement initiative and an optical disc piracy initiative, has led in the past to some concrete positive results in terms of facilitating better enforcement against copyright infringements. It also helped build capacity, mentored, and provided 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.

## **COPYRIGHT LAW AND RELATED ISSUES**

**Copyright Law Implementing Regulations Still Have Not Been Issued:** 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

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<sup>10</sup> In one case, an August 2007 raid on a 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.

<sup>11</sup> Training activities in 2008 are highlighted in the 2009 Special 301 report on Indonesia, and included motion picture industry programs to combat illegal camcording in cinemas and business software industry trainings for police and prosecutors on combating end-user software piracy.



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 WCT and the WPPT.<sup>12</sup> Indonesia joined the WCT on June 5, 1997 (in force March 6, 2002) and the WPPT on February 15, 2005.

**Copyright Law Amendments Needed to Modernize Protection:** Reform of the Copyright Law has been in the works for a several years, and IIPA understands that a draft set of amendments emerged in 2008 and is currently in the legislative queue. 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 Minimum Criminal Penalties for All Kinds of Copyright Infringement:** There is a continuing need to provide a minimum criminal penalty clause as to all copyright infringements. The current Copyright Law provides minimum criminal penalties only for the production or manufacture of pirate goods (see Article 72(1) of the Copyright Law). For future amendments, it would be vital to provide minimum criminal penalties for sellers of pirate goods as well as those who engage in corporate end-user piracy, especially in view of the low fines we have seen imposed by the courts. The law should also 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).
- **Maintain *Ex Officio* Powers to Raid Upon Suspicion of Infringement:** It is important that, for the next amendment of the Copyright Law, copyright infringement must remain a state offense. Any change from this could result in a significant decrease in the numbers of raids and decrease the efficacy of enforcement in Indonesia.
- **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 for ridding their premises of piracy. Articles 55 and 56 of the Penal Code provide for criminal liability for one who forces others to commit or jointly commits a criminal act (Article 55(1)) or one who providing "opportunity" or "intentionally 'persuades' others" to commit a criminal act. We understand the government is considering codifying such liability for criminal copyright infringements as to mall landlords who have infringing activity occurring on their premises. IIPA supports this move.
- **Cover Copyright Infringement Under Cybercrime Law, and Provide Incentives for Service Providers to Cooperate, Including Notice and Takedown:** With Internet piracy, including P2P downloading, increasing in Indonesia, it is imperative that the laws adequately address computer-based infringements. The government of Indonesia has reportedly just enacted a new Cyber Law. IIPA has not had an opportunity to review this law, but looks forward to doing so to compare it against the Council of Europe Cybercrime Convention.<sup>13</sup> 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

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<sup>12</sup> An April 2003 Report issued by the Indonesian government indicates that

The Law No. 19 does not provide detailed provisions on the safeguard of technological measures. Rather, such provisions have been accommodated by Law Number 14 of 2001 regarding Patents.

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

<sup>13</sup> Article 10 of the Council of 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 willfully, on a commercial scale and by means of a computer system."

pornography or distribution of false information through Internet media, although unfortunately not involving copyright piracy. The law should be used to combat IP-related cybercrime including copyright infringements. It is also very important to ensure that proper incentives are 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, including notice and takedown as well as effective and fair policies in place by ISPs as to potential termination of repeat infringers, and to ensure assistance to right holders in identifying and removing infringing content and P2P piracy.

- **Include Anti-Camcording Piracy Provisions and Consider Standalone Provisions:** 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.
- **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.
- **Establish Statutory Damages:** The TRIPS Agreement permits WTO members to adopt a system of pre-established damages. In cases where it is difficult or impossible to determine actual damages, which would by definition include cases against pirate distributors (without receipts, which infringing operations often would not keep, it may be impossible to know how many copies of a work have been distributed), or cases in which the infringer achieved an unjust enrichment (as in the case of end-user piracy of business software), it would be important for right holders to be able to elect, in advance of final judgment, to receive pre-established damages equivalent to compensation for the injury suffered by the right holder.
- **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 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 That the 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 also 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 Berne Article 12.

**Need for IP Hook to Organized Crime Statute:** It has been established that criminal syndicates behind pirate enterprises which manufacture and distribute optical discs 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 as a predicate crime for remedies under its organized crime law, e.g., grounds for broader criminal investigations, seizure/freezing of assets, etc.

**Implementing Regulations to New Customs Law:** Law No. 17 of 2006 (amending 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 and comment on such regulations prior to their issuance to ensure that they provide adequate border measures.

**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 reportedly 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 discs 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; and
- 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,<sup>14</sup> and another on reporting by registered producers.<sup>15</sup> The former sets forth requirements as to the importation of optical disc production machinery, raw materials (optical grade polycarbonate) and, unfortunately, finished discs (in addition to blank discs). It remains a fear that this importation Decree will be used as a tool 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.

## **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 2008, almost \$2.2 billion worth of Indonesian goods entered the U.S. under the duty-free GSP code, accounting for almost 13.8% of its total imports to the U.S. During 2009, almost \$1.5 billion worth of Indonesian goods, or almost 11.3% 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.

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<sup>14</sup> Regulation of Minister of Trade of the Republic of Indonesia 05/M-DAG/PER/4-2005 (May 2005) (which repealed Ministerial Decree of the Minister of Trade and Industry of Republic of Indonesia, Number 645/Mpp/Kep/10/2004 (October 18, 2004), Regarding Stipulations on Importation of Machinery, Machine Equipments, Raw Material and Optical Disc.

<sup>15</sup> Ministerial Decree of the Minister of Trade and Industry of Republic of Indonesia, Number 648/Mpp/Kep/10/2004 (October 18, 2004), Regarding Reporting and Monitoring of Optical Disc Industrial Company.

# MEXICO

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2010 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** IIPA recommends that Mexico be elevated to the Priority Watch List in 2010. Mexico has been on the Watch List since 1999.<sup>1</sup>

**Executive Summary:** The overall view of the Mexican landscape of copyright piracy remained unchanged in 2009. Intellectual property theft in all its many guises -- CD-R/DVD-R burning, Internet piracy, unauthorized camcording in theaters, widespread street piracy, counterfeit videogames, unlicensed use of software in corporate and government settings as well as unauthorized photocopying at universities -- continued to be a pervasive economic crime that harms both Mexican and U.S. creators, notwithstanding the commitment of PGR and IMPI. No matter how well-intentioned and cooperative, these agencies are simply overwhelmed by the scope of the problem, and greater resources, training, and legal reforms are required in order to have an impact on the pirate online and physical marketplaces.

IIPA and its members note that efforts of Mexican enforcement agencies were good in 2009 and there continues to be cooperation between Mexican authorities and right holder organizations. Criminal enforcement, led by the PGR, achieved some results even as new leadership took over. Customs authorities also got more involved in anti-piracy efforts, managing to seize over 800 tons of counterfeit products in 2009.

The administrative agencies, IMPI and INDAUTOR, worked well with certain rights holders last year. Despite some resource and legal limitations which hold back the potential for more effective enforcement, IMPI continued to perform well. In addition, the business software sector reports that the mediations done by the copyright office, INDAUTOR, continue to be effective. As requested by the recording industry INDAUTOR initiated the long awaited proceeding to set the tariff for broadcasting rights and but the results are still to be seen.

Nevertheless, some right holder organizations report that the cooperation they receive from Mexican authorities are limited to only selected units of PGR, particularly the Metropolitan Delegation, and Customs authorities. State governments' anti-piracy efforts continue to be poor, with only a few state governments interested in combating illegal trade and piracy. Although the recording and film industries reported a 10% increase in criminal prosecutions last year, the number of overall raids decreased by 17%. In addition, government-wide legalization of software needs significant improvement.

Still missing is a high-level national anti-piracy plan that both enhances and coordinates federal and state enforcement activities. It is imperative that Mexico deal with its Internet piracy problem. Two years ago, a coalition of rights holders started meetings with Internet service providers, under the auspices of the Mexican communications ministry, to try to reach agreement on cooperative efforts to address infringing content on the Internet, but those talks went nowhere mainly because of the lack of interest from Communications Secretary and The Federal Commission of Telecommunications (COFETEL). In late 2009, 37 civil organizations representing copyright industries, right holders and collecting societies formally established the "Coalition for the Legal Access to Culture", which is working to highlight the damage caused by Internet piracy and to offer concrete solutions to the government and private

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<sup>1</sup> For information on Mexico under Special 301 review, see Appendix D at <http://www.iipa.com/pdf/2010SPEC301USTRHISTORY.pdf> and Appendix E at <http://www.iipa.com/pdf/2010SPEC301HISTORICALSUMMARY.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/2010SPEC301COVERLETTER.pdf>. The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in Appendix B of IIPA's 2010 Special 301 submission at [www.iipa.com/pdf/2010spec301methodology.pdf](http://www.iipa.com/pdf/2010spec301methodology.pdf).

sector involved. Finally, there remains a lengthy list of needed legislative reform, as no progress was made in 2009 on several critical bills.

**Priority actions requested to be taken in 2010:** The copyright industries recommend that the following actions be taken in the near term to improve the protection and enforcement of copyrighted materials which in turn will contribute to the commercial benefit of both the U.S. and the Mexican copyright sectors:

## **Enforcement**

### **Criminal Actions, Raids and Prosecutions**

- Develop a national campaign to address well-known street markets and distribution centers where vast quantities of pirated goods are sold in broad daylight, including cooperation with municipal authorities to revoke operational licenses.
- Continue to improve investigations and raids against pirates involved in commercial distribution and street piracy, including daytime raids.
- 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.
- Consideration should be given to the appointment of an IP Czar with authority to coordinate the various enforcement bodies and to implement the national plan.
- 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.
- 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.
- Require police officials to proactively identify and arrest individuals who are responsible for the large-scale distribution and importation of pirated goods.
- Augment the tax authorities (SAT) anti-piracy actions.
- Implement stricter Customs inspection of blank media in order to reduce the importations of blank optical media products aimed at the pirate market.

### **Administrative Enforcement**

- 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.
- 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 expedite the publication of 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.

### **Prosecutions, Judges and Courts**

- Encourage prosecutors to act swiftly on complaints and recommend maximum sentences, including jail time, to the courts in order to improve deterrence.
- Increase 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 for criminal matters.
- Provide sufficient resources for the new IP magistrates within the Tax Court.

## Legislation

- Support passage of the bill which would amend the Criminal Code to give *ex officio* action in copyright infringement cases.
- Support passage of the bill which would impose penalties for the unauthorized camcording of films in theaters.
- Develop legislation that calls for ISPs' cooperation to address rampant online piracy.
- Support development of legislation that would amend the Criminal Code and the Copyright Law to impose criminal sanctions for the distribution and importation of devices used for the unauthorized circumvention of technological protection measures (TPMs).
- Enact and enforce decrees to ensure the procurement and use of legal computer software in governmental agencies, especially at the state and municipal levels.
- Enact legislation to enhance the capabilities of IMPI, including provisions to (1) establish a presumption of infringement in the event of door closures (*i.e.*, codify the AOS Solutions case), (2) 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, (3) eliminate the two witness requirement, (4) give public faith powers (this is similar to notary powers) to IMPI inspectors.
- Implement other legislative solutions to enhance administrative enforcement, such as: (1) prosecute tax crimes associated with these IP infringements, (2) equalize the level of minimum administrative sanctions between copyright infringement with trademark infringement (trademark currently is much higher), and (3) expressly allow for photographs, video recordings and electronic evidence to be gathered during inspection visits and submitted in administrative procedures.

## COPYRIGHT PIRACY IN MEXICO

There are a number of factors that keep copyright piracy levels high in Mexico, such as: challenging economic conditions (such as unemployment and underemployment), missing enforcement tools and inadequate legal remedies, other economic crimes competing for government focus -- all contribute to this longstanding problem. Hard goods 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 the manufacture, distribution, sale and importation of pirated goods.

**Hard goods piracy, street piracy, and organized crime:** Mexico has widespread, and well-entrenched, street piracy. It is very important the Mexican government devise and implement a high intensity enforcement plan for Tepito and Plaza Meave to systematically identify and prosecute criminal organizations operating in that market.

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, Bazar Pericoapa 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. Last year the PGR took a series of actions both in the Tepito area (236 actions) and San Juan de Dios in Guadalajara (26 actions).

APCM (representing the film and sound recording industry sector) reports that hard goods piracy for 2009 in the film and music industry was about 82%. Street piracy remained at a constant level. The most problematic cities are Mexico City, Guadalajara, Monterrey, Cuernavaca, Querétaro, Tijuana, Veracruz and Morelia. 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. 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 actions during the day. Such raids are largely ineffective as the same shops reopen and simply continue their business.

Because much of the pirated product in Mexican markets 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. In 2009, importation of blank media (CD-Rs and DVD-Rs) declined to 834,336,695 units, according to customs data. This figure represents a slight decrease in comparison with previous years which is probably due to the migration of customers to other media types such as USB devices, MP3 players and cellular phones. Most of the product comes from Taiwan and the main ports of entrance are Manzanillo, Matamoros, Reynosa, and Laredo.

The street markets are very well structured, with discrete distribution chains, indicating in many cases that organized criminal syndicates are involved. Pirate vendors are connected to criminal groups (Zetas and Familia Michoacana) in popular pirate markets like La Cuchilla in Puebla and Las Vias in San Luis Potosí. During 2009, several police actions were conducted to achieve the localization and neutralization of criminal organizations involved in criminal activities in these street markets. Unfortunately, however, these actions have not been adequate since the recently enacted "Ley Federal de Extinción de Dominio" – a law for the property forfeiture, has not yet totally been applied by the authorities. This special law empowers criminal judges to confiscate real estate properties used for criminal activities (i.e. a warehouse used for storage of pirated goods) and maybe is one of the most deterrent tools available in Mexico against piracy.

**Internet Piracy:** Illicit Internet downloading in Mexico is growing rapidly. There are an estimated 27.6 million Internet users in Mexico, representing 24.8 % of the population; this is a growth of 917% in users between 2000 and 2009 (according to [www.Internetworldstats.com](http://www.Internetworldstats.com)).

Internet piracy has grown due to the reduction in the cost of Internet access, and to the growth of broadband. The most prevalent platforms for unauthorized downloads are illegal sites, peer-to-peer (P2P) filesharing programs, hyperlinks, cyberlockers, forums, BitTorrent sites and blogs. 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. Several pirate servers are suspected to be based in the city of Culiacan in the state of Sinaloa. Other servers, hosted mainly in the U.S. and Europe but administered in Mexico, have been identified.

The recording industry reports that Internet piracy of music dominates about 90% of the total music market in Mexico. According to the most recent third party survey (IPSOS-BIMSA in 2009), more than 5 billion songs were downloaded in Mexico during 2009. This figure represents an increase of 15% from 2008, fuelled in part to a constant increase in the number of broadband connections in the country. P2P networks are the most predominant form of music piracy, with Gnutella and Ares the most popular in Mexico. Most recently hyperlinks posted on blogs, social networks and forum became a big part of the problem.

The Motion Picture Association (MPA) notes that a recent IPSOS survey found that 700,000 people illegally downloaded movies in Mexico and that 24 million illicit copies of movies were downloaded in 2009. IPSOS also found that 300,000 people downloaded TV series illegally with 16 million copies of TV series illegally downloaded.

**Business software piracy:** The Business Software Alliance (BSA) reports that its primary concern in Mexico is the unlicensed use of software by enterprises. Overall software piracy levels in Mexico have remained steady. However, the global economic crisis may adversely affect software consumption and thus increase the use of pirated and unlicensed software. Local software creators continue to have difficulties in commercializing their legal products. Mexico City, Guadalajara and Monterrey are still the cities with highest degrees of piracy. A study conducted by the American Chamber of Commerce Mexico reveals that Puebla is a problematic city as well. Tepito and San Juan de Dios serve as manufacturing (burning labs) and selling points for pirated software. According to the

same AmCham study, digital piracy has become a widespread custom in Mexico. Software products are sold over the net for the equivalent of a few dollars, and sometimes distributed for free. Illegal software is available in auction sites, specialized download sites and "file-sharing" sites.

Lowering software piracy levels would significantly benefit the Mexican economy.<sup>2</sup> 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 partners with IMPI to conduct a large number of inspections (*cifras*). BSA believes that because of its continuing good public-private partnership with IMPI and INDAUTOR and continuing good intelligence work, software piracy has modestly improved over the past several years. BSA reports that preliminary estimated trade losses due to business software piracy in Mexico were \$497 million in 2009, with an estimated piracy level of 59%.<sup>3</sup>

**Piracy of music and sound recordings:** The legitimate music market continues to be heavily hurt by piracy, both in the physical and online environments. 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. Physical sales of music in Mexico continued to decrease (-8% compared to 2008), and this is mainly due to Internet piracy. The level of physical piracy is similar to 2008 at over 100 million units; this means that the estimated piracy level for physical copies of music is approximately 82%.

Internet piracy of music has been growing due to the lack of investigation and prosecution of criminal cases. The most prevalent forms are hosted sites, P2P, hyperlinks, cyberlockers, forums and blogs. Based on a third party survey (Ipsos) Internet piracy reached 99% in 2009. At the present, the recording industry has reached several agreements with digital stores for distributing legal product on the Internet. Among those stores are: Mix Up Digital, Nokia, American Express, Ideas Telcel and iTunes,. However, it is difficult to be commercially viable due to increasing Internet piracy, which in 2009 reached over 5 billion illegal downloads. According to IFPI official statistics, in the last five years the legal market for music in Mexico has decreased by 46% resulting in the disappearance of hundreds of points of sale. Estimated losses due to physical music piracy are US\$436.4 million dollars; we have not been able to estimate Internet losses because there is no real established market yet.

**Camcording and audiovisual piracy:** MPA reports that Mexico has the most prolific camcording piracy problem in Latin America. Thirty-two (32) MPA member companies' films have been stolen from Mexican theaters in the past twelve months. This is a 167% increase over 2007 of illicit camcords sourced from Mexico and a 700% increase since 2005. Many of these films, such as *Tinkerbell*, *Public Enemies*, *The Fast and the Furious*, *Harry Potter*, *Coraline*, *G.I. Joe*, *UP*, and *Ice Age*, were stolen from Mexican theaters only one day after their local theatrical release. 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. The rental market declined a further 2% in 2009. As noted above, Internet piracy is also a

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<sup>2</sup> 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>.

<sup>3</sup> BSA's 2009 statistics are preliminary, represent the U.S. software publishers' share of software piracy losses in Mexico, and follow the methodology compiled in the Sixth Annual BSA and IDC Global Software Piracy Study (May 2009), available at [www.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. BSA's final 2009 data will be available later in 2010.

growing concern, particularly P2P, cyberlockers, and streaming. 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.

**Entertainment software piracy:** Unfortunately, little has changed with respect to the nature and scope of entertainment software piracy in Mexico since last year's Special 301 Report. Hard goods piracy remains the most damaging form of piracy for the entertainment software industry, as evidenced by the enormous quantities of burned optical discs and counterfeit cartridges. In 2009, ESA conducted a number of raids, resulting in the seizure of over 160,000 pirated games, numerous burner labs with the capacity to produce millions of additional games, and over 5 million pieces of packaging materials used to sell counterfeit products. Despite substantial enforcement efforts by the industry, piracy on all platforms remains rampant. Pirated entertainment software is widely available in markets throughout Mexico City as well as other urban centers, such as Guadalajara and Monterrey. In Mexico City, many of the well known markets, such as Tepito, Pericoapa, Bazar Lomas Verdes, and Plaza Meave remain active venues for the retail sale of pirated games. In Guadalajara, the San Juan de Dios market is the principal area where pirated games can be found. Most of the pirated games available for purchase in Mexico are burned domestically, either burned on demand or sourced from local production points and wholesale distribution centers. Industry enforcement efforts have uncovered multiple burning labs in the Tepito and Plaza Meave capable of producing hundreds of thousands of pirated games. In addition, the sale of memory sticks containing hundreds of pirated copies 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.

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. The widespread availability of circumvention devices underpins the growing problem of online piracy of entertainment software in Mexico. ESA estimates there to have been approximately 67,061 infringing copies<sup>4</sup> made of ESA members' computer and video games through P2P file sharing by ISP subscribers in Mexico during December, 2009. Breakdowns by ISP show that subscribers of Uninet were responsible for approximately 74% of this activity occurring in Mexico -- more than 49,000 downloads during the one-month period. These figures do not account for downloads that occur directly from hosted content, such as games found on "cyberlockers" or "one-click" hosting sites which continue to account each year for progressively greater volumes of infringing downloads.

**Book and journal piracy:** Illegal photocopying of academic materials at copy shops in and around university campuses remains the primary problem for the book and journal publishing industry. 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. Enforcement officials and education/university officials should take a more active role in addressing the problem of unauthorized reproduction, especially activity occurring on campus or using campus facilities. Universities should implement policies that discourage infringing behavior and promote the use of legitimate materials, particularly at institutions of higher learning, and appropriate sanctions should be meted out to those found engaging in infringing behavior, contrary to university policy. The local reprographic rights organization (RRO), CEMPRO (*Centro Mexicano de Protección y Fomento a los Derechos de Autor*), established in mid-1998, has "licensing" agreements with a number of university libraries and a few legitimate copy shops (such as

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<sup>4</sup> This figure is representative only of the number of downloads of a small selection of game titles. Consequently, this figure is under-representative of the overall number of infringing downloads of entertainment software made during the period.

Office Max and Office Depot). However, the royalties collected are largely symbolic, and are not a significant source of revenue for legitimate companies. The efforts of the Cámara Nacional de la Industria Editorial Mexicana (CANIEM) and CEMPRO have raised public and law enforcement awareness regarding book piracy issues and the importance of copyright protection for books and journals. However, much remains to be done particularly with respect to the manner in which law enforcement agencies and the relevant ministries of the government of Mexico address the country's book piracy problems. Though local industry representatives have made industry concerns known to the relevant agencies, efforts to date have been limited.

## **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. BSA reports that IMPI conducted a record volume of *ex officio* actions in Mexico City, Monterrey, Guadalajara, Querétaro, Puebla and other cities. The number of full raids conducted by IMPI also increased considerably. However, the videogame industry reported that it was again unable to conduct raids against key pirate markets in Mexico City for the second consecutive 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.

## **CRIMINAL ENFORCEMENT**

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.

**Improve national-state-local actions:** There remains an unfortunate lack of effective communication between the municipal, state, and federal governments on these kind of enforcement matters, and this problem did not improve in 2009. 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. 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. In the context of the National Anti-Piracy Agreement signed by the Fox Administration in 2004, federal authorities must conduct joint operations with state and municipal governments. Industry colleagues have observed, during 2009, there were acceptable coordination levels with federal authorities. However, this coordination has been poor with the local and municipal authorities. Just a few states conducted raids. Municipal governments are reluctant to conduct anti-piracy operations arguing their lack of jurisdiction on federal crimes like copyright piracy. Priority states to continue efforts in this regards are the Federal District, Nuevo Leon, Jalisco, Mexico State, Puebla, Morelos, Baja California Norte, Veracruz and Michoacán.

**PGR:** Due to a change in PGR leadership in 2009, there was a lack of continuity in the anti-piracy campaign. The copyright industries hope that recent changes in the Assistant Attorney General Specialized Federal Crimes office will reinvigorate local enforcement and will allow the implementation of new strategies for dismantling organized crime-related piracy. The copyright industries will also seek to apply the "Ley Federal de Extinción de Dominio" (Federal Law for Property Forfeiture) to piracy cases. Furthermore, an aggressive campaign targeted at major markets with consistent raids will have a deterrent effect. As discussed further below, some industry sectors continue to experience difficulties in working with the PGR on certain anti-piracy actions.

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 to communicate with PGR. 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.

**Organized crime enforcement:** Although piracy is considered an organized crime offense, for many years no copyright cases were initiated under this law. Over the last two years the recording industry submitted four organized crime cases to PGR but only one reached the judicial system ("Operation King Pin"). This should remain as a priority for 2010.

Another PGR unit, the PGR-SEIDF (the "Subprocuraduría" Specialized in Investigation of Federal Crimes), which includes the Specialized Piracy Unit, has worked effectively 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. The PGR also empowered its Organized Crime Investigative Division, PGR-SIEDO, to investigate piracy and develop systematic coordination with the private sector back in 2004. 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. 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. More coordination between PGR-SIEDO and PGR-SEIDF is needed.

**The tax authorities (SAT):** Recently the Mexican Tax Administration (SAT) has shown signs of interest to effectively support the fight against software piracy through a consistent and permanent exercise of its inspection powers on IP compliance by companies. SAT might start enforcing currently existing laws, so that Mexican taxpayers report their IPR compliance with respect to software. In times of economic crisis reducing software piracy can be a strategic tool for creating jobs, increasing tax revenues, expanding business opportunities, and fueling economic growth.

**Customs:** The recording industry notes that much of the pirate material is produced locally and the following supplies are imported: blank CD-Rs, blank DVD-Rs, jewel boxes and burners, but such [importations are not considered a crime](#). As a consequence of coordinated actions with SAT and PGR, APCM reports that there were significant seizures of illegal imported raw material, mainly CD-Rs, DVD-Rs and jewel boxes. However, the SAT and PGR's goodwill did not prevent a drop in blank media seizures of 64% for the first 11 months of 2009.

**PROFECO:** IIPA and its members have recommended over the years that PROFECO should use its *ex officio* powers for consumer protection to stop street market piracy. But PROFECO lacks human and financial resources to conduct raids on a consistent basis and needs police assistance to protect personnel during raids. Last year it made some inroads on the public education messaging. Recently, a training on identification of genuine software and the risks associated with counterfeit products was provided by industry to the "trainers of trainers" in PROFECO. Each of these trainers is responsible for approximately 130 consumer organizations which add up to more than 500 entities in the Federal District. This development is the opening for better work with PROFECO on the education of consumers so that they drive demand of genuine products.

**The complaint requirement and additional problems with hard goods enforcement:** 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. As a consequence, copyright owners incur high legal costs in pursuing any piracy case. For over six 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 is still pending in Congress.<sup>5</sup>

**Results in criminal actions in 2009:** Criminal anti-piracy actions in Mexico are taken by the film, music and entertainment software sectors.

Three years ago the film and music industries combined their anti-piracy operations into the Association for the Protection of Film and Music (APCM). In 2009, APCM reported continuing good level of cooperation with PGR on film and music actions. There were 2,715 criminal actions conducted across Mexico (physical), 1,284 Internet actions (642 for music and 642 for movies), 960 administrative actions (Internet), 30 civil cases (Internet), seizure of 5,800, 283 DVD units, and 15 actions with Customs. While seizures have been significant, the piracy percentage index has not been reduced. Although the number of overall raids taken by PGR decreased by 17% in 2009, there was an increase in daytime raids with focused actions in strategic areas by police forces, under the direction of PGR, resulting in significant seizures. Unfortunately, there were only few arrests.

In mid-January 2009, the PGR arrested six leaders of a hard goods operation in Tepito that paid people to go to theaters and camcord films that they then turned into pirated DVDs. They will hopefully be prosecuted for the offenses they committed, including camcording. However, these are for films that were successfully camcorded and subsequently distributed on a massive scale. That means that in order to sustain a successful prosecution under existing law, investigators had to watch the thieves actually camcord the movie, walk out of the theater, hand it over to the people who hired them, and then wait for the films to be widely distributed, thereby inflicting grievous harm on the rightsholder. Notably, the people who were hired and who actually did the camcording were not arrested because the authorities believed there was insufficient evidence under existing law to prosecute them. A new anti-camcord law without the existing loopholes is desperately needed, so that camcord thieves can be arrested and charged without having to let them walk out of the theater with a stolen film and waiting for them to distribute it (thereby bringing great harm to our members). There were 1,560 pirated discs, 13,400 blank DVD-Rs, two camcorders, and 160 disc burners seized in this raid. In September 2009, local authorities supported by APCM searched two residences associated with the leaders of the online piracy release group "SceneLatina." It is suspected that this group was directing local camcord activities. Multiple pirated movies were found on the individual computers, FTP server and on pirated discs and arrest orders have been issued. Although piracy is not yet an *ex officio* crime, the Mexican army and the navy initiated several raids that were then taken over by PGR in 2009.

The ESA's anti-piracy enforcement program had several noteworthy actions in 2009 but also experienced (and continues to face) significant difficulties in obtaining raids against two key game piracy havens in Mexico City. ESA was again able to secure a raid of San Juan Del Dios in 2009, resulting in the Specialized IP Unit seizing over 55,000 pirated games and 365,000 items of manufacturing materials. In conjunction with the Metropolitan Delegation, ESA conducted five raids in Tepito, which yielded over 100,000 pirated games across multiple platforms, and over 3.5 million counterfeit game covers. More importantly, the multiple raids on Tepito resulted in the dismantling of 12 burner labs and storage facilities capable of producing millions of more pirated products. While ESA regards the five Tepito raids as a success, this figure also underscores the fact that failure to follow up raids with prosecutions and source investigations undermines any hope for deterrence.

Despite the above successes, ESA has 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

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<sup>5</sup> 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.



retail and distribution center. Despite clear evidence of substantial game piracy activity in both areas, PGR has for almost two years refused to raid either area. Specifically, the PGR's Specialized IP Unit has failed to act on certain complaints filed by the game industry for almost two years. Although the ESA commends PGR's Metropolitan Delegation for leading multiple raids against targets in Tepito in 2009, the Specialized IP Unit on the other hand has failed for two years to conduct raids for the game industry in Plaza Meave and Pericoapa, the former one of the most notorious sources of pirated games and the latter one of the most popular retail centers for pirated games. These markets are filled with and openly sell pirated games on a daily basis and yet PGR's Specialized IP Unit refuses to exercise its enforcement powers to shut down these sources of game piracy. The consequence is that the pirates have been and continue to enjoy tax-free profits from the sale of pirated games, while the game industry suffers from the massive piracy that exists at these two venues. 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. ESA hopes that administration changes at PGR in recent months will have a positive impact on ESA's ability to secure raids of Pericoapa and Plaza Meave in the near term. However, optimism may already be dwindling, as the new PGR administration that was installed in the fall of 2009 already broke its promise to raid the piracy havens before the end of the year.

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 2009, but supported 45 street sweeps and 157 channel actions.

## JUDICIAL ISSUES

Enforcement of intellectual property rights by Mexican judges unfortunately continues to be inadequate overall despite Mexican government efforts to organize seminars and academic events for criminal judges. Given the depth of the piracy problem, there are few sentences issued, and most of them are lenient. Over the past two years, there has been a slight increase in deterrent sentences issued. Problems also remain with civil litigation.

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. APCM reports that there have been some major convictions that kept individuals in prison (from 2 to 7 years). Presently, 57 individuals are serving time for music and movie piracy. However, these have not been sufficient compared to the number of actions conducted in Mexico. Convictions account for only 9.8% of the total of indictments. BSA did not obtain any criminal convictions in 2008 or 2009, and obtained only one (3 years in prison) in 2007. As a general matter BSA does not initiate criminal cases in Mexico.

The glaring problem remains the low number of full prosecutions, especially given the extent of copyright piracy in Mexico. Mexico should consider the 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.

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. While there have been some improvements, for example, Mexican law does award full validity to electronic documents and discovery, some judges are still not familiarized with it.

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. 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.

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.

A positive recent development has been the appointment of magistrates in the Tax Court to specialize on IP cases. The Tax Court Magistrates (now constituting a Specialized IP Court) have attracted most IP cases being litigated before said court (some IPR-related cases are being attracted by the Superior Court of the Tax Court, when these cases should be adjudicated to the IP Specialized Court), and the copyright industries remain hopeful this will lead to more expeditious adjudication of IP cases. Nevertheless, it is still advisable for Mexico to create a separate IP court within the regular Federal courts.

## **ADMINISTRATIVE ENFORCEMENT**

The two administrative agencies that work on copyright matters in Mexico are IMPI (the industrial property office) and INDAUTOR (the copyright office), both on administrative enforcement efforts as well as public awareness campaigns.

**IMPI:** BSA reports that its excellent cooperation with IMPI continued last year. In 2009, there were approximately 1,493 IMPI actions taken (about 1,106 *ex officio* and 387 *ex parte*, also known as “full raids”). IMPI remains hampered in its enforcement efforts by a lack of statutory authority to sufficiently deter door closures (cases where targets close their door to IMPI inspectors), including authority to impose higher fines and a presumption of infringement in cases involving door closures.<sup>6</sup> Investigative authorities and judges need to become more familiarized with electronic crimes and electronic evidence. Investigations need to be conducted in a faster manner, and evidence needs to be preserved immediately upon the discovery of a crime.

The music industry reports that for the second year in a row, IMPI continued its actions against cyber cafés 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 cafés, mainly in the capital city area. This program worked out extremely well during 2009; IMPI continued its 80 administrative actions per month in 2009, 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. These inspections are conducted *ex officio*, and IMPI imposes a fine when conducting inspection visits and the owners and/or administrators regularly oppose them. So far, these fines have been collected without setbacks.

During 2009, MPA collaborated with IMPI to develop a preventative campaign for cyber cafés and theaters. MPA also launched with CANACINE the 3D phase of the anti-piracy campaign which included five new spots. In 2008, MPA worked with IMPI, the RTC (Radio, Television and Cinematografía) and the home video retailers on an

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<sup>6</sup> In 2005, there was a favorable court case (AOS SOLUTIONS) where 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. This ruling needs to be codified so it can be implemented in all cases.

agreement to address Mexico's serious parallel import problem. This agreement is now being signed by the retailers and studios. More details on IMPI's work in the Internet space is discussed in the next section.

BSA believes the following legislative solutions could enhance IMPI's capabilities and significantly improve administrative copyright enforcement: (1) end door closures for good by incorporating case law into the statute, (2) issue higher fines and impose them sooner, (3) establish a presumption of infringement in the event of door closures (this would codify the AOS Solutions case), (4) 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, (5) eliminate the two witness requirement, (6) give public faith powers (this is similar to notary powers) to IMPI inspectors, (7) prosecute tax crimes associated with these IP infringements, (8) equalize the level of minimum administrative sanctions between copyright infringement with trademark infringement (trademark currently is much higher), and (9) expressly allow for photographs, video recordings and electronic evidence to be gathered during inspection visits and submitted in administrative procedures. These solutions are being introduced in Congress by local rights holders associations.

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

BSA reports that its relationship and work with INDAUTOR went smoothly in 2009. During 2009 BSA worked with INDAUTOR and held approximately 95 conciliation meetings (*Juntas de Avenencias*) with end-users, a decline from the 130 actions in 2008. 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 also is responsible for supervising the collecting societies in Mexico. Part of that responsibility is for INDAUTOR to issue rates for the broadcasting of sound recordings in TV and radio stations. INDAUTOR reinstituted a process that had been presented by the music industry collecting society to establish the rates at the end of 2009. The proposal is currently being considered at the Federal Market Commission (COFEMER) responsible to evaluate the impact of the future rates in the Mexican economy. Additional bureaucratic steps should be taken before publication of the official tariff. The recording industry is working closely with INDAUTOR on this matter.

## **ONLINE ENFORCEMENT**

**Legal concerns:** There is no specific Mexican legislation establishing liability principles for ISP's in piracy cases. It is assumed that ISPs are subject only to the general liability principles contained in the Civil and Criminal Codes. Furthermore, specific provisions in the Telecommunications Law prohibit ISPs from disclosing personal information on customers to rights holders seeking civil recourse against alleged infringers. 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. Because ISPs are not allowed to provide information on alleged infringers, rights holders must bring a criminal action to PGR in order to obtain those details. ISPs also have been reluctant to include a clause in their contracts with users that would permit termination of the subscribers contract if the subscriber infringed intellectual property rights.

File-sharing committed through P2P networks is not considered a serious legal violation in 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 as a result effective prosecutions in P2P cases are unavailable. Just a few Internet piracy cases were filed last year by APCM mainly due to the lack of adequate criminal provisions described above.

The film and music industries report that they have received a decent level of cooperation from some Mexican ISPs involving hosted content, such as the removal of illegal music files posted on webpages and forums. For example, in November 2009, APCM shut down a major music forum site named "mexicowarez" which had more than 246,000 posts and 35,171 topics mainly decided to music and other illegal copyrighted materials for distribution to its users. The forum contained more than 40,000 full albums with 520,000 illegal music tracks. 82% of the users were from Mexico and 12% from the U.S., and the forum had more than 1.2 million unique visitors each month. APCM notified the ISP of the massive copyright infringement taking place on this forum site and the ISP shut down the site.

APCM has worked with IMPI on administrative enforcement measures with most cases followed with sanctions. APCM reports that it issued 997 cease and desist letters (823 for music and 174 for movies), and worked to take down 16 hosted web pages, 128,382 permalinks, plus 32,534 P2Ps links and 1,238,733 cyberlocker links.

However, in the case of P2P file-sharing, ISPs (especially Telmex, which has about 70% of the domestic broadband connections in Mexico) have to-date been reluctant to take any actions. It is this inaction on P2P piracy which has prompted heightened concern by the content community.

**Voluntary discussions by interested parties:** A coalition of rights holders that includes the authors' society (SACM), the motion picture association (MPA), the recording industry (AMPROFON), the music publishers (EMMAC) and book publishers (CEMPRO), in 2008 submitted a petition to the Ministry of Communications and Transportation to launch a negotiation roundtable with ISPs to identify ways to reduce the availability of unauthorized content online and to govern ISP responsibility particularly with regard to repeat infringers. A working group (the Commission for Internet Piracy Mitigation) was formed between the coalition and the Ministry of Communications and Transportation, to find solutions to online piracy. Entertainment software publishers also participated in the working group discussions. This working group aimed to generate a policy to respond to repeat infringers. Several meetings were held in late 2008-early 2009 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. Discussions continued through the summer of 2009 but no progress was made and P2P piracy continues unabated on ISP networks.

In November 2009, the "Coalition for the Legal Access to Culture" (CALC) was formed with 37 founding members.<sup>7</sup> The CALC aims to promote and defend copyrights and related rights threatened by physical and online piracy, working with different government entities and federal authorities on cultural issues. The CALC also focuses on legislative reforms, including: affording *ex officio* authority to law enforcement, addressing private copy issues, and developing legislation to promote better ISP accountability to address piracy in the online environment.

## **BORDER ENFORCEMENT**

**IMPI order still required for border action:** There remain formal, onerous requirements to initiate border actions. For example, 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. There has not been any significant IMPI-Customs improvement during 2009. More broadly, the customs law needs to be amended to grant customs officers *ex officio* powers.

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<sup>7</sup> The Coalition presently has 37 organizations including IFPI, the Society of Authors and Composers (SACM), the National Association of Performers (ANDI), the Mexican Society of Phonograms, Video and Multimedia Producers (SOMEXFON), the National Chamber of the Publishing Industry (CANIEM), the Mexican Association of Record Producers (AMPROFON), the Motion Picture Association (MPA) and other members of the creative community.

**Border efforts to track blank optical grade media:** 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. 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. Trainings promoted by Customs, Industry and the U.S. Embassy have resulted in a decrease in illegal importations of blank optical media. Notwithstanding this success, over 800 million units of blank media come across the border and much of this product will end up as pirate product in Tepito and San Juan de Dios.

**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. ESA reports a positive impact from its training efforts with Mexican Customs officials, resulting in an increase of detention notifications and seizures of pirated game product from diverse ports, including Alamira, Ensenada, Guadalajara, Monterrey, Pantaco, and Toluca.

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

Mexico still has not fully implemented its WIPO Treaties' obligations. In addition, many bills that would strengthen enforcement were not acted on in 2009 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 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 to the current law would include:

- Adding definitions and provisions on technological protection measures (TPMs), including criminal penalties for trafficking in circumvention devices;<sup>8</sup>
- 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;

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<sup>8</sup> The current criminal prohibitions on manufacture of circumvention devices do not afford meaningful criminal enforcement opportunities because, in the vast majority of instances affecting the video game industry, circumvention devices are manufactured elsewhere and imported for sale in Mexico.

- 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 and ongoing initiatives. It is clear that a more comprehensive upgrade the statutory provisions of the Mexican copyright law is needed to bring this law more fully up to bilateral and international standards.

### Pending Legislation

**Bill to provide for *ex officio* copyright actions:** This legislation would allow the police to act without rights holders having to file a criminal complaint for every case of infringement. Several attempts have been made to pass such legislation. There is currently a bill approved at the Senate and pending before the House Justice Commission.

**Bill to provide protection against unauthorized camcording in theaters:** 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 was introduced to the Senate in 2009, and was promoted to the House, where it is still pending. MPA is pressing for passage of the legislation as passed by the Senate.

**Bill to establish sanctions for anti-circumvention:** In recent years, there have been several bills aimed at establishing criminal sanctions for the distribution or trafficking in devices used for the circumvention of technological protection measures (TPMs). One bill would have amended the criminal code and the other would have amended the copyright law, but both lost their legislative momentum. Effective TPMs are especially important to the videogame industry, as current law provides only criminal remedies for the manufacture of circumvention devices, but not for the import or distribution. Current law could also benefit from amendments to better capture the kinds of acts which could circumvent TPMs, including devices, components and services.

**Bill on ISP cooperation:** The Coalition for Legal Access to Culture is considering legislation aimed at improving ISP accountability and deterring online piracy.

**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 is continuing to work with federal and state governments on software audit programs.

**Bill to change jurisdiction of copyright infringement cases:** A bill has been introduced recently in the Chamber of Representatives, suggesting that copyright infringement cases be handled by District Courts and INDAUTOR. Currently, IMPI is handling such cases because it has the technical, human and legal resources for doing so. IIPA members have serious reservations about this bill. IMPI has built a strong enforcement system throughout over a decade, and the current system has proven to be a good tool for fighting copyright piracy. An important body of case law and administrative practice has been built around the current enforcement system led by IMPI. The capacities built by IMPI and around it are very valuable. This system that is producing results today should be preserved. Moreover, the bill is poorly drafted and would create confusion and uncertainty. The bill does not provide a complete model on how the proposed new regime would work in detail, and is not clear about powers and attributions of the different agencies dealing with IPR enforcement. Instead, IIPA members support legislative efforts to strengthen IMPI's enforcement capabilities (as noted throughout this report).

**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 supports legislation advocated by local IPR associations 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.

## **IPR TRAINING AND PUBLIC AWARENESS**

Copyright industry associations and companies regularly conduct training and informational seminars for Mexican enforcement authorities.

BSA offers continuous training sessions and seminars for government officers, regarding IPR law, criminal law, administrative procedure and software piracy, including the technical and legal aspects of software programs, servers, licensing models, and new developments in the software area. They also participate in the yearly summit regarding IP and the Judiciary. This year, BSA will work more closely with customs Authorities, some local law enforcement groups, SAT, the Federal Telecommunications Commission (CoFeTel) and Profeco. 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. In 2009, ESA elevated its commitment of resources to IP education initiatives. In addition to launching its own educational program aimed at school-age children in Mexico City, ESA, in conjunction with the BSA, again participated in IMPI's Poster Campaign Contest "For the respect of ideas . . . The Children against Piracy." ESA also participated in a U.S. Embassy training on IPR and product identification attended by representatives of Mexican and U.S. Customs, PGR, IMPI, and the Mexican Attorney General's office.

During 2009, APCM Mexico organized two training seminars with Customs (SAT) where a hundred officials received updated information on smuggling activities and border IPR crimes related to the importation of blank media destined to music and movie piracy. Additionally, one seminar for 60 PGR experts was held in cooperation with APCM on identification of illicit music products. The film and recording industries via APCM frequently organize and participate in training sessions for law enforcement officials, including IMPI, PGR prosecutors, judges, customs officials and other experts. For example, in coordination with IMPI, a training course has been developed via APCM for 25 inspectors so that they can act legally via inspection visits to cyber cafes, jukebox reproduction centers and discotheques, where music is played and movies or series are downloaded without the authorization from the rights holders. The recording industry participated on five seminars on copyright with PGR, SAT and judges.

# PEOPLE'S REPUBLIC OF CHINA (PRC)

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

### 2010 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** IIPA recommends that USTR maintain China on the Priority Watch List in 2010.

**Executive Summary:** China continues to have some of the highest piracy rates in the world, while representing one of the largest and most rapidly growing markets for the copyright industries. Copyright infringement concerns range from pervasive use of unlicensed software by businesses to widespread digital piracy and piracy of hard goods. As the new global leader in Internet, broadband and mobile device penetration, China remains a major safe haven for digital pirates. Addressing Internet piracy is a critical priority for many copyright sectors. The Chinese government has stood by while the online and mobile markets have become overrun with pirated materials via an array of illegal websites, "cyber lockers," user-generated content sites and "deeplinking" search engines which connect users directly to infringing websites. Ninety-nine percent of music files downloaded or streamed in China are pirate and China has become one of the biggest sources of illegal downloads in the world. While recently a number of prominent websites have been taken down, the Chinese government continues to make many public assurances that it is committed to combating copyright piracy, but has chosen not to take truly effective action to reduce the levels of online piracy, just as it has not for years taken effective and deterrent actions against physical piracy.

China appears to have adopted an industrial policy in which such theft is a component driving Chinese competitiveness, or at a minimum, permitting free access to American content through unapproved pirate channels which simply ignore censorship controls but to which legitimate rights holders must adhere.

With the PC software piracy rate remaining at 80 percent, Chinese enterprises continue to use unlicensed software at excessive levels. This denies revenues to the producers and distributors of genuine software and also gives the Chinese enterprises using unlicensed software an unfair competitive advantage over U.S. and other foreign businesses that are paying for similar software.

2009 marked some positive developments, with Chinese rights holders taking more of a lead with their own government in calling for improved IPR protection. However, a Chinese court recently found the leading source of unauthorized music downloads in China not liable for the massive infringement occurring over its facilities, infringement from which it draws huge profits. While there have been some welcome court decisions with deterrent penalties, deterrence, as a general matter, remains absent from the enforcement system, both online and in the market for physical products. The administrative enforcement system remains understaffed and does not pose a deterrent to piracy. China's many publicly announced enforcement campaigns have not had a demonstrable effect on the levels of retail piracy. Criminal actions against copyright piracy, while growing in number, need to be significantly increased. Manpower, financial resources and stronger enforcement authority must be made available to the NCAC and local copyright bureaus, which are primarily responsible for Internet enforcement and enforcement against enterprises using unlicensed software, as well as to the Law and Culture Enforcement Administration (LECA), which are increasingly being tasked with copyright enforcement. 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, especially in the online environment, continues to be cumbersome and agency jurisdiction and cooperation remain overlapping and often muddled. More progress must be made in 2010 in dealing with the huge losses suffered by the U.S. and Chinese software industries from enterprise end-user piracy and in legalizing





government and SOE use of software, as promised in the JCCT. Progress in addressing book piracy at university textbook centers continued as well. IIPA hopes that the Notice to libraries to strengthen copyright protection will result in concrete actions being undertaken by the relevant Chinese agencies to address piracy occurring at university libraries, such as unauthorized access to online journals or the presence of pirated textbooks on library shelves.

China has begun the process to amend its copyright law in compliance with its WIPO Internet treaties' obligations, but this should be done on a fast tracked timetable instead of the three years contemplated by some government officials. It is also hoped that the amendment process will be transparent to allow interested parties an opportunity to provide input into draft legislation. Unfortunately, it appears that necessary changes to the criminal law are apparently not even on the drawing board and new judicial interpretations need to be considered as a stop gap measure. China should also promptly and fully implement the WTO panel's recent decision holding many of China's market access restrictions on the motion picture, music and publishing industry violative of its WTO obligations and remove other market access restrictions. Inadequate market access for most industries and barriers to establishing a meaningful commercial presence with authorized product continue to fuel the market for pirated material.

Finally, it should be noted that China has promulgated a series of "indigenous innovation" policies that attempt to compel transfers of foreign intellectual property to Chinese ownership using access to China's market as leverage. These policies undermine the intellectual property development of U.S. and other foreign copyright industries.

**Priority actions requested to be taken in 2010:** 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 prosecutions and effective administrative actions against online and mobile service piracy, corporate end-user and hard disk loading software piracy and other piracy of hard goods including textbooks, trade books and scholarly journals; clarify that corporate end-user software piracy is a criminal offense and bring prosecutions;
- Significantly increase the manpower, financial resources and skill training available to NCAC, the local Copyright Administrations (CA's) and Law and Cultural Enforcement Administration's (LCEA's) so that they may take effective enforcement action with deterrent penalties against software corporate end-user piracy, and online and hard goods piracy;
- Increase actions by SARFT and MIIT to revoke the business licenses and terminate Internet access of online services that deal in infringing material, or whose business models depend upon providing access to infringing materials;
- Enhance pre-release administrative enforcement for motion pictures, sound recordings and other works;
- Mandate the use of legitimate books and journals on university campuses and in government institutions and libraries, including fully implementing the *Notice on Enhancing Library Protection of Copyright* as promised in the 2009 JCCT outcomes; legalize practices of textbook centers and on campus reproduction facilities;
- Allow increases in staff for, and anti-piracy investigations by, foreign rights holder associations where so desired;
- Assign specialized IPR judges to hear criminal cases, and move more criminal IPR cases to the intermediate courts.

#### **Legislation and Related Matters**

- Amend the Copyright Law to bring it into full compliance with the WTO panel decision and the WCT/WPPT;

- Amend the Criminal law or issue a new SPC Judicial Interpretation (JI) to establish, at a minimum, appropriate thresholds for criminal prosecution of corporate end-user piracy of software and Internet infringements of all copyright material;
- Review the SPC Judicial Interpretation to ensure that the thresholds comply with the WTO IPR case panel decision's definition of "commercial scale";
- Increase punitive damages against copyright infringers in civil cases to deter piracy;
- Clarify and/or make amendments on Article 24 of the SPC's 2002 JI "Several Law Application Explanation about Trying Copyright Civil Dispute Case " to change "unit profit" to "unit reasonable market price";
- Significantly increase maximum statutory damages of RMB500,000 (US\$73,160) in the Copyright Law and related laws to ensure deterrence in the new technological environment;
- Review and clarify the 2006 Internet Regulations to ensure their effectiveness and implement them with more aggressive administrative and criminal enforcement;
- Issue an SPC JI to clarify whether Article 36 of the new China Tort Liability Law is consistent with Article 23 of the "Internet Regulation" in relation to the "reasonable grounds to know" element of the knowledge requirement, and to clarify the exact requirements under Article 14 of the "Internet Regulation";
- Ensure use of legal software by the government, SOEs and other enterprises in accordance with China's commitments in the JCCT, including directing government agencies and SOEs to conduct annual inspections for software legalization and implement Software Asset Management (SAM) as a tool for ensuring software license compliance;
- Amend the Copyright Law to grant to producers of sound recordings rights to authorize or prohibit the communication to the public of their sound recordings, including by way of broadcasting, simulcasting, cable transmission and public performance, subject to appropriate exceptions or limitations.

#### Market Access

- Amend all relevant laws, regulations, circulars and interpretations promptly and fully to bring them into full compliance with the WTO panel's decision on market access, including the withdrawal of the recently implemented Ministry of Culture "Circular" *on Strengthening and Improving Online Music Content Examination* which contains several provisions that will disrupt the development of a healthy, legitimate and competitive online music market including (1) an increase in the already burdensome procedures for digital distribution of sound recordings; (2) new inequitable censorship procedures that will delay the legal marketing of sound recordings online; and (3) WTO-inconsistent restrictions on the ability of foreign-invested enterprises to engage in the importation and distribution of online music.
- Provide meaningful and effective market access for all copyright materials;
- Suspend the November 2009 indigenous innovation product accreditation program and related policies that would provide procurement preferences for products based on whether the embedded intellectual property is owned and developed in China.

For more details on China's Special 301 history, see IIPA's "History" Appendix to this filing at <http://www.iipa.com/pdf/2010SPEC301HISTORICALSUMMARY.pdf>, as well as the previous years' country reports, at <http://www.iipa.com/countryreports.html>.

## UPDATE ON COPYRIGHT PIRACY AND ENFORCEMENT IN CHINA

All forms of piracy infect and damage the Chinese market. With the largest Internet, broadband and mobile phone use in the world, China's digital piracy has in the last two or three years become the principal concern of most of the creative industries. For the business software industry, the vast majority of the losses suffered continue to result from enterprise end-user piracy which remain its highest priority and "hard" goods piracy continues to deserve increased attention from the enforcement authorities.

**Internet and mobile service piracy:** China is one of the world's largest potential markets for Internet and mobile delivery of copyright content, but piracy continues to inhibit the growth of this market. With China increasingly seeking to move its economy up the value chain by its increasing focus on developing the "creative industries," it is becoming even more critical that China complement its effort to develop those industries with a far more robust and committed effort to build out an enforcement infrastructure that can deal with massive online piracy. There were some signs in 2009 that this message may be getting through, but so much remains to be done. It is a welcome sign that Chinese rights holders in the "creative industries" are becoming much more aggressive in urging their own government to more effectively deal with the problem.

China's Internet population is now by far the largest in the world. The China Internet Network Information Center (CNNIC), reports<sup>1</sup> that the online population became the largest in the world in mid-2008 and at the end of 2009 is estimated at 384 million, larger than the population of the U.S. This is a spectacular 28.9% increase over the previous year (the figure was 298 million at the end of 2008). It was estimated that 346 million people used high-speed broadband interconnections (representing 90.1% of all users), allowing for download of larger files including feature movies, TV programs and videogames. China's Internet penetration rate is still only 25.5% (as of July, 2009); it was 22.6% at the end of 2008) so there is much room for continued growth (and piracy losses to rights holders).

According to CNNIC, 83.5% of Internet users accessed music on the Internet in December 2009, higher than any other use. The recording industry estimates that a staggering 99% of the music accessed was unlicensed. The fifth and sixth largest uses were for online gaming and online video at 68.9% and 62.6%. IIPA reported in its 2009 submission that the CNNIC acknowledged that music is one of the most important "drives for promoting the increase in netizens."

China also has by far the largest population in the world using mobile devices – 747 million.<sup>2</sup> It is reported that 233 million<sup>3</sup> people access the Internet from their mobile phones, providing instant access to pirate copyrighted material, not only music, but also video, books, software and videogames. Piracy on mobile devices, and the pre-loading of music files on mobile devices, is a massive problem for the recording industry, and has now become a problem for the motion picture and other copyright industries as 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). WAP (Wireless Application Protocol) portals now allow 192 million mobile phone users to access copyright materials on the Internet with the mobile services generating revenue both through advertising and data fees.<sup>4</sup> By the end of 2010, it is estimated that China will have 170 million users accessing the Internet through broadband 3G networks, posing a huge challenge for the content industries.<sup>5</sup>

The recording industry has reported that China is now one of the biggest sources of illegal downloads in the world, both over the Internet and now over mobile devices. The biggest problem today are the "MP3 search engines" which offer "deeplinks" to thousands of infringing song files and derive significant advertising revenue from doing so. Baidu, which operates the largest deeplinking service, is responsible for an estimated 50%-75% of all illegal downloads in China. Another 29% is provided by pirate websites, 22% via P2P filesharing over services such as Xunlei and verycd.com<sup>6</sup> and 1% from over 100 cyberlockers sites, like Rayfile, Namipan, and 91files. While Baidu has been sued by the local and international record companies, a Beijing court has very recently ruled that its

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<sup>1</sup> Statistical Survey Report on the Internet Development in China (July 2009) : <http://www.cnnic.net.cn/uploadfiles/pdf/2009/10/13/94556.pdf>

<sup>2</sup> <http://en.c114.net/583/a479298.html>

<sup>3</sup> <http://www.miit.gov.cn/n11293472/n11293832/n11293907/n11368223/13008363.html>

<sup>4</sup> <http://en.c114.net/583/a463731.html>

<sup>5</sup> <http://en.c114.net/583/a479042.html>

<sup>6</sup> VeryCD.com, China's largest eMule site, was taken down by SARFT in early December 2009. See discussion below.

deep linking service was not infringing – an unexpected development given prior court decisions. Unless immediate remedial action is taken, this will significantly exacerbate the music piracy problem in China. Baidu's deeplinking service also continues to infect neighboring markets like Hong Kong and Taiwan and is also accessible worldwide.

The piracy problem for the music industry is made even worse by censorship and market barriers, discussed further below, that discriminate against foreign record companies. The industry has been fighting these onerous restrictions, first codified in the Ministry of Culture's (MOC) *Several Opinions on the Development and Administration of Internet Music*. A new MOC *Circular on Strengthening and Improving Online Music Content Examination* was released in September and, while easing a few of the procedures for obtaining censorship approval, continues to blatantly discriminate against foreign record companies.

Internet piracy also remains the top enforcement priority for the motion picture industry. User generated content (UGC) sites, where users post films and TV programs on the site for stable streamed viewing, is the most damaging problem, followed by P2P filesharing and IPTV (webcasting) piracy. The impact of the UGC sites, such as Tudou.com and Youku.com, is multiplied by "leech sites" where the content on the UGC site is available by linking to it from the leech site. MPA continues to report that close to half of the content available on the world's "topsites" is sourced from UGC sites in China. P2P filesharing is also a problem. There are P2PTV streaming sites, like PPLive and PPStream, and sites that offer enabling filesharing software and services, BTpig, Kugoo, Xunlei, VeryCD and others.<sup>7</sup> Internet cafés also offer the ability to download movies in their facilities.

While end-user software piracy (and unauthorized use of software by government ministries) is by far the business software industry's most significant piracy problem, the Business Software Alliance (BSA) continues to report that Internet piracy of business and consumer software is a growing problem. P2P filesharing makes up an estimated 90% of that piracy but offers of pirate software on websites have also been a problem. In IIPA's 2009 submission, we highlighted a criminal case brought against the tomatolei.com website which since 2003 had been offering pirate copies of Windows XP and other U.S. software products. In a major positive and deterrent development, that case (discussed below) – the first criminal conviction for online software piracy – has now concluded.

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 Entertainment Software Association (ESA) estimates 549,111 completed downloads<sup>8</sup> of select member titles by Internet users in China during December, 2009, placing China in the top five nations in terms of infringing game downloads during this period. These figures do not account for downloads that occur directly from hosted content, such as games found on "cyberlockers" or "one-click" hosting sites, which continue to account each year for progressively greater volumes of infringing downloads.

The book and journal publishing industry reports that Internet infringements continued unabated over the past year, affecting academic books and commercial bestsellers or trade books scanned and traded or offered for download in PDF form,<sup>9</sup> and online journal piracy occurring through intermediaries that operate commercial sites. In its 2009 submission, IIPA highlighted a new and disturbing development involving the massive sharing of

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<sup>7</sup> In a major positive enforcement development, as described further below, SARFT has closed two of the largest P2P filesharing sites in early December, 2009. In IIPA's 2008 and 2009 submission, it was reported that Xunlei was sued by MPA in February 2008 after having, a few days earlier, lost a civil case to a Shanghai company and ordered to pay damages of RMB150,000 (US\$21,947) for assisting in copyright infringement.

<sup>8</sup> This figure is representative only of the number of downloads of a small selection of game titles. Consequently, this figure is under-representative of the overall number of infringing downloads of entertainment software made during the period.

<sup>9</sup> 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.

electronic copies of journals 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. Publishers brought to the attention of the enforcement authorities on numerous occasions that a company called Kangjian Shixun, was providing electronic files of millions of medical and scientific journal articles on a subscription basis to customers in libraries and hospitals throughout China, without the permission of nor payment to the rights holders. Many of these articles continue to be provided by a well-known, powerful state-run medical library. Given the lack of action against the site, copy-cat sites arose in the country following the Kangjian Shixun model. This matter was raised at the 2009 Joint Commission on Commerce and Trade (JCCT) dialogue, and as one of its commitments to the U.S. under this process, the Chinese agencies<sup>10</sup> issued on October 28, 2009 a *Notice on Enhancing Library Protection of Copyright* notifying libraries of their obligations under the copyright law. The Notice calls for regular random inspections by NCAC and the local copyright administrations, and as appropriate, the imposition of administrative sanctions upon libraries found to have been engaged in unauthorized copying and dissemination of copyrighted works. IIPA and AAP call for aggressive enforcement of this Notice and the imposition of deterrent sanctions, as appropriate, against institutions found to be in violation of the Notice.

**Update on Internet Piracy Enforcement:** With the adoption of the Internet Regulations in July 2006 and the entry into force of the WIPO “Internet” treaties on June 9, 2007, 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 legal regime for combating online piracy. We continue to commend China for taking both these steps.

There were some positive developments in the enforcement area in 2009, and more than a few significant disappointments. The whole picture must be seen against a backdrop of very high levels of online piracy and an enforcement system that remains fundamentally ill-equipped to deal with increasing levels of digital infringements.

On the positive side, and as detailed below, a number of coalitions consisting of U.S. and Chinese rights holders were established. Chinese rights holders, particularly in the video and TV area, began a series of significant lawsuits and began putting increased pressure on government ministries. SARFT, the agency regulating the audio visual industry, began shuttering pirate websites, including some of the largest sites in China, for their failure to acquire required licenses to operate. The NCAC completed another annual Internet piracy campaign in November 2009 with what appear to be improved results, including referral of 25 cases to the criminal authorities.<sup>11</sup> This campaign was also marked by some improved transparency, both at the national and provincial level, with NCAC informing the representatives of certain industries of the actions taken on the formal complaints they filed as part of the campaign.

Despite these positive developments, however, many problems remain and the overall picture continues to remain bleak with respect to the overall level of Internet and mobile device infringements nationwide. These problems have been detailed at length in previous IIPA submissions. For example:

- Administrative enforcement remains inadequate to the task and the copyright enforcement agencies continue to be woefully understaffed and the penalties they impose remain non-deterrent. The number of trained personnel is far too small given the size of the problem; the number of enforcement actions pale in comparison to the scale of both hard goods and online piracy. Too few cases are referred to the criminal authorities where real deterrence could be achieved.

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<sup>10</sup>The Notice was issued by NCAC, MOC, the Ministry of Education and the National Anti-Piracy and Anti-Pornography Working Group of GAPP (NAPP).

<sup>11</sup> <http://english.ipr.gov.cn/news/headlines/602441.shtml>. NCAC reported that 558 cases were investigated, 375 websites were shut down. Fines totaled RMB1.3 million (US\$196,000) and 163 servers were confiscated.

- In the online environment, 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.<sup>12</sup> Jurisdictional battles hamper overall enforcement and more central government direction is essential.
- While the underlying legal framework is generally adequate<sup>13</sup> and ISPs who do not cooperate with rights holders can be deemed to be infringers, NCAC has yet to levy an administrative fine against any ISP. Compliance with takedown requests still remains far too low in China.
- The deficiencies in China's criminal enforcement regime are more severe with regard to online piracy. The application of the criminal thresholds to online piracy is unclear, and the "for-profit" precondition to establishing a crime results in a huge loophole in the P2P environment. Criminal authorities remain insufficiently trained 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 politically subversive activities, but not at all for piracy.

Chinese leaders' statements on the importance of strong IPR protection to China's own development, including online, have yet to be translated into practice in such a way as to significantly deter online infringements. One must question whether the development of Internet and mobile communications technology and infrastructure takes precedence over the protection of content and the development of legitimate commerce in the online environment, given the extent to which piracy continues to fuel the growth of these technologies. It even appears that the Chinese government may have adopted an industrial policy in which copyright theft is a component driving Chinese competitiveness, or at a minimum, permitting free access to American content through unapproved channels while ignoring China's sensitive content-based controls censorship controls.

**Motion Picture Industry:** MPA continued in 2009 to focus its Internet anti-piracy program on the large UGC sites, like Tudou.com and Yukou.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 been generally successful; takedown requests are being honored for the most part and most have participated in two filtering trials, with one site having already provided MPA member companies with automated takedown tools. Illegal downloads in China increased in 2009. The independent motion picture industry reports that local distributors are paying lower license fees and sometimes violating the terms of license agreements due to the impact of piracy.

A number of other developments are likely to have a positive impact on reducing the level of online video piracy and in legitimizing the online marketplace. On September 15, 2009, led by Sohu.com, the Online Video Anti-Piracy Alliance was launched. Claiming 110 Chinese company members (MPA is supporting but is not a member), the Alliance's purpose is to bring high-profile litigation against sites and portals that engage in piracy, as well as their advertisers. Sohu and Joy.com and Voole Technology Co., the leaders of the Alliance, have been licensing Chinese TV and film product for some time and seek to legitimize the market. On September 22, 2009, the three companies sued the infamous UGC site, Youku.com, in the Beijing Haidan District Court for infringing 111 titles (Chinese presumably). Compensation of US\$7 to 21 million was being sought and the case concluded on November 26 with a judgment against Youku and a damage award of RMB450,000 (US\$65,843). Voole also sued the Coca-Cola Co. for an ad it placed in connection with the unauthorized use of a popular domestic TV series.

<sup>12</sup> Witness the Kangjian Shixun case, which has been passed among four administrative agencies in China, without resolution.

<sup>13</sup> The recent decision in the Baidu case, where the People's Intermediate Court found that BAIDU did not have "reason to know" that the named sites to which it linked contained infringing material, casts significant doubt on whether Article 23 of the Internet Regulations is broad enough to cover deep linking infringements. IIPA and the recording industry have not yet had the opportunity to thoroughly analyze this key and disappointing decision.

This new Alliance was enthusiastically supported by the Beijing Copyright Bureau. The participation of so many domestic Chinese companies representing domestic rights holders is the kind of development that hopefully will accelerate the legalization of the market and help in creating the kind of effective enforcement infrastructure that has to date been absent in China.

In a subsequent major and undoubtedly related development, NCAC, the PSB and MIIT held a press conference on January 20, 2010 to announce the signing of the *China Internet Industry Declaration on Content Protection* by 101 Chinese websites, through which they pledged to facilitate the protection of online IP rights by preventing the upload and sharing of infringing materials on the Internet. The Declaration was signed by filesharing video and music services like Youku.com, Sina.com, Baidu.com, Xinhuanet, China.com, Tencent and many other powerful legitimate, and even some illegitimate, operations. In addition to promising to protect content, they commit to adopt "industry standard technical measures" to prevent infringement which "restrict users from uploading movies which are still being screened in cinemas and popular TV shows which are still on the air." They also commit to adopt a "graduated response" regime to terminate recidivist infringers. Finally, they commit to adopt takedown measures within 24 hours of receiving a notice from a rights holder. While clearly a positive development, time will tell if the signatories are truly serious. The leader the Online Video Anti-Piracy Alliance, Sohu.com, voiced concern that this may be just another failed commitment similar to many signed over the last few years.<sup>14</sup>

Other developments occurred as recently as late November 2009. On November 26, CCTV.com, the website of Chinese largest state-owned broadcaster, launched two trial versions of legitimate online video websites one modeled on the Hulu model, the other on the YouTube model. As a powerful state-owned entity, the entry of CCTV into the legitimate online video market, like the developments above, bode well for the expanded legalization of the market. In addition, towards the end of December 2009, Shenda, China's huge online videogame developer (and an aggressive enforcer of its IP rights), announced its acquisition of Ku6.com (through its subsidiary Hurray!), a pirate UGC site mentioned in our 2009 submission, and its plans to legalize it.

MPA has filed an average of 40 complaints per year from 2005-2008 with NCAC against some of the largest pirate sites in connection with NCAC's "Special Campaigns Against Internet Piracy." The 2009 MPA-led campaign commenced in August and ended in November 2009. Until this year, MPA had faced complete non-transparency with respect to these complaints, receiving no information on their disposition. Following lobbying efforts, this year NCAC provided increased transparency on the 13 priority complaints filed by MPA in September. MPA learned that four of these cases were referred to the criminal authorities, and are able now to follow up. One site was shut down in Jiangsu Province. In an unrelated development noted above, the notorious eMule site, VeryCD.com, the subject of one of MPA's complaints, was taken down by SARFT for failure to secure an operating license but was back online a few days later and is rumored to be awaiting the receipt of a SARFT license. Unfortunately, seven other cases, including against some very notorious pirate sites, were dismissed with little or no explanation of the reasons behind those decisions. Other IIPA members have also reported welcome increased transparency by some provincial copyright bureaus.

It is hoped that this Declaration will provide cover for NCAC to begin to fine ISPs that fail to respond to takedown notices promptly. NCAC has such authority under the 2006 Internet regulations; IIPA and its members have been pressing for these actions and this result since that time.

Also, on September 15, 2009, SARFT supplemented its earlier 2008 regulations in a *Notice on Management for License of Internet Audio-Visual Programs Service*, essentially notifying all concerned that it would take down websites, filesharing and other services that did not have a SARFT license. By December 3, 2009, SARFT had closed 539 unlicensed (and pirate) websites and on December 4 sealed the fate of the biggest

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<sup>14</sup> <http://english.ipr.gov.cn/news/headlines/602441.shtml>



BitTorrent site in China, BTChina, by closing it down as well. A special inspection mechanism is to be put into place by March 1, 2010.

MPA has had considerable success in its civil litigation program as well. In 2007, MPA filed complaints in the Shanghai Intermediate Court against a number of defendants for unauthorized offering of 20 representative MPA titles, 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 MPA 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 member companies for the unauthorized availability of 32 representative films. The case has since been settled to the satisfaction of the plaintiffs.<sup>15</sup>

Another encouraging development is the recent compliance shown by Chinese auction site Alibaba in response to takedown notices requesting the deletion of unauthorized listings offering the sale of pirated optical media, typically in large commercial quantities. Compliance rates have averaged at around 80% during the fourth quarter of 2009, with a 98% compliance rate noted in December. Such cooperation bodes well for the improvement of effective protection of content on the Internet.

**Recording Industry:** As detailed in previous submissions, the recording industry was the first 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 SARFT and the local copyright bureaus. But as is the case with other industries, these agencies' action have consistently generated little deterrence, and fines are low and rarely imposed. About half of the infringing websites included in administrative complaints filed in 2009 became inaccessible. It was, however, difficult to evaluate the results due to the lack of transparency on the part of administrative authorities in disclosing information to the recording industry. Practices at a few provinces to terminate Internet access of the complained domain names appeared to be helpful in preventing resumption of infringing service in other provinces, although such actions are rare. Although some websites of smaller scale have been taken down, such actions have had little impact since the major source of online piracy has been Baidu and other large and powerful services that generate huge profits from advertising and from increased traffic for providing access to infringing materials.

In its 2009 submission, IIPA detailed the tortured history, dating as far back as 2005, of the international record industries' civil litigation against Baidu.<sup>16</sup> On January 20, 2010, the Beijing No. 1 Intermediate People's Court found that Baidu's MP3 deeplinking search service did not infringe the rights of Chinese and international record companies. While the decision remains to be fully analyzed, the court apparently decided that Baidu did not have "reason to know" that the tracks to which it was linking were infringing under Article 23 of the Internet regulations, despite the fact that it actively provided full indexes of popular songs, and knew that the sites being linked to were not those of the only legitimate licensees of the plaintiffs. However, it did hold that Sohu/Sogou (in a companion case) did infringe a few tracks that were part of a notice & takedown request made by the plaintiffs, although the damages awarded were a dismal RMB1000 (US\$146) per track.

These cases dealt a devastating blow to both the Chinese and international music industry and permit Baidu and other services in China to continue to dominate the online music market in the country without paying one renminbi in compensation to the creators who drove the growth of this service in the first place, allowing it to be

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<sup>15</sup> 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\$10,237). <http://transasialawyers.com/newsletter/prc-telecoms-media-technology-law-newsletter/14-january-2009>.

<sup>16</sup> <http://www.iipa.com/countryreports.html> at 89

listed on major stock exchanges around the world. These decisions are not in line with the decisions of previous Chinese courts.

The recording industry filed administrative complaints with NCAC, MOC, SARFT and NAPP, however, only 53% of the sites became inaccessible. It is unknown whether the sites were ordered taken down by the administrative bodies since no official results were received by the industry. More deterrent administrative actions are needed before its enforcement can be said to be effective. The recording industry also sent over 9,000 takedown notices to ISPs and content providers in 2009, with only about half of them taking down infringing content.

**The Software Industry:** In an effort to reduce growing Internet piracy, BSA significantly increased the number of notices sent to ISPs in 2009 -- over 258,000 notices, up 440% from 2008. Auctions sites are also a big problem and 338 such sites were taken down in 2009.

Most significant, however, and a landmark development in the area of online criminal enforcement, is the conviction of the owners of the Tomato Garden website, [tomatolei.com](http://tomatolei.com), on August 20, 2009 by the Suzhou Huqiu District Court. The operator of the site and the founders and managers of the company were sentenced to 3.5 years in prison (for the founders) and two years (for the others) and fined RMB 1 million and RMB100,000 each, respectively. The company itself was fined RMB8.77 million (US\$1.28 million) and illegal income of RMB2.92 million (US\$427,412) was confiscated. The complaint was filed by BSA with the NCAC/MPS in June 2008 and the case was then transferred to the PSB.

[Tomatolei.com](http://tomatolei.com) was one of the country's most popular websites dealing in pirated software. The owners offered free downloads of a modified version of Windows XP to an estimated 10 million users and the program was copied and resold extensively by software dealers around the country.

This case is the first criminal conviction for major online piracy of software, and IIPA and BSA commend NCAC, MPS and the PSB in Suzhou (that made the case a priority during the 2008 online piracy campaign) and the courts for pressing a case which will have a significant deterrent impact throughout China.

**The Publishing Industry:** The Kangjian Shixun case mentioned above has been pending for over three years, and remains one of the publishing industry's most pressing problem in China. AAP has met on numerous occasions with authorities and provided whatever information was requested. This is a blatant case of piracy, resulting in substantial damages to publishers that it needs to be acted on expeditiously. Unfortunately, the matter remains stalled at the administrative level. It is hoped, and expectations are high, that the new Library Notice will result in action on this matter (and similar cases) and serve to end infringing conduct of this nature. It will only result, however, if deterrent penalties are imposed on infringers. The case is serious enough to warrant criminal prosecution<sup>17</sup> and the authorities should cease delaying taking such action.<sup>18</sup>

In 2008, the publishing industry discovered and conducted an investigation into another Internet operation that facilitated access to online journals in a manner similar to the entity KJ Shixun. In mid-2009, the industry initiated an administrative complaint with the NCAC against the entity, which was providing unauthorized access to over 17,000 online journal articles published by foreign publishers to universities and other organizations. The case remains pending, and publishers will continue to pursue the action in 2010.

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<sup>17</sup> The authorities have brought criminal cases against book piracy. In 2008, a book posting and download case involving just over 1,300 titles on an ad-supported website was concluded with a conviction and a 1 ½ years imprisonment sentence.

<sup>18</sup> AAP reported in IIPA's 2008 submission that its complaint against [www.fixdown.com](http://www.fixdown.com) and related sites received good attention from NCAC and the Guangdong copyright authorities, and the site was taken down soon after it was listed as one of China's "Top 50" Internet priorities.

**Other barriers to effective Internet enforcement:** Below we list some of the other procedural barriers that stand in the way of China building an effective and deterrent enforcement system.

*Non-deterrent civil damage awards:* The recording industry's civil cases against Baidu, Sohu/Sogou and Yahoo! CN illustrate a critical problem faced by copyright owners in China's civil court system. In the Yahoo and Sohu/Sogou cases, the damages were *de minimis*, limited to a few tracks, and provided little deterrence to the defendant. In the Yahoo! CN case, US\$25,000 in damages was awarded for 229 tracks infringed, an average of about US\$50 per song; in Sohu/Sogou an average of US\$145 per song. 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. For example, the average damages awarded in the recording industry's cases<sup>19</sup> 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 RMB400 (US\$58.50) per title in 2008 and averaged about RMB1,000 (US\$145) per title in 2009.

*Ineffective regulations on the transfer of cases from the administrative to the criminal system:* 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.<sup>20</sup> However, with a few exceptions (some of which are mention in this submission), 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. A clarification of how such thresholds apply should issue and be widely circulated throughout all the agencies responsible for enforcement.<sup>21</sup> Second, as discussed further below, the PSB demands that rights holders prove that in effect the thresholds have been met before they will investigate a case, instead of requiring a "reasonable suspicion" that a crime may have been committed.

*Procedural rules covering take down notices to ISPs:* 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 (though takedown compliance rates remain too low) and rights holders are monitoring the situation to ensure that it continues working. However, in the Baidu and Sohu/Sogou decisions, the Court's interpretation of Article 14 of the Internet Regulation requires rights holders to attach a "copyright verification report" to the notice, which makes it even more burdensome for rights holders to notify ISPs or other entities of the infringing content or activities.

*Onerous evidentiary rules in civil and criminal cases:* 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

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<sup>19</sup> 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.

<sup>20</sup> *Opinions on the Timely Transfer of Suspected Criminal Cases Encountered in the Course of Administrative Law Enforcement* (Issued by the Supreme People's Procuratorate, the National Office of Rectification and Standardization of Market Economic Order, the Ministry of Public Security and the Ministry of Supervision, March 2, 2006.) ("Criminal Transfer Regulations").

<sup>21</sup> 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.

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 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; (d) allowing repertoire or title-wide injunctions and e) formalizing the release of information obtained in the course of conducting administrative and/or criminal enforcement actions to facilitate civil litigation. These are serious deficiencies in the civil system that will affect Internet cases and have affected hard goods cases already.

*Difficulties in obtaining accurate IP addresses and subscriber identities:* 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 MIIT and NCAC requiring ISPs to maintain accurate, up-to-date contact information. This information should be provided on the MIIT 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. Even worse, search engines or other deeplinking services often deeplinked to unauthorized song files on some unknown IP addresses which did not appear to have a website and thus their owners' or operators' identities are unascertainable. This has also greatly hampered enforcement actions.

Another hindrance that NCAC and the Internet division of the PSB had reported to IIPA and its members is the difficulty of getting infringers' IP addresses and identifying rights holders. As early as 2006, 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.

**Criminal enforcement generally:** Before turning to piracy of "hard goods," end-user piracy of software and other non-online piracy and enforcement matters, IIPA must repeat what it has emphasized in every submission it has filed on China – namely, the critical need for a significant increase in criminal prosecutions for copyright piracy to create deterrence in its enforcement system, including against Internet piracy. Chinese leaders have repeatedly said that criminal enforcement is a necessary component of its enforcement system. However, attempts by industry to obtain it have been met with great resistance both as a matter of political will and as a result of legal and procedural barriers. Unfortunately, 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. China has yet to fulfil its promises in the JCCT to increase significantly the number of criminal prosecutions for copyright piracy, though this submission details some very significant criminal decisions in 2009 which IIPA commends.

In its 2009 submission, IIPA summarized its review and analysis of criminal cases reported on in Chinese news reports. Through 2008, that record was improving, but continued to fall far short of what would be required to reduce the continuing high piracy levels in China.<sup>22</sup> Without significant increases in criminal prosecutions resulting

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<sup>22</sup> See discussion at <http://www.iipa.com/countryreports.html> at 92-93. IIPA has not formally updated that research for this submission but as of February 2009, we counted 27 criminal convictions in 2008 alone for copyright infringement compared to only six convictions in prior years. Six of the total number of cases involved only the retail sale of pirate product, with two involving street vendors, which was a noteworthy advance. The major *Summer Solstice* case involving pirated software and an international piracy ring was concluded with deterrent penalties imposed. Six of these cases involved Internet crimes and this year we report on a major software infringement criminal case (see below).

in deterrent penalties and a willingness (a) to devote the necessary resources to such prosecutions, (b) to jointly develop criminal investigations with copyright owners who may have more market intelligence (c) to seek assistance from rights holders with respect to training etc., and (d) 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.<sup>23</sup> China must do the same. IIPA hopes that criminal cases reported in this year's filing, for both Internet as well as for hard goods piracy, may be a signal that more resources will be devoted to criminal enforcement in 2010.

**Hard Goods Piracy:** Piracy of physical product, or "hard goods," remains rampant in China. This type of piracy 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. It also includes the "hard disk loading" of software, without a license, on computers for sale, the loading of pirate music on karaoke machines and on mobile devices and the commercial reprinting and photocopying of books and journals. In addition, camcording piracy has become source of pirate films on UGC sites and as masters for pirate DVDs. The first camcording case in China (of a Chinese film) was reported in November 2008 but since China has no camcording law, the three suspects were release by the police. This continues to this day.

The piracy levels for video, audio and entertainment software in OD formats continue to range between 90% and 95% of the market. The piracy rate for PC software (primarily unauthorized use of software by enterprises, in government and SOE's and by consumers) remains at 80% of the market, the same level as in 2008.

**Optical disc factory piracy:** OD piracy at the manufacturing/factory level continues as a major problem. 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.<sup>24</sup> A considerable amount of very high quality pirate Chinese OD production continues to be exported. Infringing product from China continues to be found in many other countries.

Considerable effort was made during 2006 and in early 2007 by the recording and motion picture industries, as well as 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, 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. However, the Chinese government was unwilling to cooperate with rights holders or governments in such an endeavor.

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Four of the cases involved convictions for video piracy. To the best of our knowledge, none of these criminal cases involved the prosecution of an OD factory, something industry has sought for over 15 years, as far as we know, without success.

<sup>23</sup> South Korea, Singapore, Taiwan and Hong Kong are examples of countries where criminal enforcement has been able to significantly reduce piracy levels.

<sup>24</sup> MPA reports that HD disks are being fraudulently sold in China as Blue-ray disks. There are also reports that plants are manufacturing pirate blue-ray disks for export and seizures have occurred throughout Asia and elsewhere.

IIPA and the U.S. government have repeatedly urged the Chinese government to bring criminal actions against OD factories engaging in piratical activities. In its 2007 submission, IIPA reported on administrative actions 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 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. Unfortunately, these referrals did not result in any criminal prosecutions. The PSB offered a variety of explanations for its failure to pursue criminal prosecutions based on the referrals: claiming that the cases had to be brought initially to administrative authorities, or that the evidence presented 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,<sup>25</sup> and with respect to the second reason, China stands alone in the world in apparently requiring more than “reasonable suspicion” of a crime before commencing an investigation. IIPA understands the “reasonable suspicion” criterion is under study but no formal change has yet occurred. Until China criminally prosecutes factory owners engaged in pirate production, there is little hope that levels of piracy in this area can be significantly reduced.

**Piracy at the wholesale and retail level:** Raids and seizures at the wholesale/warehouse/distribution level continue to turn up massive quantities of pirate product. On April 22, 2009, the Chinese authorities launched another of their annual “campaigns” in 31 provinces all over China. The authorities reported seizing 46.85 million units of pirated audiovisual product, pirated business and entertainment software and pirated publications. This was down from the seizures reported from January-November 2008, when 76.85 million “illegal publications” which included 69.71 million “pirated audiovisual products,” 12 million pirated books and 2.58 million copies of pirated software and “electronic publications” were seized.

Unfortunately, these annual “campaigns,” while always involving significant seizures of pirate product at both the wholesale and retail level, have not resulted in any meaningful improvement in the market for legitimate product. This is due to the lack of deterrent penalties being imposed at the administrative level on establishments dealing in pirate product, and the failure of its criminal system to bring such effective deterrence. In its 2007 submission, IIPA reported on the result of outside surveys on the impact of the 2006 “100 Day Campaign,” directed primarily at retail piracy, on the availability of pirate product in the marketplace. While seizure statistics were very high (and continued to be high through 2009), those studies concluded that pirate product remained available throughout the 2006 campaign in virtually the same quantities as before the campaign commenced. While pirate product tended to become less visible in retail establishments and was made available clandestinely from catalogues and stocks hidden at the rear of stores or down back alleyways, this did not substantially reduce the piracy rate at the retail level and pirate activities tended to return to normal when the campaign concluded.

Unfortunately, and despite the repeat of these campaigns in 2007-2009, including during the Olympics, industry still cannot report any meaningful improvement in the retail marketplace. Reports are that retail and street

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<sup>25</sup> Taking cases through the administrative machinery slows the case down, risks that evidence will not be preserved and under applicable criminal rules is not necessary. Indeed, the PSB is obligated to take cases directly where criminal conduct is demonstrated. See Article 84 of the *Criminal Procedure Law of the People's Republic of China* (adopted at the Second Session of the Fifth National People's Congress on July 1, 1979, and revised in accordance with the *Decision on Amendments of the Criminal Procedure Law of the People's Republic of China*, adopted at the Fourth Session of the Eighth National People's Congress on March 17, 1996). See also, Article 18 of the *Rules of Public Security Authority on the Procedure of Handling Criminal Cases* (promulgated by the Ministry of Public Security under Decree No.35 on May 14, 1998).

vendor piracy overall has not significantly diminished, and piracy rates remain as high as ever. Annual legitimate sales recorded by the Guangdong Audio and Video Distribution Centre in Guangzhou in 2009 fell 97% compared to 2003. What is needed, of course, is the imposition of fines and other sanctions at the administrative level which truly deter pirates from continuing in this business, not just seizure of their pirate product available at that time and low fines which amount to the “cost of doing business.” This will in turn require that the NCAC and local copyright bureaus be given significantly more manpower and resources than they now have. In addition, there needs to be significantly greater criminal enforcement against the distribution and sale of pirate product, through lowering the thresholds or, at a very minimum, calculating them through reference to prices of legitimate product. The PSB and SPP must devote greater resources to bringing high profile, well-publicized cases with real deterrent sanctions. In 2008 and 2009, there appears to have been an uptick in criminal enforcement against retailers. For the situation to improve, this must continue at a far higher rate.

There were a number of important civil cases decided in 2009 involving software piracy:

In July 2009, Microsoft won a few significant civil judgments for corporate end-user piracy. This included the case in Shanghai against Dare Information Industry Ltd. Co., a subsidiary of a listed company, in which the disclosure rules on IP infringement litigation were applied to the parent company for the first time in a case involving software piracy. There was also the case against Guangdong Huaxing Glass Co., Ltd. in Fuoshan where the court mediated the case and defendant paid RMB500,000 (US\$73,180) in compensation and RMB1,000,000 (US\$146,320) for software legalization. Also in July, Microsoft, Adobe and Altium brought a civil action in Shenzhen against CRS Electronic Co for end-user piracy. The court granted an evidence preservation order for the first time in a software end-user piracy case and the defendant paid the plaintiffs RMB780,000 (US\$114,129) in compensation.

In July 2009, Microsoft won a significant civil judgment for “hard disk loading” against Beijing Strongwell Technology & Development, one of the larger custom PC dealers in Beijing. In another “hard disk loading” case brought in Shanghai, Microsoft sued the Shanghai HISAP Department Store, the court awarded a total of RMB700,000 (US\$102,430) in damages and costs. Compensation in this case reportedly followed the SPC’s July 2009 announcement requesting civil judges to award damages on the “full compensation” principle.<sup>26</sup> Microsoft also won an important “hard disk loading” case against Beijing Sichuangweilai Technology & Development, one of the larger custom PC dealers in Beijing with RMB460,000 (US\$67,310) in damages.

In a case involving infringement of the Graduate Management Admission Test (GMAC), the Beijing No. 1 Intermediate People’s Court found that Beijing Passion Consultancy Ltd. infringed and awarded the plaintiff RMB 520,000 (US\$76,087) in damages. All these cases are welcome developments and IIPA hopes that damage awards continue to increase.

**Enterprise End-User Piracy and Government Legalization of Business Software:** Chinese authorities have not been successful in their efforts to address the pervasive use of unlicensed software by enterprise end-users. Such piracy accounts for the largest proportion of losses suffered by the U.S. software industry in 2009 – an estimated **\$3.078 billion**. Because of the lack of real deterrence in the Chinese market, the software piracy rate remains the same as it was in 2008 – **80%** of the market.

Enterprise end-user piracy is not viewed by the authorities as a crime in China, so there is no criminal enforcement against end-users (as distinguished from commercial counterfeiters where the thresholds are met). Systemic change in addressing enterprise end-user piracy will require criminal enforcement. In April 2007, the Supreme People’s Court (SPC) finally made clear that, under Article 217 of the criminal law, unauthorized

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<sup>26</sup> <http://www.chinaipr.gov.cn/news/government/283006.shtml>



reproduction *or* distribution of protected software and other copyrighted materials qualifies as a crime. Clearly, the unauthorized use of software in enterprises (or under-licensing) involves reproduction. But the SPC has not clarified, and the enforcement authorities will not agree to take the position that such infringement meets the “for-profit” criterion in Article 217, even though income received through advertising meets this test. Other countries with this same test have been able to conclude that the conscious lowering of the business cost of licensing legitimate software contributes directly to the profit-making purpose of any enterprise. IIPA and BSA urge the SPC and/or the PSB and SPP to clarify the law and commence criminal prosecutions for end-user software piracy.

Administrative and civil enforcement remain very weak and ineffective against the massive scale of the problem. NCAC and the local copyright bureaus are woefully understaffed. They conduct some end-user raids, but cannot, even with the best of intentions, undertake meaningful enforcement with deterrent impact without significantly more manpower. In 2009, BSA lodged 23 complaints against end-users with CAs and LECAs and 19 raids were undertaken. Thirteen cases were settled and only three cases were closed with administrative fines. The maximum fine was only RMB20,000 (US\$2,926), hardly deterrent and of little consequence for other companies that continue to use unauthorized software. It is patently obvious that this level of deterrence remains woefully insufficient against the scale of the problem. In addition to adding significant staff and resources at NCAC, CAs and LECAs, more political will must be demonstrated to take action against enterprise end-user piracy and more administrative fines of greater severity must be issued. Failure to confiscate equipment in many cases is also a problem. BSA also brought three civil cases in 2009 against end-users, a drop from 7 in 2008. Six civil cases were settled in 2009.

The civil and administrative cases cited above have been welcome but have not yet had a sufficient deterrent impact to 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.

Unauthorized use of software within government offices and SOEs in China is another significant cause of piracy losses faced by the business software industry.<sup>27</sup> With respect to government legalization, China made a commitment in the 2005 and 2006 Joint Commission on Commerce and Trade (JCCT) meetings to complete legalization within all government agencies, including provincial and local level government offices, by the end of 2005, and to ensure legalization in SOEs and Chinese enterprises. There has been little transparency on what has been done to meet these important commitments. Moreover, they need to be implemented on an ongoing (not one-time) bases, utilizing tools such as Software Asset Management (SAM) to ensure compliance.

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 has been the subject of endless discussions but still no permanent plan is in place. Toward the end of 2007, NCAC announced a list of model enterprises for software legalization. However, as of 2009, it still 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.

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

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<sup>27</sup> 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 2008 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.



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 used by end-users 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 yet it is actually shifted to unlicensed Windows in channel or by end-users, 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.

**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 and 2009 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.<sup>28</sup> In its 2007- 2009 submissions, IIPA applauded the unprecedented administrative actions taken by GAPP, NCAC and local authorities on this issue, many of which resulted in administrative fines. While some progress has been made, piracy continues at high levels.

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.<sup>29</sup> IIPA and AAP hope this good cooperation continues into the high seasons (February/March and September/October) of 2010.

One area of possible improvement concerns transparency in the process of inspections, raids and formulation of administrative decisions. As reported above, this transparency has been enhanced by NCAC with some other industries and in some provinces.

In its 2009 submission, IIPA reported that libraries had begun 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

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<sup>28</sup> IIPA notes that this problem plagues Chinese publishers as well, with locally-produced Chinese books found in every raid conducted to date.

<sup>29</sup> The pertinent periods for enforcement against university textbook centers—or any type of copying of academic materials—surround the start of university terms. These most often begin in September and March. Several of the government investigations in response to 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 three years.

books. In mid-2009, publishers conducted a letter campaign directed at 20 university libraries, informing their administrators that pirated books had been found on their library shelves and requesting that they remove the infringing materials immediately. Of the 20 libraries, 8 responded positively, either stating that the infringing books would be or had been removed.

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 prior years, MOE has been reluctant to engage, and indeed has consistently refused meetings with rights holders during 2008 and 2009. The past year saw no apparent progress in implementing the notices issued by the Ministry in late 2006.<sup>30</sup> 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 three 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 are fully implemented.

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 ambulatory street vendors throughout China, thus making enforcement difficult. It is rather ironic that pirated copies of books that have been denied entry into China for censorship reasons are increasingly prevalent in the market. The content control mechanisms prevent or delay the entry of legitimate books into market, thus allowing the marketplace to be saturated with pirated versions.

**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 for piracy of U.S. entertainment software.

**Internet café and public performance piracy:** Piracy in Internet cafés is a major concern. Virtually all of these cyber cafés make available unauthorized videos and music for viewing, listening or copying by customers onto discs or mobile devices.<sup>31</sup> 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.

**The public performance of musical compositions:** On November 10, the State Council publicly announced that commencing January 1, 2010, China's broadcasters must begin making payments to copyright owners of musical compositions (songwriters and music publishers, through performing rights societies). The *Measures on the Payment of Remuneration to the Copyright Owners of Audio Products* would correct a longstanding violation by China of their TRIPS/Berne Convention obligation to compensate copyright owners for the

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<sup>30</sup> 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.

<sup>31</sup> 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](http://www.media.ccidnet.com/art/2619/20050814/310051_1.html).

broadcast of musical composition. However, according to U.S. rights holders, such payments are wholly inadequate and the tariff would result in one of the lowest payment rates in the world. Broadcasters could either choose to pay rights holders based on very low percentage of a station's advertising revenue or pay RMB0.3 (US\$0.04) per minute for music paid on the radio or RMB1.5 (US\$0.22) for TV. Advertising revenue for Chinese broadcasting was reported to be US\$10.16 billion in 2008.<sup>32</sup> 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 recovery for U.S. composers and music publishers would be tens of millions of dollars below what would be a fair rate. In last year's submission, IIPA urged that the new tariff be retroactive, at least to the date of China's joining the WTO. The new tariff is prospective only.

## **COPYRIGHT LAW AND RELATED ISSUES**

On January 26, 2009, the WTO DSU panel issued a final decision in the dispute in which the U.S. asserted that China was in violation of its WTO TRIPS obligations. 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. Based on the definitions and discussion of what constitutes “commercial scale” piracy, China will need to revisit its criminal thresholds and consider amending Articles 217 and 218 of the Copyright Law.

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.

**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 has yet to clarify coverage for temporary copies. There continues to be 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. IIPA notes that over 100 countries around the world extend, or have committed to extend, such protection in accordance with their (and indeed China's) obligations under the WCT and WPPT
- **Scope of Coverage:** Although SCLAO's Director General Zhang has taken the position that all rights are covered directly by Article 47 of the Copyright Law, IIPA remains concerned that textual vagueness may result in an interpretation under which Article 47 applies only to the right of communication to the public. IIPA reiterates that further regulations would be highly desirable to remove any ambiguity in coverage and urges this result.

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<sup>32</sup> <http://www.onscreenasia.com/article-4897-chinainfocus-onscreenasia.html>

- **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. Notwithstanding these laudable improvements, the test for what constitutes a circumvention device still remains unsatisfactory, and despite the narrowing of exceptions, they remain overbroad in some areas.
- **Service provider liability, notice and takedown, 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 receiving a compliant notice). Exceptions still cause some concern, especially the Article 9 statutory license, which Director General Zhang confirmed applies 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. While IIPA and RIAA also believe this to be the case, the recent Baidu decision seems to cast doubt on the extent to which Article 23 applies to deeplinking in the absence of actual knowledge. Other necessary clarifications are: that email notices are permitted and that takedowns following notice must be within 24 hours,<sup>33</sup> 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.<sup>34</sup> 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, including detailed copyright verification reports, 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 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.<sup>35</sup>

**Administrative-Criminal Transfer Regulations:** The amended Criminal Transfer Regulation has not assisted greatly in securing more and easier referrals from administrative agencies to the PSB. The regulations leave unclear whether transfers were required upon “reasonable suspicion” that the criminal thresholds had been met. Indeed, the enforcement authorities have taken the position that “reasonable suspicion” is insufficient to result in a transfer. In assessing whether to accept case transfers from administrative authorities, the PSB requires proof of illegal proceeds/gains obtained by the infringers. However, administrative authorities lack the investigative power to collect the type of evidence necessary to fulfill this requirement. As a result, administrative authorities are often unable to transfer cases, and are left only with the option of seizing infringing productions, producing little deterrence. While we report a number of transfers to criminal authorities in this submission, IIPA urges the practice

<sup>33</sup> The January 20, 2010 Declaration on Content Protection contains the principle that takedowns should be accomplished within 24 hours.

<sup>34</sup> 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.

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

be reversed and, if necessary, that the “reasonable suspicion” rule be expressly included in amended transfer regulations. In those cases where copyright owners have worked closely with administrative authorities to develop criminal complaints, some have experienced great difficulties in obtaining case updates from the PSB after the case transfer.

**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 has acknowledged that further amendments to the copyright law are needed<sup>36</sup> to bring China fully into compliance with its international obligations, particularly under the WIPO Internet Treaties. This view has also been expressed by Chinese experts at a number of recent seminars held in China on protection of copyrights on the Internet. IIPA understands that the Copyright Law amendment has now begun and it urges that these issues be dealt with in the amendment 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 full communication to the public rights, including performance, broadcast, simulcast and cable transmission 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.

Additionally, in order to comply with the WTO panel's recent decision, Article 4 must be amended to remove all language that limits the scope of subject matter eligible for full copyright protection. WTO rules require that this action must be taken no later than March 2010.

**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 cases of piracy on a commercial scale as required by TRIPS Article 61. Examples of omissions include the exhibition and broadcast right, the translation right and others, the infringement of which do not constitute crimes even if done “on a commercial scale.” In addition, China is one of the only countries in the world that requires proof that the act in question was undertaken with the “purpose of reaping profits,” and is the only country we know of that has a threshold (“gains a fairly large amount” or “when the amount of the illicit income is huge”) for criminal liability based on pirate profits or income.<sup>37</sup> China should remove the “purpose of reaping profits” standard since commercial scale piracy can be, and in the digital age often is, engaged in without any purpose of reaping profit (e.g., on a P2P Internet site where no money is exchanged, or in the case of hard-disk loading where the software might be

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<sup>36</sup> Interview with NCAC Vice Minister Yan Xiaohong, June 13, 2007, BBC republishing and translation of original Xinhua text from June 9, 2007

<sup>37</sup> 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.

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. It is also important to criminalize the manufacture and distribution of circumvention devices. Thus, IIPA proposes 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).<sup>38</sup> 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.<sup>39</sup>

**Criminal thresholds should be further lowered or abolished entirely:** The 2004 and 2007 JIs made only minimal decreases in the monetary thresholds required for criminal prosecutions, and left in place the requirement that calculations of “gain” or “illicit income” are to be assessed at pirate prices (as opposed to legitimate retail prices). Further, copyright owners have not found that the lowering of the copy threshold in 2007 has proven very helpful in generating new criminal prosecutions. China should further lower its thresholds or abolish them. As noted above, IIPA believes that China’s current thresholds are inconsistent with the test laid out by the WTO panel and thus should be promptly revisited by the SPC.

A new challenge is how to meet the threshold in the case of Internet infringement. The severity of Internet piracy clearly calls for adjustments to the thresholds in the JIs so that Internet piracy, when on a commercial scale, is actionable with clear copy thresholds and even if pirate profit or “illegal business volume” is not proved.

As a result of these onerous evidentiary threshold requirements, law enforcement agencies are often reluctant to take actions against alleged Internet infringers. This problem is further exacerbated by the inability of rights holders to investigate the content or to seize the servers of alleged infringers in order 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 broadcasting, simulcasting and cable transmission, 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. China should adopt an exclusive right of public performance and broadcasting for sound recordings, permitting the Chinese performing rights society to negotiate freely a fair payment for this right.

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<sup>38</sup> In the JCCT, the Chinese government committed that the Chinese Ministry of Public Security and the General Administration of Customs would issue regulations “to ensure the timely transfer of cases [involving pirate exports] for criminal investigation.” The JCCT outcomes indicate that the “goal of the regulations is to reduce exports of infringing goods by increasing criminal prosecution.”

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

China should also establish clear rules that promote more responsible practices on the part of all players involved in the digital transmission of copyright materials, following the example set out in the recent *China Internet Industry Declaration on Content Protection*. 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:** As discussed above, 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 to electronic media (e.g., 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 (both foreign and local) to Chinese consumers. On December 21, 2009, the WTO Appellate Body issued its decision on the appeal by China of the WTO Panel's report on certain Chinese market access barriers to the motion picture, recording and publishing industries.<sup>40</sup> The Appellate Body affirmed the Panel's ruling that requires China to (a) allow U.S. companies to import freely into China (without going through the government monopoly) films for theatrical release, DVDs, sound recordings, and reading materials; (b) distribute certain reading materials and sound recordings in electronic form; (c) remove certain restrictions that impose discriminatory operating requirements on foreign-invested distributors of reading materials and DVDs; (d) remove burdensome requirements that discriminate against the distribution of imported reading materials. These copyright industries had sought to remove these and other market access barriers ever since China joined the WTO in 2001 and may must now be eliminated as a result of this WTO case.<sup>41</sup>

This landmark WTO case will, within an expected 12 to 15 months, require China to open up its market for these industries in significant ways and we hope begin the process of undoing the vast web of restrictions which hamper these industries not only from doing business in China, but in engaging effectively in the fight against piracy there.

There are a range of restrictions, affecting more than a single copyright industry, some of which must be eliminated as a result of the WTO case, and all of which stifle the ability of U.S. rights holders to do business effectively in China. 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, to enter the Chinese market, if at all, only as a partner in a minority-share (up to 49%) joint venture with a Chinese company. These limitations must be eliminated.

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<sup>40</sup> <http://www.wto.int>, CHINA – MEASURES AFFECTING TRADING RIGHTS AND DISTRIBUTION SERVICES FOR CERTAIN PUBLICATIONS AND AUDIOVISUAL ENTERTAINMENT PRODUCTS, WT/DS363/AB/R, 21 December 2009.

<sup>41</sup>The U.S. government requested consultations in this case on April 10, 2007, supported by the China Copyright Alliance (a coalition consisting of MPA, IFTA, RIAA, IFPI and AAP). The U.S. requested the establishment of a WTO dispute settlement panel on October 11, 2007 and a panel was established on November 27, 2007. The panel rendered its confidential interim decision on April 20, 2009 and its final decision to WTO members and the public on August 12, 2009.

**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 not censored (and, of course, pirates do not submit their illegal wares for censorship at all). 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.

Earlier in this submission we cite to the Ministry of Culture's September 2009 *Circular on Strengthening and Improving Online Music Content Examination* which imposes unnecessarily burdensome censorship and ownership requirements on legitimate online music providers. The *Circular* 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, this imposes virtually impossible delays on these foreign businesses and the rights holders who license their product to them. In addition, the *Circular* interferes with the commercial licensing of foreign music by imposing on rights holders certain conditions in the licensing of their music, for example in the appointment of exclusive licensees for not less than 1 year period. The *Circular* will significantly hamper the development of a healthy legitimate digital music business in China, whilst making it easier for the pirates, who do not need to comply with these rules, to thrive.

Entertainment software companies continue to face lengthy delays in the censorship approval process, wiping out the window for legitimate distribution of entertainment software products, a window that is already shorter than for other types of works. Each entertainment software title must go through an approval process at the GAPP, which takes several weeks to several months.<sup>42</sup> Consistent with its approach to other industries, 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 is the ongoing dispute between GAPP and MOC on which agency has the authority to grant censorship review for online versions of games.<sup>43</sup> The review function should be lodged with only one agency, either the GAPP or the MOC. 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. MPA member companies had experienced a slow down in the censorship process, but the situation started to improve somewhat by the end of 2009. 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, compared with the 30-day timeframe that is typical in China. Pirates effectively enjoy a "protected window" where only illegitimate copies are available and consumers were given no legitimate alternative. If the GAPP 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.

**Restrictions on ability of trade association staff to engage in anti-piracy investigations:** Also affecting the ability of some copyright industries to do business in China are the severe restrictions on the ability of copyright industries' local trade associations from engaging in investigations in the anti-piracy area, as well as restrictions limiting the number of employees that trade associations may employ. Companies that invest in China are not subject to these same restrictions. Because copyright-based companies in certain sectors conduct virtually

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<sup>42</sup> 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.

<sup>43</sup> This overlapping jurisdiction and these interagency power struggles engulf most of the agencies responsible for cultural and copyright product, including the MOC, GAPP, SARFT and the MIIT to the detriment of the industry affected.



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.<sup>44</sup> The universal experience of nations in which the international record companies do business is that local artists have expanded opportunities to have their music recorded and distributed widely. The in-country presence of U.S. companies also has brought jobs and expertise in a wide variety of areas. China should permit U.S. (and other foreign) sound recording producers to engage in:

- the integrated production, publishing and marketing of sound recordings;
- production, publication and marketing their own recordings in China;
- the signing and management of domestic artistes;
- the distribution of sound recordings via digital platforms and in physical formats; and
- the importation of finished products of their own sound recordings.

**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. These restrictions should be eliminated in accordance with the WTO panel decision.
- **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. These restrictions should also be eliminated in accordance with the WTO decision.
- **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.

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<sup>44</sup> The work of these companies encompasses a wide range of activities, including developing and investing in state-of-the-art recording, mastering and engineering facilities; identifying and training talented singers, songwriters, composers, and musicians; promoting and advertising acts and recordings; establishing efficient and competitive distribution systems to take products from recording studio to replicator to wholesalers to retailer; and using global arrangements and distribution services to release products in markets outside the local market. U.S. record companies have long sought to bring these skills to China to develop and record Chinese artists for the Chinese market and for export.

- **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 foreign 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. This must be eliminated under the WTO decision. Foreign producers cannot directly distribute revenue-sharing foreign films but China has indicated to the WTO that distributors other than the China Film and Huaxia may apply to distribute foreign films, including through joint ventures with foreign producers.
- **Restricted market access for foreign satellite signals:** Foreign satellite channels may only be shown in three-star hotels and above and in foreign institutions. Moreover, foreign satellite channels beaming into China are required to uplink from a government-owned satellite for a fee of US\$100,000, placing a significant and unnecessary financial burden on satellite channel providers. Further, foreign satellite channels are not allowed carriage on local cable networks without government approval or landing permits. Offending news items on sensitive subjects in China are still routinely blacked out by officials who monitor all broadcasts over the national satellite system. Only a handful of foreign channels have been granted approval, and carriage is currently limited to Guangdong province.
- **Broadcast quotas, content restrictions, and restrictive license practices for satellite channels:** SARFT's "Regulations on the Import and Broadcasting of Foreign TV Programming" effective October 23, 2004, sets severe quotas on the broadcast of foreign content (e.g., no more than 25% of all content broadcast can be foreign films or television dramas, with a 0% allowance during prime time).<sup>45</sup> 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).<sup>46</sup>

<sup>45</sup> Broadcast of foreign film and television dramas may not comprise more than 25% of total air time each day and 0% during prime time (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.

<sup>46</sup> The "Interim Management Regulations on Sino-Foreign Joint Ventures and Sino-Foreign Cooperative Television Program Production Enterprises," effective November 28, 2004, sets out the 49% minority joint-venture restriction for "production ventures"; investment requirements of foreigners; licensure requirements; requirements that foreign partners must be "specialized radio or TV ventures"; restrictions

- **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. These “black out periods” artificially drive 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.
- **Regulations on Home Video Licensing Agreements:** The General Administration of Press and Publication (GAPP) requires that copyright owners enter into home video license agreements of not less than three years duration with their licensees in China – an unnecessary intrusion into copyright owners’ contractual rights.
- **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*, stymies the growth of the entertainment software sector in China. The ban even extends to development kits used in the creations and development of video games. The ban impacts not only foreign game publishers, but also 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 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:** In November 2009 the National Development and Reform Commission, the Ministry of Finance and the Ministry of Science and Technology issued a joint circular which would establish an accreditation system for a national catalogue of “indigenous innovation” products to receive significant preferences for government procurement. Among the criteria for eligibility for the catalogue is that the products contain intellectual property that is developed and owned in China and that any associated trademarks are originally registered in China. This represents an unprecedented use of domestic intellectual property as a market-access condition and would make it nearly impossible for the U.S. software products (and the products of other high-tech industries) to qualify unless they are prepared to transfer their IP and/or research and development to China. This November circular was followed in late December by the announcement that the government would develop a broader catalogue of indigenous innovation products and sectors to be afforded preferences beyond government procurement (i.e., including subsidies and other preferential treatment). The December announcement, which was issued by four Chinese agencies including the State Owned Assets Supervision and Administration Commission (SASAC), also raises the specter of China subtly encouraging its many state-owned enterprises to discriminate against foreign companies, including software companies, in the context of procurement, including for commercial purposes. In January, BSA and a broad array of other U.S. business associations sent a letter to five U.S. cabinet officials (State, Treasury, Justice, Commerce and USTR) urging them to make addressing China’s discriminatory

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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.

"indigenous innovation" policies a strategic priority in the bilateral economic relationship. It is noteworthy that these Chinese policies directly counter the repeated pledges by the Chinese government to avoid protectionism, including the joint commitment of President Hu and President Obama at their recent summit in November to pursue open trade and investment. They also are counter to China's commitments in the JCCT and US-China Strategic and Economic Dialogue (S&ED) to keep government procurement open to foreign-invested enterprises (FIEs) and its efforts to join the WTO's Government Procurement Agreement (GPA).

In addition, 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. Other examples of state-owned enterprises being instructed to prefer domestic software include a January 2008 "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". MIIT has also been known to encourage and commend those enterprises that have adopted indigenous software products in their legalization. All 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 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 a number of training and awareness programs throughout China in 2009. 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 2009, MPA sponsored and co-organized 15 trainings/seminars for over 1,500 administrative enforcement officials, police, prosecutors, IPR judges, Customs officials, and representatives from ISPs and ICPs, local copyright industries, with topics covering new challenges and strategies for the movie industry in the digital industry, trends in technological solutions for content protection, the need to amend China's copyright law, the impact of piracy on the film industry, and investigative techniques against Internet piracy and the identification of pirate optical disks, among other topics.

MPA assisted in organizing the following law enforcement trainings with the NAPP and its provincial offices:

- May – Hefei (50 officials from mainland China, Taiwan, and Hong Kong participated)
- July – Nanching (102 participants)
- August – Hefei (50 participants)

MPA assisted in organizing the following law enforcement trainings with the Ministry of Culture

- June – Fuzhou (130 officials from Fujian, Jiangxi, Shangdong, Sichuan, Guizhou, and Xinjiang participated)
- July – Hangzhou (78 participants)
- September – Nanjing (63 officials from Jiangsu, Guangdong, Gansu, Hainan, Chongqing, and Inner Mongolia participated)
- September – Chengdu (108 officials nationwide participated)

MPA assisted in organizing the following trainings with local Cultural Task Forces

- April – Shanghai (70 participants)
- July – Shenzhen (80 participants)
- November – Shanghai (86 participants)
- November – Qingdao (103 participants)

...and sponsored/participated in seminars and conferences

- July – Copyright protection for movies and music (84 attendees)
- November – International conference on trends in copyright protection (over 200 participants)
- December – Training seminar on copyright industries and digital technologies (120 participants)
- December – US-China Forum on frontier and hotspot issues for copyright protection over the internet (180 participants)

The record industry focused primarily on training for online enforcement and conducted over 20 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 offered two training seminars in 2009 on software enforcement and also provided training to the Qingdao and Guangxi copyright bureaus and in early June and in November joined with MPA and IFPI and others in seminar on amending the Copyright law. It also collaborated in mid-June with the SPC on a seminar on software end-user civil liability and litigation. BSA also provided seven SAM training for enterprises in six cities.

- March – Guangzhou (80 enterprises)
- April – Shanghai (40 enterprises)
- July – Guangzhou (60 enterprises)
- July – Chengdu (62 enterprises)
- July – Shenzhen (46 enterprises)
- November – Hangzhou (55 enterprises)
- December – Nanjing (44 enterprises)

# THE PHILIPPINES

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

### 2010 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** IIPA recommends that the Philippines be elevated to the Priority Watch List and that USTR conduct an Out-Of-Cycle Review (OCR).<sup>1</sup> IIPA commends the government of the Philippines for its work in addressing computer software piracy. Nonetheless, our recommendation that the Philippines be elevated is made in light of the continuing, and mounting, problems faced by other copyright industries. The OCR would be to assess whether progress has been made in reducing piracy and passing pending legislative initiatives.

**Background to Recommendation:** The Philippines is currently undergoing an Out-Of-Cycle Review (OCR) to determine whether it should remain on the Watch List or be elevated to the Priority Watch List. On November 9, 2009, IIPA reported that, while there is potential for positive change, piracy remains dominant in the market, and the situation in the Philippines has not improved significantly since IIPA's February 2009 Special 301 report. Therefore, IIPA recommended that the Philippines be placed on the Special 301 Priority Watch List. Our view has not changed. IIPA recommends conducting a review to determine whether the Philippines qualifies for benefits under the Generalized System of Preferences trade program, under which more than \$733.6 million of Philippine goods, or 10.8% of the Philippines' total imports to the U.S. in 2009, enjoyed duty-free access to the U.S. market.

**Executive Summary:** The 2010 election cycle in the Philippines nears, with the election to be held May 10, 2010. In the area of copyright protection, much has been left unfinished by the current Administration and Congress. The agenda includes passage of copyright amendments, the original drafts of which were introduced in the Congress more than a decade ago, and signing into law legislation to ban illegal camcording of movies in theaters. The agenda also includes dealing with specific piracy phenomena and streamlining the enforcement system, through the issuance of search warrants without fear of quashing the warrant, coordinated raids including *ex officio* actions, and deterrence-building criminal prosecutions. At the same time, key posts in the government are being or have already been vacated, including departures of the prior Chairman of the IPO Philippines, the prior Chairman of the Optical Media Board, and the IP Department of the National Bureau of Investigation (NBI). Thus, a new leadership comes on the job with major tasks ahead of it.

Copyright piracy remains a significant barrier to legitimate trade in copyright materials in the Philippines, causing losses to all the industries.<sup>2</sup> Piracy phenomena abound, including growing Internet piracy, software end-user piracy in businesses, mobile device piracy, book and journal piracy, illegal camcording of movies in theaters (which turn up as DVDs on the streets or on the Internet), retail shop and mall piracy, Pay TV theft, and some remaining pirate optical disc production being imported or exported. To combat these problems, industry works with the Philippine National Police (PNP), the National Bureau of Investigations (NBI), the Optical Media Board (OMB), all of which comprise the Philippine Anti-Piracy Team (PAPT). All these agencies provided some support for anti-piracy activities in 2009, including raids on retail piracy and companies engaged in end-user piracy of business software. The IPO Philippines reported seizures out of raids through June 2009 which matched the entire seizure numbers for

<sup>1</sup> For more details on the Philippines' Special 301 history, see IIPA's "History" Appendix to this filing at <http://www.iipa.com/pdf/2010SPEC301HISTORICALSUMMARY.pdf>, as well as the previous years' country reports, at <http://www.iipa.com/countryreports.html>.

<sup>2</sup> For example, business software piracy losses increased from US\$121 million in 2008 to US\$126.4 million in 2009, while business software piracy levels increased during the same period from 69% to 71%. This represented increased losses due to business software piracy for the fifth straight year, while the piracy level remains above the regional average. Music and record industry piracy losses and levels have always been high in the Philippines, at US\$112.1 million in 2009, slightly down from US\$117 million in 2008. The piracy level remained steady in both years at 83%. The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2010 Special 301 submission at [www.iipa.com/pdf/2010spec301methodology.pdf](http://www.iipa.com/pdf/2010spec301methodology.pdf). BSA's 2009 statistics are preliminary, representing U.S. software publishers' share of software piracy losses in the Philippines. They follow the methodology compiled in the Sixth Annual BSA and IDC Global Software Piracy Study (May 2009), available at <http://global.bsa.org/globalpiracy2008/index.html>. 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.



2008. While such seizure numbers are commendable, problems in the enforcement system remain, including difficulty in obtaining search warrants in cases of known or suspected piracy activities, and the ease of them being quashed; and the failure to establish IP courts, which in part may be responsible for the paucity of cases resulting in criminal convictions.

**Priority Actions Requested in 2010:** IIPA requests the following actions in the Philippines, 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 and that they are not easily quashed.
- Remedy enforcement bottlenecks, including inquests and preliminary investigations by the Department of Justice by streamlining signing procedures.
- Develop IP expertise in judges and prosecutors and re-establish specialized IP courts, with the goals of increasing speeds of dockets and enabling a significant number of cases, including criminal cases, to move forward in the system.
- Maintain raiding on suspected business software end-user piracy targets; run surprise and transparent inspections on all (licensed or unlicensed) optical disc plants and CD-R burning operations in cooperation with industry; take enforcement against piracy activities in the malls and against pirate book and photocopy shop operations both on and off university campuses; prosecute cases involving illegal camcording of movies in the movie theaters; and shut down some of the estimated 800 pirate cable systems, revoking their licenses or permits.
- Investigate and eradicate P2P and other Internet-based piracy, implement and improve current laws (like the E-Commerce Law), and draft and enact legislation to facilitate removal of infringing material or services from the Internet through fostering ISP cooperation and implementing an effective notice and takedown system.
- Issue implementing rules for the penal provisions of R.A. 8792, particularly on piracy.
- Provide funding for OMB verification visits, and allow right holders to participate in OMB plant visits and other investigations and accompany inspectors.
- Permit voluntary music collective management organizations (CMOs) to commercially operate without interference from the government.
- Launch measures to reward good and honest government work and work to eradicate corruption and compromises in IP enforcement (and take action to punish offenders).

### Legislation

- Pass as a matter of first priority an IP Code amendment Bill (SB880) aimed at implementing the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT) and making other positive changes.
- Finalize national legislation (HB5699, which passed third reading in February 2009, and SB3529 which passed third reading in January 2010) to halt illegal camcording of motion pictures, and promote and support implementation of the law and city ordinances through training for PAPT officers.

## PIRACY AND ENFORCEMENT CHALLENGES IN THE PHILIPPINES

**Criminal Court System Remains Dysfunctional and Non-Deterrent; Special IP Courts Needed:** Starting with the criminal inquest procedure at the Department of Justice, and ending with criminal trials, 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 extended trial period, many problems often arise, including the transfer of prosecutors and judges, eliminating any institutional memory of the case; the use of delay tactics by defendants' counsel 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. The expense and delay of seeking a judicial remedy, coupled with the recent warrant quashals, discourages private right holders from bringing civil cases. Defendants understand this and therefore also stand in a strong position when it comes to any criminal proceeding or settlement discussion.

No criminal copyright convictions were secured prior to 2002 for copyright piracy, and since 2002, there have only been five convictions under the Copyright Act.<sup>3</sup> To our knowledge there were no criminal convictions in 2009 for copyright piracy. Out of 132 raids run against motion picture piracy and business software end-user piracy in 2009, there were 89 pending criminal cases by the end of the year with no results. The largest criminal fine ever imposed in the Philippines for copyright piracy was a modest P200,000 (approximately US\$4,300). While two defendants were sentenced to one year in prison or more, in the case involving blatant and massive book piracy, the defendant absconded and remains at large. Unfortunately, law enforcement agencies/police have little interest in locating and apprehending the defendant who absconded. One major step which IIPA believes will make a difference would be the establishment of the long promised specialized IP courts in the Philippines, including criminal trial courts, in line with the President'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 would ensue. IIPA understands that the Intellectual Property Office held a public hearing for stakeholders on August 10, 2009 to discuss the establishment of new rules to govern IP litigation, with the proposed rules also addressing the creation of two or three pilot IP courts with national jurisdiction. The proposed rules were presented by IPO to the Chief Justice of the Philippine Supreme Court at the 2009 IP Colloquium for the Judiciary on October 23, 2009. As of mid-February 2010, to IIPA's knowledge, the special rules have yet to be approved by the Supreme Court. Though the timetable is uncertain, the courts should be made functional as soon as possible.

#### Effective Search Warrant Procedure in Copyright Cases Needed to Avoid Unjustifiable Quashals:

One of the most problematic 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 latest example was the 2008 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. Previous cases included the Telmarc Cable case,<sup>4</sup> coming on the heels of the search warrant quashal in the Solid Laguna decision,<sup>5</sup> which 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"

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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, Maraque 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)

<sup>4</sup> *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>.

<sup>5</sup> *Sony Music Entertainment (Phils), et al v. Hon. Judge Dolores Español et al*, G.R. No 156804, March 14, 2005.



[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.

These decisions are inconsistent with the Supreme Court's own decision in the Columbia case,<sup>6</sup> which held that affidavit evidence is sufficient to uphold the requirement of "probable cause" to obtain a search warrant and which the government has stated on numerous occasions is controlling precedent. Without the availability of a search warrant remedy – a TRIPS requirement – progress cannot be made in piracy cases in the Philippines. Search warrants, raids and follow up prosecutions should be obtainable on a transparent, reasonable and timely basis, and should not be quashed without full transparency and notice to rights holders. It is also increasingly important to get the courts to issue multiple warrants needed to conduct a thorough search of rows of retail stores selling pirated discs, where the violation of the law is obvious. Judges have hesitated to issue multiple warrants.

**Camcording Piracy:** The Philippines has become a regional hotspot for illegal camcording of movies at cinemas. The number of instances of illegal camcording forensically matched to the Philippines in 2009 was 21 while there were 44 additional instances in 2008. Philippine movie pirates engaging in this activity typically 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.<sup>7</sup> Infringing copies of U.S. motion pictures forensically linked to illegal copies made by camcorders in Philippine cinemas are distributed globally. Pirate versions sourced from illegal camcording are often available just two or three days after the theatrical release in the Philippines. This piracy has had a devastating impact on the life cycle of many 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.

In terms of enforcement, the local Metro Manila and Quezon City governments, and some government officials (e.g., the former head of the OMB) were early to recognize the scope of harm caused by illegal camcording, and IIPA recognizes their efforts to curtail it through targeted enforcement, and the issuance in Manila and Quezon City of local ordinances in 2008 making it illegal to use an audiovisual recording device in a movie theater. Legislation to ban camcording in theaters passed a third reading in the Philippine House of Representatives in February 2009 and in the Philippine Senate in January 2010. The bills must now be reconciled and forwarded to President Macapagal-Arroyo for signature. It would be highly disappointing if this bill did not become law. Swift and immediate enforcement actions should ensue against illegal camcording in 2010; we are aware of eight interdictions resulting in five arrests in 2009. We are not aware of the status of any prosecutions, however. IIPA also welcomes NBI's effort to create a complaint mechanism for illegal camcording. IIPA appreciates these efforts by the government, and views passage of the camcording bill as indispensable as it would, if enacted, specifically define the acts constituting unauthorized possession, use and/or control of audiovisual recording devices; and ease judicial enforcement easier since it would obviate the need to prove copyright infringement or provide evidence as to the subsistence or ownership of copyright.

**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 2009, thereby stunting the growth of the information technology sector. The piracy rate, estimated to be 71% in 2009, remained high compared to the regional median for Asia (which was 61% in 2008). Studies have shown that reducing the piracy level by ten percentage points in the Philippines will lead to job creation, likely in the thousands, the generation of significant tax revenues and greater contribution by the software industry to economic growth in the Philippines.<sup>8</sup>

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<sup>6</sup> 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).

<sup>7</sup> For example, in 2008, *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.

<sup>8</sup> See *The Economic Benefits of Reducing PC Software Piracy A Report by IDC*, January 2008, at [http://www.bsa.org/idcstudy.aspx?sc\\_lang=en](http://www.bsa.org/idcstudy.aspx?sc_lang=en).

The business software industry continued to receive good cooperation from PAPT in 2009, as PAPT conducted a number of end-user raids in 2009 which were successful in terms of items and value of illegal software seized. In addition, the OMB made visits to thirty companies suspected of using unlicensed Business Software Alliance-member software. The visits were not confined to Metro Manila and these efforts benefited software companies in terms of legalization of software usage inside businesses. One minor problem BSA encountered is that the Philippine National Police (PNP) has a lengthy approval process to apply for search warrants, depending on the availability of superior officers to sign the clearance. The establishment of IP courts will make this process easier. The Intellectual Property Rights Department (IPRD) of the NBI has new officials, namely, Atty. Dante Bonoan (Chief, IPRD) and Atty. Joel Tovera (Executive Officer, IPRD). The appointments of these two officials is a welcome development and their performance will be closely monitored by stakeholders in the coming months. The BSA has done two corporate end-user raids with the IPRD under Attorneys Bonoan and Tovera and the results are encouraging. IIPA hopes that with the appointment of a new OMB Chairman, Ronnie Ricketts, and these new NBI-IPRD officials that BSA will receive continuous support in 2010.

**Internet Piracy:** Internet usage in the Philippines continued to explode in 2009. The Philippines was fourth in the world in growth of broadband connections (12%) between the second and third quarters 2009, according to Point-Topic, adding over 500,000 broadband subscriptions in the year ending October 1, 2009 (growth of 12.32%), to reach a total of almost 1.5 million broadband subscribers.<sup>9</sup> A recent study by Universal McCann noted there were 37 million regular social networking users in the Philippines.<sup>10</sup> It is therefore not surprising that Internet piracy worsened significantly in 2009, 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 textbooks, reference books and trade books placed onto CD-Rs). Previously, a high percentage of Internet access to infringing sites occurred through the use of Internet cafés; thus, piracy activities online were limited geographically and to certain demographics. Now, high-speed Internet direct-to-home connections and connections through a wireless LAN have become popular, as have inexpensive plug-in USB LAN devices. In addition, the proliferation of low-cost notebook computers and “wi-fi” hot spots has resulted in more people gaining access to the Internet in the Philippines.

The music industry experienced a 19% decrease in legitimate physical sales, which can be attributed at least in part to Internet piracy, and which was not replaced by legitimate Internet sales. It is also somewhat ironic that physical piracy of music (e.g., on CDs) has declined due to rising Internet piracy. From a commercial standpoint, the physical market still exists, but the focus of pirate product in physical disc format is on older established acts, meaning younger acts are being illegally downloaded on the Internet, which in turn makes it more difficult or impossible for them to break into the legitimate market. In addition, the Internet has become the source of choice for mobile device pirates and for burning onto recordable discs, and conversely, camcording pirates use the Internet to upload their pirate motion picture captures.

The legal framework and enforcement infrastructure to deal with Internet piracy in the Philippines rapidly needs to catch up with the technology. 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 (without relying on court-issued relief) in that law or the Philippine IP Code. Such a mechanism, as well as fostering cooperation with service providers to effectively deal with infringing websites and services and P2P piracy activities including effective and fair termination policies for repeat infringers, should be added. As it stands, those in the Philippines who offer broadband all freely allow P2P downloading.

In the meantime, existing enforcement authorities should launch a campaign aimed at stopping Internet infringements. The CICT (Commission on Information and Communications Technology) states among its declared policies the establishment of “a strong and effective regulatory system that fosters competition and protects

<sup>9</sup> See Fiona Vanier, *World Broadband Statistics Q3 2009*, PointTopic, December 2009, at 19, 25.

<sup>10</sup> 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>.

intellectual property rights.” IIPA members would welcome the CICT’s involvement in combating Internet-based copyright infringements. While industry notes that many of the infringing sites or services are hosted and registered outside of the Philippines, it remains incumbent on the government to act. A proactive approach, including takedowns and blocking sites engaged in blatant and serious piracy activities, has been successful in other markets in curtailing online infringing activities. In addition to enforcement against Internet-based infringements such as P2P file sharing, attention should be paid to enforcement against blatant commercial pirates who advertise hard goods or downloading for loading onto devices (including mobile devices).

**Mobile Device Piracy:** Mobile device piracy similarly exploded in the Philippines in 2009, as it now estimated that there are over 68.1 million mobile phone subscriptions, representing a 75.9% penetration rate.<sup>11</sup> 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, especially medical and nursing titles and trade books, etc.) onto mobile telephones, MP3 devices, flash drives, recordable optical discs, and even computer hard drives. There are also increasingly infringing wireless application providers (WAP) which provide pirate content directly through wireless communications onto mobile phones/devices. There has been very little enforcement taken against mobile device piracy in the Philippines. The Philippine government must formulate an anti-piracy enforcement plan targeting piracy activities over mobile networks. While the copyright industries in the Philippines have legitimate business with all three major telecommunication companies, it has been difficult to convince telecommunication companies to block access to pirate sites on a voluntary basis. IIPA recommends empowering the National Telecommunication Commission (NTC) or the CICT to act on piracy and other copyright issues over mobile networks, or enhancing anti-piracy enforcement work carried out by OMB by including mobile device piracy within their purview.

**Book and Journal Piracy:** Illegal commercial-scale photocopying and the scanning and conversion of entire books into digital files are the predominant piracy problems facing the publishing industry in the Philippines. The industry is also seeing an increase in online piracy, particularly of medical textbooks, professional books, and trade books. Photocopy shops continue to operate with impunity in and around college, medical, and nursing school campuses due to a lack of action by law enforcement authorities. The large number of college and graduate students in the Philippines results in high demand for university textbooks, technical books, and professional medical and nursing books. Unfortunately, much of this demand is being met through illegal photocopying, and increasingly through downloads of unauthorized digital copies of books onto mobile devices. Pirates also burn CD-Rs with up to 100-200 titles on each disc. The “university belt” in Metro Manila is a notorious venue for illegal photocopying activities. Copy shops also operate in and around hospitals, and near government regulatory agencies. Vendors of pirated books have also taken to selling the infringing products door-to-door at doctors’ offices, medical establishments, and trade fairs. Many shops now operate on a “print-to-order” basis, thus avoiding stockpiles of infringing goods in their establishments and thereby complicating investigations and enforcement actions. The Department of Education and, in particular the Commission on Higher Education should take a more active role in encouraging institutions of higher learning to adopt appropriate copyright policies and encourage the use of legitimate materials at colleges and universities.

**OD Replication for Export:** The Philippines is somewhat unusual in its pirate consumption habits since it both imports pirate discs (mainly from China) as well as having excess production capacity in the country. In 2008, exports from the Philippines of pirate CDs, DVDs, and CD-ROMs were once again detected. Local production reportedly makes up an estimated 40% to 50% of hard goods found in the domestic market. The total number of licensed plants already has a production capacity which exceeds legitimate demand, and the Philippine government should conduct verification checks on licensed premises. The number of underground plants and their total capacity is unknown. Only one underground plant was reported to have been raided in 2009, but due to legal maneuverings and a rift between the OMB and the President’s Anti-Smuggling Group (PASG), the machines found at the raid site

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<sup>11</sup> Point-Topic, *The Philippine Broadband Overview*, October 7, 2009, at <http://point-topic.com/content/operatorSource/profiles2/philippines-broadband-overview.htm>.

were returned to the owners by the Court without the knowledge of OMB. The owners were not even required by the Court to obtain a license to possess, let alone operate, machines, both of which require OMB licenses. The Courts should keep the OMB involved where there are replicating machines, and in this case, should not have released the machines since the OMB had not granted the Respondents a proper license. This has been overlooked by the Courts in the past, which have returned seized machines to unlicensed enterprises without informing the OMB.

In terms of enforcement, IIPA commended President Macapagal-Arroyo for her November 2006 memorandum on IP enforcement, which directed her agencies 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.” To effectuate the President’s direction to raid and inspect factories, the government should properly fund OMB’s verification visits. IIPA urges OMB to provide transparency as to information related to the licensed facilities. IIPA also urges OMB to pay surprise visits to all optical disc plants in the presence of witnesses from the private sector. According to industry, there are plants which have not been visited for more than a year. Some plants have been reported by OMB to be non-operational and in the process of being sold, however, there is no evidence to suggest that these “non-operational” factories which have been up for sale for some time have actually taken concrete steps to sell the factories. In one case, a plant continues to occupy its rented factory space, and recently renewed its three-year lease agreement with its lessor.

Industry appreciates the new OMB Chairman’s interest in combating piracy and looks forward to working with him to chart a course for effective inspections and then enforcement against any irregular activities detected. A critical aspect of this process which has been missing is adequate funding for OMB to operate effectively. The Philippine Congress has never taken the important step of properly funding the OMB, but should now do so to provide the new Chairman with the tools for effective enforcement.<sup>12</sup>

**Retail and Mall Piracy:** Although it was noted above that the rise in Internet piracy has led to a reduction in physical piracy for some industry sectors, several areas of the country are still plagued by retail pirate trade. For example, Manila’s Quiapo district remains a center for OD pirate trade, Davao’s pirate trade has largely been untouched, and Cebu City remains a major hub in the operations of pirates in the Visayas. The sale of pirate and counterfeit optical media also remains unchecked in Antipolo, Dasmariñas, and Cagayan de Oro. In addition, retail piracy of software and games can still be observed in Makati Cinema Square (Makati City) Metrowalk (Pasig City), and practically every mall in metropolitan Manila. Market intelligence also suggests an increase of locally burned pirated discs (including a recent proliferation of pirate DVD-Rs) from Quiapo Barter Trade complex. Also, it should be noted that while 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, pirate DVDs remain at those sites, but are now sold in a clandestine fashion through the use of runners, while music, software and games are openly sold on discs or offered for downloading.

With regard to enforcement, due to the fact that industry is not often invited to participate in investigations (end-user piracy investigations are an exception to this), IIPA has little information except what has been provided by the government. On June 23, 2009, the IPO of the Philippines reported enforcement statistics for January to June 2009 on its website, including over three billion pesos (about US\$65 million) worth of “counterfeit goods and paraphernalia” seized between January and June 2009. This includes, according to IPO, “three replicating machines, with a total estimated value of P200 million (about US\$4.3 million) which was intercepted during an operation jointly undertaken by the Bureau of Customs (BoC) and Optical Media Board (OMB) in May 2009.” The PNP reportedly had the greatest haul (over two billion pesos) followed by OMB, BoC, and the NBI.

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<sup>12</sup> For example, the OMB’s total budget for 2008 was P27 million (US\$585,000), 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\$238,000. These amounts are wholly 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\$108,000), electricity, travel, communications, and office supplies, it is clear OMB (which now has only around 20 approved positions) faces a difficult task.

Unfortunately, some questions are left unanswered by these statistics, including the true value of the seizures given the lack of transparency. In addition, product seized is not broken down by category so it is impossible to tell what percentage is counterfeit (trademark) goods versus pirated goods. Nor do the statistics indicate the size and scope of the overall piracy market, nor the sources from which any pirate product was seized, i.e., small distributors versus source piracy operations. Further, since there is no reporting on any cases commenced out of the seizures or previous seizures, it is impossible to conclude whether these enforcement actions have had any deterrent effect on piracy operations. Without such follow-up, it is impossible to ascertain, for example, how many of those engaging in such piracy activities have been apprehended or whether they remain free to continue to engage in piracy activities.

Specifically with respect to mall piracy, IIPA recommends the adoption in the Philippines of a landlord liability law. Then, mall owners and retail mall merchants should be warned that they will be held accountable for failing to stop piracy in the malls. They should follow President Macapagal-Arroyo's 2006 letter memorandum 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."

Finally, as noted, judges should issue multiple warrants in order to conduct thorough searches of the hundreds of retail stores that currently sell pirated discs where violations of the law are obvious.

**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 ten brands have sought licenses from music publishers, but there are still many that do not, thus violating the Philippine IP Code for failure to pay proper royalties. Exacerbating the problem are a few manufacturing companies which slap USB ports onto their karaoke machines which allow them or the owners of the machines to add unauthorized copies of 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 that revenue losses are declining somewhat due to investment in digital technology by the leading cable provider but that there remain over 900,000 illegitimate Pay TV connections in the Philippines, and in addition, under-declaration by Pay TV operators continues to sink legitimate revenues.

In 2009, very little progress was made against Pay TV piracy in the Philippines, and court processes in the cases going forward have revealed 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 (MOA) 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, filed complaints of copyright infringement against Cable Link. It is disappointing that the complaints still remain with the IPO Philippines, 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 NTC to invoke 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 IP Code of the Philippines, was reversed in October 2007.<sup>13</sup> Unfortunately, the Court in Cotabato City has refused to set a hearing for the case, although it is positive that in December 2008, the Supreme Court rejected the defendant's appeal to reinstate the DOJ Secretary's initial decision. 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 final decisions reached by IPO in any pay TV piracy cases (although there has been a successful private outcome in one case).

**Several Steps Are Needed to Make Enforcement Practices More Efficient:** Right holders in the Philippines unfortunately face some unnecessary hurdles that result in inefficient enforcement and ease the way for pirates to escape accountability. First, right holder inquests and preliminary investigations by the Department of Justice are often delayed by purely bureaucratic signing procedures, as the Chief Prosecutor apparently has to sign off on every resolution issued by all prosecutors – not just members of the IP unit. Such processes should be streamlined and accelerated, as should processes involved in the filing of cases subsequent to a raid and during the litigation phase. In addition, a major hurdle in the Philippine enforcement system remains the fact that the PNP cannot act on an *ex officio* basis but must always act in conjunction with the Optical Media Board or on a right holder complaint. This should be remedied, and the authority should extend to PNP being able to initiate actions and seize infringing items on an *ex officio* basis. Finally, it remains the case that with certain exceptions (notably, the BSA reports they do participate in investigations with PAPT officials), copyright owners are not often permitted or invited to participate in investigations. As an example of this, in 2008, the OMB agreed to accredit PARI, the local music and record industry association, to help the PNP investigate violations committed by registered producers. However, nine months later, PARI's authority was suspended. Apparently, according to PARI, pirate producers have been releasing record albums without paying royalties and sell their products at very low prices (US\$1 versus the legitimate price of US\$4 or \$5).

**Deal With Compromises in IP Enforcement Through Rewards for Good Governance:** Stemming dishonest practices related to enforcement of IP (e.g., leaks in advance of raids, irregularities in investigation or post-raid procedures) has always proved to be a difficult task in the Philippines. IIPA recommends long-term solutions such as education and increasing compensation of government employees engaged in enforcement of IP. One short-term suggestion would be to introduce a reward and recognition program for those government employees who honestly do their jobs and for those who report irregularities.

## **COPYRIGHT LAW AND RELATED ISSUES**

**Enact WIPO Treaties Implementation Bill 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 government of the Philippines joined the WCT and WPPT in 2002 but has never completed the implementation process. The latest attempts are contained in Senate Bill 880 (sponsored by Senator Edgardo J. Angara in July 2007) and the House Bill 3741 from the 13th Congress, which are virtually identical to bills proposed in previous Philippine Congresses. IIPA supports many provisions of these bills,<sup>14</sup> with only a couple of modifications.<sup>15</sup> One of

<sup>13</sup> 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 there was no broadcast right enumerated in the IP law. The decision was reversed as incorrect in *Juliano-Tamano et al v. Discovery Communications, Europe et al*, Resolution, October 10, 2007.

<sup>14</sup> 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

the principal achievements of the Bill is that it would result in full and proper implementation of the WCT and WPPT. The Bill would update and expand the scope of copyright protections for the digital and online world. In particular, the legislation would expand the scope of the reproduction right to include temporary copies and would explicitly broaden the right to control all communications to the public, including by providing an interactive “making available” right for the digital world. The Bill also provides critical protections against circumvention of “technological protection measures” and protections against unlawful tampering or use of “rights management information.” The Bill would 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 mall-owner liability.<sup>16</sup> However, most unfortunately, the Bill does not contain any amendments addressing ISP liability issues, including even notice and takedown.

The latest updates indicate a dim outlook for passage of the House and Senate bills since the 2010 election season has now commenced. The House version of the Bill was approved at the House Subcommittee level on August 11, 2009, after hearings. As of late 2009, the situation was not as good in the Senate where the Bill was stalled since its first reading in September 2007. It would be truly unfortunate if the Philippine Congress missed yet another opportunity to pass world-class legislation as was contained in the House and Senate bills.<sup>17</sup>

**Make Adjustments to E-Commerce Law, E.g., Adding Statutory Notice and Takedown and Incentives to Cooperate Against Repeat Infringers:** The E-Commerce Law 2000 (Republic Act No. 8792) 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 (e.g., in the

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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 Macapagal-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.” 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-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.”

<sup>15</sup> 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....”

<sup>16</sup> In respect of the addition to the copyright bill which would impose mall liability, we understand that Senator Manny Villar (now a Presidential candidate) has been opposed to this provision. IIPA notes that President Macapagal-Arroyo issued a memorandum in 2006, and a directive for 2008 instructing the IPO to pass mall owner liability. 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.

<sup>17</sup> IIPA takes this opportunity also to note that the Philippines should enact an organized crime 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.



absence of court ordered relief) or policies to effectively and fairly address repeat infringers. 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. It should also, as discussed, provide incentives for ISPs to cooperate in investigations into newer forms of online piracy, such as P2P file sharing, torrent sites, cyber lockers, and should likewise ensure that ISPs have in place effective and fair policies to be applied to deal effectively with cases of repeat infringers.

**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. The government should fully enforce this Order and avoid contrary proposals that have reportedly been considered which would restrict or create preferences as to technology choices by government agencies.

**Enact Anti-Camcording Legislation:** House Bill 5669, the Anti-Camcording Bill, which would prevent the unauthorized operation of audiovisual recording equipment in motion picture theaters while a motion picture is being exhibited, passed the House in a third reading in February 2009. While illegal copying is of course already a violation of the Philippines IP Code, 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. The corresponding Bill SB 3529 made its way through the Senate following a third reading and final reading in January 2010. The House and Senate versions of the legislation will be reconciled before being forwarded to President Macapagal-Arroyo for signature. IIPA urges swift signing of the Bill into law once reconciled and publication of the law in the official gazette which will have a very positive effect against illegal camcording in the Philippines and will set a positive example for the region and worldwide.

**Enact Cybercrime Prevention Act:** In January 2010, the House of Representatives passed on third and final reading House Bill 6794, known as the Cybercrime Prevention Act of 2009. It seeks to address crimes committed via the Internet such as child pornography, illegal hacking of websites, phishing, data fraud, and the like by imposing corresponding penalties.<sup>18</sup> It is unknown whether this Act includes a provision on intellectual property similar to that contained in the Council of Europe Cybercrime Convention, but hopefully, the law will afford protection consistent with the COE Cybercrime Convention which contains a prohibition on transmitting copyright material on the Internet without authorization.

**Ensure Transparency in the Consultations Regarding Any Moves Toward Collective Licensing or Implementation of Fair Use Guidelines as Regards Published Materials:** In 2008, the Philippine government announced the formation of FILCOLS to act as a collecting society for publishers and authors. Though there appear to have been some discussions, efforts toward establishing a collective licensing model in the Philippines must at a minimum include an open and transparent consultation process with all affected foreign and domestic right holders regarding the parameters for such an organization. The collecting society's practices should conform to certain

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<sup>18</sup> Tom Noda, *Posts Tagged ' House Bill (HB) 6794 '*, January 21, 2010, at <http://computerworld.com.ph/tag/house-bill-hb-6794/>.



criteria, 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 copy shops engaged in unauthorized copying of books. The Philippine government should also engage in a transparent consultation process regarding the adoption of fair use guidelines. Despite protestations alleging lack of U.S. publisher interest and cooperation, it remains the case that U.S. publishers have yet to receive adequate information from FILCOLS as to the organization's structure and proposed licensing practices to allow publishers to objectively assess its viability as a reprographic rights organization.

**Avoid Burdensome Restrictions on Collective Management of Music Rights, and Allow Collective Management Organizations to Operate Freely in a Commercial Manner:** Unfortunately, in 2009, the Philippine government continued to take steps to get in the way of free contractual relations between music companies and collective management organizations (CMOs) which collect public performance royalties on the broadcast or communication to the public of sound recordings. Specifically, in 2008, IPO Philippines held consultations regarding the control of CMOs and forced them to stop their commercial operations. The chief record producers' licensing entity (MVP) has as a result been prohibited from conducting its licensing activities on behalf of record companies since October 2008. CMOs should be permitted to operate in a commercial manner, free from interference from the government.<sup>19</sup>

**Other Draft Legislation:** The Congress of the Philippines went on recess on February 5, 2010. Prior to that, there were several other copyright-related bills being watched by IIPA. 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 etc. 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. IIPA was concerned regarding reports of consideration of a Free Open Source Software bill which would require government offices to use open source software. Passage of that bill would deny technology choice regarding software usage and ultimately would stunt the growth of the IT industry in the Philippines.

## **MARKET ACCESS ISSUES**

**Restrictions on Advertising:** Under Presidential Decree 1986, advertising on pay television is currently limited to ten minutes per hour of programming. Restricting advertisement placement tends 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.

## **TRAINING AND PUBLIC AWARENESS**

IIPA members continued to provide and participate in various public awareness and training activities in the Philippines in 2009. Past trainings have included sessions on illegal camcording, bringing successful prosecutions in the Philippine courts, and adequate software asset management. The Motion Picture Association continued anti-camcording training for cinemas in the metro Manila area in 2009. BSA regularly conducts capacity-building seminars for judges, prosecutors and law enforcement. BSA has also recommends these judges, prosecutors and law enforcers to attend seminars abroad sponsored by other organizations. The BSA in cooperation with the American Chamber of Commerce and the IP Coalition held a capacity-building seminar and workshop on February 2009 which included participation by law-enforcement officials and Department of Justice Prosecutors, and involved a workshop to identify problems encountered during preliminary investigation proceedings by stakeholders. The prosecutors in

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<sup>19</sup> There was a set of Draft Guidelines for the Accreditation of Collective Management Organizations issued by the IP Office back in 2008. Those Draft Guidelines should be scrapped as having potentially been detrimental to existing licensing mechanisms for music.

turn also identified problem areas which must be addressed by law enforcers and stakeholders to ensure a smooth preliminary investigation process.

## **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 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. As noted, in 2009, more than \$733.6 million of Philippine goods, or 10.8% of the Philippines’ total imports to the U.S. 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)

### 2010 SPECIAL 301 REPORT ON COPYRIGHT ENFORCEMENT AND PROTECTION

**Recommendation:** IIPA recommends that the Russian Federation be retained on the Priority Watch List.<sup>1</sup>

**Executive Summary:** In 2009, Russian law enforcement officials continued to engage in criminal enforcement activity, including raids against warehouses and retail establishments, and some optical disc production facilities. However, for the past two years, the total number of actions undertaken by enforcement officials has been on a decline. Still, the business software industry has seen – over the past five years – a significant decline in piracy (including a 19% drop in the last four years). This is due to a combination of commercial success, and the unique nature (among the copyright industries) of effective criminal and civil enforcement for software publishers, namely activity directed against end-user piracy. The commercial successes in the business software industry are in large measure the result of the 2008 decision of the Russian Ministry of Education to legalize software in Russian schools, entailing the government-funded purchase and distribution of licensed copies of both Russian and non-Russian software products throughout the country. The enforcement successes have come because of a combination of industry enforcement programs, along with cooperation on criminal enforcement from relevant government authorities.

However, the business software industry is the only industry with an overall positive story in Russia in 2009. The majority of copyright industries – motion picture, recorded sound, entertainment software, music and book publishing – experienced another year of disappointment in Russia in 2009, because of the smaller number, size, and scope of enforcement actions undertaken by the enforcement authorities, a lack of focus by Russian authorities on the growing threat of Internet and other forms of piracy, with ongoing high piracy rates – for hard and digital copies – keeping legitimate markets from achieving their full potential. While Russia's law allows for enforcement against hard goods piracy, it is inadequate for addressing Internet piracy and must be amended to provide for ISP liability.

The record industry is particularly concerned about the continued operation of various pay-per-download services that have taken the place of the infamous allofmp3.com, as well as peer-to-peer piracy. The pay-per-download websites are operating under "licenses" granted by collecting societies that have no authority to issue such licenses. These rogue collecting societies continue to plague the Russian market now two years after Russian Civil Code amendments went into force which, among other things, clarified that these types of activities by both websites and collecting societies are illegal. Recent activities to accredit legal societies are fraught with problems even though the accreditation process was supposed to curtail illegal activities. In fact, the accreditation of a single collecting society (VOIS) to collect on an extended license basis on behalf of performers and record companies has resulted in market confusion and serious questions about its compliance with the Russian law, and international norms concerning the fair representation of foreign rightsholders, as well as, proper transparency, accounting and governance rules. IIPA calls upon the Russian government to take an active role in ensuring that reasonable agreements are reached with VOIS (or any other accredited society) that permit the effective representation of U.S. rightsholders.

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<sup>1</sup> For more details on Russia's Special 301 history, see IIPA's "History" appendix to this filing at <http://www.iipa.com/rbc/2010/2010SPEC301HISTORICALSUMMARY.pdf>. See also the previous yearly country reports at <http://www.iipa.com/countryreports.html>.



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. Optical disc piracy remains a very serious problem for some industries – notably, the motion picture and entertainment software industries, even as changes in the marketplace have resulted in a modest decline in physical (hard copy) piracy for some of the copyright industries. In addition to the rapid rise in Internet piracy, other forms of piracy – for example, unauthorized camcording of motion pictures in theaters, and unauthorized access to journals online, have plagued the growth of legitimate markets and investment. In fact, camcord piracy exploded in Russia in 2009, with Russia becoming the world's leading source of illicit full-video recordings of films from theaters.

The IIPA encourages the Obama Administration to continue to work with the Russian Government to make further and faster progress on intellectual property rights (IPR) issues. In 2009, the U.S. and Russian Governments signaled a “fresh start” to U.S.-Russia relations, and in concert, various new mechanisms to further cooperation (including a new U.S.-Russia Presidential Economic Commission). IIPA welcomes these developments and continues to offer its cooperation to improve the marketplace for all the copyright industries in Russia. As President Obama recently noted, the “insufficient protection for intellectual property rights” (citing as examples the piracy of everything from “DVDs to very sophisticated software”) is a priority “at the highest levels of foreign policy” for his Administration because it promotes technological advances, increases exports and open markets, and results in more jobs.<sup>2</sup> Russia has also expressed interest in promoting technology, better markets, and jobs. For example, in January 2008, 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. A roadmap for success exists for this scenario, namely for the USG and Russian authorities to ensure the full implementation of the November 19, 2006, IPR Agreement between the Governments of Russia and the United States.<sup>3</sup> 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 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. After a delay, the U.S. and Russian IPR dialog rooted in the 2006 agreement, was re-started in 2009. This is a positive step, but only if it leads to an enhanced and detailed dialog on mutual IPR matters. As such, the copyright industries continue to offer support for the Obama Administration in this endeavor, to reinvigorate technical support as appropriate, and to pursue a priority and activist work plan.

This past year, there was little change regarding the market conditions under which the copyright industries operate in Russia. Thus, top copyright industries priorities still include:

Enhancing the growth of digital markets for copyrighted works by eliminating the operation of illegal pay-per-download Internet sites and illegal peer-to-peer services. Stopping the illegal Internet sites and peer-to-peer services that illicitly distribute copyrighted content 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. Amending Russia's Civil Code to provide for ISP liability and

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<sup>2</sup> White House Press release of January 22, 2010, of a transcript of remarks by President Barack Obama during a town hall meeting at Lorain County Community College, Elyria, Ohio.

<sup>3</sup> 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](http://www.ustr.gov/Trade_Sectors/Intellectual_Property/Russia/Section_Index.html).

establishing a specialized Internet IPR Unit within the Ministry of Interior are of utmost priority if Russia is to be able to respond to President Medvedev's call to improve the effectiveness of IPR protection on the Internet.

Improving the certification process and implementing fair representation by legitimate collecting rights societies – as required in Part IV of the Civil Code (under the authority of Roshrankultura) – is also a priority. This includes the ability of foreign rightsholders to be fairly represented in practice and consistent with law, by a collecting society of their choosing, and that the state (e.g. VOIS) adopts open, transparent and responsible policies that comply with international treaties and norms on practices for fair representation, accounting and governance, to determine the conditions for the use of their works, phonograms and performances.

Moreover, it is a priority that the Government of Russia take steps against illegal camcording of motion pictures in theaters.

The Russian Government must also 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, as well as actions against businesses using unlicensed software. Legislative reforms to provide for the criminal liability of corporate entities are also necessary.

Last, it is imperative that prosecutors: (1) coordinate their efforts with the police; (2) bring more IPR cases; and (3) conduct expeditious investigations. One step that would significantly improve criminal enforcement in Russia is the need to update the existing methodology (adopted in 2004) for the investigation and prosecution of copyright and related rights infringements. Russian criminal law has undergone several amendments in recent years, making the existing methodology prepared by the General Prosecutor's Office outdated. IIPA recommends that the Ministry of the Interior, the General Prosecutor's Office, and the Investigational Committee jointly prepare – with all rightsholders (as was done in 2004) – a new official uniform methodology, including a methodology for the treatment of Internet piracy cases. The absence of such a methodology has resulted in prosecutorial investigators refusing to initiate many criminal cases that, under the existing criminal law, should be prosecuted.

## **COPYRIGHT ENFORCEMENT IN RUSSIA**

**Criminal Enforcement in General:** Criminal enforcement in Russia remains a priority for IIPA and its members. In 2009, 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 2009, 7,147 criminal copyright cases were initiated (that is, investigations were commenced), 5,270 criminal cases were sent to court, and approximately 3,800 individuals were convicted. In 2009, the first criminal case in Russia was initiated against a pirate Internet site, as well as the first criminal case against an illegal camcorder. Although no 2009 statistics were made available by the Russian Ministry of the Interior (MOI), they 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 have been improvements at the Gorbushka market according to the motion picture industry (which regularly inspects the market). As a result, it now appears that pirated products are not sold as openly as they once were at this market (in part, because 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) are improving the conditions for some businesses in Russia. Unfortunately, any successes will be short-lived if the recent trend of diminished enforcement activity continues. For example, the business software industry reported fewer end-user raids and Internet infringement actions, fewer criminal cases commenced, and thus fewer convictions in 2009, than in previous years.

The motion picture industry reports that enforcement activity in the past few years, especially in Moscow and St. Petersburg, has remained relatively consistent. Given the economic crisis, the theatrical market declined by approximately 12% in 2009.

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. As set out in previous reports, addressing commercial-scale piracy through criminal measures is an obligation of WTO members, 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.

Criminal actions are necessary because civil actions remain problematic due to 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 rightsholders), 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. Even more troubling, as the markets move to the Internet, is that deterrent criminal penalties are rarely, if ever, imposed against owners of commercial Internet operations. 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 IIPA is unaware, in all of the years of optical disc piracy, of a single plant owner who was convicted under the criminal law, 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 2009 than in previous years, a downward trend in fact, of the past several years; in addition, many older cases have languished for a long time.

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 and 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

two years for the experts to finalize their seizure report. Delays result not only from a lack of experts, but also from a lack of subject matter expertise, particularly as it relates to video games. When experts are available, they all too often lack the type of training necessary to adequately perform their duties. For instance, an Entertainment Software Association (ESA) member company reports receiving an examination report from a government expert indicating that the expert was unable to conclude whether a seized shipment of video game product was legitimate as a result of a lack of subject matter experience. ESA members have provided training materials and offered assistance to Russian law enforcement experts to familiarize them with issues specific to the video game industry, but law enforcement officials have not demonstrated an interest in obtaining information related to forensic examination.

Improvements should also be made with respect to court procedure, particularly with how a court dispenses with the seized pirated products. IIPA recommends that courts regularly include an order for destruction of the goods in its verdict – currently, such an order is included, sometimes, but not always, in final judgments. Additionally, the criminal procedures generally require that a rightsholder request the destruction of the seized goods (or moves for recovery of damages) in a separate proceeding before the Arbitration Court – which unnecessarily lengthens the process and makes enforcement even more difficult.

Although there were fewer criminal cases in 2009 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. Plus, many of the cases highlight the role of organized syndicates, as for example, a December 22, 2009 report of the arrest of three Bulgarian nationals in Moscow, charged with making and distributing pirated discs. A criminal investigation has commenced in that matter.

As was highlighted in previous years, 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 rightsholders. It is crucial that the Government of Russia improve its IPR criminal enforcement focusing, in particular, on the thus-far inadequate actions aimed at Internet piracy. One way to accomplish this would be through the central coordination of law enforcement. In November 2009, President Medvedev announced his intention to improve the effectiveness of Internet enforcement (and tasked Prime Minister Putin to lead this effort) – that is a positive step. We continue to recommend high-level public announcements by the government that IPR enforcement – including in particular, 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. It is also essential that the Government create a specialized IPR unit to fight against Internet piracy in Department K of the MOI. 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. Some copyright industries report that in recent training programs, MOI officials (and its copyright crimes investigators) were, unfortunately, unable to participate in IPR enforcement seminars. IIPA recommends that MOI and its investigators continue to work with all IIPA members on future training programs.

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 allofmp3.com remains down, 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 is that 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. In addition, a lack of an updated (since 2004) methodology for prosecutorial investigations (for all IPR crimes including Internet ones), the lack of technical knowledge (as well as the absence of ISP liability and cooperation) are key factors in the failures of the criminal enforcement regime.

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 (along with the Ministry of the Interior and the Investigative Committee of Prosecutors) appoint a government liaison with IP rightholders to more effectively bring criminal investigations and trials to successful conclusions.

IIPA encourages President Medvedev to fulfill his promise to combat IPR piracy with criminal enforcement – a problem he properly identified. IIPA members are concerned by the recent reconfiguration of the IPR Commission – by a decree of December 30, 2009. Under that decree, the RFG IPR Commission was abolished and replaced by a sub-commission, thus, a demotion for IPR enforcement issues. Further, the new sub-commission will be led by the Ministry of Trade and Industry, which lacks jurisdiction in IPR matters. IIPA continues to recommend a high-level coordinated government focus to IPR criminal enforcement.

**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 for the second straight year. In 2009, there were 409 raids, down from 499 raids in 2008 (and 589 in 2007). 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), the Investigative Committee of Prosecutors, and the General Prosecutor's Office in relation to implementation of Article 146 of the Criminal Code. In 2009, the police ran more raids against chain retail stores (1,063, up from 740 in 2008), and increased warehouse inspections. Also, in 2009, the police initiated 97 criminal cases against end-user pirates (down from 154 cases in 2008, and 200 in 2007); some of these included raids against some larger companies. Criminal cases, if initiated (and this is very rare in St. Petersburg), are frequently terminated by investigative authorities. For example, an advertising company in St. Petersburg was raided and found to contain BSA member illegal software (over \$22,000 worth). A criminal case was initiated but then terminated twice for formal reasons (appeals were unsuccessful).

There were a total of 55 end-user court verdicts in 2009, down from 71 in 2008 (and from 83 in 2007). There were 496 criminal cases initiated against channel pirates, up from 427 in 2008 (and 378 in 2007); there were 276 court verdicts in channel cases compared with 234 in 2008 (and just 131 in 2006). Further, the business software industry reported that one of the reasons for the significant drop in piracy rates the past several 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 2009 for hard copy piracy programs, as in recent years). However, there has not been the same level of cooperation (for example, with Department K) for on-line programs. Even with the significant activity taken against business software piracy, the Business Software Alliance reported, as preliminary figures, that it lost \$1.869 billion in Russia in 2009, and the piracy rate was 68% (albeit, a significant decline in the past several years).



Some business software publishers have also employed technological means to improve enforcement of their rights. For example, in December 2009, Microsoft Corporation launched a new program in Russia to protect Internet users against pirated software by deploying an (optional) software application that notifies users if their on-line software system interfaces are genuine or not. The aim is to make Internet users aware of illegal software resident on their machines and the problems such systems can cause (such as viruses), in order to encourage them to purchase legal products.

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).

Effective January 10, 2009, a Federal Law on Police Activities was adopted and it is reported that the police are undertaking *ex officio* investigations. The copyright industries continue to monitor the implementation of this law because there were some concerns that it might 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 2009 law was implemented with guidelines from the Ministry of the Interior. IIPA recommends that the Ministry additionally promulgate regulations that will not delay police actions in IPR investigations until after a criminal or administrative case has been initiated; such delays 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 corporate entities; (b) the failure of the police to comply with the Criminal Procedure Code; and (c) the general reluctance of prosecutors to initiate criminal cases. Regarding corporate liability, Russia's current law allows for corporate entities to be found criminally liable for infringement only upon a showing that a corporation's director had a direct intent to commit the infringement. Such a showing is virtually impossible, especially when seeking to impose liability on the corporate owners of a retail outlet known to be selling pirated product. As a consequence, verdicts are issued against only the individual retail staff found selling pirate products at the time of a seizure or raid, rather than against the corporate owner. Such a scenario provides for little deterrence, as the owner of the retail establishment is seldom punished in any capacity.

There were a considerable number of important raids against pirate warehouses in 2009 and there were a number of large seizures of copyrighted materials at these warehouses. In total, the copyright industries reported 11 large raids against warehouses resulting in the seizure of over 10 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; all IIPA members had hoped that there would be increased FSB engagement in 2009. However, FSB did work in close cooperative work with RAPO in 2009 in several raids. 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 2009 included: a raid at Tupolev, an aviation research institute near Moscow, where several storage units containing approximately 1.75 million pirated optical discs were seized. Another raid in 2009 was conducted against Transconteyner, which is near three railway stations in the center of Moscow. This raid resulted in the seizure of more than a half-million pirated optical discs, which were destined for distribution across Russia by train. According to the documents seized in the raid, this warehouse –

which was re-stocked with pirate product – weekly had been in operation for at least five years. FSB also raided a very large warehouse in St. Petersburg, named Meduza, seizing about 3.5 million pirated DVDs; six people were convicted in that case, resulting in 3 to 5 years imprisonment sentences (albeit, suspended) in early 2010.

In 2009, in Moscow and St. Petersburg, RAPO took part in a number of raids. In 2009, the Moscow Police and RAPO organized 386 raids, from which 249 criminal cases were initiated, in addition, about 2,000 inspections were conducted. In St. Petersburg, the local RAPO office and the police organized 156 raids, including the initiation of 135 criminal cases, and about 1,300 inspections were conducted. There were many other raids and resulting cases undertaken by the police (without RAPO participation). In total, 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 Russia's IPR Agreement obligation to criminally prosecute cases of piracy on a commercial scale.

Unauthorized camcording in Russian theaters exploded in 2009. There were 43 full video camcords illegally recorded in Russian theaters in 2009; this represents a 152 percent increase over 2008. In 2009, a camcorder for the notorious Russian and Ukrainian piratical film release group Elektria4ka, was caught camcording a local movie in a Moscow theater. The camcorder admitted to working for the website Uniongang.ru and to uploading the content from his home computer, which content was available on that website within hours. A criminal case was initiated against this individual. This is the first criminal case in Russia against a camcorder under the new amendments of Part IV of the Civil Code.

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. Thus, hard copy piracy remains a problem as domestic factory replication remains widespread (although there continue to be some imports from Ukraine) with highly sophisticated pirated video game products being manufactured in Russia. Pirate distributors of hard copy material remain 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. Rightsholders are typically asked to support such cases and to provide information with respect to the pirated video game titles and the damages incurred. Online piracy is also a growing concern for the entertainment software industry. ESA estimates there to have been approximately 118,211 infringing copies made of ESA members' computer and video games through P2P file sharing by ISP subscribers in Russia during December, 2009.<sup>4</sup> These figures do not account for downloads that occur directly from hosted content, such as games found on "cyberlockers" or "one-click" hosting sites which continue to account each year for progressively greater volumes of infringing downloads.

The book and journal publishing industry reports that though hard copy piracy – commercial photocopying, unauthorized translations or misappropriation of an author's work or unauthorized use of elements of a book (such as illustrations) in locally published scripts – continues to be problematic, the predominant problem now facing the

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<sup>4</sup> This figure is representative only of the number of downloads of a small selection of game titles. Consequently, this figure is under-representative of the overall number of infringing downloads of entertainment software made during the period.

industry is online piracy in its many forms. Popular works subject of online infringements include reference works, textbooks and commercial bestsellers. Journal articles are also subject to piracy by pharmaceutical companies, which produce and distribute unauthorized copies of the articles. Unfortunately, law enforcement authorities have done little to address rampant book piracy occurring in the market, and universities, where unauthorized photocopying of academic textbooks predominantly occurs, have shown no interest in addressing the problem.

On February 1, 2009, the Moscow Government ordered all kiosks and shops selling pirated optical disks to be closed within pedestrian subways and metro stations. In order to accomplish this, the government established a special enforcement unit (RAPO is included), which is responsible for stopping sales of audiovideo products in pedestrian subways and metro stations. Further, the government ordered all shops closed in metro passages, as well as shops within a 25 meter (82 feet) radius from metro stations. The order to undertake this action was signed by the Minister of the Government of Moscow, Vladimir Malyshev, who is responsible for all trade in Moscow. This is an important and positive enforcement step to reduce the availability of pirated DVDs in Moscow. A similar regulation has been very successful in combating street vendor and kiosk piracy and IIPA recommends that similar regulations be undertaken in other cities with significant street piracy problems.

**Raids Against Optical Disc Plants:** Although optical disc piracy is no longer the highest priority for IIPA members in Russia, according to the Russian police, about 70 million discs were replicated in Russia in 2009, with an estimated retail price of approximately \$630 million.

In November 2009, the enforcement authorities undertook a series of raids against seven illegal optical disc replication plants and warehouses in Russia. The raids resulted in a total of 25 replication lines (16 DVD lines and 9 CD lines) and 60,000 stampers being confiscated (in six different raids). The operation involved more than 250 law enforcement officials – police and special forces – along with 15 RAPO investigators. The initial November raids were undertaken in 30 hours with additional raids against two additional labs carried out several days later; preparation for the raids was done in close cooperation with the new department of “Anti Corruption” at the Ministry of Interior (MOI).

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. It is estimated that about 7 optical disc plants were closed in 2009. However, it is more difficult now to gauge the number of plants in operation in Russia because there are many that have licenses, but are not known to be operating, and also because of the migration of piracy into smaller operations. The U.S. Government estimated that at least 30 optical disc plants remained in operation in 2009 (although the November 2009 raids may have closed at least one plant). IIPA continues to push for additional and effective enforcement to deter illegal activities. Such enforcement needs to be called for from the highest levels within the Russian Government.

**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. According to the ITU, there were 45,250,000 Internet users as of June 2009 in Russia – a 32.3% penetration.

The recording industry reports that paid download sites remain one of the largest sources of piracy in Russia. In addition to the rampant peer-to-peer services, there are also “cyber-lockers” in Russia that serve as a source of pirated music.

All the copyright industries agree that the fundamental enforcement shortcoming is the lack of authority and jurisdiction (and willingness) of Department K to act against copyright infringement crimes occurring on the Internet.

In June 2007, the most notorious website, [allofmp3.com](http://allofmp3.com), was taken down, and has not resurfaced at that Internet address. However, there are now in excess of 30 similar sites based on the same business model as the original [allofmp3.com](http://allofmp3.com). The user-interface of these sites looks very professional and can easily deceive users into believing the sites are legal (some offer “give away” incentives to get more users; some sell albums for as little as \$1). Some of the sites use up to 30 different domain names (but the same user interface).

In 2009, 7,551 infringing addresses (uniform resource locators, URLs) were taken down compared with 2,541 infringing URLs in 2008 according to industry statistics, but that is still too small a number which only accounts for less than half of the URLs identified and requested to be taken down. Moreover, Russia is also host to a number of major BitTorrent indexing sites such as [torrentz.ru](http://torrentz.ru), [torrentreactor.net](http://torrentreactor.net), and [BTmon.com](http://BTmon.com) (which includes materials from many copyright industries), which are popular channels for illegal peer-to-peer downloading, catering to English speaking audiences and with very high Alexa rankings. Another particularly problematic site is GameTorrent, a BitTorrent tracker and online pirate discussion forum that is owned by a Russian national, but is 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.

There was one bright spot: the MPAA reported that in May 2009, enforcement authorities raided a web-based pirate (of pre-release films) – Interfilm which operated the site [Interfilm.ru](http://Interfilm.ru). Dozens of law enforcement officials took part in the raid, including officers from Department K, special forces, investigators from Investigating Committee of the MOI, as well as RAPO investigators. There were several arrests, including the head of Interfilm. The Interfilm website was hosted in the Netherlands at Leaseweb, which took down the site after the raid. This is the first ever criminal raid against a pirate website in Russia since the [allofmp3](http://allofmp3.com) case several years ago (and is the first ever raid on a film or TV pirate website).

For the recording industry, the most vexing Internet piracy problem in Russia is the pay-per-download websites operating under “licenses” granted by collecting societies that have no authority to issue such licenses. The websites need to be taken down and their operators criminally prosecuted. With regard to these rogue collecting societies, they are still in business two years after the Russian Civil Code amendments went into force which, among other things, clarified that these types of activities – by both websites and collecting societies – are illegal; the amendments to the law were supposed to put an end to these piratical activities. In lieu, the accreditation of a single collecting society (VOIS) to collect on an extended license basis on behalf of performers and record companies has resulted in significant problems for the recording industry because VOIS represents a very small fraction of foreign rightsholders. Most U.S. record companies have entrusted the administration of their rights to RFA, a society which has been in operation for some time and which complies with international standards in terms of accountability and transparency. However, the Russian government decided to accredit a different society known as VOIS, which has very little legal representation of non-Russian rightsholders. In order for U.S. rightsholders to be properly represented

in Russia, it is essential that VOIS operate in a transparent manner that reflects the interests of the broader community for which it is now responsible, requiring an integration of non-VOIS members into their governing bodies, and reasonable agreements between the respective societies. The IIPA and the RIAA urge the Government of Russia to take an active role in ensuring that reasonable agreements are reached with VOIS (or any other accredited society) that permit the effective representation of U.S. rightholders.

Publishers report that Internet piracy affecting academic and professional textbooks and reference books continues unabated. In particular, a group of sites – including [download-ebook.in](http://download-ebook.in), [download-ebook.org](http://download-ebook.org) and [ebooknetstore.com](http://ebooknetstore.com) – continue to decimate the market for academic and professional materials. Other sites include [pdfchm.com/](http://pdfchm.com/) and free-file host providers like [Paid4share.net](http://Paid4share.net), [Icefile.info](http://Icefile.info) and others. Takedown notices have gone unheeded (non-compliant ISPs include: [relcom.ru](http://relcom.ru), [agava.ru](http://agava.ru) and [delfan.net](http://delfan.net)). IIPA urges immediate action against the operators of illegal sites, in particular, the afore-mentioned sites. Commercial bestsellers are also widely available for download on multiple websites. There are also a growing number of phishing sites hosted in Russia that purport to offer instant downloads of free ebooks (along with other copyrighted content) for a minimal membership fee. However, once a customer provides his/her credit card information, no files are actually delivered and thereafter, unauthorized charges begin appearing on the supplied credit card account. These phishing sites advertise on many popular P2P sites.<sup>5</sup>

Few 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 only six raids against Internet users or services in 2009 (compared with 25 in 2008), which resulted in the commencement of only one criminal case (compared with 15 in 2008). There were only two convictions (seven in 2008) – all against individuals in the distribution of illegal copies of software offered via peer-to-peer networks. Some copyright 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 and the process to access these limited resources is also very difficult. IIPA members report that Internet piracy is a very low priority for the Ministry of the Interior's Department K (the department with responsibility for combating technological crimes and Internet fraud, but not, *per se*, Internet copyright piracy) which is an issue of major concern. 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 industry statistics, less than 1% of the cases they pursued in 2009 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 ill-defined. 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 clearly fall within the current jurisdiction of the Computer Crimes Department (Department

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<sup>5</sup> Examples include: [nowdownloadall.com](http://nowdownloadall.com), [idownloadall.com](http://idownloadall.com), [10xdownloads.com](http://10xdownloads.com), [idownloadunlimited.com](http://idownloadunlimited.com), and [nowfreedownloads.com](http://nowfreedownloads.com).

K) within the Ministry of the Interior even though they have occasionally taken action. Department K's authority and responsibility to act in cases of online infringement should be clarified and strengthened.

**Administrative Enforcement:** The business software industry (BSA) reported only 11 administrative court decisions against infringing end-users and 11 against channel pirates in 2009. This is compared with the 40 administrative court decisions that were resolved in 2008 – 37 against end-users, three against channel pirates (compared with 35 and five, respectively, in 2007). 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 need for legal software in the government. 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 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 2010, and the software industry is ready to carry this remarkable progress into other sectors of the Russian economy.

**Enforcement Training:** The copyright industries report that they have participated in many training seminars over the past 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. Most of the programs, however, were directed toward hard-copy piracy. Program participants included: the Interactive Software Association of Europe, the Business Software Association, the Motion Picture Association, and the International Federation of the Phonographic Industry. For example, they participated (again) in a cross-industry training seminar, jointly organized by the European Commission (through its Technical Assistance and Information Exchange, TAIEX, program), the General Prosecution Office, and the Investigation Committee of Russia in December 2009. That program was the third of its kind and 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 training programs for prosecutors in 2009, as well. One other notable program was a series of seminars organized by the investigative department of the MOI in St. Petersburg, Kazan, Krasnodar and Ekaterinburg (each with about 200 attendees.).

## **Optical Disc Plant Licensing and Inspections**

The continued lack of clear authority for optical disc licensing and inspections in 2009 remains a significant set-back 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 (ROK) and Rossvyazcomnadzor (which as of January 2009, was named Roskomnadzor (RKN) – 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) has not undertaken regular inspection of plants or the suspension of raided licensed plants for the past two years, as is required under the IPR Agreement. That is because ROK does not have the authority to do so, and RKN, which has the formal authority for inspections, has neither the staff, resources, nor, it seems, interest, in undertaking proper inspections. Additionally, a new concern has developed: Federal Law 294-FZ (December 27, 2009) – a general anti-corruption measure – prohibits commercial enterprises from being inspected by governmental bodies more than once every three years, unless ordered to do so by a prosecutor.

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.

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. It was hoped that, as a result, they would address the present lack of adequate staffing and be able to engage in the kind of monitoring contemplated by the IPR Agreement – but, that did not occur in 2009. More training and more resources need to be available to conduct the promised effective enforcement. For some copyright industries (especially recorded sound), the problem of optical disc piracy in Russia has migrated, in part, from major production facilities to smaller “burning” operations which require more flexible enforcement mechanisms and resources. The motion picture industry continues to see optical disc plant produced pirate product in Russia. In sum, the Russian Government is 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. The demotion of IPR enforcement from the IPR Commission to a sub-commission is also likely to delay coordinated activities against optical disc (and other) pirates.

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 has reported in the past (in 2008) that it would close the remaining plants by cancelling their leases. While the closure of some plants 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.

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 2009, that Russian manufactured pirated optical discs were forensically matched in several countries outside of Russia and that moreover, there remains a significant Ukraine-Russia transshipment problem of optical disc material.

## 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. In order to have effective (criminal) enforcement, 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. This includes taking down the pay-per-download sites and criminally prosecuting their operators as well as stopping the unauthorized collecting societies (such as ROMS, FAIR, ROUPI and FOSP) that purport to grant licenses for rights that they do not possess. It also means criminally prosecuting peer-to-peer and BitTorrent operators.
4. Ensuring that collecting societies can only operate within the scope of the mandate that they receive from rightsholders – after direct contractual negotiations with rightsholders – and that such societies operate with proper transparency, accounting, and governance rules in accordance with international norms.
5. 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.
6. Effectively enforcing measures that criminalize the camcording of motion pictures in theaters, since this is the primary source for illegal DVDs and much of the illicit content online.
7. 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 rightsholders. In addition, any plant licensing regime should extend in scope to the operators of telecine machines and mastering laboratories used to pirate audiovisual works.
8. 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.
9. 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).
10. 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.
11. 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 members are obviously pleased that allofmp3.com was itself taken down, we note that numerous nearly identical sites are now in operation 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, in 2009, the U.S.-Russia Working Group meetings resumed, 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 (now three years overdue) were not met, with Russia still needing to: (1) 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); (2) combat Internet piracy – including criminal actions against the pay-per-download and fixing the rogue collecting societies problem; (3) implement international IPR agreements, up to the WTO-TRIPs levels; (4) address the problem of illegal optical disc manufacturing; (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).

## **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 continues to monitor 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).
- 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). Another resolution is expected (it was not undertaken in 2009) – by the Supreme Court and Senior Arbitration Court – to 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 (in force, April 9, 2007) added a new Article 14.33 on unfair competition. This provision 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 also amended in 2006 by revising the timetable for administrative investigations – the amendments permitted investigations to run for up to two months (the old provision, was two days), and, the statute of limitations was extended to a year. There were also penalty increases, 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\$1,015 to \$1,353).
- 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 previous reports, 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) amending the Civil Code to provide for ISP liability and sanctions (including a clear definition of an “Internet Service Provider”), clear third party liability in civil and criminal law, injunctive relief, and a duty to provide all necessary information to law enforcement agencies and rightsholders in Internet piracy cases; (3) the Customs Code which must be amended to add *ex officio* authority (amendments were introduced in the Duma but never enacted in 2007); and (4) the complete and proper implementation (in the Civil Code) of both digital treaties – the WCT and the WPPT – now that Russia acceded to the treaties (effective February 5, 2009), as well as the other Civil Code amendments (some of which were considered, but never adopted, the past few years). Plus, Russia needs to adopt the 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 Federal Service is in operation, we are concerned that it is still operating under the old, 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 initiative (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.

On March 26, 2009, the Supreme Court and the Higher Arbitration Court adopted a joint Plenum Resolution (“On issues relating to the introduction of Part IV of the Civil Code”) – to clarify the application of Part IV. Unfortunately, the resolution left many issues unresolved including: the “use” of software which is misinterpreted by judges as being not a violation of Copyright Law (when unauthorized); the determination of damages relating to the cost of (software) works; the use of works on the Internet and the “making available” right; the application of provisional measures; and, the application of civil search procedures (especially important for software piracy cases). Also as noted, the 2004 methodology on the investigation of copyright and related rights criminal cases is outdated, resulting in cases not reaching the courts. The methodology needs to be substantially revised and updated, (with rightsholder input) consistent with the existing criminal law of Russia, and in order to provide effective criminal remedies applicable to all hard copy and Internet piracy crimes.

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 are causing challenges to enforcement and collection efforts. Second, there are administrative law principles throughout the Civil Code that likely cannot be enforced by civil or criminal procedures.

IIPA continues to recommend improvements to the enforcement regime of Russia. 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 offered in prior years – 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 (and rightsholders) 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(5), 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 and applied across the board to all of the exceptions in the law – to narrow the scope of all exceptions to permissible international norms. 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, as a ceiling, the (corrected, per above) three-part test to particular personal uses, to apply it only to specific personal use 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 (and rightholders) 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 confirming by means of a governmental interpretative communication that Articles 1244(4) and 1326 do indeed allow rightholders to exclude their works and phonograms from the accredited societies' extended license repertoires and can in lieu authorize their own collective societies (by direct contract).
- Article 1326(1) is limited to a statutory license for neighboring rights producers. In lieu, the Civil Code should provide a broad making available right applicable for objects of neighboring rights.
- 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 add 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 provide 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 2009, Russia benefited from over \$252.4 million in unilateral duty free Generalized System of Preferences ("GSP") benefits in the U.S. market. In 2008, Russia benefited from \$593.7 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.

# **WATCH LIST**

# BRAZIL

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2010 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** IIPA recommends that Brazil remain on the Watch List in 2010.

**Executive Summary:** The Brazilian Government has actively worked with the copyright industries to develop and implement strategies aimed at education, enforcement and expansion of commercial opportunities. This overarching 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) end-user software piracy, hard goods piracy, including retail and street 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.

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. Despite a large volume of raids, most of the well-known marketplaces are still operational. Few task forces have been created at state and municipal levels despite Federal Government efforts. Universities, likewise, need to take more steps to legalize use of academic materials on their campuses. Copyright cases, both criminal and civil, have been at the mercy of a broken judicial system that requires serious reform so that cases reach sentencing more quickly and with fewer procedural obstacles. In the Internet realm, rights holders have worked with Internet Service Providers to take down infringing content involving hosted websites, but that success has not translated into any action involving the grave problem of peer-to-peer (P2P) file-sharing of unauthorized copies of copyrighted content and most recently the free access to millions of illegal cyber-locker links posted on social networks, forums and blogs.

The copyright industries continued to work well with the National Council to Combat Piracy and Intellectual Property Crimes (CNCP) during 2009. We are pleased that the CNCP has issued a new national plan that provides a more targeted list of priority actions, and has taken initial steps to implement its top five priorities for 2010. We also note that a special commission of the Congress focused on anti-piracy efforts issued a report with some positive recommendations for legislative action. And we welcome the Minister of Culture's formal opinion that camcording is captured by the Penal Code. In early 2010, the Ministry of Culture is poised to release draft legislation that would amend the current copyright law. Lastly, the copyright industries are concerned with the prospect of Brazil "cross retaliating" against U.S. intellectual property products as compensation in the WTO cotton case. In sum, this coming year will present an agenda on many copyright law and enforcement issues that will require close monitoring, and we expect the government (including, but not limited to, the CNCP) to continue to consult with the copyright community on these issues.

**Priority actions requested to be taken in 2010:** 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

- Continue to achieve concrete results in the seven areas that have been previously 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 (task forces were already created in Sao Paulo, Rio de Janeiro, Minas Gerais, Bahia and Pernambuco);
  - (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.
- Ensure that the CNCP has adequate resources and high-level government attention to implement the top priorities of its national plan effectively.
- Under the leadership of the CNCP, set up a new roundtable negotiations between right holders and the ISP industry aiming to achieve a cross industry agreement to combat Internet piracy in Brazil. 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.
- Create more Specialized Police IPR units at both the state and local levels.
- 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 national program to train judges, prosecutors, and police officers on IPR law and enforcement measures.
- The CNCP should provide Minister of Culture with a concrete proposal to include effective legal tools against the Internet Piracy in the context of the announced copyright reform.

### Legislation

- Ensure that the copyright sector with the Ministry of Culture can participate in copyright law reform efforts expected to begin this year. There are a number of improvements that merit inclusion (including, for example, amending the section on technological protection measures).
- Avoid legislation or other implementation of "cross retaliation" against U.S. intellectual property products as compensation for the WTO cotton case ruling.
- 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.
- Amend the Penal Code to increase the penalties applicable to infringement of copyright in software programs so that criminal cases involving software infringement are not eligible to be suspended by judges.
- Reject legislation that would have the effect of promoting unauthorized, overbroad reproduction of works in university settings (e.g. 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.
- Reject discriminatory legislative proposals that would limit foreign investment in the audiovisual industry.
- Avoid legislation on the mandatory use of open source software by government agencies and government controlled companies.

**Cross-retaliation bill against IP:** The copyright industries remained very concerned about the impact any retaliation against U.S. intellectual property would have on respect for intellectual property and accompanying enforcement in Brazil.

In August 2009, the World Trade Organization ruled that Brazil could impose \$294.7 million annually in sanctions because of subsidies paid to U.S. cotton farmers. According to the Foreign Ministry, Brazil will seek to impose as much as \$270 million in intellectual property sanctions. On February 10, 2010, the government enacted legislation (Medida Provisória 482) that will allow Brazil's suspension of concessions or other commitments related to intellectual property



rights because of the U.S.' failure to comply with its WTO obligations in this case.<sup>1</sup> A group of ministers responsible for setting Brazil's trade policy will release a list of goods that will face higher tariffs by March 1, 2010.<sup>2</sup> Both Brazil and the U.S. have stated that they hope to resolve this cotton dispute without resorting to actual sanctions.

IIPA notes that 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 2009, \$1.97 billion worth of Brazilian goods entered the U.S. under the duty-free GSP code. For more information on Brazil's history on the Special 301 lists, please see other sections of this IIPA Special 301 report.<sup>3</sup>

## **COPYRIGHT PIRACY IN BRAZIL**

Piracy involving hard goods continues to be a key concern for several copyright-based industries. The business software industry continues to combat end-user piracy among corporations and other businesses. Internet piracy is a major challenge for all copyright-based industries doing business in Brazil.

**Business software piracy:** The Business Software Alliance (BSA) reports there was no specific change in the nature and scope of piracy in the software industry in Brazil over the past year. Software piracy continues to include the following: business end-user piracy, illegal reproduction and duplication of software programs (both for commercial and non-commercial ends), 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. Digital piracy has grown consistently in Brazil due to the growth of broadband penetration as well as the increase in the possession and use of home computers by Brazilian population in general.

BSA reports that preliminary estimated trade losses due to software piracy was US\$831 million in 2009, with an estimated piracy rate remaining steady at approximately 56%.<sup>4</sup> These preliminary numbers reflect a slight decline from the prior years (US\$905 million at 58% in 2008), despite market growth and devaluation of the U.S. dollar against the Real. A package of tax reductions and incentives for the production and sale of PCs in Brazil has resulted in a significant reduction in the final price of computers in the retail market and the increase of the PC local market. These results are due to good coordination by the CNCP, better public awareness, lower prices on software, and good enforcement. This decline is a move in a positive direction; if the levels of software piracy were lowered by 10 points, there would be positive benefits to the Brazilian economy.<sup>5</sup>

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<sup>1</sup> Under this new decree, intellectual property covers copyright, trademarks, patents and other rights, and the following measures may be adopted: the suspension of intellectual property rights; the limitation of intellectual property rights; the amendment of measures to apply rules to protect intellectual property rights; the amendment of measures to obtain and maintain intellectual property rights; the temporary suspension on royalty payments or remuneration related to the intellectual property rights; and the application of rights of a commercial nature on the payments of the holder of intellectual property rights.

<sup>2</sup> *BusinessWeek*, "Lula Sets Law for Brazil to Retaliate on U.S. Patents," posted February 11, 2010, at <http://www.businessweek.com/news/2010-02-11/lula-sets-law-for-brazil-to-retaliate-on-u-s-patents-update1-.html>.

<sup>3</sup> For more information regarding the history of Brazil under USTR's Special 301 review, see Appendix D at <http://www.iipa.com/pdf/2010SPEC301USTRHISTORY.pdf> and Appendix E at <http://www.iipa.com/pdf/2010SPEC301HISTORICALSUMMARY.pdf> of this submission. For more on IIPA's global issues, see IIPA's 2010 Cover Letter to this 301 submission at <http://www.iipa.com/pdf/2010SPEC301COVERLETTER.pdf>.

<sup>4</sup> BSA's 2009 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 Sixth Annual BSA and IDC Global Software Piracy Study (May 2009), available at [www.bsa.org](http://www.bsa.org). BSA's final 2009 data will be available later in 2010.

<sup>5</sup> 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>.

**Internet piracy:** There are an estimated 67.5 million Internet users in Brazil, which represents about 34% of the country's population; between 2000 and 2009, there was a 1,250% increase in the number of Internet users (see [www.Internetworldstats.com](http://www.Internetworldstats.com)).

Most of the Internet piracy problems in Brazil involve file sharing 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. Although the majority of Internet piracy occurs through P2P networks, the use of social networks for piracy is on the rise. During the past two years there has been a significant increase in piracy facilitated through the exchange of links to infringing materials in "blogs", forums and social networks. As an example, one of these social networks (ORKUT) comprises more than 35 million users, over two million active cyber-locker-links, and over 1,000 communities dedicated to the illegal sharing of music posted via these cyberlockers.

In Brazil, the recording industry suffers greatly from widespread Internet piracy, illegal file sharing on P2P networks, and illegal links made available through social networks. Local industry estimates that over 2 billion songs are being downloaded annually in Brazil. This has decimated the local legitimate music industry.

For the time being, Internet piracy is the prevailing form of digital piracy in Brazil, although the growth in the "smart phones" with Internet navigation capabilities indicates that in the near future, mobile piracy will be increasing its share of the illegal market.

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. ESA estimates there to have been approximately 576,465 infringing downloads<sup>6</sup> made of ESA members' computer and video games through P2P file sharing by ISP subscribers in Brazil during December, 2009, comprising approximately 5.99% of the total number of illegal copies made by P2P users globally during this period. These numbers reflect a dramatic increase in the rate of online piracy in Brazil since 2008, when Brazilian users accounted for only 4.9% of global infringing downloads. These figures place Brazil as number 4 in highest overall volume of P2P game downloads. Breakdowns by ISP show that subscribers of Brasil Telecom, Tele Norte Leste Participacoes, and Telecomunicacoes De Sao Paulo were responsible for approximately 69% of this activity occurring in Brazil -- more than 399,000 downloads during the one-month period. These figures do not account for downloads that occur directly from hosted content, such as games found on "cyberlockers" or "one-click" hosting sites which continue to account each year for progressively greater volumes of infringing downloads. Brazilian consumers access these sites through blogs, forums, social networking sites and other websites ("linking sites") where links are provided that provide direct access to the infringing files stored on the hosting sites. Brazil's troubling online piracy problem is facilitated by the widespread availability of circumvention devices that are necessary to make infringing copies of games and also to enable infringing copies to operate on a user's video game console or PC. Local industry representatives estimate that up to 95% of game consoles in use in Brazil have been modified with circumvention devices. As part of its efforts to crack down on online piracy, ESA hopes the Brazilian government will amend its current TPM provisions to make criminal sanctions available for defendants engaged in the distribution of circumvention devices.

The Motion Picture Association (MPA) reports that its principal Internet challenge involves cyberlockers such as rapidshare and megaupload. Hard good sales via the Internet continues to be a problem although show a declining trend. 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 Independent Film and Television Alliance (IFTA) reports that a worldwide Internet monitoring program it conducted in the last quarter of 2009 for 90 of its Members films recorded over 4,500,000 instances of P2P infringements and almost 50,000 instances of OSP infringement. Brazil ranked in the top ten countries of illegal downloading with over 100,000 instances of P2P infringements.

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<sup>6</sup> This figure is representative only of the number of downloads of a small selection of game titles. Consequently, this figure is under-representative of the overall number of infringing downloads of entertainment software made during the period.

**Hard goods piracy in general:** 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 800 million blank media discs (CD-Rs and DVD-Rs) enter Brazil each year from ports throughout the country. Paraguay, as well as China, 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.

Music sales in 2009 remains the same as 2008 with no signals of growth or recovery. The most damaging effect is suffered by local artists because 70% of the music consumption goes to Brazilian acts. Physical piracy of music and sound recordings in Brazil appears contained, mainly due to the consolidation of a national anti-piracy campaign and the striking increase of Internet piracy (discussed above). CD and DVD piracy sold in the streets and flea markets is the most common form of “hard goods piracy” in the music sector. Optical disc piracy is relatively low and the cities that cause the most impact here are also the largest consumers centers, although the sale of music pirated products in the black market is spread all over the country. Street piracy in São Paulo and Rio de Janeiro is visible 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. Finally, the use of “fake licenses” for the production and distribution of bootleg music DVDs may be considered a growing problem in Brazil. This situation accounts for 48% level of music piracy and commercial losses to recording companies for about US\$147 million in 2009.

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 that are then burned locally in small labs. 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, Rio de Janeiro, Minas, Pernambuco, and Brasilia, 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, circumvention devices (game copiers and mod chips) and high-end counterfeit game discs. A law making such circumvention devices illegal along with consistent enforcement thereof would be significant factors in helping to reduce game software piracy, as they have been in other countries where such laws and enforcement practices exist.

MPA reports that the most harmful form of audiovisual piracy for its members in Brazil is indeed hard goods piracy. This hard goods piracy is fueled by illicit camcording of movies in theaters. 90% of all pirated movies originate as illegal camcords. Unauthorized in-theater audio camcording spiked in Brazil through 2008 and 2009. In 2009, MPA identified 23 member companies’ films camcordered from Brazilian theaters compared to only one in 2007. This is a 2,200% increase in the number of camcords sourced from Brazilian theaters over a two-year period. Movies such as *Wolverine*, *Harry Potter and the Half Blood Prince*, *Avatar*, *Ice Age 3*, *Monsters vs. Aliens*, *Night at the Museum 2*, *Terminator Salvation* were stolen from Brazilian theaters, uploaded to the Internet, and replicated onto DVD-Rs which are then distributed to Brazil’s many black markets, undermining the lifecycle of the film. Many of the illegal recordings out of Brazil are audio captures which are then coupled with visual captures found on the Internet, and distributed in hard goods and on the Internet. MPA appreciates the Minister of Culture’s statement confirming that camcording is covered by the Penal Code. This formal opinion has been useful to MPA in seminars and workshops with public officials. 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.<sup>7</sup> Most of the pirate

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<sup>7</sup> 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% 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.

audiovisual products 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. Physical piracy damages the home entertainment market very rapidly. Sales of legitimate DVDs for the rental market decreased more than 16% in 2009.

The Independent Film & Television Alliance (IFTA) reports that many local distributors are claiming that they must pay lower licensing fees due to declining DVD sales caused by Internet and hard goods piracy. This is particularly devastating for Independents who depend on distribution commitments and minimum license fees to finance films. Local distributors who are competing with pirated copies are permanently damaged. The local Brazilian copyright community is equally impacted by the damage from piracy and the shrinking of the local distribution channels while piracy remains rampant.

The book piracy situation in Brazil has not changed dramatically over the last year. Unfortunately, unauthorized photocopying of entire textbooks, individual chapters, lessons and study materials remains rampant and continues to be the predominant form of book 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. It is imperative that the Ministry of Education and the administrative bodies of universities and colleges work with the enforcement authorities to send a clear message 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 should 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, 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. Online piracy is a growing threat in the country. Unauthorized copies of textbooks, readers and dictionaries are being downloaded from websites hosted in Brazil and overseas.

## **COPYRIGHT ENFORCEMENT IN BRAZIL**

**CNCP work and industry cooperation:** The CNCP (the National Council to Combat Piracy and Intellectual Property Crimes) is the main governmental entity responsible for the central coordination and implementation of Brazil's national anti-piracy campaign.

The CNCP's effort to better prioritize its efforts and target resources is commendable. This year will be an important one to determine whether the CNCP has the resources and high-level government attention to make meaningful progress on its goals. On May 28, 2009, the CNCP launched its second national plan, which identified 23

priority projects that will guide CNCP activities between 2009 and 2012. The CNCP's five priority projects to be addressed in 2010 (in the order they are identified by the CNCP) are:

(1) Piracy Free City: The goal is to actively involve municipal governments in the fight against piracy by creating incentives and establishing local strategies to pursue piracy. City Free of Piracy Project is an agreement between the city halls, the Ministry of Justice and the Brazilian Institute of Competition Ethics (ETCO) to bring awareness against the illegal commerce. Status: The main players in official and private sectors have already been identified to conduct the program in principal cities around the country. In December 2009, Curitiba and Sao Paulo signed their respective agreements to participate in the program. It is expected that other important cities will sign the agreements soon. It is critical that these programs address the broad range of piracy concerns, including unlicensed use of software by businesses (business end-user piracy).

(2) Legal Fair: The goal is to negotiate with the managers of the most popular fairs to legalize trade by offering legal alternatives and reducing or eliminating the sale of illegal products. Status: The National Confederation of Commerce (CNC) is leading the initiative and is making contacts with representatives of flea markets and "camelodromos" for a possible agreement. Educational campaigns along with legal businesses owners are being conducted.

(3) Shops Against Piracy: The goal is to unite shop owners nationwide against piracy, and to improve public awareness about the harmful effects of piracy.

(4) Anti-Piracy Portal: The goal is to develop an interactive communication portal, including educational and promotional campaigns, to improve communication with the public and present national efforts to fight piracy. We understand that the local software association ABES has been requested to assist in the development of this portal.

(5) Partnerships and Cooperation with Internet Service Providers: The goal is to create mechanisms with the Internet service providers to prevent the distribution of pirate products over the Internet. This is a critical element for many.

All of the copyright industries' local colleagues participate directly on the CNCP. Copyright industry cooperation with the CNCP continued to be very good in 2009. Recent news that the head of the CNCP, Luiz Paulo Barreto, has taken office as the new Minister of Justice on February 10, 2010, bodes well.

**Overview of Copyright Enforcement:** 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.<sup>8</sup> Moreover, any progress made in the effort to curb the hard goods piracy problem has been undermined by a lack of effort to combat online piracy.

**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

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<sup>8</sup> To recap, here is a list of action issues that IIPA has identified in the past and which remains relevant today (numbering follows for clarity's sake, not priority): (1) 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; (2) 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; (3) increase high-level investigations against organized crime syndicates; (4) augment coordination between federal and state IPR task forces; (5) establish a dedicated IPR section in the Federal Police and in Customs; (6) increase the number of border enforcement personnel, especially at the tri-border area; (7) legalize use of copyrighted materials on university and school campuses; (8) foster deterrent sentencing, encouraging training and outreach to the judiciary to increase understanding and appreciation of copyright piracy as a serious economic crime; (9) address, in a comprehensive manner, judicial delays in both criminal and civil copyright cases; (10) promote an environment of cooperation between ISPs and copyright holders to prevent online piracy.

prosecutors all have authority to enforce copyright infringement. More resources should be provided to law enforcement. On major issue for the movie and recording industries in Brazil is the cost of storage for seized merchandized. Since the judicial power and prosecutors do not have the resources to provide for a public facility for the storage of pirate products, the private sector must keep those materials in custody until destruction is ordered by criminal judges. This represents along about one third of the budget of local associations dedicated to combat music and audiovisual piracy. Hence, the Brazilian government must destined appropriate resources to relief private sector from this expense.

**More cooperation needed with state and local officials:** A long time IIPA recommendation involves creating more specialized IPR units at both the state and local levels. 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. Relationships with State civil and military police vary, as does the level of local attention to anti-piracy efforts. The Military Police of Sao Paulo were particularly helpful in 2009, facilitating enforcement actions by ensuring the security of those conducting raids.

The copyright industries working in Brazil strongly support 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 have been formed (Rio de Janeiro, São Paulo, Bahia, Pernambuco, Minas Gerais, Federal District and Rio Grande do Sul). However, the only active police precincts are Rio de Janeiro and Pernambuco. São Paulo does not work properly, Minas Gerais is about to be terminated and Rio Grande do Sul has not been implemented yet.

It is important that such a specialized unit be also installed in the State of Paraná. During 2009, there was little activity on this particular topic, although some initiatives were taken to establish state and municipal IPR units, such as Joinville and Recife.

**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 last year.

ABES, the local software association that represents the interests of both the business and entertainment software sectors, has good relationships with enforcement authorities. With respect to business software piracy, ABES reports that it conducted the following actions in 2009: 185 raids against street vendors; 6 raids on software shops; 7 raids at ports and borders. The following copies and equipment were seized as a result of these raids: 1,120 application software, 12,583 PC games, 79,147 videogames (CDs), 815 videogames (cartridge).

Unfortunately, this impressive number of raids is completely undermined by a lack of follow-up investigations or prosecutions. Indeed, the 614 raids of targets engaged in the piracy of entertainment software did not result in a single conviction, ESA reports. Raids in and of themselves are not effective in combating piracy. When vendors of pirated goods realize that raids are not followed with criminal prosecutions leading to convictions and the imposition of penalties, they begin to view seizures as the mere "cost of doing business."

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.

In 2007, the sound recording industry and the major studios combined their anti-piracy operations in 2007 in an organization named APCM (*Associação Anti-pirataria de Cinema e Música*). During 2009, APCM conducted, with support of different law enforcement agencies, conducted an active anti-piracy campaign. In the first 11 months of 2009 APCM

conducted, with support of different law enforcement agencies, the following actions: raids on 2,800 street/black market, 225 production facilities, 149 warehouses, 18 cybercafés, and 350 regular shops. These 2,800 raids resulted in the following seizures: 4,596,000 recorded CD-Rs, 7,594,865 blank CD-Rs, 2,707,115 recorded DVD-Rs of music, 14,348,677 recorded DVD-Rs films, 20,845,530 blank DVD-Rs, along with 8,650 CD- and DVD-burners and 96 jukeboxes. This represents a 20.6% increase in recorded-R's of music and a 48.1% increase in the number of recorded DVD-Rs of films.

APCM also confirms that at the federal government level, there are constant raids at the borders, customs facilities and--at a smaller scale--major operations against crime organizations connected with smuggling, tax evasion and piracy. The bottleneck as far as physical piracy of music and movies is concerned lies in the federation state and municipal levels. At the state level, music piracy done with the intent to profit, although classified as a crime (with penalties that vary from two to four years of jail time, which in 99.9% of the cases is replaced by alternative penalties, usually inexpensive fines), is perceived by police authorities as a non-serious crime, and by the people as something never punished. This is not to say that state police do not carry out raids, seizures, arrests; they do. The problem is that the scale of the physical piracy problem is so vast that the state police alone are not enough to tackle it, especially considering the serious public security problem in major Brazilian cities. At the municipal level, the lack of enforcement of municipal regulations regarding street commerce combined with a policy of "tentative destination" of certain public areas to an organized and (in theory) legal street commerce, have led in the past 10 years to the creation of street markets where everything from clothes to electronics are sold at cheap prices, with lots of pirated products of all kinds sold. State police and Municipal authorities (especially in Rio de Janeiro and São Paulo) raid those premises with certain frequency, but the so-called "camelódromos" (street markets) continue to be the biggest distribution centers for pirated music and movies. With the issuance of the Minister of Culture's formal opinion that camcording is captured by the Penal Code, the MPA would appreciate augmented attention to and cooperation on anti-camcording enforcement actions.

**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.

Industry-initiated actions: 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 ISPs do take down sites hosted on their servers that offer illegal files.

Here is a summary of APCM's music-related internet actions for 2009: sent 8,870 cease and desist notices and removed 128 webpages, 196,395 permalinks located on blogs, 332 offers of illegal products from virtual auction sites, 652,199 cyberlocker links, 344 links at forum sites and 9,826 P2P links. Some 17,193 "topics" (indexing of users that exchange illegal files of music) were removed from social sites, as was 3,036 pre-release music from sites and social networks. The major problem the music industry faces in Brazil continues to be "Orkut," the social site owned by Google. Around 65% of the Internet piracy problem in Brazil is concentrated inside the MP3 communities operating from Orkut. This includes the offering of complete career discographies from many international artists. The MP3 communities in Orkut congregates around 1.5 million registered users exchanging illegal music files.

The following is a summary of APCM's film-related actions for 2009: sent 9,823 cease and desist notices; took down 181,441 webpages/URLs; stopped 510,127 cyberlocker film links; shut down 5 virtual auction users and 455 virtual action products, removed 45,716 P2P film links, alerted ISPs about 16,884 social networks with illegal content and took down 97,270 links to pre release films. MPA notes that, in relation to cyberlocker links illegally made available through social networks, despite Google's recent improvements on Orkut on the removal of links upon notice, the fact is that the communities in Brazil remain dedicated to sharing music and movies, and many more illegal links are posted daily than are removed upon a notice received.

Unfortunately, Brazilian ISPs continue to take no action to curb P2P music and movie piracy despite requests for industry assistance. APCM reports that the problem of P2P file sharing is vast, involving millions of Internet users.

Nevertheless, the industry was able to remove 652,199 cyberlocker links. It is prohibitive at this time for the record and film industries to consider a court solution against Internet users (not to mention the fact that it would take some time simply to get the Internet users identities in order to initiate individual legal claims).

With respect to internet actions for the business software industries, BSA and ABES report that 23 websites were removed, 1,453 auction announcements were removed, and 214 internet advertisers removed. BSA is not involved in any *ex officio* actions on ISP facilities, but has alone and with the support of the local software association (ABES) removed several websites. BSA is also aware of a certain number of police raids against piracy in cyber cafés and “LAN houses” in several states last year.

Data retention: 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 ISPs 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.

Criminal enforcement: 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 APCM is not prosecuting any P2P case through criminal means, because of possible negative repercussions with the general public and with the government.

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.<sup>9</sup> When police authorities want to investigate Internet crimes (such as bank fraud, child pornography), a judicial order is necessary to allow the identity disclosure of the user involved in that crime and further prosecution. In that sense, there are no obstacles that prevent internet investigations as long as they are legal and authorized by a judicial authority. The challenge is in having the police authorities understand the scale and nature of P2P and social network piracy (as described above) may, in appropriate circumstances, require criminal investigation.

Discussions between content industries: In 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. The CNCP participated in those meetings, and the working group coordinated by Ministry of Culture has this issue as one of the priority projects of the new CNCP’s Anti-Piracy plan (as discussed above).

During this past year of discussion regarding ISP talks with the content community, one proposal arose. This involved the possibility of adopting a “warning system” through ISPs to their customers whose IP addresses were identified by rights holders as “heavy uploaders” of film and music content. At the request of Brazilian ISPs, the government asked for opinions from the Federal Public Attorney’s Office, the General Union Advocacy and the Consumer’s Protection Department (DPDC). The DPDC was the one agency to oppose this warning system, alleging that an ISP sending warnings to their customers at a third party’s request would violate the subscriber’s right to privacy. At the Ministry of Justice’s request, the DPDC (which reports to Justice) is being asked to reconsider its position. The bottom

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<sup>9</sup> 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.



line, however, is that one year has gone by with millions of files being downloaded illegally and little has been done to prevent it. The government needs to resolve this issue internally, and ideally have DPDC remove its opposition to this proposal. Locally, MPA, IFPI, BSA and ESA are supporting the Ministry of Justice in this matter.

**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. 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 250 convictions for audiovisual and music piracy in 2009. 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. The suspension of the criminal action against first time offenders has become an individual right for the accused in Brazil; in practice there is not an option for the prosecutor provided that the accused meet minimum requirements such as good behavior and commitment to compensate the victim (which is always reduced to a minimum in view of the personal finances of the majority of the accused).

**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.

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. The problem with the length of Police investigations ("inqueritos") is in the hands of the judicial power. Every six months police authorities must request to criminal judges a formal authorization to keep the investigation "open" (normally due to unfinished recollection of evidences) and the normal practice is the renewal of the judicial authorization without further analysis. The Supreme Court and the state level supreme courts must instruct criminal judges everywhere in the country to limit the number of "permit renovations" for police inqueritos to an acceptable number so the police "delegacias" will know that they have to complete all relevant investigations before the last judicial renewal is granted.

Furthermore, criminal case experts can only be appointed by a judge and there are too few experts in the country. To expedite preliminary investigations conducted by the police, Brazilian law should be amended to permit the private sector to appoint. 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. No changes in this regard since last submission, no new experts appointed to examine pirate evidence.

**Civil actions, delays and high bonds:** BSA 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). BSA's enforcement campaign is based on a cease and desist letter procedure aiming at legalizing licenses. On specific cases voted by the BSA member companies, civil actions are filed in order to get the target companies to stop using irregular licenses and to pay a fine for the past use of irregular licenses. In 2009, BSA started 188 civil actions against end-users of software (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). BSA is increasing the number of legal actions to 230 in 2010 and we are generally satisfied with this number of cases, since the idea rather than penalizing is to have the companies legalize the illegal products and we accomplish that with the Cease and Desist letters. The outcome is satisfactory, although we have detected a tendency of the courts in the southern states to sentence the companies found using irregular software to pay the price of the software only, without any additional penalty. This is harmful, since some of these companies may wait until they are sued before legalizing the licenses.

The bottleneck resides in courts, where judges have little or no knowledge of IPR. 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. More 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 2009 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.

**Border enforcement:** Brazil's extensive border makes it very vulnerable to smuggling of all sorts of goods, from drugs to DVDs. 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. Also, 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.

Seizures of blank media increased by 9% in 2009, up to 28.4 million units (comprised of 7,594,865 blank CDs and 20,845,530 blank DVDs). 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. Customs authorities in the state of Parana alone seized over 300,000 pirated video games. APCM reports that some 14,348,677 pre-recorded CD/DVDs were also seized.

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 notices 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.

**IPR trainings and public awareness:** It is essential that Brazilian government take increased actions to properly train enforcement agencies and judicial officials. There is no national program to train judges, prosecutors and police officers on IPR law and enforcement programs. Although most of the training seminars/workshops for judges, prosecutors and police officers is organized and financially backed up by the affected industries, CNCP has been active in stimulating, promoting and participating in such events at the national, regional, and state levels. For example, in 2009, BSA and ABES trained enforcement officers in 12 cities throughout Brazil. BSA has also taken part in seminars from the Rio de Janeiro School of Judges to discuss IPR law and enforcement measures and is an active member of the "Escola Legal" project of the American Chamber of Commerce. APCM also participated in many of the seminars MPA participated in 14 trainings in 2009 with 847 officials trained. In partnership with APCM and the CNCP, the ESA and ABES developed a training program aimed at training public agents and engaging university students and businesses executives about the

importance of intellectual property rights and the need to combat software piracy. Over the course of 2009, the Road Show program visited 11 cities, helped to train 725 public agents, and reached out to more than 1,500 university students and executives.

## **COPYRIGHT LAW IN BRAZIL**

There was no significant legislative movement on key issues related to improving copyright enforcement in Brazil last year. The CNCP was not very active with its work with the Chamber of Deputies in 2009. There is also some pessimism that there will be any progress in 2010, as this is an election year in Brazil. In any case, it is hard to evaluate with any certainty what legislative progress might be made this year.

**Possible copyright reform in 2010:** Over several years, 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. We look forward to working with the Government in 2010 to identify and implement amendments that would enhance the protection afforded to creators in Brazil. The copyright industries are concerned about reforms that would weaken existing copyright protections in a number of areas.

In July 2009, the Ministry of Culture established a Division of Intellectual Property which broadened the government's ability to take action on copyright issues. However, any effective action from the government on the regulatory process will only be possible through amendments to the existing legislation. In November 2009 the Ministry of Culture held the III Congress on Copyright and Public Interest. Proposals discussed III Congress were to be compiled into a draft bill and presented to the public; this has not yet occurred but is expected in the early part of 2010.

IIPA has pointed out in previous Special 301 reports some of the key gaps in the current Brazilian copyright regime (which includes the 1998 Copyright Law and 1998 Software Law). The Brazilian government unfortunately continues to refuse to join the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT). 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. But there are some gaps. For example, Brazilian law is weak on technological protection measures and needs to be amended so that it: (1) covers both access-controls and copy-controls; (2) prohibits not only the act of circumvention but also preparatory acts, such as the manufacture and distribution of circumvention devices; and (3) includes criminal remedies for the distribution or manufacture of circumvention devices.

### **Proposed legislation related to enforcement**

For the past three years, the industries and the CNCP have worked to develop and introduce legislation to strengthen Brazilian measures and penalties for copyright infringement.<sup>10</sup> Currently there are several proposals that the industries have worked to present both to the Congress and through the CNCP.

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<sup>10</sup> 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 (this action is no longer requested in 2010); (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).

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. The president of CEPIRATA, Dep. Pedro Chaves, and the reporter, Dep. Maria do Rosario, presented a bill (5057/2009) on forensics and destruction of illegal products. The final report of the CERIPATA was issued in 2009 and recommended a series of actions: the creation of a Commission to analyze the "bio-piracy" problems; amend copyright law to increase civil sanctions for copyright infringement; have the Ministry of Justice and Ministry of Labor adopt measures against piracy; have public authorities coordinate on actions and measures against piracy; and approve bill 3378/04 which establishes ex-officio authority for crimes against industrial property (trademark, patent design, etc).

**Bill on forensics and destruction of illegal products:** This proposal would establish a system to facilitate forensic experts' work. Bill 5057/2009 would amend article 530-D of the Criminal Procedure Code to authorize sampling on pirated materials; this was considered a priority for the CEPIRATA. The bill also 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 sampling of pirate seized goods for experts' reports purposes. The bill does not contain any provision related to destruction of seized material; MPA is lobbying to have such a provision included.

**Cybercrime Bill (Bill 89/2003):** This proposed bill would amend 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. Bill 89/2003 advanced was approved by the Senate in 2008, but is still under consideration by the Chamber of Deputies, and that Chamber reported is not interested in amending this bill as the Senate would then have to approve those modifications.

**Objectionable copyright bills regarding student copying:** Academic publishers (local and international) already must combat unauthorized photocopying of books and journals in educational institutions, and legislation that would codify such use should be opposed. 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 still waiting for review of the Senate Education Commission. Brazil must comport with the TRIPS three-step test for exceptions to protection, and this legislation fails to do so.

**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 either 2008 or 2009.

**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.

**Tax exemption on certain imported media:** A bill proposed several years ago would exempt from taxes imported recordable blank media. This bill has been presented in the Senate and is still pending before the Education Commission. A public hearing was to have taken place in 2009 but did not, nor is a hearing likely in 2010. MPA is lobbying for the rejection of this bill.

**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. This bill is pending at the Constitutionality and Justice Commission; its report has already been issued and recommends approval of the bill.

**The Criminal Code (2003):** The Penal Code needs to be amended to increase the penalties applicable to infringement of copyright in software programs so that criminal cases involving software infringement are not eligible to be suspended by judges. 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, 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 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. Unfortunately, the amendments to the criminal code did not change the separate provisions in the Software Law. Defendants found guilty of commercial scale software piracy are eligible for only one year in prison, and as a result, these defendants often have their sentences commuted. 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. This problem has undermined the deterrent value of criminal enforcement actions against those dealing in pirated software. A bill (Projeto de Lei no. 333/1999) to achieve this was introduced in 1999 and was approved by the Chamber of Deputies in 2000 but this bill has been stuck in the Senate since then, despite having received approvals by various Senate Committees.

## **ADDITIONAL ISSUES**

**Government software procurement:** The Brazilian Government should be encouraged to continue its efforts to implement effective software asset management practices in its public ministries and agencies, while avoiding mandates for procurement of software based on the model of development or the business model of the developer. 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. Following a technology neutral approach to procurement will allow government agencies to purchase the best software available on the market to meet their particular needs. The government should work closely with the private sector in this regard.

**High tariffs and barriers on entertainment software:** High tariffs and taxes continue to 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.<sup>11</sup> 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,

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<sup>11</sup> 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.

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 2010. The bill remains pending approval before the House of Deputies and needs to be analyzed by the Constitutionality and Justice Commission.

**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. In 2009, the House of Deputies' Public Security and Fight against Organized Crime Commission held a public hearing to discuss the importation of blank media through Brazilian ports. The copyright industries participated, as well as representatives from the Federal Police and Brazilian IRS (Receita Federal). Despite having the participation of the public authorities, discussions regarding adoption of a reference price did not evolve.

# COMMONWEALTH OF INDEPENDENT STATES

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

### 2010 SPECIAL 301 REPORT ON COPYRIGHT ENFORCEMENT AND PROTECTION

IIPA recommends that the following five Commonwealth of Independent States (CIS) countries should either remain on the Watch List for 2010 (in the case of Belarus, Tajikistan, Turkmenistan and Uzbekistan), or be elevated to the Watch List for 2010 (Kazakhstan) for failing to comply with existing bilateral and/or multilateral treaty obligations to provide adequate and effective protection and enforcement.

Each of the five countries have different copyright laws and treaty accessions and ratifications. However, IIPA has combined the reports of these five countries into a single report because the overwhelming majority of issues in each country is based upon very similar issues in each country, and upon very similar bilateral trade agreements (negotiated and signed separately) with the United States by each of these five countries, in the early to mid-1990s. These trade agreements conferred Normal Trade Relations (then known as "Most Favored Nation") on each country in exchange for a series of legal reforms and treaty accessions and ratifications which have, to date, not been met.

The details of the recommended legal reforms, treaty accessions and ratifications, and enforcement obligations for each of the five countries – **Belarus, Kazakhstan, Tajikistan, Turkmenistan and Uzbekistan** – is set out below in the individual country reports.

# BELARUS

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

### 2010 SPECIAL 301 REPORT ON COPYRIGHT ENFORCEMENT AND PROTECTION

**Recommendation:** IIPA recommends that Belarus remain on the Watch List in 2010.

**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 almost seventeen years, Belarus has not yet adequately implemented the IPR obligations in that agreement.

In 2009, the U.S. Trade Representative – while retaining Belarus on the Watch List – noted that the U.S. “reiterated its concern about Belarus’ delayed implementation of its IPR commitments under the [1993] United States-Belarus Trade Agreement.” In short, the U.S. Government said “[t]here has been no apparent progress since that time. The Belorussian market is dominated by illegal optical disc[s], with pirated DVDs sometimes making it to the market before they are released in U.S. cinemas. The Government reportedly misuses software licenses openly. Enforcement officials have no *ex officio* authority to investigate, seize or prosecute IPR cases. Reports indicate that IPR enforcement is virtually non-existent.” The U.S. Government continued to “urge Belarus to strengthen its IPR laws and to enforce against piracy and counterfeiting.” There were no reports of any relevant or significant legal reforms or enforcement successes in Belarus in 2009.

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) from relocating to Belarus, as well as to stop the importing and exporting of illegal optical media discs (CDs, DVDs, CD-ROMs, CD-Rs, etc.). IIPA is aware of one optical disc plant (opened in October 2004) in Belarus. The Vigmaplast optical disc replication plant is operating near Minsk; it has two lines and an estimated plant capacity of 7 million discs a year. We understand that it was assigned a source identification (SID) code.

**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. Related 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 Article 158) to commence liability, which is now BR12.1 million (US\$4,174).
- 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 do not provide “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. Furthermore, the definition of “technical measures” does not cover access controls. 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 Article 40 of the Copyright Law (1998), 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, monitoring optical disc production in particular (at the one known plant), and using the criminal law remedies.

There are no comprehensive enforcement statistics for 2009. In recent years, the industries reported a trend of increasing raids, but unfortunately, the vast majority of these raids were 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 imposed, even against these retailers, are generally insignificant.

# KAZAKHSTAN

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

### 2010 SPECIAL 301 REPORT ON COPYRIGHT ENFORCEMENT AND PROTECTION

**Recommendation:** IIPA recommends that Kazakhstan be placed on the Watch List in 2010.

**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, 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, however, 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. IIPA understands that further revisions are being contemplated in 2010 to the Copyright Law, as well as revisions to the Customs Code (to provide *ex officio* authority). These, and other IPR issues, were discussed with the U.S. Government in bilateral talks with Kazakh officials in October 2009.

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 of 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.) At the top of the list of priorities for digital treaty implementation, IIPA recommends that Kazakhstan adopt provisions that protect the use of technical protection measures applied by rightsholders to works and sound recordings.
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 2010.

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. Last, Kazakhstan (as well as Russia and Belarus, as part of an anticipated Customs Union), is considering a complicated duty valuation that would be

(unfairly) based on royalties rather than, as in most countries, on the value of the underlying carrier media (i.e., the discs). IIPA recommends that Kazakhstan (and the Russia/Belarus customs union) reject these unfair tariff rates to allow for copyright industries to invest in the local market.

## **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 the past two years, there was a decline in the number of police raids and seizures, and in prosecutorial activity as well. Thus, 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 2009 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). 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 about 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 2009 figures), that the piracy rate for business software in Kazakhstan was 79% and that losses were \$57 million.

In the past, BSA has reported on some raids undertaken against optical disc (CD) and hard-disc software pirates, and, even one against an Internet pirate, as well as the commencement of civil actions. 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 the past several years, 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 approximately \$48.1 million in 2009 (and additionally, \$303.7 million in 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.

# TAJIKISTAN

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

### 2010 SPECIAL 301 REPORT ON COPYRIGHT ENFORCEMENT AND PROTECTION

**Recommendation:** IIPA recommends that Tajikistan remain on the Watch List in 2010.

**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 2009, the U.S. Trade Representative – in retaining Tajikistan on the Watch List – noted that Tajikistan “has yet to fully implement its IPR obligations under the 1993 U.S.-Tajikistan Trade Agreement (Bilateral Trade Agreement).” The U.S. Government noted “some positive movement” because the Tajik Government agreed to join “the WCT [WIPO Copyright Treaty] as of April 5, 2009, ratified the Rome Convention, and applied for accession to the WTO; however, significant issues remain.” 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. and other foreign sound recordings” and its denial of protection for pre-existing works (before 2000) and sound recordings; the absence of criminal penalties for IPR violations (noting its current law is “insufficient to deter infringers”); that “officials lack proper *ex officio* authority to commence criminal cases” and “the Tajik Customs Code does not provide customs officials with *ex officio* authority to interdict suspected infringing materials at the border.” As in years past, the U.S. Government has 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 seventeen years ago in the Bilateral Agreement.

Although accession to the WCT in 2009 was positive news, unfortunately, Tajikistan did not also deposit its instrument of accession to the other WIPO “digital” treaty, the WIPO Performances and Phonograms Treaty (WPPT). Instead, 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 provisions 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. This would include, as a priority, the need to adopt provisions that protect the use of technical protection measures applied by rightsholders to works and sound recordings, as well as other effective legal remedies against those who engage in acts of circumvention or distribute circumvention devices.

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, 2002.



2004 to enhance trade and investment between the two countries. The governments held talks, in the context of the TIFA, to further improve trade relations in October 2009.

According to the recording industry (International Federation of the Phonographic Industry, IFPI), there are currently no known optical media plants in Tajikistan.

# TURKMENISTAN

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

### 2010 SPECIAL 301 REPORT ON COPYRIGHT ENFORCEMENT AND PROTECTION

**Recommendation:** IIPA recommends that Turkmenistan remain on the Watch List in 2010.

**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. Seventeen years later, Turkmenistan has not implemented the IPR obligations in that agreement.

In April 2009, the U.S. Trade Representative – in retaining Turkmenistan on the Watch List – noted “Turkmenistan has yet to fully implement its IPR commitments under the 1993 bilateral U.S.–Turkmenistan Trade Agreement (BTA)...Turkmenistan is neither a member of the Berne Convention nor of the Geneva Phonograms Convention, and it has not yet signed the WIPO Internet 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. The U.S. Government further stated its priorities regarding the deficiencies in the Turkmen IPR legal regime, including no “comprehensive procedures and penalties for IPR infringement as required under the BTA” as well as failing to adopt a “separate Copyright Law” (relying on Civil and Criminal Codes for rudimentary protections against IPR infringement), failing to provide “any protection to foreign sound recordings or preexisting works” and an “inadequate” Customs Code that “does not provide *ex officio* authority to interdict suspected infringing material at the border.” Turkmen officials participating at a U.S. Patent and Trademark Office (GIPA) program in December 2009, said that Turkmenistan plans to join the Berne Convention and the Geneva Phonograms Convention sometime in 2010. That would be a very positive first step towards improving the Turkmen IPR legal regime.

**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 treaties (WCT/ WPPT) compliant Copyright Law to protect works and sound recordings. This includes, as a priority, the need to adopt provisions that protect the use of technical protection measures applied by rightsholders to 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. The governments held talks, in the context of the TIFA, to further improve trade relations in October 2009.

# UZBEKISTAN

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

### 2010 SPECIAL 301 REPORT ON COPYRIGHT ENFORCEMENT AND PROTECTION

**Recommendation:** IIPA recommends that Uzbekistan remain on the Watch List in 2010.

**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. Unfortunately, over 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 2009, the U.S. Trade Representative, in announcing Uzbekistan’s retention on the Watch List, noted ongoing concerns because Uzbekistan “has yet to fully implement its commitments under the 1994 U.S.-Uzbekistan Trade Agreement” highlighting in particular, its Article 18 reservation pertaining to Berne Convention accession (failing to “protect pre-existing works”), and its failure to join the Geneva Phonograms Convention (thus failing to “provide any protection or rights to U.S. and other foreign sound recordings”). The U.S. Government announcement noted other legal and enforcement reforms that Uzbekistan needs to undertake in order to comply with its international obligations (including, the 1994 U.S.-Uzbekistan Trade Agreement) and that its enforcement regime is “weak” as a result. Included on the list were: “criminal penalties for IPR violations are low and its enforcement officials do not have *ex officio* authority necessary for effective enforcement by police and customs authorities.” As a result, IIPA continues to recommend that the U.S. Government should 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).<sup>1</sup> 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 technical 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

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<sup>1</sup> Note, IIPA 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).

recordings), or has several unclear or incomplete protections (such as, those pertaining to technical protection measures).

In 2005, Uzbekistan 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 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. We testified again on October 4, 2007, and on April 24, 2009 at GSP hearings. Now, more than four years later, and after three rounds of hearings, the Government of Uzbekistan has failed to adopt seven of the eight recommendations (which, for the most part, track the 1994 trade agreement obligations). The same set of recommendations is set out here – with some additional detail.

**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. Removing the reservation to Article 18 of the Berne Convention by a formal notification from the Government of Uzbekistan to the WIPO, in order to properly provide protection – as required by Berne and the U.S. Bilateral – for pre-existing works.
2. Adherence to the Geneva Phonograms Convention.
3. Amending the Copyright Law to provide protection for pre-existing works and sound recordings for a minimum of 50 years (and preferably, 70 years).
4. Amending the Criminal Code to include "neighboring rights" violations (the current code only applies to infringements of "works").
5. Amending the Criminal Code to raise the penalties for IPR violations to deterrent levels (for example, to 500 times the minimum wage).
6. Amending the Criminal Code to adopt a threshold for a criminal violation calculated on the basis of the price of legitimate product, instead of a threshold based on an undefined "large-scale damage" for IPR crimes; and, set that threshold at a low actual level.
7. Amending the Criminal Code (or Criminal Procedure Code) to permit the confiscation and destruction of manufacturing equipment used to produce pirated material.
8. Amending the Criminal Procedures Code to provide the proper *ex officio* authority for police officials to initiate copyright criminal cases and investigations.
9. Amending the Administrative Code to provide *ex officio* authority to administrative authorities to commence investigations and cases.

10. Amending the Customs Code to grant the proper *ex officio* authority to border officials to seize illegal material and to commence their own investigations and criminal cases.
11. Amending the Civil Code to provide the proper *ex parte* search provisions for effective enforcement against end-user pirates.
12. Adherence to the WIPO digital treaties: the WIPO Copyright Treaty (“WCT”) and the WIPO Performances and Phonograms Treaty (“WPPT”), plus enacting all of the appropriate implementing legislation in the Copyright Law.
13. Correct deficiencies (and some uncertainties) in the Copyright Law of 2006, including:
  - i. Providing protection for pre-existing works and sound recordings (see recommendations above).
  - 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 technical protection measures (Article 63, which currently provides for no civil or criminal remedies) 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. 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. The governments held talks, in the context of the TIFA, to further improve trade relations in October 2009.

In 2009, Uzbekistan benefited from \$414,000 worth of GSP benefits (compared with over \$3 million for all of 2008). 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 reform and treaty accessions, it also 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.

# EGYPT

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2010 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** IIPA recommends that Egypt remain on the Watch List in 2010.<sup>1</sup>

**Executive Summary:** Once a country of great cultural significance in terms of creative output in the Middle East, the copyright market in Egypt today is less characterized by creative activity than it is by pirate consumption.<sup>2</sup> Local Egyptian and U.S. right holders are equally hampered by piracy and other barriers, as authors such as Alaa al-Aswany,<sup>3</sup> and the local Egyptian film market duopoly of the Arabic Company for Production and Distribution Group and El Mottahida (which suffer from piracy, cultural burdens, narrow theatrical windows, and a dearth of screens in the country)<sup>4</sup> can attest. In addition to damaging photocopy and print piracy, other piracy phenomena like retail and Internet-based piracy of music, software, games, and movies, and business software end-user piracy (which statistically worsened in 2009), caused copyright owners losses and kept them from doing legitimate business in Egypt. Internet usage continued to grow rapidly in 2009, and along with it, Internet-based piracy, especially of music, became a growing concern.

Despite a few positive developments and some enforcement cooperation in 2009, the piracy situation remained of great concern in Egypt. The establishment of new Economic Courts by Law No. 120 (2008) approved by the Shura Council and passed by the People's Assembly is clearly a positive development. Under this Law, civil and criminal copyright cases will be handled by judges with specialized training and can, as the government of Egypt's Submission in the Special 301 process indicates, promote "speedy judgments rendered."<sup>5</sup> The government's Submission discussed cases in which the Ministry of Communications and Information Technology's "Information Technology Industry Development Agency" (ITIDA) had offered support, and listed several criminal convictions purporting to demonstrate improvements in the IP system. However, right holders remain concerned since cases have in the past usually resulted in non-deterrent fines, and almost never resulted in imprisonment. The Copyright Investigation Police Office in Cairo has been helpful on occasion to the publishing industry in carrying out enforcement against copy shops. However, the market remains largely overrun by piracy. The shift in jurisdiction for all software copyright (business and entertainment) to the Intellectual Property Unit at ITIDA has been helpful in leading to actions against piracy targets, and cases brought against some longstanding and notorious pirate enterprises. The Ministry of Culture, which still has enforcement purview over books, music, and motion pictures, has been less active. Finally, no legal structure is in place in Egypt to deal with growing Internet piracy, as Egypt's Internet penetration broadens faster than almost anywhere in the world.

The United States and Egypt signed a Trade and Investment Framework Agreement on July 1, 1999, and in May 2009,<sup>6</sup> United States Trade Representative Ron Kirk and Egyptian Minister of Trade and Industry Rachid Mohammed Rachid met to discuss ways to expand U.S.-Egyptian economic ties, and signed a "Plan for a Strategic Partnership," which "aims to further promote economic cooperation between United States and Egypt." The Plan

<sup>1</sup> For more details on Egypt's Special 301 history, see IIPA's "History" Appendix to this filing at <http://www.iipa.com/pdf/2010SPEC301HISTORICALSUMMARY.pdf>, as well as the previous years' country reports, at <http://www.iipa.com/countryreports.html>.

<sup>2</sup> 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>.

<sup>3</sup> See Abdallah, *Alaa El Aswany*, Egypt Today, August 2004, Volume # 30 Issue 02.

<sup>4</sup> See Moullier et al, *supra* note 2.

<sup>5</sup> See Arab Republic of Egypt (Mona El Garf, Advisor, Minister of Trade and Industry), *USTR Section 301 Report for the Year 2009 Submission by the Arab Republic of Egypt*, February 2009, submitted to [regulations.gov](http://regulations.gov) (on file with IIPA).

<sup>6</sup> United States Trade Representative, *Joint Statement of U.S. Trade Representative Ron Kirk and Egyptian Minister of Trade and Industry Rachid Mohammed Rachid*, May 27, 2009, at [http://ustr.gov/assets/Document\\_Library/Press\\_Releases/2009/May/asset\\_upload\\_file610\\_15662.pdf](http://ustr.gov/assets/Document_Library/Press_Releases/2009/May/asset_upload_file610_15662.pdf).





expressly includes "protection and enforcement of intellectual property rights" as one of the issues which may be a priority area for discussion and cooperation.

**Priority Actions Requested in 2010:** IIPA requests that the government of Egypt take the following actions in 2010, which would result in the most significant near term commercial benefits to the copyright industries:

#### **Enforcement**

- Fully establish specialized "Economic Courts" with specialized judges to deal with copyright matters, emphasizing speed and deterrence in piracy cases including jail sentences served, not suspended, and deterrent fines, and take active steps to develop core of specialized IP prosecutors and judges.
- Tackle book and journal piracy, both illegal reprints and photocopying, by taking sustained enforcement actions against pirate production and ensuring universities adopt policies to use only legal copies of publications.
- Fully implement laws and decrees (such as Law No. 118/1975, Decree No. 770/2005, and other measures) to seize piratical imports and exports, without guarantee amounts that are prohibitively expensive.
- 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.

#### **Legislation and Market Access**

- Ease onerous market access restrictions which close the Egyptian market to legitimate copyright companies.
- Amend the copyright law and implementing decree to cure TRIPS deficiencies and resolve ambiguities, and fully implement and join the WIPO Copyright Treaty (WCT) and WIPO Performances and Phonograms Treaty (WPPT).
- Establish mechanisms for service providers to cooperate with right holders against Internet piracy, including an expeditious way to remove infringing content, block piracy websites, enforce against illegal file sharing, and deal effectively with repeat infringers.

## **PIRACY AND ENFORCEMENT CHALLENGES IN EGYPT**

Previous reports have discussed the piracy and enforcement challenges faced in Egypt.<sup>7</sup> Piracy concerns raised included book piracy, including both pirate photocopying and pirate printing businesses, business software end-user piracy, Internet-based piracy, retail piracy, pirate distribution under false licenses (mainly of games), and mobile device piracy, among other issues. The following sections provide brief updates to the piracy and enforcement situation in Egypt. Failure to mention a specific issue does not indicate that the problem has been fully resolved.

**Book Piracy – Educational Book Market Suffers From Illegal Photocopying and Some Print Piracy:** The publishing industry has long complained of illegal photocopying of English language teaching (ELT) course books and other materials (e.g., grammar books, dictionaries) at universities and elsewhere in Egypt. Pirated higher-education textbooks, reference books and professional books are regularly sold at stalls set up near university campuses, and the institutions sometimes condone the activities or look the other way. Lecturers also may encourage illegal photocopying or universities may maintain bureaucratic and nontransparent adoption processes that give pirate enterprises cover (or may rent space to photocopy shops they know or reasonably should know are supplying pirate copies of texts and course packs). There are a few exceptions, most notably the Arabic Academy of

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<sup>7</sup> See International Intellectual Property Alliance, *Egypt*, at <http://www.iipa.com/rbc/2009/2009SPEC301EGYPT.pdf>. In 2009, the business software industry reported US\$88 million in losses due to piracy with a 60% piracy level. This is up from US\$87 million in losses and a 59% piracy level reported for 2008. In 2007, the latest year the music and record industry and book publishing industry reported, piracy losses were estimated as high as US\$119 million, and piracy levels for records and music were 75% in that year. The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2010 Special 301 submission at [www.iipa.com/pdf/2010spec301methodology.pdf](http://www.iipa.com/pdf/2010spec301methodology.pdf). BSA's 2009 statistics are preliminary, representing U.S. software publishers' share of software piracy losses in Egypt. They follow the methodology compiled in the Sixth Annual BSA and IDC Global Software Piracy Study (May 2009), available at <http://global.bsa.org/globalpiracy2008/index.html>, whose 2008 U.S. losses were also updated in February 2010. 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.

Science and Technology in Alexandria, which has achieved an outstanding record of supplying legitimate texts. The piracy level for medical books in particular is very high, and the vast majority of the market for other professional reference books such as engineering books is pirated. Online piracy, though not yet a significant problem, is a growing concern. A publisher reports that a number of its higher education textbooks are available on various BitTorrent websites.

Enforcement efforts have been at best sporadic as the authorities have not typically shown an interest in taking action against copy shops engaged in unauthorized photocopying activities. Recently, however, there have been isolated cases in which the industry has had an opportunity to work cooperatively with the Copyright Investigation Police Office in Cairo. Overall, it appears that authorities will not initiate raids and criminal prosecutions on their own without a specific complaint from rights holder representatives. Thus, book piracy, particularly illegal photocopying, remains rampant. Publishers have recently launched an anti-piracy campaign and met with several ministries and the Arab League IP office late last year. Though still in the early stages with much work to be done, the increased level of interest shown by the authorities is encouraging and welcome.

In theory, authorities indicate they are willing to take measures to stop piracy occurring on university campuses. In some cases, university administrators have indicated a willingness to take measures to stop piracy occurring on university campuses, especially when the institution is up for accreditation to 'Western' universities, and the university is evaluated on the basis of the curriculum, exams and its overall standing in the wider academic community. Unfortunately, in reality, promoting the use of legitimate published materials at most universities tends to happen on an *ad hoc* basis and varies from faculty to faculty. For example, some faculty members only allow students to register who have a book receipt for a legitimate purchase. Others appear to encourage or condone illegal photocopying. In order to truly tackle the unlawful photocopying and print production that is supplying Egypt's university campuses, the Ministries of Education and Higher Education should undertake measures to promote the use of legitimate published materials on college campuses. IIPA notes that at present, public state-funded universities are taking no responsibility for renting out space to stores that turn into pirate enterprises. 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 pirated copies at the university.

**Establishment of Economic Courts to Deal With Copyright Cases a Welcome Development:** The government of Egypt's February 2009 Special 301 Submission<sup>8</sup> indicated that the Shura Council and the People's Assembly approved Law No. 120 for the Year 2008, establishing economic courts. According to the Ministry submission,

"These specialized courts will have jurisdiction over cases involving a number of economic laws, including the intellectual property rights law. These courts will ensure specialized judges trained in these legislations hear IPR cases and speedy judgments rendered. The courts will decide on both the criminal aspect of IPR cases as well as the civil remedies."

In the past, most copyright cases decided favorably in Egyptian courts resulted in non-deterrent fines usually a fine of no more than EP5,000 (US\$905). It is hoped that the advent of the Economic courts will result in greater numbers of cases, speedier trials, and deterrent penalties, including fines and imprisonment sentences, not suspended.

IIPA also commends ITIDA for its cooperation to date with right holders in cases under the old court system, seeking positive results,<sup>9</sup> although in some of those cases, ITIDA demanded voluminous information of the type not

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<sup>8</sup> See *supra* note 5.

<sup>9</sup> In the government of Egypt's 2009 Special 301 Submission, the government noted that ITIDA as well as other governmental authorities provide technical expertise to law enforcement officers, prosecutors, and judges involved in IPR cases, indicating, "[s]ince Jan[uary] 2008, ITIDA has provided support in investigating 1087 cases, tried in front of Egyptian courts, through providing expert/technical reports," including Case No. 8887 for the year 2008 (concerning a CD replication factory accused of copying illegal CDs worth about 8 million Egyptian pounds). The submission also mentions ITIDA support to "Electronic Arts

normally requested in simple piracy cases, to the detriment of those cases. The Egyptian government's Special 301 Submission reported five criminal case results from 2008-09, with four resulting in "imprisonment of infringers," which the Submission notes "constitutes a new trend in Egypt's judicial efforts in deterring piracy." The cases listed are:

- "Case No.14 for the year 2009, in which the court gave a sentence of imprison[ment] for 6 months."
- "Case No. 9172 for the year 2008 in which the court gave a sentence of imprison[ment] of a year plus a fine of 5000 Egyptian Pounds [US\$905]."
- "Case No.14532 for the year 2008, in which the court gave a fine of 15,000 Egyptian Pounds in addition to a sentence of pre-civil remedy of 5001 Egyptian Pounds [US\$905]."
- "Case No. 9171 for the year 2008 in which the court gave a sentence of imprison[ment] for 3 months plus a fine of 5000 Egyptian Pounds [US\$905]."
- "Case No. 20039 for the year 2008 in which the court gave sentence of imprison[ment] for 6 months plus a fine of 5000 Egyptian Pounds [US\$905]."

IIPA hopes that with the new courts, a specialized core of IP prosecutors and judges emerges and that court processes will also be improved. In particular, courts should not impose bureaucratic documentary hurdles to effective judicial enforcement, or other hurdles which could, if allowed to deny protection altogether, amount to inconsistencies with Egypt's current international obligations.<sup>10</sup> It would also help right holders if the new courts shared court decisions in a more transparent manner by publishing them expeditiously, and in this regard, IIPA welcomes the government's reporting of the cases noted above in its Submission. Finally, somewhat indicative of the continuing turf issues between ITIDA and the Ministry of Culture, there have been in the past instances in which clearly pirate material has been deemed "genuine" by the Ministry of Culture, leading to further delays in investigations leading to legal proceedings. ITIDA and MOC should regularly invite copyright owner assistance in ascertaining the legitimacy of suspect product. 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. Right holders can quickly dispense of such questions.

**Internet Piracy:** Egypt is witnessing an explosion of Internet growth. As of September 2008 (the latest date for aggregate statistics from the International Telecommunications Union), Egypt boasted 13.6 million Internet users,

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(EA) Company by presenting a technical expert report in another case," communicating with EA "to collect specific information concerning its products for the case, which in turn helped protect the copyright holder (EA)." The report also indicated exchange of information "with multinational companies in case No. 4384 for the year 2007, concerning 2373 CDs which contained software from Microsoft and EA."

<sup>10</sup> In several infringement cases in 2008 and 2009, 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. IIPA understands 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 be inconsistent with Egypt's international obligations under the Berne Convention and the TRIPS Agreement. The Berne Convention imposes a "no formality" principle in Article 5, by requiring copyright protection to be afforded without regard to any formality. In the Egyptian government's February 2009 Special 301 Submission, the government indicated,

"With regard to depositing and registering software, ITIDA confirms that the copyright protection is automatic according to the Egyptian law. So the author is protected automatically without any formalities. Our system is completely compliant with Berne convention and TRIPS agreement without having any inconsistency. The process of depositing or registration will help in establishing evidence if there is any dispute. It is not by any mean a barrier nor a condition for protection, and this is very clear in article (184) of the Egyptian IPR law (Law 82 of 2002)."

The Ministry pointed to "Cases No. 9040 and No. 28896 Year 2007" as evidence that registration was not required since convictions were achieved in those cases without registration. IIPA appreciates this clarification of the issue and hopes that in all cases, documentary requirements and deposit requirements, the latter which are spelled out in the law, are never used to deny copyright protection.

representing 16.7% penetration (compared with 12.9% penetration in 2007). More impressive is that Egypt added 350,000 broadband subscribers from October 2008 to September 2009, for a total of 944,000 broadband subscribers as of October 2009, according to Point-Topic. Egypt's growth ranks third in the world from July to October 2009, and fifth in the world from October 2008 to September 2009. Thus, it can come as no surprise that Internet piracy is becoming a serious issue in Egypt. Internet piracy comes in all forms in Egypt, from websites advertising physical pirate product, to illegal download sites, deep linking sites, peer-to-peer (P2P) file sharing services, cyberlockers, web bulletin board or forum websites, and BitTorrent sites. The music and record industry reported in 2008 that 97% of all digital distributions of music in Egypt are pirate, but reported that the situation actually worsened in 2009. As a result of Internet-based piracy in Egypt, the music and record industry reports that its budgets for new production shrank by 50% in 2009, due to decreasing revenue from local music, and noted that foreign music revenues were also down. These reductions resulted in less taxes paid to the government, taxes which pirate enterprises do not pay. Due to budget reductions, reductions in force have also resulted. Overall, the negative social effects of piracy have hit the music and record industry extremely hard in Egypt.

IIPA reported in the 2008 Special 301 report the activities of the Information and Internet Crime Department at the Ministry of Interior, and that the courts in 2007 handed down a preliminary court decision in what was reportedly the first lawsuit regarding Internet piracy in Egypt, ordering the defendant to pay a fine of EP10,000 (US\$1,810). IIPA appreciates that increasing numbers of cases may be needed against major Internet piracy services, or those engaging in large-scale sharing of infringing files. We also believe that a major component of dealing with Internet-based infringements is the establishment of an effective legal structure to deal with such, including laws in place that foster cooperation among IT companies and Internet service providers. At present, industry reports that ISPs do not cooperate with right holders on Internet actions in the "hosted" environment. In meetings with ISPs, copyright owners are refused relief due to the absence of a legal structure. The laws should be amended to provide for notice and takedown for the hosted environment, and incentives to cooperate with respect to other Internet-based infringements which are becoming the more prevalent kind of activity in the online environment.<sup>11</sup>

**Cairo Declaration on Cybercrime:** Computer-based infringements are on the rise in Egypt, whether Internet-based piracy or business software end-user piracy. Thus it is crucial that the government of Egypt deal with such copyright infringement as a species of cybercrime. In November 2007, Egypt hosted an Arab regional conference on cybercrime convened by the Council of Europe, at which 400 participants from around the region and other countries discussed using the COE Cybercrime Convention as a model to guide the development of national legislation on cybercrime.<sup>12</sup> 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).<sup>13</sup> The Declaration:

<sup>11</sup> 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 could 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 effective and fair mechanisms to ensure service providers assist right holders seeking to enforce their rights against subscribers or repeat offenders who may be engaged in activities like peer-to-peer file sharing, deep linking, uploading, downloading, providing access to cyber lockers, and the like.

<sup>12</sup> 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, EASCIA and other partners.

<sup>13</sup> 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

- 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.”

**Business Software Piracy:** The unauthorized use of software by businesses, so-called end-user piracy of business software, and retail piracy caused serious harm to the business software industry in Egypt. The end-user piracy level rose to 60%, while losses climbed to US\$88 million in 2009. Reducing piracy in Egypt would bring positive benefits to the Egyptian economy. 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.<sup>14</sup> The Business Software Alliance (BSA) has noted in the past 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. In Egypt's 2009 Special 301 Submission, the government indicated that “software anti-piracy raids during the year 2008 increased by about 20% compared to 2007, reaching 70 raids per month compared to 50 raids per month in the year 2007.”

**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. 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. Resellers of pirate software advertise these illegal products openly in trade magazines. As noted just below, Egyptian Customs authorities are apparently poised to set up a mechanism for better handling of infringing import and export cases, to seize such goods at the point of entry or exit.

**Customs Measures to Deal With Unauthorized Imports and Exports Would Be a Welcome Improvement:** Egypt's February 2009 Submission to USTR regarding the Special 301 process indicated that Egyptian Customs is putting into place what it hopes will be “an effective mechanism” to deal with infringing imports and exports. Specifically, the Submission noted,

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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.

<sup>14</sup> 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](http://www.bsa.org/~media/Files/idc_studies/bsa_idc_egypt_final%20pdf.ashx).

"In 2005, the Minister of Foreign Trade and Industry issued the Ministerial Decree No. 770/2005 Issuing the Executive Regulations To Implement Import and Export Law no.118/1975 as well as Inspection and Control Procedures of Imported And Exported Goods. Chapter 9 of These Regulations provided the rules governing the application of Border Measures. Competence of border measures is divided between Trade Agreements sector (TAS) under Ministry of Trade and industry and the Customs Authority. The former is competent for receiving complaints, inspection and decision making, while the latter is responsible for implementing these decisions."

The Ministry has discussed establishing an "information bank" based on trainings conducted with a brand owner. IIPA welcomes the initiative of the government to try and effectively stop pirate imports and exports. IIPA would be wary of any formality put into place, such as any mandatory title verification, which would hinder the ability of Customs to act on an *ex officio* basis. For example, almost any exports of copyright materials from Egypt will be illegitimate, so the ability to act on an *ex officio* basis serves the purpose of providing greater efficiency to the system. To the extent the government goes forward with the "information bank," it must be voluntary and not serve as a substitute for effective border enforcement against pirate copies. IIPA has noted in previous filings the absence of customs measures to provide TRIPS-level protection, but looks forward to seeing how this system discussed by the government can work to reduce infringing imports and exports.

## **MARKET ACCESS ISSUES**

In past reports, IIPA has noted that many market access barriers in Egypt make it one of the most closed markets in the world for legal copyright businesses.<sup>15</sup> Barriers in Egypt have included *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-inconsistent entertainment tax on foreign films; and a *de jure* discriminatory cap of five film prints for theatrical distribution for U.S. films. 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.

## **COPYRIGHT LAW AND RELATED ISSUES**

**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 contain some inconsistencies with Egypt's international obligations, many of which have been discussed in previous filings.<sup>16</sup> The laws also failed to fully implement the WCT and WPPT, which Egypt should implement and join.<sup>17</sup> The following is a non-exhaustive list of some important changes that should be sought in amendments:

- **Amend Law to Ensure Registration and Deposit Are Voluntary:** Articles 184 and 185 contain registration and deposit provisions for copyright. ITIDA has indicated that these deposit requirements, though not necessary for

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<sup>15</sup> See *supra* note 7. To the extent any of these problems has, in the opinion of the government of Egypt, been resolved, we appreciate the attention to the matter, and would respectfully request that the government of Egypt provide documentation, such as any written regulations or other measures resolving the issue raised.

<sup>16</sup> *Id.*

<sup>17</sup> In its February 2009 Submission to USTR, the Egyptian government notes that Egypt is in the process of joining the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations. Not only has Egypt not yet joined the Rome Convention, but at this stage, has taken no steps to join the relevant modern treaty as to related rights, the WPPT, as well as the WCT.

copyright protection to attach, are nevertheless useful, presumably for enforcement purposes. While the February 2009 Egyptian government Submission indicates that there have been criminal convictions obtained without deposits, the law indicates deposit is mandatory and subject to administrative penalties for failure to deposit. As such, amendments should be sought to make the system of registration and deposit voluntary. While the government insists these requirements are not intended as a bar to copyright protection as such, to the extent failure to meet these requirements denies copyright protection and the ability to enforce rights, they may rise to the level of a prohibited formality under the Berne Convention and the TRIPS Agreement. Articles 11-16 of the Implementing Decree appear to codify the registration ("recordal") and deposit requirement of the IP Code.

- **Criminal Remedies Too Low:** The Copyright Law contains very low criminal penalties which appear to be incompatible with TRIPS, which requires member nations to provide criminal penalties sufficient to deter 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\$905 to \$1,810). The minimum sentence of "one month" imprisonment is important, but there is no set maximum jail term as there was in the old law, and in practice, the minimum is being employed as a benchmark for maximum criminal sentencing, if criminal sentencing is occurring at all. Fines on their face also 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.
- **Civil Remedies.** Nowhere does the Egyptian law provide for adequate compensatory damages, as required by Article 45 of TRIPS. Only Article 179 of the Code provides for some "cautionary measures," including "[c]alculating the revenue of [illegally] exploiting the work or performance or sound recording or broadcast, then distrain this revenue in all cases," although it is unclear whether this is intended to cover all civil damages. TRIPS requires the courts to have the authority to award "damages adequate to compensate for the injury the right holder has suffered because of an infringement of that person's intellectual property right by an infringer who knowingly, or with reasonable grounds to know, engaged in infringing activity," and in appropriate cases, suggests the availability of "recovery of profits and/or payment of pre-established damages," even where the infringer did not knowingly (or with reasonable grounds to know) engage in the infringing activity. Egypt's law remains deficient on provision of adequate civil remedies.<sup>18</sup>
- **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.
- **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

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<sup>18</sup> The following suggested text would provide a TRIPS-compliant framework for compensatory damages:

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

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.

- **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.<sup>19</sup>
- **Ambiguous Protection for Pre-Existing Works/Sound Recordings.** There is no provision in the Code ensuring that pre-existing works and the objects of neighboring rights (including sound recordings) receive full retroactive protection as required under TRIPS Articles 9.1 and 14, and Berne Article 18. Even though we understand that the government of Egypt takes the position that TRIPS and Berne are self-executing in Egypt, the absence of a provision for full retroactivity for TRIPS/Berne terms of protection may lead to confusion. Therefore, it would be highly preferable for Egypt to include an express provision for full (TRIPS- and Berne-compatible) retroactivity for all subject matter under the law.<sup>20</sup>
- **Requirement of Translation into Arabic.** Section 148 of the Code requires translation of all literary works into Arabic within three years of publication; if not, they are deemed to fall into the public domain. This is an extremely disturbing development. This unprecedented provision violates Egypt’s TRIPS and international obligations, is highly prejudicial to all right holders, including U.S. publishers, and 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 could 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.

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<sup>19</sup> The following formulation might, for example, be appropriate:

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

<sup>20</sup> The simplest way to fix the retroactivity void in the Egypt draft would be to add a new article as follows:

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



- **Article 171 Exceptions.** The law contains exceptions to protection which are broad and may be in questionable conformity with TRIPS Article 13.<sup>21</sup> 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.<sup>22</sup> The producer of an audiovisual work should have the ability to exercise all the economic rights in that work without the further consent of the authors.

The Implementing Decree created some additional issues. For example, 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 unintended but certain consequence of further insulating pirates, who will not pay for such registrations. Article 17 of the Implementing Decree and the Table set forth an elaborate schedule of charges to legitimate businesses dealing in copyright materials.

<sup>21</sup> Preferably, Article 171 (on exceptions to protection) could 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.

<sup>22</sup> The simplest formulation of the producer's rights would be as follows: "Unless otherwise agreed upon in writing, the producer shall be entitled to exercise all the economic rights in relation to the work and copies thereof."

**2006 Decrees Established ITIDA Jurisdiction Over Business and Entertainment Software:** 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.

## **GENERALIZED SYSTEM OF PREFERENCES**

Egypt currently participates in the Generalized System of Preferences trade program, offering duty-free imports of certain products into the United States from developing countries. In order to qualify for such unilateral 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 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. During 2009, almost \$45.4 million worth of Egyptian goods, or almost 2.2% 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.

# GREECE

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2010 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** IIPA recommends that Greece remain on the Watch List in 2010.

**Executive Summary:** It is imperative that the new Greek government make copyright law and enforcement a priority which not only hurts industry and translates into job losses, but also represents a massive loss of tax revenue for the Greek State. However, because of several elections and other political challenges and financial crises in 2009, very little progress on copyright protection was made at a national level last year. Greek's comprehensive intellectual property rights (IPR) action plan, proposed in February 2009, basically went unnoticed and unimplemented for the rest of the year. Although the new Administration has decided to deal with the economic crisis by significantly increasing taxation of a number of legitimate goods and services, no new measures are planned to combat those intellectual property infringements which result in major losses to the industries and the State alike.

The level of copyright piracy in Greece remained high in 2009. Regarding business software piracy, the tax police (YPEE) drastically slowed down their efforts to issue software audit letters to small- and medium-sized companies, a sharp reversal from very active campaigns in prior years. Physical piracy of many copyrighted products remains a problem in the cities and on the streets. The amount of piracy of music and movies in physical format on the streets has been declining as Internet piracy is on the rise. The unauthorized photocopying of books and journals continues to occur on and near university campuses. Internet piracy really hit the Greek market about two years ago, and continues to grow. 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 (P2P) file-sharing environment. Discussions between the content industry and the Internet Service Providers (ISPs) have been underway under the auspices of the copyright office, however they have not led to any results and they need stronger political engagement by the government. Despite some good cooperation between the copyright industries and the police on physical piracy raids, the overall enforcement system in Greece fails to tackle the endemic piracy problems. The municipal police are unable to produce significant results, and the immigration service is overwhelmed, making it difficult to pursue prosecutions. 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. Poor illegal immigrants, who benefit from public sympathy given their plight, are frequently used by organized pirate rings as street vendors. If caught, such vendors equally benefit from sympathy in the courts.

We have reached a point where only proper legislation in conjunction with proper application by courts can provide a solution to piracy (physical and digital). Police and Customs know how to identify pirate product. Prosecutors and judges know the law and know what they are supposed to do with it. The public knows that buying a CD-R from a street vendor or downloading tracks from Rapidshare or through a peer-to-peer (P2P) file-sharing network are committing an economic and moral crime. The ISPs know that the majority of their bandwidth is consumed by illegal activities.

In addition, the copyright industries had worked with the Copyright Office to develop proposals to amend the copyright law that were to be issued to the public in 2009, but as of yet it has not been issued. On a positive note, Greece, along with the EU and 15 other member states, did accomplish its deposit of instruments to join the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty, effective March 14, 2010. On the other hand, three years have passed since some promising legal reforms were adopted in 2007 yet are still not fully in force. For example, the ministerial decree permitting administrative fines for certain infringing acts (including software and sound recording piracy) has not yet been fully implemented. In sum, we hope that the new Greek government can swiftly rise to the challenge to improve the state of legal protection and effective copyright enforcement in Greece.



**Priority actions requested to be taken in 2010:** 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

- Any national campaign for 2010 should involve rights holders and include raids, prosecutions and criminal non-suspended sentencing, in addition to public awareness and training.
- Continue enhancing cooperation with the police on inspections, raids and other anti-piracy activities, encouraging 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 re-engage its 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. (5) YPEE should be obliged to perform specific numbers of audits per year and publicize all the results.
- Institutionalize a Special Operational Department for IPR issues within YPEE (which is in the Ministry of Economy and Finance).
- Support the soon-to-be created Financial and Cyber Crime Division in the Ministry of Public Order.
- 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, and also should be instructed to issue deterrent sentences, including imprisonment and fines as provided by the law, and not to suspend sentences or fines.
- 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 and an IP court should be established in Patras.
- Expand these special IP courts' jurisdiction 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.
- Publicly circulate the government's proposal to amend the copyright law, which should, at the very least, include the following: (1) provide the same level of protection for technological protection measures (TPMs) utilized in software that is currently afforded to other classes of works, and (b) specifically exclude camcording from the scope of the private copy exception.
- 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.

## COPYRIGHT PIRACY IN GREECE<sup>1</sup>

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.

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. There was a reduction of such piracy forms both in Athens and Thessaloniki, because of the rapid increase of the end-users' connections to the Internet. In other cities of Greece, where the end-users' access to the Internet is lower and the local authorities and the police show unwillingness to cooperate and act against IPR piracy, these forms of piracy remain in a high level. BSA's preliminary estimated 2009 losses due to piracy rose slightly to US\$141 million, at a 59% level, both up slightly from the \$131 million and 57% reported as final numbers for 2008.<sup>2</sup> The reason for this slight increase may be due to the lack action taken by YPEE for most of 2009. Within the EU, Greece has the third highest piracy rate (behind Bulgaria and Romania). With the exception of 2009, much of this progress in slowly reducing software piracy over the last few years may be attributable in part to the work of 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 software use.<sup>3</sup>

The pirate music market is gradually migrating from physical product to the internet. 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 remains in disarray. However, there is a growth of internet-based piracy, with the forums/cyber-lockers being the major problem. and this is the primary area in which industry action requires government support, not least in ensuring ISP cooperation. As already reported before, 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.

The Motion Picture Association (MPA) reports 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. 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.<sup>4</sup> Furthermore,

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<sup>1</sup> For information on Greece under Special 301, see Appendix D at <http://www.iipa.com/pdf/2010SPEC301USTRHISTORY.pdf> and Appendix E at <http://www.iipa.com/pdf/2010SPEC301HISTORICALSUMMARY.pdf> of this submission. To read IIPA's cover letter to this Special 301 submission, go to <http://www.iipa.com/pdf/2010SPEC301COVERLETTER.pdf>.

<sup>2</sup> BSA's 2009 statistics are preliminary, represent the U.S. software publishers' share of software piracy losses in Greece, and follow the methodology compiled in the Sixth Annual BSA and IDC Global Software Piracy Study (May 2009), available at [www.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. Final 2009 statistics will be issued by BSA later in 2010. The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in Appendix B of IIPA's 2010 Special 301 submission at [www.iipa.com/pdf/2010spec301methodology.pdf](http://www.iipa.com/pdf/2010spec301methodology.pdf).

<sup>3</sup> 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](http://www.bsa.org/idcstudy), released January 22, 2008, and is available online at <http://www.bsa.org/idcstudy>.

<sup>4</sup> 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.

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.

Illegal commercial-scale photocopying of academic textbooks continues in Greece, causing significant damage to higher education textbook publishers.<sup>5</sup> Photocopy shops near university and college campuses regularly process orders for entire classes of students. Photocopy shops make cover to cover, bound copies for distribution to students, and face no consequences. In fact, bulk discounts for students are common.<sup>6</sup> Major universities all over Greece are affected though the bulk of the unauthorized copying activity occurs at either private colleges or among students pursuing MBA courses at both private and state institutions. The authorities should take more serious note of this issue and begin to tackle the copy shops through effective enforcement and encourage universities to implement policies that promote the 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 copy shops. One case still remains pending, three years after a successful 2007 raid from which the case arose. There have been numerous postponements, with the case, though calendared, not even being heard on the scheduled date. Law enforcement authorities should ensure that this case is adequately heard, and upon a favorable conclusion of the proceedings, the appropriate penalties meted out.

**Internet piracy:** There are now over 4.9 million Internet users in Greece, representing about 46% of the population (according to [www.internetworldstats.com](http://www.internetworldstats.com)). According to EETT (the Greek National Regulating Authority for the Telecommunications), by the end of the third quarter of 2009 the broadband connections in Greece reached 1,794,295, up by 36.84% compared with the third quarter of 2008. The scope and depth of Internet piracy in Greece really took off in 2008. Peer-to-peer (P2P) file-sharing of infringing content and cyber-lockers (with relevant links offered through forums) became very popular. Leech sites and download sites are also a growing problem, and some illegal sites hosted in Russia (such as music-bazaar.com and legalsounds.com) remain frequently visited by Greek users. Mobile piracy is not a serious problem yet as most of the mobile companies control the downloadable copyrighted works and the exchange of such works (ringtones) between the mobile users.

The Entertainment Software Association (ESA) estimates there to have been approximately 127,445 infringing downloads<sup>7</sup> made of select ESA members' computer and video games through P2P file sharing by ISP subscribers in Greece during December, 2009. This comprises approximately 1.32% of the total number of illegal copies made by P2P users globally during this period. These figures place Greece as number 15 in highest overall volume of P2P game downloads, and number 6 in highest volume of P2P game downloads per capita during the study period. Breakdowns by ISP show that subscribers of Ote, FORTHnet, and OTEnet were responsible for approximately 71% of this activity occurring in Greece--more than 91,000 downloads during the one-month period. These figures do not account for downloads that occur directly from hosted content, such as games found on "cyberlockers" or "one-click" hosting sites which continue to account each year for progressively greater volumes of infringing downloads.

The major legislative deficiency (discussed more, 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. In general, Greek Internet Service Providers (ISPs) cooperate in the few cases involving hosted websites. In the file-sharing environment, the ISPs use the personal data protection legislation as an excuse for non-cooperation. There are several negotiations on Ministry level aimed at introducing graduated response legislation or something similar to address repeat infringement.

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<sup>5</sup> 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.

<sup>6</sup> Examples include "buy four photocopies, get one free" deals, advertised by flyers near major universities.

<sup>7</sup> This figure is representative only of the number of downloads of a small selection of game titles. Consequently, this figure is under-representative of the overall number of infringing downloads of entertainment software made during the period.

## COPYRIGHT ENFORCEMENT IN GREECE

Establishing copyright protection and enforcement as a priority in the new Administration is imperative. The copyright industries report that their working relationships with the Greek police authorities in 2009 continued to be good, however, industry relationships with YPEE were strained last year, a disturbing negative development. Overall, the principal challenges continue to be achieving tangible enforcement results through a difficult judicial system and affecting needed legislative/administrative reform.

**Comprehensive Action Plan on the Protection of Intellectual Property Rights:** The Interministerial Steering Committee, led by the Ministry of Foreign Affairs, was formed several years ago 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.<sup>8</sup> Members of this "Coordination Committee for Monitoring and Coordinating IPR" include: the Ministries of Foreign Affairs, Economy and Finance, Interior, Public Administration and Decentralization, Development, Justice, Culture, Rural Development and Food, as well as the Hellenic Copyright Organization, the Hellenic Industrial Property Organization and the Municipality of Athens. The new Coordination Committee has been integrated into the Interministerial Committee.

In February 2009, the Coordination Committee issued Greek national IPR plan. This document provided a summary of piracy and counterfeiting issues, the Greek legal framework, and the work of the legal offices and enforcement agencies, among other issues. It also outlined a 7-point action plan, with the following objectives: (1) ameliorating the legal framework; (2) collecting and processing statistical data and forming a database; (3) enhancing IPR enforcement measures; (4) coordinating law enforcement authorities; (5) training; (6) raising public awareness; and (7) promoting a dialogue on intellectual property rights. Since the creation of this plan, there has been no progress, and no actions have been taken on a practical level. Unfortunately, there were no actions by the Interministerial Committee until the replacement of the Greek government. Since the government turnover in October 2009, the Interministerial Committee has shown some interest in information regarding IPR by collecting and processing present statistics relating to IPR issues. However, there has been no meeting of the Coordination Committee for Monitoring and Coordinating IPR since the replacement of the government in October 2009. Only recently a representative of the Ministry of Foreign Affairs spoke about the contents of the action plan in the American Chamber of Commerce, and indicated that the plan is not yet fulfilled. The OPI (Hellenic Copyright Organization) is currently does not even have its Board in place. OPI is always willing to organize or attend seminars but has not been at all effective in pressing the relevant ministries to enforce and enact effective legislation.

**Significant drop in actions by the tax police on business software cases:** In recent years, BSA reported continued good cooperation and communication with YPEE. For example, YPEE conducted raids and inspections and sent software audit letters and followed-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.

This software anti-piracy administrative efforts by YPEE all but stopped for most of 2009. The only action that was performed by YPEE was the issuance of letters to approximately 5,500 small companies at the beginning of the year (February 2009), asking them to provide YPEE with the relating software licenses and invoices. Taking into consideration the June and October elections, there was a significant delay in all planned actions. As far as BSA is aware, YPEE took no other software anti-piracy actions (such as raids, audits, further letters and posting of YPEE actions on their website) for the rest of 2009. YPEE should be obliged to perform specific numbers of audits per year and publicize all the results. Taking into consideration the current piracy rate, BSA had requested, and still urges, that YPEE should publish monthly statistics on

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<sup>8</sup> Unfortunately, none of the private sector organizations were allowed to participate in this new Interministerial Steering Committee at its first meeting in 2008. The copyright industries supported the Interministerial Steering Committee and urged 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 number of such raids, including the resulting administrative fines imposed. BSA would like to see a more systematic follow-up of these warning letters and more raids against non-responsive companies. There was no other initiative or action whatsoever and this will have an adverse impact in the marketplace. Unfortunately yet not surprisingly, BSA's relationship with YPEE worsened during 2009. BSA believes it is crucial for the new government and new leadership at YPEE to give high priority to IPR enforcement.

Furthermore, BSA believes the Greek Government should publicly commit to fight software piracy; no such announcement occurred in 2008 or 2009. Such a public pronouncement by the government (perhaps coming from the Ministry of Finance) would greatly increase public awareness regarding the risks of using illegal unlicensed software and would codify the government's commitment to protect intellectual property.

**New Financial and Cyber Crime Division and Special IPR department:** In years past, the copyright industries have pointed out the need to institutionalize a Special Operational Department for IPR issues within YPEE. While nothing has been done in that regard, the Minister of Public Order (who also served in this capacity in a prior administration) has indicated his interest in creating a specialized IPR department.

In addition, a new Financial and Cyber Crime Division with responsibility for fighting Internet crime (including software piracy) is expected to be created. According to the Minister's of Public Order announcement in December 2009, this new cyber crime division will be established within the first months of 2010, within the Ministry of Public Order and will probably be independent to YPEE (which still exists under the Ministry of Economy and Finance). Further announcement regarding the official establishment of the new Division is expected by the Minister of Public Order by the end of February 2010.

**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. 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 several years, the only enforcement activity implemented by the government has been YPEE's audit letters. There was no official Circular issued to adopt the new legal framework. An industry proposal suggested that (a) administrative fines should act cumulatively with prosecutions<sup>9</sup> and should be paid before legal proceedings, (b) DVDs should be included in the regulation, and (c) there should be authority to inspect establishments (café, restaurants, etc) where there may be illegal reproduction of phonograms for public performance.

The music industry also is very concerned with the lack of effective administrative enforcement and the lack of progress on this front. 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. 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.

**Civil infringement actions on business software:** BSA has no major issues to report regarding civil litigation during 2009. Search orders are normally granted without major difficulties and normally we settle the cases out of court. With respect to its civil actions in 2009, here are BSA's results (all against end users): 6 civil raids executed, 11 warning letters sent, 2 follow up letters sent, 1 lawsuit filed, 1 civil action heard and 3 settlements completed. BSA has not filed any civil lawsuits seeking damages, only applications for injunctions.

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<sup>9</sup> Regarding point (a) on administrative fines, this means that the offender, while brought to Court, would have to pay the administrative fine in the state cash desk before the trial. This would ensure that an illegal immigrant, with an unknown address, would pay at least the administrative fine for his offense, before potentially fleeing away to unknown location, which has often happened in the past. The point is that in addressing an economic crime, the approach should be related to damages for the infringer. Suspended sentences with no fine cause no economic harm (aside from the cost of the confiscated discs) to a person who earns illegal money from infringing activity.



**Criminal actions (raids):** The recording industry reports that its work and relationship with police authorities, especially in Athens, remained very good in 2008. The recording industry reports 588 cases in the first half of 2008 (full year statistics are not yet available). The recording industry reports that the police and customs authorities continue to take ex-officio actions. Criminal actions in 2009 were at about the same level as in 2008. There has been a slight increase in the number of raids (702 in 2009, 693 in 2008) where IFPI Greece has participated, with larger amount of confiscated products (505,806 discs in 2009 compared to 451,051 discs in 2008) and better statistics in “quality” targets such as burning places and distribution centers (322,706 discs in 34 raids in 2009, compared to 278,299 discs in 55 raids in 2008).

BSA reports that the Greek police cooperate positively in most areas of the country. There are some departments where the police show a noticeable unwillingness to cooperate, especially in northern Greece. The police, as well as the municipal police, although generally willing to cooperate, yet they too are disappointed with the lack of results and sanctions. BSA itself does not pursue criminal actions.

Earlier this month, arrests in a pay television fraud action were made during police operations in Athens, Thessaloniki, Irakleio, Rhodes, Syros, Drama and Corinth. The only digital pay television platform in Greece, Nova, filed a lawsuit charging that the suspects distributed its electronic subscriber codes via the Internet for a fee. The police electronic crime squad in Athens and Thessaloniki arrested eight Greek nationals and two foreign nationals (three more suspects will face the same charges) on charges of violating intellectual property and subscriber television services legislation.

**Difficult problems with the courts--long delays, non deterrent sentences:** A major hindrance to effective IP enforcement in Greece continues to be its judicial system.

Few prosecutions: The overwhelmed Greek judicial system and the lack of specialized IP courts means that there are very few intellectual property rights cases in the system. In years past, 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 aversion appears to be slowly changing in major Greek cities (such as Athens, Thessaloniki and Patras), more work needs to be done, at many levels, to improve criminal prosecutions.

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: Courts continue to deny to apply all possible procedural measures to guarantee the defendant's presence at the Court hearing and the result is that the Majority of the defendants are not present at the Court of appeals or at the First Instance Court for felonies. There are many differences between the courts from region to region in the way of decision-making and many times judges show lack of knowledge in sophisticated IPR issues.

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.<sup>10</sup> What usually happens is that the prosecutors bring thousands of cases at the First instance Court and aim for deterrent, non-suspended penalties, but the majority of the judges insist on leniency for first offenders and then they suspend the penalty and eliminate the fine. For example, the one-year imprisonment sentence provided by law usually becomes three to four months imprisonment, but suspended for three years,

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<sup>10</sup> 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.

and the €3000 fine (US\$3,860) is simply stricken entirely. In the cases where the First Instance Court's decisions actually follow the Law (and issue a non-suspendable sentence), the defendants launch an appeal and Court of Appeals suspends the penalty and removes out the imposed fine. 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.

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.

**Actions against Internet piracy:** Greek ISPs do cooperate in those case involving hosted websites. There are practically no cases of local hosting of infringing material.

Greek ISPs are currently not cooperating with rights holders on Internet piracy actions, except occasionally on P2P sites hosted in Greece. In the file-sharing environment, the ISPs use data protection legislation as an excuse for non-cooperation. Internet investigations in Greece can go only so far as identifying an infringing IP address. The relevant law for disclosure of personal data (Law 2225/1994) is very strict and limited to a specific range of crimes which, unfortunately, does not include copyright infringement, not even in the felony cases. This is the most serious obstacle for the Internet investigations and prosecutions. The now former Minister of Justice recognized this limitation and promised that the law will be reformed to include felony aspects of copyright infringement, but took no action on this matter. The release of the infringers' identity--among other targets--is necessary so that the affected rights holders can initiate criminal or civil actions. The new Government is still trying to shape up. There was finally (with a few months delay) a newly appointed Secretary of the Ministry of Culture, but OPI is still lacking its leadership board.

**Cross-industry negotiations to address Internet piracy:** Negotiations between the content community and the ISP community were taking place at the ministerial level, but there has been no progress. For two years, negotiations between copyright rights holders and ISPs have been underway, done under the auspices of the Hellenic Copyright Office (OPI). OPI was aiming to have ISPs adopt voluntary measures to decrease Internet piracy. Objectives for the copyright sectors are: (1) blocking access to illegal sites hosted in countries with poor or no IP protection; (2) adoption by ISPs of effective and fair 3-step procedures for terminating accounts of repeat P2P infringers; 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 promised to act on the third prong, and the EETT can play a substantial role in the first two prongs.

The first and last meeting with the ISPs took place in EETT in March 2009, following IFPI's request in the presence of one OPI's representative that was invited by EETT. OPI prepared a proposal for the amendment of the EETT's regulation on general ISP licensing but nothing was done with that. The industries organized a press conference in November 2009 and series of meetings with authorities, OPI and the Ministry of Culture regarding Internet piracy. No further information yet regarding the results of the above actions.

## **COPYRIGHT LAW REFORM AND RELATED ISSUES**

**Copyright Act in general:** 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 (discussed further, below).

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 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 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. 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. A decision by the Ministers of Finance and Culture was issued in September 2007 to provide procedures for imposing the administrative sanctions found in the copyright law.

**Possible reform of the Copyright Act:** A Legislative Committee in the Hellenic Copyright Office under the Ministry of Culture completed its work to propose further reforms to the Greek Copyright Act at the end of 2008, as expected. During that process, the copyright sectors offered various proposals to this committee.<sup>11</sup> However, the Committee's release of its work for public review was delayed due to a cabinet reshuffle in late 2008, and during 2009, no progress was made to release this plan publicly. Given that there is a new government, it is not yet known what the next steps on this effort might be. At the very least, the copyright sector hopes that the expected consultation process to discuss this Committee's proposals will be open and transparent.

It is important to highlight that in implementing the WIPO Treaty requirements for technological protection measures (TPMs), Greece opted for a bifurcated approach under which TPMs used by the creators of computer programs (Articles 66(5)(a) and (c)) are afforded less protection than those utilized in other types of works (Article 66A). Unfortunately, the software provisions fall far short of the requirements mandated by the WIPO Treaties, failing to explicitly cover both copy- and access-controls or provide civil remedies. The software provisions also utilize an impermissible "sole purpose test" for assessing whether a circumvention device runs afoul of the law. To achieve compliance, Greece must afford the same level of protection for TPMs applied to software as that which is applied to other types of works.

**Government software legalization:** BSA reports no new developments or progress on government legalization efforts during 2009. 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.

**Criminal law reform:** The ex-Minister of Justice has promised to reform the criminal law (2225/1994) in which felony aspects of copyright infringement would be included. The bill was forwarded by the Hellenic Copyright Office to the Ministry of Justice, but because of cabinet reshuffling in late 2008, it was 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.

**Civil procedure law reform on search orders:** Last year, a legislative proposal to amend the Greek Civil Procedural Law was issued which would affect the procedures for granting search orders (Bill for the Reformation of the Greek Civil Procedural Law, issued at 27 August 2009 by Special Standing Committee of Ministry of Justice). The legislative committee proposed, in case of an ex parte search order, to summon the other party within the next three days after the

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<sup>11</sup> For example, the copyright sector 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.

issuance of the order. 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 and there is no estimate as to when it might pass.

**Problems with obtaining access to personal data from ISPs:** The problem of data protection as an obstacle to enforcement has already been discussed, above. This 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. (In fact, the former Minister of Justice recognized this limitation and promised that this law would be reformed so that the felony aspects of copyright infringement would be included).

The industries have supported amending Greek 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. To this end, copyright holders strongly support amending Greek legislation to clarify the obligations of ISPs to reveal identities of copyright infringers. Both the former and current chief Prosecutors have issued circulars endorsing this view, and advising that internet protocol (IP) addresses comprise external data of the communication and should not be regarded as communication data protected by communications privacy. These Circulars express the view that IP addresses should not be regarded as personal data, since they reveal no personal information regarding the person and are not permanently assigned to a specific person. Both Prosecutors also suggested that measures should be taken so as not to turn internet to a criminal haven, where violators would exploit legislation on personal data protection which was designed for the protection of personal rights. Thus, the Prosecutors believe that when internet crimes are involved, there can be disclosure of personal data. However, given that such statements from the Prosecutor do not bear equal legal strength as a law and, while they are binding on Prosecutors, may not be adopted by Courts, it remains imperative that the government enact relevant legislation on this important issue that is a critical component of an effective challenge to internet piracy.

**Administrative fine law:** Unfortunately the Administrative Fine, Law 3524, issued in January 26, 2007, has been ineffective. As discussed above, 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 (YPPE) have issued Circulars to adopt the new legal framework on administrative fines nor have they mobilized their resources to do inspections for software piracy.

**Ineffective implementation against street vendors:** Ministerial Decree No. K1-1178, was signed June 25, 2007 by the Minister of Public Order, 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. This 2007 decree, however, was never applied in practice due to the complexity of its content and the procedures necessary for its implementation. The decree itself did not mandate seizure and immediate destruction, but required boards comprised of municipal servants that would meet one or two times before they would come to a decision that would validate the destruction. As a result, the municipal police would rather pass the seized items to the Police. 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. The industries require fast and bureaucrat-free procedures, so as we will not waste time with court cases that lead to acquittals or lenient penalties. Greek Law 3731/2008 provides the general provisions of jurisdiction of the Municipal Police, but no provision regarding the arrest/prosecution of street vendors for IP infringements is included in the Law content. 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. Therefore, new legislation to provide Municipal Police with authority to arrest and prosecute street vendors for IP infringements needs to be issued.

## **IPR TRAINING AND PUBLIC AWARENESS**

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. A course of intellectual property was recently introduced in the Athens School of Judges and Prosecutors. Last year OPI organized some meetings and seminars among the legal departments of the IP organizations and that was it. With respect to trainings for police and customs officials, a good number of educational seminars have been organized on IPR infringement over the past years. However, there were no relevant seminars in 2009. The recording industry (IFPI) and the film industry (EPOE) held a few training seminars for police and custom authorities and they also participated in additional seminars for custom authorities that were organized by the government. With respect to trainings for YPEE, there were no relevant seminars in 2009, as YPEE did not proceed to any audits. BSA is always available to offer trainings regarding IPR infringement for police and customs officials.

# HUNGARY

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

### 2010 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: IIPA recommends that Hungary remain on the Watch List in 2010.<sup>1</sup>

**Executive Summary:** The copyright industries continued to actively cooperate with Hungarian law enforcement officials on investigations and prosecutions and have provided educational training to police, customs, prosecutors, and judges during 2009. The police, who have generally done a good job supporting Internet piracy investigations, are still under-resourced and under-equipped to tackle this grave problem. Onerous requirements to prove ownership of rights and requests for expert opinions on all goods seized continue to strain limited resources of both the government and the rights holders. In general, prosecutors and judges are still reluctant to treat copyright infringements as serious crimes, and those rare instances in which criminal charges are brought, the sentences issued are not deterrent. Some criminal cases involving Internet piracy resulted in indictments several years ago and prosecutions are still underway. Last year there were several large Internet actions and one criminal sentence issued involved a significant penalty of two years' imprisonment. The copyright sectors are optimistic that the government's public awareness and trainings to implement the 2008 national anti-piracy structure and action plan will continue to lower the piracy levels of both hard goods and Internet piracy in Hungary.

**Priority actions requested to be taken in 2010:** 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). The official report on the implementation of the action plan shall be submitted to the Hungarian government in 2011.
- Allocate more resources, including trainings for police and infrastructure (open Internet access and PCs) to police forces to fight increasing Internet piracy.
- Specify to the police, prosecutors and courts that copyright and intellectual property cases are a priority.
- Encourage Internet Service Providers (ISPs) to cooperate with the content industries in the fight against piracy.
- 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 for enforcement investigations to help aid the police how to conduct copyright infringement investigations.
- Impose stiff criminal penalties to deter 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 in and around educational institutions (schools, colleges, universities).

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<sup>1</sup> For information on Hungary under Special 301 review, see Appendix D at <http://www.iipa.com/pdf/2010SPEC301USTRHISTORY.pdf> and Appendix E at <http://www.iipa.com/pdf/2010SPEC301HISTORICALSUMMARY.pdf> of this submission. See also IIPA's cover letter to this submission at <http://www.iipa.com/pdf/2010SPEC301COVERLETTER.pdf>.



## 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.
- Adequate norms should be included in the Copyright Law to eliminate the legal monopoly of poorly functioning collective management organizations like the FILMJUS. The monopoly-related provisions disputed by the European Commission in an official infringing proceeding (a proceeding which has been suspended) were not modified by the February 2009 copyright law amendments.

## COPYRIGHT PIRACY IN HUNGARY

Internet piracy: Hungary's Internet user population is approximately 5.87 million people, reflecting about 59% of the population; this is a 721% increase in number of users from 2000 to 2009 (according to [www.internetworldstats.com](http://www.internetworldstats.com)). Hungary has the highest broadband penetration in Central and Eastern Europe, amounting to 1.724 million subscribers as of October 2009.<sup>2</sup> 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 peer-to-peer (P2P) file-sharing activity, FTP (File Transfer Protocol) servers, and simple uploading of files to private web pages. More specifically:

- There are an estimated 600,000 peer to peer users in Hungary. The most commonly used P2P service is DC++, although it is losing popularity. The music and 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. Complaints filed by rights holders against the Top 20 DC hubs and their operators continued in 2009. It is important to note that the police also takes ex officio action in P2P cases.
- Video streaming sites (such as YouTube and videa.hu) continue to gain popularity.
- The recording and films industries also have successfully filed complaints with police who in turn have run several major raids against BitTorrent and FTP sites.<sup>3</sup> There are torrent cases currently pending in Győr and in Budapest. Each month sees a successful official action where FTP servers are seized. The National Investigating Office holds the records for the largest FTP seizure, which involved nearly 50 content servers were seized, with an estimated content of 300 terrabytes, and six arrests.

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. ESA estimates 104,022 completed downloads<sup>4</sup> of select members titles by Internet users in Hungary during December 2009, placing Hungary in the top 10 nations in terms of infringing downloads per capita during this period. These figures do not account for downloads that occur directly from hosted content, such as games found on FTP sites, "cyberlockers" or "one-

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<sup>2</sup> Source: <http://nhh.hu/index.php?id=hir&cid+9712&mid=614>.

<sup>3</sup> 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 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."

<sup>4</sup> This figure is representative only of the number of downloads of a small selection of game titles. Consequently, this figure is under-representative of the overall number of infringing downloads of entertainment software made during the period.

click” hosting sites, which continue to account each year for progressively greater volumes of infringing downloads. Breakdowns by ISP show that subscribers of Hungarian Telecom, Invitel, UPC, and DIGI were responsible for approximately 71% of this activity occurring in Hungary -- more than 74,082 downloads during the one-month period. 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, as well as a government effort to encourage ISPs to cooperate with rights holders in the fight against piracy.

**Domestic “burning” and street/stadium piracy:** Street piracy seems to have declined slightly in 2009. Street raids are regularly conducted by the customs and police officers at the well-known “piracy markets” of Budapest. Nevertheless, it remains a serious problem and the industries continue to request that such street sales be banned. 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.

There is recent positive news in that the public notary of Budapest ordered the closure of Verseny market based on evidence that vendors engaged in the sale of pirated goods. The largest market for illegal movie DVD-Rs has been the Verseny street market. There as many as 20 vendors may be found each weekend, selling illegal movie copies. In Budapest’s largest weekend flea market (Petőfi 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). Pirate DVD-Rs are also found at other flea markets across Budapest. The Verseny street market and Petofi Hall have been the primary sources of pirated video game product. It is 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. ProArt requested increased surveillance of flea markets specializing in burned CDs (e.g. at Petőfi Hall, Verseny street market, Gyáli-street market, Veresegyház market), and almost weekly raids now take place there.

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. Surveillance cameras were set up in the market at Petőfi Csarnok. Vendors are more and more afraid to do sales in the open, and the content industries have convinced customs officers to conduct random searches at least once a month at each flea market in Budapest. The situation has improved as far as flea markets are concerned. The main locations for burned discs to appear are increasingly the online advertising platforms (apronet.hu, expresssz.hu); such advertisements have to be checked by trial buying, and based on these, rights holders can file complaints at the competent authorities. ProArt has initiated dozens of such cases, and the police has successfully found the guilty persons.

There is one optical disc factory in Hungary. There is no evidence or reason to believe that this factory is used for illegal industrial activities.

**Business software piracy:** Business Software Alliance (BSA) reports that during 2009, the more traditional forms of piracy have been stagnating, while Internet piracy is rising at a moderate pace. The consumer (non-business) market is more affected by hard goods piracy, with respect to the fact that there is a relatively high level of pirated software in small PC shops selling PCs and computer equipments for individuals. However, BSA is seeing signs that the economic recession is having a negative impact on the use of illegal software, since small enterprises are tending to reduce their operation costs by using cheaper illegal software. BSA has seen that successful enforcement actions (such as the outstanding police raid in April 2009 mentioned below) have visible positive effects on the Internet piracy. BSA campaigns, such as the new SoftVisit campaign launched in October 2009, serves to inform consumers and businesses by warning them of detrimental effects of software piracy. BSA believes its active campaigns in Hungary have helped halt



further declines in the legitimate business software market.<sup>5</sup> BSA estimates that the preliminary trade losses due to business software piracy in 2009 have remained at a steady pace, with the estimated piracy rate dropping 1 point to 41%, with a preliminary estimate for losses due to piracy in 2009 of US\$79 million, down from \$88 million in 2008.<sup>6</sup>

**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. Markets in Budapest, such as Petőfi Csarok (PECSA), Verseny street, and Soroksár, continued to be a source of hard goods piracy in 2009. It is ESA's hope that the closure of the Verseny market will be sustained and serve as a template for action against other markets with similar reputations.

**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 enforcement efforts. Even though music piracy was slowed in 2007, ProArt reports of new piratical developments; 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 still 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 music 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 unauthorized photocopying of academic textbooks in and around university campuses continues to be problematic. While there has been some improvement in the market, progress remains slow. Law enforcement authorities have been responsive to rights holder requests for actions against copy shops while also undertaking a few actions *ex officio*. Prosecutions, when they occur, unfortunately continue to be very slow.

**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. MPA has worked with local theaters and police to address Hungary's camcord problem. The good news is that physical copies audiovisual works caused by street piracy appears to have decreased slightly.

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<sup>5</sup> 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>.

<sup>6</sup> BSA's 2009 statistics are preliminary, represent the U.S. software publishers' share of software piracy losses in Hungary, and follow the methodology compiled in the Sixth Annual BSA and IDC Global Software Piracy Study (May 2009), available at [www.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. Final BSA 2009 data will be made available later in 2010.

## COPYRIGHT ENFORCEMENT IN HUNGARY

Inter-Ministerial Task Force (HENT): Three years ago at a U.S. Embassy-organized workshop held in January 2007, the Hungarian 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.<sup>7</sup> In 2009, warning labels were placed on computers (and other equipment) and information leaflets were given to the customers in the shops of major electronic device distributor channels, information campaigns and related art competitions for high school students were launched, anti-piracy exhibitions were held, and HENT's highly informative website has been operating since early 2009.

In accordance with its objective to improve enforcement, HENT organized the conference "Enforcement co-operation in criminal actions related to copyright infringements" for police officials, public prosecutors and court judges. Also in mid-2009, HENT ordered a nation-wide public research on attitudes concerning counterfeiting activities. For example, the research revealed that 1 of every 5 youngsters regularly uses illegal software. HENT is in the process of preparing its official report on the implementation of the action plan to the Hungarian government in 2011.

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 anti-piracy group), BSA and ProArt (together the three groups 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.

The copyright industries are pleased that police cooperation on raids and seizures continued in 2009, and authorities continued to take *ex officio* actions. Street raids are continuously made by the customs and police officers at the well-known "piracy markets" of Budapest, with the recent closure of the infamous Verseny market a notable success.

A new sub-department of the Budapest Police was established in 2007 to deal specifically with on-line infringements. In addition, these industry groups have good relationships with the tax authorities and hope for increased involvement by them in 2010. As a new and negative development, the police budget for judicial expert fees has been seriously decreased, which will clearly undercut effectiveness in criminal actions. The overarching problem is converting the police actions into full prosecutions leading to deterrent sentencing.

BSA reports that its relationship with the enforcement authorities is good. In the past few years BSA entered into cooperation agreements with the authorities, which are still valid and in force. Hungarian authorities conducted approximately 90-100 raids during 2009. The authorities regularly take *ex officio* actions in Hungary, but mostly against private individuals. The majority (80-90%) of copyright case judgments were issued in criminal actions.

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<sup>7</sup> The three major industries involved in HENT's plan were 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.

In general, the authorities tend to conduct *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. On a very positive note, BSA saw efficient actions taken by the National Investigation Office against the trading of illegal software. In the wake of a raid of the largest scale ever, in April 2009 the National Investigation Office seized approximately 250 terabytes of illegal contents, that is, software, movies and music stored on 43 computer servers, which BSA considers as an outstanding result in the region. The criminal actions based on copyright infringement are in many cases combined with other computer and Internet related crimes (e.g. prohibited pornography acts). Acting in the name of the right-holders, BSA generally joins the criminal cases by filing civil claims with the criminal authorities. This means that BSA may receive information on the status of the matters, may take initiatives and may enforce the eventual compensation claims of the right-holders within the criminal action.

ESA reports that its members in the entertainment software sector that are active in Hungary continue to have a positive relationship with law enforcement authorities. In 2009, a video game publisher supported over 200 new cases, based on raids in which the quantity of seized products ranged from 1-250, averaging 20-30 titles per raid. Law enforcement has 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. Consultation with rights holders has the added benefit of reducing the cost of consulting with experts in order to determine the price of legitimate products for damages calculations. Transparency is, however, lacking and should be encouraged in law enforcement efforts – there is a strong need for regular communication on new files and on progress on initiated cases from law enforcement and prosecutors to rights holders' representatives. In addition to initiating actions *ex officio*, law enforcement also follow leads provided by a rights holder, initiating investigations into targets and organizing raids. Although Hungarian authorities must be applauded for their willingness to accept leads from rights holders, the speed of their 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.

The music 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: The industries report that cooperation with Hungarian authorities improved including with the National Bureau of Investigation, the Internet Department of the Budapest Police, Tax authorities, the Budapest Police Central Captainty/Division of Economy, and Customs, among others.

As mentioned above, the April 2009 Internet action in which the Hungarian National Bureau of Investigation ran a large warez raid in Budapest and seized 43 servers which had approximately 300 terabytes of capacity was very successful. On just 12 of those 43 servers there were 21,000 copies of films, computer programs, sound recordings etc. This warez site "published" spam messages offering cheap downloads. The downloaders had to register themselves, study a catalogue, and then pay by elevated-priced SMS messages. The price list extended from 200 to 9,000 Hungarian forints (~US\$1-\$45). For example, one infringing high-end software program costs 2,000 forints (US\$10) where the price of the legitimate product was 1.5 million forints (US\$7,500). Six people were arrested and remain in custody. Expert continue to gather data.

Some criminal cases involving Internet piracy have moved forward in recent years. 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.

**Cross-industry cooperation on Internet cases:** Many industries report that cooperation with Hungarian ISPs is relatively good. For example, ProArt sent 2,000 notice and takedown requests, of which more than 98% were successfully resolved. BSA's cooperation with local ISPs is sufficient; the ISPs usually fulfill BSA's notice and takedown requests without any problems. At the same time, it is important to clarify that BSA's campaign focuses on end-user enforcement, not Internet actions, and ISPs are generally not affected in BSA enforcement cases.

Hungarian ISPs should cooperate with the content industries in the fight against piracy. In fact, the first round table discussions among the parties concerned was held in November 2009, and the next one is expected to happen in the Spring of 2010.

**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. As mentioned above, border officials are also taking part in Internet piracy investigations. Customs officers conduct searches and controls often in a joint effort with officers from the tax administration, and if they see signs implying tax felonies, they initiate tax cases.

**Prosecutorial bottlenecks with expert reports:** Revising the current situation regarding expert reports is an important goal within HENT, and the copyright sectors hope to gain more support on this issue with the new government after elections in April. In order to reduce costs, ProArt made a specific proposal within HENT to setup a database, making it easy to determine the plaintiffs (this process currently consumes a large amount of time and money, it could however be easily automated), unfortunately this was not supported by the relevant government bodies.

Here is the problem. 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 necessarily fully qualified. The expert opinion system should be revised to allow for sampling methodologies. Resources allocated to fund the requisite expert opinions should also be increased (the police budget for judicial expert fees has been significantly decreased).

A continuing obstacle to effective enforcement particularly for the online environment is the lack of engagement of qualified experts. That being said, 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. Insufficient resources for basic infrastructure (computers, open Internet access) as well as qualified experts continues to hinder effective enforcement and may result in further delays in proceedings. Recognizing that strained resources continue to be a challenge, ProArt initiated the creation of a database that includes titles, rights holders and retail price information, providing police and customs officials fast, inexpensive and accurate information.

**Delays and non-deterrent penalties:** Historically the level of criminal sanctions in copyright piracy cases in Hungary has been rather low. Court decisions are still very rare in the field of the Internet-based piracy, due to the fact

that the identification of the perpetrators of this type of piracy is the most difficult, therefore the investigating authorities (police, customs) do not spend their resources on investigating these kinds of cases. Two positive developments that provide the industries with some optimism. First, a landmark judgment was passed by the County Court of Pest as second instance court in September 2009 in a copyright infringement criminal action. The infringer was sentenced to imprisonment of two years (enforcement suspended for five years) and a high amount of financial penalty, which shows the tendency that criminal courts intend not to depreciate IP and copyright infringement related crimes. Second, HENT is working to improve training for police and prosecutions, such as the nation-wide conference "Enforcement co-operation in criminal actions related to copyright infringements" held in April 2009.

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. Where an indictment is actually made, the case often languishes before the court for one to three years, with the rights holders typically uninformed of any developments in the proceedings. An ESA member company reports that although most of its pending cases made progress in Hungarian courts in 2009, 48 of its cases were simply terminated. 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.<sup>8</sup>

**Civil copyright cases:** As mentioned above, BSA is aware that the Hungarian civil courts issued approximately 70 judgments in software cases in 2009, mostly against targets of smaller significance. There have been only a very few civil judgments.

The range of damages generally vary from HUF 50,000 (~US\$250) up to HUF 500,000 (~US\$2,500) there were only a few cases where higher damages (HUF 1,000,000-1,500,000, or ~US\$5,000-\$7,500) were involved. However, BSA itself does not initiate civil actions against individuals; most of its actions take the criminal route.

## **IPR TRAINING AND PUBLIC AWARENESS**

During 2009 many events and campaigns were held and coordinated by HENT, in which the affected industries also participated. For example, there was a professional conference "Enforcement co-operation in criminal actions related to copyright infringements" organized by HENT was specifically aimed for warning police officials, public prosecutors and court judges of the significance of copyright cases and the benefits of the cooperation in this area.

In addition, the copyright sectors, particularly the music and sound recording and business software industries (individually and collectively) continued in 2009, as they have in prior years, to provide trainings for police officials, judges and public prosecutors. BSA has always been ready to provide information upon the requests of the authorities in piracy matters, and always held seminars and educational courses in the frames of its co-operation agreements in the past few years. Most recently BSA conducted is SoftVisit campaign from October-November 2009 by visiting companies and offering presentations in educational institutes; similar activities are also planned for 2010. Under HENT's operations, the Hungarian Patent Office and ProArt have signed an agreement with RTF (Police Officers' Training College) to hold a one semester long course on copyright and patent laws and infringements. This course was held in the fall of 2009, and will be held again in 2010. Another training was also made possible by partial financing from HENT; ProArt held this online training in April 2009 for police officers in 23 different locations (all the county seats plus Budapest), and this dealt with

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<sup>8</sup> 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.

both traditional infringements and online infringements. This law enforcement conference will take place again on April 7, 2010, at the Hungarian Judge Training Academy, organized by ProArt and HENT, and will target senior officers.

HENT has also engaged in a variety of public awareness campaigns. ProArt joined the public awareness activities of HENT and also held its own campaigns, taking part in school forums, holding open discussions at the largest festivals in the country, and organising a year-long effort aimed at boosting CD-sales, with significant prizes going to the lucky winners. ProArt had its own stand at the largest musical equipment, sound & light exhibition in Central Europe (Hangfoglalás – Soundquest), and took the message to upcoming local musicians and their fans by working together with various talent competitions.

In addition to the programs dedicated to law enforcement officers, the Hungarian government should also organize campaigns aimed at the general public, to increase copyright awareness in the whole of society, because law enforcement officials cannot distance themselves from the general expectations of society. With respect to public awareness, ProArt is conducting such campaigns on music; they are continually reshaping its public relations activities and messages as new developments arise. An important focus of its PR activities is placed on sales-boosting efforts; as more and more ISPs are willing to cooperate in the shift towards legal download opportunities in the digital world, ProArt's messages are gradually moving away from CD buying, and towards obtaining music legally in various digital formats. For example, a "PPP" campaign was conducted in the spring of 2009, with HENT providing the background and ASVA, BSA and ProArt supplying the funds. Leaflets were attached to hardware products or handed to their buyers, with the message "genuine hardware should be used with legal software and content."

## **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. In Hungary the Electronic Commerce Act (Act CVIII of 2001) contains detailed regulation with respect to the ISP liability and also the notice and takedown procedure. The Act is in full compliance with the EC requirements laid down in the relevant EC Directives (basically 2000/31/EC and 98/27/EC). There are no specific laws on P2P/file-sharing; these activities are interpreted on the basis of the Copyright Act and in the view of related court practice.

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 amendments entered into force on February 1, 2009; however, the entry into force of the orphan works provisions was postponed until the publication of the implementing government decree, and that entered into force on May 16, 2009. With respect to orphan works, the Hungarian Patent Office will grant a non-exclusive license to use the work for five years upon request to a person who has taken reasonable measures to locate the author but was unable to locate that author. This license is granted against of a fee to be paid in escrow handled by the Office in case the owner of the rights is located (the possibility of which is facilitated by an online database about such licenses) in respect of works and rights not covered by extended collective management (in the latter case, orphan works are licensed in the framework of the collective system). In addition, IIPA members are also concerned that the private copy exception might be interpreted to extend to copies from illegal sources; the law must be clarified that the exception does not apply in such a case. Moreover, the new provisions also introduced a more complex system regarding the determination of royalties for collecting societies. The Copyright Act's current provisions on collective rights management ensures a monopoly position for such poorly functioning organization as FILMJUS. Although the European Commission has suspended its official infringement proceeding initiated against Hungary (which were aimed at the monopoly provisions for collecting societies), there is a need to solve the problems caused by the statutory monopolies, preferably through adequate modification of the Copyright Act.

**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.

## **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 the local collection society FILMJUS to collect and administer all shares of levies (such as those generated from these levies. The U.S. audiovisual sector shares the concerns of the European Commission which has initiated infringement proceedings against Hungary regarding certain provisions of the Hungarian Copyright Law which guarantee monopoly position for collective 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) 2010 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** Israel should be on the Watch List.<sup>1</sup> In IIPA's November 2009 filing in the Out-Of-Cycle Review of Israel's Special 301 status, IIPA recommended keeping Israel on the Special 301 list. In that filing, IIPA noted that, in addition to the priorities for 2009 in IIPA's February Special 301 report, Israel should "enforce[e] court decisions ordering Israeli cable operators to make payments for retransmissions of broadcast television signals and acced[e] to and implement[t] the WIPO Internet Treaties, in order to provide an appropriately high level of IP protection consistent with that of members of the OECD."

**Executive Summary:** The government of Israel desires to join the Organization of Economic Co-operation and Development (OECD),<sup>2</sup> and on May 16, 2007, the OECD Ministerial Council Meeting approved a decision to open accession discussions with Israel.<sup>3</sup> Soon thereafter, the Israeli government passed a new copyright law (effective May 25, 2008), which did not, like almost all other OECD members have already done,<sup>4</sup> implement key provisions of the WIPO Copyright Treaty (WCT) and WIPO Performances and Phonogram Treaty (WPPT) which provide the basic minimum framework for protection of copyright in the online environment. Also, unlike most OECD members, Israel has not yet joined the WCT and WPPT.<sup>5</sup> Israel should be encouraged to fully implement and join the WCT and WPPT.

Piracy in Israel grew slightly worse in 2009. For example, despite good cooperation with the authorities on issuing audit letters and investigating claims of unauthorized use of software in businesses, the business software end-user piracy level increased from 32% in 2008 to 34% in 2009, and losses increased for the fifth straight year, from US\$72 million in 2008 to US\$84 million in 2009. The recording and music industry reported losses of US\$55 million and a piracy level of 55%.<sup>6</sup> Israel's new copyright law also contains no minimum statutory damages amount, which also results in less effective enforcement. Israel's Internet usage continued to increase in 2009, and along with it, so did infringing activities online. Israel ranks fifth of all countries of all countries surveyed by the entertainment software industry in terms of per capita downloading.<sup>7</sup>

To reduce piracy, some important improvements would include confirming criminal liability against end-user piracy, providing minimum statutory damages, and establishing an effective structure for enforcement in the online environment.<sup>8</sup> One major and longstanding issue for the audiovisual industry remains the resistance of Israeli cable

<sup>1</sup> In IIPA's 2009 Special 301 submission, IIPA recommended that Israel be placed on the Watch List, but USTR decided to place Israel on the Priority Watch List, with an out-of-cycle review "in order to continue positive discussions with Israel regarding potential amendments to Israel's laws that affect IPR protection for pharmaceutical products." For more details on Israel's Special 301 history, see IIPA's "History" Appendix to this filing at <http://www.iipa.com/pdf/2010SPEC301HISTORICALSUMMARY.pdf>, as well as the previous years' country reports, at <http://www.iipa.com/countryreports.html>.

<sup>2</sup> See Organization of Economic Co-operation and Development Home Page, at [http://www.oecd.org/home/0,2987,en\\_2649\\_201185\\_1\\_1\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/home/0,2987,en_2649_201185_1_1_1_1_1_1,00.html).

<sup>3</sup> Israeli Ministry of Foreign Affairs, *Israel to Join OECD*, May 16, 2007, at <http://www.mfa.gov.il/MFA/Government/Communiques/2007/Israel+to+join+OECD+16-May-2007.htm>.

<sup>4</sup> Among OECD members, only Canada has not implemented any key aspects of the WCT and WPPT.

<sup>5</sup> The following OECD members are members of the WCT and WPPT: Australia, Austria, Belgium, Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Japan, Korea, Luxembourg, Mexico, Netherlands, Poland, Portugal, Slovak Republic, Spain, Sweden, Switzerland, Turkey, United Kingdom, and United States. Only Canada, Iceland, New Zealand, and Norway have not, and of those, only Canada has not implemented either Treaty.

<sup>6</sup> The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2010 Special 301 submission at [www.iipa.com/pdf/2010spec301methodology.pdf](http://www.iipa.com/pdf/2010spec301methodology.pdf). BSA's 2009 statistics are preliminary, representing U.S. software publishers' share of software piracy losses in Israel. They follow the methodology compiled in the Sixth Annual BSA and IDC Global Software Piracy Study (May 2009), available at <http://global.bsa.org/globalpiracy2008/index.html>. These figures cover, in addition to business applications software, computer applications such as operating systems, consumer applications such as PC gaming, personal finance, and reference software.

<sup>7</sup> The survey was conducted by the Knesset's research institute, on the occasion of its 61<sup>st</sup> anniversary. The survey shows that today, about 4.4 million people are surfing the internet. 95% of students have a computer that is connected to the internet. About 45% of the students surf the internet for approximately 6-12 hours a week, compared with about 20% who surf the internet for over 13 hours a week. About 45% of the surfers, use file sharing programs.

<sup>8</sup> See, e.g., Government of Israel, *2009 Submission Of The Government Of Israel To The United States Trade Representative With Respect To The 2009 "Special 301 Review"*, March 2009 (on file with IIPA) (*2009 Israel Submission*). In that *2009 Israel Submission*, the government noted,



operators to compensate copyright owners for unauthorized uses of their works through retransmissions of broadcast television signals, despite court decisions confirming remuneration for unauthorized retransmissions. The number of police officers in the IPR Units has declined and today there are only about 16 police officers dealing with IPR infringements. Internal prosecutors have yet to be assigned to the Units, resulting in long delays in indictment submissions and in lower quality cases being filed due to lack of experience.

The United States and Israel have longstanding bilateral copyright relations, dating back to the May 4, 1950 bilateral copyright agreement and to the 1985 bilateral Free Trade Agreement (FTA).<sup>9</sup> IIPA appreciates that through bilateral consultations and the Special 301 process, the Israeli government has had a chance to consider and hopefully resolve these issues.<sup>10</sup>

**Priority Actions Requested in 2010:** IIPA requests that the government of Israel take the following actions which would result in the most significant near-term commercial benefits to the copyright industries:

### Enforcement

- Enforce court decisions ordering Israeli cable operators compensate copyright owners for unauthorized retransmissions of television broadcast signals containing their works, and establish fair remuneration structure going forward.
- 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 proactive Israeli Police pursuance of Internet piracy cases.
- Give copyright piracy cases priority attention, through Israeli Police and prosecutors expeditiously handling copyright piracy files, processing of criminal prosecutions of pirates, and seeking deterrent penalties.
- Establish national and independent unit specifically to prosecute piracy cases.

### Legislation

- Enact copyright amendments to enhance protection, e.g., by adding prohibitions against the circumvention of technological protection measures, circumvention services, and the trafficking in circumvention.
- Clarify the scope of ISP liability for authorizing infringements and provide incentives for them to help right holders tackle online infringement, e.g., including takedowns and assistance with repeat infringers in the online space.
- Enact Bill that would provide for closing down operations and confiscating property of those caught selling pirate materials.
- Scrap regulation prohibiting foreign television channels from carrying some advertising aimed at the Israeli market.

## PIRACY AND ENFORCEMENT CHALLENGES IN ISRAEL

Previous reports and filings (such as the Out-Of-Cycle Review) have included discussions of the many piracy and enforcement challenges faced in Israel.<sup>11</sup> The following section provides brief updates only to the situation

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"[i]n July and August of 2008 [a bill on ISP liability] was debated before a Knesset committee on several occasions. Shortly thereafter the Knesset went into recess and the Knesset was later dissolved pending new elections. It is unclear at this time whether the Bill will be continued in the coming Knesset and if so in what format. In the meantime a growing body of case law continues to provide guidance with respect to ISP copyright liability issues."

<sup>9</sup> The U.S. and Israel concluded FTA Joint Committee meetings in December 2009 at which issues of mutual concern were raised, including intellectual property rights. See United States Trade Representative, *USTR and Israel Hold FTA Joint Committee Meeting*, December 15, 2009, at <http://www.ustr.gov/about-us/press-office/press-releases/2009/december/ustr-and-israel-hold-fta-joint-committee-meeting>.

<sup>10</sup> See 2009 Israel Submission.

<sup>11</sup> See International Intellectual Property Alliance, *Israel*, at <http://www.iipa.com/rbc/2009/2009SPEC301ISRAEL.pdf>. See *infra* discussion of the GSP Petition involving Lebanon and IP rights. See also International Intellectual Property Alliance, *Docket: USTR-2009-0001, Israel: Special 301 Out-Of-Cycle Review, IIPA Comments on the Status of Copyright Protection and Enforcement*, 74 Fed. Reg. 51215 (October 5, 2009), at <http://www.iipa.com/pdf/IIPAIraelOCRsubmissionFINAL110909.pdf>.

on the ground in Israel. Failure to mention any specific issue should not be taken as an indication that the problem has been resolved.

**Collections for Retransmissions of Broadcast Television Signals:** Notwithstanding protections afforded 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 resist making payments for retransmissions of any broadcast television signal. Specifically, more than ten 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 and the TRIPS Agreement (as well as the WIPO Copyright Treaty). AGICOA's claims, filed after many years of trying to come to terms with cable operators directly, have gone unresolved, though some of their claims have now been paid thanks to a favorable outcome in a bankruptcy case filed by certain cable operators that were part of the original suit. It seems clear from the disregard of the Israeli courts and the failure to advance serious settlement discussions that there is little will in Israel to ensure 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 by cable operators without authorization. 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 payments going forward.

In the Israeli government's 2009 Submission to USTR in the Special 301 process, the government indicated, "[r]etransmissions are subject to copyright exclusive rights," and "[w]ith respect to the referred to court case brought by AGICOA that case is still pending in the court system and its outcome will depend, inter alia, on the ability of AGICOA to prove their case." We appreciate the Israeli government's statement confirming the exclusive rights of our copyright owners, but respectfully suggest that local government officials have it within their power to support and motivate constructive settlement discussions both for past violations of copyright laws by cable operators and for fair payments going forward.

**Business Software End-User Piracy Remains Relatively Low:** The Business Software Alliance reports that due to the increasing levels 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 has remained relatively low in the past few years.<sup>12</sup> There can be no doubt that protecting copyright in Israel and reducing piracy brings resulting positive gains to the Israeli economy. For example, a study released in January 2008 by International Data Corporation demonstrated that a 10 point reduction in software piracy by 2011 (which was 32% at the time) 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.<sup>13</sup>

While still low by comparison with other markets in the region, software piracy in Israel did worsen slightly in 2009, as the piracy level increased from 32% in 2008 to 34% in 2009, as a result in part of market growth in Israel, and losses increased from \$72 million in 2008 to \$84 million in 2009. Also, 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.

There are a couple of areas in which improvements are sought. The first involves statutory damages, which provide a very important remedy in software end-user cases since they can provide a certainty to damage awards in cases where it may be difficult to prove actual damages. Currently, under Section 56 of the Copyright Law, 2007, the statutory damages range between no damages and NIS200,000 (US\$53,500), replacing the old minimum of NIS10,000 (US\$2,675) and maximum of NIS20,000 (US\$5,350). While the higher maximum is very helpful, the fact that there are no longer minimum statutory damages has negatively affected the BSA's ability to effectuate its

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<sup>12</sup> The Business Software Alliance reports that in 2009, as in previous years, they offered seminars and training courses and classes regarding software protection at various events open to different members of the public, such as hi-tech companies and the Israeli Bar Association.

<sup>13</sup> 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](http://www.bsa.org/-/media/Files/idc_studies/bsa_idc_israel_final%20pdf.ashx).

program through warnings and the elimination of illegal uses. Also, 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. One further issue involves whether pre-established damages are to be awarded on a per-copy basis or a per-work basis. The recent judgments regarding software copyright infringements have resulted in one statutory damage award per software title infringed, regardless of how many copies were infringed.

In addition, BSA has had to exclusively rely on bringing civil cases to enforce against end-user piracy of business software, since the Israeli government's position has long been that unauthorized use of software in a business setting does not constitute a crime in Israel. This situation makes deterrence very difficult as to end-user piracy, since, as just mentioned, the statutory damages awards are limited per software title, and yet, there have been as of yet no criminal cases brought regarding end-user piracy of software. The Israeli government, in the 2009 Submission in the Special 301 process indicated,

"Business Software End user liability is addressed by Israeli copyright law. Perhaps not in the manner sought by the IIPA, but clearly in a manner that leads to some of the world's lowest rates of business software piracy. Criminal liability may also inure provided that the software has been distributed on a commercial scale. Distribution on a smaller scale will be remedied by actual damages or statutory damages and permanent injunctions."

Since software in a business setting is distributed throughout a company without authorization, albeit there is no monetary exchange, IIPA is interested in exploring this theory for criminal liability in Israel under the new Law. 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 and we believe the government should ensure the law criminalizes end-user piracy.

**Book Piracy:** In 2009, publishers became aware of a growing problem of illegal photocopying occurring at copy shops in at least two university campuses. In both instances, the unauthorized copying appeared to be facilitated by the university student union, which was producing the illegal copies of textbooks and selling them to students. The publisher's source believes that university administrators are aware of the illicit activity but have not acted against the ongoing pirate activity. It is not known at this time how widespread illegal photocopying is but publishers are continuing to investigate this problem.

**Internet Piracy:** Almost 5.3 million Israelis, or 74% of the population, used the Internet as of May 2008 (according to TNS Global), with almost 1.7 million broadband subscribers as of December 2008 (according to the International Telecommunications Union). As such, it is not surprising that Internet infringements have increased in Israel, with illegal P2P file sharing services, BitTorrent, deep linking sites, web bulletin boards, cyberlockers, and direct sharing of files becoming more prevalent. The Entertainment Software Association (ESA) estimates there to have been approximately 134,935 infringing downloads<sup>14</sup> made of select ESA members' computer and video games through P2P file sharing by ISP subscribers in Israel during December 2009. This comprises approximately 1.40% of the total number of illegal copies made by P2P users globally during this period. These figures place Israel thirteenth among the countries surveyed in overall volume of P2P game downloads, and fifth among countries surveyed in volume of P2P game downloads per capita during the study period. Breakdowns by ISP show that subscribers of Golden Lines, Bezeq International, and NetVision were responsible for approximately 77% of this activity occurring in Israel, amounting to more than 105,000 downloads during the one-month period. These figures do not account for downloads that occur directly from hosted content, such as games found on "cyberlockers" or "one-click" hosting sites which continue to account each year for progressively greater volumes of infringing downloads.

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<sup>14</sup> This figure represents the number of downloads of a small selection of game titles only. Consequently, this figure is under-representative of the overall number of infringing downloads of entertainment software made during the period.

The industry reports generally good cooperation as to Internet investigations and prosecutions in Israel, and reports indicate that local ISPs are cooperating with copyright holders in regard to Internet activities at least in the hosted environment. Some recent court cases are encouraging. In March 2008, the Haifa District Court ordered that Israel's three largest ISPs block access to HttpShare, a BitTorrent and deep link website.<sup>15</sup> 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." In 2009, the local branch of the International Federation of Phonographic Industries (IFPI) reported reaching major legal settlements with ten copyright infringing online services.<sup>16</sup> IFPI Israel had filed court proceedings against the services which illegally provided links to unlicensed local and international repertoire hosted on cyberlockers. The settlement reached with the operators of the sites was unprecedented in its scope, with Israeli courts issuing broad permanent injunctions prohibiting the individuals involved from copying, distributing, linking or ripping onto MP3 or other formats any copyright infringing repertoire. The settlement also involves the payment of around US\$50,000 in compensation. In both cases, the infringing content and websites were hosted outside the country, predominantly in the Netherlands but the sites were aimed at Israelis.

In one other case, the local recording industry group also reports a January 2009 decision in which 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. By contrast, in another case, *The Football Association Premier League Ltd. v. John Doe*, the Tel Aviv District court, in a preliminary order issued in July 2008, refused to order service providers to divulge identifying information of a website offering free onward streaming of Premier League soccer matches first beamed into Israel from the United Kingdom.<sup>17</sup>

The Israeli government has indicated in its 2009 Submission to USTR in the Special 301 process that "[p]iracy carried out through the internet is ... receiving attention," and noted, "like in many countries, where the servers are located outside of the jurisdiction enforcement is impeded," while when "activities are carried out from Israel enforcement is easier." The government's point regarding the potential complexities of enforcement when multiple jurisdictions are involved in an infringement is well taken, although the IFPI cases indicate that it is quite possible, and indeed, in the years ahead, will be necessary for enforcement authorities to deal with cases in which activities occur both domestically and extraterritorially.

## **COPYRIGHT LAW AND RELATED ISSUES**

While many of the legislative developments discussed in previous reports are now moot due to the dissolution of the previous Knesset, and while analysis of the 2007 Copyright Law has been undertaken in previous reports,<sup>18</sup> the following provides a brief listing of issues which IIPA would like to see addressed in Israel in the coming year.

**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),<sup>19</sup> and entering into force on May 25, 2008. The law resulted in some important positive changes. Some of

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<sup>15</sup> *Court forces three largest ISPs to take action...*, March 10, 2008, at <http://www.dsireports.com/shownews/Israel-Latest-To-Force-ISPs-To-Block-Piracy-92487>.

<sup>16</sup> International Federation of Phonographic Industries, *10 Illegal Cyberlocker Services Settle with IFPI Israel*, December 10, 2009, at [http://www.ifpi.org/content/section\\_news/20091210.html](http://www.ifpi.org/content/section_news/20091210.html).

<sup>17</sup> *The Football Association Premier League Limited v. Anonymous*, District Court of Tel Aviv – Yaffo (MCA 011646/08). IIPA appreciates the fact that the Attorney General issued a copyright advisory opinion in November 2008, affirming that copyright protection subsists in the filming of sporting events under Israel's new copyright law in the same manner as it did under the former legislation.

<sup>18</sup> See International Intellectual Property Alliance, *Israel*, at <http://www.iipa.com/rbc/2008/2008SPEC301ISRAEL.pdf>.

<sup>19</sup> 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

the provisions, however, resulted in weakened protection. The legislation also does not add protection against the unlawful circumvention of “technological protection measures,” circumvention services, and the trafficking in circumvention devices, which would have gone far to implement the WCT and WPPT.<sup>20</sup> There are also no provisions dealing with “rights management information.” The Knesset also rejected other modernizing elements of copyright protection into this law such as an extended term of protection for sound recordings. The following is a non-exhaustive list of some issues IIPA believes should be addressed:

- **Legal Protection for Foreign Phonogram Producers (Sections 8, 10):** Israel has until the 2007 Law 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 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 not settle for this weakening of protection, and should reinstate protection for foreign sound recordings enjoyed under the previous law, granting all foreign phonogram producers the full set of rights granted to Israeli nationals. The 2009 Israel Submission indicates, among other things, that “[t]he treatment of sound recordings under the new Copyright Law is fully conformant with Israel’s bilateral and multilateral obligations,” a statement with which we agree. However, the Submission fails to address the justification for the weakening of protection, i.e., the failure to maintain protection under the previous law, and the move from providing equal national treatment to discriminatory treatment for non-U.S. foreign recordings.
- **Presumption of Ownership for Non-U.S. Foreign Sound Recordings Omitted (Section 64):** The presumption of ownership available in Section 64 of the 2007 Law does not expressly cover sound recordings. As a result, a new discrimination now exists, since creators of works get the presumption while sound recordings producers apparently no longer do. 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 non-U.S. recordings, however,

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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.

<sup>20</sup> In the 2009 Israel Submission in the Special 301 process, the Israeli government addressed the issue of omission of protection against circumvention of TPMs, noting:

“Israel is not a member of either the WIPO Copyright Treaty (WCT) or the WIPO Performances and Phonogram Treaty (WPPT), the only multilateral instruments which obligate implementation of Technical Protection Measures and Digital Rights Management ... [h]ence, Israel is under no obligation to introduce TPM.... [S]everal large authors’ groups vehemently oppose TPM.”

To the contrary, there is no debate that content providers worldwide rely on an array of TPMs to set up workable commercial approaches to content creation and distribution. Varying TPMs allow for varying distribution models, from pay-per-use models to free-and-clear distributions, and even, as the government indicated, some models which would include unencrypted access to content. Also, it should be noted that such unencrypted access does not indicate a non-use of TPMs or DRM; therefore, protection against circumvention of TPMs remains a vital part of such distribution models. WIPO has been clear, from the earliest days of consideration of the WCT and WPPT that

“it is not sufficient to provide for appropriate rights in respect of digital uses of works, particularly uses on the Internet. In such an environment, no rights may be applied efficiently without the support of technological measures of protection.... There was agreement that the application of such measures... should be left to the interested rights owners, but also that appropriate legal provisions were needed to protect the use of such measures.”

Lastly, the government notes “lack of uniform implementation worldwide.” This is inaccurate. First of all, there are now 88 members of the WCT and 87 members of the WPPT. This constitutes a strong global consensus, making Israel the outlier. Second, with respect to implementation into domestic laws, even more countries have implemented into domestic law the obligations of the WCT and WPPT than have acceded or ratified them. As of February 2010, over 100 countries/territories had fully or partially implemented the anti-circumvention obligations, had already committed to, or had draft legislation which would provide such protection. At least two-thirds of these countries/territories cover all or some access controls, are committed to do so, or have draft legislation which would provide such protection.

will impose unnecessary hardships on producers in establishing their rights in infringement cases. The former version of Section 64 should be reinstated.

- **Limited Right to Injunctions:** Section 53 could limit the ability of copyright owners to enjoin infringements 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 limitation appears to undermine 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. This amendment raises questions about Israel’s compliance 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 appears to violate Article 46 of TRIPS which mandates the disposal of infringing goods “without compensation of any sort,” since 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.<sup>21</sup> 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 “prescribed for such work” 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.
- **Parallel Importation:** The definition of “infringing copy” in Paragraph 1 of the 2007 Law excludes from protection copies imported into Israel the making of which was made with the consent of the owner of rights in the country of manufacture. This means that goods which are considered genuine in their country of origin may not 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

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<sup>21</sup> Indeed, since those works are measured from the date of publication (or in the case of “records” from the date it was created) it is even more imperative that, for the sake of providing proper incentives for further creation and dissemination, that an attempt be made to arrive at an equivalent number of years to “life of the author” plus seventy years. In the United States, studies were conducted to arrive at the actuarial equivalent of “life of the author” plus seventy years, which was demonstrated to be ninety-five years from publication.

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.

- **Limitations and Exceptions:** IIPA points to several exceptions in the 2007 Law which could, if not properly interpreted, run afoul of the well-established Berne “three-step test” (incorporated into TRIPS), especially if applied in the digital environment. IIPA appreciates the Israeli government’s reaffirmation that “[t]he Berne “three step test’ ... sets forth a binding international standard that is embodied in the new Copyright Law, and in particular in its ‘fair use’ section ... and exceptions sections.” At least one decision has created concerns about how Israeli courts will interpret the new fair use provisions of their law, and we suggest that USTR, in conjunction with experts from the Copyright Office and PTO, begin a dialogue with the government of Israel, to ensure that the government of Israel acts in a manner conducive with achieving interpretations consistent with Israel’s international obligations under the three step test.
  - **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.
  - **Computer Program Exceptions (Backup and Interoperability) (Section 24):** The 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 6<sup>22</sup> in order to appropriately narrow the exceptions.
    - 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.”

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<sup>22</sup> 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,

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.

- 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.
- **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, however, to cause 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.” IIPA respectfully suggests the following changes to make the exception more palatable:

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 by 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.~~

The 2009 Israel Submission notes, “Section 26 ... tracks very closely the European Directive and jurisprudence on temporary copies and deals with copying incidental to transmission of works, or as part of a legal use of the work. As the new law specifies that temporary copies are ‘copies’, this exemption became essential in order to enable the smooth and legal use of computers and networks.” IIPA appreciates the Israeli government’s response confirming the protection of temporary copies, but maintains the exception as drafted is overly broad and subject to misinterpretation (e.g., the source copy must be legal and the reasons for the transient reproduction must be sufficiently spelled out in the statute).

- **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 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.

**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.

## 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) 2010 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** Italy should remain on the Watch List in 2010.

**Executive Summary:** There was little improvement in the piracy situation in Italy in 2009 and Italy remains a country with a very high level of both physical, digital and end-user piracy. The continued growth of Internet piracy in Italy continues as a top concern for most of the copyright industries and recent studies show that digital piracy in Italy has reached 23%, well beyond the EU average. At the same time, hard goods piracy and end-user piracy of software remains among the highest in Western Europe. Enforcement authorities continue to be generally cooperative in conducting raids, but raiding activity declined for most industries overall in 2009. Furthermore, a lax attitude by the courts, insufficient resources for the civil IP specialized 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. A recent decision by the Supreme Court concerning the software industry held that non-corporate professionals involved in software piracy would not be subject to the criminal provisions of Article 171*bis* which it said applied only to commercial companies. This would make it virtually impossible to obtain criminal enforcement against software pirates engaged in the professions. The reluctance of the courts to issue *ex parte* search orders in end-user software piracy cases must be remedied by a reaffirmation that this must be the primary means to deal with this type of piracy.

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 Data Protection Authority's uncompromising opposition reflected by 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 (including in the EU, for example in the Czech Republic) and against major uploaders in the filesharing (P2P) environment. Action hoped-for in 2009 by a special government-sponsored steering committee to deal with P2P piracy stalled in early 2009 although has resumed in February 2010. No additional cooperation between ISPs and rights holders has been agreed. In one welcome development, though, an Italian court held that the notorious PirateBay P2P service engaged in criminal conduct under Italian law by participating in the making available of unauthorized content to persons in Italy and that the criminal authorities could order ISPs to block access to the site. It was also positive the law on corporate liability for the violation of copyrights was extended.

Legislative concerns are also continuing, including a pending Bill ("processo breve") which, if adopted, could result in the dismissal of many criminal copyright cases.

**Priority actions to be taken in 2010:** 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 additional criminal actions against P2P services that meet the criteria for injunctions/liability established in the PirateBay decision and order ISPs to block access to those services;
- Encourage the government's anti-piracy steering committee to conclude its discussions and propose an effective remedies system;

- Invigorate a nationwide anti-piracy campaign which focuses on commercial scale piracy controlled by organized criminal syndicates, on end-user piracy of business software, appropriately covers all types of Internet piracy, and also includes unauthorized commercial photocopying of academic materials;
- 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;
- Clarify and confirm 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);
- 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;
- Develop positive messaging on the value and importance of copyright, including in the online environment, and of intellectual property as a whole;
- Continue the process of 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 like the bill proposing to limit the length of the judicial process. If adopted, for offences carrying a sentence of ten years, the law would limit judicial proceedings to six years in total, from the first verdict through two rounds of appeals. All cases involving copyright violations would fall within this provision;
- Amend the copyright law to remove "remote videorecording systems" from the levy system, providing exclusive rights.
- Repeal the 2005 Cirelli Law and the 2006 Pecorella Law;
- Eliminate the stickering requirement, at least with respect to business and entertainment software, and recorded music;
- Clarify that professionals who infringe copyright on software in the framework of their activities are criminally liable under Art. 171 *bis* Copyright Act as companies are.

## UPDATE ON COPYRIGHT PIRACY IN ITALY

**Internet piracy generally:** All copyright industries report an increase in Internet piracy in 2009, making this issue a continuing critical priority for U.S. bilateral engagement in 2010. Broadband penetration continues to grow<sup>1</sup> and the lack of cooperation by ISPs and inadequate legislation and enforcement have combined to make the online piracy situation even worse than in 2008. While uploading of infringing content is illegal under the 2004 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 recording and motion picture industries.

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<sup>1</sup> There are an estimated 30 million Internet users in Italy as of September 2009, almost a 51.7% penetration rate. <http://www.internetworldstats.com/stats4.htm#europe>. Broadband subscribers are 11.8 million, the 8<sup>th</sup> largest in the world. <http://www.a4aapl.com/2010/01/netherlands-tops-list-of-countries-with.html>

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 were less cooperative in 2009 with respect to takedown requests for websites and auction sites hosting infringing material, but the takedown process is cumbersome as the Italian law is unclear and it has been interpreted by some to require that takedown procedures be subject to a prior order from a "judicial or administrative" body.

It is dramatically different with respect to P2P piracy since Italian law appears to provide no incentive for ISPs to cooperate with rights holders with respect to material transiting their networks. Even the mere forwarding of notices of infringement to potentially infringing subscribers is routinely refused.

The overall legal environment in Italy makes private sector online 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. Because this results in the practical absence of civil remedies, Internet piracy enforcement necessarily falls to the criminal authorities. While criminal enforcement has been quite difficult, the recent PirateBay court decision should significantly improve the situation (see discussion below).

ISP cooperation is essential to effectively addressing P2P piracy. Although private sector negotiations have been ongoing, progress appears slow and it is unlikely that a cooperative solution or agreement will be in place any time soon in the absence of a government presence that compels a reasonable and effective result. In any case, the PirateBay decision confirms that the judge can require an ISP to block access to an infringing site, even if located abroad. Negotiations with ISPs ought to proceed in the context of this case.

**Online piracy of music and sound recordings:** The recording industry reports that online music piracy still accounts for losses far higher than it generates in legitimate sales -- or losses of over **\$300 million** in 2009. Last year, the local recording industry associations, FIMI and FPM reported that more than 7 million people were using P2P networks for illegal uploading and downloading of music files. These numbers also are confirmed for 2009. 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.

**Online piracy of entertainment software:** The Entertainment Software Association (ESA) reports that in 2009 Italy ranks as the global leader in terms of the incidence of infringing downloads of ESA member titles. BitTorrent and eDonkey continue to be the top two P2P protocols in Italy. ESA estimates there have been approximately 1.95 million infringing copies<sup>2</sup> made of select member titles through P2P file sharing by ISP subscribers in Italy during December, 2009. This comprises a staggering 20.3% of the total number of illegal copies made by P2P users globally during this period. These figures place Italy as number one in highest overall volume of P2P game downloads, and number one in highest volume of P2P game downloads per capita during the study period. Breakdowns by ISP show that Telecom Italia subscribers were responsible for approximately 54.8% of this activity occurring in Italy -- more than 1 million downloads during the one-month period. These figures do not account for downloads that occur directly from hosted content, such as

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<sup>2</sup> This figure is representative only of the number of downloads of a small selection of game titles. Consequently, this figure is under-representative of the overall number of infringing downloads of entertainment software made during the period.

games found on “cyberlockers” or “one-click” hosting sites which continue to account each year for progressively greater volumes of infringing downloads.

The industry’s online piracy problem is exacerbated by the widespread availability of circumvention devices, which enable people to make infringing copies of games, and to play unauthorized copies on game systems. Although Italy’s statutes prohibit circumvention devices, courts have not been uniform in the application of these laws. For example, a court decision in Bolzano, Italy, had held that mod chips were not illegal under Italian legislation implementing the EU Copyright Directive. Fortunately, in 2006 the Supreme Court reversed this court decision and found that circumvention devices are illegal under Italian law,<sup>3</sup> but the damage was done and continues. Rights holders report lingering misconceptions about the status of circumvention devices, particularly those used to circumvent technological protection measure (TPMs) utilized by the video game industry to prevent the unlawful copying of games as well as the playback of unauthorized games. Indeed, since December 2009, judges in two separate proceedings of the same case have ruled that mod chips do not run afoul of Italy’s TPM provisions. ESA is pleased to learn that Italian prosecutors will appeal these decisions to Italy’s Supreme Court, and remains hopeful that the case will ultimately result confirm the earlier Supreme Court precedent that TPMs utilized by the game industry are covered by existing statutes. Unfortunately, while we wait for the Supreme Court’s review, vendors continue to traffic in the circumvention devices that foster the high game piracy rate in Italy. ESA believes that a more regimented approach to the enforcement of Italy’s TPM provisions could result in a significant reduction in the level of online piracy of entertainment software.

**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. P2P piracy and forums directing users to illegal copies of movies also are very damaging. The Motion Picture Association (MPA) reports that the video market in Italy declined by 17%<sup>4</sup>, much of this due to online piracy. The industry faces a particular problem -- the illicit recording of the Italian 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. FAPAV estimates that 78% of the films released theatrically in Italy can be found in the Italian language on the Internet within two days of that release.

In 2009, FAPAV sent a cease and desist letter to Telecom Italia requesting the blockage of major infringing websites and that measures be put in place to prevent the widespread piracy of motion pictures over the Telecom Italia network. Telecom Italia’s response was negative on all fronts. As a result, FAPAV filed a request for an injunction against Telecom Italia before the Rome Court’s specialized section on intellectual property. At the time of writing the Court has not yet issued a decision, however the case was widely publicized in the press on the basis of Telecom Italia’s objections and allegations, clearly following the negative press strategy of the latter. Due to misleading allegations of privacy right violations in the press, the Data Protection Authority joined the case and requested FAPAV to provide clarifications on the methodology used for the piracy infringement data it submitted in the filing. Despite clear evidence provided by FAPAV demonstrating that no privacy rights had been infringed in the process, the Data Protection Authority has thus far shown no willingness to cooperate as part of the solution to the problem. This case is a clear example of the misrepresentation of the problem vis-à-vis the public, the lack of will to reach a solution following a ‘fair balance of the rights and interests in play’ principle and the refusal of the major telecommunications operator in Italy to engage in any voluntary and meaningful cooperation with rights holders.

In 2009, FAPAV conducted a study on film piracy in Italy. The study found that 32% of Italians had acquired and/or watched pirate movies over the prior 12 months. It estimated the total losses due to physical and online film piracy in Italy at €530 million (US\$721,846); the infringers had viewed an average of 21 pirate titles in the prior year; that the losses due to physical piracy were estimated to be €332 million (US\$452 million); and that 70% of those surveyed who engaged in infringement would be willing to acquire or view films legally in the absence of the availability illegally. The study illustrates that film piracy is pervasive in this market.

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<sup>3</sup> *Corte di Cassazione*, Judgment no. 1602 General Register No. 35598/2006.

<sup>4</sup> 2009 Univideo Report.

**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 a significant increase in online piracy of books and journals in 2009, 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, without concerted action by authorities and cooperation of relevant parties.

**End-user piracy of 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 at **49%** of the market and is the second highest in Western Europe, behind only Greece at 59%. 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.<sup>5</sup> Preliminary estimated U.S. trade losses in Italy due to business software piracy in 2009 were **\$1.138 billion**.

**Piracy of physical product generally:** Italy continues to have the highest level of piracy of physical 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:** 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.

**Entertainment software:** Hard goods piracy appears to be on the 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.

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<sup>5</sup> 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>.

**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.

**Audiovisual works:** MPA also reports no major improvements in the overall piracy situation in Italy during 2009. Physical piracy still accounts for 17% of losses with pirate DVD-Rs sold in fleas markets and by street vendors most problematic. 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 three 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<sup>®</sup> encryption system.

**Books and journals:** Unauthorized and uncompensated photocopying continued to plague academic publishers during 2009. 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.

## **UPDATE ON 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 online piracy, end-user piracy of software and hard goods piracy, mainly at the retail level. In past years, the responsibility for enforcement is split among at least 19 offices and successive government reorganizations have kept enforcement fragmented. However, in the spring of 2009, the government established a new General Directorate for Intellectual Property, with responsibility to oversee all anti-counterfeiting/anti-piracy activities in the country, propose legislation and build awareness. Two working groups were set up, one to liaise with the rest of the government and one with the private sector.

**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 limitations on monitoring and collecting data on Internet infringements resulting from Italy's Privacy Code and the 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 2009. 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. 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. In addition, the recent legislative proposal ("processo breve") to cap the length of criminal trials would, if adopted, put an end to more than 90% of all copyright trials pending before the courts.

On December 23, 2009, the Italian Supreme Court, in a landmark decision, held that the PirateBay P2P filesharing service was engaged in criminal conduct through the unauthorized distribution of pirate content for profit through advertising on the site. Through the categorization and tracking process, the site operators were held liable for participating in a crime. This is the case even though the site is located outside of Italy because distribution occurred in Italy to Italian users. The court confirmed that precautionary measures to prohibit the continuation of the crime can be issued by courts on the merits, which could consist in the seizure of the web site (even if located in a foreign country) and that as an accessory measure courts may order, by way of injunction, that ISPs block access to the site under the EU's E-Commerce Directive. It is too early to tell what the full implications of this decision will be in Italy. Italy has joined Sweden, Denmark and the Netherlands in declaring PirateBay a criminal enterprise.

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 the GdF (Guardia di Finanza) is very positive and led to successful operations. In particular, major cases in 2009 include a P2P operation where three people living in Rome and Milan have been identified by Italian Fiscal Police (GdF) as the original illegal uploaders of the charity single Domani 21/04/09 recorded by 52 leading Italian artists, including Bocelli, Pausini and Zucchero, to raise funds for the victims of the earthquake that struck the city of L'Aquila in April 2009 with devastating effect. The track was made available on the internet for free through the DirectConnect network and free file-hosting services such as Rapidshare as soon as it was available from legitimate online music stores. The GdF worked with the local industry anti-piracy unit of FPM to trace the original uploaders of the track. This investigation led to raids in Rome and Milan, which prompted the seizure of hard disks containing more than 1,300 gigabytes of music files. More P2P cases were carried out by the Fiscal police from Desenzano, Venice and Cuneo. A total of 91 uploaders were referred to the judicial authority in 2009.

On the physical piracy side, the GdF police raided a factory that manufactured counterfeit optical discs intended for export around Europe. That raid produced unlicensed box sets that contained music, film and television programs. The raid followed industry investigations in countries across Europe into the sale of the 12-disc unlicensed box set Masterbox, which contained music by international artists such as Bob Dylan, Depeche Mode, Eminem, Katy Perry, Lady Gaga and Tiziano Ferro. Masterbox box sets had previously been manufactured in Poland, but the operation moved to Italy following raids by Polish police in February 2009. At that point, nine million copyright infringing albums in total were estimated to have been distributed around Europe, with an estimated trade value of around €19 million (over US\$25 million) being put on the previous 15 editions of the box set series produced in the plant.

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 reports again that the priority given to software piracy enforcement in 2008 and 2009 diminished somewhat and it describes its relationship with prosecutors as mixed. Judges remain not particularly concerned with criminal enforcement of IPR violations. In 2009, BSA supported 120 actions carried out by the GdF. Seventy-six of these raids were successful and involved the seizure of 1399 units of pirate software with an estimate value of €3.5 million (US\$ 4.76 Million).

In December 2009 the Italian Supreme court issued a decision which will have a very negative development on software enforcement. The case held that unincorporated professionals using illegal software in the carrying out of their activities cannot be held liable under the criminal provision of Article 171 *bis* of the Copyright Act for the mere fact of being a professional (there are no doubts that the same behavior carried out by a company would incur criminal liability under this



provision). This conclusion would unjustly limit criminal enforcement against non-corporate professionals where the piracy rate is believed to be even higher than among companies.

The entertainment software industry also reports a positive working relationship with the GdF. In 2009, the GdF participated in 60 criminal raids on targets engaged in the sale of infringing software and circumvention devices.

MPA, through FAPAV, reports that the police are generally supportive of FAPAV's efforts yet lack necessary resources. In 2009, FAPAV supported law enforcement authorities on 67 raids, seizing 52,603 CD-Rs and DVD-Rs. Working with FPM cooperatively on online activities, 3,600 links to audiovisual content were taken down. 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 2007<sup>6</sup> 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. This was misrepresented in the press as "P2P is legal" – a clear misrepresentation of a case which had been dismissed on the grounds that it targeted a particular technology or system rather than the infringer and infringements. MPA and the recording industry sought to clarify the decision in the public's mind but the problem lingers to today. In fact, a 2009 IPSOS study on film piracy in Italy found that 100 percent of those interviewed deemed audiovisual piracy to be of little consequence.

Moreover, the repeated instances of granting amnesty to criminal infringers, including in the 2006 "Pardon" law mentioned in previous submissions (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. This problem could be exacerbated, with disastrous consequences, if the Bill ("processo breve") now pending in the Italian Senate is ultimately adopted. This Bill would amend criminal procedure rules to provide that all criminal proceeding which last more than two years would result in case dismissal, with a few exceptions for serious crimes of which piracy is not one. These kinds of bills, which are periodically introduced to speed up and reform the court system, continue to have a negative effect on prosecutors and their interest in commencing cases for piracy crimes.

**Civil Enforcement:** As noted above, rights holders are worried that a general lack of resources on the civil IP specialized courts could result in major delays in proceedings (to make an example, the Milan Court – which is dealing with the vast majority of copyright cases in Italy – as of today only has 4 judges, while the minimum provided for by the law would be 6, and still would be insufficient). It is extremely important that new competent judges are allocated to the IP specialized courts, to avoid disrupting further delays in civil proceedings.

Also as indicated 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.<sup>7</sup> This has severely limited the ability of rights holders to bring civil Internet cases and unless there is a clear legal

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<sup>6</sup> Sentence No. 1872 of January 9, 2007.

<sup>7</sup> 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

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. There were expectations that the government would take action through the Antipiracy Committee formed in January 2009 (and discussed further below) to introduce legislation or take other actions to remedy this problem, but to date no action has been taken.

In a promising development, amendments to the Civil Procedure Code, designed to speed up civil proceeding, were adopted in Law 69/2009.

BSA continues to use the civil court system for enforcement against business users of unauthorized software. Six civil raids were undertaken by BSA in 2009 which resulted in the seizure of illegal software valued at €225,000. (US\$306,303). BSA also reports that in some courts, including specialized IP courts, there has been an increasing reluctance to award *ex parte* search orders or to award such orders in a timely fashion. These specialized IP 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 court requires a Court Expert report and the plaintiff requests an injunction or similar remedies). This seriously hampers efforts to take civil action against software infringers. It is therefore extremely important to reaffirm the need to easily and timely grant *ex parte* search orders in all cases of software infringements carried out by end-users.

## **COPYRIGHT LAW REFORM AND RELATED ISSUES**

In earlier submissions, IIPA has reported on efforts to amend the Italian copyright law. In early 2007, for example, proposals were being considered which would have:

- Required government approval to apply digital rights management;
- De-criminalized P2P file sharing;
- Provided for a “global license” for file sharing (in effect, a form of compulsory licensing for Internet distribution);
- Provided for a number of overbroad exceptions to protection (which would violate of the range of permissible exceptions and limitations of copyright protection).

While these particular proposals were not adopted, they are illustrative of a general negative attitude toward effective copyright protection, particularly online protection.<sup>8</sup>

An amendment was passed to Article 71 *septies* which extended 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. The EU Commission intervened, directing the Italian government to change its law. This has not yet happened. However, the Government has also not yet implemented the

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identified infringers with a settlement proposal of €330.00 (US\$452), 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.

<sup>8</sup>An amendment did pass, however, to Article 70 of the copyright 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.

law.

**Internet piracy and ISP responsibility:** On January 14, 2009, the Italian Government announced the establishment of an Antipiracy Committee (Comitato Technico 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 held hearings with the content sector, consumer organizations and telecommunications operators with the intention drafting a bill and/or propose specific antipiracy initiatives. Unfortunately, this process went dormant in the fall. There have been some official statements that work may restart in 2010.

**Implementation of the EU E-Commerce Directive:** In its implementation of the E-Commerce Directive (in Legislative Decree No. 70 of 2003) Italy appears to require take-down procedures to be available only upon application to, and order from, the "relevant authorities." This apparent 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 (usually through a right holder notice) 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 in 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. The Antipiracy Committee was going to revisit and reverse this decision so that civil enforcement would become effectively available to rights holders. It has yet to happen.

**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\$2,810). 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*ter*, anyone who commits such acts for "financial benefit" is liable to a fine of some €15,000 (US\$20,412) and a sentence of 4 years' imprisonment.

**Amend Art. 171*bis* of the Copyright Act:** As reported above, the Italian Supreme Court has held that Article 171*bis* requires that, for criminal liability to attach the infringing act had be carried out by corporate entities acting for commercial purposes. A professional purpose was held not to be expressly contemplated in the law, with the consequence that professionals would not be criminally liable for the use and detention of illegal software in their business. An amendment to Art 171*bis* should therefore be enacted to specify that the provision also criminalizes infringements carried out with a professional purpose.

**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 Agreement<sup>9</sup> and Italian Constitution. As a consequence, BSA urges that Article 181*bis* be revised to expressly state that all software programs containing less than 50% of audio or video materials are not to be marked 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 decision by the EU Court of Justice (issued November 8, 2007, in case C-20/05) has already 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 the government finally decided to retain the rule. Notwithstanding a promise to subsequently discuss and possibly reconsider the issue, nothing has happened so far.

Other deficiencies remain in the enforcement system and should be eliminated. The 2005 “Cirelli Law,” and the 2006 “Pecorella” and “Pardon” Law<sup>10</sup> all have taken their toll by undermining the deterrent effect of the enforcement system.

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<sup>9</sup> Article 9 of TRIPS requires compliance with the provisions of the Berne Convention, including Article 5(2), which prohibits countries from subjecting the “enjoyment and the exercise” of copyright rights to any formality. Italy’s stickering, associated fee and declaration requirements represent prohibited formalities. The burden imposed by the requirement makes criminal enforcement unnecessarily complicated and costly, and creates a barrier to legitimate trade, contrary to the requirements of TRIPS Article 41.

<sup>10</sup> A description of these laws is contained in IIPA’s 2008 Special 301 submission at <http://www.iipa.com/rbc/2008/2008SPEC301ITALY.pdf>.

# KUWAIT

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2010 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** IIPA recommends that Kuwait remain on the Watch List in 2010.<sup>1</sup>

**Executive Summary:** Over the past five 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. Nonetheless, a number of piracy problems remain including end-user piracy of business software rampant internet piracy of sound recordings, and some pay TV decoder box businesses, although enforcement against the latter has resumed after a brief stoppage. Anecdotal accounts also report piracy in the open markets, including sale of pirate CDs right outside record stores which cannot sell legitimate copies of the exact same CDs due to censorship. These problems stifle the legitimate market for copyright owners and keep out investments in creative endeavors from the country. IIPA is calling upon the government of Kuwait to end this policy of inaction and make copyright protection and enforcement one of its top priorities. This is particularly important in light of the fact that Kuwait is now holding the rotating presidency of the Gulf Cooperation Council.

The courts in Kuwait remain the weak link in the enforcement chain, and the Law is clearly deficient. While the Kuwaiti government has pursued many cases criminally, the lack of mandatory minimum sentencing and the very low maximum fine (KD500 or \$1,735) usually applied by the criminal courts means those who engage in copyright piracy have no fear of the consequences of getting caught. 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. IIPA also encourages the government to implement and join the WIPO Copyright Treaty (WCT) and WIPO Performances and Phonograms Treaty (WPPT), as other countries in the Gulf region have.

The United States and Kuwait entered into a Trade and Investment Framework Agreement (TIFA) in 2004, which established a formal dialogue to promote increased trade and investment between the two countries, and which recognizes "the importance of providing adequate and effective protection and enforcement of intellectual property rights and of membership and adherence to intellectual property rights conventions." IIPA hopes this ongoing bilateral dialogue in 2010 will help convince the Kuwaiti government to take steps to further reduce piracy and establish a modern and forward-looking copyright system in Kuwait.

**Priority Actions Requested In 2010:** In addition to sustaining the priority actions from previous submissions,<sup>2</sup> 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

- Investigate and where appropriate prosecute cases involving end-user piracy of business software, as well as cases involving pirate software resellers and hard-disk loading of pirate business software onto computers being sold in the market.
- 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.
- Enforcement and Internet takedowns by Kuwaiti authorities should be applied against pirate vendors who sell or advertise products which are prohibited by marketing restrictions (such as religious requirements) and

<sup>1</sup> For more details on Kuwait's Special 301 history, see IIPA's "History" Appendix to this filing at <http://www.iipa.com/pdf/2010SPEC301HISTORICALSUMMARY.pdf>, as well as the previous years' country reports, at <http://www.iipa.com/countryreports.html>.

<sup>2</sup> See, e.g., International Intellectual Property Alliance, *Kuwait*, at <http://www.iipa.com/rbc/2009/2009SPEC301KUWAIT.pdf>.



censorship rules. At present, enforcement is not even-handed and pirates effectively enjoy a state-enforced monopoly to sell restricted/banned materials on the streets or over the Internet, given the lack of action taken against them under copyright or other marketing/censorship grounds.

### 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.
- Ensure the law provides incentives for ISPs to cooperate with right holders against online piracy.
- Amend and modernize the copyright law to bring it into full compliance with the TRIPS Agreement, the WCT and the WPPT, and appropriately update the law to effectively address Internet piracy.
- Join the WCT and WPPT.

## PIRACY AND ENFORCEMENT UPDATES IN KUWAIT

Previous reports have discussed the piracy and enforcement challenges faced in Kuwait, including business software end-user piracy, retail piracy, optical disc piracy (“burning” and factory produced discs),<sup>3</sup> pay TV theft (through decoder boxes), growing Internet-based piracy, including downloading and P2P file sharing, mainly through P2P services such as LimeWire for international repertoire, as well as some advertising sites for hard goods piracy,<sup>4</sup> and the onerous censorship process for music combined with the lack of enforcement against the corresponding pirate product.<sup>5</sup> Also discussed were positive developments such as the good university adoption practices for the book publishing industry. The following sections provide brief updates to the piracy and enforcement situation in Kuwait. Failure to mention a specific issue does not indicate that the problem has been fully resolved.

**Business Software End-User Piracy:** The business software industry continues to be harmed by business software end-user piracy, losing an estimated \$39 million in 2009 with a 59% piracy level (both down from \$43 million in losses and a 63% piracy level for 2008).<sup>6</sup> Many mainly small- and medium-sized enterprises in Kuwait, which are otherwise legitimate businesses, have failed to adequately license and pay for their software. Failure to address the problem of end-user piracy affects the ability of legitimate software businesses to operate in Kuwait and harms the development of the local IT industry. While cooperation with the Ministry of Commerce has improved significantly for the software industry, there has been no concerted effort to reduce the end-user software piracy rate through investigations, raiding where warranted, and criminal prosecutions. There were no end-user piracy raids in 2009.<sup>7</sup>

**More Enforcement Needed Regarding Software Piracy, Including Against Pirate Resellers and Hard-Disk Loading:** Two major problems facing the software industry are loading PCs with unlicensed or pirated software, so-called hard-disk loading, and pirate sales in the retail markets, much of which takes place in Hawalli, Bin Khaldoun street, and the Al Fahahil area. The level of cooperation and commitment of the Ministry of Commerce in Kuwait is apparent. However, the industry reports only three raids against resellers in the last six months. Industry would like to see more raids focused on resellers of software and hard-disk loading in 2010. In addition, for those raids which are

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<sup>3</sup> Industry reports that the main areas of piracy activities remain Hawalli, Bin Khaldoun street and the Al Fahahil area.

<sup>4</sup> Kuwait had around one million Internet users, amounting to a 34.2% penetration rate, and 40,000 broadband subscriptions in 2008 (according to the International Telecommunications Union). The high overall penetration rate has meant an increase in Internet activity, unfortunately also including Internet-based piracy activities, in Kuwait.

<sup>5</sup> See *supra* note 2.

<sup>6</sup> Business software piracy levels in Kuwait have hovered around 60-65% for years, being 62% in 2007, 64% in 2006 and 66% in 2005. The music and recording industry has also previous recorded losses and levels of \$10 million and 75% respectively in 2007, which was up from previous years. BSA's 2009 statistics are preliminary, representing U.S. software publishers' share of software piracy losses in Kuwait. They follow the methodology compiled in the Sixth Annual BSA and IDC Global Software Piracy Study (May 2009), available at <http://global.bsa.org/globalpiracy2008/index.html>. 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 used by BSA and other IIPA member associations to calculate estimated piracy levels, losses, and/or sales is described in IIPA's 2010 Special 301 submission at [www.iipa.com/pdf/2010spec301methodology.pdf](http://www.iipa.com/pdf/2010spec301methodology.pdf).

<sup>7</sup> The industry remains committed to work with authorities through trainings and seminars as it has done in 2009 and previous years. The trainings and seminars in 2009 were provided to judges, prosecutors and police officials.

run, greater speed and transparency are warranted in order to maximize their effectiveness. Right holders cannot assist the authorities if they do not know about impending or past raiding activities.

**Courts Hampered by Non-Deterrent Maximum Penalties:** No matter how many raids are run, piracy levels in Kuwait cannot significantly decrease until courts are empowered to administer deterrent penalties, including mandatory minimum fines and mandatory minimum prison sentences, as well as deterrent maximum fines and prison sentences. IIPA calls for the immediate passage of a new copyright law with minimum mandatory sentences and much higher maximum penalties, and penalties that include both fines *and* imprisonment for maximum deterrent effect.

**Lack of Even-Handed Enforcement Against Piracy Versus Enforcement of Marketing Requirements and Censorship Regulations:** The recording industry reports that the Kuwaiti authorities are very diligent about enforcing censorship regulations and banning legitimate product from legal stores for this reason. For example, the Virgin Megastore in Kuwait City was closed for three months due to restrictive marketing requirements and censorship. Meanwhile, the same product for which the Virgin Megastore was closed is openly available on the streets in pirated copies as well as over the Internet through pirate sites. The product is considered too “subversive” for the legitimate store shelves but is allowed to be made available through illegal means, while no similar enforcement action is taken in this respect.

## **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 the Copyright Law, Decree No. 64/1999 (effective February 9, 2000).<sup>8</sup> The Law has never been interpreted through implementing regulations. The law fails to comply with TRIPS in certain important respects and contains other problems and ambiguities, all of which have been recounted in previous IIPA filings.<sup>9</sup> The most important changes or clarifications needed would include:

- **Provide Minimum Sentencing and Deterrent Maximum Fines *and* Imprisonment:** The criminal provisions in the Kuwaiti Copyright Law providing for a maximum fine of 500 Kuwaiti Dinars (approximately US\$1,735) or up to one year of imprisonment, or both penalties (to be raised by “not [more] than [half][sic] for recidivists”), are not in IIPA’s view “sufficient to provide a deterrent” as required by the TRIPS Agreement. In IIPA’s view, this is the most important element of the law which must be remedied. We understand the new draft Copyright Law provides for a maximum fine of KD5,000 (US\$17,350) but this must be accompanied by minimum penalties that include a fine *and* imprisonment to achieve deterrence.
- **Confirm Criminalization of End-User Piracy of Business Software:** The Kuwaiti Copyright Law does not expressly criminalize the unlicensed or unauthorized use or copying of computer programs in a business setting. Criminal liability for such acts should be confirmed.
- **Provide 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.
- **Provide (or Clarify) 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 whether the law provides full TRIPS-

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<sup>8</sup> Originally, the Copyright Law was passed as Decree Law No.5/1999 Relating to Intellectual Property Rights, published in the official *Gazette*, issue no. 414 in June, 1999. When a new National Assembly was elected in October 1999, it revoked all decrees including the Copyright Law, but in December 1999, the National Assembly voted again to reissue the code as Decree No. 64/1999, which was ratified by the Amir on December 25, 1999. Decree No. 64/1999, was published in the official *Gazette*, issue 445 on Jan. 9, 2000.

<sup>9</sup> See *supra* note 2.

compatible protection for older works from WTO countries. The law must be confirmed to protect those works and sound recordings that are protected in their country of origin, including those which were never protected in Kuwait prior to 1999, or which may have expired due to failure to comply with a formality but otherwise are eligible for protection for their full TRIPS-compatible term.

- **Provide Adequate 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.
- **Fix 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.
- **Formally Confirm 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 to make existing protection for sound recordings express and unambiguous.
- **Provide 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.
- **Provide TRIPS-Compatible Remedy as to “Materials and Implements”:** 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.
- **Provide Border Measures, Including Protections Against 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. IIPA understands that Kuwaiti Customs is interceding on an *ex officio* basis in practice, and this should be provided for in the law to effectively enforce against illegal imports and exports. 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.
- **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.
- **Confirm 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.
- **Narrow Moral Rights Provision to Avoid Its Impingement on the 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 WCT and WPPT, but took some steps backward from the 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. Kuwait should take the opportunity to join those treaties, as well as the WCT and WPPT, and to fully modernize its law.

- **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, and Join the Treaties:** The amendment should make the necessary changes to conform the Kuwaiti law with the WCT and WPPT, as is apparently intended by the drafters. Then Kuwait should demonstrate its leadership in the GCC by joining the WCT and WPPT, and set a good examples for others who have not yet joined the Treaties. For example, the amendments should:
  - 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. They 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 and codes. Circumvention services should be clearly covered. A non-cumulative test should be employed to determine whether a circumvention device is unlawful.<sup>10</sup> Civil and criminal (and as appropriate, administrative) 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 for Internet Service Provider Responsibility and Foster Cooperation, Through Statutory Notice and Takedown and Policy to Deal With Repeat Infringers:** The Kuwait law contains nothing regarding how service providers should cooperate with right holders to address online piracy. The new draft law should include

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<sup>10</sup> 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.

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). It should also ensure that the law provides incentives for ISPs to cooperate with right holders against online piracy, including having in place effective and fair policies to deal with repeat infringers.

- **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 other copyright materials (works and sound recordings) and adequately manage government software usage. If such implementation exists in other laws, regulations or decrees, the Kuwaiti government should share this information.
- **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.**
- **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.<sup>11</sup>
- **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 extremely important to criminalize acts in which the one engaging in infringement may not have a motive of financial gain. Kuwait should therefore provide that copyright piracy involving significant willful infringements shall be criminalized and considered willful copyright piracy on a commercial scale, even if they have no direct or indirect motivation of financial gain.
- **Ensure the Possibility of Confiscation and Destruction of Infringing Goods, and Tools and Implements Used to Infringe.**
- **Provide for Authorities to Order Information Regarding Those Connected With Infringement:** The Kuwaiti 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.
- **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 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

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<sup>11</sup> 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.

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.

- **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 criminal penalties, civil remedies, including compensatory damages, should be available for any person injured by these activities.
- **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 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 they otherwise allow copying or adaptation of a program without authorization of the right holder, such copy or adaptation must 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.

# LEBANON

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2010 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** Lebanon should remain on the Watch List in 2010.<sup>1</sup>

**Executive Summary:** The current government of Lebanon, formed in July 2008, stands poised to make some real gains in establishing a better framework for copyright protection and enforcement in the country. IIPA has noted some incremental progress in enforcing copyright in previous submissions and in recent testimony before USTR. For example, in 2008, two companies, through successful lawsuits, convinced many pirates engaged in unauthorized cable retransmission to pay them for both Arabic language channels and U.S. programming, resulting in improvements in the longstanding problem of illegal cable and pay TV hookups. In addition, the Lebanese Police Cyber Crime and Intellectual Property Rights Bureau (CCIPRB) Unit has provided needed support to the industries in bringing raiding actions against open pirate retail activities, especially among street stalls. Notwithstanding these signs of incremental progress in Lebanon, piracy remains a significant hurdle to legitimate business for the industries, including problems like end-user piracy of business software which continues to cause enormous losses to U.S. software companies, book piracy, retail piracy (of all kinds of copyright materials), cable and pay TV piracy, and some growing Internet-based and mobile device piracy.<sup>2</sup>

It is important for Lebanon to establish the proper legal framework for copyright protection and fully implement the laws to reduce piracy and foster growth in the creative sectors in Lebanon. The Lebanese government is considering an overhaul of its 1999 Copyright Law, early drafts of which would have posed major problems for copyright owners and would have failed to resolve longstanding problems with the original law. IIPA understands that recent discussions have focused on crafting a bill that will be fully TRIPS-compatible and implement with the WIPO Copyright Treaty (WCT) and WIPO Performances and Phonograms Treaty (WPPT). IIPA also understands that in January 2010, a Joint Committee of Parliament approved Lebanon's accession to the WCT and WPPT, which would mean Lebanon can deposit the two Treaties soon, furthering its path toward establishing its laws for effective copyright protection in the online environment.<sup>3</sup> Since late 2006, the United States and Lebanon have been party to a Trade and Investment Framework Agreement,<sup>4</sup> which has regularized discussions on many trade matters, including intellectual property protection. Copyright protection issues should be a permanent part of the TIFA agenda. Lebanon's IPR regime continues to undergo a review by the U.S. government to determine whether Lebanon should continue to receive Generalized System of Preferences (GSP) duty-free treatment for many of its goods imported into the United States. IIPA views this review as necessary to ensure the law does not get amended to become less protective.

<sup>1</sup> For more details on Lebanon's Special 301 history, see IIPA's "History" Appendix to this filing at <http://www.iipa.com/pdf/2010SPEC301HISTORICALSUMMARY.pdf>, as well as the previous years' country reports, at <http://www.iipa.com/countryreports.html>.

<sup>2</sup> See *Piracy in Lebanon is Sinking Cinema and Music Industry*, Nahar Net, February 20, 2009, at <http://www.naharnet.com/domino/tn/NewsDesk.nsf/AwayPolitics/9F1377FE28A27631C225756300270824?OpenDocument>, which describes much of the problem in Lebanon accurately. It cites the government for the proposition that piracy is one of the main factors preventing Lebanon from joining the World Trade Organization, and quotes Bassam Eid, production director for Empire Cinemas and agent for Columbia/Sony and 20th Century Fox, noting, "[c]inemas have seen their revenues drop by more than 50 percent in 10 years," and also noting, "[i]t cost a million dollars for cinema distribution rights to 'Valkyrie' and you can find it everywhere." Eid also notes, "[f]rom time to time the police destroy seized disks but these represent only one percent of the ones on the market." The article cites "an unstable political situation, a lack of resources and a certain indifference to the problem" as reasons for a "lack of action by the state."

<sup>3</sup> Lebanon's cabinet had approved adherence to the WIPO Copyright Treaty (WCT) and WIPO Performances and Phonograms Treaty (WPPT) in November 2008. See U.S. Commercial Service, Lebanon: Investment Climate, at [http://www.buyusa.gov/lebanon/en/investment\\_climate\\_2.html](http://www.buyusa.gov/lebanon/en/investment_climate_2.html).

<sup>4</sup> *United States and Lebanon Sign Trade and Investment Framework Agreement*, November 30, 2006, at [http://www.ustr.gov/Document\\_Library/Press\\_Releases/2006/November/United\\_States\\_Lebanon\\_Sign\\_Trade\\_Investment\\_Framework\\_Agreement.html](http://www.ustr.gov/Document_Library/Press_Releases/2006/November/United_States_Lebanon_Sign_Trade_Investment_Framework_Agreement.html).



**Priority Actions Requested in 2010:** IIPA requests that the government of Lebanon take the following actions, which will have the greatest short term benefits for the copyright industries:

- Ensure that the special police bureau, the Cyber Crime and Intellectual Property Rights Bureau (CCIPRB) Unit, continues actively running raids against piracy targets on request, including end-user software piracy, and take steps to provide the Unit with *ex officio* raiding authority and a regular operating budget.
- Ensure that draft amendments to the Lebanese Copyright Law (1999) are compatible with major international copyright treaties, including the TRIPS Agreement and the WCT and WPPT.
- Pass accession legislation to permit Lebanon to join the Berne Convention (Paris 1971 text), and join the WCT and WPPT.

## **COPYRIGHT'S CONTRIBUTION TO THE LEBANESE ECONOMY**

The Lebanese government should be well aware that copyright protection, and therefore enforcement against illegal uses of copyright, is important for Lebanon's economic development. In July 2007, the World Intellectual Property Organization released a report prepared by Roger Malki entitled *The Economic Contribution of Copyright-Based Industries in Lebanon* (published in World Intellectual Property Organization, *National Studies on Assessing the Economic Contribution of the Copyright-Based Industries*, July 2007, at 491-550). That report demonstrates that in 2005, the total copyright industries in Lebanon contributed around US\$1.04 billion to the annual gross domestic product (GDP), employed almost 50,000 workers, and contributed 4.75% to the GDP and 4.49% to overall employment.<sup>5</sup>

Meanwhile, copyright industries continue to report high piracy levels,<sup>6</sup> for example, the Business Software Alliance reports U.S. losses of \$29 million in 2009 due to piracy of all of its members' software titles, with the piracy rate growing to 75%, representing increases in losses for the fifth straight year and increased piracy levels for the third straight year (up from 73% in 2007). The record industry reported at least \$3 million in illegal sales and a 70% piracy in 2008. The Lebanese government is losing out as well due to piracy. In 2000, a study carried out by Statistics Lebanon, Ltd. between April and June 2000 estimated that, due to cable piracy alone, the Lebanese government lost approximately US\$38 million in 1999, including lost taxes, social security contributions, and the earnings of the Lebanese government if the cable industry was legitimate.

These numbers roundly demonstrate two things: 1) that copyright is important to Lebanon's economy; and 2) that copyright would contribute even more to the economy if intellectual property rights were more effectively enforced.

## **COPYRIGHT LAW AND RELATED ISSUES**

**The Copyright Law Amendments Must Not Weaken Protection, and Need to Ensure a TRIPS- and WIPO Internet Treaties-Compatible Law:** The Copyright Law of Lebanon (effective June 14, 1999) provides a sound basis to enforce against piracy of works and sound recordings, including potentially stiff penalties against copyright infringers, confiscation of illegal products and equipment, and closure of businesses engaged in pirate activities, among other strong remedies. 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

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<sup>5</sup> The same report indicated that in 2005, the core copyright industries generated almost US\$556 million of value added, employed over 23,300 workers, and contributed 2.53% to the GDP and 2.11% to overall employment.

<sup>6</sup> BSA's 2009 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 2009), available at <http://global.bsa.org/globalpiracy2008/index.html>. 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 used by BSA, RIAA, and other IIPA member associations to calculate their estimated piracy levels, losses, and/or sales is described in IIPA's 2010 Special 301 submission at [www.iipa.com/pdf/2010spec301methodology.pdf](http://www.iipa.com/pdf/2010spec301methodology.pdf).

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 WCT and WPPT. 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. Legislation should also provide sufficient remedies against piracy over the Internet, including notice and takedown provisions, and provisions to ensure that Internet service providers will have incentives to cooperate with right holders in dealing with online infringements occurring on web-based services or through the activities of subscribers.

We understand the government is finalizing a new draft which hopefully will address specific issues raised by the IIPA. The latest draft would have weakened protection compared with the current regime, and left it TRIPS- or WIPO Treaties-incompatible in important respects. The 1999 Copyright Law currently in force contains, among other issues which have been noted in previous submissions, the following deficiencies:<sup>7</sup>

- 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.
- Article 25, providing a broad exception allowing copying of software, and even as limited 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 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. 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 or curtailing 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 the context of Lebanon's bid to join the WTO, and Lebanon must take measures to address these deficiencies. The new amendments should, in addition to resolving the issues noted above, ensure the following:

- The amendments must ensure proper point of attachment for U.S. sound recordings and performers, on the basis of national treatment, and should not curtail key rights afforded on the basis of material reciprocity.
- The amendments should ensure a WCT- and WPPT-compatible "making available" right is afforded to authors, producers of sound recordings, and performers.

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<sup>7</sup> A detailed discussion of deficiencies in Lebanon's copyright law can be found in the 2003 Special 301 report, at <http://www.iipa.com/rbc/2003/2003SPEC301LEBANON.pdf>. The government of Lebanon must consider the far-reaching consequences of its failure to bring its law into compliance with international standards, including potential negative effects on its chances to quickly accede to the World Trade Organization. WTO members will expect Lebanon to achieve minimum standards of intellectual property protection as spelled out by the TRIPS agreement.

- The amendments should preserve the ability of parties to freely contract with respect to copyright licenses and transfers, including ownership issues. The law should not restrict parties' ability to freely contract, nor interpret private agreements by statute.
- The amendment should limit exceptions to ensure they are compatible with the Berne Convention's three-step test and, where applicable, with specifically enumerated exceptions therein (e.g., Berne Article 10(2)). In particular, it must be clear from the law that infringing peer-to-peer filesharing is not an exempted act, either as to those sharing or to those facilitating such sharing. Any amendment must also ensure that exceptions with respect to software do not run afoul of the three-step test, and certainly should not be broad enough to potentially allow, under the guise of an exception, end-user piracy of software.
- The amendments should ensure that moral rights abide by the limitations set forth in the Berne Convention (and the WPPT) and do not impinge on or interfere with other economic rights.
- The amendments should provide that deposit should be voluntary, and not made a condition for a presumption of ownership (Berne Article 15) or subsistence of copyright in Lebanon.
- The amendments should provide effective remedies for violations of involving circumvention of technological protection measures (TPMs) and rights management information (RMI) including both civil and criminal remedies. The amendments should appropriately cover access controls as well as those which restrict copying or other infringements, should cover services. Any exceptions should be narrowly tailored to allow for circumvention in certain prescribed circumstances aligned with a stated policy purpose; a gaping exception, e.g., allowing circumvention for a permitted purpose, would eviscerate the rule and would be WCT- and WPPT-incompatible.

**Lebanon Reportedly Set to Join the WCT and WPPT:** The Ministry of Economy and Trade announced in January 2010 that the WCT and WPPT have received Joint Parliamentary Committee approval. Lebanon's accession to the WCT and WPPT would allow the country to join the nearly 90 countries that have deposited the Treaties, and would signify Lebanon's commitment to provide key protections for copyright in the online environment, a crucial step for the growth of healthy electronic commerce in the country. Also, for several years, IIPA has heard that the Lebanese government was prepared to ratify the latest Berne Convention text, and in 2007, we understand legislation was prepared and forwarded to the National Assembly to do this (namely, 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 and very important development.

## **PIRACY AND ENFORCEMENT UPDATES IN LEBANON**

Previous reports (and filings in the GSP process) have included discussions of the many piracy and enforcement challenges faced in Lebanon.<sup>8</sup> The following sections provide brief updates only to the situation on the ground. Failure to mention any specific issue should not be taken as an indication that the problem has been resolved.

**Piracy Challenges Remain Largely Unchanged in 2009:** Notwithstanding the incremental progress noted at the outset of this report, piracy phenomena abound in Lebanon. These include end-user piracy of business software, cable and pay TV piracy (which, as discussed, has improved somewhat due to consolidation of the illegal distributors), retail piracy (of movies, music, entertainment software/games, business software, published materials),

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<sup>8</sup> See International Intellectual Property Alliance, *Lebanon*, at <http://www.iipa.com/rbc/2009/2009SPEC301LEBANON.pdf>. See *infra* discussion of the GSP Petition involving Lebanon and IP rights.

book piracy in the form of illegal photocopying on and around university campuses as well as illegal translations and some counterfeiting of textbooks and trade books, rising Internet-based piracy, piracy involving loading pirate content onto mobile devices, some hard-disk loading of software onto computers at the point of sale, and the sale of circumvention devices, particularly pay TV decoders. Retail piracy in Beirut's southern suburbs continues unabated, in an area that causes difficulty for enforcement agencies due to the presence of armed militias. In addition, industry reports a hike in piracy in Southern Lebanon in general along the borders.

**Enforcement Cooperation with CCIPRB Good, Although They Lack *Ex Officio* Authority and a Formal Budget; Customs Acts on Some Cases Both at the Border and Within Lebanon:** Industry continues to report good relationships with those in CCIPRB who continually provide raid support upon request. As of early 2009, the CCIPRB Unit comprised 33 total officers (15 ranking officers and 18 junior officers). IIPA members believe it is important that CCIPRB have *ex officio* raiding authority so that CCIPRB can proactively address and investigate piracy cases. Thus, at present, in order for CCIPRB to act, a criminal complaint must be filed with the prosecutor's office. In addition, we believe the Lebanese government should be asked, perhaps as part of the TIFA process, to provide transparency on cases they are pursuing so there is some methodology instituted for tracking statistics and success in enforcement. Third, with the various kinds of piracy activity, but with an increasing number of piracy issues involving computers (e.g., end-user piracy of business software) or the Internet (Internet-based piracy, mobile device piracy), IIPA recommends that CCIPRB consistently receive updated training on computer crime issues. This will help to ensure that law enforcement agencies are becoming properly equipped to investigate computer-based or Internet-based infringement and to document such acts of piracy. Finally, as an example of improvements that could be made, we note that, like other police units in Lebanon, the CCIPRB Unit does not even have a formal budget. Providing such a formal budget could help the Unit become even more stable and effective in its functioning.

It should be noted that in 2009, some of the responsibilities that used to fall under the jurisdiction of the CCIPRB have been transferred to another police bureau called the Financial Crimes Bureau. The transfer includes counterfeiting cases, although the industry reports copyright cases can still be handled by CCIPRB. IIPA members have also reported increased cooperation with Lebanese Customs on tackling imports and with inspectors of the Ministry of Economy and Trade. Lebanese Customs has on occasion acted *ex officio* and seized offending products when spotted at the ports of entry, and sometimes even after the offending goods enter Lebanon.

**Court Processes, From Prosecutorial Preparation to Judicial Process, Do Not Lead to Deterrence or Adequately Compensation Against Piracy:** The courts in Lebanon continue to be a weak link in the enforcement chain, starting with relative inactivity by prosecutors' offices, and ending in results which can hardly be said to provide a deterrent to further infringements. For example, only four criminal cases were filed in 2008 involving business software piracy. There have been problems with maintaining integrity of evidence and some leniency of prosecutors with commercial piracy operations. Once a case is brought to court, IIPA's previous reports document well delays in simple piracy cases, postponements in court, even of urgent matters, and judges who are unaware of and/or unsympathetic with the IP laws. 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. IIPA urges the continuous training of Lebanese prosecutors and judges, and urges the government to consider seriously the establishment of a special IP tribunal, at least in Beirut, and to assign special IP prosecutors, so that a group of prosecutors and judges can emerge that is familiar with IP cases and the damage caused by IP infringements in Lebanon.

## **TRAINING AND TECHNICAL ASSISTANCE**

The Ministry of Economy and Trade, along with the Business Software Alliance, held a 5th annual Pan Arab Intellectual Property Rights Forum on January 19 and 20, 2010 in Beirut to discuss software piracy and cybercrimes issues in the region. At this forum, the Ministry of Economy and Trade announced that a Joint Committee of Lebanon's Parliament had approved accession by Lebanon to the WCT and WPPT.



## **MARKET ACCESS AND RELATED ISSUES**

**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.

## **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 original Petition noted 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. 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.

The GSP program is important to Lebanon. In 2008, Lebanon imported \$48.6 million worth of products into the United States duty-free, or almost 49.1% of its total imports into the U.S. In 2009, Lebanon imported almost \$43.6 million worth of products into the United States duty-free, or 56.5% of its total imports into the U.S. On April 2, 2009, IIPA submitted written testimony before the GSP Committee,<sup>9</sup> noting that “[w]hile some progress has been made on some key issues raised by IIPA in that Petition, unfortunately, the government of Lebanon still does not comply with the IPR eligibility requirements for GSP benefits.” While we do not believe it is warranted to immediately suspend benefits at this time, we urge the GSP Subcommittee to keep IIPA’s Petition ongoing to urge the government of Lebanon ensure that copyright law amendments fix deficiencies in the law in Lebanon that render legal protection inadequate and ineffective, and do not create significant new problems. We also continue to urge the government to take the necessary steps to enhance enforcement efforts to make them more effective, especially those that are discussed in this filing.

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<sup>9</sup> International Intellectual Property Alliance, *GSP Country Practices Review, 007-CP-08, Lebanon: Notice of Intent to Testify, Hearing Statement & Pre-Hearing Brief*, 74 Fed. Reg. 11141-3 (March 16, 2009), Submitted to [www.regulations.gov](http://www.regulations.gov), Docket No. USTR-2009-0009, April 2, 2009, at <http://www.iipa.com/pdf/IIPALebanonGSPRequesttoTestifyTestimonyApril2009Hearings.pdf>. IIPA also responded to additional questions posed after the hearing. See International Intellectual Property Alliance, *GSP Country Practices Review, Case No. 007-CP-08 (IPR - Lebanon), Lebanon: Responses to Additional Questions*, pursuant to 74 Fed. Reg. 11141-3 (March 16, 2009), Submitted to [www.regulations.gov](http://www.regulations.gov), Docket No. USTR-2009-0009, May 18, 2009, at <http://www.iipa.com/pdf/LebanonGSPFollowUpSubmission051309.pdf>.

# MALAYSIA

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2010 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** Malaysia should remain on the Watch List,<sup>1</sup> with an Out-Of-Cycle Review (OCR) to monitor the Malaysian government's progress with respect to the following areas of concern for the copyright industries: (1) an increase in source investigations and prosecutions by MDTCC; (2) prompt and precedent-setting adjudications in criminal cases to assist enforcement activity, including in the BASIC Electronics case; (3) implementation of amendments to the hologram requirements under the Trade Descriptions (Original Label) Regulations (2002); (4) reinstatement of MDTCC officers as heads of enforcement in Malaysia and removal of MADS officers; (5) carrying out a formal public consultation with stakeholders regarding proposed amendments to the Copyright Act; and (6) introduction of anti-camcording legislation to Parliament.

**Executive Summary:** IIPA members have always placed great hope on the promise of development of a strong legitimate copyright market in Malaysia. Malaysia had the distinction of being the first country in the world to partially implement the WIPO Internet Treaties, the WIPO Copyright Treaty (WCT) and Performances and Phonograms Treaty (WPPT), as far back as 1998. A study carried out by the World Intellectual Property Organization, in conjunction with the Intellectual Property Corporation of Malaysia (MyIPO) in 2007, showed that for the years 2000-2005, creative industries contributed almost 6% to the Malaysian economy, grew at an annual rate averaging more than 11% per year (faster than the rest of the economy) and had faster growth in employment than other sectors (10.7% to 3.3% growth in employment). Notwithstanding these impressive numbers, which demonstrate that copyright is a powerful engine for economic growth in Malaysia, piracy in various forms stunts the further growth of Malaysia's copyright market. While for a time it appeared the situation might improve due to negotiations between the U.S. and Malaysia toward a Free Trade Agreement, those negotiations have stalled.

IIPA members continue to look to the government of Malaysia to assist them in the protection and enforcement of their rights in Malaysia. Members report generally good cooperation with the renamed Ministry of Domestic Trade, Co-operatives and Consumerism (MDTCC) and the Malaysian police, as evidenced by several successful actions taken in relation to end-user piracy of business software and a few high-profile raids on physical pirate optical disc and CD-R/DVD-R burning operations. Increased vigilance regarding pirate shipments exported out of Malaysia has also helped curtail the negative effects of Malaysia's piracy problem on foreign markets. Industry reports that Pos Malaysia has MDTCC deploy a twenty-four hour presence at the Pos Malaysia Kuala Lumpur International Airport (KLIA) Export Center and MDTCC has been asked to ensure the Center holds all suspect shipments until MDTCC can inspect them.

Some problems remain, such as the subordinate role of MDTCC's enforcement division to the Malaysian Administrative and Diplomatic Service (MADS), which has taken over enforcement decision-making. Unfortunately, MADS administrative officers are insufficiently experienced in copyright cases, and in many cases have delayed enforcement unnecessarily. MDTCC officers should once again have *ex officio* authority in the handling of enforcement operation functions and should not be slowed by bureaucratic hurdles or rely in every instance on right holders' complaints. Furthermore, MDTCC should be encouraged to pursue a greater number of source or up-the-chain investigations, particularly following successful raids of optical disc production facilities, and to conduct expeditious and adequate prosecutions when charges are pursued. Other issues include MDTCC's lack of enforcement against piracy in the night markets, as well as failure to enforce against those who do not comply with the hologram requirements under the Trade Descriptions (Original Label) Regulations (2002). Due to the failure to enforce the label regulations, IIPA members end up paying for stickers for their genuine products at prices far higher

<sup>1</sup> For more details on Malaysia's Special 301 history, see IIPA's "History" Appendix to this filing at <http://www.iipa.com/pdf/2010SPEC301HISTORICALSUMMARY.pdf>, as well as the previous years' country reports, at <http://www.iipa.com/countryreports.html>.



than the market rate. It is hoped that an open tender system for the supply of hologram stickers will reduce the cost to the industry. IIPA is pleased by the establishment of specialized IP courts, but due to an increase in case files by the police and MDTCC, a backlog remains, giving rise to the need for further expansion of the courts (originally there were to be 15 tribunals around the country). IIPA members sit on the recently revived Special Anti-Piracy Taskforce (SAPTF), which met twice in 2009 and will hopefully continue to work through these problems with the government.

On the legislative front, IIPA hopes that the government of Malaysia will quickly publicize and then introduce needed amendments to the now outdated copyright legislation to implement the WCT and WPPT, provide for effective means of enforcement against physical, end-user, mobile device, and online infringements, create the possibility for right holders to elect statutory damages, and foster ISP cooperation in shutting down growing online piracy. IIPA also hopes the government will enforce the current law against camcording a movie in a theater and is pleased that a law to ban camcording has been proposed by MDTCC to specifically define the act of camcording or recording in cinemas as a strict liability criminal offense.

**Priority Actions Requested in 2010:** Following on the above discussion, IIPA requests that the government of Malaysia take the following actions which would have the greatest short-term commercial benefits for copyright owners:

#### Enforcement

- Return to MDTCC enforcement officers the autonomous authority to raid, and remove MADS officers as a bureaucratic hurdle to effective enforcement; streamline reporting requirements to MADS officers so they will not unnecessarily inhibit effective enforcement by MDTCC.
- Establish more IP courts or panels to deal with the rapid filing of copyright cases in courts, which has exacerbated the bottleneck of cases.
- Instruct the Ministry of Local Government and Housing, the Kuala Lumpur City Council (DBKL) and other like local councils, who are in charge of licensing night market vendors, to curtail the uncontrolled piracy activities at night markets, shopping centers, and other fixed premises.
- Ensure that the Trade Descriptions (Original Label) Regulations (2002) are amended and fully enforced against retailers selling optical discs of all content (including entertainment software) without the requisite holograms issued by the MDTCC, including, of course, pirated optical disc product.
- Curb pirate entertainment software exports, and unlicensed use of games in Internet cafés.
- Make a renewed push for university legalization, and specifically, get the Ministry of Higher Education to start a campaign toward legalizing textbook “adoption” practices.
- Reduce adjudicatory delays that hinder expeditious and adequate prosecutions.
- Take significant enforcement action against detected piratical production in licensed optical disc plants.

#### Legislation

- Swiftly publicize for comment and then seek adoption of legislation to modernize the copyright law, including full implementation of the WCT and WPPT, and join those treaties.
- Adopt or amend legislation to enable right holders to elect statutory damages.
- Fully enforce the current law prohibiting recording devices from being used to record movies, and pass a law to ban camcording which would specifically define the act of camcording or recording in cinemas as a strict liability criminal offense.
- Adopt legislation to combat Internet piracy, *inter alia*, by ensuring that the law properly covers indirect infringements such as knowingly facilitating infringement, and promotes Internet service provider responsibility, including statutory notice and takedown and effective and fair mechanisms to deal with all forms of Internet piracy expeditiously, including P2P file sharing and repeat infringers.
- Amend the optical disc laws to ensure that source identification (SID) code applies to recordable discs, to

prohibit “gouging” of source identification codes from discs;<sup>2</sup> to allow inspections at any location 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.

## **PIRACY AND ENFORCEMENT CHALLENGES IN MALAYSIA**

The following recounts some of the many piracy phenomena harming copyright owners in Malaysia,<sup>3</sup> any notable changes in such phenomena, enforcement developments, and remaining enforcement and copyright piracy challenges.

**Malaysian Authorities Need to Address Enforcement Concerns:** The following are a few of the enforcement needs to be addressed in 2010 by the Malaysian government.

- **Reestablish Autonomous Enforcement by MDTCC’s Enforcement Division, Including *Ex Officio* and Without MADS Interference:**<sup>4</sup> The most recent reports indicate that in meetings in 2009, the Secretary General of MDTCC committed that for established rights owners such as IIPA members, raid approvals would be provided by MADS within 24 hours. In practice, while approvals for raids are more easily obtained than in 2008, they can take up to a week to occur, sometimes due to unnecessary hurdles being imposed. For example, copyright owners have been required to submit full sets of documentation (for example, proof of ownership of each title) upon the filing of a complaint. In other cases, enforcement officers are unavailable to conduct raids due to other priorities. IIPA strongly urges the government to remove MADS officers from the copyright enforcement side of MDTCC’s functions which would enable rights owners to work directly with the state and district enforcement teams of MDTCC as had been the case for the past 20 years.

As a result of the problems experienced in 2008 and 2009, the former MDTC’s statistics indicated a drop in the number of cases launched by the government (e.g., just 668 in 2008, leading to seizures of only 1,837,946 pirate units). The local recording industry group, as an example, lodged 951 complaints via an online facility on the then-MDTC website relating to hard goods piracy during the second half of 2008, but only one quarter of them have even received a response from the Malaysian government. The criminal raid data for 2009 is way down, with the Motion Picture Association reporting 187 raids, the record industry reporting 67 raids, and the Business Software Alliance (BSA) reporting 37 end-user raids. Seizures numbered over one million pieces.

- **Pursue a Greater Number of Source Investigations and Prosecutions:** The industries would like to see investigations up-the-chain to the source of distribution in Malaysia. As it stands, too many cases end with the raid on the downstream distributor. As an example of this, the entertainment software industry reports that between January 1, 2009, and November 30, 2009, MDTCC anecdotally raided 3 factories, 3 burner labs, 7 distributors/storage labs, and 10 retailers, and seized 206,575 pirated videogames and 5 replicating lines (including one capable of producing more than 2.5 million pirated optical discs annually). While these MDTCC

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<sup>2</sup> These changes to Malaysia’s optical disc regulations are important since factory and market raids continue to reveal physical piracy, including gouged discs of games, movies, etc., and since physical piracy remains prevalent especially outside the major cities in Malaysia.

<sup>3</sup> Copyright owners in Malaysia continue to experience losses due to piracy. For example, losses due to business software piracy increased from US\$184 million in 2008 to US\$192.1 million in 2009, an increase for the third straight year. The piracy level for business software remained steady at 59%, right below the regional average. The record industry experienced physical piracy losses of US\$23.5 million in 2009 with a 60% piracy level (unchanged from 2008). Significant losses are also attributable to online piracy, mainly using P2P services, with losses in the millions. The methodology used by these IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA’s 2010 Special 301 submission at [www.iipa.com/pdf/2010spec301methodology.pdf](http://www.iipa.com/pdf/2010spec301methodology.pdf). BSA’s 2009 statistics are preliminary, representing U.S. software publishers’ share of software piracy losses in Malaysia. They follow the methodology compiled in the Sixth Annual BSA and IDC Global Software Piracy Study (May 2009), available at <http://global.bsa.org/globalpiracy2008/index.html>. These figures cover, in addition to business applications software, computer applications such as operating systems, consumer applications such as PC gaming, personal finance, and reference software.

<sup>4</sup> As IIPA reported in the 2009 Special 301 report, many bureaucratic problems hindered enforcement in 2008. For example, simple retail piracy raid requests, which easily would have been run within a few hours of lodging a complaint as recently as 2006, were taking in excess of a month for mere approval in some cases, or in other cases, resulted in no response at all or outright rejections.

raids on facilities that housed piratical product are commendable, they are undermined by MDTCC's reluctance to pursue source investigations up-the-chain after the initial raid. In order to achieve maximum deterrence, MDTCC must use evidence collected during raids that reveals connections to syndicate operations to aggressively pursue source investigations and prosecutions.

- **Enforce Trade Descriptions (Original Label) Regulations (2002) As Amended:** IIPA members have long raised concerns over the label program instituted in Malaysia, including concerns over possible fraudulent use of holograms and the cost to legitimate right holders complying with such measures. While right holders have done their best to comply with the Regulations, the government has not done its part to enforce them against manufacturers or retailers who with impunity make or sell products, including entertainment software, without the requisite holograms. In a recent informal survey, over 50% of games found in Malaysian markets did not have the requisite holograms, which is a violation of the law. Both the businesses manufacturing the games as well as those distributing such products should be made responsible for such violations. IIPA was surprised to learn that MDTCC's position is that the Regulations were intended to "assist consumers" in discerning legitimate from pirate product, but apparently did not provide MDTCC with the authority to take administrative actions against violations, either among manufacturers or distributors. IIPA understands and commends MDTCC for undertaking an amendment process of the Regulations to ensure that such enforcement can be taken. IIPA had understood that the amended Regulations would be in force by January 1, 2010, although this date has now been pushed back to February 15, 2010, when the amended Regulations were to have published in the official gazette. MDTCC has indicated the Regulations will be enforced immediately. This would be a welcome development, and IIPA looks forward to the commencement of earnest enforcement of the Regulations against manufacturers and distributors of product without labels.
- **Need to Expand IP Courts in Malaysia to Deal Effectively with Backlog and Issue Deterrent Sentencing:** IIPA applauded the establishment of the first IP courts that were launched in July 2007 in Kuala Lumpur, Penang and Johor to deal specifically with copyright and other intellectual property matters. As in IIPA's 2009 filing, members continue to report a significant court backlog, leading to delays in case adjudication. Of the over 100 criminal cases commenced in 2009 against mainly physical piracy (with a few against business software end-user piracy), most remain pending. The industries report at least 175 criminal cases currently pending, many of which were lodged in previous years. Of those, only two jail terms actually served were noted, and of the 12 cases that we know of resulting in criminal fines being imposed, five of the fines were either under US\$1,000 or between US\$1,000 and US\$5,000. In one recent end-user piracy case, the fine was close to the minimum amount permitted by law (RM2,000 per copy, or approximately US\$580) and given that the maximum criminal fine is RM20,000 (approximately US\$5,850) this hardly constitutes a deterrent. One problem stems from the number of copyright cases now being presented, which is overwhelming the courts, leading to a backlog of court cases on IP matters. IIPA urges the urgent assignment of more dedicated judges to these courts, especially in Kuala Lumpur, and the establishment of the 15 Sessions courts around the country that were promised in 2007. Then, significant cases should be brought against those engaged in end-user piracy of business software, optical disc factory owners, mobile device pirate operations, illegal photocopying operations, chief pirate Internet websites, 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.

**Basic Electronics Case:** One casualty of the systemic problems described above with the courts in Malaysia has been the case against a notorious pirate operation – BASIC Electronics (M) Sdn. Bhd. Basic Electronics 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 six 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 repeated postponements, the case still awaits final adjudication. Disappointingly, it was MDTCC (then 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 officials regarding the circumstances of the postponement but did not receive a response. During 2009, the case was postponed two more times when called to trial in April and August. This case is currently on its eighth set of trial dates and is scheduled for trial March 12 and 13, 2010.

**ODVD Case:** Another example involves a civil litigation brought by a Motion Picture Association of America member company against ODVD, a local licensed factory that is alleged to have produced illegal copies of its film. The case, initiated in 2003, only received a first hearing in November 2008. The civil judgment awarded to the plaintiff in December 2008 following the defendant's failure to appear at trial was set aside by another judge, forcing the plaintiff to retry the case in January 2010 and incur additional costs and expense (including the production of two overseas witnesses). Meanwhile, ODVD was granted a new license in 2007 to operate its factory, although to date there is no evidence it is back in service and they claim to have wound down operations. The criminal prosecution also remains pending.

**End-User Piracy of Business Software Harms Software Companies and Stunts IT Growth in Malaysia:** The willful use of unlicensed or pirate software in the workplace in Malaysia and the installation in new computers of pirated software (hard-disk loading) continue to cause significant losses to the business software industry, seriously compromising resellers and distributors of genuine software, and stunting the growth of the IT sector in Malaysia. The PC software piracy rate has remained essentially flat for the past several years at almost 60%, however, losses due to piracy have grown over time mainly due to the increasing size of the market. The 60% piracy level is just slightly below the median software piracy rate for the region (which was 61% in 2008). BSA, working with MDTCC, continues to conduct end-user raids, totaling 37 criminal end-user software piracy raids in 2009, leading to 5 criminal cases brought to the courts.<sup>5</sup> MDTCC regularly leads press conferences on the raids, and BSA meets regularly with MDTCC to review past results and plan for future effective actions.

The situation in Malaysia regarding software piracy shows some improvement over previous years, although the piracy problems remain a huge concern and enforcement challenges abound. The Malaysian government understands the link between better intellectual property rights protection and benefits to the Malaysian economy. A January 2008 study done by the International Data Corporation (IDC) with BSA entitled *The Economic Benefits of Reducing PC Software Piracy* concluded that decreasing Malaysia's PC software piracy rate by ten percent (from 60% to 50%) would deliver an additional 2,600 new jobs, US\$140 million in tax revenues, and US\$660 million in economic growth in Malaysia.

BSA has excellent working relationships with the MDTCC, which grew stronger in 2009 under the leadership of the new Minister, Y.B. Dato' Sri Ismail Sabri Bin Yaakob. Problems remain the continued lack of *ex officio* authority for MDTCC officers, which if provided would lead to more effective or at least swifter enforcement actions. In addition, court processes could be improved, starting from the activities of police and prosecutors preparing case files for prosecution, up to sentencing by the courts. As noted above, problems at the courts include the backlog being created by an increasing number of case files being submitted, and the lack of deterrence, including in cases involving end-user software piracy.

**Hard Goods Piracy Remains A Serious Problem in Malaysia:** Due to declining enforcement actions in 2008 and 2009, hard goods piracy, including distribution of factory-produced optical discs and "burned" recordable discs (CD-Rs and DVD-Rs) has reemerged in Malaysia. In particular, night market piracy stalls flourish in Malaysia notwithstanding significant information supplied to the government of Malaysia on a continual basis. There are many night markets operating in different locations every night. Over a one week period, industry representatives visited at random 22 locations (each location is a night market operating independently with 50 to 200 stalls). From the 22

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<sup>5</sup> In the 2008 IIPA Special 301 report on Malaysia, BSA reported that 6 criminal cases were commenced out of 30 end-user raids, and reported that 116 cases remained pending in the courts.

locations, a total of 289 stalls (independent street vendors) were found to be selling pirated CDs, VCDs and DVDs. These figures reflect the seriousness of piracy at night markets in Kuala Lumpur.

As a result, the legitimate market for copyright materials continues to deteriorate. In several fixed premise locations in Klang Valley (particularly in Bangsar, Sg Wang, Petaling Jaya, and Shah Alam), Penang (Perangin Mall) and Johor Bahru (Holiday Plaza), pirates openly sell illegal products. The chief hurdle to enforcement against physical fixed premises and night market piracy over the past year was the decision by the then-MDTCA that they would not take enforcement without a complaint. While MDTCC is now apparently prepared to reverse course on this complaint requirement (and while the music industry reports faster response times to complaints lodged and enforcement requests and that in the month of December 2009, there have been more proactive raids), the damage caused by the previous shift is already done, resulting in a massive uptick in street piracy throughout the country in 2008 and 2009.

Specifically with respect to the night markets, the Ministry of Local Government and Housing, the Kuala Lumpur City Council (DBKL), and other like local councils and authorities, who are ultimately in charge of licensing night market vendors, have taken little or no actions whatsoever in respect of the availability of pirated music, movies, and other copyright materials at night markets. 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. Regarding piracy at shopping malls, there is some positive news, in that the new Minister has announced an interest in exploring landlord liability which would effectively help curtail such activity in Malaysia.

**Mobile Device Piracy on the Rise in Malaysia:** Mobile device piracy, in which infringing files are loaded onto mobile devices at fixed locations, is one of the most serious piracy problems for the music and publishing industries in Malaysia. Mobile penetration in Malaysia has exploded over the past several years; the Malaysian Communications and Multimedia Commission (MCMC) estimates that there is now 100% (actually 106%) mobile penetration in Malaysia by the end of 2009.<sup>6</sup> While many fixed locations previously engaging in 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.

**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. Since 2006, there have been 48 arrests of people caught in the act of illegally camcording movies in Malaysia, in many cases involving local Malay films. The Copyright Act, 1987, contains Section 41(1)(g) which prohibits recording devices from being used to record a movie, and under which cinema exhibitors can prohibit/seize and detain the suspects by making a citizen arrest and then subject them to a minimum fine of RM4,000, approximately US\$1,170, for each offense and/or imprisonment up to 10 years. Unfortunately the enforcement authorities are presently of the opinion that in order to prosecute a suspect under Section 41(1)(g), the suspect must have successfully completed camcording the entire movie; there has been only one prosecution under this provision. IIPA encourages the government to fully enforce this provision which does not require the recording of an entire movie to constitute copyright infringement, and also expeditiously develop a standalone legislative solution to make the use of an audiovisual recording equipment in a movie theater to record a film off the screen a strict liability offense.

**Internet Café Server-Based Piracy Remains an Issue of Concern:** A major problem for several years in Malaysia involves the unauthorized use of copyright materials at Internet cafés or Internet game rooms. In many

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<sup>6</sup> Malaysian Communications and Multimedia Commission, *Penetration Rates at a Glance*, at [http://skmm.gov.my/facts\\_figures/stats/ViewStatistic.asp?cc=45899166&srid=50919742](http://skmm.gov.my/facts_figures/stats/ViewStatistic.asp?cc=45899166&srid=50919742).



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 recent years, the industry has seen 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.

**Production of Optical Discs for Export From Malaysia Still Detected:** Malaysia remains a producer and supplier of pirate optical discs, including for export. Although Malaysia has addressed its export piracy problem with respect to most sectors, the export of pirate discs and pirate entertainment software was detected in 2009. The problem of pirate movie and music exports, once a major issue in Malaysia, has been mitigated by the presence of industry and MDTCC representatives who are stationed in Kuala Lumpur International Airport to monitor and stop such exports. The Entertainment Software Association’s joint anti-piracy program with the local Motion Picture Association entered its third year in 2009. 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 exports of pirated game product.

**Book Piracy Negatively Affected in 2009 by MDTCC Slowdown:** The principal problem book publishers face in Malaysia is massive illegal photocopying in and around university campuses. Unfortunately, as enforcement actions/raids are not consistently carried out by law enforcement, the scale of illegal photocopying activities remains a problem. Copy shops in and around universities are raided occasionally, but continue their activities following the raid as they know that law enforcement follow-up or prosecution of perpetrators is generally unlikely to occur. Some changes in recent years in the pirates’ methods 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 infringement more difficult. Other 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. Photocopy shops no longer keep stocks of photocopied books on hand due to digital technology. Shops are increasingly keeping unauthorized copies at various locations, making detection difficult. Certain areas within Klang Valley have worsened, including Subang Jaya campuses, Universiti Putra Malaysia (UPM), University of Malaya (UM) and TAR College.

Local counsel reports that in early 2009, then-MDTCA officials were interfering with raid targets that previously would have been open-and-shut piracy cases on copy shops. There continues to be no uniform approach to the pre-requisites for conducting raids. Some Ministry officers continue to impose prohibitive conditions such as requiring publishers to submit statutory declarations as proof of ownership in advance for each title in a given raid (a hurdle which is virtually impossible to meet since one cannot precisely know which titles will be found in a raid). Where prosecutions actually occur, they remain slow and mired in problems (ranging from lost documents, turn over in personnel handling the cases, and a general lack of preparation on the part of the officers handling the cases). While MDTCC has been open to suggestions and is willing to work 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, as well as corresponding oversight by the Ministry of Education and Ministry of Higher Education to promote efforts to combat infringing activity occurring at universities and the adoption of appropriate copyright policies.



**Internet Piracy Increases in Part Due to Greater Internet and Broadband Penetration:** As of the end of 2009, Malaysia had almost 17 million Internet users, which represents more than 66% Internet penetration, and ranking 22nd in the world.<sup>7</sup> Broadband penetration continued to grow, with statistics showing 1.4 million broadband subscribers (almost all DSL technologies, however) by the end of the third quarter 2009, an increase of roughly 200,000 subscribers in one year.<sup>8</sup>

As a result of these developments, it can be no surprise that Internet piracy, whether direct downloads from websites, P2P file sharing, deep links, advertising sites (for hard goods sale or delivery), MP3 download sites, "blog spots," social networking sites, or cyber lockers, is causing increasing harm to legitimate copyright owners' businesses in Malaysia. Music piracy from Internet sources remains prevalent.<sup>9</sup> The record industry estimates that 25% of losses due to music piracy in Malaysia (US\$8.6 million) are Internet-based, and that 99 out of 100 copies on the Internet in Malaysia are infringing (99%). 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.<sup>10</sup>

Online piracy is an increasing problem for the entertainment software industry in Malaysia, with BitTorrent being the most popular platform for illegal file sharing. The Entertainment Software Association estimates 75,763 completed downloads of select ESA members' entertainment software by Internet users in Malaysia during only the month of December 2009, placing Malaysia in the top 10% of nations in terms of infringing downloads per capita during this period.<sup>11</sup> Breakdowns by ISP show that Telekom Malaysia Broadband subscribers account for approximately 79% of the infringing downloads of ESA members' software in Malaysia – more than 59,000 downloads during this one month period. These figures do not account for downloads that occur directly from hosted content, such as games found on "cyberlockers" or "one-click" hosting sites, which continue to account each year for progressively greater volumes of infringing downloads. The Motion Picture Association of America is primarily concerned with P2P piracy (about 1 million instances per month) and ISPs hosting linking sites. A continuing problem in Malaysia involves the use of websites to advertise the sale and delivery of physical pirated goods.

Enforcement of copyright in the Internet environment remains one of the major challenges to copyright owners worldwide, not just in Malaysia. With regard to infringing sites, the industry's experience in Malaysia is that most (but not all) are cooperative and take down infringing material within 48 hours of receipt of a notice. Some service providers are reportedly tracking P2P users and taking steps to make it more difficult for those engaging in massive file sharing to continue doing so. During 2009, 29 websites containing motion picture piracy online were taken down by ISPs and web host services. The local music and recording industry group reports an 82% takedown rate, with 50 takedowns out of 56 notices sent. The group also reported statistics which detail the growing size and scope of the Internet piracy problem. It reported almost 5,000 links to cyberlockers containing allegedly infringing files, as well as 166 links on YouTube and 4 pre-release links (i.e., links to pirate recordings of records not yet released in the commercial market). Pre-release piracy in particular can destroy the entire market for that product.

Informal and voluntary takedowns by service providers and of websites have thus far been more successful than those initiated pursuant to Section 263 of the Communications and Multimedia Act of 1998 with notices sent by

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<sup>7</sup> CIA, World Factbook, *Malaysia*, at <https://www.cia.gov/library/publications/the-world-factbook/geos/my.html>.

<sup>8</sup> Fiona Vanier, *World Broadband Statistics Q3 2009*, PointTopic Ltd, at [http://point-topic.com/login.php?comp\\_id=102217&red=/operatorSource/dslreports/World%20Broadband%20Statistics%20Q3%202009.pdf](http://point-topic.com/login.php?comp_id=102217&red=/operatorSource/dslreports/World%20Broadband%20Statistics%20Q3%202009.pdf). The Malaysian Communications and Multimedia Commission, at [http://www.skmm.gov.my/facts\\_figures/stats/index.asp](http://www.skmm.gov.my/facts_figures/stats/index.asp), claims that by the third quarter 2009 the household broadband penetration exceeded 27%.

<sup>9</sup> 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." Siti Syameen Md Khalili, *Mawi Versus Pirates*, New Straits Times, February 2, 2006.

<sup>10</sup> Sites particularly noted include piradius.net and eastgate.net.my.

<sup>11</sup> This figure is representative only of the number of downloads of a small selection of game titles. Consequently, this figure is under-representative of the overall number of infringing downloads of entertainment software made during the period.

the Malaysian Communications and Multimedia Commissions (MCMC) based on information given to them by the MDTCC.<sup>12</sup> The reasons for this include a lack of knowledge with regard to Internet piracy and a lack of urgency on the part of the enforcement authorities. For example, it has been reported that the MDTCC Internet Investigation and Forensic Unit commences an often lengthy investigation process upon receiving a complaint. The Unit reportedly writes to the MCMC which technically is supposed to issue notices and work with ISPs to ensure that piracy in respect of the site complained of ceases. MCMC, as the body issuing licenses to ISPs, is best positioned to ensure that ISPs take appropriate action against infringers, but unfortunately, MCMC has taken an approach that appears to right holders as protective of the ISPs. IIPA and members call upon the government to assist in working out solutions to protect the rights of copyright owners and foster cooperation among major ISPs in Malaysia. While ISPs prefer to wait for proposed legislation than voluntarily deal with the issue through negotiation, both must occur. In the continued absence of specific ISP legislation, MCMC should become a stronger presence in the fight against Internet piracy, and in particular, must help enforce the provisions of the Communications and Multimedia Act.<sup>13</sup>

**Malaysian Authorities Capitalize on Good Industry Cooperation to Achieve Positive Results in Raids on CD and DVD Production Facilities:** There remain dozens of optical disc production plants in Malaysia,<sup>14</sup> with capacity to produce hundreds of millions of discs per year, and dozens of other facilities that produce blank CD-Rs and DVD-Rs. IIPA remains concerned about the high production capacity, which easily dwarfs legitimate demand in Malaysia, the cessation of raids on licensed factories, and the lack of coverage under the Optical Disc Act of plants that produce recordable discs. However, in 2009, the industries experienced excellent cooperation against large-scale pirate production facilities. The following are a few anecdotal examples of good industry/government cooperative efforts leading to effective raids on large-scale pirate manufacture/distribution:

- March 2009: Authorities shut down an unlicensed replicating facility in Sungai Buloh, Selangor, seizing three DVD replicating lines, one printing machine and 800 kilograms of polycarbonate used in the manufacture of optical discs. A hidden door camouflaged as a wardrobe cabinet concealed the entrance to a secret room in which the equipment was located and replicating six local Malay movie titles at the time of the raid. Four suspects on the premises during the raid were taken into custody. Conservatively, the factory lines were capable of manufacturing more than 10 million pirated optical discs per year, generating potential illegal revenues of more than US\$27 million. An estimated 5,000 pirated DVDs fresh off the production lines were in boxes ready for delivery, including MPAA member company titles *Valkyrie*, *Australia*, and *Body of Lies*. Preliminary investigations revealed that these pirate DVDs were headed for Johor, the Malaysian state south of Kuala Lumpur and just next to Singapore, for onward shipment out of the country.
- April 2009: The Royal Malaysian Police raided commercial premises in the industrial zone of Seri Kembangan in Selangor following intelligence about illegal CD production. On entering the secured premises, police discovered a CD replication line producing copies of a recent Warner Music release, *Tak Hilang Cinta* by veteran local artist Jamal Abdillah, as well as a printing machine (both of which were seized). During the search, four men were arrested and a total of 17,900 pressed discs were seized, including 1,200 copies of *Tak Hilang Cinta*. Two of those arrested appeared in court charged with offences under the Copyright Act 1987 and the Optical Discs Act 2000, while the other two, who were foreign nationals in the country illegally, were handed over to immigration authorities.

<sup>12</sup> *Communications and Multimedia Act, 1998*, at [http://www.commonlii.org/my/legis/consol\\_act/cama1998289/](http://www.commonlii.org/my/legis/consol_act/cama1998289/). 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."

<sup>13</sup> *Id.*

<sup>14</sup> Our understanding is that there are anywhere between 26 and 31 licensed factories which altogether comprise 63 VCD lines capable of producing 220.5 million discs per year, 5 DVD lines capable of producing 17.5 million discs per year, and as many as 8 CD-R lines capable of producing as many as 28 million discs annually.

- May 2009: MDTCC's K9 unit engaged in a successful operation to shut down six warehouses storing pirated movie and videogame DVDs and software CD-ROMs in the Malaysian state of Johor which were destined for export to Singapore. Paddy, the Labrador trained to detect optical discs and donated by the Motion Picture Association to the Malaysian Government in 2008, accompanied the raiding parties to four locations at the Holiday Plaza, Johor Bahru (a short ride away across the Causeway linking Malaysia to Singapore), resulting in seizure of a total of 19,000 copies of videogames, software and movies. Post-raid investigations revealed that two of the targets were actively involved in exporting pirated DVDs to Singapore, and uncovered packages with e-mail orders from two websites which became the subject of follow up investigations. The case is still pending although the website is inoperable. On the following day, another raid on two additional targets revealed a large warehouse of pirated movie DVDs leading to seizure of over 6,000 discs and a delivery point for pirated DVDs to Singapore with another 4,000 pirate discs. Recent titles such as *"Terminator Salvation"*, *"Night at the Museum: Battle of the Smithsonian,"* *"Angels & Demons"* and *"Star Trek"* as well as the latest Malay movie titles were among the 10,000 titles seized. IIPA is pleased that Paddy and the K9 Unit were employed in these raids, since they had not been used as much at the airports for detecting pirate CDs and DVDs. IIPA advocates for Paddy to be regularly deployed (as opposed to intermittently as is currently the case) at POS Malaysia KLIA Export Center to detect pirate shipments and exports of copyright products.
- July 2009: Malaysian police from the Commercial Crime Division of the Royal Malaysian Police raided a house in the Kuala Lumpur district of Pandan Indah, discovering over 170,000 pirate CDs, including more than 10,000 counterfeit Michael Jackson albums. Three people caught packing the pirate CDs into plastic covers were arrested during the raid. Initial investigations reveal that the pirate operation was shipping counterfeit CDs to distributors elsewhere in Kuala Lumpur and across Malaysia. Evidence of disc gouging (in which the source identification code on factory-produced discs is wiped off the disc) was detected by the local music industry that assisted authorities in the raid. Two foreign workers were charged in court and a hearing date was set for January 12, 2010.
- August 2009: A team of 15 enforcement officers from MDTCC assisted by industry raided an unlicensed replicating facility in Balakong, Selangor, seizing one DVD replicating line, an offset printer and a metalizing and bonding machine. A group of dogs were guarding the premises, the entrance of which was equipped with closed circuit TVs. On entering the premises, the raiding party found the machines in operation but no one on the factory floor. The enforcement team seized an estimated 2,000 pirated DVDs of 4-in-1 movies, TV series' and games in spindles of 100 discs ready for delivery. Recent titles among them include *Transformers: Revenge of the Fallen*, *Watchmen* and *Race to Witch Mountain*. Silk screens of the titles such as *Night at the Museum 2*, *Land of the Lost*, and *Public Enemies* and more than 100 boxes of DVD casings were also found on the premises. Conservatively, the factory line was capable of manufacturing more than 3.5 million pirated optical discs annually, potentially generating illegal revenues in excess of US\$9 million.

## **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 2009. The Motion Picture Association of America's local group engaged in training activities, conducting 35 trainings for investigation officers from the Malaysian Police on copyright investigations and prosecutions. It also conducted trainings for 25 theater staff representatives in Kuala Lumpur on camcording theft. The local music and recording industry group participated in trainings and seminars in 2009 related to Internet piracy for enforcement officers. Specifically, three courses on Internet/forensic investigations were conducted with the MDTCC in November 2009 for 100 officers at 3 venues: Penang, Johor Bahru and Miri, Sarawak. Officers were given information and training on the role of ISPs by the music and movie industries. In addition, the local music and record industry group maintains a close advisory relationship with prosecutors in music piracy cases, with hands-on training and advice as the cases are filed in court and prosecuted. The Entertainment Software Association has provided training programs for the

MDTCC, directly and through local counsel, on both an as-needed basis and as part of larger training initiatives. The Business Software Alliance's continued participation in the Ops Sikap Tulen (Original Attitude), which MDTCC started in July 2007 and continued to gain traction in 2008 and 2009. The aim of the campaign was to cultivate a lifestyle that includes respect for intellectual property rights and to change behavior and mindsets to use only original and licensed software.

## **COPYRIGHT LAW AND RELATED ISSUES**

**Copyright Law in Need of Modernizing Revisions, Including Full Implementation of the WIPO Treaties (WCT and WPPT):** Copyright protection in Malaysia is afforded under the Copyright Act of 1987, as amended through 2003. The 2003 amendments<sup>15</sup> strengthened criminal penalties to up to five years and fined RM20,000 (approximately US\$5,850) for each infringement and generally gave enforcement authorities more ability to carry out enforcement against copyright piracy. For example, Section 50A gives MDTCC officials the ability to carry out arrests for copyright piracy on an *ex officio* basis, which needs to be reinstated in 2010.

Regarding the enforcement of copyright, the 2003 amendments unfortunately did not go far enough to make changes necessary to fully meet Malaysia's international obligations and/or improve the effectiveness of the enforcement regime overall. They did not, for example:

- Impose mandatory minimum jail sentences for piracy.
- Address deficiencies with respect to presumptions in the law as to copyright ownership or subsistence of copyright. Specifically, Section 42 (which states that an affidavit or statutory declaration is *prima facie* evidence of facts contained therein) should be properly interpreted such that the burden of proof shifts to the defendant. As necessary, Section 42 should be amended to afford right holders with presumptions of subsistence of copyright and ownership in practice and expressly indicate the burden of proof (on the defendant) to ensure that statutory declarations of ownership and subsistence are not vulnerable to technical challenges by defendants. Specifically, 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, in accordance with a High Court ruling that holds that such appearances are unnecessary and contrary to the spirit and intention of Section 42. "Presumptions" of ownership are required under Malaysia's current TRIPS obligations.
- Provide for stronger damages in civil copyright cases by providing an option 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. As of yet, it does not appear statutory damages have been included in the most recent draft copyright law amendments (which have not been made available to IIPA). This should be included as an important element of the amendments.
- Deem infringing, in civil cases, the "possession and control" of infringing copies for the purpose of sale or other transfer.

In addition, the government of Malaysia needs to adopt amendments to fully implement the WCT and WPPT and make other modernizing changes. The Malaysian government has apparently indicated that the draft

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<sup>15</sup> The Copyright (Amendment) Act 2003, Act A1195 (effective August 14, 2003).

amendments are being finalized, but the draft has not been released for public consultation. Included in the amendments should be the following:

- Full implementation of protections against the circumvention of technological protection measures (TPMs) and the trafficking in circumvention devices or services.
- Express protection for temporary copies.
- Term extension 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 trade of pirated products that still occurs within many commercial buildings. A couple of years ago, five known civil actions filed against landlords for copyright infringement liability of tenants’ use of their premises to sell pirated materials, and the government in 2007 lodged the first-ever criminal complaint against a landlord for the same. The civil cases filed by the music industry have either been settled or are progressing through the court system, with various interlocutory applications having been filed. The prosecution of the criminal case has not progressed much. However, the Minister of Domestic Trade, Co-Operatives and Consumerism has made a number of public statements that the Malaysian Copyright Act is being amended so that action can be taken under the Copyright Act against owners of business premises who allow their tenants to carry out illegal activity; IIPA urges that this be a specific criminal offense for a landlord who permits the premises to be used for infringement of copyright, *inter alia*, the reproduction, distribution or sale of pirated products. To the extent the law extends mall owner liability for the rampant trade of pirated products that occurs within many commercial buildings, IIPA believes this amendment 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. IIPA supports these actions.
- 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. Facts adduced in a criminal prosecution should be deemed admitted as evidence in any subsequent civil action. The MDTCC and Attorney General’s Chambers continue to apply a narrow interpretation of Section 52, and as a result, in a number of recent cases, the music industry’s requests to make “mirror copies” of digital works seized, to enable the industry to initiate civil cases, have been rejected by the Ministry.
- Issue sentencing guidelines to ensure imposition of deterrent sentencing, including a minimum term of imprisonment.

**Effective and Fair Mechanisms to Deal with Online Infringements and Foster Internet Service Provider Accountability Needed:** IIPA understands now that the proposed copyright amendments will include provisions dealing with the liability of Internet Service Providers (ISPs) for Internet-based infringements occurring over their services.<sup>16</sup> Over the past year, the government, including MyIPO, and stake holders (both right holders and

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<sup>16</sup> It is noteworthy that the Malaysia-Japan Economic Partnership Agreement, which was signed by both Prime Ministers on 13 December 2005 in Kuala Lumpur and came into force on 13 July 2006, contains in Article 122 (2), the following obligation:

Each Country shall provide for appropriate measures concerning limitations on liability for service providers:

(a) in case where a service provider provides a necessary deterrent to the transmission of information through telecommunication systems or networks controlled or operated by the service provider which it believes to be the infringement of copyright or related rights; and

(b) in case where the infringement of copyright or related rights occurs by the transmission of information through telecommunication systems or networks controlled or operated by a service provider and where the service provider is technically unable to deter the transmission or has difficulty in finding the infringement of copyright or related rights.

ISPs), have discussed and commented back and forth on the requirements for such legislation. It is absolutely necessary, if an acceptable approach is to be achieved, that the Malaysian government broker be neutral in the least, with an understanding of the important right holder interests involved, and without a bias toward protecting ISPs from taking any responsibility for online infringement.

It should be recalled in this context that the Communications and Multimedia Act (1998), while not setting forth with specificity the mechanisms needed to combat online piracy, states 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 with ISP liability legislation specific to copyright infringement.

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 essentially to 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 anyone should be able to file a notice.
- 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). We understand some ISPs have proposed “14 days” for takedowns. Such a long period, which for some copyright works comprises a substantial portion if not all of their commercial window for sales, is totally unacceptable.
- Any draft should contain a counter-notification mechanism, so that one who has had material taken down may file such a counter-notification in order to get the material put back.
- Any draft should contain a provision for ISPs to have in place a fair and effective policy for repeat infringers, and it is reasonable also to consider denying safe harbors to those service providers who fail to implement such a policy.
- Any draft could contain a mechanism to obtain expeditiously from a service provider information in its possession identifying the alleged infringer.

**MDTCC Proposal for Strict Liability for Illegal Camcording Should be Adopted:** IIPA welcomes the decision by the government to address illegal camcording, but given the current state of the law (the enforcement authorities are presently of the opinion that in order to prosecute a suspect under Section 41(1)(g), the suspect must have successfully completed camcording the entire movie), a standalone legislative solution is desperately needed. A

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Thus, the government of Malaysia is already obliged to provide adequate measures to provide “a necessary deterrent” to infringing transmissions, and should be encouraged to take such an approach in any legislation to be proposed.

MyIPO working committee is considering a strict liability proposal for illegal camcording that would 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 a theater without having to establish the ownership or subsistence of copyright in the recorded film, a substantial taking, or other elements, and without the need of a formal complaint. Among the committee's discussion items is whether the proposed legislation should take the form of a standalone law or whether it should instead be included as an amendment to the copyright law. One benefit of making the law entirely standalone would be to obviate the necessity to establish the subsistence and ownership of copyright and to prove the act of infringement of a work being recorded. IIPA fully supports MyIPO's efforts in this regard.

**Make Necessary Changes to Optical Discs Act and Ancillary Regulations:** The Optical Discs Act could 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 MDTCC, and that MDTCC should have the power to seize and remove such machines if found in unlicensed premises; 2) prohibit the gouging or other removal of SID Codes 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 based 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, are fully subject to the licensing regime. Exemplars from all such plants/lines must be provided, even from recordable-only plants. These and other changes noted in previous submissions are important to continue providing an effective remedy against optical disc piracy in Malaysia.

**Employ 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 enforce 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. IIPA understands that Malaysia has enacted the Anti-Money Laundering and Anti-Terrorism Financing Act of 2001 (AMLATFA), which includes these provisions. Copyright infringement is one of the specific offenses listed in the schedule of "serious offenses" for AMLATFA, and also included are attempts and abetments. Unfortunately, despite having received training in the use of and prosecution under AMLATFA, the government has been slow to use it in copyright infringement matters.

## **FREE TRADE AGREEMENT**

The United States and Malaysia initiated negotiations on a Free Trade Agreement (FTA) in June 2006, and while for a time, solid progress was made in the negotiations. USTR now indicates that "some significant challenges remain," and while also indicating that the United States and Malaysia are "currently planning for technical discussions on a variety of topics, including intellectual property rights, services, and investment," the negotiations have slowed.

## **MARKET ACCESS AND RELATED ISSUES**

The Malaysian government has not taken seriously, and indeed, does not view as urgent, dealing with certain market access barriers raised by IIPA and the copyright industries over the years. IIPA views these issues as potentially quite serious, and would urge the government to deal with them forthwith. IIPA understands that at least

local music broadcasters have sat down with the local music industry to discuss ways of going forward on reasonable commercial terms, and it is hoped those discussions can resolve the issues raised below with respect to music broadcasting.

**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 significantly limit the expansion of the television sector in Malaysia, and should be eased or lifted. The Market should determine programming allocations.

**Lift Cinema Entertainment Tax:** The entertainment tax for theater admissions, at 20% of the gross ticket price, is among the highest in the region and limits the growth of the theatrical industry by artificially increasing box office prices.

**Lift Foreign Ownership Restrictions:** Foreign investment in terrestrial broadcast networks is strictly prohibited. The government imposes a 20% limit on foreign investment in cable and satellite operations through licensing agreements. These restrictions should be lifted.



# PAKISTAN

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2010 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** IIPA recommends that Pakistan remain on the Watch List.<sup>1</sup>

**Executive Summary:** Pakistan's copyright market has been a disappointment to the copyright industries over the years. For example, Pakistan remains principally a pirate market for books. While IIPA appreciates the government's actions to combat piracy in the Urdu Bazaars, the piracy situation has improved only slightly. The National Book Foundation continues to claim it may avail itself of compulsory licenses to copy books even though doing so is incompatible with Pakistan's international obligations under the Berne Convention. The situation is not much better in the category of business software. Unlicensed use of software by businesses, so-called end-user piracy of business software, causes significant losses each year to the software industry. There was a slight decline in the business software piracy level from 86% in 2008 to 85% in 2009, with losses also decreasing from US\$80 to US\$73 million. A software industry study concludes that reducing piracy by ten percent would bring high-paying jobs, tax revenues, and increased flow to Pakistan's gross domestic product.

Over the years, through cooperation with publishers, the authorities, especially the Federal Investigations Agency (FIA), Islamabad, have taken some timely and positive actions against book piracy in the Urdu Bazaars, but much more needs to be done. Also, the Pakistani government has been supportive about legalizing government use of software, and putting into place healthy procurement practices to foster such legitimate use. Unfortunately, little has been done to address end-user piracy which causes most of the losses to the business software industry in Pakistan. The Pakistani government in its Submission in the Special 301 report discussed the "5th Meeting of the Central IPR Enforcement Coordination Committee, Islamabad held on the 17th January, 2009,"<sup>2</sup> and while IIPA is appreciative that the committee is considering ways to improve the piracy situation, actions are needed to follow through on those discussions.<sup>3</sup>

The United States continues to engage with the government of Pakistan through a Trade and Investment Framework Agreement signed between the two countries in 2003. Intellectual property remains on the economic and trade agenda between the two countries.<sup>4</sup> IIPA hopes that the TIFA talks can spur the government of Pakistan to follow through on copyright protection consistent with the country's international obligations, so that creative industries can once again consider Pakistan a hospitable place to do business.<sup>5</sup> Pakistan's Intellectual Property Office (IPO) has made overtures of interest as to implementation and ratification of the WIPO Copyright Treaty (WCT) and WIPO Performances and Phonograms Treaty (WPPT). Given increasing Internet usage in the country and digitization of copyright materials (for example, publishers note unauthorized digitizations of books in the educational setting), the interest in establishing a legal framework for copyright protection in the online environment is welcome.

<sup>1</sup> For more details on Pakistan's Special 301 history, see IIPA's "History" Appendix to this filing at <http://www.iipa.com/pdf/2010SPEC301HISTORICALSUMMARY.pdf>, as well as the previous years' country reports, at <http://www.iipa.com/countryreports.html>.

<sup>2</sup> See Government of Pakistan, *Special 301 Review 2009*, February 27, 2009, submitted to [regulations.gov](http://www.regulations.gov) (on file with IIPA).

<sup>3</sup> IIPA appreciates the discussion in Pakistan's Special 301 Submission regarding FIA activities, and agree that ongoing specialized training for FIA officers and judges will be helpful. IIPA also notes the assertions by FIA that "prosecution is very weak to give deterrent sentence on violation of IP rights," which we think indicates a need for improvements in the deterrent effect of criminal judicial enforcement.

<sup>4</sup> See United States Trade Representative, *United States-Pakistan Trade and Investment Framework Agreement (TIFA) Meeting Joint Statement*, April 27, 2009, at [http://www.ustr.gov/assets/Document\\_Library/Press\\_Releases/2009/April/asset\\_upload\\_file784\\_15596.pdf](http://www.ustr.gov/assets/Document_Library/Press_Releases/2009/April/asset_upload_file784_15596.pdf). This was the third meeting of the United States-Pakistan Trade and Investment Council, which is the implementing body of the U.S.-Pakistan TIFA.

<sup>5</sup> Pakistan once had a vibrant creative industry including cinema, but in recent years, very little creative activity has taken place or been supported. Cf. *Cinema of Pakistan*, at [http://en.wikipedia.org/wiki/Cinema\\_of\\_Pakistan](http://en.wikipedia.org/wiki/Cinema_of_Pakistan) (unverified).



**Priority Actions Requested in 2010:** 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 pirate booksellers in the Urdu bazaars to clean up that market, taking legal actions as appropriate for deterrence.
- 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.

### **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.
- Fully implement and join the WCT and the WPPT.

## **PIRACY AND ENFORCEMENT CHALLENGES IN PAKISTAN**

Previous reports have discussed the many piracy challenges faced in Pakistan,<sup>6</sup> including book piracy; National Book Foundation compulsory reprints; end-user piracy of business software; pirate CDs, DVDs, and recordable discs in the retail markets; Internet-based piracy; and pay TV piracy due to illegal cable hookups.<sup>7</sup> The following sections provide brief updates to the piracy and enforcement situation in Pakistan, but failure to mention other specific issues does not indicate that those problems have been fully resolved.

**Update on Workings of Pakistani Policy and Enforcement Authorities:** IIPA appreciates the ongoing work of the FIA. Its officers have been instrumental in bringing the incremental improvements for some copyright sectors. FIA's Advisory Council on IPR which is inclusive of industry has been helpful, and its officers have responded to complaints of piracy by carrying out raids. The Intellectual Property Office of Pakistan (IPOP) has improved marginally, but only as far as responding to requests for meetings and carrying on a dialogue, and in policy issues such as increased engagement on the area of seeking industry input on legislation. Unfortunately, no concrete outcomes or results have been achieved by IPOP, due perhaps to power struggles within the organization and under-inclusiveness of industry in its Board.

**Book Piracy Situation in Bazaars:** Pakistan remains a predominantly pirate book market, with print piracy and to a somewhat lesser extent illegal photocopying being the primary problems in the country. The Urdu Bazaars in Karachi (which have at times featured 350 booksellers and wholesalers) and Lahore (which have at times featured 700 sellers) remain the main sources of pirated books in the country, though book piracy has spread beyond just bazaars and is rampant. Pirate booksellers are highly organized, well-connected, and often succeed in convincing

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<sup>6</sup> Losses due to piracy of business software in 2009 are estimated at US\$73 million with an 85% piracy rate. The piracy rate has hovered around 85%, only dipping to 84% in 2007, and standing at 86% in 2005, 2006, and 2008. Losses in 2007 were \$63 million and in 2008 were \$80 million. The book publishing and music industries had reported consistent piracy losses of around US\$80 million through 2007. The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2010 Special 301 submission at [www.iipa.com/pdf/2010spec301methodology.pdf](http://www.iipa.com/pdf/2010spec301methodology.pdf). BSA's 2009 statistics are preliminary, representing U.S. software publishers' share of software piracy losses in Pakistan. They follow the methodology compiled in the Sixth Annual BSA and IDC Global Software Piracy Study (May 2009), available at <http://global.bsa.org/globalpiracy2008/index.html>. These figures cover, in addition to business applications software, computer applications such as operating systems, consumer applications such as PC gaming, personal finance, and reference software.

<sup>7</sup> See International Intellectual Property Alliance, *Pakistan*, at <http://www.iipa.com/rbc/2009/2009SPEC301PAKISTAN.pdf>.

authorities to drop cases immediately after any enforcement action or avoid enforcement action altogether. In some cases, they have even resorted to threats of violence and intimidation to try and avoid enforcement.<sup>8</sup> 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, harming U.S. publishers of mainstream commercial fiction and non-fiction. Some pirate enterprises are now able to produce fairly high-quality counterfeit copies that are difficult to differentiate from legitimate versions.

The situation improved slightly in 2009, due to periodic raids by FIA officers upon complaint of rights holders that have had a positive, though marginal, effect on the market for legitimate books. The police, however, have not been as helpful to date. Nonetheless, the government has recognized the severity of the problem and for that, IIPA and publishers are appreciative. In its March 2009 Submission in the Special 301 report to USTR, the Pakistani government noted,

"[t]ill 2004 the book piracy situation was as follows ... Foreign publishers had mostly considered Pakistan as a closed market. There were no offices of foreign publishers here in the country, except for 1 or 2. Book piracy was rampant with Urdu Bazaars being considered as the hub of organized piracy; ... Original book sales in Pakistan was negli[g]ble; and ... No publisher was willing to invest, but in the past 3 years, 90 raids had been carried out on printing presses, 165 on book binders, and 322 on 'Godowns.'"

The government presented the following evidence of increases in volume sales of legitimate book sellers in Pakistan, which it suggests are the result of actions taken in the Bazaars:

% Increase in Volume of Sale of Original Books of Foreign Publishers			
City	2005	2006	2007
Lahore	9.5	13.6	14.8
Karachi	10.89	18.65	20.99
Rawalpindi (including Peshawar)	6.51	7.21	10.51

The government also cites 59 raids by FIA and 168 actions from November 2006 to January 2009 by the Pakistani Intellectual Property Service against book piracy. IIPA and the publishers remain unclear as to how the government sales figures represented in the chart were derived, but even taking them at face value, given that piracy levels have not improved much if at all, increased sales still do not account for continuing piracy at the Bazaars. Nonetheless, IIPA and AAP are appreciative of the government's attention to this piracy phenomena and look forward to continuing work to eradicate piracy from the Bazaars. Further, publishers look forward to greater transparency with FIA officials in 2010 regarding potential book piracy targets and then follow up on activities taken as a result of consultations.

**Educational Book Sector Experiences Significant Piracy:** The potential market for elementary and high school materials in English is immense, given the number of children in English language schools. Unfortunately elementary and high school courses taught in English routinely feature pirate versions of books. Piracy at the university levels is worse, with piracy rates around 90%. A newly emerging problem includes digitized resources being pirated by schools. The piracy of English language teaching (ELT) books used at language schools is of particular concern as most language schools charge a consolidated fee covering tuition and the cost of books. Invariably, rather than providing legitimate copies of the books, the pirated versions of the ELT books are supplied to the students. Among the worst offending universities in this respect are the College of Business Management in

<sup>8</sup> The FIA's assistance is greatly appreciated, since often in Pakistan, carrying out such enforcement can subject the officers or industry representatives to threats of violence. During a recent raid in Karachi by the FIA on a few shops selling pirated editions of IIPA members' books, a couple of booksellers from these shops were handcuffed and arrested by the FIA and were being taken in a car to the FIA office. This car was surrounded by a group of men from the market who blocked the passage of the car and tried to pull out the arrested men. They withdrew and allowed the car to proceed only when faced with the threat of force by the officers. It is believed the same men who had surrounded the car then vandalized and caused property damage to one of the IIPA member association's company members' offices.

Karachi, Punjab College of Business Education in Lahore, and NED University, and Karachi University in Karachi. U.S. publishers receive routine and suspicious requests for free supplementary materials from professors who say they have adopted the book when there are no legitimate sales. Unauthorized compilations in the form of course packs are on the rise as well.

Unfortunately, university administrators appear to have little to no interest in addressing piracy occurring on university campuses (with campus book stores actually stocking pirated books). Indeed, some university professors have been known to inform pirates of the books they intend to assign to their class and the pirates will then produce pirated copies of the book in bulk for the class. 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 such materials and the relatively small market over which to spread production costs, making it unattractive to pirates. 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." The Pakistani authorities have to date not been willing to take appropriate action to eradicate illegal uses of published materials at educational institutions. The only action taken by the Ministry of Education has been to instruct university librarians not to purchase pirated books, but whether the institutions comply is not monitored.

**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 using the compulsory license. The periodic overtures of NBF have been accompanied by advocacy to foreign publishers and their governments to grant NBF license agreements. Voluntary licensing is made impossible by the NBF's continued unauthorized activities. As a condition precedent to any licensing discussion, the publishers would expect the immediate cessation of all unauthorized reproductions of U.S. publishers' titles, and a written commitment from NBF that it will no longer avail itself of the compulsory license and will engage in transparent business practices. It would also be important and timely for the government to commit 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 Alliance over the past two years, unauthorized use of software by businesses – so-called end-user piracy – remained a serious problem in 2009. At 85%, Pakistan has one of the highest software piracy levels in the world. Reducing piracy levels would not only help software copyright owners create a legitimate market in Pakistan, but would also lead to very positive economic benefits for Pakistan. A study released in January 2008 by International Data Corporation demonstrated that a 10 point reduction in software piracy from 2008 by 2011 (i.e., from 86% to 76%) would deliver more than 11,700 new jobs, US\$23 million in tax revenues for the Pakistani government, and US\$160 million in economic growth in Pakistan.<sup>9</sup>

IIPA is pleased that 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. Unfortunately, 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 are also not deterred. Steps should be taken to reverse these trends.

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<sup>9</sup> Business Software Alliance and IDC, *The Economic Benefits of Lowering PC Software Piracy: Pakistan*, January 2008, at [http://www.bsa.org/sitecore/shell/Controls/Rich%20Text%20Editor/-/media/Files/idc\\_studies/bsa\\_idc\\_pakistan\\_final%20pdf.ashx](http://www.bsa.org/sitecore/shell/Controls/Rich%20Text%20Editor/-/media/Files/idc_studies/bsa_idc_pakistan_final%20pdf.ashx).

**Court Cases Involving Piracy Almost Never Lead to Deterrence:** The copyright industries' experiences with the courts in Pakistan have been mixed over the years. In recent times, publishers note that criminal court cases involving book piracy have not resulted in either timely or positive outcomes. As noted below, maximum penalties are non-deterrent to begin with, and there are no minimum penalties. As a result, magistrates use their discretion in favor of the accused by imposing fines as low as a few hundred Rupees (RP100 = \$1.15) and no jail sentences. The prosecution of cases is subject to chronic delays inherent in the system and process. The judiciary is understaffed with an enormous backlog of cases. Also, IPR cases are given low priority and pirates are viewed in many instances as sympathetic defendants.

## **COPYRIGHT LAW AND RELATED ISSUES**

**Penalties in Copyright Law Fail to Deter Piracy:** Copyright protection in Pakistan is provided under the Copyright Ordinance, 1962 (as last amended in 2000), which provides generally strong tools to fight piracy.<sup>10</sup> The Ordinance includes, as an example, provisions enabling the Registrar to monitor exports, with the ability to inspect and seize pirated goods leaving Pakistan.<sup>11</sup> Also, copyright offenses are cognizable, meaning the FIA can act on its own cognizance (*ex officio*), and non-bailable (meaning defendants need not be brought before a magistrate to determine whether bail is appropriate). 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, if the minimum fine were even increased to PKR500,000 (US\$6,300), reasonable by any estimation, the law would stand a better chance at achieving deterrence. There are some other problems with the Ordinance in its current form, including 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 WCT and the WPPT, which establish the framework for the protection of copyrighted works in the online environment. Pakistan should also adopt the 1971 (Paris) text of the Berne Convention and should join the Geneva (Phonograms) Convention. 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. The Ordinance should also 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 IPOP its thoughts on these issues in the past, including more detail than is contained in this report. IPOP has recently inquired once again about needed

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<sup>10</sup> 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.

<sup>11</sup> Please see the 2003 Special 301 report on Pakistan, at <http://www.iipa.com/rbc/2003/2003SPEC301PAKISTAN.pdf>, for a full discussion of the Pakistan Copyright Ordinance.

amendments to implement the WCT and WPPT. IIPA hopes IPOP will take the opportunity to amend its Ordinance to fully modernize the law.

**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, which we understand was promulgated again in 2009 as an Ordinance. 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 of Europe Cybercrime Convention (2001) (to which the United States is a party). Article 10 of the Council of 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.

**The Coming of the Internet in Pakistan, and Need for ISP Accountability:** One noteworthy development in 2009 was the rising use of the Internet in Pakistan. Pakistan now has a 10.6% penetration rate overall, with an estimated 18.5 million users (using 3.7 million Internet subscriptions), according to the International Telecommunications Union, with an estimated 320,500 broadband connections (188,500 DSL and 132,000 cable), according to Point-Topic. Yet, for about the first time, development and deployment of broadband in Pakistan is taking off, with Pakistan's broadband growing a rapid pace.<sup>12</sup>

As such, the government could, as discussed above, take the opportunity now to enact a system fostering cooperation by Internet service providers with right holders for infringements occurring online, including notice and takedown and an effective and fair mechanism to deal with repeat infringers. As of now, the Prevention of Electronic Crime Ordinance, 2007 (re-promulgated 2009) requires “licensed service providers” to retain real time collection of traffic data which may be requested by any law enforcement or intelligence agency, which could be very helpful going forward. IIPA notes that there is a limitation of liability set out in the Ordinance, namely, network service providers are absolved from any liability civil and criminal for the reason of use of their telecommunication system in certain circumstances (e.g., in connection with the contravention of the Electronic Transaction Ordinance, 2002).

## **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 2004, USTR agreed to review Pakistan's eligibility to retain its GSP trade benefits based on a petition by IIPA. In IIPA's petition, several problems were identified, including a massive optical disc piracy for export problem, and book piracy issues. In 2006, the review was terminated.<sup>13</sup> As a result of termination,

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<sup>12</sup> For example, according to Point-Topic, Pakistan's DSL connectivity grew from 173,500 to 188,500, and cable modem connectivity grew from 118,000 to 132,000 in the third quarter 2009. Pakistan had the sixth highest quarterly growth of broadband connections in the world during the same period, and was the tenth highest in terms of annual growth (third quarter 2008 to third quarter 2009).

<sup>13</sup> 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.

Pakistan enjoys duty-free status for imports of certain products into the United States. During 2008 \$183.9 million of Pakistani products that entered the United States enjoyed duty-free status, or 5.1% of its total imports to the U.S. In 2009, \$169.5 million of Pakistani products that entered the United States enjoyed duty-free status, or almost 5.7% of its total imports to the U.S. The government of Pakistan must continue to meet the discretionary criteria in this U.S. law if it expects to continue receiving favorable treatment at this level.

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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."



# PERU

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2010 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** IIPA recommends that Peru remain on the Watch List in 2010.

**Executive Summary:** Piracy in the Peruvian marketplace continues to be a significant problem, undercutting legitimate business. Hard goods piracy is widespread, with burned optical discs (infringing content on CD-Rs and DVD-Rs) the favored medium of street piracy. There is basically no legitimate music industry left in Peru, as the piracy rate is 98%. Book fairs sell pirated books and street piracy is a problem, along with illegal photocopying of textbooks near university campuses. Piracy of business software applications, including end-user piracy in businesses, continued at basically the same rate as the prior year, but publishers report a recent rise in false or expired licenses being used in the government procurement process. Internet piracy is growing, but it is not yet a major problem in Peru, compared to what is seen in neighboring countries.

The most pressing problem for the copyright industries in Peru continues to be inadequate criminal enforcement and deficient administrative sanction for copyright infringement. Cooperation between rights holders and enforcement entities, both in the criminal and administrative realm, remain generally good. While street actions are taken by the police, they are not enough to address the scope of piracy and the cases rarely go forward through prosecution. Simply, more police actions are needed, prosecutors have to pursue piracy cases, and cases need to proceed to final judgment where judges issue deterrent-level sentences allowed under the criminal code. In charge of administrative enforcement, INDECOPI (El Instituto Nacional de Defensa de la Competencia y de la Protección de la Propiedad Intelectual) continues to work with the software and music industries on a variety of actions and inspections. INDECOPI could issue more deterrent sanctions in its cases and for declined inspections. Last year also saw more activity by the tax and customs authorities (SUNAT), and that is welcomed. This year, the government must take actions to actually structure and implement its program to legalize software within government agencies, a long overdue obligation under the Trade Promotion Agreement.

The lack of resources dedicated to intellectual property infringement remains a persistent problem (but is in itself not the major impediment) in Peru, and given the current economic climate, it may be unlikely that resources will increase in 2010. 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 U.S.-Peru Trade Promotion Agreement (TPA). IIPA and its members support the TPA that entered into force on February 1, 2009, as it contains a comprehensive intellectual property rights chapter that contains high standards for copyright protection and enforcement.

**Priority actions requested to be taken in 2010:** 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.
- Continue progress made by INDECOPI to issue deterrent sanctions and to enforce compliance and collection of their fines.



- 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.
- 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, which was markedly improved in 2009, 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.
- Involve INDECOPI, local and regional governments, the National Library and the Ministry of Education to take actions to halt unauthorized photocopying at universities.
- Pursue prosecutions and impose expeditious and deterrent sentences in piracy cases.
- Conduct IPR trainings for judges nationwide, now that the specialized IPR courts have been eliminated.
- 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

- Have INDECOPI change its criteria when it issues fines against businesses that refuse to be investigated or raided by INDECOPI.
- 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.
- 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).

Peru has been the subject of IIPA's Special 301 filings for many years.<sup>1</sup> IIPA supported the passage and effective implementation of the U.S.-Peru Trade Promotion Agreement. IIPA also notes our support the Trans-Pacific Partnership (TPP).<sup>2</sup> 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 Peru.

## 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. Lima, Arequipa, Trujillo, Chiclayo, Tacna have the most wide-spread hard goods piracy problem. The purchase of pirated and counterfeit hard goods through web sites (Internet piracy) is also reported, but this is not yet widely used.

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<sup>1</sup> IIPA's cover letter to this Special 301 submission contains more information on the concerns and issues of the copyright-based industries, see <http://www.iipa.com/pdf/2010SPEC301COVERLETTER.pdf>. For more information on Peru's placement on the 301 lists over the years, see Appendix D at <http://www.iipa.com/pdf/2010SPEC301USTRHISTORY.pdf> and Appendix E at <http://www.iipa.com/pdf/2010SPEC301HISTORICALSUMMARY.pdf> of this submission.

<sup>2</sup> USTR announced on September 22, 2008 that the U.S. will launch negotiations to join the Trans-Pacific Strategic Economic Partnership, a comprehensive Free Trade Agreement (FTA) (then known as "the P4 Agreement") concluded by Brunei Darussalam, Chile, New Zealand and Singapore. This expanded negotiation was later renamed the TPP.

Optical disc piracy is a major problem in Peru where large numbers of blank media (e.g., CDs, DVDs) are imported and then used for burning copyrighted content. It is no longer possible to evaluate the dimension of piracy based simply on the volume of optical disc imports. The decline in 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 in recent years (down to 16.2 million units in 2007, more recent data is not available-). 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 the more popular smuggling routes involving Tacna and Puno (south of Peru border with Chile and Bolivia).

The sound recording industry reports that music piracy remains at a staggering 98% of the total market. The most predominant form of piracy is the burned CDs and DVDs sold in streets and popular flea markets in Lima and other important cities. Street piracy of burned music CD-Rs is decreasing in general terms for two reasons: The bigger availability of Internet Broadband connections and MP-3 players that allows people to download more illegal content using personal computers and the substitution of music for movies as the preferred product for street sales. Flea markets are licensed by local governments but no supervision is exercised on the use of commercial permits for illicit activities such as the sale of pirated goods. The lack of coordination between the competent national agencies and the local municipalities is very disturbing. After the raids are conducted by prosecutors and SUNAT, the inventory of pirate copies is quickly reestablished in these market and operations continue without major interruption.

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. One fair, locally known as Amazonas, is arguably one of the largest in Latin America, and has about 2000 vendors selling used, antiques and pirated volumes. Peruvian author Daniel Alarcón's press story on book piracy documents even pre-release piracy of popular author Paulo Coelho's new novel, "O" (published in English as "The Winner Stands Alone").<sup>3</sup> Pirated books printed in Lima are shipped all over the country and exported to Bolivia, Ecuador, Chile and even Argentina. Street vendors of pirated books are very visibly on the streets of the capital or on its sidewalks. Alarcón also reported that street vendors gather in middle and upper class neighborhoods; book piracy is not only aimed at poorer neighborhoods. In addition, 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. This 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.

MPA members saw a decline in camcord piracy sourced to Peruvian theaters in 2009. One camcord capture of an MPA member's film was sourced to a Peruvian theater. As for street piracy, there are thousands of street vendors selling burned DVD-Rs containing the latest Hollywood releases (such as *Avatar* and *The Blind Side*, etc.), available for US\$1.00 each.

**Business software piracy, end-user and retail:** The business software industry reports that it continued to confront twin problems last year--widespread piracy of infringing copies (usually optical discs) of software in the black markets and end user piracy. Software levels remained basically at the same level in 2009, despite efforts made by the authorities in both matters (black market by the police and company inspections by INDECOPI). The Business Software Alliance's (BSA) preliminary estimated piracy level for 2009 is 71%, with \$50 million in preliminary estimated trade losses due to piracy.<sup>4</sup> This is a slight decrease in piracy levels from 74% in 2008, but a slight increase from the estimated losses of \$41 million in 2008 (this increase being due to a larger hardware base).

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<sup>3</sup> Daniel Alarcón, "The Book Pirates of Peru," in the U.K. Guardian, January 18, 2010, available on [www.guardian.co.uk](http://www.guardian.co.uk). Alarcón also reports that for the last 30 years, the budget of the National Library of Peru to acquire new books remained unchanged, at zero.

<sup>4</sup> BSA's 2009 statistics are preliminary, and represent the U.S. software publishers' share of software piracy losses in Peru, and follow the methodology compiled in the Sixth Annual BSA and IDC *Global Software Piracy Study* (May 2009), available at [www.bsa.org](http://www.bsa.org). These figures cover, in

The main problem for street piracy of software is found at Av. Garcilazo de la Vega (Wilson) in Lima, with other significant black markets in other cities, such as Galeria Las Pulgas in Chiclayo. In addition, other pirated software products are located close to universities in Lima (UNI and Ricardo Palma). However, the most damaging form of piracy in Peru remains end-user piracy in private corporations (mostly small- and medium-sized businesses) and government agencies. In fact, in the 2008-2009 timeframe, a new kind of software piracy arose. This involves companies taking part in tenders brought by the government to sell software and hardware, and then these companies use "re-used" or "recycled" licenses in order to deceive the purchasers. Efforts should be made by the prosecutors and INDECOPI to take action in impose sanctions against these companies that use fake software licenses and cheat the companies that purchase this product. These acts should be denounced before the Police or Prosecutor's Office and properly communicated to the "Organismo Supervisor de Contrataciones del Estado" ("OSCE") in order to punish the vendor with ineligibility to contract with public entities. Finally, it is imperative that the government take action this year to start implementing its obligations to legalize software in government agencies.

**Internet piracy and cooperation with the ISP community:** Peru is not a leading country in broadband and personal computers penetration. The software industry continues to report that Internet-based piracy is not yet widespread in Peru. There are 7.6 million Internet users in Peru, representing about 26% of the population (according to [www.Internetworldstats.com](http://www.Internetworldstats.com)). For the music industry, Internet piracy is the most pressing concern because it is the only possible market left for this industry. Internet cafés serve as important locations for downloading and burning of illegal files. Free access to peer-to-peer (P2P) networks in Internet cafés and universities has become the major source of illegal downloads in the country. The most popular P2P network is ARES. Keep in mind that the Internet is also used as a source to download and copy, without authorization, content onto other media, such as optical discs (CDs and DVDs), MP3 devices and even cellular phones. Several auction sites (such as Mercado Libre and De remate) offer infringing copies of films, software and music. The music industry reports that there is no voluntary cooperation with the ISPs at this time.

## **COPYRIGHT ENFORCEMENT IN PERU**

Industry sectors report generally good cooperation with the criminal enforcement authorities (police and tax authorities) but some industries report continuing difficulties exist in obtaining prosecutions and administrative measures that result in effective and deterrent sanctions that deter piracy. By contrast, the business software industry reports that it has worked with INDECOPI to carry out effective enforcement actions against end-user piracy of business software.

**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 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.

**IPR Trainings and Public Awareness:** BSA participated in several different seminars in 2009 aimed at training Peruvian authorities, with topics ranging from IP legal protection to software licensing trainings and workshops aimed at identifying fake CDs, boxes and false licenses involving business software. Since the recording industry terminated its anti-piracy campaign in Peru last year, no new trainings are been promoted in this area, except for the events held by INDECOPI on its own initiative.

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addition to business applications software, computer applications such as operating systems, consumer applications such as PC gaming, personal finance, and reference software. BSA will report final 2009 data later in 2010.

With respect to training INDECOPI, BSA and its member companies reports that it undertook several trainings in 2009 regarding software licensing, to different INDECOPI personnel such as Appeals Court, the Copyright Office, the Copyright Commission, and the Fiscalization team (Area de Fiscalización del Indecopi, or AFI). Additionally, at the end of 2008 and early in 2009, INDECOPI took part, together with BSA, in an educative campaign addressed to more than 20,000 companies around the nation. Additionally, from October to December 2009, an education campaign was run in the Northern area of the country (Piura, Chiclayo and Trujillo) with the active participation of INDECOPI in the launching and promoting in media. Additionally, INDECOPI has sent informative letters to retailers to duly inform the PC buyers regarding legal software purchasing, preventing to suggest alternatives that are against Copyrights Law. In addition, 11 trainings were given at universities of the country regarding the legal use of software. Additionally, workshops directed to judges and 7 training directed to municipal police took place; all these measures brought by INDECOPI. Additionally training sessions have been made, directed to different mayors of Lima's districts.

### **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.

The copyright industries' concerns in 2009 generally remain the same as those reported in prior years. First, there is 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 (7<sup>th</sup> Region) providing troops when large raids are 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. The specialized police force lacks resources to develop intelligence plans that would support investigating and discovering large warehouses of clandestine laboratories of pirated goods. They have little logistical resources (vehicles, cell phones) needed to coordinate their field work. The Specialized Prosecutors need more budgetary resources to hire personnel who can follow up on cases after the raids in order to process them swiftly. Currently, 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.

Second, it is important to keep conducting raids in local black markets. In 2009, street actions were taken, but more are needed to begin to reduce their size and increase their economic impact. BSA believes that the main enforcement problem is not connected to the police, the prosecutor office or INDECOPI; the problem in conduct raids in the large black markets is due to the lack of support from the judges in issuing the orders to allow the target locations to be raided. Usually the judges demand too much evidence to grant the appropriate measures, even when the black markets are widely known to flagrantly be involved in the sale and distribution of pirated and counterfeit products. In other cases, they refuse the Prosecutor's request with no basis. BSA reports that the element of surprise is often lost due to leaks. As a result, it seems that rights holders have to target smaller and medium sized markets in order to get past judicial refusals to issue orders in large market cases.

BSA reports the relationship among these authorities is generally good. BSA reports that the Fiscal Police also have been efficient. In addition, BSA's relationship with IP Special Prosecutors is also good. With respect to software actions, BSA reports that six successful raids were made in 2009, and involved the assistant of the IP Specialized Prosecutor's Office and the Fiscal Police. These raids results in the seizures of an average of 20,000 CD-R in each action. BSA reports that, though few in number, the police and customs are taking ex officio actions. The six (6) cases promoted by software industry are pending at the prosecutorial stage, they have not reached the judicial stage, so there are no sentences yet. BSA has no concrete data on ex officio cases.

The music and recording industry reports that just a few actions in El Hueco, Polvos Azules and Mesa Redonda were conducted by National Police and the IP Specialized Prosecutors in capital city area. For its actions, more than 90% of the actions are requested by right holders. During 2009, the (First) Specialized Prosecutor's office in Lima opened 175

new criminal prosecutions against individuals involved in pirate music activities. As a result of these actions a total of 143 people were arrested but not charged (these involved street vendors arrested in flagrant violation of the copyright law, taken to prosecutor's office and released the same day as per Prosecutor's instruction because these cases deserve a very low penalty according to the law). The majority of the cases are dismissed on the grounds that violations are insignificant. These actions resulted in the seizure of 30,124 CDs and DVDs containing illicit recordings of music and movies. The (Second) Specialized Prosecutor's Office in Lima, conducted two major operations in 2009: (1) In "Mesa Redonda" Flea Market on November 17, 2009, a total of 320 stands were raided. 200,000 pirate music CD's were seized along with 40 CD/DVD burners and 5 computers. 400 police officers supported the action lead by Prosecutor Lucila Cabrera. Unfortunately, no arrests were made at the site. (2) At "El Hueco" Flea Market on August 27, 2009, a total 500,000 pirate music CDs and DVDs were seized. Six individuals were arrested and processed for piracy. The (Third) Specialized Prosecutors' Office in Lima did not conduct any big operations in 2009 but did open 36 new files for IPR crimes.

For 2009, Peru's Fiscal Police (responsible for IPR crimes and Customs operations) performed the following operations. The police conducted 139 raids, indicted 87 people, and seized 28,147,800 copies of recorded and blank CD-Rs and DVD-Rs of music and movies. With respect to border operations, there 128 raids were run, 152 people processed and 110 charged, and seizures of 9.5 million blank CD-Rs and DVD-Rs were made.

Third, it remains important to work with local municipalities to revoke licenses granted to vendors selling pirate product and close black-market businesses. Municipalities and their police forces (Serenazgo), other than San Isidro, do not assist in raids carried out in their jurisdiction. No licenses have been revoked in black markets in their jurisdiction.

Last, although current Peruvian legislation has the tools to sanction such unlawful behavior on the Internet, further refinements are needed to fully implement the FTA and also to specify that the sharing of information between peer-to-peer (P2P) networks and other similar networks constitutes unlawful actions.<sup>5</sup> There is a specialized body in National Police with deals with High Technology crimes, prioritizing Internet-based crimes linked to pedophilia, kidnapping, phishing, and there are only a very few cases focused on intellectual property.

**Enforcement by tax authorities:** A very positive point in 2009 was that SUNAT increased its cooperation with IP Prosecutors and National Police. SUNAT is providing logistic and legal support in operations in El Hueco and Polvos Rosados. Unfortunately, the resources dedicated to these operations are insufficient. SUNAT has coordinated on many border raids; for example, containers which carried diverse pirate product have been stopped and these measures have increased. However, no further work has been made in connection with tax authority involving in end user software raids and retailer actions.

**Few prosecutions:** Peru still has four IPR prosecutors who work with INDECOPI when they are requested to do so. BSA reports good cooperation with the specialized IPR prosecutors. Unfortunately, these IPR prosecutors' jurisdiction has restrictions, and filing of the complaint before the judge can take four to six months after the raid has occurred; in fact some delays have taken as long as two years from the raid to get the case before the court. IP prosecutors have brought cases related to raids performed in 2009 and in prior years.

**Problems with the judiciary--non-deterrent results and delays:** Few criminal cases reach the Peruvian judiciary, and if they do, judges do not impose deterrent sentences. Judges are not sensitive to IP crimes, they do not see this crime as dangerous so sentences are benign, even if the police and prosecutors conduct a raid on a huge clandestine reproduction center of software, music, book, etc. Criminal sentences take between 3-5 years to be issued. BSA notes that prosecutors have brought cases before the court, connected to raids performed prior to 2009; those cases filed in 2009 have not reached the court instance yet, due to the consistent delay of the prosecutors.

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<sup>5</sup> 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.

Furthermore, 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; (b) 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. We believe that the average sentence in 2009 was the same as in 2008, that is, 2 or 3 years conditional imprisonment (suspended sentences), and fines of US\$300.

**Judicial issues and restructuring:** In April 2009, the Special Courts for Intellectual Property Rights were eliminated by the Peruvian Government (per the Resolucion Administrativa N° 094-2009-CE-PJ of the Board of Directors of the Judiciary System, published in the Official Gazette on April 7, 2009). This means that all intellectual property issues are handled by ordinary courts. Cases that were already underway would continue before the court where the action was taking place. The IPR court judges had better expertise with these issues. It was easier to train those specialists, and now this reorganization in effect means that those industries that support judicial training will have a much greater challenge. We are also concerned about the message of removing the IP courts means as a priority (or not) of the government.

### **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 collects royalties for the public performance right. INDECOPi is supposed to be self-funded 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.

**Software actions with BSA:** BSA's relationship with INDECOPi was cordial in 2009, as INDECOPi was a strategic ally to the software industry. Fortunately last year, INDECOPi increased its administrative actions taken for the software industry, taking more than 180 inspections to companies to monitor their software licensing. INDECOPi has revamped its prosecution team, which rapidly answers the requirements made by the right holders. As discussed above, BSA worked with INDECOPi on a variety of trainings regarding software licensing.

**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 reports that during 2009 INDECOPi conducted a total of 42 administrative actions for the protection of performance rights in capital city area.

**INDECOPi music piracy actions:** The recording industry reports that its efforts are being reoriented to the collective licensing of performance rights and away from anti-piracy actions. With respect to physical music piracy, INDECOPi conducted 8 raids against pirate points of sale in Lima in 2009. Also, at an event held as part of the "Intellectual Property week" organized by INDECOPi, a total of 475,000 pirate units (CDs and DVDs) were destroyed. This industry remains concerned that INDECOPi lacks the appropriate resources to do a national anti-piracy campaign.

**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.

**Increasing deterrent sanctions by INDECOPI:** It remains important to 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.

BSA reports that there is good news as some progress was made by INDECOPI in 2009 regarding the timing of sanctions. INDECOPI is ordering immediate fines to companies that do not allow end user inspections. These fines are then confirmed by the Appeal Court. In 2009, BSA reported that INDECOPI made efforts to execute the fines imposed to violator companies. In this period, a recovery of 815,482 Nuevos Soles (approximately US\$286,134) from the companies on fines was derived from software infractions.

However, further amendments should be done to the criteria used by INDECOPI in rendering its decisions in order to raise the amount of fines, based on the size of the companies. Indeed, fines ordered to all companies for denying the raids is 5 Tax Units (around US\$5,500). While this amount may be deterrent for small companies, it does not serve as a deterrent for medium-sized and larger companies. For these larger companies, the fine is so low that the infringer prefers not to admit the raid rather than allowing the inspection. This results in software piracy continuing since it is not an effective measure, because medium and large companies may afford this amount and refuse the inspection. Increasing the amount of fines would make INDECOPI inspections more effective.

**Problems with INDECOPI and Appeals Court:** BSA reports that difficulties with the Intellectual Property Chamber of INDECOPI's Trial Court are its primary source of difficulties with administrative enforcement.

(1) Incorrect calculation of damages: INDECOPI's Appeals Court is still misinterpreting articles 193 and 194 of the Copyrights Law failing to grant "due copyrights" so-called "*remuneraciones o derechos devengados*" when the infringer purchases the licenses after the inspection. This interpretation is a direct violation of the law which has been raised in previous IIPA reports. Nonetheless, INDECOPI is still misinterpreting the law and has currently appealed a sentence issued by the Judicial Power's Appeals Court that rejected INDECOPI's criteria and thus granting due copyrights to the rights holders.

(2) Problem with lowering of damages: Likewise, problems with incorrect fixing of damages continue. In fact, INDECOPI's Appeal Court is still reducing the amounts of the fines ordered by the Copyright Commission (first step in administrative procedures) in 66%. This makes that the fine is finally too low, due to their incorrect calculation. These fines are calculated to be twice the "market average price of the original software," but this "average price" is only 30% of the actual market price. This is due to an incorrect interpretation of the law (Law Decree 822, Article 194).

(3) Problems with "Due copyrights": 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.

In prior years BSA has reported problems related to certain troubling issues resulting from the Trial Court's decisions. For example, earlier decisions, if continued, 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. This problem is currently being reviewed by the judiciary, in order to reverse INDECOPI's position. The first instance (in the judiciary) has been favorable; BSA expects the second instance (the Supreme Court) to uphold the reversal of INDECOPI's position.

BSA had also previously reported difficulties in obtaining administrative inspections due to an incorrect interpretation issued by the Constitutional Trial Court.<sup>6</sup> BSA now reports that there was a change of criteria by INDECOPI issued in 2009. The change in criteria is that inspections are now granted as “provisional measures” instead of “precautionary measures.” “Provisional measures” do not require 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; all that is needed are facts that a cease and desist letter was sent and the target did not reply.

### **Border Enforcement**

In early 2009, no fewer than three new laws and regulations affecting border measures were enacted.<sup>7</sup> The competent border authorities (INDECOPI and SUNAT) take actions to seize pirated material. 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. Over 100 million units contraband optical discs per year enter Chile, mostly through Iquique. SUNAT also 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).

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. Finally, 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.

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

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.<sup>8</sup> Some of the refinements in these laws should, and must, aid in swifter and more effective enforcement by Peruvian authorities in 2010.

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<sup>6</sup> The problem had been related to a decision issued by the Constitutional Trial Court that increased the requirements necessary 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. 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. 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.

<sup>7</sup> Decree No. 003-2009 implemented border measures for the protection of copyright and neighboring rights, Resolution No. 043-2009/SUNAT addressed the implementation of border measures initiated by right holders applications, and Law No. 29,316 implemented FTA obligations. See further discussion, below.

<sup>8</sup> Over the years, Peru has been a beneficiary country of several U.S. trade programs which contain high IPR standards. After the TPA entered into force, tariffs for both countries were lowered, and no longer will Peru be eligible for certain U.S. preferential trade programs (such as GSP). During 2009, the following quantities of Peruvian imports under the various U.S. trade programs entered the U.S.: \$1.37 billion under the Andean Trade Preferences Act (including the ATPDEA) plus \$30.6 million under the Generalized System of Preferences (GSP) program.



## 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 Trade Promotion Agreement, 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.<sup>9</sup> 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 contains transition periods for certain elements. 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). This important provision has not yet been met.

**Implement government software asset management now:** Six years ago, Peru issued its first order on government software legalization<sup>10</sup>, and yet the implementation of that order has been continuously delayed, now until 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. Efforts should begin now in order to have the government agencies drafting its inventories and legalizing its software. Also, in order to comply with regulations to guarantee the acquisition of legal software by the government by the new deadline, Article 3 of Supreme Decree N° 002-2007-PCM, which requires that all purchases of personal computers also include licensing of operative system and desktop solutions, should be expanded in order to apply to all acquisitions by public entities in present times.

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<sup>9</sup> 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](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.

<sup>10</sup> 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 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).

**Criminal penalties and procedures:** 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, positive amendments to the criminal code were accomplished by this decree, Legislative Decree 29263, published on October 2, 2008.<sup>11</sup> Additional refinements to the criminal code were made in Legislative Decree No. 29316, which was published on January 14, 2009.<sup>12</sup>

**Copyright law-related implementation:** Peru passed several pieces of legislation that implemented various copyright and enforcement measures. Legislative Decree No. 1076, published on June 26, 2008, amended the copyright law in a number of positive ways to implement the TPA, especially with respect to the TPMs and judicial remedies.<sup>13</sup>

One major concern for the recording industry is the interpretation adopted by the Copyright Office of INDECOPI regarding the protection of national sound recording published in Peru before December 17, 1993 (when the Andean Decision No. 351 came into force). According to the opinion ratified several times by the Copyright Office, neither the Andean Decision nor the Peruvian Copyright Law contain any provision to extent the protection retroactively to those national sound recordings published before the above mentioned date. Fortunately, INDECOPI's Tribunal has been rejecting unanimously the Copyright Office's opinion based on the application of Civil Code. However, as new cases are filed with INDECOPI, chances are that the Tribunal may change its criteria in the future. As a final note, the Copyright Office's interpretation only affects sound recordings originally published in Peru, in other words, international catalogues are not in danger of been considered unprotected.

**Border measure reform:** Legislative Decree 1092 on border measures, adopted in June 2008 and effective upon the TPA's entry into force, implements various border measures for IPR enforcement. This law provides that (1) customs measures cover imports, 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); (3) establishes a proceeding for SUNAT (customs) officials to stop suspected infringing imports officials to inspect and seize suspected products in-transit; (4) requires customs to implement a recordation system for trademarks and copyrights; (5) requires Customs and INDECOPI to implement an electronic system to exchange information; and (6) clarifies definitions for piracy and counterfeiting.

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<sup>11</sup> This 2008 criminal code amendment accomplished the following TPA implementation, for example: adding 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; empowering judges to order preventative seizures of suspected infringing products and equipment used to make such infringement, as well as the destruction of same; adding, 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; adding the crime of infringement of rights management information; penalizing the reception and distribution of encrypted program carrying satellite signals; penalizing the unauthorized use of computer software manuals and licenses; and prohibiting 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.

<sup>12</sup> These 2009 amendments accomplished the following issues: amended the criminal code to protect against decryption and distribution of program-carrying satellite signals and amended the criminal code to protect against the circumvention of technological protection measures and similarly amended the copyright law on TPMs. It also amended an Andean Community implementation law to allow judicial authorities to order the seizure of suspected infringing products and equipment.

<sup>13</sup> The 2008 copyright law amendments accomplished the following TPA implementation, for example: 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; and 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). Peru also 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.

**INDECOPI reform:** Legislative Decree 1033 on INDECOPI, adopted in 2008, consolidates and regulates the functions of INDECOPI 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 still early to evaluate the impact of this reform on INDECOPI's effectiveness. First, it will be important to 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.

### Other laws used to enforce IP in Peru

**Revocation of licenses:** Law 28976 on Licenses for Business Preparations should be amended to include, as grounds for closure and revocation of licenses, the sale of products that violate intellectual property. Unfortunately in 2009, this law was not revised to grant local governments (municipalities) the revocation of license for sale of products that violate intellectual property. Law 28976 only grants local government the ability to close temporarily or permanently a shop or stand in markets and commercial galleries on the ground of infringing administrative norms. This law should be amended in two ways: (1) it should apply to any type of commercial establishment and not only markets and commercial galleries, and (2) the basis should be for any type of law infringement and not only administrative ones.

**Local municipality ordinances 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.

**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 (2005):** 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.

# POLAND

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2010 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: IIPA recommends that Poland remain on the Watch List in 2010.

**Executive Summary:** Copyright piracy in Poland is commonplace in both the hard goods and Internet areas, though the depth of the problem is not as dire as that found in neighboring countries. 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, though raids last year resulted in lowering the visibility of this problem. There has been no progress on banning the sale of optical discs sale in the trading rules of the local marketplaces. The business software sector experiences the greatest damage due to piracy in business organizations. Internet piracy, especially involving peer-to-peer (P2P) file-sharing networks, is on the rise. The Polish police are to be commended for their diligent work on Internet piracy cases; more resources for them would greatly aid this effort. 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 remain. Civil litigation is not a viable option. The continuing failure to impose deterrent penalties against copyright infringers, with respect to physical piracy and online piracy, contributes to the challenge in Poland.

The Polish government is in the midst of implementing its IPR strategic plan for 2008-2010. Legislative efforts to strengthen enforcement mechanisms, such as including criminal sanctions in the optical disc regulations and passing anti-camcording legislation, are still needed. Other efforts to examine amending the copyright law to address online issues and to regulate collecting societies is underway. Criminal procedures must be made more efficient and streamlined to avoid unnecessary delays. To avoid a high recidivism rate, Polish courts must impose adequately deterrent sentences.

**Priority actions requested to be taken in 2010:** IIPA believes that proper implementation of these eight points, at a minimum, by the Polish government in the near term will contribute to a higher level of IPR protection and will raise the efficiency among Polish law enforcement agencies.

- Enforcing local sale bans on pirate OD product, and monitoring markets both at the border and on the streets.
- Strengthening the divisions within police units which are responsible for Internet monitoring and gathering evidence for criminal proceedings so that more actions can be pursued.
- Appointing and training specialized IPR prosecutors and harmonizing evidentiary procedures.
- Introducing criminal sanctions to Copyright Law regarding the monitoring of optical discs
- Including *ex officio* actions in the copyright and criminal law.
- Introducing anti-camcording legislation.
- Withdrawing the reservation to Article 12 of the Rome Convention.
- Clarifying the law on the protection of technological protection measures to eliminate the need for evidence of an end-infringement and adding criminal provisions for the distribution of circumvention devices.

**Special 301 out-of-cycle review of 2009:** In our Special 301 submission for 2009, IIPA outlined 15 proposed actions--both enforcement-related and legislative--that we believed the Polish government should take to address copyright-specific enforcement and legislative issues.<sup>1</sup> In its April 2009 Special 301 Report, the Office of the U.S. Trade Representative announced that Poland would undergo an out-of-cycle review to monitor progress on intellectual property rights protection and enforcement.<sup>2</sup> On November 9, 2009, IIPA recommended to USTR that Poland remain on the Watch List,<sup>3</sup> and there we identified the seven areas of continuing concern (as listed above and discussed below). As of this 2010 filing, USTR has not yet issued its decision regarding its 2009 out-of-cycle review.

## **COPYRIGHT PIRACY IN POLAND**

The copyright industries face myriad forms of piracy in Poland, all of which harm the ability of the rights holders of the legitimate products to do business.

**Business software piracy in organizations (end-user piracy):** The Business Software Alliance (BSA) reports that 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. In addition, more and more illegal software products are being distributed via the Internet. BSA supports and promotes initiatives aimed at the implementation of voluntary auditing procedures to be applied by corporate end-users. From a public awareness perspective, the Ministry of Economy has cooperated with BSA in promoting software asset management in business under its "Zrób to Samo" (Do the SAMe) campaign. The aim of the campaign was--by promoting an example of Software Asset Management (SAM) good practice at the Ministry of Economy in the form of a case study and by other marketing initiatives--to encourage the Polish entrepreneurs and the public administration entities to implement a software assets management program including performance of a software audit. The expected result of the program was also to increase an awareness of Polish small- and medium-size businesses and the public administration entities in the field of intellectual property rights as well as efficient promotion of SAM policy as a professional standard within each organization. The Ministry took active role in the campaign.

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<sup>1</sup> The seven elements IIPA propose for 2010 also were included in IIPA's 2009 Special 301 submission, see <http://www.iipa.com/rbc/2009/2009SPEC301POLAND.pdf>. An eighth issue on technological protection measures has been added for this report. For more information on Poland and Special 301, see Appendices D and E at <http://www.iipa.com/pdf/2010SPEC301USTRHISTORY.pdf> and <http://www.iipa.com/pdf/2010SPEC301HISTORICALSUMMARY.pdf> of this submission. For more of IIPA's 2010 issues, see our cover letter at <http://www.iipa.com/pdf/2010SPEC301COVERLETTER.pdf>. The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2010 Special 301 submission at [www.iipa.com/pdf/2010spec301methodology.pdf](http://www.iipa.com/pdf/2010spec301methodology.pdf).

<sup>2</sup> USTR's 2009 Special 301 Report on Poland stated: "Poland will remain on the Watch List in 2009 and the United States will conduct an OCR to monitor progress on IPR protection and enforcement. The OCR will focus in particular on Poland's implementation of the National IPR Action Plan for 2008-2010 issued by Poland's Team for Counteracting Infringements of Copyright and Related Rights. The development of this plan may reflect a renewed Polish Government commitment to addressing persistent IPR problems. The United States recognizes: the police closure in early 2009 of one of the largest pirated optical disc distribution operations in Europe; the Government closure in 2007 of the notorious Warsaw Stadium market, where large quantities of counterfeit and pirated goods were being sold; and the efforts by law enforcement agencies to combat hard goods piracy. Poland has yet to make adequate progress against Internet piracy and the trade in pirated and counterfeit goods in markets on Poland's border with Germany. The U.S. copyright industries report that raids conducted at these border markets in early 2008 by Poland's Border Guard have begun to have a positive effect, but sustained enforcement actions are needed. In addition, Poland should take concrete steps to achieve its goal of increasing the effectiveness of criminal proceedings and prosecutions of IPR crimes, including encouraging its prosecutors and judges to seek and impose deterrent-level sentences. The United States encourages Poland to commit additional resources and attention to addressing these IPR protection and enforcement issues. We will monitor Poland's implementation of its National IPR Action Plan through the OCR." Posted at <http://www.ustr.gov/sites/default/files/Watch%20List.pdf>.

<sup>3</sup> IIPA's Nov. 9, 2009 submission on Poland's out of cycle review is at <http://www.iipa.com/pdf/IIPAPolandOCRsubmissionFINAL110909.pdf>.

More efforts by the Polish government to promote the acquisition and use of legal business software would benefit the Polish economy.<sup>4</sup> SAM policies should be implemented in more governmental entities, like in the Ministry of Economy. There are also numerous flea markets that still sell pirated software, e.g. in Kraków Balice and in Wrocław. BSA uses criminal enforcement and relies on good police cooperation to carry out Internet investigations. As reported last year, while the biggest Polish auction site is cooperative in limiting a scale of illegal distribution, it is still very often used for illegal distribution of software. BSA's preliminary estimates of trade losses due to business software piracy in Poland for 2009 are \$362 million, with a 54% piracy level.<sup>5</sup> This represents a slight drop in the piracy levels from 56% in 2009 and a larger drop in estimated losses (from \$389 million).

**Hard goods piracy -- optical disc piracy, street piracy, and the outdoor markets:** Hard goods piracy of copyrighted materials has shifted toward local burning of CD-Rs and DVD-Rs. The vast majority of pirate optical discs are sold by street vendors and at public flea markets. 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.

Polish pirates are also burning discs specifically for German consumers, distributing them at markets on the Polish-German border and in Germany. 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 over the last two years.

There has not been any significant change in the nature and scope of the piracy of music and sound recordings in Poland over the past year. The local recording industry association, ZPAV, estimates music piracy in Poland at the level of 27%. Fewer and fewer pressed pirate discs can be found on the streets, and most pirate carriers available at local marketplaces are CD-Rs. ZPAV has not observed an emergence of any major centre of pirate distribution. Pirate copies can still be found at marketplaces in Cracow and Wrocław. However, after successful raids by Border Guard officers at local marketplaces along the Polish-German border, the supply of pirate discs has significantly diminished, and this is a significant success. As discussed further below, Internet piracy is hurting the music and recording market the most. Such piracy occurs predominantly via cyberlockers, hyperlinks and P2P. Mobile piracy is spreading but Internet piracy is most prevalent. Most often the Internet Service Providers (ISPs) react promptly to ZPAV's notices and remove the infringing content. As far as peer-to-peer file-sharing networks are concerned, the ISPs prefer to co-operate with the police. According to ZPAV, the estimated level of music piracy in Poland was 25% in 2008, with the estimated piracy levels for U.S. music repertoire slightly higher at 27%. The level of physical piracy remains on the same level in 2009 but internet piracy estimates--which is the primary problem-- are approximately 20% higher (based on information regarding the Internet user activity in P2P and rapidly developing social networking websites). Estimated losses due to music piracy in Poland rose to US\$118 million in 2009, with the bulk of this due to Internet 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

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<sup>4</sup> 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.

<sup>5</sup> BSA's 2009 statistics are preliminary, represent the U.S. software publishers' share of software piracy losses in Poland, and follow the methodology compiled in the Sixth Annual BSA and IDC Global Software Piracy Study (May 2009), available at [www.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. These 2009 estimates will be finalized in mid-2010.

piracy continues to rise, and in 2009, Poland was again among the top ten (10) countries for infringing download activity. ESA estimates there to have been approximately 264,946 infringing copies<sup>6</sup> made of select ESA members' computer and video games through P2P file sharing by ISP subscribers in Poland during December, 2009. This comprises approximately 2.75% of the total number of illegal copies made by P2P users globally during this period. These figures place Poland as number 9 in highest overall volume of P2P game downloads, and number 11 in highest volume of P2P game downloads per capita during the study period. Breakdowns by ISP show that subscribers of Polish Telecom and Netia SA were responsible for approximately 63% of this activity occurring in Poland -- more than 167,000 downloads during the one-month period. These figures do not account for downloads that occur directly from hosted content, such as games found on "cyberlockers" or "one-click" hosting sites which continue to account each year for progressively greater volumes of infringing downloads. The number of unauthorized downloads of games for mobile devices has also grown, with sites such as [www.mobilebice.pl](http://www.mobilebice.pl) providing direct links to pirated content.

The growing rate of online piracy of entertainment software is made possible only because of the widespread availability of circumvention devices that are needed in order to disable the technological protection measures (TPMs) utilized by game publishers and console makers to prevent the playback of pirated games. Because Poland's TPM provisions provide for no criminal or civil sanctions for the distribution of such devices, there is nothing to deter pirates from entering the very lucrative market and selling circumvention devices.

According to the Motion Picture Association (MPA) and its Polish sister group FOTA, the problems of movie piracy in Poland remained relatively unchanged during 2009. 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 and Kraków). The majority of pirate discs are recordable (DVD-R and CD-R). 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. As noted above, P2P networks as well as cyberlockers and FTP servers are the most prevalent sources of unauthorized online protected content of movies.

The publishing industry reports that illegal photocopying of academic books and journals at copy shops in and around universities continues to be problematic. University administrators should be encouraged to adopt policies that promote appropriate use of copyrighted works on university campuses. The industry also notes that online piracy is a growing concern, with scanned books available for download from websites which unfortunately are typically hosted in Russia, thus making enforcement against such sites difficult. The Polish authorities are generally more responsive in cases involving online piracy, but appear to have no interest in taking action against copy shops engaged in illegal photocopying.

**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 20 million, representing 52% of the population (according to [www.internetworldstats.com](http://www.internetworldstats.com)). Internet websites offering exchange of links to illegal content were very active 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"). Polish Internet users often use international services to

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<sup>6</sup> This figure is representative only of the number of downloads of a small selection of game titles. Consequently, this figure is under-representative of the overall number of infringing downloads of entertainment software made during the period.

share copyright protected files, such as [rapidshare.com](http://rapidshare.com) and [hotfile.com](http://hotfile.com) as well as Usenet services such as newshosting.com (located in the United States). Any form of filtering these services would significantly reduce the levels of Internet piracy in Poland. 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. A dynamic increase in infringements is being noted on social networking websites such as: wrzuta, chomikuj, odsiebie, pobieraczek-commercial website. IFTA reports that a worldwide Internet monitoring program it conducted in the last quarter of 2009 for 90 of its Members films recorded over 4,500,000 instances of P2P infringements and almost 50,000 instances of OSP infringement. Poland ranked in the top ten countries for illegal downloading with over 150,000 instances of P2P infringements.

## **COPYRIGHT ENFORCEMENT IN POLAND**

**The national anti-piracy plan:** 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"), which was created in 2000, and the copyright private sectors participate in the meetings of this group.

Two working groups have been established within the framework of the Intergovernmental Committee for the Prevention of Copyright Infringements: "Internet" and "Optical Disc". The Internet Group which consists of representatives of the private sector and the Ministry of Culture and National Heritage, Ministry of Justice, State Prosecutor's Office and the Ministry of Interior, including the Main Police Office, has been working on proposals of amendments to the criminal part of the Copyright and Neighboring Rights Law. The Optical Disc Group began to work on the proposals of amendments to the Copyright and Neighboring Rights Law in the part referring to the optical disc production control and the Decision which regulates the law in this aspect.

In mid-2008, the Polish government adopted its IPR strategic plan for 2008-2010 (it issues such plans every three years). In November 2009, the Polish Ministry of Culture issued a comprehensive report on its accomplishments under the national plan during the first half of 2009 ("Special Report dealing with the Implementation of the Program For the Protection of Copyright and Related Rights 2008-2010", or "Mid-Year Report" here). The good news is that the police certainly have conducted a few high-profile cases against Internet piracy (strategic goal No. 4). The Ministry of Economy also has cooperated with the BSA in promoting software asset management in business (strategic goal No. 5—education). However, there is still much room for improvement, especially with respect to bringing criminal copyright prosecutions through judgment (strategic goals No. 1 and No. 2—improvement of effectiveness). Leads provided by industry to police are often not taken by prosecutors who reject institution of more complicated criminal proceedings. Finally, some of the plan's elements, such as those items that involve the purchase of necessary equipment or expansion of personnel have been delayed or not taken due to budget cuts.

**Recommended action items in the Special 301 context:** Below is a summary of the eight actions (numbering simply identifies the action, not in any particular priority) that IIPA believes merits continued attention and results by the Polish government.

**1. Enforcing local sale bans on pirate optical disc product, and monitoring markets both at the border and on the streets.** There has been recent progress reported on reducing the piracy problem, especially of recorded music at the borders. When it comes to street fairs not at the borders, more work can be done.

According to the local recording industry's statistics regarding the activity of law enforcement agencies at near-border markets as well as flea markets in Wrocław and Krakow, 54 raids were conducted and 54 preliminary criminal



proceedings were initiated in result of these actions. The music industry's losses in these cases were estimated at 535,000 PLN (US\$181,800), and nearly 40,000 carriers in different formats were seized, mostly DVDs with music compressed to mp3 format, copied locally. The local music anti-piracy group (ZPAV) has noted no progress with regard to including the ban on optical disc sale in the trading rules of the marketplaces (which is the easiest and least costly solution which could regulate this issue, a solution requested by ZPAV on many occasions) .

Market monitoring should continue to be taken with respect to marketplaces along the Western border of Poland. The activity of the police and Border Guard at bazaars and outdoor markets in this area should be increased. It turns out that these businesses intertwine and the same organizers control and organize the replication of CD-Rs and production and distribution of counterfeit cigarettes. Both products are dedicated to the German market. To give a sense of this border problem, the international recording industry group IFPI conducted a review of 10 markets at the end of July 2009. These markets were predominantly at the Polish German border but did also include internal cities. Approximately 70% of the markets contained stalls selling counterfeit music discs which were openly on sale. There were a high quantity of stalls at these markets and there was no sense of concern from stall holders. Furthermore, monitoring of marketplaces in Krakow and Wroclaw that are well-known for the sale of pirate and counterfeit materials is necessary.

In most cases the land, where bazaars and outdoor markets are situated, belongs to the State Treasury and it is leased by market administrators from local authorities. A simple and fast solution would be an obligation for administrators, imposed by local authorities as a condition of a land lease, to introduce to their rules and regulations a provision on the ban of optical discs at the marketplace. Such activity should be followed by consistent enforcement of this rule by the marketplace's security agencies.

Taking action with the local governments to introduce bans on the sale and distribution of optical discs at local marketplaces is needed. Regular monitoring of producers and distributors of pirate discs by these law enforcement agencies is also recommended. The government's mid-year Report indicated that police and Border Guards took actions in bazaars and marketplace, confiscating over 17,300 pirated and counterfeit goods worth PLN 5.4 million. This included some actions around the infamous "Warsaw (Tenth Anniversary) Stadium," which was closed down some years ago.

The November 2009 Midyear Report indicated that during the first half of 2009, the Customs Service was involved in 899 cases, confiscating pirate and counterfeit goods, along with other non-IPR products (such as home appliances and cigarettes) worth of EUR 19 million (US\$26 million).

**2. Strengthening police actions against Internet piracy.** The copyright industries work closely with the police and greatly appreciate the support that they get. However, frequent personnel changes in the National Police Headquarters and the Ministry of Interior lead to constant changes in organizational structures, and often the professionals who have been trained and obtained significant and necessary expertise in copyright matters are transferred to other, non-IP units. Strengthening these police Internet teams with additional personal and technical resources within the existing police structure remains important.

The copyright industries report that cooperation with criminal authorities on Internet cases was very good. The Ministry of Culture and Police Headquarters meet regularly with the industries and work Internet issues. Continued cooperation between industry, Polish police, and its information technology team to take actions against Internet piracy should be supported. This should include using government resources to arm the police with additional resources for training and information technology (IT) equipment. The investigation and prosecution of copyright infringements on the Internet requires technical knowledge and adequate equipment. A stable organizational structure of police Internet teams would go far, too.

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.

With respect to music piracy actions, ZPAV is satisfied with the level of co-operation with law enforcement authorities, especially with the police. According to ZPAV's statistics for 2009, 765 criminal cases in total were instigated (321 hard goods and 444 Internet piracy). At least 149 cases were instigated by police upon ZPAV initiative against file-sharers in P2P network. The estimated value of losses generated by seized copies of music were 1,587,415 PLN (~US\$523,000), and the estimated value of losses in Internet cases (estimated on the basis of materials) was 1,540,000 PLN (~ US\$5,400,000). As examples of major actions, in September 2009, four individuals responsible for the upload of a pre-release album of Kazik Staszewski, one of the best known Polish artists, were found and detained in a record time (10 days from a leak appearing on the Internet). The investigation was carried out by the police in Rzeszow and ZPAV. The case generated wide media coverage and the commitment of police officers was appreciated. In November 2009, the police shut down a service called Odsiebie.com, which allowed for hosting and sharing files. Apart from copyright protected music and films one could also find computer games and software in the service. Odsiebie.com was popular among Internet users, it was visited by about 2 million visitors a month. As the police have established, the administrators have not taken any action to limit the illegal practice.

On February 12, 2010, an Internet forum which provided links to movies and TV shows hosted on sites such as Rapidshare was raided by Polish police.<sup>7</sup> Following an anti-piracy group investigation by FOTA and the police, three alleged operators of file-sharing site Filmowisko were arrested. The site, which had 30,000 members, did not host any illicit material but provided links to movies, TV shows, music and other warez stored on hosting sites such as Rapidshare, and benefitted financially from advertising on its site. In addition to the arrests police also conducted searches on site members in three other locations and seized 6 computers and 150 DVDs and CDs which allegedly contained copyright infringing content. The evidence is now being examined by forensic experts.

With respect to voluntary actions, usually 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. ZPAV collects information on the active public DC++ hubs where copyright protected music is shared. This information is forwarded to the National Police Headquarters, and then passed to local police units for further use. As a result of these actions the number of such hubs has decreased by 80% within one year. A key reason why there is so much action in the criminal sphere is because rights holders using civil processes in Poland 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. BSA reports that it does not bring P2P cases in Poland but it supports law enforcement authorities whenever it is needed; 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.

The music and recording industry has taken additional steps to identify problems with bringing criminal Internet actions. They report that ISPs asked by the police to provide personal details of suspected infringers are often unable to identify the infringer due to the following reasons: they do not keep logs or a given IP address is used by a few or even a hundred users.<sup>8</sup> Such obstacles require a reform in the telecommunication law.

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<sup>7</sup> Blog post by Enigmax, "Three Arrested As Police Swoop on Rapidshare Link Forum," February 16, 2010.

<sup>8</sup> Specifically, 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

The process of possible co-operation with ISPs is at the initial stage. The positive aspect is that the representatives of the Ministry of Culture and National Heritage participate in the talks. It is difficult to predict at the moment what will be the results of these talks and when they will be completed.

IIPA members also continue to report that the Police Economic Crime Department in Wroclaw has taken down the country's largest file-sharing portal, instantly denying access to more than 4 million visiting infringers and arresting the administrators as they planned to expand their business. For example, on October 26, 2009, police took action against the administrators and arrested two Wroclaw residents, aged 21 and 41 years. While the site was registered in Poland, the site administrators had purchased server space on a number of servers abroad and allowed users to open free accounts for the storage of illegal content. Links to the content were also posted to external sites and the administrators had not taken any appropriate crime reduction action; the trading and exchange of illegal content was a simple process of uploading and downloading for free. This site allowed visitors to exchange copyrighted content on a massive scale, including the trading of movies, computer games, music and computer software. Police investigation revealed that there had been 120 million visitors to the site. During the ensuing search of the suspects' residence, police seized documentation, portable memory drives, pirated software and computer equipment, and a car, in anticipation of the future court penalty.

Speaking more broadly, the number of police officers that could investigate copyright infringement cases is not satisfactory. The government has adopted a plan of budget cuts for the police which led to their unwillingness to undertake such cases as there is always a problem of covering costs for forensic expertise of secured hard drives. The expertise of police IT specialists is not honored by the courts — the courts require expertise of an independent expert, which is quite an expense for the police.

**3. Appointing specialized IPR prosecutors and harmonizing evidentiary procedures.** The appointment of prosecutors who possess specialized knowledge indispensable in copyright cases (including technical knowledge of end-user piracy of business software, the reproduction of optical discs like CDs, DVDs, CD-Rs and DVD-Rs, and the functioning of Internet infrastructure and P2P networks) -- within the existing structure of the Ministry of Justice -- is strongly recommended.

The copyright sectors believe that such cooperation with specialized prosecutors will facilitate public/private anti-piracy activities. Maintaining organizational continuity among the prosecutors, independent of any changes in political personnel, is also critical. In addition, various regions in Poland currently have different requirements as to submitted evidence and documents. It is essential to have the procedures unified in practice and especially to understand all of the complicated issues related to the distribution of files on the Internet. There is still a general problem at the prosecutorial level in that prosecutors tend to terminate more complicated proceedings or they do not initiate them at all.

Regarding music piracy, ZPAV reports the following results of the 765 cases which were instigated in 2009. First, 40 Internet piracy cases were finalized with a positive outcome—usually sentences with suspended imprisonment,

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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.

requiring the payment of damages in most cases. Second, 56 physical piracy cases were finalized with a positive outcome, and 57 physical piracy cases were finalized with a negative outcome. Third, 122 Internet piracy cases were finalized with a negative outcome, the usual justification being the inability to determine the perpetrator or the lack of characteristics of a crime. Such situation is caused mainly by two factors: the inability of ISPs to provide information on the infringing users (lack of log registers) and erroneous evaluation of the evidentiary material by the prosecutors. Fourth, some of the cases were discontinued due to minor social damage, although these were not predominant. And first, the currently pending cases include: 207 Internet cases investigated, 133 physical piracy cases investigated, 75 internet piracy cases in Court, and 75 physical piracy cases in court. Finally, there are over 4,000 other criminal cases in different procedural stages.

BSA notes that in 2009 the Polish police were active in investigating cases of software piracy. BSA is aware of 150 raids conducted in Poland in 2009 related to software piracy (69 initiated by BSA and 81 known so far, performed as *ex officio*), 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). Almost 4,000 CDs and over 80 hard drives were seized in the course of these raids. BSA members have submitted 200 motions for prosecution. 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. If cases are continued they 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 2009, an ESA member company was informed that law enforcement authorities had initiated over 1,500 new cases involving its products, though most of the cases involved small quantities of seized products (typically only 15-30). 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.

With respect to audiovisual piracy actions, FOTA reports that they experienced continued cooperation with law enforcement and reports numerous raids were run in 2009. In 2009, FOTA assisted in over 650 investigations which resulted in over 600 police raids and criminal cases. As a result of these raids, 112,000 DVDs and 75,500 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 60% of these investigations were dedicated to Internet piracy. 80% of these cases resulted in prosecutions. Camcord piracy also remains a concern in Poland with the audios of three member company films sourced to Polish theaters in 2009 and already another audio sourced to Poland in 2010. These Polish audio-tracks are then coupled with video sources and uploaded to the Internet. 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. FOTA indicates that about half of its police raids and criminal cases involved Internet piracy.

**4. Introducing criminal sanctions to Copyright Law regarding the monitoring of optical discs production.** Poland has a decree (2004) that regulates and governs the production of optical discs in Poland. At the time of its enactment and since then, the copyright industries have expressed concerns about effective enforcement given the lack of criminal sanctions in that decree for the failure to perform the obligation of reports by some plants. Such sanctions were proposed by the Senate during the course of the legislation process, but the Sejm never approved them. Another legislative vehicle containing such provisions to the copyright law has been ready for several years, but no action has been taken. Talks are pending as to the introduction of necessary amendments to the Copyright Law and a decree of the Ministry of Culture.

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. The technological capacity of optical disc production is on the same level as in 2007 and 2008. Due to the huge number of orders from the EU, the plants use other facilities, such

as the Czech plants, to meet the demand. There continued to be scant evidence to suggest that Polish plants themselves 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 requires strong optical disc regulations that contain criminal sanctions, if only to minimize the risk of this capacity being used for illegal purposes.

The Masterbox case clearly indicates the necessity to introduce criminal sanctions to optical disc regulations. To summarize, one of the largest raids involving pirated discs in Europe happened in February 2009, when actions by the Polish police, working with rights holders, dismantled an organized criminal syndicate that produced and distributed pirated music and films on an industrial scale.<sup>9</sup> Raids were run on two replicating plants in Warsaw and Rybnik and a distribution centre in Zabki which were involved in the production and distribution of pirate music and films in the so-called Masterbox series. The organized criminal syndicate distributed an estimated nine million albums in Europe. The initial losses incurred by the music industry were estimated at 18 million euro. The Masterbox case is still pending.

5. Include *ex officio* actions in the copyright and criminal law. The introduction of *ex officio* procedures, in both the Polish criminal law and amendments to the copyright law, are needed to provide more effective procedures in Internet piracy cases. To this end, the Polish copyright industries submitted specific proposals to address the present lack of criminal penalties for Internet piracy to the Intergovernmental Team for Counteracting Copyright and Related Rights Infringements back in 2005, and have held various discussions with the government sector (including police, public prosecutors). Regrettably, years have passed and the Polish government has thus far failed to move forward with any specific proposal to address this.

BSA reports that the police do undertake *ex officio* raids in connection with business software piracy under the Polish criminal code. The possibility for these kinds of actions does not exist in case of non-software industries who rely solely on the Polish copyright act. Even in the software cases, police usually require additional evidentiary materials from the right holders (sometimes they need almost full evidence that infringement took place). It seems that such approach results from policy of Polish prosecutors who are reluctant to undertake more complicated software piracy cases. The Midyear Report also mentions (page 86) that the number of instituted proceedings has decreased.

ESA also reports that at least one of its members has had limited success in having police initiate *ex officio* actions. Unfortunately, the utility of these *ex officio* actions has been undermined by burdensome procedural requirements, such as a requirement that all injured parties join the case, that often result in the cases being suspended. This requirement is also extremely burdensome to rights holders who join the cases, as they must agree to appear when summoned as witness, often times only to confirm information that was already provided in a sworn statement.

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<sup>9</sup> In this 2009 action, the 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*.

6. **Introducing anti-camcording legislation.** Anti-camcording legislation should be adopted in Poland to require jail sentences, preferably of up to a year or longer for the first offense, with a higher penalty for any subsequent offense. 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. We ask that the U.S. government obtain the Polish government's views on their willingness to pursue this goal.

7. **Withdrawing the reservation to Article 12 of the Rome Convention:** The continuing lack of protection for foreign repertoire has greatly complicated licensing discussions between the relevant collecting societies and commercial users. While Poland's reservation under Article 12 may not be inconsistent with its international obligations, maintaining its "reservation" is just a politically correct way of expressing a policy based on denial of national treatment and discrimination against foreign rights holders with respect to broadcast rights, and should not be tolerated. In addition, the absence of protection for U.S. repertoire undermines the position of the entire sector, and removal of the reservation is supported by Polish rights holders.

8. **Clarifying and expanding Poland's TPM provisions:** Poland's TPM provisions are not currently sufficient to reduce the prevalence and widespread availability of circumvention devices. As previously discussed, Poland's current TPM regime affords only civil remedies, and only then to actual acts of circumvention. Because it is difficult, if not impossible, to effectively enforce against individual acts of circumvention, the WIPO Treaties (to which Poland is a member) requires that protection extend to "preparatory acts," such as the manufacture and distribution of circumvention devices. To fulfill its international obligations, Poland must extend coverage to preparatory acts and provide criminal remedies.

**Ongoing, systemic problems with prosecutions and the judiciary:** In prior years, IIPA and its members have identified a series of problems in the criminal courts. The civil courts are so unworkable that no one in the copyright community uses them to pursue remedies. Most of the criminal cases are sent to the courts but very few cases result in a sentence. Despite help provided by the industries' anti-piracy staffs to the prosecutors preparing the copyright cases, very few prosecutions result. The court proceedings take a long time and this is an impediment to the expeditious and efficient prosecution of infringement cases. The lack of transparency during the proceedings is also of concern; sometimes the affected companies are notified only after the outcome of the proceedings. Furthermore, cases typically do not result in deterrent sentences, but only with the imposition of minimal fines notwithstanding the quantity of infringing material seized. Courts still appoint 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) and this causes higher costs for the courts and delays prosecutions. Many cases are backlogged (at one point, over 5000 film cases were waiting for consideration). Finally, most sentences are insufficient to provide a reasonable level of deterrence, despite the fact that the penalties in the Copyright Law are severe (providing fines of up to US\$175,000 and jail sentences of up to five years). The copyright industries believe that specialized IP courts should be established. The bottom line is that more judges with IPR competences are needed in the courts.

**IPR Trainings:** The copyright industries continue to participate in seminars for law enforcement agencies. For example, the music industry (ZPAV) continues to participate and co-organize training seminars for police, the Border Guard and customs administration. ZPAV's workshops are included in the curriculum of the Police Academy in Szczytno and Police Education Centre, where they focus on the disclosure and collection of evidence material in Internet copyright infringements cases. ZPAV stands ready to provide training seminars for police officers and prosecutors who are interested in broadening their knowledge in this field. 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. Similarly, BSA

participates in trainings for police, prosecutors and judges. However, more training is required, particularly for prosecutors. 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. The only way to train judges is to include the subjection of copyright protection in the training programs organized by the Ministry of Justice.

The Midyear Report confirms that there have been a number of training sessions. For example, during the first half of 2009, 141 judges took part in a training courses on types of intellectual property rights and criminal remedies. More trainings were planned for December 2009.

## **COPYRIGHT AND RELATED LEGAL REFORM IN POLAND**

Possible copyright law reform: An "Internet team" of the Intergovernmental Group for Counteracting Infringements of Copyright and Related Rights is evaluating possibilities to amend the copyright law to improve copyright protection in the online environments. Reports suggest that the proposed changes would focus on precise definitions of terminology and specifying the forms of infringements and offenses.

**Copyright and Neighboring Rights Act:** 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, including provisions regarding the regulation of optical disc production (issued in June 2004). Unfortunately, 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 – in addition to the deficiencies discussed earlier, 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 could pose a problem because it seems to exclude from criminal remedies a wide range of activities which are very harmful to rights holders. It should be confirmed that this criminal liability for both hard goods and online piracy is available under this article.

- 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).

**Copyright amendment bill on collective management:** Legislative efforts to revise the copyright law to address collective management issues have been underway for some time. 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. On January 26, 2009, the Polish government submitted to the Parliament a Bill of amendments to the copyright law containing proposals for complex regulation of collective management issues.

On a separate track, in December 2009 the Special Sub-Commission established to draft the copyright and neighboring rights law reform in the field of rights collective management finalized its discussions. A draft text of amendments was prepared by the sub-commission, much different from the one which had been forwarded to Parliament by the government (document No. 1628). It needs to be emphasized that the representatives of the government—the Ministry of Culture and National Heritage—have been actively involved in the Sub-Commission’s work in their efforts to improve the position of rights holders in fixing tariffs and in the system of the Copyright Law Commission’s operation. The proposed changes go far beyond the 2006 decision of the Constitutional Court, which found Article 108 item 3 of the Copyright and Neighboring Rights Law unconstitutional. According to the Court, this provision did not provide the rights holders with adequate representation in the process of tariff creation by the Copyright Law Commission. The provision was deleted from the copyright law in 2006 and the legislative process in this area has been pending since then. No session of the Commission has taken place since that time and no tariffs have been approved. This situation is not favorable for all participants in this process, and especially for rights holders. The government has decided to introduce a broad reform, which, as mentioned above, goes far beyond the decision of the Constitutional Court.

The current draft – as developed by the Sub-Commission – is definitely a compromise, but needs some further work. It has been forwarded in January 2010 to many groups with a request for comments. Many comments have been provided, different in content, depending on the group submitting them (copyright and neighboring rights management organizations, broadcasting organizations, telecom chambers, etc.). A session of the Commission of Culture and Mass Media, which leads the issue in Parliament, is planned for February 16, 2010. It is difficult to say at this time which direction the parliamentary debate will go—whether there will be a second reading in Parliament or the commission shall decide to continue discussions. ZPAV representatives have been actively involved in the works of the sub-commission and parliamentary commission, but the decision will be made by the Ministers of Parliament. From the point of view of the collecting societies, this draft of copyright law reform is definitely better than the initial proposal submitted by the government. It is not good enough, however, to be fully accepted.

**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.

## **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 MPA 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) 2010 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: IIPA recommends that Romania remain on the Watch List in 2010.

**Executive Summary:** The new Romanian government needs to express a commitment to enforce the law and reduce copyright piracy and instruct all enforcement authorities (from police to prosecutors to the courts) to take sustained and concrete actions to support that commitment.

The music industry reports that the problems of Internet piracy, especially peer-to-peer file-sharing and hub sites, continue to grow. Optical disc piracy (including local burning), a pervasive phenomenon several years ago, has declined over the last three years. Still, infringing copies of films and videogames can be found on the streets. While unlicensed business application programs and hard disk loading remain a key challenge for the business software industry, the Romanian government has taken efforts to legalize software within its offices.

Both the music and recording and the business software industries reported generally good cooperation with Romanian police authorities during 2009, as the police took raids and actions against hard goods piracy, end user piracy and internet piracy. Unfortunately, the hard work of the police is diminished because enforcement breaks down at the prosecutorial level. Although cooperation with prosecutors is good, many music piracy and some business software piracy cases continue to be closed by the prosecutors based on a perceived "lack of social harm," among other reasons. For the first time, two convictions against companies (apart from convictions for the owners thereof) for business software infringement were issued last year, making it through a usually challenged criminal process. However, much more needs to be done to ensure full prosecutions and deterrent sentencing. To complicate matters, the Romanian Copyright Office (ORDA) continues to undermine enforcement, especially in the music area; it still supervises the objectionable and expensive stickering system and causes some delays in delivering its forensic technical reports on pirated materials to the police; however, the situation has improved from the previous years, when such delays were substantial thus impeding a due course of action. ORDA did initiate several meetings last year to address these longstanding problems but so far there had been no resolution; this delay is also due to the political situation which made it difficult to have legislative drafts promoted and adopted. Finally, discussions have been held over the past two years regarding possible copyright reform efforts, and the Ministry of Culture is reviewing matters; rights holders request that their input and expertise be heard in order to close important gaps in the current legislation.

The Romanian government needs also to address the issues that concern the data retention legislation. We had hoped that a revised version of the data retention law would be introduced in January 2009. However, the ongoing delay in the introduction of this legislation has provided ISPs with an excuse to obstruct cooperation. After this law was struck down by the court, we are back to square one, i.e. the police can request disclosure, which is good. Romania must transpose the EU Data Retention Directive. It is imperative that new legislation to achieve this is clear in that "serious crimes" must encompass copyright violations, regardless of whether or not they were performed by a criminal organized group, and that peer-to-peer (P2P) infringements are included.

**Priority actions requested to be taken in 2010:** The copyright industries recommend that the following actions be taken in the near term in Romania in order to improve protection of copyrighted materials:

### Enforcement

- Senior levels of the Romanian government must develop strong political will and express a commitment to eradicate copyright piracy and instruct all enforcement authorities to 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.
- Rights holders' organizations should be permitted to serve as court experts in copyright infringement cases.
- Get prosecutors to give high priority to the prosecution of IPR cases, including Internet cases. 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.
- Impose deterrent, non-suspended sentences (in criminal courts) and fines, and stop dismissing cases, especially those involving repeat offenders.
- Establish specialized independent IPR courts under the Appeals Court to alleviate current problems in the civil courts, which are overburdened by IPR cases. Establishing specialized courts or at least panels with criminal jurisdiction should also be considered.

### Legislation

- With respect to ORDA (the Copyright Office), (1) the statutory stickering (hologram) system should be abolished; (2) ORDA's track recordation system for sound recordings should be made voluntary and free of charge; and (3) ORDA's tariffs should be substantially reduced.
- Remove the warrant requirement for search of computers in public areas; this could be accomplished by amending 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.
- 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.

## COPYRIGHT PIRACY IN ROMANIA<sup>1</sup>

Internet piracy: There are about 7.4 million Internet users in Romania, about 33% of the country's population (as of September 2008, according to [www.internetworldstats.com](http://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++, and Stron DC. 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.

The music recording industry (which is represented by the national trade organization AIMR and the music collecting society UPFR) reports that the level of Internet piracy in Romania is so high that the music industry is struggling to develop more legitimate on-line services and the existing ones are facing unfair competition from the massively available pirated free offer. The main segment of music Internet piracy involves P2P (peer-to-peer) file-sharing yet cyber locker sites are catching up. An encouraging point is that the administrators of such sites almost always cooperate in taking down infringing links. Online services are developing to sell legitimate digital products in collaboration with the recording industry labels. It is difficult to establish the losses in sales due to the increased piracy, but the labels are turning to the digital sector and are making efforts to concentrate legitimate sales here. Recent public awareness efforts

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<sup>1</sup> For more information on Romania under the Special 301 review process, see Appendices D and E of IIPA's submission at <http://www.iipa.com/pdf/2010PEC301USTRHISTORY.pdf> and <http://www.iipa.com/pdf/2010PEC301HISTORICALSUMMARY.pdf>. For a summary of IIPA's 2010 global issues, see our cover letter at <http://www.iipa.com/pdf/2010PEC301COVERLETTER.pdf>.

to communicate some of the music piracy to the public resulted in a large number of users eliminating music content from their shared folders (e.g. reduced music content shared on DC++ hubs).

The business software sector reports that it too has seen 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.

The Entertainment Software Association (ESA) also reports an escalating online piracy problem in Romania. ESA estimates there to have been approximately 217,840 infringing copies<sup>2</sup> made of select games through P2P file sharing by ISP subscribers in Romania during December, 2009. This comprises approximately 2.26% of the total number of illegal copies made by P2P users globally during this period. These figures place Romania as number 11 in highest overall volume of P2P game downloads, and number 9 in highest volume of P2P game downloads per capita during the study period. Breakdowns by ISP show that subscribers of Romania Data Systems and ROMTelecom were responsible for approximately 85% of this activity occurring in Romania--more than 186,000 downloads during the one-month period. These figures do not account for downloads that occur directly from hosted content, such as games found on "cyberlockers" or "one-click" hosting sites which continue to account each year for progressively greater volumes of infringing downloads.

Last year, the Romanian copyright Office (ORDA), along with the Ministry of Culture, initiated a dialogue with the copyright rights holders and the Internet service providers to find ways to promote the legitimate usage of protected content and effective protection of copyrighted content on their online networks. These discussions are still at an early stage but it is critically important that the new Administration give these discussions its backing and make them a priority. Rights holders have expressed hope for better collaboration with the authorities having control attributions in the digital domain and with the ISPs to find more effective solutions to protect the content and products on the Internet.

**End-user 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). Under-licensing of software product is a significant problem. 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 last year, but BSA acknowledges that is not the most harmful form affecting its sector in Romania. BSA appreciates the work of the police in taking anti-piracy and the government in taking significant steps to legalize its own software. BSA reports that its preliminary estimated trade losses for business software piracy in Romania in 2009 rose to \$156 million, while the estimated piracy level fell to 66%.<sup>3</sup> BSA members reported a major decline in sales of software products in Romania last year, but are not able to clearly relate such trend to crisis conditions, to software piracy or to another reasons.

**Hard goods 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 three years, as Internet piracy has become more popular. Street piracy as of music piracy is very low, although there have been identified cases in Mehedinti, Braila and Arad. The motion picture industry is also negatively impacted by street piracy. Street piracy also affects other industries in Timisoara, Mehedinti, Caras-Severin, Constanta, Iasi, Craiova, Dolj, Arad (but decreasing), and Cluj.

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<sup>2</sup> This figure is representative only of the number of downloads of a small selection of game titles. Consequently, this figure is under-representative of the overall number of infringing downloads of entertainment software made during the period.

<sup>3</sup> BSA's 2009 statistics are preliminary, represent the U.S. software publishers' share of software piracy losses in Romania, and follow the methodology compiled in the Sixth Annual BSA and IDC Global Software Piracy Study (May 2009), available at [www.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. Final 2009 BSA data will be issued in mid-2010.

The music and sound recording industry reports that, with respect to physical piracy, very few stores, commercial centers or markets sell pirated music. The street ban appears to be working, as fewer pirated materials appear on the streets. There are indications, however, of slightly more couriers selling products on the street. 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. For example, the local sound recording industry group has identified at least 94 such illegal studios all over the country (București, Alexandria, Alba, Cluj, Constanța, Bacău, Brașov, Bistrița Năsăud, Brăila, Cîmpulung, Craiova, Drobeta T. Severin, Giurgiu, Hunedoara, Iași, Ilfov, Gorj, Năvodari, Piatra Neamț, Prahova, Reșița, Săcele, Sibiu, Târgoviște, Teleorman, Tîrgu Mureș, Timiș). The digital music piracy rate in 2009, as in 2008, 2008 was almost 100%. The situation is exacerbated by the fact that, even those cases that have been conducted successfully by the police, few have been sent to the court.

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 2008). An ESA member company reports that 48 new criminal cases were initiated on its behalf in 2008, less than the number of cases (114) it supported in 2008. However, only five of the cases initiated in 2008 reached the trial stage, each resulting in a verdict/judgment. 27 cases initiated in 2008 or earlier also achieved disposition in 2009.

With respect to audiovisual piracy, pirate burned DVDs, even of new releases, are sold on the streets due to a rapid adaptation of infringers to a new legal business model (whereby legitimate videos are sold with newspapers in special projects developed by licensees). Pirates are using the Internet to market and sell illegal hard goods and illicit Blue Ray discs are available. Online piracy, particularly P2P piracy, is also negatively impacting legal business models.

## COPYRIGHT LAW AND RELATED ISSUES

There are a variety of Romanian laws that affect the ability of rights holders to protect their content and for the authorities (both criminal and administrative) to enforce the law.

**Problems with the data retention law and Internet anti-piracy enforcement:** 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). 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.<sup>4</sup> 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 notified by the authorities that his client is performing an infringement.<sup>5</sup> The Constitutional Court ruled in October 2009 that the law regarding data retention (published in 2008) was unconstitutional due to the fact that "it allowed Police Officers to commit abuses". This was because the terminology of the technical terms was not correctly worded. The Romanian data retention law treated two distinct elements under the same form. One element was the traffic data (which basically is what flows on the "pipe" when the user is connected to the Internet) and the other element was the identity of

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<sup>4</sup> For example, there is an unclear reference of such liability in the copyright law. (See Article 143<sup>2</sup> –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.)

<sup>5</sup> 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 unspecific obligation is unenforceable.

the user that could be obtained by associating an IP address to a name, based on the investigated activity. Obviously, these two elements are separated, where the last one should be considered “traffic data” because nothing is “traffic” on an identity.

Before, when the former law was in force, the ISP would simply refuse to offer the identity to the police officers on claims that this is traffic data, and the police officer needed to go to the prosecutor who needs to go to a judge and ask for a search warrant. It had to be shown that the case represents a “serious crime”, as the procedural law required. In practice, this was almost impossible to obtain, because judges do not issue warrants for such issues as they do not consider Internet piracy cases as “serious crimes”. After the law was declared unconstitutional, the situation reversed to the initial state that existed before, wherein the ISP could not claim anything and was forced to give the requested identity to the police officers directly. It is important for the Romanian Government to separate the terms in the data retention law, because it allows ISPs to refuse (based on a bad wording of the text) any request from the police officers as per internet infringers’ identity. Also, the “serious infraction” limitation should be removed.

The data retention law is now being held back for further modifications because it was vague and allowed the interpretation that the Internet user’s identity is to be considered traffic data. This raised the issue that police officers could commit abuses in one’s private life when requesting the associated identification data of an IP address being investigated. However, at this point, with the data retention law set aside, the practical procedure involving Internet piracy case investigations is reversed from the situation before this law where police officers were very much entitled to request identity information from the ISP based on investigated internet protocol addresses. So, at this moment the situation is better than before when it comes to the practical way of handling Internet piracy cases. What the next iteration of legal provisions on data protection is not yet known. However, since Romania is obligated to properly transpose the EU data retention directive, and hence new legislation on this will have to be introduced, it is critical that this legislation be worded in such terms that make it clear that copyright infringements are serious offenses for which the police will have the authority to request disclosure of user identity data.

**Copyright law reform:** Last year, a large group of copyright rights holders developed proposals to refine the Romanian copyright law. This proposal was submitted to the Romanian Copyright Office and the Ministry of Culture, and the consultation is still underway. The scope of this proposal covered four subjects: (1) the elimination of the articles that establish the remuneration for the related rights not being able to exceed one-third of the remuneration for the authors’ rights; (2) the elimination of the articles that establish that for the cable retransmission of the “must-carry” programs, there are no remunerations for the authors rights or for the related rights; (3) the amendment of several articles regarding the collective management system for the related rights in the case of radio broadcasting; (4) the expansion of the definition of importation in order to include the acquisitions from EU countries for private copying; and (5) eliminating the search warrant prerequisite for raids at companies.

BSA reports that ongoing efforts to draft amendments to the Government Ordinance No. 25 of 2006 reportedly includes an obligation for software distributors to inform customers about software piracy risks; this proposal was accepted by the Romanian Copyright Office in its official draft.

The 1996 Romanian Copyright Law has been consistently amended a number of times in the past decade. Various amendments were made in 2004 <sup>6</sup>, 2005 <sup>7</sup>, and 2006 <sup>8</sup>, many of which were aimed at coming into compliance

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<sup>6</sup> 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.

<sup>7</sup> 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

with EU Directives. 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. Some problematic provisions reported by local industry colleagues remain. Article 143, which provides protection for technological protection measures, 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, Article 121(2) 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).

**ORDA, the hologram system and ineffective administrative enforcement:** The music 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. This industry has objected to this entire hologram system for more than five years. Last year ORDA initiated several meetings with industry to correct or modify these problems, but there has been no modifications of the system, pending revision of the law.

In November 2008, Decision No. 1086 of 2008 added more 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. It also showed that the government intended to remove this entire regulatory systems. The 2008 decision regulates the procedure of registering recorded music titles and videograms in the National Phonogram Registry.<sup>9</sup> It also regulates ORDA's performance of forensic examinations and the two types of expert analyses and reports. Both activities have prohibitively high tariffs, which constitutes a serious impediment to copyright 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. ORDA does have administrative enforcement abilities and does not do a very good job there (see further discussion below)

**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). This street ban has been a positive move. However, retail piracy has moved from the streets to the newspaper stands or to closed circles in housing compounds and offices.

**Government software legalization (2004):** BSA appreciates the work the Government has undertaken to legalize its own software use in 2004 (under Decree H.G. Number 470/01-04-2004) and then in 2009. The business software industry looks forward to continuing to work with the Government to ensure that the gains made through this effort continue into the future.

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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 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*."

<sup>8</sup> 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.

<sup>9</sup> 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.

**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 should be amended to provide that the mere verification of the existence of software installed on computer should not require such a search warrant. BSA hopes that this issue can be included in the copyright law reform process.

ESA also reports that the burdensome warrant requirements have had the effect of impeding enforcement actions, particularly in the case of Internet cafés that utilize pirated copies of entertainment software. Because these computers are in public areas, and indeed are provided explicitly for public use, a search requirement should not be required in order to verify the existence of pirated software on these systems.

**Criminal Code reform delayed:** A large part of the Criminal Code reform in 2006, including the intellectual property chapter, was postponed until September 1, 2008 then, until September 1, 2009, and then, again, until January 1<sup>st</sup>, 2011. 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.

## **COPYRIGHT ENFORCEMENT IN ROMANIA**

Given the depth of piracy problems in Romania and the importance of rule of law, senior levels of Romania's government need to commit to eradicate copyright piracy and instruct all enforcement authorities to 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--Anti-fraud 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 it used to meet almost every month. Lately, however, there has been a decrease of the public authorities' (i.e. the Public Ministry) interest in organizing such meetings.

**Business software reports good work with police and prosecutors during 2009, and obtained first-ever criminal convictions against companies:** BSA reports that its relationships with the Romanian enforcement authorities was good in 2009, resulting in some excellent raids against large targets. 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 when Romania was readying to join the EU.

BSA reports that the Romanian authorities took *ex officio* actions and were receptive to private industry's referrals. In 2009, BSA had more than 500 new raids (more than 430 end-users, more than 50 for resellers and about 15 for hard-disk loading). Large companies were targeted (for instance, there was a raid targeting a company that had seven office locations and more than 600 PCs) and there was a constant number of raids against hard disk loaders (another



BSA priority). BSA indicated that although prosecutors did continue to drop some of their cases for lack of social harm, in general the prosecutors were transparent in their activities and in their contacts with rights holders.

There were 24 convictions in software cases in 2009 (a slight decrease compared to 2008, due likely to the two-month magistrate's strike where no judicial actions took place). Also, on a very positive note, BSA reports that in 2009, the first two convictions against companies were achieved (the defendant received fines and a criminal record, on top of criminal penalties for their administrators and damages). In 2009, with the average sentence was 1.25 years of suspended imprisonment for persons (illegal distributors and administrators of companies infringing software copyrights) and €4,700 (US\$6,450) criminal fine for companies. 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 2010, BSA believes that actions against large end-users (companies) and hard-disk loading cases need to continue.

With respect to criminal Internet actions involving business software applications, BSA believes there are several 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. (The recent Constitutional Court decision will have an impact on this matter; it is too early to evaluate what exactly that impact might be). Second, the longstanding problem involving the need for a computer search warrant still cause problems and delays (see discussion above). 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 five years later it is still unsolved. Third, 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. Moreover, ISPs have no legal obligation or incentive to cooperate with rights holders.

**Music industry reports cooperation and raids, but cases continue to be dropped:** The music and recording industry has good rapport with the police and prosecutors, in both hard goods and Internet cases; still some hard good cases are dropped. Civil actions are also underway in the Internet realm, although too many are closed by the prosecutors based on a perceived "lack of social harm," among other reasons. The local music industry organizations (both UPFR and AIMR) report the following legal actions taken in 2009.

The music industry reports good cooperation with police officers both in Bucharest and outside Bucharest on physical piracy cases, and have obtained positive results. Most police officers now have good knowledge regarding investigatory procedures in physical music piracy cases, work well with industry representatives, and also start *ex officio* cases, most of which end up in court. Hard goods piracy consists more of mail order piracy and burned products. Street vendors are not as frequent as before, but there have been such cases mostly outside Bucharest. With respect to physical music piracy cases in 2009, 28 criminal complaints were filed by AIMR, and in 186 criminal investigations, AIMR asked for damages (the damages totaled 1,335,880 lei, ~ €324.360 (US\$442,100). However, in 133 criminal cases, the prosecutors dropped the case due to lack of social harm and applied administrative fines (between 150-500 lei each ~ €36 – €121 each ~ US\$50 – US\$165 each), without any damages being paid to AIMR/UPFR. Furthermore, 29 cases of physical piracy cases have been sent to the court. Only 7 of those have been concluded, in which it has been decided a penalty of up to 2 years of imprisonment, suspended.

Internet action are a priority for the music industry and efforts have concentrated on DC++ cases. The main issue regarding Internet piracy is the lack of response from the ISP to the police officers as related to identifying a user behind an IP address. It takes a lot of time to obtain a response and sometimes the ISP responds evasive claiming that it cannot be established who used the respective IP at that time indicated in the complaint.

During the past year, the music industry anti-piracy organizations have developed and maintained good relations with 12 prosecutors in Bucharest, Sibiu, Arad, Constanta, Calarasi, Arges, Botosani, Cluj, and Suceava. All of them have been properly trained in the IPR issues and fully cooperate with our inspectors on digital piracy cases. None of them drop

the cases based on lack of social harm. The most frequent collaboration was with DC++ user cases which were treated seriously and all of them lead to successful raids. There are still some counties where this is not the case, and it is difficult to present digital piracy cases, but overall there was an improvement in the way prosecutors treat this issue. New piracy cases have been identified in Giurgiu and Alexandria after almost 2 years in which there have been no cases identified in those counties. This lead to a better relationship with the local police officers and the new prosecutors. Also, in Giurgiu after several discussions on the IPR subject, the police officers have developed a better understanding, and an advantage is that they have good informal relationships with ISPs and are able to obtain information with more ease. In Tulcea, there are new and young police officers and they manifested positively. Overall, the collaboration level for 2009 was the same as in 2008, and slightly better with the Police officers and Prosecutors in Tulcea, Olt, Alexandria, Giurgiu, Bistrita Nasaud and Bacau. Industry collaboration remains excellent with police officers in Alba, Arges, Galati, Suceava, Gorj, Dolj, Mehedinti, Călărași, Cluj, Timis, Brasov, Iasi, Constanta and Mures. The authorities are also taking ex officio actions in Arad, Timisoara, Mehedinti, Bistrita Nasaud, Sibiu, Constanta, Brasov, Galati and Braila. This is applied to both hard good piracy and Internet piracy cases. In these countries, the prosecutors have a good relationship with the judges in promoting our interests further. Regarding physical music piracy, there are over 50 criminal cases in court.

Regarding Internet piracy cases, in 2009 AIMR filed 102 criminal complaints and asked for damages in 15 cases (the damages total being approximately 200,000 lei ~ €48,560 ~ US\$66,150). In 69 criminal cases, the prosecutors' office dropped the case with only an administrative fine. In 7 cases, the industry was informed that it was impossible to identify the infringer from traffic data. In the criminal court there are only 2 Internet music piracy cases, without a solution. .

Currently there are more than 7 civil cases pending, the object of the litigation aimed at having the parties pay damages for acts of infringement online (e.g. posting files in P2P networks, selling ringtones, developing digital platforms on which illegal content is posted etc.) Without precedent in Romania, there has been a solution to UPFR's request of damages resulted from piracy actions on the Internet (making available to the public through a DC++ share from one user). Through a civil sentence, the defendant was forced to pay material damages in quantum of approximately 3,000 EUR. Evidence included the materials resulting from the criminal pursuit from the case against the respective infringer where the prosecutor dropped the case due to lack of social harm and set an administrative fine. Currently pending there are 4 more similar cases in the Civil Court. There are two 2 criminal cases in Court regarding the liability of the Internet providers for the content made available to the public.

The entertainment software industry also received cooperation from law enforcement authorities. 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. Unfortunately, cooperation did not extend to all phases of prosecutions. Prosecutors continued to dismiss cases for "lack of social harm," at a similar rate in 2009. In 2009, almost 40 such dismissals occurred, about 10 times 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. One ESA member 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. 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.

**Problems with ORDA and its stickers and forensic examinations:** ORDA is an independent Government agency that has had various administrative enforcement powers rise and wane over recent years. The copyright industries have objected to two particular practices of ORDA for years.

First, ORDA still has 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 anti-piracy activities.<sup>10</sup> 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.

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. In practice, only ORDA provides expert reports, and there are not independent experts in the copyright domain. 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.<sup>11</sup>

**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. Romanian courts remain reluctant to impose deterrent penalties, with small fines, minimal damages, and suspended jail sentences continuing to be the norm.

As noted above, the music and recording industries reports that in 2009 many pending cases were dismissed and others are still pending. BSA reports that its first two criminal convictions against companies in end-user piracy cases occurred in 2009.<sup>12</sup>

Aside from the Bucharest Tribunal and the Appeal Court in Bucharest, there are no panels specialized on Intellectual Property issues, reason for which the IPR cases are processed by legal panels for civil causes or criminal depending on the case, without the judges to have a specialization in the IPR domain. In this context, there is the risk of a non-unitary practice at national level regarding the applicability of the legal provisions within the IPR domain (contradictory solutions or passed on a wrong interpretation of the IPR legislation).

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<sup>10</sup> 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.

<sup>11</sup> Of course, there are rules of incompatibility that are provided for by the criminal and civil procedure. This would mean, for example, that music experts (like AIMR) would be incompatible in cases where AIMR is part of the trial. They must be authorized as a judicial expert. More generally, it would be very useful and more fasten for our cases if right holders would make the expert reports but the statutory incompatibility is very difficult to change. For rights holders serving as court experts, the civil procedure code should be amended.

<sup>12</sup> BSA has obtained convictions since the 1999-2000 timeframe, but those were against natural persons. It was only in 2006 that the criminal liability of companies was adopted in the legislation and three years later, BSA has its first set of convictions.

The Romanian judicial system should be more receptive as in regards with the measures of insuring the evidence within the Internet and also in the case of Piracy and counterfeiting goods, sense in which the legal frame should be improved in the sense of involving the state authorities in the applying such measures. At this time, the procedure forces the press of legal charges against the defendant in order to ask the court to apply insuring measures on the evidence. In this situation, when the defendant is practically warned of the intentions of the right holder, he destroys the evidence (e.g. music files, uploaded or made available on the Internet, or any counterfeited goods he holds in a certain place), without having the possibility to prove the infringement. Securing the evidence in the informatics system is one of great importance, given the extraordinary degree of piracy on the Internet; indeed, the hesitation and reticence of police investigators and prosecutors in applying searches or securing the evidence on computer systems is startling.

**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 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. Appeals take even longer.

**IPR trainings and public awareness:** The music and recording industry reports that although it did not have any formal organized seminars in 2009, it did work directly with police officers on collaborating on anti-piracy investigations, and that was a positive experience. This sector does plan to organize regional seminars in 2010. 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. The BSA organized a training in October 2009 for 75 police officers and prosecutors, and inspectors from ORDA were also invited.

# SINGAPORE

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

### 2010 SPECIAL 301 REPORT ON COPYRIGHT ENFORCEMENT AND PROTECTION

**Recommendation:** IIPA urges USTR to place Singapore on the Special 301 Watch List.

**Executive Summary:** While the copyright law and enforcement provisions of Singapore's Free Trade Agreement with the United States, which came into force in 2005, have been largely successful, several significant shortfalls must be addressed. Corporate end-user piracy of business software continues unabated; and with only a single prosecution in such cases, and inadequate penalties available, Singapore's FTA compliance can be questioned. Singapore's music market is beset by piracy, online and offline, and the government's response is clearly inadequate. Its continued refusal to bring public prosecutions of music pirates, and its failure to bring Internet Service Providers into a cooperative stance with rights holders, also raise serious FTA compliance questions. Singapore should also join the global trend and outlaw camcording in its cinemas, before a festering problem becomes more serious.

#### ACTIONS WHICH THE SINGAPORE GOVERNMENT SHOULD TAKE IN 2010:

- Enhance enforcement against end-use business software piracy, and fulfill its FTA obligations, by protecting informants, adopting a reasonable construction of the "wilfulness" requirement, and increasing potential criminal penalties.
- Fulfill its FTA obligations by bringing public prosecutions against significant instances of music piracy, both online and offline.
- Engage with ISPs to make responsible repeat infringer policies a regular feature of the landscape, and otherwise to encourage cooperation with right holders to combat online piracy.
- Improve enforcement against imports of piratical music CDs.
- Adopt legislation specifically outlawing camcording in Singapore cinemas.

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2010 marks five years since Singapore's landmark Free Trade Agreement with the United States, and specifically its copyright law and enforcement obligations, came into force. For the most part this agreement has been a success for the copyright industries. IIPA congratulates Singapore's government for successfully resolving a flagrant FTA violation by clearly establishing the exclusive right of sound recording producers over non-interactive transmissions of their recordings through simulcasting (simultaneous retransmission of broadcast signals). The supportive efforts of US negotiators on this complex issue culminated favorably in December 2009, with the announcement of license agreements between the recording industry and Singapore's leading broadcaster, MediaCorp, regarding simulcasting.

Unfortunately, the half-decade of experience under the FTA also clearly demonstrates that in some key areas, the full potential of this pact is far from being achieved. Singapore is also falling behind global anti-piracy



trends in at least one other area not directly addressed by the FTA -- camcording. IIPA urges the US government to focus its efforts in the following areas during bilateral discussions with Singapore in 2010:

**More Effective Enforcement Against End-User Piracy of Business Software.** Singapore continues to suffer from unacceptably high levels of corporate and institutional piracy of business software. This end-user piracy -- the willful use of pirated or unlicensed software in the workplace -- has long been the most significant feature of software piracy in Singapore, and the form of infringement that inflicts the greatest losses on U.S. business software companies. Although the overall business software piracy rate has edged down from 36% in 2008 to 35% in 2009, corporate end-user piracy continues unabated.

When Singapore took on the obligation, in its Free Trade Agreement with the United States, to provide criminal remedies for willful infringements of copyright for purposes of commercial advantage or financial gain, IIPA was hopeful that this would lead to more effective enforcement against business end-user software piracy.<sup>1</sup> The FTA provision also requires remedies that "include imprisonment as well as monetary fines sufficiently high to deter future acts of infringement consistent with a policy of removing the monetary incentive of the infringer." In its Copyright (Amendment) Act 2004, intended to fulfill Singapore's FTA obligations, Singapore adopted Section 136(3A) to enable the criminal prosecution of willful infringers who act to gain a commercial advantage. Section 136(3A) was enacted specifically to facilitate criminal prosecution of business end-user software pirates.

Unfortunately, the hopes generated by this FTA provision and its implementation in Singapore law have not been realized. Five years after the FTA came into force, there has been only a single completed prosecution of a corporate end-user pirate under Section 136(3A), and that prosecution resulted in the imposition of penalties that fall far short of the level required to "remove the monetary incentive of the infringer."<sup>2</sup> In two other cases, after raids in 2007 on corporate end-user pirates, with support and considerable assistance from the Business Software Alliance (BSA), the prosecutions were abruptly dropped in 2009, without any official explanation.<sup>3</sup> This history casts considerable doubt on Singapore's compliance with its commitments under the USSFTA.

Although the reasons for Singapore's failure to deliver on this commitment remain opaque, at least three factors may be contributing to the near-total dearth of prosecutions for end-user piracy of business software. All these shortcomings should be addressed as part of a comprehensive strategy to deal effectively with this serious problem.

First, detecting end-user piracy typically depends on inside information from informants within the company or other institution engaged in the infringement. In Singapore, many informants are afraid to step forward, despite the offer of monetary incentives, because they fear retribution, including threats to their physical safety as well as to their future employability. BSA has asked Singapore authorities to consider solutions such as not requiring informants to provide sworn statements in search warrant applications that are then turned over to the target company; but these efforts have proven inconclusive. Until the police and prosecutors can agree upon a means for protecting informants, it is difficult to generate leads for prosecutions.

Second, there seems to be a surprising (and disturbing) range of views among police and prosecutors about what is required to prove "willful" infringement within the meaning of Section 136(3A). Some apparently believe that it is necessary to prove that the infringement was carried out only after a deliberate instruction from an officer of the company to use infringing software. Such an unjustified hurdle could hardly ever be surmounted. Others seem to

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<sup>1</sup> See USSFTA, Art. 16.9.21.a.i.

<sup>2</sup> This case was *Public Prosecutor v. PDM International Pte. Ltd.*, which concluded in April 2006.

<sup>3</sup> The defendants in these two cases were (1) Boonty and (2) Wang & EF Tan.

take the view that if the unlicensed software were only used a few times, even a knowing infringement would not qualify as “willful.” These strained interpretations, which fly in the face of the clear intentions underlying both the FTA provision and the parallel language in the WTO TRIPS Agreement, need to be rejected in favor of a common sense approach, under which only negligent or accidental commercial infringements are excluded from criminal liability.

Finally, even if these hurdles were overcome and a successful prosecution were maintained under Section 136(3A), that statute provides insufficient penalties to assure full deterrence. Section 136(3A) provides a fine of up to S\$20,000 (US\$14,000) or up to 6 months’ imprisonment, or both, with stiffer penalties for repeat offenders. Notably, the maximum fine that can be imposed for a first violation of Section 136(3A) is much less than that available for other copyright offenses defined in Singapore’s law, or for willful trademark counterfeiting.<sup>4</sup> Furthermore, since the fine authorized under Section 136(3A) – unlike comparable provisions in Singapore law -- does not vary with the number of copies involved in the infringement, a high-volume pirate prosecuted under that section is exposed to the same maximum fine as someone who makes very few infringing copies, or even just one.

In the only known case in which a business has been prosecuted under Section 136(3A), the defendant PDM, an interior design company, pleaded guilty to two violations of Section 136(3A). The first count involved 20 infringing copies of an Adobe program that it had installed on its computers; the second count involved 20 infringing copies of a Microsoft program. A third count, involving the installation of 11 Autodesk programs, was taken into account for purposes of sentencing. The total retail value of the programs that PDM had installed illegally was S\$78,174. There was no question that the programs were all used in daily business operations – some over a period of years -- in order to obtain a commercial advantage.

Because PDM pled guilty to two violations of Section 136(3A), the maximum possible fine it faced was S\$40,000. In fact, in consideration of the guilty plea, a fine of S\$30,000 was imposed. In other words, for years of unlicensed use of more than fifty copies of computer programs, PDM had to pay a fine amounting to less than 40% of what it would have paid for the licenses in the first place. Even if the maximum allowable fine had been imposed, PDM would have paid barely 51 cents on the dollar of what it would have cost had it obeyed the law.

The potential that the penalties authorized under Section 136(3A) would fall short of deterrent levels was evident at the time that the law was enacted. Now that this potential has been realized in the PDM case, however, the Government of Singapore should be encouraged to review penalty levels in its copyright law, to ensure that the standard for criminal remedies set forth in the US-Singapore FTA is being met.

**Active Engagement in Enforcement Against Music Piracy, Online and Offline.** The recorded music marketplace in Singapore is under serious stress. Sales of physical product (CDs) is in free fall, with revenues plummeting almost 50% from 2004-2008. Many labels, both international and local, as well as the major international music publishers, have drastically cut back their Singapore offices, or ceased operations there altogether. The retail market has been decimated, and wholesale operations no longer exist in Singapore. Even the weakened remaining market for CDs has to contend with pirate product, sold at makeshift stalls in bazaars and at night markets, or at tourist centers, or imported in counterfeit form from China under the guise of original parallel import products.

Of course, in Singapore as elsewhere, access to music online or via mobile device is a key factor in the demise of the hard-goods marketplace. And, just as in many other markets, the vast majority of that online or mobile

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<sup>4</sup> Section 136(1) (selling or renting infringing copies, or making them for sale or hire) and 136(2) (possession or importation of infringing copies for sale or distribution) are each punishable by fines “not exceeding \$10,000 for the article or for each article in respect of which the offence was committed or \$100,000, whichever is the lower.” Section 136(3) (which prohibits distribution of infringing copies “for purposes of trade; or ... to such an extent as to affect prejudicially the owner of the copyright”) is punishable by a fine of up to \$50,000. Similarly, section 49 of Singapore’s trademark law authorizes significantly higher fines of up to \$100,000 for willful trademark counterfeiting.

access is to infringing material. Internet music piracy has become pervasive in Singapore, as the household broadband penetration rate has soared from 42% in 2004 to nearly 100% in 2008. In this highly connected, technologically savvy city-state, online music piracy is thriving, via forum sites, unauthorized portal sites, cyber-lockers, and especially peer-to-peer (p2p) file sharing. One leading Singapore ISP, StarHub, estimated that up to 42% of its bandwidth at peak hours was consumed by p2p traffic before it took steps to manage the network more aggressively. Online piracy has not only decimated the legitimate hard-goods market; it has also crowded out licensed download services and digital music stores, such as the local SoundBuzz operation, which was forced to close its doors in July 2009, unable to compete with piracy.

The response of the Singapore government to these depredations against the music industry can best be described as passive. In the online arena, the music industry has been filing complaints with the Intellectual Property Rights Branch (IPRB) of the Singapore police since 2005. These have led to the issuance of a handful of warning letters from government enforcement agencies, with no action whatever in the vast majority of cases. In October 2006, the recording industry filed 25 additional complaints with IPRB against infringers who were uploading music files illegally. The IPRB informed the industry in July 2007 that it would not be taking any action on these complaints and suggested that "collaborative enforcement" was the best form of action. By that, the IPRB meant that the industry should take up private prosecution or civil proceedings. Following a meeting with IPRB in 2007 at which the authorities told the music industry that it would consider enforcement actions in cases involving a "significant number" of music files, IPRB has never responded to industry requests to specify what level of infringement would qualify as "significant." In June 2008, the industry lodged formal complaints with IPRB against two pirate websites hosted in Singapore, and provided extensive follow-up information to the authorities. Eight months later, IPRB told the industry that warnings had been issued, and the files were closed. The government has never responded to industry requests for an explanation of why the site operators were not prosecuted.

The same passive pattern applies with respect to offline piracy. Industry groups have brought numerous complaints to IPRB against night markets and stalls selling pirate CDs in areas such as Bugis and Changi Village. While time is of the essence in these cases, since the stalls move to new locations frequently, IPRB has consistently refused even to investigate them, and have instead directed industry to follow the "self-help" approach, sometimes mislabeled as "collaborative enforcement," in which copyright owners bear the full burden of initiating and prosecuting criminal cases.<sup>5</sup> This pattern has been repeated numerous times. One of the more recent cases involved stalls selling pirate CDs at Boon Keng night bazaar in April 2009. After industry investigators carried out numerous trap purchases, IPRB agreed to carry out a raid on the stalls, and industry groups assembled representatives from the major labels to be able to confirm on the scene the pirate status of items seized. But the raid was aborted at the last minute, on the stated grounds that the specific titles involved in the trap purchases were no longer displayed in the stalls. Short of buying of every single title in the pirate's stock, this approach virtually rules out criminal enforcement, even against stalls that are clearly involved in syndicated distribution operations.

IPRB's consistent refusal to investigate piracy complaints brought to it by industry, and its consistent direction that industry bring private prosecutions, is particularly disturbing because it marks a return to a practice that the FTA was specifically designed to discourage. Article 16.9.21.b of the FTA provides that "Each Party shall ensure that non-private criminal actions are the primary means by which it ensures the effective enforcement of its criminal law against willful copyright or related rights piracy. In addition, each Party shall ensure that its competent authorities bring criminal actions, as necessary, to act as a deterrent to further infringements." Five years after the FTA came into force, Singapore's fulfillment of these commitments is open to serious doubt. The experience of the music industry, at least, is that private criminal actions, far from ceding primacy to government prosecutions, is virtually the

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<sup>5</sup> Long delays in taking action are also common. For example, IPRB conducted a raid against a warehouse and its retail stalls in 2004, resulting in a large quantity of seizures. Five years after the complaint was filed, IPRB informed the industry that the case had been closed, with the perpetrator merely warned, not punished. No explanation has ever been provided either for the outcome or for the delay in reaching it.



only path open to it to combat criminal infringements; and the government's failure to bring criminal actions is a significant part of the explanation for the indisputable fact that music pirates are simply not being deterred in Singapore.

The fight against online music piracy is further hobbled by the widespread unresponsiveness of Singapore's Internet service providers (ISPs). The recording industry sends ISPs, on a weekly basis, notices of infringements carried out by their subscribers. Nearly 4400 such notices were sent in 2007-09, including many that identified IP addresses of subscribers who had apparently engaged in multiple instances of online infringements, mostly through the use of p2p file sharing services. These notices, and requests for the suspension of the accounts of repeat infringers, have been completely ignored. There is no evidence that any notices have been passed on to the infringing subscribers, nor that any ISPs even have a policy to do so. A number of ISPs have even refused to meet with the recording industry to discuss ways to cooperate to deal with digital piracy. The damage inflicted by online music piracy on Singapore's economy and culture, as well as on the interests of U.S. copyright owners, cannot possibly be addressed without cooperation from the ISPs whose facilities and services are being used to carry out infringements; yet that cooperation has been completely lacking.

Singapore's government has a responsibility to contribute to solving this problem, as well. It pledged in its FTA with the United States to "provide ... legal incentives for services providers to cooperate with copyright owners in deterring the unauthorized storage and transmission of copyrighted materials." USSFTA, Art. 16.9.22.a. Since no cooperation is occurring, any incentives the government is offering are manifestly inadequate. More specifically, the FTA clearly exhibits a policy to encourage ISPs to "adopt and reasonably to implement a policy that provides for termination in appropriate circumstances of the accounts of repeat infringers." Art. 16.9.22.b.vi.A of the FTA makes such adoption and implementation a prerequisite for any ISP seeking to limit the scope of remedies available against it for infringements taking place on its network, including infringements as to which the ISP's liability arises only from its role in transmitting, routing or providing connections, or engaging in associated intermediate and transient storage. See Art. 16.9.22.b.i.A. The fact that, from all that is known, Singapore ISPs have not even adopted any such policies, much less implemented them, raises significant issues of FTA compliance.

IIPA urges USTR to press Singapore's government to step up to these problems. There are many steps, both formal and informal, that the government could take to encourage ISPs operating within its jurisdiction to begin to cooperate with right holders as the FTA specifically directs. These steps should include, but should not be limited to, making responsible repeat infringer policies a regular feature of the ISP marketplace in Singapore. Whether this is achieved through adoption and active enforcement of reasonable contractual terms of service for provision of Internet access, or whether it takes the form of a required "graduated response" program with appropriate due process safeguards before suspension or termination of user accounts, Singapore must move beyond the status quo if it is to make any headway against this well-entrenched problem.

Finally, with regard to hard goods piracy, the prevalence in the market of pirate product imported from China in the guise of legal parallel imports justifies a review of Singapore's policies and practices in this area. In cases involving such importation, Singapore should reconsider its refusal to impose the burden of proof on the defendant to establish that the articles in question were legitimately made in the country of origin. As it now stands, the law requires the plaintiff (or the prosecutor) to prove a negative – that the article was not made with the authority of the copyright owner anywhere in the world – as well as proving the defendant's knowledge of the article's piratical nature. Singapore should also make more active use of its authority to detain shipments of suspected infringing CDs *ex officio*. While this authority is sometimes used with respect to items such as counterfeit alcoholic beverages or tobacco products, it is almost never invoked to enforce copyright protections against importation of pirate CDs.

**Outlawing Camcording.** Although a number of Asian jurisdictions have joined the global trend toward outlawing the unauthorized camcording of feature films in cinemas, Singapore has not yet done so. In 2008, two individuals were caught camcording in Singapore cinemas, but the government declined to prosecute either of them. Clearly this pernicious practice continues; in December 2009, MPAA established that a pirate copy of the film "Ninja

Assassin," available online, was made by camcording in a Singapore cinema. A specific criminal provision against camcording has proven to be an effective anti-piracy tool in many countries that have adopted it. Singapore should follow suit promptly, without waiting until the problem becomes more widespread.

**Entertainment Software:** Entertainment software companies remain very satisfied with the record of the Singapore Government on enforcement for their products, particularly with the efforts of the local police.<sup>6</sup> The Government continues to have an excellent record of cooperation and partnership with the entertainment software industry on educational initiatives aimed at increasing the public's awareness of the importance of protection of copyright in interactive games. There is, however, a rising concern with respect to the sale of circumvention devices, which facilitate the play of pirated games on consoles. Despite provisions in Singapore's Copyright Act outlawing these devices, police were in years past reluctant to initiate enforcement actions against targets engaged in the distribution of circumvention devices. In last year's report, ESA called on Singapore Police elevate the priority of actions against retailers and distributors of such devices. ESA is pleased to report that in 2009 Singapore authorities followed through and conducted several high profile raids on targets engaged in the distribution of large quantities of circumvention devices. While there is a concern about the volume of online downloads of pirated games, ESA is looking to the ISPs in Singapore to address the infringing activities of their subscribers by forwarding to them any notices received regarding specific infringements detected, as well as addressing any persistently infringing subscribers through sanctions available within their terms of service.

**Book Piracy:** U.S. book publishing companies continue to suffer from illegal commercial photocopying in Singapore. The industry needs more support from the Singapore Police in tackling the problems created by **entities involved in book piracy, but response by law enforcement authorities has been less than robust.** Specifically, IIPA would like to see the same model of police-initiated raids that has been successful in tackling optical disc operations in the past employed to combat book piracy, including the use of police investigative powers to bring the syndicate owners to prosecution.

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<sup>6</sup> There is a thriving legitimate market for this industry's products, with retail and mall piracy having been effectively addressed by the local authorities.

# SPAIN

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2010 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** IIPA recommends that Spain remain on the Special 301 Watch List in 2010, and that an out-of-cycle review be conducted later this year.

**Executive Summary:** More active leadership by the Spanish government is needed on all fronts to address the dire piracy situation harming many of the content sectors in Spain. Effective action to combat the theft of creative content serves to enforce the rule of law, defend Spain's cultural heritage, and expand economic opportunities.

While national and municipal police and prosecutors have made efforts against street piracy, Internet piracy continues unabated. Effectively addressing Internet piracy is a priority for both the U.S. and Spanish creative industries. The government's actions taken thus far on the Internet piracy issue address only part of Spain's online piracy problem. For many of the copyright industries, Spain is among the worst-performing markets in the world, and has suffered greatly from an online piracy problem that is spiraling out of control. Contributing to Spain's high piracy levels are the government's policies that decriminalize illegal downloading of content distributed via peer-to-peer (P2P) file-sharing (as reflected in the 2006 Circular issued by the Attorney General), and its failure to meet the minimum EU-level requirements regarding liability for Internet service providers (ISPs) under the E-Commerce Directive. As a result of the legal uncertainties, the police refuse to take Internet enforcement actions, and the Attorney General's circular instruction dismissal of current criminal cases against illegal portal and link sites remains in force. Moreover, the inadequate legal and regulatory structure has led to a failure in the negotiations between rights holders and the ISP community to find ways to prevent infringing content from being distributed over the ISPs' services and/or networks, given the lack of incentives on the part of the ISPs to reach any reasonable agreement.

Enforcement authorities are taking action against street piracy involving physical goods and are working on actions against organized syndicate connections. However, pirate product remains fairly ubiquitous, and circumvention devices that enable use of illegally copied games remain widely available. The predominant piracy problem for the business software sector in Spain is persistent organizational end-user software piracy and, in this regard, the industry remains concerned about the availability, cost and speed of civil enforcement measures (such as problems associated with expensive bonds and low damages). This sector reports good cooperation with the Ministry of Industry on efforts, including public awareness work, to halt end user piracy in corporate settings.

There were two encouraging developments at the end of 2009. First, the Spanish Government set up a new Inter-ministerial Commission comprised of representatives from the Justice, Industry, Interior and Culture ministries. It will seek to close the gaps in the legal framework to address Internet piracy and advise on the fight against the violation of intellectual property rights on websites. Second, a bill aimed at stimulating the economy contains provisions that would permit the Ministry of Culture to request ISPs to interrupt access to alleged illegal content offered on websites. These provisions would permit site-blocking following a complaint by a rights holder or their designee to the Commission pending a brief judicial review. The launch of both these initiatives met with mixed reactions from the content industries who recognize that this is a key starting point to engage on these projects, but who highlight that these measures would only address part of the overall problem. It is imperative that the Government actively work to have this legislation expeditiously passed by Parliament. However, we highlight that unless there is a strategy that tackles the whole problem and all forms of infringing behavior, piracy will simply shift to other easier alternatives. Creating greater accountability on the part of individual users and those companies that provide network services--while ensuring that subscribers' rights to due process are respected -- is a critical component in the fight against online piracy, and urgently needed.

One positive note in Spain is reported by the business software industry. Thanks to an awareness campaign sponsored by the Ministry of Industry, the software piracy level within the distribution channel has been dramatically reduced (although software piracy levels by business end users remain at similar levels). Due to the success of this campaign, the Business Software Alliance (BSA) is negotiating with the Ministry of Industry to conduct a new campaign during 2010, now extended to business end users -- especially small- and medium-sized enterprises (SMEs) -- seeking similar reductions in organizational end-user software piracy levels, which contribute to a decrease of the general piracy rate. In addition, BSA has been organizing during the last years, in full cooperation with the Spanish Government, yearly events with police forces ("Congreso Nacional de Policía Tecnológica"). It is anticipated that the new event for 2010 also will involve judges and prosecutors, in order to increase awareness within the judiciary. Furthermore, BSA entered into a cooperation agreement with the Tax Agency several years ago, which is likely to result in a greater involvement of the tax authorities in the fight against software piracy during 2010. Considering all these positive developments, and considering that BSA is detecting a more sensible approach from the Ministry of Culture towards the problem of business software piracy, BSA is satisfied with the involvement and actions developed during 2009 by the Spanish Government within the specific field of business software piracy.

Finally, concrete progress on improving the Spanish copyright landscape would demonstrate its leadership and serve as a positive example to other EU members. Along with the EU, Spain recently joined the two WIPO treaties, which will enter into force in March 2010. In addition, Spain holds the EU Presidency for the first half of 2010. Now is the time for the Spanish government to become a leading example for other EU member states and take charge of the Internet piracy problem and take effective action to protect copyright.

**Request for Special 301 out-of-cycle-review in 2010:**<sup>1</sup> IIPA places great importance on addressing the problem of Internet piracy in Spain, and urges USTR to maintain a regular high level dialogue with the Spanish government to ensure that adequate progress is being made in addressing one of the worst Internet piracy problems in Western Europe, as well as to conduct a formal out of cycle review in the fall of 2010. Spain's music market is in virtual collapse, having dropped by over 65% in the past five years, mostly the consequence of P2P piracy. Spain's market has suffered more than its EU neighbors due to limitations in Spanish legislation, regulation and practice.

We recommend that USTR conduct an out-of-cycle review in the Fall of 2010 that examines how the Spanish government has responded to the challenge posed by Internet piracy, and how it plans to meet its obligations under Article 41 of TRIPS, Article 23 of the WPPT, and Article 14 of the WCT to "ensure that enforcement procedures are available under their law so as to permit effective action against any act of infringement of rights covered by this Treaty, including expeditious remedies to prevent infringements and remedies which constitute a deterrent to further infringements." Specific topics for review should include examination of Spain's progress in advancing the specific legislation addressing websites, its progress in curing the various deficiencies identified in this report, including reversing the 2006 Circular, and the progress achieved in addressing infringements that take place other than via websites, including through ensuring action by ISPs to prevent proprietary networks from being used for the storage or transmission of infringing materials.

**Priority actions requested to be taken in 2010:** 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:

### **Enforcement**

- Ensuring action by ISPs to prevent proprietary networks from being used for the storage or transmission of infringing materials.

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<sup>1</sup> For more information on the history of Spain and Special 301, see Appendices D and E at <http://www.iipa.com/pdf/2010SPEC301USTRHISTORY.pdf> and <http://www.iipa.com/pdf/2010SPEC301HISTORICALSUMMARY.pdf> of this submission. For more information on IIPA's 2010 challenges, see the IIPA cover letter to this Special 301 submission, posted at <http://www.iipa.com/pdf/2010SPEC301COVERLETTER.pdf>.

- Reverse or rescind the Attorney General's May 2006 official instruction (Circular) that decriminalizes infringing downloads using peer-to-peer (P2P) networks.
- 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.
- Take appropriate steps to ensure that circumvention devices are illegal.
- Continue to take actions in well-known markets to combat the widespread street piracy problem harming the film, music publishing and sound recording, and videogame industries, 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 and regional governments on anti-piracy strategies and actions, resulting in more criminal actions, effective prosecutions and deterrent sentencing.
- 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 and include intellectual property into law schools' curricula.
- Develop and implement an effective national campaign on the importance of intellectual property rights through educational, press and similar public outlets.

### Legislation

- Expeditiously pass the Law on the Sustainable Economy which includes provisions to address websites hosting infringing content.
- Develop legislation to address infringements that take place other than via websites, including through ensuring action by ISPs to prevent proprietary networks from being used for the storage or transmission of infringing materials.
- 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 the Data Protection legislation so that rights holders can enforce their rights on the Internet, in both civil and criminal proceedings.
- Amend Spain's e-commerce laws, specifically the LSSI, to establish a workable notice-and-takedown procedure and eliminate the current definition of "actual knowledge", which limits the application of the EU Directives.
- 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.

## COPYRIGHT PIRACY IN SPAIN

Piracy of audiovisual products, music and sound recordings, and entertainment software in Spain has supplanted the legitimate marketplace, making it extremely difficult for these industries to distribute authorized content.

**Internet piracy:** There are now approximately 29.1 million Internet users in Spain, amounting to 71.8% of the population (a significant increase from the 2007 statistics of 22.8 million Internet users and 55%, according to [www.Internetworldstats.com](http://www.Internetworldstats.com)). Overall, this reflects a 440% increase in number of Spanish Internet users from 2000 to 2009.

Starting in 2007, Internet piracy in Spain exploded, and it has continued to grow at a tremendous rate. Comparative studies by the music, videogames and motion pictures industries (below) demonstrate that Spain has one of

the worst Internet piracy problems in the world. For example, 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. As detailed below, the entertainment software industry conducted a recent survey of targeted markets and found that Spain is number two in highest overall volume of P2P game downloads, and number two in highest volume of P2P game downloads per capita. Spain has the worst online piracy problem among the major European markets, with 32% of Internet users frequently using peer-to-peer (P2P) networks for illegal music downloads. This is more than double the European average of 15% (source: Jupiter Research, 2009).

The extent of online piracy faced by the content industry is enormous. Just to cite an example for the music industry, Spain has been one of the worst performing recorded music markets in Western Europe over the last five years. Today, Spain's recorded music market is approximately one third of its size compared to 2001, with the market having experienced its most dramatic drop in 2009. The levels of piracy also have had a serious impact on the make-up of the Spanish market, despite the availability of many legal online services (from Apple's iTunes to Spotify, Deezer and 7digital). Research by GfK in June 2008<sup>2</sup> found that there were 8.6 million people engaged in P2P music piracy in Spain. Combined with estimates of the volume of files downloaded on average (57.4 files per person per quarter) taken from a Ministry of Culture report (2007), the International Federation of the Phonographic Industry (IFPI) estimates that 2 billion songs were illegally downloaded in Spain in 2008. This compared to only 7.3 million legitimate songs downloaded online (Nielsen SoundScan International). In Spain, illegal music offerings on the Internet are available in many formats. Recent research and surveys carried out by the Coalition of Creators and Content Industries consider different percentages regarding levels of offer and modalities to access infringing content. Although some differences exist on the type and size of music files compared to other industries (films, software, books), the illegal offer of music in Spain may be summarized as follows: (a) P2P file exchange protocols (eMule, Pando and BitTorrent, mainly) -- 60% of music content users' offer and access; (b) Web pages offering links to music files direct download -- roughly 30% of the problem; and (c) blogs, FTP, Cyberlockers and other systems (chat, e-mail, etc.) -- around 10% of music content users' offer and access.

The damage to the legitimate recording industry in Spain is huge. The value of recorded music sales in Spain has decreased from €626 million (US\$802 million) in 2001 to just €257 millions (US\$450 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 physical market in Spain continued to slide, and was worth €225 million (US\$306 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. Second, 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, piracy also harms 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 Entertainment Software Association (ESA), representing the videogame industry, also reports that piracy levels in Spain worsened in 2009. P2P is still the most prevalent form of piracy affecting this sector, along with sites that

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<sup>2</sup> We reiterate three stunning points from the qualitative research about the penetration of online piracy in Spain done by GfK (June 2008) and reported in IIPA's 2009 Special 301 report: (1) 67% of the Spanish Internet surfers (8.8 million) admit to downloading illegal copyright content (music, film, TV series, videogames) 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 (8.6 million people) download music illegally, 58% are men, and two in every three are people between 16 and 34 years old.

provide links to infringing material. 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. 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. ESA estimates there to have been approximately 1.2 million infringing downloads<sup>3</sup> made of ESA members' computer and video games through P2P file sharing by ISP subscribers in Spain during December 2009. This comprises approximately 12.5% of the total number of illegal copies made by P2P users globally during this period. As mentioned above, these figures place Spain as number two in highest overall volume of P2P game downloads, and number two in highest volume of P2P game downloads per capita during the study period. Breakdowns by ISP show that Telefonica subscribers were responsible for approximately 52% of this activity occurring in Spain--more than 620,000 downloads during the one-month period. These figures do not account for downloads that occur directly from hosted content, such as games found on "cyberlockers" or "one-click" hosting sites which continue to account each year for progressively greater volumes of infringing downloads. 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.

The music industry highlights that piracy associated with websites accounts for only 30% of the piracy problem, and that the present legislative proposal in the Law on Sustainable Development fails to address the bulk of the music industry's online piracy problems, notably the issue of peer-to-peer file sharing through services that facilitate the unauthorized exchange of copyrighted content between users without going through a centralised system. Research by Jupiter in 2009 found that Spain had a very strong bias towards P2P file-sharing compared to other European markets. Despite continued growth in other forms of online piracy, P2P continues to dominate illegal downloading for the music industry in Spain.

Furthermore, Internet piracy, especially of film titles that have not yet reached the Spanish theatrical market, is very harmful. The Independent Film & Television Alliance (IFTA) reports that a Internet monitoring program it conducted in the last quarter of 2009 for 90 of its members' films recorded over 4,500,000 instances of P2P infringements and almost 50,000 instances of OSP infringement. As broadband penetration climbs in Spain, some IFTA member companies are pioneering electronic sell-through partnerships with ISPs, however such ventures and partnerships with local distributors have had almost no success because of the high rates and easy availability of free illegal copies. Since 2004, DVD sales have declined by 46% and the number of video stores has dropped from 12,000 down to 3,000. Spain's Ministry of Culture indicates that the Spanish theatrical market contracted by 12.4% in 2009 with a 7.4% drop in admissions. IFTA reports that for independent audiovisual producers, the ability to rely on national distributors (who cannot compete with free) is interfering with the ability of national distributors in Spain to provide a part of production financing, resulting in a decreased ability to create independent films and in some cases films are not being made at all.

**Street piracy and the influence of organized criminal syndicates:** The music and motion picture industries report that there was no substantial reduction in street piracy during 2009. While digital piracy today has a bigger impact on music sales, street piracy continues to harm the local industry as 81% of music sales in the country still come from physical formats. Pirate networks running illegal sale activities in the streets and flea markets seem to be mostly selling film DVDs. Police actions against "mochileros," who sell out of backpacks, remain more difficult than actions against the highly mobile street "manteros," who sell from blankets and are relatively fixed in location and maintain more product.

**Hard goods piracy and unauthorized public performances of music and sound recordings:** Regarding physical piracy for music, the piracy level in some specific cities has risen, ranging between an average of 18% and 24%; this indicates that last year's overall average of 20% for Spain was conservative. These levels, which were expected to have fallen in 2009, are not only at the same level, but in fact showed an increase in particular regions like Andalusia,

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<sup>3</sup> This figure is representative only of the number of downloads of a small selection of game titles. Consequently, this figure is under-representative of the overall number of infringing downloads of entertainment software made during the period.

Catalonia, Murcia and Valencia, due to the economic crisis and the presence of back-street illegal sellers. Also for the first time, the music industry detected the appearance in top manta of pirate CDs pre-release music in physical format. So far pre-release piracy does not seem to have spread much, but it is likely this kind of piracy will grow as physical pirate networks have to fulfill a demand for new content or compilations to compete also them with the growing illegal Internet offer.

In order to study the issues regarding physical piracy in Spain, Promusicae's (Spain's national association of record producers) enforcement department conducted a national survey and in November 2009 issued "The Map of Physical Music Piracy in Spain 2009." This report investigated 25 cities from 22 provinces and 12 autonomous regions during October 2009, and covered an area that represent 81% of legal music sales. The number of usual pirate CD-R/DVD-R sellers exceeds 1,200 and can reach up to 2,000 during the spring and summer. The survey found that 53.4% of the sales were carried out by rucksack sellers (top mochila), 26.7% in the open air flea markets and 18.6% on blankets (top manta). Last year it seems that sellers have started to transition away from CD-R/DVD-R piracy activities and turned toward trademark counterfeiting. According to police general headquarters data, 1,725 people were arrested for reselling, with most of the arrests occurring in the regions of Madrid, Andalucia and Valencia.

Physical piracy is affected by digital piracy through the Internet. As mentioned above, digital piracy of music keeps growing with total impunity, having a greater and greater impact on the illegal sale and distribution of music in both physical and digital formats, thereby depressing sales of pirate carriers as well as deeply affecting the market for legitimate physical, online and mobile offers. In addition, the music industry in Spain is experiencing the step-by-step increase of new illegal business niches linked to public performance in entertainment premises. This is the case of companies that reproduce unauthorized music in both audio and video formats for loading coin activated machines (jukeboxes), or the more and more frequent activity of placing computer devices loaded with illegal music in premises such as pubs, discos, etc. for background ambiance.

The Spanish music market has experienced a spectacular collapse of 31% in the first half 2009, compared to same period of 2008. According to details from the producers' collecting agency AGEDI, 40% of jobs have been lost during the last 4-5 years in Spanish recording companies. To draw attention to this economic plight, a rally was staged by the workers of all the music industries in front of the Ministry of Industry on December 1, 2009, to highlight that "Music is culture" and "music is employment", and asked for tougher action by the government to protect the industry. The Ministry of Industry received a delegation of the demonstrators and promised action, however, no meaningful steps have been taken to date.

**Hard goods piracy of film and home video entertainment:** The Motion Picture Association (MPA), working with its local anti-piracy organization, FAP, reports that hard goods piracy of audiovisual products in Spain continues to hurt the local market. In 2009, some 25 million pirate DVD-Rs were sold, compared to the legal market barely distributing 30 million legal DVDs. While some municipalities have effectively forbid street vendor activity, Madrid, Barcelona, Valencia, Malaga, Sevilla remain serious concerns. 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. IFTA reports that the damage done to local distributors from piracy may forever change the market by shutting out legitimate audiovisual product. Many local distributors are reporting that they must pay lower licensing fees due to declining DVD sales caused by piracy.

**Camcord piracy:** MPA reports that, shockingly, 114 films were illegally sourced – both audio and video recordings -- in Spanish theaters in 2009. Films such as *Harry Potter and the Half Blood Prince*, *Inglorious Basterds*, *X-Men Origins: Wolverine*, *District 9*, *Dragonball Evolution*, *Duplicity*, *Star Trek*, *State of Play*, *Michael Jackson's This is It* 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. It appears that even exchanged P2P movies are sourced locally via camcording in Spanish theaters. For example, a camcorder arrested in 2007 in Alicante was also responsible for uploading illicit camcords of films to his website; this case is ongoing. This same camcorder/webmaster has since reopened his site under a different name and has continued to upload titles to the



site. In another incident in December 2009, police arrested an individual audio-recording the soundtrack of a film. The investigation of this incident led the police to the aforementioned webmaster. Despite the clear commercial damage of such camcording and the clear evidence of the organized criminal nature such piracy, prosecution of camcorders remains quite difficult. Only two instances have resulted in police action, and this was only after exhaustive investigations by FAP and EGEDA. The public prosecutors appear disinclined to criminally prosecute.

**Entertainment software piracy:** Although hard goods piracy remains a continuing concern, growth in online piracy rates represent the biggest threat to the entertainment software industry. The widespread availability of mod chips and game copiers that bypass the technological protection measures exacerbates the online piracy problem, as these devices are needed in order to produce and play unauthorized copies of entertainment software.

Prosecuting individuals or entities engaged in the trafficking of circumvention devices and/or the provision of services related to circumvention devices 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 illegal. A 2009 decision in Salamanca also relied on this faulty reasoning in concluding that mod chips capable of any legitimate use are lawful, notwithstanding the fact that the primary purpose of such devices is to effect a circumvention. 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 had success working with the Spanish National Police and the Specialized Crime Squad in securing raids against targets involved in the distribution of game copiers, including retail establishments, and the seizure of their unlawful products.

**Business software piracy:** The Business Software Alliance (BSA) reports several sources of piracy in Spain, with the form that causes the most economic damage being organizational end-user piracy. Widespread piracy keeps companies (end-users) using unlicensed software, resellers distribute illegal software mainly at shops, and the Internet continues to present challenges.

Spain is mainly a country of small and medium businesses where the levels of piracy are still rampant (which is not the case of bigger organizations). Nevertheless, and due to the bad economic environment in Spain, BSA is detecting that some big organizations might reduce their budgets for software purchases, and decide to obtain savings by running the risk of using unlicensed software. In an effort to combat this, BSA, with the support of the Ministry of Industry, conducted an awareness campaign in 2009 addressed to the 200 major enterprises and companies in Spain. This included training seminars in Madrid, Barcelona, Sevilla and Valencia, and the furnishing of guides on best practices on legal use of software, and arguments to be addressed to the management of companies about the risks related with the illegal use 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, employs directly 80,000 people, and generates 300,000 more indirect jobs (source AETIC). BSA conducted a regional piracy study in 2008, 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 were held with all regional governments in order to seek their cooperation in the fight against software piracy. As a result of these meetings, BSA is developing a training program in cooperation with the Judiciary School in Cataluña, addressed to judges and magistrates.

As an awareness campaign done with the cooperation of the Ministry of Industry addressed to the illegal channel and to illegal software distributors, the level of piracy in this specific field (illegal resellers) has dramatically been reduced down to 21%. This significant reduction has been identified only in the specific field of the illegal channel, and has not generated a similar decrease in the overall PC software piracy rate, which increased by one point, from 42% in 2008 to 43% in 2009. BSA is seeking to extend this cooperation with the Ministry in order to ensure that the reduction in levels of

channel piracy are sustained in the years to come, and obtain new significant reductions in the levels of piracy among small and medium enterprises.

With respect to circumvention devices, BSA has its own positive precedent in Spain; this involved the VESATEC case where a guilty judgment was obtained against a company making available circumvention devices through a web site. The judgement confirmed the illegal nature of this activity, correctly enforcing the intellectual property legislation in force in Spain. In sum, BSA's preliminary estimated trade losses due to U.S. business software piracy, of all formats, in Spain in 2009 amounted to \$617 million, with a 43% piracy rate.<sup>4</sup>

## **GOVERNMENT APPROACH TO INTERNET PIRACY**

The continuing lack of action by the Spanish government (legislative, executive and judicial branches) has contributed to the Internet piracy problem in Spain. The main impediments are the Spanish e-commerce law which improperly implements the EU E-Commerce Directive (by requiring actual knowledge coming from a court order or, now, an administrative competent body in order to block access or remove infringing content), problems in data protection laws that prevent right holders from obtaining personal data (i.e. IP addresses to enforce their rights on the Internet), and the Attorney General's May 2006 official instruction that considers P2P file sharing as a private copy unless commercial aim of profit is involved in the activity. IIPA welcomes recent steps by the Government to protect Spain's cultural industries by addressing hosted illicit content and by updating Spain's legislative framework to comply with European norms. We also call upon the Government to not delay examination of other measures that will address P2P piracy or other forms of internet piracy not related to the operation of websites.

**The Sustainable Economy Bill:** Following the collapse of strained government-fostered negotiations between REDTEL (the Spanish ISP coalition) and content holders, an Inter-Ministerial Commission ("Comisión Interministerial de Trabajo") comprised of eight ministries that was established in October 2009 to consider website-related piracy put forward a legislative proposal to address websites hosting illicit content. According to the Sustainable Economy bill, there would be a procedure whereby right holders would send complaints to a newly created administrative body (the Intellectual Property Commission) which would process the complaint. Absent a convincing rebuttal or corrective action by the sites, the Commission would forward the cases to a judge for review and a court-order suspension of the services (or the blocking of foreign-originating sites). If the owner of a site were to refuse to take down the content, the Commission could adopt a recommendation to remove the infringing content or block access to the site in question and forward this recommendation to a specialized tribunal. The tribunal will hear from the interested parties and will authorize or reject the measure proposed. Under the new law, the tribunal will have to take a decision within four days. The tribunal judge would not be expected to examine the merits of the case beyond a review of whether the remedy is justified and in particular whether fundamental rights have been respected. The idea is to accelerate the current procedure for the taking down of infringing content hosted on websites. It is hoped that with time and experience, the process will become routine and efficient. This proposal has, as predicted, generated significant pushback from the Internet user community who would like unimpeded access to illicit cultural content on the Internet to the detriment of both the Spanish and U.S. cultural industries.

This proposed law is useful, and IIPA hopes that it will be enacted. However, as noted elsewhere in this submission, it is very important that the Spanish government continues to examine additional measures that may be employed to address non-website related issues, through further legal/regulatory reform and through active encouragement and facilitation of agreements between ISPs and content owners. It is essential that the Commission remain actively engaged on tackling Spain's very serious Internet piracy problem including unauthorized file-sharing, and do so in a way that is effective and that respects the right to due process of Internet subscribers.

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<sup>4</sup> BSA's 2009 statistics are preliminary, represent the U.S. software publishers' share of software piracy losses in Spain, and follow the methodology compiled in the Sixth Annual BSA and IDC Global Software Piracy Study (May 2009), available at [www.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. BSA's final data for 2009 will be issued later in 2010.

**The 2006 Attorney General's Circular is still being used to justify the lack of criminal actions in P2P cases involving infringing content:** 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 infringing distributions of content by P2P. 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.

The Spanish government has stated that the Circular is "not binding" on any judge. Nevertheless, 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, 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, 2008) and Indicedonkey (Madrid, 2008), and pending cases include Spanishare (Madrid, 2008), PS2Ripnet (Barcelona), Emwreloaded (Malaga), Elitetorrent (Malaga, 2007), FenixP2P (Bilabo), and InfoPSP (Rioja). Furthermore, Criminal Investigation Courts (Juzgados de Instruccion), following the Circular, have declared that there were no criminal grounds in cases against Elite Divx, PS2Rip.net and pctorrent.com. Fortunately, these decisions were reversed by Appellation Courts following appeals by private prosecutors.

In spite of these positive decisions, the Criminal Investigation Courts continue to try to close cases against Spanishare.com, CVCDgo.com (Madrid), etmusica.com (Moguer) and portalvcd/emule24horas (León), naiadadonkey.com (Alcoy), todotorrente/spatorrent, and elitetorrent.net. The divxonline case was reversed in January 2010 (discussed further, below).

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 2009, in contrast to 2006 and 2007, the BIT investigated several cases, but took no action beyond turning the evidence over to the appropriate judge should the judge wish to take action.

**Inadequate requirements for actual notice undermine removal of infringing content online:** No progress was made in 2009 on this longstanding concern to the content industries. 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" cannot be established by directly notifying a site-operator of the existence of infringing material on their site. Rather, to establish "effective knowledge" rights holders must submit evidence to a competent authority (a court or administrative body) 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.

As explained before, the LSSI gives the possibility for ISPs to gain “actual knowledge” that the content they are hosting or linking is illicit only if a competent body (a court or administrative body) has stated it so. Up until now, there was no administrative authority enabled to do this. The Law on Sustainable Economy enables an existing administrative authority to take this kind of action, but the LSSI still lacks the obligation for the hosting provider contained in the e-commerce directive, to remove content when he is aware of facts or circumstances by which the illegality of the content is apparent.

**Spanish data protection law used to block identification of users in civil cases:** Although Spanish legislation provides the means to identify holders of Internet protocol addresses in the context of some criminal proceedings (see discussion below related to ability to obtain such information for “serious crimes”, a designation that does not include copyright piracy), no such mechanism exists for civil proceedings.

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 (the LSSI), which provides that personal data can only be disclosed in criminal proceedings, is in line with EU legislation. However, in combination with the Attorney General’s 2006 Circular that decriminalized infringements via P2P (see above), the inability to obtain user information in civil proceedings renders rights holders unable to enforce their copyrights online civilly or criminally. As a consequence, Spain fails to provide the “fair balance” required by the ECJ in *Promusicae* since it offers no meaningful manner in which copyright owners can effectively protect rights guaranteed under EU Directives.

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 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.

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. Because a 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. No known action on any of these points was taken during 2009.

## 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.

**National Action Plan:** Although an enforcement-based anti-piracy plan was enacted in 2006, it has been abandoned. Political leadership and coordination to face larger policy and legal reform issues--such as those needed to address Internet piracy--were severely lacking for much of 2009.

Several ministries are critical to anti-piracy and policy efforts. The Ministry of Justice should take steps to increase its involvement in providing solutions to the many problems with criminal copyright enforcement. More resources and practical trainings on Internet 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 and includes the Secretary of State for Telecommunications (SETSI) 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.

BSA has a good relationship with this Ministry, which has, at BSA's request, approved and funded a program to train and prevent software piracy in the illegal retail channel. As mentioned above, BSA has been working with the Ministry of Industry on a public awareness campaign that has resulted in the reduction of software piracy within the distribution channel.

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. Promusicae notes that for many years it was very difficult to obtain collaboration from police authorities and judges because of poor legislation, but the level of hard goods piracy for music and street piracy slightly decreased. On the other hand, as noted above, Internet piracy is growing fast and the police have taken limited actions in that sphere.

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 has been very high. Also on a positive note, the industries are appreciative that the Spanish government issued a Best Practices Manual for the prosecution of intellectual property crimes in July 2008 which has had a positive impact on police willingness to enforce IP crimes but has not helped with addressing judges and public prosecutors disinterest in prosecuting IP crimes.<sup>5</sup> The music industry has tried to spread this manual as much as possible, but the government has not launched any official campaign to help get the word out.

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<sup>5</sup> 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. 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 and the BIT has significantly curbed its Internet piracy work.

The Motion Picture Association (MPA), though FAP, reports that the few police actions in 2009 against Internet piracy revealed the existence of organized structures offering music and movie files, including pre-releases, online, 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 physical piracy networks and there are clear connections between the webmasters and illicit camcording incidents in Spain. The police carried out only one Internet raid in 2009, after a claim made by EGEDA (the film producers' collecting society).<sup>6</sup>

The different sectors affected by infringements are united in a group called "Coalition of Creators and Content Industries." It includes the record producers' members of Promusicae, the authors and publishers members of SGAE, and different organizations from cinema, videogames, software, etc. The Coalition has provided the Spanish Ministry of Industry and SETSI with the names and directions of 200 websites that offer links to illegal downloads of IP protected content; we are not aware of any action yet taken.

There was also only one conviction in 2009. In February 2010, an operator of three streaming sites for movies and television programs was sentenced by the Criminal Court in Vigo to one year in prison and a fine of 1,825 Euros (US\$2,480) which, if not paid, will lead to an additional 12 months' imprisonment. The action was initiated in December 2006 against, [www.simonfilms.tv](http://www.simonfilms.tv), [www.siglox.com](http://www.siglox.com) and [www.maxivideos.tv](http://www.maxivideos.tv), that offered streaming services of recent and new releases dubbed into Spanish for one Euro per film and came with an initial obligation for visitors to pay for a minimum of ten titles. These sites were also very popular in Mexico.

At the end of January 2010, there was another positive decision in Valencia where the Court of Appeal upheld the appeal filed by FAP and ordered continuation of the prosecution against the site, [www.divxonline.info](http://www.divxonline.info). This procedure was initiated by the police in 2007 and FAP joined the case as a private prosecutor. A judge had decided to drop the case based on the Attorney General Circular criteria and in response to a request from the defendant who argued that the site was only providing links and that there was no commercial activity directly connected to the communication of copyrighted works. This was the same argument that was used when the Sharemula case was dismissed.<sup>7</sup> However, FAP's appeal here was successful. The court's decision states "Despite the Attorney General consideration that there is no commercial activity by this type of web sites, it is clear that there is a commercial activity directly connected to the movies, music, and videogames made available."

This decision is welcome and in line with similar decisions recently handed down by Courts in Murcia, Barcelona, Alava, and Madrid. Despite these six positive decisions (all won on appeal) that state that there is commercial activity on such sites, the Police still do not want to initiate new raids like those called "Descargas en la red" (Internet infringements)

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<sup>6</sup> In December 2009, following a year-long BIT investigation supported by FAP, a massive 30 Terabyte FTP site was taken down and the administrators arrested. The eight servers provided an average connection speed of 220,000 ks and the 30 Terabytes of stored data seeded many of the main P2P sites. All of the sites estimated 500 members were required to pay a monthly fee of 20 Euros (US\$27).

<sup>7</sup> 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.

to close more sites. Moreover, judges have declared that there are no grounds for criminal procedures against such sites, citing the Sharemula ruling. In other cases, judges work to close cases against this type of website.

**Police actions and prosecutions involving physical piracy:** Promusicae reports that police enforcement agencies and customs administration act *ex officio* in more than 95% of actions involving physical piracy of music and sound recordings (for the first nine months of 2009). This reflects their high involvement level. Unfortunately, regarding digital piracy the number of actions is virtually nil due to the numerous legal deficiencies and loopholes in the digital arena.

	Actions	Arrested People	Total Carriers	Recorded Carriers		Blank Carriers		Burners	Inlays	Juke-boxes	Hard Drives
				CD-R	DVD-R	CD-R	DVD-R				
2008	7,406	2,396	2,598,324	986,602	1,030,020	266,922	314,780	1,865	296,474	34	19
2009	3,571	1,820	1,342,451	631,163	680,210	14,256	16,822	928	151,947	11	21

Spain: Anti-piracy operations, years 2008 and 2009. The 2009 data above is not yet final as more information may be provided by the enforcement agencies.

For the music industry, 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 undermines the work of the police actions.

FAP reports a 30 percent reduction in hard goods raids in 2009, mainly due to a reduction in actions against street vendors. MPA member companies working through FAP and with the police conducted over 3,000 raids against street vendors, DVD-R labs and distributors. FAP receives good cooperation from the police but inadequate laws preclude any real reduction in piracy levels. Street vendors move their wares to evade arrest and even when arrested, are released immediately because piracy is considered a minor crime. Barcelona and several Catalan cities have effectively utilized public awareness campaigns on the illegality of street vendor piracy. Such campaigns should be adopted in all major cities, notably Seville, Madrid, and Alicante.

For 2009, the local entertainment software industry association, aDeSe, reported that, through its work with FAP on enforcement efforts against game piracy, it conducted 201 investigations of computers stores, cyber cafés, labs, and mod-chip sellers, resulting in enforcement actions against 194 separate targets. These actions resulted in the seizure of roughly 16,900 pirated games and 26,800 circumvention devices. The industry supported 61 criminal prosecutions that resulted in convictions in 43 of the cases.

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 in 2008.<sup>8</sup> More recently, there was an important operation carried out in the province of Toledo in September 2009. The raid of a house in Seseña led to the arrest of 4 Chinese citizens and the seizure of 89 burners in 9 towers, over 35,000 burnt carriers (CD-R+DVD-R), 4,500 blanks carriers, 13 printers and 3 computers.

<sup>8</sup> 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. The gang operated burners that could produce €600,000 (now US\$896,840) 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 in 2008, 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 2009 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 2009, BSA started 442 legal actions against alleged business software infringers, according to the following details: 26 cease and desist letters to alleged Internet infringers, 79 cease and desist letters to alleged illegal distributors or resellers of unlicensed software, 322 cease and desist letters to end user infringer companies allegedly using unlicensed software, and 15 civil raids against end-user infringing companies, which resulted in a total amount of damages of \$815,562.

**Difficulties in certain enforcement procedures/logistics:** The music industry faces the following problems:

- When producing detailed forensic reports, it is impossible to deliver them within the 72 hours deadline set for special procedures called "fast-track trials." This results in the competent judge sending the procedure to an "abbreviated procedure," which is a much longer procedure and therefore not as effective.
- Some judges require extremely detailed lists identifying every single seized item (such as album name, every artist, producer and song), on a one-by-one bases; this is hugely inefficient, due to the high cost in human resources and time involved for enforcement agencies.
- Police storage facilities are full of millions of units of seized music carriers. In many cases, judges do not order the destruction of goods, and as a result, this involves high expenditures for storage fees and industry monitoring security while pressing for destruction.

**Effective civil actions against business end user piracy but continuing problems with certain civil procedures:** Nearly all of BSA's judicial work in Spain is done via the civil courts. BSA conducted 15 raids against end-user companies during 2009 (twice the number achieved in 2008), resulting in significant damages. In addition, 322 cease and desist letters were sent to end user companies, 79 cease and desist letters sent to illegal distributors, and 26 take down notices issued against Internet-based software piracy cases. Total legal actions for 2009 has been 442.

BSA is fully satisfied with its cooperation with the Ministry of Industry, as mentioned previously. Furthermore, in 2010 BSA will increase its cooperation with the Tax Agency, which will increase its involvement in the investigation of end-user companies using unlicensed software, as well of illegal resellers of software. Two pilot programs will be launched during 2010 (in the region of Cantabria for end user companies and in the region of Murcia for illegal resellers), that are expected to produce positive results.

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 the target company was not infringing. 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\$163,090 in one instance) as to make it impossible to bring the case. BSA reports that the maximum amount it recently posted was €60,000 (US\$81,500).
- 2) 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, some civil courts (mainly in Madrid and Barcelona) still 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 problem makes it difficult for the software industries to pursue actions in these two major markets.



- 3) **Calculation/valuation of damages:** The usual rule in calculating damages involves the full retail price of the product. However, a decision from a court of appeal (against the company “In Hoc Signo Vinces”), might have a negative effect because it reduces the valuation of damages for right holder companies that are based outside Spain. On the theory that 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 reduced. 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.

BSA also voices generalized concern that the knowledge level of prosecutors, civil (commercial) and criminal judges on copyright issues needs improvement, which may be carried out through the above-mentioned Intellectual Property Congress.

**Public performance piracy in restaurants and bars:** The recording industry reports that the national government, through its 2006 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. This campaign was actually aimed at preventing sales of physical CDs in restaurants and bars (people with back packs carrying illegal CDs for selling them in stores ). No further action has been taken.

**Border enforcement:** In 2007, Promusicae signed an agreement with the Tax Agency, and this is being implemented in the fight against tax and customs fraud affecting the music industry. The primary results of this agreement are helping to improve communication and collaboration with the customs authorities regarding training, investigation and actions in customs premises. Several investigations are ongoing.

## **COPYRIGHT AND RELATED LAWS IN SPAIN**

**Proposed Sustainable Economy Law:** On December 1, 2009, the Spanish government presented a comprehensive bill called the “Sustainable Economy Law” aimed at stimulating the economic recovery. Among many other measures, it proposes to amend several articles of the LSSI and the Intellectual Property Law (as discussed in some detail, above). The proposal also calls for the creation of an Inter-Ministerial Commission with the power to examine complaints from rights holders or their designees and notify websites which would be able to challenge the notifications. Absent a convincing rebuttal or corrective action, the Commission would forward the cases to a judge for review and a court-ordered suspension of the service. U.S. and Spanish rights holders are actively lobbying for swift passage of the draft bill without negative amendments.

**EU and Spain join the WIPO Treaties:** The European Communities and 12 of its Member States, including Spain, finally deposited their instruments of ratification to the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT), and these obligations will enter into force on March 14, 2010. Addressing the erroneous conclusion reached by Spanish courts that devices primarily designed for the purposes of circumvention are not unlawful when capable of some ancillary legitimate use is made all the more important in light of the obligations under the WCT and WPPT with respect to the protection of technological protection measures. We also highlight that Spain, by ratifying the WIPO Treaties, has committed itself to “ensure that enforcement procedures are available ... so as to permit effective action against any act of infringement of rights ..., including expeditious remedies to prevent infringements and remedies which constitute a deterrent to further infringements” (Article 23 of the WPPT, and Article 14 of the WCT). To achieve this, Spain will need to address adequately the various deficiencies identified in this report, including reversing the 2006 Circular, and ensuring more responsible action by ISPs to prevent their proprietary networks from being used for the storage or transmission of infringing materials.

**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 any

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.

**EU Enforcement Directive (2004):** Proper implementation of the EU Enforcement Directive remains of vital importance 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, there was an amendment affecting the redefinition of who is a "competent authority" to notify ISPs.<sup>9</sup> The amendments proposed by the Sustainable Economy Bill would streamline this issue but only with respect to content hosted on websites.

**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):** 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.

**Proposal to reduce penalties for street piracy:** On November 13, 2009, the government approved a proposal to amend the Criminal Code in order to avoid prison penalties for street sellers in case of minor offenses of Intellectual

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<sup>9</sup> 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.

Property rights ("minimum economic profit obtained by the infringer"). In these cases, the Court would impose fines or community work services (from 31 days to 60). The bill is at a very early stage and there has been no movement recently.

## **TRAININGS and PUBLIC AWARENESS**

The content industries regularly offer training sessions and enforcement assistance in Spain. What is clearly needed is more government involvement in such seminars particularly to increase the participation of judges and public prosecutors. FAP organized 14 seminars, provided experts for judicial procedures and evidence storage and closely cooperated with the police during investigations.

Promusicae believes training for enforcement agencies as well as judges and prosecutors is very important. During the first nine months of 2009, Promusicae organized and carried out 15 training seminars and courses for a total of 1,850 attendees. This figure reflects the number of training seminars and courses organised directly by Promusicae-Agedi. Also during the year, Promusicae took part in a total of 28 courses held by other associations. The total number of training and courses in which Promusicae have participated was 43, with 2,852 attendees. This is not as many events as in 2008, and the challenging Spanish economy is part of the reason for this. In addition, Promusicae and other associations are aware of the direct relationship between training to enforcement agencies and their involvement in the prosecution of IPR crimes, and much of the training dealt with physical piracy. Promusicae keeps making big efforts to promote and organize training sessions that can contribute to enforcement agencies' awareness.

During 2009, BSA worked with the government to create a cooperative project with the Spanish Judiciary School. As a result, an Intellectual Property Congress will be held in 2010, aimed at training judges and magistrates, specifically in intellectual property issues. Also during 2009, the third annual Technological Police Congress took place, and that afforded an opportunity to strengthen the present cooperation with the Ministry of Interior and police forces. FAP organized seminars, provided experts for judicial procedures reports, provided evidence storage and closely cooperated with police forces during investigations.

## **MARKET ACCESS BARRIERS**

**Film Dubbing (Catalunya):** IFTA reports that the Catalan regional government is proposing new restrictions on films released in Catalunya. Basically they are planning to require that for any film released in more than 15 prints (which means most films), half must be dubbed into Catalan. This is costly and not warranted by public demand. Details of the proposals are just emerging. While promoting "linguistic access" is the goal and not something we question, the means are not suitable or fair. This restriction would be particularly burdensome to independents and their local distributors who, depending on size of release, may not be able to recoup the costs of additional dubbing and this may further impede release of independent films.

**Investment Obligation:** Spain maintains discriminatory investment provisions whereby audiovisual media service providers, including broadcasters, must annually invest five percent of their revenues in the production of European and Spanish films and audiovisual programs. In addition, 60% of this allocation should be directed towards productions in any of Spain's official languages. These investment obligations also apply to future digital terrestrial channels.

**Screen Quota:** For every three days that a non-EU country film is screened, in its original language or dubbed into one of Spain's languages, one European Union film must be shown. This is reduced to four to one if the cinema screens a film in an official language of Spain and keeps showing the film at all sessions of the day in that language. Non-observance of the screen quotas is punishable by fines. These discriminatory measures ignore market demand for U.S. and non-EU country films and stifle development of Spain's theatrical market.

# THAILAND

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2010 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** Thailand should be lowered to the Watch List.<sup>1</sup> An Out-Of-Cycle Review (OCR) should be conducted by USTR to:

- determine whether the Royal Thai government has put into place measures to ban the unauthorized camcording of movies in theaters and provide for landlord liability; and
- review progress in adopting legislation that would be WCT- and WPPT-consistent, including, *inter alia*, adequate protection for technological protection measures, and address Internet piracy and promote service provider responsibility (including statutory notice and takedown), and delete the copyright owner code from the OD law.

USTR should also review whether the Royal Thai government has taken necessary action to ensure the operation and performance of adequate and dedicated enforcement units, best achieved by vesting enforcement authority in DIP to conduct raids, make arrests, investigate, and commence anti-piracy litigation, by increasing resources in the newly created Division of Technology Crime which will oversee Internet piracy issues, and by making progress in increasing the number of criminal prosecutions with deterrent sentencing.

**Executive Summary:** IIPA congratulates His Majesty the King of Thailand for launching with his Ministries the “Creative Thailand” initiative along with the twelve “Creative Thailand Commitments” in February 2009.<sup>2</sup> The laudable goals of the initiative include promoting Thailand as a “hub of creative industries in South East Asia” and boosting the economic contribution of Thailand’s “creative industries” to 20% (from its current 12%). IIPA believes adequate protection and enforcement of the existing intellectual property framework will lead to reductions in piracy, which in turn will spur the kinds of investments in local Thai IP industries necessary to achieve the “Creative Thailand” goals. Studies such as that done by the Business Software Alliance and IDC (discussed below) and a just-released study by the Fiscal Policy Research Institute (FPRI) and the Kenan Institute Asia conclude that better protection of copyright could generate additional income. The FPRI/Kenan study, for example, concludes that better copyright protection will generate an additional BT3.7 billion (US\$111 million) for the movie sector and BT1.7 billion (US\$51 million) for the music industry in Thailand.<sup>3</sup>

Unfortunately, losses due to copyright piracy in Thailand grew worse in 2009, and piracy levels remained well above average for the Asia region. For example, losses due to piracy of business software grew to US\$367.8 million in 2009, up from US\$335 million in 2008, while the piracy level for business software grew to 77% in 2009, up from 76% in 2008, many points higher than the regional median.<sup>4</sup> Pirate product remains widespread in Thailand, with some evidence of decreasing optical disc factory production but higher levels of burning and other forms of piracy such as mobile device and online piracy, piracy of published materials in the form of pirate photocopying, and some evidence of counterfeit print piracy at least some of which is destined for export. In conjunction with the global

<sup>1</sup> For more details on Thailand’s Special 301 history, see IIPA’s “History” Appendix to this filing at <http://www.iipa.com/pdf/2010SPEC301HISTORICALSUMMARY.pdf>, as well as the previous years’ country reports, at <http://www.iipa.com/countryreports.html>.

<sup>2</sup> In conjunction with the launch of Creative Thailand, the Royal Thai government reported establishing a National Committee on Prevention and Protection of Intellectual Property Rights in January 2009 (now called the National Committee on Intellectual Property Policy), Chaired by the Prime Minister, and a Sub-Committee on Prevention and Suppression of Intellectual Property Rights Violation chaired by the Minister of Commerce, comprising senior officials from major enforcement agencies in Thailand.

<sup>3</sup> *IP Rights Vital to Creative Economy*, Bangkok Post, January 28, 2010, at <http://www.bangkokpost.com/business/economics/31876/ip-rights-vital-to-creative-economy>.

<sup>4</sup> The record industry suffered at least US\$15.1 million in losses with a 50% piracy rate in 2009. The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA’s 2010 Special 301 submission at [www.iipa.com/pdf/2010spec301methodology.pdf](http://www.iipa.com/pdf/2010spec301methodology.pdf). BSA’s 2009 statistics are preliminary, representing U.S. software publishers’ share of software piracy losses in Thailand. They follow the methodology compiled in the Sixth Annual BSA and IDC Global Software Piracy Study (May 2009), available at <http://global.bsa.org/globalpiracy2008/index.html>. 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.



economic downturn, piracy has devastated the local creative economy in Thailand. 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. In 2009, physical sales of legitimate music products decreased an additional 17%.

The Royal Thai Police, specifically, the Economic and Cyber Crime Division (ECD) of the Central Investigation Bureau (CIB) and the Department of Special Investigations (DSI) continued assisting copyright owners seeking targeted enforcement. Raiding activity ensued, including against business software end-user piracy targets and many retail targets. However, enforcement actions continued to focus mainly on smaller targets, thus having only a minimal effect on overall piracy rates or losses. Increases in manpower in ECD, expansion of the authority of DIP, and expanding resources and training of the newly created Division of Technology Crime and are needed to achieve maximum deterrent effect. In 2009, the government proposed some initiatives that would aid in efforts to thwart piracy. Proposals like imposing liability on landlords who benefit from piracy and either know or should know that infringement is occurring on their premises will be helpful and appear poised for passage into law. IIPA commends the government for its decision to propose a bill outlawing camcording movies in a movie theater, and urges the government to act on long-awaited copyright legislation to modernize protection and, among other things, join the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT). Conversely, IIPA is concerned by the proposed preference policy of the Prime Minister mandating government agencies to buy open source software, which is inconsistent with APEC policy guidance on technology choice.

**Priority Actions Requested In 2010:** 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

- Expand enforcement authority to DIP, and increase manpower in enforcement authorities such as ECD and the newly created Division of Technology Crime.
- New CIB Police Task Force should be activated, made permanent, and made proactive in developing and implementing an effective anti-piracy strategy.
- Continue to improve search warrant issuance, facilitating a right holder's ability to obtain a search warrant from the IP & IT Court when there is evidence of a suspected infringement.
- Close notorious piracy markets ("Red Zones" and "Yellow Zones"), hold mall owners accountable, and conduct progress surveys to demonstrate overall decrease in numbers of vendors throughout the country.
- Continue investigating business of counterfeit book production for export, as well as other key book and photocopy piracy issues.
- Investigate and prosecute greater numbers of key piracy cases, including those involving business software end-user piracy, Internet piracy, mobile device stores or services, burner labs, pirate plants, warehouses, retailers, and pirate book producers, with deterrent results actually imposed and publicized.
- Through meetings between agencies, copyright owners and Internet service providers (ISPs) and appropriate legislation, ensure active cooperation of ISPs with right holders to prevent the use of networks for the commission of infringing acts, including but not limited to effective and fair policies to deal with repeat infringers.

### Legislative

- Introduce (and enact) landlord liability bill.
- Introduce (and enact) planned legislation to ban unauthorized camcording of movies in theaters.
- Introduce (and enact) planned amendments to fully implement the WCT and WPPT, including amendments to address Internet piracy and promote service provider responsibility, e.g., statutory notice and takedown and mechanisms to address hosted piracy, P2P file sharing, web bulletin board services and torrent sites, advertising sites, and Internet-based mobile device piracy.
- Join the WCT and WPPT.
- Address organized crime by adopting measures to make copyright piracy a predicate offense that triggers 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 rights holders acquire a “copyright owner’s code” before any replication of legitimate CDs.
- Issue clarification that copy exceptions in the copyright law comply with TRIPS Article 13 and do not allow whole copying of books without permission and payment.

### Market Access and Related Issues

- Among other market access restrictions to be addressed, reverse proposed policy mandating use of open source software, and, e.g., requiring bundling of government funded computers and computers for schools with open source software; maintain neutral policies with respect to technology choice.
- Fix the Motion Pictures and Video Act B.E. 2550 to address potential quantitative and screen time quotas on foreign films that undermine market access for legitimate content.

## PIRACY AND ENFORCEMENT CHALLENGES IN THAILAND

**End-User Piracy of Business Software and Other Software-Specific Issues:** 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 77% in 2009, higher than 2008 and well above the Asia regional median (which was 61% in 2008). Other piracy phenomena harming the business software industry include hard disk loading of illegal software onto computers at the point of sale. The Business Software Alliance (BSA) also reports illegal software programs being used for the purpose of circumvention of technological protection measures (TPMs) on legitimate business software. This last problem highlights the urgent need for copyright amendments to provide protection against products being used to circumvent TPMs, which is also an important part of WCT and WPPT implementation. Reducing piracy would have a net positive effect on Thailand’s economy. A January 2008 study done by the International Data Corporation (IDC) with BSA concluded that decreasing Thailand’s software piracy rate by ten percent over a four year period would add US\$1 billion to Thailand’s economy, create 2,100 new high-wage high tech jobs and generate an additional \$55 million in tax revenue.

The business software industry reported that they received good support from ECD for end-user software piracy actions and also the support of DIP and ECD in building awareness and promoting the use of legal software in the workplace.<sup>5</sup> As a result, business owners and IT managers appear to have become more aware of the risks of using pirate or unlicensed software in the workplace. While insufficient in terms of manpower, BSA finds ECD officials to be competent and dedicated to their work. BSA also received good cooperation from the state prosecutor’s office. ECD has indicated that in 2008, the division arrested individuals and businesses who were later charged in 85 illegal software cases involving BT300 million (US\$9 million), and that it expected the number of arrests in 2009 to reach about 120, in cases involving about BT433 million (US\$13 million). In October 2009, ECD announced it would begin investigations into about 1,000 companies for possible infringement of software copyright, which is also a welcome sign.<sup>6</sup>

There were also improvements in 2009 regarding fines in a few IP & IT Court verdicts in 2009 (following on one case in 2008) for end-user raid actions. The fines in these cases are equivalent to the requested amount for actual damages. For example, the maker of design and engineering software was awarded BT1.8 million (US\$54,000) in damages for the infringement of its copyright by a Bangkok-based manufacturing company. In one case in 2008, a software company was awarded civil damages of BT3.5 million (approximately US\$105,000), which included the retail value of the software at legitimate prices (BT2.5 million or US\$75,400) found on the computers,

<sup>5</sup> Unfortunately, the authorities refuse to name targets of end-user raids, for fear of defamation claims, but the failure to fully publicize raids makes them much less effective as a deterrent. This reluctance arises out of a feature of Thailand’s criminal law that 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.

<sup>6</sup> Jirapan Boonnoon, *Police Probe Corporate Software Violators*, The Nation, October 8, 2009, at <http://www.nationmultimedia.com>. The article also indicates that ECD has sent 30,000 letters to companies around the country to encourage their use of legal and properly licensed software.

plus legal fees, interest, and damage to the software copyright holder's reputation. This civil judgment marks a welcome improvement over the norm. Court verdicts for sale of counterfeit products over the Internet have also been higher as software representatives have been able to demonstrate that the offenders also duplicated the infringing material themselves, which carries a higher penalty than distribution alone.

The chief problems with the IP & IT Court for the software industry remain non-transparency in the granting of search warrants (and the requirement for continuous evidence submission to obtain warrants) and the imposition of non-deterrent sentences in many cases (with the above-noted cases being the exception to this rule). In particular, judges often side with or express sympathy toward small offenders and on occasion sentence them to probation only. These attitudes can be found within key agencies as well, and extend specifically to end-user software piracy such that due to a lack of understanding, some officials have indicated disinterest in enforcing the law with respect to such piracy activities.

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. However, this positive request may be made much less valuable by the Prime Minister's apparent policy that government agencies acquire open source software, thus restricting their technology choice.

**Internet Piracy Grew Worse in 2009 with Greater Connectivity:** Internet-based piracy affects nearly all industries and is unfortunately on the rise. Internet connectivity continued to grow in Thailand in 2009. Thailand boasted 16.1 million users, or 24.4% penetration as of September 2009, and well over 900,000 broadband connections, or almost 1.5% penetration as of November 2008.<sup>7</sup> Broadband connections are mainly found in big cities, while rural villages continue to rely mainly on dial-up connections, thus, Internet piracy in its most virulent forms is primarily prevalent in major hubs. The local music and record industry group, the Thai Entertainment Content Trade Association (TECA), estimates that there are as many as 4,000 websites dealing in recorded music piracy that are hosted in Thailand (this number excludes overseas sites that cater to the Thai market and excludes other industry-specific sites). Bit torrent index sites and tracker sites are also increasingly being used in Thailand to facilitate the unlawful distribution of copyrighted files.<sup>8</sup> Public and private web bulletin boards (some of which are supported by advertising), free social networking sites, web blogs and cyberlockers are just a few of the additional ways Internet piracy is spreading in Thailand. Traditional P2P file sharing sites, both commercial and non-commercial, download services, deep linking, and websites advertising pirate product remain ever present.<sup>9</sup> Many consumers have replaced the purchase of copyright materials in hard copies with ripping such content from the Internet to use on their computers or store on mobile devices. IIPA is encouraged by a raid in early 2009 involving a man advertising pirate movies and TV series' over the Internet through a website based in Thailand.<sup>10</sup>

To effectively deal with Internet piracy, the government should enact an appropriate legal framework and put in place an enforcement infrastructure that includes a group of competent officials to deal with Internet-based infringements. These officials should also oversee how the private market – meaning mainly ISPs in cooperation with copyright owners – respond to the challenge. Unfortunately, neither the Computer Act nor the Copyright Act of

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<sup>7</sup> These statistics are according to the International Telecommunications Union.

<sup>8</sup> In Thailand, tracker sites consist of general trackers which are open to any user, and exclusive trackers which accept only a particular group of users (i.e., based on the amount of torrent files uploaded), which are by invitation only or referral and involve membership fees. The contents available in these tracker sites are mostly unauthorized files as well as pornography files.

<sup>9</sup> For example, in April 2008, following an in depth investigation, the Business Software Alliance (BSA) 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.

<sup>10</sup> The Motion Picture Association reports that on February 6, 2009, MPA Thailand representatives teamed up with ECD officers to conduct the first ever raid in the country specifically targeting Internet piracy. It was the second significant operation in 2009 for MPA Thailand following a January 2009 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\$12,000 (BT400,000) over a two-month period. The police completed their investigation and passed the matter over to the public prosecutor.

Thailand provide for statutory notice and takedown, nor for service providers to assist right holders in investigations. As a consequence, there is no mechanism for rights holders to learn the identities of suspected infringers. The Royal Thai government should ensure that ISPs are aware of their responsibility to deal with infringements, by enacting statutory notice and takedown and otherwise fostering cooperation to defeat online infringements including P2P file sharing. We urge DIP to call together copyright owners and ISPs to forge an MOU on anti-piracy cooperation in the online space.

In 2008 and again in 2009, industry reported good relationships with DIP and the Royal Thai Police on Internet piracy issues, and reported fairly high takedown rates. For example, in 2009, the local music and record industry association was able to achieve 645 takedowns based on 749 cease and desist letters to webmasters and ISPs, a takedown rate at 86% (compared with 155 takedowns out of 163 notices to service providers in 2008, a 95% takedown rate).<sup>11</sup> BSA also has had some success in the past seeking takedowns. Unfortunately, service providers, while fully aware of copyright piracy on illegal sites and services, have become reluctant to divulge IP addresses or names, refusing even to name the webmaster. The Royal Thai Police used to obtain such information on an informal basis, but in 2009, the information flow and cooperation have slowed considerably. The Royal Thai Police have also been slow to establish a procedure for requesting court orders for ISPs to release this information and wait for rights holders to obtain a warrant from the court. The Communication Authority of Thailand (CAT) provides space for ISPs to set up a server to operate their business but has not to date helped rights holders monitor the operation of ISPs. In one positive development, TECA was able to obtain agreement from some cyberlocker sites not to accept MP3 files, but this does not guarantee the absence of such files since file names can be easily changed.

IIPA is pleased that the Royal Thai Police established a new Technology Crime Suppression Division on September 7, 2009. While the Division is not up and running in full force yet, IIPA commends the government for recognizing the need for a separate unit to deal specifically with Internet-based infringements. However, the unit has only 20 police officers working in the new Royal Thai Police building, and is short on tools and supplies, with only 10 standalone computers and no high-speed Internet connections. Some personnel lack Internet access, some even lack the requisite computer knowledge, so training is urgently needed.

**Judicial Reforms Still Desirable to Ensure Consistent Issuance of Search Warrants, and Deterrent Results:** IIPA heralded the establishment of the IP & IT Court in Thailand more than a decade ago as a necessary step to achieve deterrence in regard to copyright piracy cases. Having this specialized court has meant speedier dockets and dedicated judges who are better aware of the needs of a copyright case adjudication practice. The court's expertise has also led to some more significant civil judgments in piracy, as noted was the case in a couple of end-user software cases decided recently.

Unfortunately, some problems remain with court adjudication, some of which are fundamental to the overall effectiveness of judicial enforcement in Thailand against copyright piracy. One example involves the issuance of search warrants. Copyright cases are unique in that evidence of infringement can be easily discarded or erased, especially in the age of digital or online content. Thus, quick and consistent issuance of search warrants, on an *ex parte* basis, is vital to ensure preservation of the element of surprise and the preservation of evidence which might otherwise be easily lost or discarded. Unfortunately, in recent years, copyright owners have faced inconsistencies in the process of obtaining a warrant and a lack of transparency in decision-making in certain instances, especially

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<sup>11</sup> 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.



when warrant requests are rejected. The arbitrary nature of the review process makes it impossible for right holders to anticipate what any particular judge may request in terms of evidence of to support a warrant. In 2008, such arbitrary decision-making led to a terrible drop in success rate for issuance of warrants for the business software industry, down to 3% for all of 2008. While the issuance rate improved in 2009, IIPA members report that the same judges continue denying search warrants or set truly onerous proof standards, e.g., requiring pictures of the distributor selling the product or of the plant operator actually producing discs. IIPA recommends that in 2010, a series of discussions ensue between affected rights holders and the court to sort out the standards for issuing search warrants. Unreasonable proof burdens such as those described above should be disfavored and a more reasonable approach, based on reasonably obtainable evidence and a reasonable suspicion of illegal activity, should be adopted.

IIPA also strongly urges the Royal Thai government and the courts to consider sentencing guidelines and adopting minimum sentencing that provides a real deterrent to infringement, as well as applying maximum sentences allowable under the law where warranted. While IIPA also notes that criminal enforcement would be improved by bringing more high profile cases involving source piracy, it still remains the case that, especially in recent years, most cases involving pirate distribution result in non-deterrent fines. Of the cases concluded in 2009, over 90% of them resulted in a fine from US\$1,000 to \$5,000. For example, in a few cases where the defendant was shown to have reproduced and distributed the product, a slightly more significant penalty was imposed (e.g., in a recent Internet piracy case, a fine of US\$3,000 and a suspended six month sentence were imposed). The Court has also been applying discounting factors to first-time offenders or those who plead guilty, further limiting the deterrent effect.

**Physical Piracy in Retail Hotspots in 2009; Some Indication of Drop-Off:** Street piracy still pervades the markets in Thailand (in places like Bangkok, Phuket, Samui, Pattaya, Chiangmai, and Krabi), although there was some drop-off in physical piracy in 2009, attributable to the economic downturn, sporadic enforcement campaigns, and the rise of other forms of piracy.<sup>12</sup> 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 in Thailand.<sup>13</sup> Industry reports indicate the Royal Thai Police applied pressure through raids and investigations in the Red and Yellow Zone areas, forcing the pirates (especially music pirates) to change their strategy, opting for sales in open street markets scattered around villages and narrow streets and roads. These street hawkers erect small stalls and move around from day to day selling their wares, for example, compilation discs with the top 50 to 100 songs, sometimes selling for only a couple hours a day. Street hawkers in general have also changed their selling habits by displaying only the sleeves and inlay cards without the discs inside, and in many cases, by leaving their stalls entirely unmanned, often only appearing when a buyer wants the product. Such hawkers then burn-to-order the product or pick it up from a nearby storage facility or warehouse.

IIPA members continued to note a decrease in the quality of the physical product, as pirates move from factory discs to burned discs, and from off-set printing for labels to sticker labels or no labels at all. However, there remain a few cases in Thailand of politically “untouchable” factory plants producing higher-quality pressed discs, and many of the more sophisticated counterfeits are imported from places like China and Malaysia. Pirates operating in the physical market have also made changes to accommodate technology and better compete, for example, offering thousands of songs in MP3 format on one pirate disc.

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<sup>12</sup> Regarding the pricing of pirated versus legitimate discs, industry reports that Factory-pressed pirate CDs and DVDs (movies, music, or software) are not surprisingly more expensive than burned discs in Thailand, running at about BT100 per disc (US\$3), while pirate burned discs are around BT80 (US\$2.40) and Chinese imported discs are from BT120 to BT150 (US\$3.60 to 4.50) and pirate Bluray discs from China (mostly normal discs being “passed off” as Bluray) are BT150 (US\$4.50). By contrast, legitimate local Thai music discs start at BT99 (about US\$3) while imported content can range from BT149 (US\$4.50) to BT1,499 (US\$45.00), depending on the kind of music, whether the product is a special edition, box or “bonus” set.

<sup>13</sup> 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 Surattani Province; Pattaya in Chonburi Province; Haad Yai District in Songkla Province; Ao Nang area in Krabi Province; Hua-Hin in Prajauabkirikan 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.

The Royal Thai government reported over 6,500 raids involving intellectual property violations in 2009, although these are not broken down by type of IP involved.<sup>14</sup> Many of these raids involved retail locations, with few focusing on the source of pirated goods, such as manufacturing facilities or warehouses raids and the raids are almost always run based on copyright owner complaints.<sup>15</sup> IIPA would like to see a comprehensive approach to retail piracy that enables authorities to close notorious piracy markets ("Red Zones" and "Yellow Zones"), hold mall owners accountable, and conduct progress surveys to demonstrate an overall decrease in numbers of vendors who sell pirate product throughout the country. For example, just taking the zones alone, the government could measure how many stalls exist today, and then measure on a monthly basis how many remain and how many have been closed. Reducing the number of stalls will make an impact on retail piracy rates.

**Camcorder Piracy:** Thailand is a significant source of pirate camcording<sup>16</sup> in the Asia region, with 22 recordings forensically matched to cinemas in Thailand in 2009 (over 35 cases of illegal camcording of U.S. major motion pictures were detected in 2008). Many major U.S. motion pictures, but also local Thai films, fell victim to camcording piracy in Thailand, harming the films' onward distribution since pirate versions taken from such camcordered copies would then appear on pirate DVD or even over the Internet. IIPA urges the Royal Thai government to ensure that the problem of illegal camcording is properly addressed and we are pleased that the government has decided to legislate a ban on camcording in movie theaters (in addition to any protection that currently exists in the copyright law). There has been only one case prosecuted under the copyright law, involving a guilty plea by the defendant resulting in an insignificant and non-deterrent penalty following the arrest of a suspect caught recording *Body of Lies* at the Siam Paragon theater on October 9, 2008.<sup>17</sup>

**Mobile Device Piracy:** Thailand's mobile subscriber penetration grew once again in 2009, as Thailand hosted 66 million mobile subscribers by mid-2009 (compared with 53 million in 2008).<sup>18</sup> As a result of this growth in the market, right holders experienced greater harm in 2009 from businesses in Thailand providing content on mobile devices, thumb drives, MP3 players, and the like. Industry surveys reveal that mobile shops in the Red and Yellow Zone areas, i.e. Pantip Plaza, Klongtom and Saphan Lek, Koa Sarn Road, Fortune Center and Sear Department Store, all offer "pre-downloaded" music files to customers on mobile devices as a service. Fewer consumers purchased legitimate or pirate product in physical format, instead choosing to rip their content onto mobile devices from various sources including from the Internet. In addition, former retailers of pirate optical discs continued to set up brick-and-mortar shops offering digital download services to consumers for mobile devices, some maintaining an in-store hard drive containing literally thousands of files to purchase and load onto mobile devices. The local music and record industry association monitors this type of infringement on a regular basis and continues to find some mobile phone shops in big cities and tourist attraction areas that provide services for illegal pre-loaded tracks to consumers who are buying new mobiles phones or are requesting infringing content. In an 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 a device. Book and journal publishers have in the past reported occurrences of downloading reference books and dictionaries in a similar manner.

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<sup>14</sup> In Thailand's Department of Intellectual Property (Ministry of Commerce) report, *Thailand's Implementation on Intellectual Property Rights, March 2008 – February 2009*, the government indicated 5,328 raids (2,973 copyright) resulting in seizures of almost 3.2 million pieces (2.3 million copyright) from January to November 2008, and 521 Customs seizures resulting in seizure of almost 1.3 million pieces. The Customs statistics are not broken down by sector. ECD ran 130 copyright raids in 2008 with seizures of over 170,000 pieces.

<sup>15</sup> For example, the record industry group in Thailand, TECA, reported 194 successful raids, with 184 defendants arrested, and over 50,000 discs seized. They report 173 indictments, with 68 convictions or guilty pleas, and 105 cases still pending. Out of the 68 convictions, 7 resulted in jail time although the sentences were all suspended. 43 of the cases resulted in criminal fines, with all but three of the fines ranging from US\$1,000 to \$5,000. Only one fine in 2009 exceeded US\$5,000. For the motion picture industry, there were 47 raids, resulting in over 400,000 seized discs, and out of 121 criminal cases commenced, there were 19 jail sentences imposed, although all but one were suspended. Out of 28 criminal fines imposed, 24 ranges from US\$1,000 to \$5,000, and no fine of over US\$5,000 was imposed in 2009. The business software industry reports 28 end-user raids, with one positive outcome, and 16 cases pending.

<sup>16</sup> 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 and upload illegal copies to the Internet.

<sup>17</sup> *Id.* The Royal Thai Embassy's February 13, 2009 report mentions this case.

<sup>18</sup> *Thailand – Mobile Communications – Overview*, at <http://www.budde.com.au/Research/Thailand-Mobile-Communications-Market-Overview.html>.

Thai law enforcement officials remain behind the curve on mobile piracy, with some even questioning whether the mobile download (or upload) services provided by the stores can be considered copyright infringement, and refusing to go after the stores that are reproducing the content from the Internet and then distributing it to customers. Such copying and file-transferring clearly constitutes copyright infringement, and must be dealt with severely or this problem of mobile device piracy will grow more harmful.

**Book Piracy, Including Production for Export and Unauthorized Photocopying:** The book and journal publishing industry continues to face the following problems in Thailand: print piracy, illegal photocopying, unauthorized translations, and online piracy, though the latter is not yet a significant threat. Of these, unauthorized photocopying of educational materials, in and around universities, remains the predominant form of book piracy in Thailand. Copy shops continue to copy books for students, often on a “made to order” basis to avoid keeping infringing stock on site. Lecturers are culpable too, compiling “course packs” of works without permission from publishers, with some producing unauthorized translations of works and claiming authorship. Other pirated materials include novels, travel guides, history books and foreign language newspapers. Various private institutes in Thailand provide illegally reprinted Test of English as a Foreign Language (TOEFL) materials to their students.

In recent years, the industry alerted Thai authorities to the problem of counterfeit/pirated books being produced for export – a problem of considerable concern as these pirated books were making their way into the U.S. market.<sup>19</sup> The Thai based-producer and exporter of these pirated books runs a sophisticated operation and network of consignees, using several companies as fronts for the export activities. Though there was little action by the Thai authorities in the past, in 2009, the relevant agencies of the Royal Thai government began to vigorously pursue an investigation into the production and export of pirated/counterfeit books. In October 2009, the Sub-Committee on Investigation and Suppression of export of counterfeit books was formed, and the Association of American Publishers is working closely with the member agencies in pursuing investigations into the problem of counterfeit book exports. The member agencies of the Committee include the Department of Intellectual Property (DIP) and the Department of Special Investigation (DSI), ECD Police and Royal Thai Customs. The industry appreciates the vigor with which the Committee and its member agencies are now pursuing investigations into this problem. Though there has been considerable effort to address the problem of counterfeit book exports, it remains the case that no *ex officio* actions are conducted against unauthorized photocopying that occurs quite openly

A longstanding problem has been the misconception about “fair use” in the educational context. IIPA is appreciative of recent efforts made, such as sending officers to lecture on book copyright to teachers and librarians, and to explain its manual on fair use at universities. IIPA continues to request input into the Royal Thai government’s development and release of “Fair Use Guidelines for Education,” particularly in light of older court decisions which may be easily misinterpreted by the universities regarding the scope of allowable copying (IIPA recommends amending Section 32 to ensure that broad interpretations allowing wholesale copying of textbooks without authorization and payment cannot be upheld). At least, it must be made clear in such activities by DIP that wholesale copying of academic materials without permission and payment is impermissible.

**Optical Disc Piracy Mainly Consists of “Burned” Discs, with Some Imported and Factory Pressed Discs:** Changing technologies has meant shifts in the kinds of pirate optical discs found in the market. Shops, back rooms, and even private premises are increasingly being turned into pirate recordable disc burning labs, especially in rural areas of Thailand. Imported discs have increased, particularly from China which are generally higher quality sophisticated counterfeits,<sup>20</sup> and discs are still detected coming in from Malaysia. There has been an overall decrease in audio discs, since much of the pirate audio market has been replaced by Internet- and mobile-based piracy. There remains some factory production, with some untouchable plants still in operation. Industry indicates the

<sup>19</sup> As reported last year, U.S. Customs authorities seized shipments of pirated books, including English language technical and professional books, and English language textbooks, in varying quantities.

<sup>20</sup> The local music and record industry group reports that smuggling CDs and DVDs from China is popular since consumers of piracy believe Chinese pirate compilations have high quality covers and are relatively inexpensive. These are smuggled in through the Thai-Myanmar border in small amounts to avoid detection by Royal Thai Customs, or are sent via postal service or delivery companies to retailers for further distribution.

ratio of burned-to-factory discs now stands at about 80%-20%. While historically industry had not been permitted to participate in investigations of particular plants, one breakthrough in 2009 was the inclusion of industry in the latest plant visits. The Plant Visit Program was conducted in July and August 2009 with 30 (out of 38) plants visited. The local recording industry group, TECA, and the Motion Picture Association's local group were invited and teamed-up with the DIP, Police Bureau and DSI to visit all of these plants. IIPA appreciates the government's willingness to open the process, since it is through this cooperation that the optical disc piracy problem (at least, the factory production problem) will be resolved. The Team was able to collect three sets of exemplars from almost every plant visited. DIP generously gave industry a set of exemplars to be sent to IFPI's lab in London. The plant visits remain important due to some continued evidence of some exports out of Thailand. Recent years' anecdotal evidence indicated that discs were being exported from Thailand to Malaysia<sup>21</sup> and to Australia (through an operation run by a Thai student community in Australia, operating a website in Thailand that shipped discs to Australia), and in 2009, some exports were detected flowing into Japan.

IIPA previously reported three major optical disc actions.

- **Cyber Planet:** This plant was raided on April 10, 2007, and the managers were charged with violating the Optical Disc Manufacturing Act for failing to inform DIP regarding production. The Cyber Planet case is now in the hands of the State Attorney, and industry reports that it is likely that the State Attorney will bring charges against the plant for violating the Optical Disc Law.
- **The "307 Plant":** Referred to in DIP's February 2009 report as "Million Silver Gold Factory," this plant was raided on June 20, 2007, leading to prosecutions under the copyright law and the Optical Disc Manufacturing Act. On February 24, 2009, the IP & IT Court found all the defendants in the "307" Plant guilty of violating the Copyright Law, the Optical Disc Law, and the Criminal Code. Each of the named defendants, the Managing Director of the plant, and two employees, received unsuspended sentences of two years in jail, and all defendants, including the "307" CD Plant Company, were punished with a BT506,000 (US\$15,300) fine. The judgment also resulted in confiscation of all machinery and equipment seized, including one optical disc factory line, one printing machine, and the pirated discs found in the initial raid. IIPA commends ECD, DSI, DIP and the Office of the Attorney General for carrying through this legal action. IIPA notes that the judgment has not been fulfilled as the defendants all appealed the case to the Supreme Court where the case is under consideration. The defendants are now free on bail. The appeal in the Supreme Court normally takes one to two years before a final judgment is rendered. Notwithstanding the appeal, the plant is closed.
- **Unregistered Plant:** One unregistered plant was raided October 19, 2007, 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. The owner's two employees, nationals of China and Myanmar, were also arrested for copyright infringement. The courts have suspended consideration of the case since the defendants absconded after being let out on bail, but arrest warrants have been issued.

In another case, in September 2009, ECD conducted operations involving an optical disc plant called "LLI Technology Company Limited" in Nonthaburi Province. A lengthy investigation revealed reproduction of pirate discs at night which were delivered to customers/downstream distributors in the early morning. Two drivers delivering thousands of pirate music and movie discs, CD-R burners and thousands of cover sheets for packaging were arrested and pled guilty to dealing in pirated items and the pirate product was seized. On the early morning of September 24, 2009, the plant was searched and six CD/DVD replicating lines were seized, along with a number of

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<sup>21</sup> 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.

stampers, molds and printing machines. The plant operator and management team were charged with copyright infringement. IIPA commends the government for taking this high-profile and important case, and while IIPA understands the case will be sent to the Office of the Attorney-General for litigation very soon, the owner of the plant unfortunately was able to successfully petition the Court for the return of all his machines. Time will tell whether the plant will remain shuttered and justice brought to bear on the owner of the plant, but the government should be commended for following through on this search and arrests given the overwhelming evidence of a highly organized operation.

Since the U.S. government has provided the Royal Thai government with optical disc forensic equipment, IIPA strongly urges the U.S. to ask the Royal Thai government to maximize the use of this equipment by taking (seizing) sample pirate discs from all areas known to be havens for piracy, e.g., in the Bangkok area, and sending such discs for forensic testing to match the discs with optical disc facilities. This will help pinpoint the Thai facilities that are supplying the retail and street markets. To the extent that discs are imported, it may be that industry can help identify the plant, which in turn would help Royal Thai Customs in their identification of pirate shipments and otherwise help cross-border investigations into import piracy.

**Entertainment Software Piracy:** Piracy of entertainment software remains prevalent in Thailand, whether through sales of burned, factory pressed or imported optical discs or cartridge-based games and use of pirated games in unlicensed Internet game rooms or cafés. Malls and street hawkers serve as retail channels for pirated entertainment software products. To evade authorities, vendors often store their pirated product in a separate location, and display only game covers or empty boxes in their stands. When a customer, after browsing the shop “catalogues,” requests a specific title, often times 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 or retransmission of U.S. programming over systems from original cable or satellite transmissions, remains a major problem, especially outside of Bangkok. 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. The cable industry group CASBAA reports losses to industry in the range of US\$211 million due to signal theft in 2009 (the second highest losses in Asia, only surpassed by India), with an estimated \$76 million in lost tax revenues to the Royal Thai government for allowing piracy to continue unabated.<sup>22</sup> The main source of losses was illegal distribution of signals, although there remain some losses due to illegal individual connections and satellite overspill. The cable industry reports 1.64 million illegal hookups in the country out of more than 2.5 million total hookups in Thailand, a more than 2-to-1 ratio between illegal and legal hookups.

Illegal decoder boxes and smart cards remain widely available in Thailand and a growing problem. Individual hackers continue to cause undue damage to the legal market by applying for a legitimate pay television subscription service, and then using the Internet to share the smart card with others, collecting a monthly fee from the users of the pirate service. Such Internet card-sharing is starting to have serious repercussions for the legitimate industry as well as direct-to-home pay television services.

The Royal Thai government has been very slow to recognize this form of piracy as a priority, but given the size of the problem and the amount the authorities can expect to reap just in terms of lost tax revenues, they need to take this problem seriously and address it. A welcome development was the inclusion in the Broadcasting Act of a provision (Section 70) that punishes manufacturers, importers, sellers and those who service pirate decoders aimed at decrypting Thai-licensed services. IIPA hopes that this change will stimulate many 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.

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<sup>22</sup> CASBAA and Standard Chartered, *Digital Deployment: Asia-Pacific Pay-TV Industry Study*, November 2009.

**Public Performance Piracy of Motion Pictures:** Public performance piracy continues to be a problem with many hotels, especially outside Bangkok, retransmitting unauthorized videos over in-house movie systems and bars in tourist areas openly exhibiting films without authorization. A growing number of bars and restaurants have also added “private” rooms to screen major motion pictures illegally.

**Link Between Piracy and Organized Crime:** It has long been the case that powerful interests have been attracted to the low-risk, high profit nature of piracy in Thailand, placing copyright industry representatives in danger and creating a dangerous situation for those in law enforcement fighting piracy. 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 are connections between organized criminal piracy and corrupt practices, like influence peddling with politicians to avoid being caught or prosecuted for piracy, or substituting pitiful, undesirable defendants in a criminal trial for the real big fish target, which has happened on many occasions in Thailand. 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. There remain examples of “untouchable” plants, including one reportedly owned by an ex-member of the Royal Thai Parliament.

**Fighting Corruption:** IIPA congratulates those in the Royal Thai government who have indicated their awareness of corruption issues and their willingness to stand up to such interference with the legal process. In the 2008 Special 301 report, IIPA highlighted a stoppage in enforcement by a local police station, and the courageous acts of the then-head of ECD 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 pirate targets during raids. Some simple but concrete steps, like rotating police officers every year or two, 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 other markets where this technique has been employed), 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.

**DIP Enforcement Agency Should Be Established:** We recommend that the Royal Thai government establish in DIP an enforcement agency with full power to do all piracy raids. The Royal Thai government should also give full authority to DIP officials to conduct searches, arrests, investigations as well as the authority to initiate litigation against infringers. Establishing such enforcement authority at the DIP has precedents in other markets (e.g., Malaysia and Hong Kong), and will provide needed additional resources (i.e., to the police) to significantly reduce piracy.

## **TRAINING AND PUBLIC AWARENESS**

**Industry Participation in Trainings and Government Events in 2009:** Copyright owners organized and engaged in numerous anti-piracy trainings and public awareness activities in 2009. These included BSA trainings provided on a continuous basis with the judiciary in Thailand, as well as training provided to ECD officials. TECA, along with their international group, the International Federation of Phonographic Industries, have delivered many trainings and seminars for related government agencies regarding investigation techniques, how to distinguish piracy from real products, enforcement techniques, legal controversies, updates on various copyright issues, scientific laboratory forensic techniques, and Internet piracy issues. In September 2009, the Motion Picture Association's local group organized a training in Bangkok for 100 officials and industry (including theater employees) on anti-camcording training. In addition, industry was invited to various events coordinated by or with the participation of the Royal Thai

government, including two destruction ceremonies and one event co-sponsored by the WIPO at Suvarnabhumi International Airport in Bangkok.<sup>23</sup> The two major destruction ceremonies conducted in Thailand in 2009 occurred on March 27, 2009, involving 1,070,170 pieces of pirated and counterfeited goods, and on September 29, 2009, involving 557,876 pieces of pirated and counterfeited goods. At both ceremonies, the Royal Thai Police, the Ministry of Commerce, the Royal Thai Customs, and the DSI were in attendance, and both were presided over by Deputy Ministry of Commerce Alongkorn Ponlaboot.

## **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, if properly enforced with the imposition of the statutory maximum sentences (but as discussed above, this is not happening generally in the courts).

**Mall Landlord Liability:** Legislation has been drafted to incorporate criminal liability for landlords, namely, in a new Section 31/2 of the Criminal Code, the law would provide that criminal liability shall be imposed against the owner or a person in possession of a building or land that knows, or has reason to know, that its lessee is using the

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<sup>23</sup> The following is a non-exhaustive list of some of the government organized programs in 2009:

- **January 14, 2009 Ceremony at the Suvarnabhumi International Airport in Bangkok:** DIP and the Airports Authority of Thailand launched an anti-piracy and anti-counterfeiting effort, in a ceremony attended by WIPO Director General Francis Gurry. Posters and leaflets displaying messages in both Thai and English were placed at different areas of the airport and handed out to travelers, warning them, "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."
- **January 22, 2009 "Task Force Released - Fighting Against an Infringement of Intellectual Property" in Bangkok:** DIP and 853 Metropolitan Police Bureau officers ran a one week campaign to stamp out pirated shops and stalls throughout the Bangkok area.
- **February 2, 2009 DIP Seminar entitled "IP Dispute Reconciliation" in Pattaya:** Local record industry representative presented for 200 attendees from the business sector (SMEs, hotels, restaurants, pubs, bars, karaoke) on proper uses of IP.
- **February 14, 2009 DIP campaign roll-out of "Love Thai, Use Copyrighted":** IP right owners, representatives, artists and government officials marched on main shopping areas to persuade Thais to buy and use only legitimate copyright products.
- **March 18, 2009 Seminar "Penetration to World Market by the Intellectual Property: New Choice for Thai Entrepreneurs" in Ubonratchathani:** DIP seminar to encourage Thai entrepreneurs to use intellectual property as a value-added for their existing products. The local record industry representative was a guest speaker on the topic, "Gateway to the value added of Copyright work." There were around 200 attendees.
- **April 30, 2009 Seminar "Penetration to World Market by the Intellectual Property: New Choice for Thai Entrepreneurs" in Krabi:** DIP seminar to encourage Thai entrepreneurs to use intellectual property as a value-added for their existing products. The local record industry representative was a guest speaker on the topic, "Gateway to the value added of Copyright work." There were around 200 attendees.
- **May 13-15, 2009 Seminar "Intensive Course on the Management of Creative Enterprises and the Role of IP":** DIP and World Intellectual Property Organization (WIPO) organized the seminar, at which the Chairman of the local record industry group, TECA, gave a presentation.
- **May 29, 2009 DIP Seminar entitled "IP Dispute Reconciliation" in Chiang Mai:** Local record industry representative presented for 200 attendees from the business sector (SMEs, hotels, restaurants, pubs, bars, karaoke) on proper uses of IP.
- **June 12-14, 2009 Seventh Annual IP Fair in Bangkok:** DIP asked the local record industry to participate in the IP Fair at the Sirikit Convention Center, Bangkok, at which the industry had legitimate products for sale. Crowd of around 100,000 people attended.
- **June 16, 2009 Seminar "Penetration to World Market by the Intellectual Property: New Choice for Thai Entrepreneurs" in Sukhothai:** DIP seminar to encourage Thai entrepreneurs to use intellectual property as value-added for their existing products. The local record industry representative was a guest speaker on the topic, "Gateway to the value added of Copyright work." There were around 200 attendees.
- **August 31, 2009 Inauguration Ceremony of the "Creative Thailand" Project:** DIP coordinated the launch of the "Creative Thailand" project with a BT21 billion (US\$634 million) budget. IIPA members have participated in this launch, and in addition have had ongoing discussions with the government regarding the IP component of the project, specifically, the need to have an adequate legal framework and enforcement infrastructure in place as a prerequisite to seek to achieve the GDP goals set forth by the project.
- **September 16-20, 2009 The Second Thailand Entertainment Expo 2009:** The Export Promotion Department (DEP), Ministry of Commerce, coordinated this Expo at Siam Paragon, Bangkok. The Expo was intended to promote the potential of the Thai entertainment industries and to upgrade Thailand as a market place for entertainment. There were around 200 film, music, animation and TV companies participating in the Expo.

property for the purposes of copyright (or trademark) infringement. Such landlord liability would subject the landlord etc. to jail time from 3 months to 1 year or a fine from BT20,000 (US\$600) to BT100,000 (US\$3,000), or both. IIPA supports swift passage of this bill which we understand sits with the Minister of Commerce.

**Enact Statute to Ban Illegal Camcording:** IIPA applauds the government for the news that it is drafting legislation to ban illegal camcording. Such standalone legislation has proved to be invaluable in markets where enacted against the fight against illegal camcording, which causes enormous damage to the motion picture industry. As highlighted in this report, not only U.S. films but local Thai and other foreign films get stolen right off the screen, stripping the livelihoods away from filmmakers and all those involved in the creative process, as well as damaging the cinema owners in Thailand who rely on theatrical exhibition receipts for their livelihoods. The draft bill should ban the illegal use of or intent to use an audiovisual recording device in a movie theater to record a film off the screen. 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.

**Prospects for Passage of Copyright Law Amendments in 2010:** Amendments to the Copyright Act have been in the planning stages for many years. The comprehensive draft amendments dating back to 2005 would have made some important improvements to copyright protection in Thailand.<sup>24</sup> 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” as separate exclusive rights, attempt to implement WCT and WPPT requirements to prohibit the circumvention of technological protection measures (TPMs) (although not totally satisfactorily),<sup>25</sup> and prohibit the unlawful tampering with rights management information (RMI), strengthen criminal penalties in certain respects, and establish voluntary collective management of copyright. Technological developments make it important for the Royal Thai government to make changes to modernize the statute and make it more effective. IIPA hopes that the latest draft retains the strong criminal penalties structure of the current statute, and fully implements the WCT and WPPT. IIPA further hopes that the government will decide to join the WCT and WPPT.<sup>26</sup> IIPA looks forward to having an opportunity to review the latest draft copyright legislation. The draft apparently sits now with the State Council.

**ISP Liability Issues:** One very important 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, and therefore, whether ISPs have proper incentives in place to assist copyright owners in combating Internet piracy. IIPA understands that rudimentary provisions on ISP liability, fashioned in part on the U.S. approach to this issue, may be included in the latest draft copyright amendment bill. IIPA would welcome the opportunity to review the draft, and reiterates that enacting the appropriate legal framework to deal with Internet-based infringements is vital, including statutory notice and takedown, and other measures to foster cooperation to defeat online infringements and repeat infringers, including P2P file sharing, bit torrent technologies, web bulletin boards, and cyberlockers. Other laws passed to date, such as the Act on Organizations Allocating Frequency Waves and Supervising Radio/Television Broadcasting and Telecommunication Business B.E. 2543 (2000),<sup>27</sup> and the Computer Crime Act B.E. 2550 (2007), which went into

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<sup>24</sup> 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>.

<sup>25</sup> An additional form of illegal circumvention came to light in 2009. Apparently, those who are producing counterfeit textbooks for export are also providing a pin code which is being used to provide the purchasers of counterfeit with unauthorized access to ancillary and supplementary materials. Thus, once the amendments are in place, there will be three bases for halting the production and export of counterfeit books: copyright infringement (piracy), trademark counterfeiting, and circumvention of a TPM.

<sup>26</sup> IIPA notes that the government is obliged to pass legislation to comply with the Japan-Thailand FTA, which went into effect on October 30, 2008. Included in the IP provisions of that FTA is the obligation to provide a WCT and WPPT-compatible “making available” right (according to Japan-Thai FTA Article 133(1)), protection against circumvention of TPMs (Article 133(2)), and protection against violations involving RMI (Article 133(3)).

<sup>27</sup> The National Telecommunication Business Commission (NTBC), responsible for implementing the provisions of the Act on Organizations Allocating Frequency Waves and Supervising Radio/Television Broadcasting and Telecommunication Business, 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



effect on July 18, 2007, have not been that helpful in curtailing online infringements.<sup>28</sup> To the contrary, right holders have indicated the Computer Crime Act is now being invoked by ISPs as a shield to protect data from being disclosed to copyright owners – data which right holders need in order for them to obtain a search warrant from court.<sup>29</sup>

**Narrow Exceptions Involving 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 must take steps to narrow the relevant provisions to ensure compliance with international norms.

**Organized Crime Prevention Legislation:** IP violations have still not been included in various organized crime statutes, such as the Money Laundering Prevention and Suppression Act B.E. 2542 (MLPSA).<sup>30</sup> Unfortunately, while the government had intended to include copyright piracy as a predicate offense in draft amendments, the Law Drafting Committee of the Council of State concluded that copyright should be removed as a predicate offense.<sup>31</sup> IIPA 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.<sup>32</sup>

**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.<sup>33</sup> IIPA finds several deficiencies which should be fixed in amendments to the law:

- **“Copyright Owner’s Code” Creates Burden on Rights Holders:** The Act should be amended to remove the onerous and unprecedented obligation in Sections 8 and 12 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.<sup>34</sup> Other provisions which refer to the copyright owner’s code should also be subject to corresponding amendments, to delete mentions of “copyright owner’s code.”<sup>35</sup>

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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, as noted above, 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.

<sup>28</sup> The Computer Crime Act, 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.

<sup>29</sup> 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.

<sup>30</sup> Under the MLPSA, generally it is a crime to transfer, convert or receive the transfer of funds or property arising from certain criminal acts including hiding or concealing the source of funds. Violators are liable to imprisonment of a maximum of ten years and a fine of up to BT200,000 (about US\$58,000).

<sup>31</sup> Nont Horayangura and Say Sujintaya, *Committee Rejects IP Offences on Public Interest Grounds*, September 28 2004, at <http://www.worldcopyrightlawreport.com/Article/?r=435&c=3003050>.

<sup>32</sup> 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.

<sup>33</sup> Act of the Production of OD Products, B.E. 2548 (2005, effective August 29, 2005).

<sup>34</sup> This kind of copyright owners’ code application process is a flaw that could, if it results in interference with the exercise of copyright, call into question compliance with the Berne Convention’s “no formality” principle. The industries find the code burdensome and problematic and call for its deletion from the law.

<sup>35</sup> IIPA proposes deletion of all provisions that place burdens on copyright owners to apply for a copyright owner’s code, which includes amendments to Section 3 (Definition of Copyright Owner Code), Section 5, Paragraph 2 and 3 (Duty of the Copyright Owner to inform the DIP official in prior of making optical disc), Section 8 (How to embed Copyright Owner Code on the Disc), Section 12 (Duty of the Copyright Owner to make the Copyright Owner Code), Section 23 (Penalty for copyright owner who fails to inform the DIP official in prior of making the Disc), and Section 27 (Penalty for copyright owner who fails to make the Copyright

- **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 (and the exception to the notification requirement in Section 5 for “production or a commission to produce for an educational purpose, for the public interest, or for the conservation of culture” should be deleted from the current Act).
- **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.

**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 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 in February 2009 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. This draft law is intended to enable the authorities to effectively control illegal broadcasting of copyrighted works and prevent copyright violations on cable television. Any such 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.

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Owner Code). The following are the major suggested redline deletions, with other changes being corresponding redlines to remove references to “copyright owner’s code”:

The following should be deleted from Section 3:

~~“Copyright code” means a sign and a code issued by the Director General to identify the copyrighted work produced.~~

The following should be deleted from Section 5 (with corresponding changes):

~~Any copyright owner who intends to operate the production or to commission others to produce optical discs must notify the competent official before starting the production each time unless it is a production or a commission to produce for an educational purpose, for the public interest, or for the conservation of culture.~~

The following should be deleted from Section 12:

~~Section 12. The copyright owner shall have a duty to produce the copyright code in compliance with Section 8 paragraph two.~~

The following should be deleted from Section 23:

~~Section 23. Whoever fails to comply with the provision in Section 5 paragraph two shall be subject to a fine not exceeding two hundred thousand baht.~~

The following should be deleted from Section 27:

~~Section 27. Whoever fails to comply with the provision in Section 12 shall be subject to a fine not exceeding two hundred thousand baht.~~

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,<sup>36</sup> 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 rights holders. The Royal Thai government should take steps in 2009 to eliminate or reduce such restrictions, while resisting the urge to impose new restrictions.

**Onerous Restrictions on Technology Choice:** On December 14, 2009, according to press reports,<sup>37</sup> Prime Minister Abhisit Vejjajiva instructed the Ministry of Information and Communications Technology (MICT) to conclude plans for measures focusing on promoting open source software. Indeed, IIPA has become aware that the Software Industry Promotion Association (SIPA) is the government entity under MICT openly promoting open source software to other government agencies and enterprises as a solution to curb piracy. As one example of implementation of this policy, the Ministry of Education reportedly has plans to purchase 1.4 million computers for schools using a budget allocated from the 'Strong Thailand' project and is considering bundling the computers with open source software in order to achieve cost savings. The government says the new policy purports to promote protection of intellectual property as well as achieve cost savings. IIPA has no issue with such policy goals, and fully supports the goal to legalize software usage consistent with APEC economies' agreement that central government agencies should use only legal software and other copyrighted materials. However, the implementation of this goal, e.g., by MOE being pressured to bundle computers with software not of their choosing, clearly flies in the face of the market, and harms companies that rely on software copyright for their livelihoods, since it denies such legitimate companies access to that education market. As such, it fails to build respect for intellectual property rights and limits the ability of government or public-sector customers to choose the best solutions to meet the needs of their organizations and the Thai people. It also amounts to a significant market access barrier for the software industry.

It should be noted that the "Principles for Technology Choice Pathfinder," adopted by APEC in 2006 (furthering the 2002 "Statement to Implement APEC Policies on Trade and the Digital Economy"), recognize that procurement preferences can close markets and stifle innovation and economic development. By implementing this government procurement preference policy, the Royal Thai government is not adopting an effective approach to drive down piracy rates, but rather, is creating an additional trade barrier and denying fair and equitable market access to software companies worldwide, which is inconsistent with the APEC Principles. Rather than start down this path away from innovation, and to further promote respect for copyright, the government should abandon this approach and follow a realistic policy framework that includes adequate education and effective enforcement of IP rights and fosters non-discrimination in business choice, software development, and licensing models. We strongly urge USTR to consider the implications that Thailand's open source preference policy has on IP protection and access to Thailand's market for U.S. goods and services.

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<sup>36</sup> See the Royal Thai Embassy's February 13, 2009 report, *Thailand's Recent Developments on Protection and Enforcement of IPRs*, *supra* note 14.

<sup>37</sup> Rungthep Turakij, *Abhisit Wants 3G Details Ready in 6 Months*, Thai-language daily, December 15, 2009; Thai Rath, *ICT Backs Opensource Software*, Thai-language daily, October 16, 2009 (both on file with IIPA).

**Problematic Film Act Imposes Screen Quota and Uncertain Censorship and Ratings System:** The Motion Pictures and Video Act B.E. 2550 (2008) went into force July 1, 2008, imposing quotas and potentially onerous censorship and ratings provisions. 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 rights holders. The Act also imposes onerous rating requirements on films, music videos and live performances, and censorship requirements<sup>38</sup> on films, audiovisual products, music used for karaoke, and videogames.<sup>39</sup> The concerns over this 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) the 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 that the right holder "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. The government should reevaluate this ill-conceived and outmoded legislation.

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 BT1 million (US\$30,000) 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.

**Television Advertising Restrictions:** Advertising is now permitted under the Act on Broadcasting and Television Operation Business, enacted in 2008, but is limited to a daily average of five minutes per hour for each channel, or a quota of six per minutes in any single hour.

## **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 2008, more than \$3.5 billion worth of products came into the United States duty-free from Thailand, or just over 16% of its total imports to the U.S. In 2009, almost \$2.9 billion in goods entered the United States from Thailand duty-free, or 15.2% 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 is to continue enjoying favorable treatment for these imported goods.

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<sup>38</sup> 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."

<sup>39</sup> 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.

# TURKEY

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2010 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: IIPA recommends that Turkey remain on the Watch List in 2010.<sup>1</sup>

**Executive Summary:** Visits by both President Obama and Secretary of State Clinton in 2009 to Turkey underscore the country's strategic importance to the United States (and the world), both politically and, increasingly, economically.<sup>2</sup> On December 7, 2009, USTR Ron Kirk and Commerce Secretary Gary Locke, on the occasion of the visit of Turkish Prime Minister Recep Tayyip Erdogan to the White House, inaugurated "a new process of engagement with the government of Turkey on economic and trade issues," to be known formally as the "Framework for Strategic Economic and Commercial Cooperation."<sup>3</sup> Turkey is also in the midst of its accession negotiations to the European Union, in which intellectual property rights have played a prominent part.<sup>4</sup> Specifically, Turkey is obligated to fully implement EU directives on copyright and related issues, which include coverage of, *inter alia*, all subject matter of copyright (including computer programs) and related rights, and implementation of the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT) which were also ratified and deposited in 2009 by the European Union. The EU Accession IP Chapter obligates Turkey to make sure that "enforcing bodies dispose of sufficient administrative capacity to enforce the rights concerning the fight against piracy and counterfeit," and that it "provides a satisfactory track record of investigations, prosecutions and judicial treatment of violations and an improved performance concerning the effective enforcement of Intellectual Property Law, including a substantial reduction in the volume of counterfeited and pirated goods exported to the EU."<sup>5</sup>

While the government of Turkey took some incremental positive steps to meet these goals in past years, in 2009, piracy worsened in a couple of key areas. Notably, the Business Software Alliance (BSA) reports a rise in the end-user piracy rate from 64% in 2008 to 66% in 2009, with losses also increasing significantly, to US\$279 million due to piracy of business software. Illegal use of business software by many in the public sector remains a major concern. The music industry notes a significant rise in Internet-based piracy, mostly in the form of P2P file sharing services. Other piracy issues, such as book piracy involving illegal commercial photocopying and print piracy, and piracy of entertainment software products, remain concerns.

The business software industry continued to receive cooperation from the Police based on complaints laid against end-user piracy of business software, but they were less impressed with efforts to implement a Circular of the Prime Ministry to legalize software usage in the public sector. The Police continued to run raids on an *ex officio* basis

<sup>1</sup> For more details on Turkey's Special 301 history, see IIPA's "History" Appendix to this filing at <http://www.iipa.com/pdf/2010SPEC301HISTORICALSUMMARY.pdf>, as well as the previous years' country reports, at <http://www.iipa.com/countryreports.html>.

<sup>2</sup> Turkey is currently the United States' 39th largest trading partner in goods, exchanging \$15 billion in 2008. Turkey is the 27th largest export market for U.S. goods. The U.S. goods trade surplus with Turkey was \$5.8 billion in 2008, an increase of \$3.8 billion from \$2.0 billion in 2007. U.S. goods exports in 2008 were \$10.4 billion, up 58.4 percent from the previous year. See United States Trade Representative, *Turkey*, at <http://www.ustr.gov/countries-regions/europe-middle-east/europe/turkey>. The visit in March by the Secretary of State to meet with Turkish Prime Minister Recep Tayyip Erdogan was, according to her, made "to emphasize the work the United States and Turkey must do together on behalf of peace, prosperity and progress." See *Officials: Obama to Visit Turkey in April*, CNN.com, March 7, 2009, at <http://politicalticker.blogs.cnn.com/2009/03/07/clinton-obama-to-visit-turkey/?fbid=bme5PTYF9HL>. President Obama's trip focused on a major address in which he said his visit was a "statement about the importance of Turkey, not just to the United States, but to the world." See *Obama Reaches Out to Muslim World*, BBC News, April 6, 2009, at <http://news.bbc.co.uk/2/hi/7984762.stm>.

<sup>3</sup> United States Trade Representative, *Ambassador Kirk and Secretary Locke Welcome New Strategic Framework with Turkey*, December 7, 2009, at <http://www.ustr.gov/about-us/press-office/press-releases/2009/december/ambassador-kirk-and-secretary-locke-welcome-new-s>. Ambassador Kirk and Secretary Locke indicated the Framework will "help enhance the already robust interaction that takes place between the two governments on economic issues," since the U.S. already work with Turkish counterparts in the economic arena through the bilateral Trade and Investment Framework Agreement and the Economic Partnership Commission, among other forums.

<sup>4</sup> On June 17, 2008, the EU and Turkey concluded their "5th meeting of the Accession Conference" in Luxembourg, at which, among other topics, Chapter 7 on Intellectual Property Rights, was agreed upon. See *EU and Turkey: 5th Meeting of the Accession Conference*, European Union @ United Nations, at [http://www.europa-eu-un.org/articles/fr/article\\_7959\\_fr.htm](http://www.europa-eu-un.org/articles/fr/article_7959_fr.htm).

<sup>5</sup> *Id.*



to implement the *banderole* regulations, but due to an ambiguity in the 2008 copyright law amendments, Police have been reluctant to run copyright infringement raids against street piracy or piracy in public areas for other industries on an *ex officio* basis as they had done in the past, curtailing the deterrent effect of Police enforcement in Turkey against these kinds of piracy. ISPs became more reluctant to provide cooperation on Internet-based piracy issues in 2009, leading to fewer takedowns in 2009. Turk Telekom, the biggest ISP in Turkey with market dominance of over 90%, is reluctant to provide IP data to right holders in court cases. The Turkish government has not yet followed closely the international trend in addressing Internet piracy and ensure that the law provides incentives for ISPs to cooperate with right holders against online piracy. The courts remain the weak link in Turkey. While district court cases generally move at a reasonable pace in piracy cases, such cases are usually appealed, where they linger or become subject to amnesties. In addition, suspended sentences are the norm, although several important criminal convictions have resulted in jail time. As a result, recidivism in Turkey for most forms of piracy is the norm. Exacerbating the situation, some of the trained IP judges have been transferred back to regular courts. Right holders continue to suffer from the failure of the government to pay royalties for a private copy levy system established by the Ministry of Culture and Tourism (MOCT). These payments should accrue to right holders, not government coffers, and MOCT must become more efficient in collecting these royalties, since the record industry estimates US\$20 million has been left uncollected.

**Priority Actions Requested in 2010:** IIPA requests that the government of Turkey take actions to curtail piracy of all IIPA members' product in all forms, including the following actions, which would result in the most significant near-term commercial benefits to the copyright industries:

#### Enforcement

- Take significant steps to legalize businesses engaged in end-user software piracy, including large- and medium-sized businesses.
- Take urgent action to legalize all use of software in the public sector by government agencies, employees, contractors and grantees.
- Take an active role in significantly reducing Internet piracy, including peer-to-peer file sharing, through strict application of the laws and cooperation by service providers with right holders to take down pirate materials and deep linking sites, and address infringements through P2P services, web bulletin boards, BitTorrent services, and cyberlockers. In this regard, policies and any regulations should provide incentives for ISPs to cooperate with right holders.
- Reconfirm through a formal circular that Police and Inspection Committee members have *ex officio* raiding authority as to piracy in public places and street piracy under the amended law.
- Speed criminal trial process in appeals of copyright cases, and work to defeat recidivism by significantly reducing number of suspended sentences and/or amnesties.
- Take significant raiding actions against illegal commercial photocopying and organized pirate printing of books.
- 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 copyright law further to fully implement the WCT and WPPT, make necessary amendments to ensure that copyright piracy is included among cybercrimes, and ensure that ISPs comply with notices to take down infringing materials and have in place effective and fair policies to address repeat infringers.
- Amend the laws and regulations to ensure that private copy levies are collected and fairly distributed to right holders; at present, all amounts accrue to the Ministry of Culture and Tourism, which does not collect efficiently or use the money that is collected for useful anti-piracy purposes or in ways helpful to right holders.

## PIRACY AND ENFORCEMENT CHALLENGES IN TURKEY

Previous reports have discussed the many piracy challenges faced in Turkey, including end-user piracy of business software,<sup>6</sup> hard-disk loading of software onto computers, Internet-based piracy, piracy of published materials (photocopy piracy and print piracy), mobile device piracy, pirate public performances of audiovisual works, and retail piracy in all forms, including CDs, DVDs and recordable discs with games, movies, music,<sup>7</sup> business software, and compilations of music.<sup>8</sup> The following sections provide brief updates to the piracy and enforcement situation, but failure to mention a specific issue does not indicate that the problem has been fully resolved.

**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 (Special IP Police), which is a national and armed civil force, exercised their authority to conduct raids on an *ex officio* basis against street piracy and piracy in public places, leading to a decrease in street and retail piracy in Turkey. Under the Law on Intellectual and Artistic Works No. 5728 which went into effect in February 2008, the express *ex officio* language was removed, and after the amendment, some district's officers refused to run street piracy and open piracy raids on their own stating they are unsure whether the law provides them with such authority. Other districts have accepted that the Police retain *ex officio* authority as to piracy on the streets and in public places. IIPA urges the government to issue a formal circular confirming that the amendment did not change the law, thus confirming that Police may still exercise *ex officio* authority as to street piracy or piracy in public places. By contrast, under the *banderole* system, authorities are taking raids *ex officio* when materials do not bear the obligatory *banderoles*.

**Business Software Piracy, Both End-User Piracy and Hard Disk Loading, Harms Right Holders:** Unauthorized use of business software by corporate end-users causes significant losses for copyright holders in Turkey. The unauthorized use of business software in corporate settings requires a different approach from other forms of piracy, including campaigns aimed at ascertaining companies' use or licensing of software, inspections against companies evidencing unauthorized and/or unlicensed use, and hands-on programs to explain to the Turkish government and businesses the basics of software asset management. Reductions in business software piracy would result in positive gains for Turkey's economy. A study released in January 2008 by International Data Corporation and BSA demonstrated that a 10 point reduction in software piracy in Turkey from 2008 by 2011 (i.e., from 64% to 54%) would deliver nearly 1,894 new jobs, US\$80 million in tax revenues for the Turkish government, and US\$600 million in economic growth in Turkey.<sup>9</sup>

Another problem faced by the business software industry is 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. 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.

The business software industry reported generally good cooperation from the dedicated Special IP Police established in the larger cities to combat end-user piracy. Business software right holders appreciate collaboration

<sup>6</sup> Losses due to business software piracy increased in 2009 to \$279 million, up from \$257 million in 2008. Piracy levels also went up from 64% in 2008 to 66% in 2009. Up until 2008, the publishers and record industry had reported losses totaling more than \$40 million each year. The methodologies used by IIPA member associations to calculate their respective estimated piracy levels and losses are described in IIPA's 2010 Special 301 submission at [www.iipa.com/pdf/2010spec301methodology.pdf](http://www.iipa.com/pdf/2010spec301methodology.pdf). BSA's 2009 statistics are preliminary, representing U.S. software publishers' share of software piracy losses in Turkey. They follow the methodology compiled in the Sixth Annual BSA and IDC Global Software Piracy Study (May 2009), available at <http://global.bsa.org/globalpiracy2008/index.html>. These figures cover, in addition to business applications software, computer applications such as operating systems, consumer applications such as PC gaming, personal finance, and reference software.

<sup>7</sup> In 2009, MÜ-YAP, the local music and record industry group, reports that it was involved in 829 raids, resulting in seizures 17,345 pirate optical discs, 393 music cassettes, 3,761,217 VCDs/DVDs, and 12,897,685 inlay cards, compared with 983 raids, netting 67,602 pirate optical discs, 1,673 music cassettes, 1,267,998 VCD/DVDs and 5,516,365 inlay cards.

<sup>8</sup> See International Intellectual Property Alliance, *Turkey*, at <http://www.iipa.com/rbc/2009/2009SPEC301TURKEY.pdf>.

<sup>9</sup> Business Software Alliance and IDC, *The Economic Benefits of Lowering PC Software Piracy: Turkey*, January 2008, at [http://www.bsa.org/sitecore/shell/Controls/Rich%20Text%20Editor/~media/Files/idc\\_studies/bsa\\_idc\\_turkey\\_final%20pdf.ashx](http://www.bsa.org/sitecore/shell/Controls/Rich%20Text%20Editor/~media/Files/idc_studies/bsa_idc_turkey_final%20pdf.ashx).



during raids, which are conducted on the basis of search warrants, against resellers of pirate software and end-user of pirate software. In 2009, BSA 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. Piracy levels and losses increased in 2009, but it is hoped that with continued cooperation, these numbers can be reduced once again in 2010.

**Business Software Legalization Circular Not Being Enforced:** IIPA welcomed the government of Turkey's issuance of the Prime Ministry's Circular No.2008/17 which was published in July 2008, ordering that government agencies should legalize their software use.<sup>10</sup> Unfortunately, the government has not implemented the Circular. Public sector administrators should train users to avoid the use of pirated software, but IT managers of public sector agencies complain that although they are required under the Circular to legalize software usage, they have not been allocated sufficient budgets to ensure that all software is licensed. The State Planning Organization (DPT) and Ministry of Finance must allocate sufficient budgets for such. By implementing the Circular, the Turkish government can set a proper example for businesses and consumers in Turkey.

**Internet Piracy a Growing Phenomenon:** Turkey boasts more than 25 million Internet users, amounting to a greater than 34% penetration rate, and there were 5.75 million broadband subscriptions in Turkey in 2008, according to the International Telecommunications Union.<sup>11</sup> Internet usage of copyright materials has thus begun to displace physical product in Turkey, and unfortunately, as a result, Internet piracy has significantly worsened. In 2009, it was estimated that 85% of all estimated Internet traffic in Turkey consisted of peer-to-peer file sharing.<sup>12</sup> Internet piracy takes on many forms, including such P2P file sharing, video hosting sites, deep linking sites, forums providing direct download links, cyberlockers, and torrent sites (employing swarm technology for faster downloads). All creative content owners – of music, movies, business and entertainment 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. The Entertainment Software Association has conducted a survey of several markets' P2P habits, and estimates that approximately 84,922 infringing copies<sup>13</sup> were made of select ESA members' computer and videogames through P2P file sharing by ISP subscribers in Turkey during December 2009 alone. Breakdowns by ISP show that subscribers of Turk Telecom were responsible for approximately 82% of this activity occurring in Turkey, or more than 70,000 downloads during the one-month period. These figures do not account for downloads that occurred directly from hosted content, such as games found on "cyberlockers" or "one-click" hosting sites which continue to account each year for progressively greater volumes of infringing downloads.

In previous years, IIPA members had reported cooperation among service providers in fighting Internet piracy.<sup>14</sup> "Additional Article 4" of the Copyright Law (added in 2004) was thought to be helpful, since it provides a

<sup>10</sup> The government of Turkey, in its submission to USTR in the Special 301 process, touted the Circular as an example of progress in 2008. See Republic of Turkey, Prime Ministry Undersecretariat for Foreign Trade, *Protection Of Intellectual Property Rights In Turkey*, February 2009, in which the government noted, "The Prime Ministry Circular on the Use of Licensed Software (No.2008/17) was published on the Official Gazette on 16 July 2008, with the aim of strengthening the rules on the prohibition of the use of unlicensed software by the public institutions."

<sup>11</sup> See ICT Statistics Database, at [http://www.itu.int/ITU-D/icleve/Reporting/ShowReportFrame.aspx?ReportName=AWTI/InformationTechnologyPublic&RP\\_intYear=2008&RP\\_intLanguageID=1](http://www.itu.int/ITU-D/icleve/Reporting/ShowReportFrame.aspx?ReportName=AWTI/InformationTechnologyPublic&RP_intYear=2008&RP_intLanguageID=1)

<sup>12</sup> 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
2009	6,179,465 (June)	11,544,292 (November)

<sup>13</sup> This figure is representative only of the number of downloads of a small selection of game titles. Consequently, this figure is under-representative of the overall number of infringing downloads of entertainment software made during the period.

<sup>14</sup> 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 users could still access the site through other means. 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 1,600+ websites have been blocked following injunction proceedings initiated by the recording industry group MÜ-YAP since August 2005.



basic structure for service provider cooperation.<sup>15</sup> However, the article needs some amending and implementing “rules and procedures” to be issued by the Ministry to define specifically ISP responsibilities and end-user responsibilities. Unfortunately, in 2009, service providers became more reluctant to cooperate with right holders, notwithstanding that they still will cooperate with law enforcement when dealing with other online crimes, such as child pornography and narcotics sales. For example, due to lack of cooperation from ISPs, right holders cannot identify IP addresses of infringers, making enforcement and preparing cases for court extremely difficult. In 2009, local ISPs generally took action only upon an official order or request of a prosecutor’s office or the court.

More efficient and immediate cooperation should be established between right holders, law enforcement, and ISPs in Turkey. IIPA recommends that an IP cybercrime unit be developed and trained to handle cases specifically related to Internet-based piracy. IIPA also urges the government to amend the laws to provide for liability of ISPs as mentioned in Additional Article 4, and, if necessary, other laws, to foster more active cooperation of ISPs with right holders to prevent the use of networks for the commission of acts of copyright infringement, including but not limited to effective and fair policies regarding possible 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.

**Speedier Adjudication of Appellate Court Decisions Sought, and Fewer Suspended Sentences:** IIPA notes positive developments in recent years with the establishment of 23 specialized IP courts,<sup>16</sup> and the establishment in Turkey of a special prosecutor’s bureau responsible for IPR investigations.<sup>17</sup> In addition, the Turkish government announced that the first annual meeting of “the Juridical Consultation Group for IPR” was held in Antalya, Turkey on November 22, 2008, with the participation of 56 judges and prosecutors from relevant civil and criminal divisions of the Supreme Court and specialized IPR courts, public prosecutors of the Supreme Court, public prosecutors assigned to investigate IPR infringements, public prosecutors charged with participation in trials in IPR criminal courts, and representatives of the Ministry of Justice. It is expected that these meetings will occur on a regularized basis, at least once a year. IIPA also notes several successful verdicts in recent years in copyright cases,<sup>18</sup> although too many cases have resulted in suspended sentences.<sup>19</sup>

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<sup>15</sup> Additional Article 4 of the Copyright Law No. 5846 specifically addresses the responsibilities of content and Internet service providers. In practice, 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 three days. If, after this period, infringement continues, a folder is assembled 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; and (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 also notes that Additional Article 4 provides for “rules and procedures” to be issued by the Ministry, but these rules and regulations still have not been completed.

<sup>16</sup> IIPA understands there are now 7 IPR Civil Courts and 7 IPR Criminal Courts in Istanbul; 4 IPR Civil Courts and 2 IPR Criminal Courts in Ankara; and 1 IPR Civil Court and 2 IPR Criminal Courts in Izmir. General civil and general criminal courts are competent to deal with IPR cases where specialized IPR courts do not exist.

<sup>17</sup> In the Government of Turkey IP Report, the government noted, “An announcement was made on “Specialization of Public Prosecutors Dealing with Preparatory Investigations of IPR Infringements” by the General Directorate for Criminal Affairs of the Ministry of Justice on November 7, 2008.

<sup>18</sup> Examples of past cases involved the Uçar CD Plant (2006) in which the defendant owner 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. In a second case, in March 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. In a third case, also in 2005, a street vendor was sentenced to 14 months imprisonment and a fine. In a fourth case, in September 2007, the owner of a shop called “The End” 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 the motion picture association’s local group 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. In a fifth case, after 25 raids on the pirate shop “Film Dnyasi/Gumus Dnyasi” operated by the Halilogullari family, in a landmark court decision at the Istanbul Specialized 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. IIPA also notes that in the past several years, over 20 defendants sentenced to fines for copyright violations were sent to prison since they were unable to pay the fines.

<sup>19</sup> The current Copyright Law stipulates penalties ranging from 1 to 5 years imprisonment, or a judicial fine. The criminal IP courts tend to use their discretion not to imprison defendants, relying on Article 231 of the Criminal Procedural Law, which stipulates that the court can suspend the conviction if the penalty is for imprisonment of less than 2 years or a judicial fine. Although there are requirements for a suspension, e.g., the accused must not be a repeat offender for an intentional crime, courts frequently apply Article 231 to suspend sentences. Further, Article 51 of the Turkish Criminal Code stipulates that any penalty of

Notwithstanding these mainly positive developments, it is largely due to the very long appeal stage of copyright cases that recidivism remains the norm in Turkey. Due to continued court backlogs at the appellate 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. There are thousands of cases still under adjudication. In addition, some of the trained and experienced specialized IP judges have been reassigned to the regular courts.

Right holders continue to experience some difficulties related to court processes in Turkey. These include the following:

- **Criminal Search Warrants:** Search warrants for criminal raids are difficult to obtain due to procedural rules requiring them to be obtained not from the specialized IP courts but from an ordinary criminal judge. Some right holders find it easier to obtain search warrants and decisions in shorter time periods from the specialized IP courts. Public prosecutors require search warrants from judges to approve any raid action in anticipation of a criminal case in some districts.
- **Presumption of Ownership:** The courts in small cities with relatively untrained judges often fail to apply a presumption of ownership of copyright to rights holder claimants, and 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. These requirements appear to be inconsistent with Article 15 of the Berne Convention.
- **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; to the extent this is currently impossible under Turkish procedures, they should be changed to allow for it, since it will greatly ease adjudication of copyright piracy disputes.<sup>20</sup>
- **Disposition of Seized Goods:** Over the years, Police and Istanbul Inspection Committee warehouses have become filled with pirate materials. This situation impedes the Police's willingness to take more actions. This problem has been discussed with representatives of the Ministry of Culture and they leased a bigger warehouse 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. IIPA understands that a new amendment concerning the destruction of pirate materials is in the preparatory stages, which would be a helpful development. In a related matter, in some cases, prosecutors, especially outside the major cities, have not accepted large quantities of evidence, resulting in pirate copies and evidence being left behind at raid sites with the accused.

**Book Piracy Problems Remains Severe:** While Turkey should be a good market for English language teaching (ELT) materials and a growing market for higher education textbooks, continuing illegal commercial photocopying and print piracy hampers the growth and further development of the legitimate market. Virtually all types of books are affected, including fiction, non fiction, school books, college textbooks, supplements, dictionaries, ELT texts, and scientific, technical and medical (STM) materials. Illegal photocopying is especially prevalent in and around university campuses but law enforcement agencies do not have the authority to go into campuses to take action. It is thus left to university administrators to address book piracy, but to date, there have been no actions directed against infringing activities occurring on campuses. Though the Turkish Publishers' Association has raised

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imprisonment of less than 2 years can be suspended. IIPA urges the courts to rely on these provisions less in order to provide deterrence in Turkey against ongoing infringements and reduce piracy levels, but also recommends an amendment the Copyright Law to provide for both imprisonment and a fine.

<sup>20</sup> 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.

book piracy issues with the Ministry of Culture and the Turkish Police Force, neither agency has responded to these concerns. Even where a right holder does initiate an infringement complaint with the authorities to raid a suspected book seller, the authorities refuse to take action absent what they consider to be “solid” evidence of pirate activity. All too often, by the time the so-called “solid” evidence is gathered, it is too late to conduct the raid. Online piracy is also a growing concern. Sites hosted in Russia are making available for download pirated copies of dictionaries, online journals, textbooks and grammar reference books, and is thus a threat to the ELT market.

**Banderol System Undergoing Needed Changes:** With the current uncertainty regarding *ex officio* raiding authority, the banderol system currently provides the only clear *ex officio* authority in the Police and Inspection Committee members, pursuant to Article 81 of the Copyright Law. Some strengthened provisions were introduced in the 2001 copyright law, including the possibility of criminal penalties for unauthorized uses of banderols or dealing in works without banderoles. If the system is going to work, Article 81 needs to be fully enforced, the system has to be automated, and right holder associations such as MÜ-YAP and others must be permitted to administer banderols. The good news is that in 2009, the latter two of these developments appear to be coming to fruition.

The Ministry of Culture and Tourism finally completed the virtual automation system enabling online applications for registration of banderols, obtaining banderols, and certifying them. This system, however, has not worked for the music and motion picture industries thus far.<sup>21</sup> IIPA hopes this automated system, if used as a tracking mechanism to ensure that those who are not in compliance are subject to enforcement, will not subject right holders to formalities hindering enforcement. Second, while IIPA is pleased that the government agreed that “professional societies will be authorized to grant banderoles” under the terms of Circular No.2008/7 of the Prime Minister for Fighting Piracy dated January 12, 2008, there has not been any progress concerning the administration of banderol system by right holder associations.

For most industries, the banderol (sticker) system simply does not function well as an anti-piracy tool. There have to date been very few cases against the unauthorized use of banderols. All industries have reported at one time or another that some plants have had on hand unnecessarily large quantities of unused banderols, which were not secured adequately. This situation has eventually led to legitimate banderols leaking from the system and being applied to pirate product. Some of that product remains in circulation today. Publishers note that the banderole system does not work for books at all, in that it does not curtail piracy and creates additional burdens and costs associated with doing business in Turkey. The government has suggested possibly removing the banderole requirement as to published materials only, and IIPA would support 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.<sup>22</sup>

**Retail Piracy, Mobile Device Piracy Optical Disc “Burning,” Imports:** Pirate physical media remains an issue in Turkey, although the problems of physical piracy have been curtailed in part by the growth of Internet piracy. In recent years, there have been essentially three forms of pirate optical discs found in the Turkish market: 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

<sup>21</sup> It has been reported that the information regarding copyrighted materials and intellectual property right owners will be collected in a new database to be established for the purpose of tracking and protecting intellectual property rights. The data base will be available for the Ministry of Justice, the Ministry of Interior and the Undersecretariat of Customs.

<sup>22</sup> The following tracks banderole issuance in Turkey between 2005 and 2009:

Banderole Issuance in Turkey 2005-2009					
	2005	2006	2007	2008	2009
Local CD	12,526,294	13,558,571	13,495,433	10,358,441	9,869,386
Local Music Cassette	15,806,517	9,010,990	4,557,232	1,917,200	747,370
International CD	1,780,370	1,788,003	1,452,421	1,951,869	1,907,044
International Music Cassette	637,707	300,510	41,200	6,600	10,000
TOTAL	30,750,888	24,658,074	19,546,286	14,414,110	12,533,800

on the Eastern border, but with some discs also likely emanating from Asia), and to a lesser extent locally produced factory discs. Shops also have in recent years capitalized on Internet connectivity to engage in CD-R burning of content downloaded from the Internet, as well as burning compilations on-demand to CD-Rs.<sup>23</sup> Mobile device piracy harms right holders in Turkey. Typically, music, audiovisual works, software, and even published materials are loaded onto MP3 players, mobile phones, PDAs, iPods, portable hard drives, and the like, with stores uploading illegal content, including content illegally downloaded from the Internet, directly onto customers' mobile devices.

According to information provided by the Police, in 2009, 2,594 retail raids were conducted, resulting in the seizure of roughly 26 million pieces of pirated materials. In one very positive development, the Turkish Police, with much cooperation from the local industry, succeeded in dissolving an organized crime ring engaging in the sale of physical pirated product, much of which was sold or distributed through Internet sites requiring the use of codes and keywords.<sup>24</sup> The Turkish Police anti-piracy operations acted against the four organized criminal syndicates starting in May 2009, effectively resulting in their collapse due to the numbers of arrests made and amounts of illegal product seized.<sup>25</sup>

On January 16, 2009, the General Directorate of Security organized a meeting with police chiefs of all 81 cities of Turkey, to discuss ways of improving the fight against all forms of piracy. Police officials complained of ineffective stipulations in the laws and problems with the judicial process. Subsequent to that meeting, a decision was made to have discussions with the Ministry of Justice to make processes more efficient and speed up the judicial process, especially at the appellate level.

## **TRAINING AND PUBLIC AWARENESS**

**Trainings in 2009:** As in 2008, copyright owners continued organizing regular trainings and participated in other events in Turkey in 2009. As examples, the music industry provided the following ongoing training activities in 2009:

- Provided training with the Ministry of Culture and Tourism for the Istanbul Inspection Committee on the disposal of seized goods.
- Participated in a seminar in Antalya, Turkey, on enforcement of IPR on October 11 and 12, 2009, for police authorities from 81 cities, prosecutors, judges and collecting societies.
- Participated in a seminar organized on Alternative Dispute Resolution In Intellectual Property Law Disputes by FISAUM (Intellectual Property Rights and Research Center) and the Italian IPR Protection Desk on October 16 and 17, 2009 in Istanbul.
- Participated in a training program on anti-piracy enforcement for Bursa police authorities, in Bursa, Turkey.

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<sup>23</sup> 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.

<sup>24</sup> International Federation of Phonographic Industries, *Police raids hit four pirate gangs in Turkey*, June 17, 2009, at [http://www.ifpi.org/content/section\\_news/20090617.html](http://www.ifpi.org/content/section_news/20090617.html).

<sup>25</sup> The first operation on May 7, 2009 targeted 83 addresses in 17 cities throughout Turkey, resulting in the arrest of 29 people and the seizure of more than seven million pirate and counterfeit items. The second operation on June 1, 2009 saw 84 different sales points in Istanbul raided simultaneously. More than two million pirate or counterfeit items were seized and 46 people were suspected of infringing the Copyright Law. Eleven suspected gang leaders were arrested by the Police. Officers also raided production centers seizing molds and other equipment. The total estimated value placed on the seizures out of these raids by Turkish Police is more than US\$102 million. As a result of these operations, the main pirate network was disrupted and it is believed its most important members were arrested. In addition, police believe the biggest pirate market, the Tahtakale, has been weakened and the pirate market is diffused.

## 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 WCT and the WPPT, and Turkey joined those Treaties effective November 28, 2008. IIPA understands that the Ministry of Culture and Tourism is working on a draft amendment to the Copyright Law and that some industry comments have been provided.<sup>26</sup>

IIPA hopes that the government will amend the law soon to protect technological protection measures against circumvention, circumvention services, and trafficking in circumvention devices. Pursuant to the annual program of the Prime Ministry State Planning Organization (DPT) and Turkey National Program on Undertaking *Acquis Communautaire*, the government plans to amend the Copyright Law further, to comply with Turkey's commitment of harmonizing its legislation with EU Directives. As mentioned above, Turkey is in the midst of its accession negotiations to the European Union. Chapter 7 of the accession package obligates Turkey to fully implement EU directives on copyright and related issues.<sup>27</sup>

**Laws Related to Enforcement Need Enhancement:** There are several areas in which the laws in Turkey still need enhancement so that the laws can be adequately enforced. These changes are necessary to ensure that Turkey can meet its international obligations, including its commitments to the EU in its accession negotiations. These commitments include ensuring that "enforcing bodies dispose of sufficient administrative capacity to enforce the rights concerning the fight against piracy and counterfeit," and ensuring "a satisfactory track record of investigations, prosecutions and judicial treatment of violations and an improved performance concerning the effective enforcement of Intellectual Property Law, including a substantial reduction in the volume of counterfeited and pirated goods exported to the EU." Recommended improvements include, but are not limited to, the following issues:

- **Ex Officio:** As noted above, IIPA hopes the government will issue a formal circular confirming that the February 2008 amendment (Law No. 5728, February 2008) did not remove *ex officio* raiding authority from the Police as to piracy in public places and street piracy.
- **Mandate Imprisonment "and" a Judicial Fine as in the Law Prior to the 2008 Amendment:** The Copyright Law should also be amended to provide criminal penalties including imprisonment "and" a judicial fine as is the case in the Trademark Decree and as was the case in the Copyright Law prior to the 2008 amendment.

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<sup>26</sup> For example, industry comments have focused on some of the following issues:

- **Private copy levies:** Industry has noted that a private copy exception is described in Article 38 but the wording appears to be inconsistent with international treaties due to the fact that it doesn't include the condition of "fair compensation of the rightholders" in exchange for availing oneself of the exception. Meanwhile, Article 44 authorizes the MOCT to collect fees from reproduction equipment but this amount is not distributed to right holders and is controlled by MOCT.
- **Realignment of retransmission rights:** Industry has noted that Article 80 is unclear and should be rewritten. Particularly, definitions of retransmission, cable retransmission, and retransmission by satellite should be added to the current law, and legal arrangements should be made which will ensure that all categories of organization dealing with retransmissions, such as cable operators and digital platforms, must be subject to licensing activities.
- **The responsibilities of ISPs:** Industry notes that the existing law gives ISPs minimum responsibility with respect to copyright infringement, but the Internet Law authorizes prosecutors to act to prevent certain designated illegal activities. Copyright infringement should be designated under that statute.

<sup>27</sup> 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.

- **Criminalize Copying Without Regard to Commercial Intent:** After the 2008 amendments, it has become uncertain whether or not copyright infringements (e.g., unauthorized reproduction or distribution or other unlicensed use) committed without a commercial intent are subject to criminal penalties. An amendment to the Copyright Law should confirm that copying, distributing, or unlicensed use of all kinds of copyright materials can be considered a crime regardless of commercial purpose.<sup>28</sup>
- **Include Copyright Infringement in Law on “Internet” Publications, and Issue Long-Awaited Regulation to Supplement Additional Article 4, to Help Foster Greater Service Provider Responsibility:** The enactment of Additional Article 4 in 2004, along with Law No. 5651 Regarding Regulation of Publications on Internet and Struggle With the Crimes Committed Through Such Publications in 2007, provided what was thought to be a very strong takedown provision to which service providers must adhere. However, infringement of intellectual property rights was not explicitly included. Additional Article 4 foresaw the introduction of a new regulation in this field, but so far, nothing has been put forward.
- **Reinstate Secondary Liability:** The provision in the old Copyright Law prior to its amendment in 2008 should be reinstated, such that liability can attach to company managers and shareholders who do not take necessary precautions to prevent infringement.

**Private Copy Levy System:** Since Turkey has chosen to implement a private copy levy, it is imperative 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.<sup>29</sup> Moreover, MOCT has been inefficient at best at levy collection. The recording industry estimates on the basis of import statistics from the Turkish Statistics Institute that over US\$20 million could have been collected on this basis. The amounts that are collected are not 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. IIPA understands that the EU experts in the EU accession consultation process have determined that MOCT must provide the private levies to right holders, but this still has not occurred.

**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 discs), exhibiting, and distributing copyright works to receive certificates from the MOCT. These regulations provide some essential elements of effective optical disc regulation.<sup>30</sup>

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

<sup>28</sup> In the United States, Section 506 of our Copyright Law provides that it is a crime to infringe a copyright willfully regardless of intent under prescribed circumstances.

<sup>29</sup> The current system is organized pursuant to 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).

<sup>30</sup> The positive elements of this Regulation have been noted in previous IIPA reports, e.g., International Intellectual Property Alliance, *Turkey*, at <http://www.iipa.com/rbc/2009/2009SPEC301TURKEY.pdf>.

proved to be the case, since back in 2005, MOCT could not get all the optical disc plants to register. One category of operators having to be certified is companies engaging in Internet distribution. We underscore that legitimate businesses with legitimate business models in the Internet environment will be burdened by this certification requirement, while those engaged in online piracy will ignore it.

Second, while the Regulation calls for “administrative fines” for operating without certification, in the case of optical disc factories, it is feared this remedy is not enough to deter them from 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, including individual liability to pierce the veil of the company engaging in production without a certificate.

RTÜK (Radio and Television Supreme Council of Turkey)<sup>31</sup> 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. This is so since it has not enforced against broadcasters who broadcast without a license.<sup>32</sup> Under the Law, the failure to sign licensing agreements with collecting societies should be subject to administrative fines from TL125,000 (US\$82,000) up to TL250,000 (US\$164,000) and closure of the radio or TV station.

## **GENERALIZED SYSTEM OF PREFERENCES (GSP)**

In addition to the Special 301 process, the copyright industries and the U.S. government have used the GSP program, a U.S. trade program that offers preferential trade benefits to eligible beneficiary countries based on discretionary criteria, including that the country provide “adequate and effective” copyright protection. Turkey enjoys enormous benefits under this program. 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. In 2009, \$645.5 million worth of Turkish goods, or almost 17.7% 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.

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<sup>31</sup> 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](http://www.rtuk.org.tr/sayfalar/IcerikGoster.aspx?icerik_id=be70e800-a512-4dd8-803f-857b504fd1f9).

<sup>32</sup> 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 royalties.

# UKRAINE

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2010 SPECIAL 301 REPORT ON COPYRIGHT ENFORCEMENT AND PROTECTION

**Recommendation:** IIPA recommends that Ukraine be retained on the Watch List in 2010, and that such a listing be coupled with a U.S. Government out-of-cycle review (OCR) for six months to assess the progress of whether the Government of Ukraine has accomplished the following urgent measures:

1. Enact Copyright and Criminal Code Amendments. Legislation to amend the Copyright Law and Criminal Code to address a number of deficiencies identified in this submission is currently pending in the Verkhovna Rada of Ukraine (draft laws # 3503, 4073 and 4439). Among other things, if enacted, these bills would fix existing shortcomings and make it possible to effectively prosecute corporate end-user piracy (use of unlicensed software in a business environment) and to stop the distribution of pirated works over the Internet. These amendments should be enacted without delay during the current parliamentary session.
2. Implement Government Software Legalization. The Government of Ukraine should take the following steps to implement the resolution of the Cabinet of Ministers regarding legalization of software in state executive bodies: (1) in the 2010 state budget (which is still in draft form) allocate to each Ministry dedicated funds for software legalization that are sufficient to meet each Ministry's software needs, and to perform software audits, in order to eliminate the use of unlicensed software in the public sector; (2) within three months, develop and make public an action plan for software legalization that identifies the steps that will be taken to implement the resolution of the Cabinet of Ministers, the individual who will be responsible for coordinating the implementation, and the individuals within each Ministry who will be responsible for carrying out that Ministry's part of the plan; and (3) put the plan into operation.
3. Increase Dedicated Enforcement Personnel. Considering the alarmingly high piracy rates in Ukraine, the current number of 130 officers serving in the IPR units of the Economic Police Departments is simply not sufficient for conducting effective and systematic actions to deter piracy. This number should be doubled to 260 officers, and these officers should be provided with effective training. Similarly, the current number of 19 state IP inspectors in the State Department of Intellectual Property (SDIP) empowered to combat illegal trade of pirated products throughout the 25 regions of Ukraine is inadequate. The number of inspectors should be increased to at least 25, so that each region has at least one dedicated inspector.
4. Increase Enforcement Actions. Law enforcement agencies should significantly increase the number of enforcement actions against all types of copyright theft in order to serve as an effective deterrent. Moreover, the main focus of law enforcement fighting IP crimes should be immediately shifted from targeting small companies and private individuals selling pirated discs, to addressing Internet piracy and corporate end-user piracy on larger scale.
5. Criminally Prosecute Rogue Collecting Societies and Website Operators. The enforcement officials in Ukraine should: (a) criminally prosecute the principals of the well-known rogue collecting societies (noted in detail in the report) that claim to offer "licenses" that they do not have the authority to grant; and (b) immediately takedown illegal websites that rely, in bad faith, on these false licenses, and prosecute the owners of such sites. The Government of Ukraine need not await the final outcome of accreditation (of collecting societies) to undertake proper criminal enforcement of those clearly engaged – under the Copyright Law – with illegal activity. The criminal case and criminal investigation launched by prosecutors against Oberih should be completed and forwarded to the courts within six months. Regarding the illegal





websites, the owners of the numerous pay-per-download and BitTorrent sites (mentioned in detail in this report) should be criminally prosecuted. Additionally, the Government of Ukraine should launch a series of roundtable discussions between rightsholders and the Internet Association of Ukraine (including the largest ISPs) to work out a voluntary solution on cooperation (and culminating in a Memorandum of Understanding). If a voluntary solution cannot be reached, the Government of Ukraine should propose amendments, no later than September 2010, to the Law on Telecommunications (in cooperation with rightsholders) to promote a fair and effective response to online piracy.

6. Increase Enforcement Against Cable Retransmission, Broadcast and Public Performance Piracy. Based on the existing Memorandum of Understanding between the Ministry of Interior and rightsholders (within the music industry), the central and regional police economic crime units should provide details to rightsholders on how they are implementing the creation of a database of cable operators and public performance venues who commercially use phonograms but who have, to date, refused to pay royalties to authorized collecting societies. In addition to creating that database, commercial users should be inspected, and unauthorized users should be subjected to administrative and criminal prosecutions. IIPA recommends that every regional economic crime unit should report (on a monthly or quarterly basis) on the number of inspections undertaken, as well as evaluate the piracy rate for each region. The objective of this enforcement effort should be to bring piracy levels for these activities currently at 90% down to at least below 50% by the end of 2010.

7. Enforcement Against Unauthorized Holograms. While amendments to improve the current hologram sticker administrative procedure are pending (or in limbo), the Government of Ukraine should immediately intervene to stop the current issuance of hologram stickers for unauthorized MP3 musical releases (including releases by well-known international recording artists). At present, hologram stickers on obviously pirated content are being issued by the Government of Ukraine based on fraudulent contracts with unknown foreign (especially, Russian) firms. The Government of Ukraine should act immediately to terminate this practice, while awaiting administrative or legislative changes in the law to prevent such fraudulent practices and the issuance of holograms to unauthorized distributors.

**Executive Summary:**<sup>1</sup> Copyright theft in Ukraine is both rampant and intractable with piracy rates for some industries exceeding 80% (as they have for many years). In the case of business software, for example, the Government of Ukraine blatantly uses significant amounts of unlicensed software. For all of the copyright industries, enforcement remains weak. There has been a sharp increase in peer-to-peer and website-based Internet piracy in Ukraine in the past few years. In fact, Ukraine is now one of the few countries in the world (along with Russia) with pay-for-download piracy of music and film, as well as the source of two of the world's top fifteen BitTorrent systems, with sites such as torrents.ua advertising openly on billboards on the streets of Kiev. All of these factors continue to undermine the development of a healthy legitimate market in Ukraine. End-user piracy and digital piracy exist alongside physical piracy in Ukraine's many open air markets and street stalls where illegal copies of recorded music, films, games and software are readily available throughout the country. Additionally, irregular and insufficient criminal and border enforcement is causing physical material to flow freely in Ukraine, as well as from Russia and other territories. IIPA recommends that the Government of Ukraine re-double its efforts on-the-ground, and that it work to fix the investigative and prosecutorial systems, while also undertaking other legal reforms to improve enforcement, especially criminal enforcement in Ukraine against digital and hard-copy pirates. The U.S. Government should undertake a six month out-of-cycle review to assess the progress in Ukraine of accomplishing the important steps set out in this report.

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<sup>1</sup> For more details on Ukraine's Special 301 history, see IIPA's "History" appendix to this filing at <http://www.iipa.com/rbc/2010/2010SPEC301HISTORICALSUMMARY.pdf> See also the previous yearly country reports at <http://www.iipa.com/countryreports.html>.

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, the Government of Ukraine should make appropriate changes in current procedural law and undertake aggressive enforcement against Internet piracy including Internet website takedowns, as well as raids and seizures of Internet pirate operations such as BitTorrent systems, in addition to taking steps (raids and seizures) against hard-copy pirates. The Government of Ukraine should follow these actions with criminal prosecutions and convictions, including the imposition of deterrent penalties against those involved in web-based and retail piracy and all other types of commercial piracy – that is, against digital network operators, as well as against physical pirate sites by prosecuting stall owners and operators, suppliers, and any large-scale distributors of pirated product. One way to accomplish this is to act on the Memorandum of Understanding signed in 2008 by: (1) making it a priority of enforcement agencies, prosecutors and courts to move decisively and effectively against Internet pirates; (2) engaging Internet Service Providers to cooperate more actively with rightholders on enforcement (something they agreed to do for the first time in 2008); and (3) acting against illegal peer-to-peer services. In addition, the Government of Ukraine should move more aggressively against on-line public performance, broadcasting and all other forms of Internet piracy, especially including the rogue collecting societies (like UPO AVTOR) and websites illegally selling music – with a combination of legal reforms and improved enforcement.

Second, the Government of Ukraine should redouble its efforts against hard-copy pirates and especially organized criminal syndicates (engaged in both on-line and hard-copy piracy). These pirates are operating with impunity, because there have been few deterrent criminal sanctions. Large-scale operators and repeat offenders (especially, of physical pirated materials) continue to be treated lightly by the courts despite the fact that this issue has been a long-standing part of U.S.-Ukraine government discussions. In lieu of criminal prosecutions, the Government of Ukraine has to date, otherwise relied heavily on non-deterrent administrative penalties.

Third, the Government of Ukraine should amend its law to make camcording illegal (under the Criminal Code), and then move decisively – with criminal prosecutions – against camcording operations in Ukraine.

Fourth, the Government of Ukraine should systematically address its serious open air and street market piracy, focusing on the big outdoor markets, 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.

Fifth, the Government of Ukraine should properly implement the Customs Code amendments, in force since February 10, 2007, which provided customs officers with *ex officio* authority. The adoption of these provisions was a positive step; however, in order to give effect to these amendments, the government should expand the specialized intellectual property rights unit within the customs service, and 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 that are able to act locally in a quick and effective manner.

Sixth, Ukraine's hologram system should be substantially improved or repealed. The system lacks transparency (even after 2008 attempts to fix it), has serious loopholes, and is not properly enforced, resulting in wide-spread issuance of holograms for counterfeit copies based on forged documents. 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, if this is not possible, it should eliminate the system entirely.

Seventh, 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.

Eighth, 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, distribution and use 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.

## **COPYRIGHT ENFORCEMENT IN UKRAINE**

**The Nature of Piracy in Ukraine in 2009:** The last few years have seen the rapid growth of 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 sites demonoid.com and free-torrents.org, as well as several well-known paid illegal MP3 sites, such as: mp3fiesta.com, mp3city.com.ua, lavamus.com, mp3ua, boxmp3.net, Mp3vim.com, and wemp3.com. These include free and pay-per-download musical and video websites, as well as streaming services. Ukraine is also the source of two of the world's largest BitTorrent systems (number 9 and number 11 – worldwide).

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 years. The hard goods piracy problem is also prevalent in some retail chains, many of which openly sell pirate product alongside legitimate product. In 2009, the motion picture industry, for example, saw an increase in the number of pirate discs. In Kiev, outlets with pirated discs are located in metro stations, bus stations and retail centers (and illegal activity at these sites only ebbs on the eve of planned police operations).

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 2009.

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 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

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report that there are 50 stalls and kiosks at the notorious Petrovka markets owned by three individuals. In early 2010, in Lugansk, the police conducted a raid against a network of shops with a huge organized pirate distribution system. This resulted in the seizure of one million discs; a criminal investigation is ongoing. One local anti-piracy organization (UAPA) notes that organized criminal groups in Odessa, Donetsk, Zytomir and Kiev have been identified. 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 a need for better border enforcement by Ukrainian authorities.

A persistent problem for the recording industry has been the proliferation of rogue collecting rights societies – such as Oberih and VAASP – which falsely claim “licenses” to repertoire, and the inability for legal societies to properly operate in Ukraine. In 2009, the Ministry of Education and Science (with approval from the Ministry of Justice) issued an executive order (Order #1175) for the accreditation of collecting societies, but providing that there could be no more than one authorized collecting society for each copyright sector – thus, one for broadcasting rights, one for public performances, etc. The executive order delegated the authority to implement the accreditation of organizations to the State Department of Intellectual Property (SDIP), and the executive order noted that the authorization of any particular organization would be based on the majority of the national and international repertoire represented. Two legitimate organizations – the Ukrainian Music Alliance (UMA) – broadcasting – and the Ukrainian Music Rights League (UMRL) – public performances – legitimately represent over 80% of the domestic and international repertoire for music. They were both properly accredited by SDIP. However, in August 2009, Oberih and VAASP (both discredited by the process and earlier case law, as well, their representation of less than 1% of legal repertoire), brought a legal challenge to the accreditation process in the Administrative Court of Kiev. When a Ministry of Education and Science representative testified that the delegation of authority to SDIP was improper, the court ruled against the accreditation process. The case is now on appeal at the Appeals Court of Kiev (with the original order remaining valid, pending a ruling from this court). There is no known time- table for a final decision. Regardless of the delay in the accreditation process, 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. The government need not await the final outcome of accreditation to undertake proper criminal enforcement of those clearly engaged – under the Copyright Law – with illegal activity. One positive step has been the launch, by prosecutors, of a criminal investigation into the activities of Oberih, the rogue collecting society. IIPA is hopeful that enforcement officials will conclude their investigation and properly prosecute those responsible for Oberih's illegal operations (in addition to taking action against other rogue collecting societies, such as, UPO AVTOR, which license pirate websites).

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 – cable operators 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.

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). Unfortunately, in one case, against an illegal website (link.zp.ua), a criminal prosecution was ended (in May 2009) by the court because of “amnesty” provisions. Several criminal cases in Odessa, Sevastopol and Zaporozie were closed without disposition (i.e., a conviction) because criminal investigations ran on for several months after illegal servers were seized without further action.

As previously noted, 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 rightsholders 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. While some ISPs will delete links upon request, most refuse rightsholders request and will demand court orders. In December 2008, the IAU agreed to work more forcefully with rightsholders to reach mutually acceptable solutions to help stem Internet piracy. This was 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. Unfortunately, these efforts, and others between the Government of Ukraine and various copyright industries have stalled (despite the memoranda of understanding). IIPA continues to recommend that the Government of Ukraine (at the highest levels) encourage ISPs to pro-actively cooperate with rightsholders in the fight against on-line piracy. If voluntary cooperation and concrete results fail to materialize, legislative measures to promote fair and effective responses to online piracy are recommended. Furthermore, procedures, subject to police, civil or criminal court approval, whereby ISPs can disclose information both to law enforcement officials and to private right owners for the purpose of detecting and taking action against piracy, should be introduced.

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 (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 continue to 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, rightsholders and the police, were effective in taking down some websites. The Government of Ukraine should ensure that these first cooperative efforts are further improved and built upon in particular, in view of the 2008 Memorandum of Understanding, and IAU's pledge to work cooperatively going forward.

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 the latest official information from the SDIP ([sdip.gov.ua/ukr/help/statiti/pcweek/](http://sdip.gov.ua/ukr/help/statiti/pcweek/)), the software piracy rate in state agencies exceeds 70% (noting that the rate is coming down at less than 5% a year). As an example, about 53% of the copies of Microsoft Windows in use by central government bodies are unlicensed, and at least 74% of the copies of Microsoft Office in use by such bodies are unlicensed. Efforts by rightsholders to get the Government of Ukraine to address this problem have yielded promises, but no action. 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 rightsholders 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 \$208 million.

The hologram sticker law adopted in 2000 failed to become an efficient solution for physical piracy in Ukraine. The 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. The latest example of the inefficiency of the hologram system is the mass appearance throughout the country in retail outlets of DVDs with Xbox games marked by original holograms – Xbox game consoles and related products are not available legally in the Ukrainian market at all because no rightsholder authorized the importation or distribution of their products in Ukraine. 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, for some industries, one out of every two products seized is labelled with a false hologram, and for others (for example, the motion picture industry), all illegal copies seized had false holograms. The copyright industries are trying to compete against the pirates, even pricing their products lower (\$5 to \$7 per CD, for example; \$10 for DVDs, compared to the pirate price of \$3 to \$4) and printing materials in Cyrillic for local distribution. However, rightsholders 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” with the close cooperation of rightsholders in order to bring transparency to the hologram sticker administration procedures and to properly enforce it.

All of the copyright industries – music, film, entertainment and business software companies – report problems with the administration of the current hologram sticker system. The Parliament has, for several years, considered but never adopted 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 and DVDs) seeking labels. This publication would assist rightsholders in tracking applications and could help to prevent the issuance of stickers for pirated discs (for example: “legal” holograms have been found during raids). The copyright industries support this notion of transparency in the process; it would be a very good step forward to fix the sticker 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 sticker program. The hologram program, as it has for other industries, has been implemented in a haphazard manner. The Government of Ukraine continues to issue hologram stickers without appropriate assurances that the hologram request is from a legitimate rightsholder or its authorized distributor, and without confirming the products that will bear the holograms are legitimate. One ESA member reports that Ukrainian officials continue to issue holograms to unauthorized distributors despite having been provided with a legal declaration listing the ESA member's titles and identifying the authorized distributors for those companies.

The BSA continues to report that the hologram sticker 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, and 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 camcording of theatrical motion pictures with an almost equal number of illegal camcordered motion pictures coming from Ukraine as originate in Russia. These illegal copies then make their way to the Internet. There is no explicit 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 2009, efforts by the Government of Ukraine to adopt clear criminal sanctions were stalled (after legislation was introduced in the Rada in February 2009); as a result, proper enforcement languished. Internet piracy is also a very serious concern for the motion picture industry with several sites offering movies (as well as music and games) for downloading and streaming. Every quarter, the anti-piracy organization UAPA sends the central police a list of infringing sites and infringing links and the central police then disseminate this information to the regional offices. Unfortunately, ISPs frequently do not respond to police requests to takedown or block access based on these notifications, and instead demand a court order. For instance, an ISP in Odessa refused to cooperate with known infringing activity and refused to block torrent.lt and linkomania.net, despite a series of police requests. For the motion picture industry, hard-copy piracy of DVDs persists. These DVDs and DVD-Rs are often multi-title discs (some with up to 20 films) – sold at the major outdoor markets in Kiev, Donetsk, Odessa, Kharkiv, Dnipropetrovsk and Lugansk, as well as in other cities in Ukraine. 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.

In 2009, 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. 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 cable operators and 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).

The book publishing industry continues to face the following forms of book piracy in Ukraine: illegal photocopying, print piracy, and the recording of audio CDs (for English language teaching courses) at a point-of-sale (meaning that a customer requests audio materials and on-site, the relevant course book and material is recorded on a hard-drive for the customer). Although the problem remains significant, one publisher did report good cooperation from law enforcement authorities. After the publisher initiated a complaint against copy shops, the police issued a

warning letters and then conducted raids against the shops. The raided shops signed the warning letters and appear to have withdrawn all the pirated books subject of the complaint from their shelves. Unfortunately, despite the fact that illegal photocopying occurs rather openly, enforcement action is taken only when a rights holder initiates a complaint.

**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 – necessary to combat digital and hard-copy piracy. For hard-copy piracy, the weak criminal enforcement system, 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.

**Internet Piracy:** The Government of Ukraine has the past two years agreed to working groups and industry agreements to work to tackle the problem of Internet piracy – both the server-based and peer-to-peer (BitTorrent) piracy – and to work on getting Internet Service Provider (ISP) cooperation. In fact, many of the websites offering pirated material of films, music, videogames and business software, are thriving in part because of the support of local Internet Service Providers. The music, film and software industries, in particular, have sought to get better cooperation with ISPs via agreements signed either with the Government of Ukraine or directly with the ISPs. In 2008, a Memorandum of Understanding was signed between the music industry and the Ministry of the Interior. The motion picture industry is also seeking 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 procedural problems 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. Another initial investigatory procedural hurdle is failure of ISPs to cooperate with law enforcement agencies and to provide available information on users suspected in the distribution of pirated products (the police claim they cannot initiate criminal proceeding absent this information). In December 2009, amendments to the Law on Telecommunications (draft # 3271) were proposed which were intended to assist the police in conducting Internet crime investigations by providing subscriber information. Unfortunately, these amendments were defeated in the third reading of the bill, in large measure due to ISP objections. The business software industry, for example, reports that legislative deficiencies and lack of cooperation with the ISPs thwart any attempts to focus on enforcement against Internet piracy.

The recording industry reports that paid download sites remain one of the largest sources of piracy in Ukraine. There are now over 30 Ukrainian or Russian illegal pay-per-download digital musical sites. They are all based on the same business model as the original Russian allofmp3.com site, with professional looking interfaces capable of deceiving unfamiliar users into believing they are legal sites. Some of these websites offer incentives such as free give-aways in return for users making monetary “deposits” onto the sites. One popular Ukrainian website -- mp3fiesta.com – sells albums for \$1.

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.



**Raids, Seizures and Other Enforcement Actions in 2009:** The Government of Ukraine reported that, in the first 9 months of 2009, 1,010 IPR crime cases were commenced; in that same period, administrative sanctions were imposed against approximately 5,900 individuals, and about 1.5 million optical discs were seized.

The Government of Ukraine further reported that, in the first 11 months of 2009, there were 686 inspections undertaken by the “state inspectors on intellectual property,” which resulted in 394 administrative actions (which were forwarded to the courts for further action). Of these actions, 49 involved orders to seize material (220,000 items in total worth \$4.37 UAH, or \$545,500) and 42 criminal cases were initiated. The government did not report on the disposition of these cases.

The copyright industries note that, at present, there are only 18 State IP inspectors nationwide for all IP matters where SDIP is engaged. 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 against distributors of counterfeit discs without rightholder complaints. This positive step however, has not led to the type of effective enforcement envisioned. In actuality, it is not possible to open a criminal file (per Article 176 of the Criminal Code) without a complaint of the rightholder. So, even with an upsurge in raids and seizures, 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.

The business software industry (BSA) reported 311 *ex officio* end-user piracy raids resulting in 126 criminal cases commencing; of these, 58 cases were sent to the courts for their consideration. There is no additional information on the disposition of the criminal investigations or cases.

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 8690 UAH (up from 5000, with inflationary increases as of January 2010) 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-rightholder 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, 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 legislative 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., and in 2009, the Government of Ukraine did, for the first time, initiate (several) criminal cases classified as organized crimes. Criminal sanctions (in force in 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 2009, more than 1,010 criminal cases concerning IP crimes were initiated in Ukraine, with administrative sanctions applied against 5,900 individuals. In 2009, more than 1.5 million optical discs were seized by the police, almost all of which were copies without hologram stickers.

In 2009, the ESA was aware of only three new cases that were initiated by the police against retail outlets and a game café. 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. The ESA reports that, unfortunately, it is common for the Ministry of Internal Affairs to refuse to proceed with investigations or to transfer cases to prosecutors, even when large volume seizures are involved. Similar delays occur at the prosecutorial level. Once a case is referred to a prosecutor, often the prosecutor decides to simply terminate the case or return the case to investigation, thus delaying the procedure further. 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. 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. In 2009, Ukrainian tax authorities exercised enforcement authority, and initiated several cases against retail pirates. These cases initiated by the tax authorities are pursued as administrative actions and tend to move more quickly than criminal cases. However, actions brought by the tax authorities are often re-classified as criminal cases, resulting in further procedural delays, and increasing the likelihood that a case will be dismissed. The ESA is open to the tax authorities playing a role in copyright enforcement, but it is important that this new trend not become subject to the same procedural delays that undermine criminal enforcement efforts.

The copyright industries provided the following examples of raids, seizures and criminal investigations undertaken in 2009:

- On February 12, 2009, a professional camcorder was caught by Leningrad Theater personnel attempting to camcord the film "The Confessions of a Shopaholic" – this was the first ever arrest of a camcorder. The case resulted in a fine and the confiscation of the video camera.
- On December 3, 2009, professional camcorders were caught in a Kiev cinema by theater personnel attempting to camcord the film "Anti-Killer 2" – a Russian film. The thieves were using an expensive high definition drive camcorder with a stabilized zoom lens. Six individuals were involved in the camcording but only two were detained, and unfortunately, in January 2010, a criminal case against the individuals was "denied," underscoring the need for legislative changes to the law to stop camcording.
- On October 15, 2009, police, with the assistance of the anti-piracy organization (UAPA), raided a warehouse in Kiev after months of deliberations. They confiscated 140,000 DVDs, 130,000 polygraph inlays, 135,000 DVD jewel boxes, 5,000 fake hologram stickers, 2 PCs and 1 notebook full of information (logs) about distribution activity throughout Ukraine.
- On November 25, 2009, police in Kiev raided a warehouse seizing 150,000 optical discs containing film, music and videogames, plus approximately 12,000 counterfeit hologram stickers, 3 PC and a notebook, 2 printers, hundreds of stampers for optical discs and hundreds inlays in electronic files. This raid and the raid of October 15 were both undertaken against the same distribution organization operating in Ukraine.

- On January 22, 2010, police in Lugansk conducted a massive regional operation against a large group of retailers of illegal material. This network of retailers owned approximately 15 shops, all used to distribute both legitimate and pirate films, videogames and software. During this operation, more than 1 million optical discs without hologram stickers were seized. These consisted of optical discs containing four to six films per disc, and included all newly released movies, many of which are still in theaters, such as "Avatar," "Alvin and the Chipmunks 2," "Sherlock Holmes," etc. This raid also uncovered the location of several warehouses used to store illegal discs and as well as information about the group's distribution network and plans.
- The recording industry also reported several raids in Kiev where pirated DVDs and CDs, smuggled from Russia via trains to a storage facility were seized (140,000 infringing copies in one instance, 149,000 in another). Additionally, a clandestine manufacturing operation was raided (resulting in the seizure of over 26,000 optical discs and 387 CD/DVD burners were confiscated along with over \$267,000 and UAH 80,000 in cash – a criminal investigation per Article 203-1 of the Criminal Code is ongoing; there was a raid near Odessa resulting in the seizure of 93,000 pirated optical discs and the launching of a criminal case; and, a raid in the oblast (region) of Rivne in which 33,000 pirated discs were seized, along with CD and DVD burners, computers, artwork and packaging devices (a criminal case is ongoing).

**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). Rightholders report good cooperation from and with this unit. Unfortunately, the division is woefully understaffed, with just 130 officers throughout the entire country. In 2009, a Cyber Crime Unit was created within the Ministry of the Interior but it will not focus on any copyright piracy issues.

In November 2009, a multi-agency order was signed into law to improve IPR protection. The order is called: "On Establishing a Program of Coordinated Actions of Law Enforcement Agencies and Supervising Authorities on Counteraction of Illegal Manufacturing, Distribution and Realization of Audio and Video Products, Optical Discs and Other Objects of Intellectual Property and for the Protection of Rights of UEFA" (# 1055/491/753/1120/656/52, November 24, 2009). The order was signed by the Police, Customs, Tax, the Ministry of Culture, the Security Service, the Ministry of Education as well as representatives of Microsoft (Ukraine), the BSA, the Music Association and UAPA.

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, eight optical media disc plants (producing CDs, DVDs or both) in operation in Ukraine. It is estimated by the recording industry (the International Federation of the Phonographic Industry, IFPI) that the total production output of the Ukrainian plants in 2009 was 23.5 million units.

**Ineffective Border Enforcement:** Ukraine still fails properly to police its borders because Customs authorities are not sufficiently engaged in enforcement measures. 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. At least one industry reports that virtually all of the material is Russian-made. There have been some minor seizures by customs authorities of illegally produced CDs and other pirated 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. The recording industry continues to report serious problems with Customs because they do not stop the importation of blank media for which a levy has not been paid. The State Customs Service of Ukraine (SCSU) has the authority to stop importations in violation of the law. Ukrainian law provides for the payment of a levy on blank media (e.g. CD-Rs) to compensate for private copying; the levies are to be paid to UMA, a collecting society of rightsholders. Unfortunately, the SCSU is not, in practice, stopping imports for non-payment of the levy. Moreover, SCSU has no legal obligation to collect and share data on its collection of imported blank media. As a result, UMA cannot sue individual importers for non-payment of the levy.

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 persist. Waiting for rightholders to file complaints against hard-copy piracy in each instance 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 2009, \$53.6 million worth of Ukrainian goods benefited from the GSP program; in 2008, that figure was over \$105 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) clear criteria for the operation of 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 a number of problems remain, especially in the sphere of the collective management of rights. A major shortcoming is the accreditation of non-representative collecting societies which have been allowed to carry out collections on behalf of all music rightsholders (including foreign rightsholders) when they do not control any "volume of rights" by legitimate negotiated direct agreement with rightsholders. One order of the Ministry of Education and Science (Order #1175) was intended to address this problem, but this administrative reform is not a substitute for the needed Copyright Law amendments (and it suffered significant setbacks by the courts as described above in this report). What is needed is a more comprehensive reform by legislation. In particular, the copyright industry-supported draft bill # 3503 proposes amendments to the existing copyright law, as well as other relevant legislation (in particular, it proposes to amend Article 176 of the Criminal Code to extend its application to cases of digital piracy and illegal public performance). However, the recording industry is particularly concerned by the progress in the Rada of two competing bills (draft # 4451 and 2451), which if adopted, would worsen the treatment of copyright and neighboring rights law in Ukraine, harming the recording industry, and reversing some of the positive developments initiated by the SDIP for the recording industry, at an administrative level. Moreover, collective management should be a private, not a government, enterprise.

Neither the Copyright Law of Ukraine nor the Criminal Code clearly provide that the use of illegal copies of software is an infringement – this should be corrected. According to the current wording of Article 1 of the Copyright law the installation, duplication and sale of unauthorized software is a violation of the copyright law, but the use of such copies is not. In addition, 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.

**Anti-Camcord Legislation (Copyright Law amendments):** The illicit recording of a movie in a theater remains the single most prolific source of movie piracy. As a result of camcorder piracy, illegal copies of many motion pictures are available on the Internet, as well as on street corners and flea markets around the world, within days of the film's legitimate theatrical release. Camcorder pirates, such as the ones found in Ukraine, are often sophisticated criminals who sell master recordings to illicit labs which then illegally duplicate the films onto optical discs, and package and distribute them to dealers around the world. A single illicit recording of a first-run motion picture widely distributed on the Internet (and on street corners) can destroy a producer's ability to recoup the investment made in its production. Thus, the losses are exponentially greater than the selling price of the pirate product or the single act of theft; the economic harm affects the complete lifecycle of a film, eroding all aspects of the economic value chain and impacting thousands of legitimate jobs involved in the production and distribution of films. To facilitate enforcement and prosecution of illegal camcording, it is imperative that Ukraine advance an amendment currently pending before the Verkhovna Rada that would specifically exclude camcording from the scope of the Copyright Law's private copy exception (draft law: "On the Amendments to Several Laws of Ukraine on Copyright and Related Rights", # 4073, February 17, 2009). The law, if enacted, would prohibit the reproduction of audiovisual works during their exhibition in theatres and at other premises intended for public consumption. The motion picture industry (MPAA) appreciates the Government of Ukraine's attention to this matter and urges expedited passage of this important legislation.

**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.

However, 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, any amendment to the Criminal Code should ensure that repeat copyright infringement (within 12 months) would automatically lead to a criminal, and not solely an 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. As submitted previously, 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, as well as ensuring that the law is correctly applied. One area of concern includes recent attempts to reverse one (proper) implementation measure (Resolution No. 71 – January 18, 2003) which ensures the proper enforcement of cable retransmission rights. For all amendments, 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\$314) to close to 5,076 UAH (US\$629). However, given the long-standing practice of the courts imposing minimum fines for administrative violations (and not even considering the maximum fines available), IIPA urges the passage of a law to substantially increase the minimum amount of the administrative fines, which are currently very low -- 170 UAH (or approximately \$21). 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 of 2004 was 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. It

also gives Customs the authority to stop the importation of products which are in violation of the law, such as the legal requirement to pay levies for blank media (as noted, above). However, for suspected illegal material, threshold remains at about 1,319 UAH (US\$163) (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\$252) for the first application; 1,015 UAH (US\$126) 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 made no progress towards its implementation in 2009.

# VIETNAM

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2010 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: Vietnam should remain on the Watch List in 2010.<sup>1</sup>

**Executive Summary:** IIPA is extremely disappointed by the National Assembly's decision to significantly weaken criminal penalties for copyright violations in its revised Criminal Code, which went into force January 1, 2010. This new law puts Vietnam in immediate violation of its commitments to the United States under the Bilateral Trade Agreement (which required Vietnam to criminalize all "infringement of copyright or neighboring rights on a commercial scale"). Whereas the 2008 Criminal Circular had clarified that criminal liability could be sought for any violation of the IP Code (copyright or related rights), the newly enacted Criminal Code curtails the acts considered criminal in Vietnam. Passage of a Decree on administrative penalties for copyright infringement, also in June 2009, appears to be an attempt to fill gaps left by the Criminal Code, but is a worrisome indication that the government intends to rely on administrative remedies as a substitute for deterrent criminal enforcement against piracy. Like other markets which have gone down a similar road, IIPA members fear these tactics will leave the market in Vietnam inhospitable to legitimate creative activity, solidifying a vicious cycle of infringement in the country and stunting the development of the creative industries in the Vietnamese economy.

While these legislative developments took place, piracy remained an open and often brazen commercial act in Vietnam, providing high profitability and little risk to pirates. Piracy levels in Vietnam remain among the highest in the world, and losses continued to mount to the industries.<sup>2</sup> Piracy in the retail markets is unchecked and the Internet in Vietnam remains replete with online piracy. In terms of enforcement, there were few positive developments in 2009. No criminal case has ever been brought in Vietnam for copyright infringement. The Copyright Office of Vietnam (COV) has admitted that they are unable to handle the piracy problem.<sup>3</sup> The COV indicated that in 2008, the Ministry of Culture, Sports & Tourism (MOCST) "examined and settled" 20 cases involving copyright piracy, meting out administrative fines of a total of VND 225 million (US\$12,050), by no means a deterrent.<sup>4</sup> Vietnam also maintains some of the most restrictive market access barriers in the world, keeping legitimate products and services out of the market, while creating a fertile ground for piracy. One positive note was the passage of the Cinematography Law in June 2009 which opened the Vietnamese market for the first time to film production for foreign companies.

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 has also joined the Trans-Pacific Partnership (TPP)

<sup>1</sup> For more details on Vietnam's Special 301 history, see IIPA's "History" Appendix to this filing at <http://www.iipa.com/pdf/2010SPEC301HISTORICALSUMMARY.pdf>, as well as the previous years' country reports, at <http://www.iipa.com/countryreports.html>.

<sup>2</sup> For example, the Business Software Alliance (BSA) reported losses of US\$171 million and a piracy rate of 84% in 2009, due to piracy of business software in Vietnam. These numbers are up from US\$123 million and 83% in 2008. The recording industry reported a 95% piracy rate in 2009. The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2010 Special 301 submission at [www.iipa.com/pdf/2010spec301methodology.pdf](http://www.iipa.com/pdf/2010spec301methodology.pdf). BSA's 2009 statistics are preliminary, representing U.S. software publishers' share of software piracy losses in Vietnam. They follow the methodology compiled in the Sixth Annual BSA and IDC Global Software Piracy Study (May 2008), available at <http://global.bsa.org/globalpiracy2008/index.html>. These figures cover, in addition to business applications software, computer applications such as operating systems, consumer applications such as PC gaming, personal finance, and reference software.

<sup>3</sup> The Copyright Office of Vietnam, in its 2008 report, indicated that the Inspectorate of the Ministry of Culture, Sports & Tourism (MOCST) "has made every efforts [sic] but is unable to meet the requirements to establish order in the field of copyright and handle strictly the organizations and individuals who violate copyright, related rights." In Vietnam, the Inspectorate of the Ministry of Culture, Sports & Tourism is the leading enforcement agency for copyright, 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 (MIC), 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.

<sup>4</sup> 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>.





negotiations which were announced by President Obama in November 2009. Vietnam will need to undertake significant legislative and enforcement reforms if it is to be able to meet U.S. free trade agreement IPR negotiating objectives.

**Priority Actions Requested in 2010:** 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:

#### Legislation and Market Access

- Amend the dramatically weakened Criminal Code to meet Vietnam's BTA obligation, by reinstating a criminal remedy identical to that provided under the 2008 Criminal Circular; and until that can be accomplished, (i) clarify that acts subject to criminal liability under the amended Criminal Code include online distributions and offers to distribute online (making available), and (ii) provide detailed interpretations of "commercial scale" infringements that include infringements which harm the market, regardless of the commercial purpose of the infringer.
- Join the WIPO Copyright Treaty (WCT) and WIPO Performances and Phonograms Treaty (WPPT).
- Cease government-endorsed open source preference policy which is limiting technology choice in Vietnam.
- Take immediate steps to afford U.S. right holders with greater 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.
- Pass optical disc licensing regulation.
- Extend the term of protection for sound recordings to the BTA-compatible term (75 years) and otherwise extend term in line with international trends (e.g., life of the author plus 70 years for works).

#### Enforcement

- Enforce the Criminal Code through targeted criminal actions, e.g., against source piracy, blatant retail piracy, and end-user piracy of business software.
- Enforce the Decree on administrative remedies to reduce piracy levels and improve deterrence.
- 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
- Reduce piracy through devotion of greater resources and manpower to campaign targeting sources of pirate production like CD-R burning facilities, pirate distribution warehouses, businesses engaged in end-user piracy of software, pirate retail shops selling CDs and DVDs, and illegal reprinting or photocopying facilities.
- Reduce pirated imports from China.
- Reduce signal theft by removing illegal content from local cable operators, including VTC, and stopping retransmission of signals from neighboring countries without license.

## COPYRIGHT LAW AND RELATED ISSUES

**New Criminal Code Violates Vietnam's BTA Obligations, Significantly Weakens Law:** On July 2, 2009, President Nguyen Minh Triet promulgated the Law on Revising and Amending Some Articles of the Criminal Code, including a new Article 170a on criminal copyright infringement. This amendment criminalizes only "commercial scale" acts of "[c]opying of works, audio recordings and visual recordings" or "[d]istributing the copies of work, audio or video recording." This is a significant and disappointing weakening from the framework in the February 2008 Criminal Circular, which criminalized all acts of "infringement" in Articles 28 and 35 of the IP Code (which included, among other things, reproduction, distribution, communication to the public, public performance, broadcast, circumvention of technological protection measures and trafficking in circumvention devices, tampering with rights management information, unlawful decoding or disseminating of encrypted satellite signals, etc.). There are two improvements in the statutory framework after the amendments: 1) the phrase "and for commercial purposes" was removed from the Criminal Code, so the standard for criminal liability is now "on a commercial scale"; and 2) fines are increased to a range from US\$3,000 minimum to US\$30,000 maximum, and for crimes committed in

“an organized manner” or for recidivism, fines are increased to a range from US\$22,000 minimum to US\$57,000 maximum.

IIPA expresses deep disappointment with the decision to scale back criminal liability under the Code. By limiting the kinds of activities covered, Vietnam clearly violates Chapter II, Article 14 of the Bilateral Trade Agreement (2001) (BTA) with the United States,<sup>5</sup> in which Vietnam agreed to criminalize all “infringement of copyright or neighboring rights on a commercial scale.” The Vietnamese government should make the changes necessary to return to the *status quo ante*, i.e., by ensuring that criminal liability can attach to infringements enumerated under Articles 28 and 35 of the IP Code (consistent with the terms of the 2008 Criminal Circular). That change would ensure that Vietnam meets its BTA obligations. The BTA also expressly calls for criminalization of the trafficking in a device or system used for “the unauthorized decoding of an encrypted program-carrying satellite signal” or “the willful receipt or further distribution of an encrypted program-carrying satellite signal that has been decoded without the authorization of the lawful distributor of the signal,” so by virtue of the revised Criminal Code, Vietnam also violates Chapter II, Article 5 of the BTA. The U.S. should commence immediate consultations in conjunction with Chapter VII, Article 5 of the BTA, to resolve these express violations of the terms of BTA recognizing that resolution is imperative to Vietnam’s successful participation in the TPP.<sup>6</sup>

Until the *status quo ante* can be restored, it is critical that the government of Vietnam clarify the types of acts subject to criminal liability under the amended Criminal Code to include online distributions and offers to distribute online (making available).<sup>7</sup> It would also be important for the government to provide detailed interpretations of “commercial scale” infringements that include acts which harm the market regardless of the commercial purpose of the infringer. Guidance should be provided to set out that “commercial scale” includes infringements that are undertaken without a commercial purpose but which nevertheless have a clear commercial impact (such as the unauthorized making available on the Internet of copies of protected works, knowingly providing access to such infringing materials, or other acts such as the unauthorized use of software in a business). Such guidance will give administrative authorities in Vietnam the confidence to recommend cases for criminal action when harmful piracy activities are taking place.

**Administrative Remedies Decree Must be Implemented in Practice:** IIPA is pleased that the Vietnamese government completed issuance of Decree No. 47/2009/NĐ-CP, on “Handling Administrative Infringement in Copyright and Related Rights” (Administrative Decree). This Decree, which went into force June 30, 2009, covers “intentional or unintentional actions of individuals or organizations violating the law on copyright and related rights but not serious enough to hold criminal liability,” which appears to cover any violation of the IP Code including violations as to works in Article 28 of the Code and as to related rights in Article 35 of the Code.<sup>8</sup> While the Administrative

<sup>5</sup> See *Agreement Between The United States of America and The Socialist Republic of Vietnam on Trade Relations*, July 13, 2000 (BTA).

<sup>6</sup> Chapter VII, Article 5(3) of the BTA provides in relevant part,

The Parties agree to establish a Joint Committee (“Committee”) on Development of Economic and Trade Relations between Vietnam and the United States of America. The Committee’s responsibilities shall include the following:

A. monitoring and securing the implementation of this Agreement and making recommendations to achieve the objectives of this Agreement;

...

C. serving as the appropriate channel through which the Parties shall consult at the request of either Party to discuss and resolve matters arising from interpretation or implementation of this Agreement....

<sup>7</sup> Specifically, to ensure proper coverage of commercial scale Internet-based copyright infringements, which cause enormous commercial damage to copyright owners, those drafting interpretations should ensure that Internet transmissions are included within the term “distributing,” so that communicating works to the public by wire or wireless means, through electronic information network or by any other technical means, and such acts as making available works through interactive networks, are covered.

<sup>8</sup> For such violations, Section 2 of the Administrative Decree provides, “for each administrative violation, the individual or organization shall be subjected to one of two forms of primary penalty: warning and fine,” with the maximum fine being VND500 million (US\$26,600). Remedies also include seizure of all infringing goods and materials (transport, equipment, raw materials, and imported materials) used in the infringement, suspension of the business or service for three to six months, and possible destruction of all infringing goods and materials used to effect the infringement. Importantly, the law expressly refers to removal from the Internet of copies “that were transferred illegally by digital networks,” and removal of all illegal copies “under form of electronic storage.” While there is overlap, the Administrative Decree also sets forth separate penalties, with a different fine structure, for illegally making derivative works, displaying (or performing) works to the public, reproducing works, distributing or importing works, communicating works to the public by wireless or wired means, electronic information networks or other technical means, and rental of cinematographic works or computer programs.

Decree should not be understood as a substitute for deterrent criminal enforcement against piracy and violations of the IP Code, IIPA members believe that swift implementation in practice of the administrative remedies in the Administrative Decree can send a strong signal that violations of the IP Code will not be tolerated.

**Cinematography Law Amendments Enacted, Allowing U.S.-Vietnam Joint Ventures in Production:** On June 18, 2009, Law No. 62 on Cinematography was amended by Law 31-2009-QH12 by the National Assembly, which went into effect on October 1, 2009. The amended Law appears to make some improvements to the original 2006 Law. For example, Article 13(2) now expressly provides that U.S. (and other foreign) entities may enter into joint ventures and cooperation agreements with Vietnamese companies for film production, film distribution, and film projection, which represents a partial opening of that market.

**Laws Leave Potential Quotas In Place:** While IIPA had heard that the law lifted quotas for importing foreign movies (though still subject to censorship), the Cinematography Law as amended appears to retain the overall structure of the original Law, leaving open the possibility for quantitative restrictions, which should be disfavored. For example, Article 38 provides that the central authorities and city and local authorities can still rely on the number of films produced locally to decide whether to authorize the issuance of “film projection permits for films produced and imported by film production enterprises” (Article 38(1)(b) as amended).<sup>9</sup> Article 35(2) also remains as a potential way to impose quotas with respect to broadcast of imported (versus Vietnamese) films, since it still provides that broadcast of films shall ensure “the proportion of Vietnamese films broadcast as compared with foreign films, the hours for broadcasting Vietnamese films, and the duration of and hours for broadcasting films for children in accordance with regulations of the government.” Unfortunately, Article 2.4 of Decree No. 96 implementing certain provisions of the Cinematography Law requires that the proportion of Vietnamese films broadcast on TV must be at least 40%.<sup>10</sup> Such quotas are disfavored and should be lifted.

**Copyright Law and Implementing Regulations to IP Code Remain Incompatible with the BTA and Potentially Vietnam’s Other International Obligations:** On June 19, 2009, the “Intellectual Property Code,”<sup>11</sup> effective July 1, 2006, was further amended by passage by the National Assembly of Law No. 36/2009/QH12, “Law on Amendment of and Supplement to Some Articles of the Intellectual Property Law,” which went into effect January 1, 2010. The law is also subject to an implementing Decree which has not been amended to our knowledge.<sup>12</sup> The amendments do not appear to have resulted in significant changes, although they do fix one deficiency of Vietnam’s law when compared with its BTA obligations, namely, they amended Article 27 of the IP Code to increase the term of protection for cinematographic works to 75 years from publication (or 100 years from fixation, if not published within 25 years of fixation). The amendments also granted this longer term to “photographic works, applied art works, [and] anonymous works.” The amendments apparently did not meet the BTA obligation to provide this longer term to producers of sound recordings. Article 34(2) of the IP Code therefore still violates BTA Article 4.4.<sup>13</sup> While amending the law to fix this BTA deficiency as to the term for sound recordings, the government of Vietnam should follow the

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<sup>9</sup> Article 38(1)(b) reads in full:

The Government shall rely on the number of films produced and imported by cinematographic enterprises administered by provinces and cities under central authority to make a decision on delegation of authority to such provincial people's committee to issue film projection permits for films produced and imported by film production enterprises within its locality, by private cinematographic enterprises within its locality and for films for export produced by television stations and radio-television stations licensed for press activities and with broadcast decisions.

<sup>10</sup> Decree No. 96/2007/ND-CP dated June 6, 2007 Detailing and Guiding the Implementation of a Number of Articles of the Cinematography Law, Article 2.4.

<sup>11</sup> Law No. 50/2005/QH11, Pursuant to the Constitution 1992 of the Socialist Republic of Vietnam as amended and supplemented by the Resolution No. 51, 2001, QH10 of the 10th Session of the 10th National Assembly dated December 25, 2001.

<sup>12</sup> 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>.

<sup>13</sup> BTA Article 4.4. provides,

Each Party shall provide that, where the term of protection of a work is to be calculated on a basis other than the life of a natural person, the term shall be not less than 75 years from the end of the calendar year of the first authorized publication of the work or, failing such authorized publication within 25 years from the creation of the work, not less than 100 years from the end of the calendar year of the creation of the work.

trend of dozens of other nations that have extended term of protection for works as well to life of the author plus 70 years.

One issue raised by IIPA in the past is the requirement under BTA Articles 4.2(a) and 4.6(b) to provide an exclusive importation right. The government of Vietnam has indicated that Article 20 provides an exclusive importation right as to works, noting Article 20(d)(1) provides the right “to circulate to the public or import the original or copies of the work,” so the law apparently satisfies Article 4.2(a). The law with regard to related rights remains in violation of Article 4.6(b) of the BTA. With respect to phonograms, Article 30 provides a right to “distribute copies to the public” but this does not expressly include “importation.” The government of Vietnam has referred to Article 35(8) of the IP Code with respect to related rights to satisfy Article 4.6(b) of the BTA. Unfortunately, this deems importation of sound recordings an infringement only when rights management information has been removed or altered without permission. This provision does not afford an importation right to producers of sound recordings as required by the BTA.

IIPA has in previous filings discussed other issues in the law, including improvements (e.g., protection for temporary reproductions, some protection against circumvention of technological protection measures) as well as some deficiencies.<sup>14</sup> It should be noted that Vietnam is largely in compliance with the WCT and WPPT and Vietnam should be encouraged to join those Treaties as soon as possible. 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. The following is a non-exhaustive list of some of the remaining issues with regard to the IP Code and compliance with Vietnam’s international obligations or international trends.

- **Making Available Right (WCT and WPPT):** Vietnam enacted, in Article 20(d’), an exclusive communication to the public right as to works, 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.” This right is implemented through Article 23(4) of Decree No. 100 which implemented the IP Code (2006) (Implementing Decree), and includes the right “to make their works or copies thereof available to the public, in such a way that members of the public may access such works from a place and at a time they themselves select.”<sup>15</sup> Thus, the Code as implemented fully satisfies the WCT. Unfortunately, while related rights receive similar treatment in the IP Code (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”), no such clarifying language is found in the Implementing Decree. A clarification should be made to Article 30 of the IP Code to ensure that this right should cover any form of transmissions of sound recordings under the distribution right, including interactive and non-interactive digital transmissions. Alternatively, it should be confirmed that Article 23(4) of the Decree applies, *mutatis mutandis*, to Articles 29 and 30 of the IP Code (covering related rights) to ensure full implementation of WPPT Articles 10 and 14.
- **Technological Protection Measures:** As noted, one of the advances of the IP Code was that it provides protection against circumvention of technological protection measures (TPMs) used by right holders to protect their works/related rights in the digital environment (Articles 28(12) and 35(7) cover the act of circumvention as to works and related rights, and Article 28(14) covers trafficking in circumvention devices as to works only). 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) as to works) 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 be added to provide that trafficking (as in Article 28(14)) is a “related rights infringement.”

<sup>14</sup> See, e.g., International Intellectual Property Alliance, *Vietnam*, in 2009 Special 301 Submission, at <http://www.iipa.com/rbc/2009/2009SPEC301VIETNAM.pdf>.

<sup>15</sup> See *supra* note 12.

- **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 Convention, the TRIPS Agreement and the WIPO Treaties. The second half of Article 7(3) also violates Vietnam's current by permitting the State to take away copyright altogether or restrict the ability of a right holder to exercise lawful rights.<sup>16</sup> 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. The World Trade Organization's Dispute Settlement Body has determined, in a case involving a similar provision of the Copyright Law of the People's Republic of China,<sup>17</sup> that such a provision denying copyright protection based on the content cannot be consistent with Article 5(1) of the Berne Convention.<sup>18</sup> That clause should be deleted.<sup>19</sup>
- **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 performer or producer must not cease to exist because the author has granted authorization of a particular use, and vice versa. Article 35 of the Implementing Regulations establishes the supremacy of copyright over related rights. This should be remedied so that in no case could the rights of producers of sound recordings or performers be impaired or otherwise prejudiced by the exercise of rights by the author.
- **Exceptions Overly Broad:** Certain exceptions in the IP Code may be overly broad. Article 25(1)(g) on "[d]irectly recording and reporting performances for public information and educational purposes" and Article 25(1)(e) on "dramatic works and other forms of performing arts in cultural gatherings or in promotional campaigns" remain potentially problematic. IIPA also remains concerned that Article 25(2) of the Implementing Decree 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)).<sup>20</sup> Notwithstanding the attempt in Article 26(2) of the IP Code 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 was a last minute addition to this legislation) for use of sound and video recordings for commercial "broadcasting" is in violation of international standards; Article 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

<sup>16</sup> Article 7(3) of the IP Code provides in relevant part, "the state has the right to prohibit or limit the intellectual property right holders from or to the exercise of their rights."

<sup>17</sup> *China - Measures Affecting the Protection and Enforcement of Intellectual Property Rights* (WT/DS362/R).

<sup>18</sup> Article 4(1) of China's Copyright Law provides that "[w]orks the publication and/or dissemination of which are prohibited by law shall not be protected by [the Copyright] Law." Vietnam's Article 8(1) provides that it is State policy "not to protect the intellectual property objects which are contrary to the social morality, public order or harmful to national defense and security."

<sup>19</sup> IIPA also notes that 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.

<sup>20</sup> The Article reads as follows:

Use of published works without obtaining permission but paying royalties, remuneration

1. Broadcasting organizations using published works for the purpose of carrying out broadcasting programs with sponsorship, advertisements or collection of money in any form shall not be liable for obtaining permission from, but shall be liable to pay royalties or remunerations to, the copyright owner in accordance with the Government regulations.

2. Organizations and individuals when using the works stipulated in paragraph 1 of this Article must not influence the normal exploitation of works and must not prejudice rights of authors or copyright owners, and must provide information about the name of the author and origin of the works.

3. The use of works referred to in clause 1 of this Article shall not apply to cinematographic works.

compulsory license provisions with the Berne Convention three-step 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.

- **TRIPS/Berne-Compatible Presumption of Ownership Must Be Afforded and No Formality Principle Honored:** 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.” TRIPS, the Berne Convention and the BTA also require that right holders be afforded with a presumption of ownership. Article 203, requires right holders to provide “necessary evidence proving basis [for] the establishment of copyrights, related rights, of which [a] Copyright Registration Certificate and Related Right Registration Certificate are consider[ed] as acceptable evidence.” The Vietnamese government position is apparently that nothing in Article 203 requires a registration certificate, so, according to the government, there is no prohibited formality. However, Article 203 of the IP Code fails to expressly provide a Berne- and TRIPS-compatible presumption of copyright ownership. Articles 208(1) (regarding provisional measures) and 217(1)(a) (with respect to border measures) apply the same standard of proof as Article 203. The Vietnamese government should confirm that it affords right holders with a presumption of ownership and preferably also a presumption of subsistence of copyright and that it adheres to the no formality principle of the Berne Convention.
- **“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. Articles 202(5) and 214(3) of Vietnam’s IP Code provide that remedies for copyright infringement may include compelling the distribution or use for non-commercial purpose of the infringing goods, as well as the materials and equipment used in furtherance of the infringement, provided that such distribution does not affect the exploitation of rights by an aggrieved rights holder. These provisions fall short of the BTA (and TRIPS) requirement, as seized goods could potentially be utilized in the “normal channels of commerce.” The government of Vietnam points to “Circular 01/TTLT-TANDTC-VKSNDTC-BCA-BTP of February 29, 2008,” which indicates that in case any law of Vietnam or international treaty to which Vietnam is party “provides that infringing goods, materials, equipments must be destroyed, the proceeding agencies must destroy them even if they still have use value.” This response seems helpful, although it may not fully satisfy the default rule in the IP Code, since that Code does not compel the destruction of infringing goods.

**Internet Rules Need to Encourage Service Provider Cooperation:** IIPA expresses disappointment that the government of Vietnam failed to amend the IP Code to adopt additional measures to deal with Internet-based piracy. The current infrastructure is contradictory and ultimately unsatisfactory to deal with growing Internet piracy, especially of music and video content. Laws in Vietnam dealing with Internet issues and service provider responsibility include the Information Technology Law (2007),<sup>21</sup> and Decree No. 55 on the Management, Provision and Use of Internet Services (2001) (Internet Decree).<sup>22</sup> The Information Technology Law apparently provides a broad exemption for information transmitted over or stored on their network.<sup>23</sup> The Internet Decree, by stark contrast, contains helpful language on service provider issues, providing in Article 6(1),

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<sup>21</sup> Law No. 67/2006, enacted by the National Assembly on July 29, 2006 (into force January 1, 2007).

<sup>22</sup> Decree No. 55/2001/ND-CP of August 23, 2001 on the Management, Provision and Use of Internet Services.

<sup>23</sup> Industry indicates that, under this Law, Internet service providers (ISPs) are exempt from liability for information transmitted over or stored on their network. Accordingly, ISPs are not responsible for any copyright infringing material transmitted over or residing on their networks, despite their knowledge of the infringement, unless (i) they themselves initiated the transmission of the information; (ii) they themselves proactively selected recipients of transmitted information; (iii) they proactively selected and modified the content of the transmitted information. Industry indicates that in practice, this means ISPs have to take down infringing content only where they are so requested by competent State authorities.

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) of the Internet Decree 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.

The laws in Vietnam must be tailored to foster greater and more reliable service provider responsibility, specifically by creating mechanisms including statutory notice and takedown (with incentives such as safe harbors for service providers who comply) to promote cooperation in taking down and otherwise dealing with infringement online. With increasing broadband penetration, it will also be important to introduce other measures to deal with peer-to-peer (P2P) file sharing, web bulletin boards, torrent sites, and cyberlockers. The government should engage ISPs, most of which have ties to Vietnamese government agencies, and adopt policies so that they can easily stop repeat infringers from engaging in such illegal activities. Such ISP policies could include implementing a system of graduated sanctions leading to suspension or disconnection of accounts used for repeat infringement. IIPA understands Vietnam may be working on changes to the Internet Decree and would look forward to reviewing a draft when made available.

**Optical Disc Regulations:** IIPA understands that draft optical disc regulations have been under consideration by Vietnam for some time to deal with optical disc production over-capacity in Vietnam. This regulation should be enacted and implemented forthwith. IIPA members have provided the government with model legislation on numerous occasions. Such a regulation on the licensing of optical disc manufacture should include 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, a prohibition on the unauthorized commercial burning of content onto CD-Rs or DVD-Rs, and a way to monitor imports of machinery and raw materials used to make pirate discs. 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.

## **MARKET ACCESS BARRIERS IN VIETNAM**

Various market access barriers exist in Vietnam today, the most serious of which are limitations and prohibitions on foreign companies' setting up subsidiaries to produce or distribute "cultural products," including IIPA members' products. This leaves certain rights holders, for example, sound recording producers, with no choice but to license Vietnamese companies, which often refuse to do business due to the prevalence of piracy. Thus, the vicious cycle of high piracy rates and little to no market access continues. 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 Vietnamese have indicated they prioritize preserving cultural diversity and strengthening Vietnam as a producer and provider, not just as a consumer, of creative products.<sup>24</sup> Unfortunately, Vietnam's restrictive policies on foreign investment operate as a limitation on investment in cultural production, thus, this part of Vietnam's legal structure operates to prevent meeting this key social objective. The following describes various market access restrictions faced by copyright owners.

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<sup>24</sup> See Asia-Europe Meeting (ASEM) Seminar on Cultural Diversity in Hanoi on Dec. 15, 2008, discussed in *Vietnam Prioritizes Preservation of Cultural Diversity*, Nhan Dan, March 26, 2009, at [http://www.nhandan.com.vn/english/culture/171208/culture\\_v.htm](http://www.nhandan.com.vn/english/culture/171208/culture_v.htm).

## BUSINESS SOFTWARE SECTOR

**Onerous Restrictions on Technology Choice Through Government Procurement Preference:** The Vietnamese government, under the auspices of the Prime Minister's Office, has established a framework for the procurement, use and adoption of open source software within government organizations with one of the key objectives being "enhancing copyrights protection." This regulatory framework was officially established in the Prime Minister's 2004 Master Plan for *Applying and Developing Open Source Software in Vietnam for the 2004 – 2008 Period*, followed by subsequent clarification and implementation through a number of ministerial directives and decisions, most recently in late 2008 by the Ministry of Information and Communications. The 2008 Directive mandated government agencies to install and use Open Source Software (OSS), which it indicated would be "contributing to reduce software copyright violation."

IIPA has no issue with the policy goal stated in the Directive, and fully supports the goal to legalize software usage consistent with APEC economies' agreement that central government agencies should use only legal software and other copyrighted materials. However, the implementation of this goal by creating a clear procurement preference flies in the face of the market, and harms companies that rely on software copyright for their livelihoods, since it denies such legitimate companies access to that education market. As such, it fails to build respect for intellectual property rights and limits the ability of government or public-sector customers to choose the best solutions to meet the needs of their organizations and the Vietnamese people. It also amounts to a significant market access barrier for the software industry.

It should be noted that the "Principles for Technology Choice Pathfinder," adopted by APEC in 2006 (furthering the 2002 "Statement to Implement APEC Policies on Trade and the Digital Economy"), recognize that procurement preferences can close markets and stifle innovation and economic development. By implementing this government procurement preference policy, the Vietnamese government is not adopting an effective approach to drive down piracy rates, but rather, is creating an additional trade barrier and denying fair and equitable market access to software companies worldwide, which is inconsistent with the APEC Principles. Rather than start down this path away from innovation, and to further promote respect for copyright, the government should abandon the current approach and follow a realistic policy framework that includes adequate education and effective enforcement of IP rights and fosters non-discrimination in business choice, software development, and licensing models. We strongly urge USTR to consider the implications that Vietnam's open source preference policy has on IP protection and access to Vietnam's market for U.S. goods and services.

## AUDIOVISUAL SECTOR

**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 MOCI.

**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. The Cinematography Law amendments appear to leave the possibility for quantitative restrictions on importation of films for distribution.



**Restrictions on Entity Type for Importation of Foreign Films:** Foreign companies are now investing in cinema construction and operation through joint ventures with local Vietnamese partners, but these are subject to government approval and a 51% ownership ceiling. The policy to modernize the cinema industry should be non-discriminatory and encourage investment in construction and renovation of all cinemas.

**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. Foreign content is reportedly limited to 50% of broadcast time, and foreign programming is not allowed during prime time.

**Censorship Process for Films:** 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. Films that require editing are subject to a re-review, though importers are not assured a right of appeal. 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

Onerous Vietnamese restrictions prevent U.S. record companies from engaging in production, publishing, distribution and marketing of sound recordings in Vietnam. Vietnam maintains investment barriers against foreign sound recording companies, many of which are of a discriminatory nature. 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 stifle the development of the Vietnamese music industry, and deny participation of U.S. companies in the market. The lack of a meaningful commercial presence of U.S. record companies in Vietnam also inhibits IIPA 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 foreign sound recording companies 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 readily available in the Vietnamese market. Thus, rights 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 cannot do business in Vietnam, pirates will fill the void, forming 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. rights holders, but also local artists.

One way to make headway into the damaging piracy that has resulted from lack of market access for foreign sound recording companies in Vietnam is to permit legitimate companies to participate in the growing mobile and Internet markets for music. Namely, Vietnam should permit foreign copyright holders to license their content to

Vietnamese Internet or mobile content providers. Further, 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.

## **PIRACY AND ENFORCEMENT CHALLENGES IN VIETNAM**

**End-User Piracy of Business Software Harms the Software Industry and Stunts the Growth of the IT Sector:** 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. The piracy rate in Vietnam went up to 84%, due to the higher growth of unlicensed use of software by small business and consumers. A January 2008 study done by the International Data Corporation (IDC) with the Business Software Alliance concluded that decreasing Vietnam's software piracy rate by ten percent over a four year period would add US\$600 million to Vietnam's economy, create 1,900 new high-wage high tech jobs and generate an additional \$30 million in tax revenue.

The software industry has experienced some limited success since the IP Code was enacted, for example, the government in 2007 agreed to procure legal software, and took some administrative actions against the unauthorized use of software by businesses and government. The Prime Minister also issued Decision No. 51/2007/QĐ-TTg dated April 12, 2007 with the goal for Vietnam to reduce its software piracy rate to the average level in the region. There were no corporate end-user raids in 2008 on behalf of BSA. However, there were three end-user raids conducted in late 2009 and another raid in early 2010 by the Inspectorate of the MOCST in cooperation with the Economic Police. Administrative fines arising out of previous actions have usually resulted in non-deterrent fines, not even amounting to the cost of having purchased legal software. The authorities have also never taken *ex officio* raids against businesses engaged in software end-user piracy.

A 2008 Memorandum of Agreement has been effective in fostering good working relations between industry and government enforcement authorities through the Partnership in Protection of Software Copyright program.<sup>25</sup> In BSA's experience, enforcement officers show a strong interest in learning about copyright, improving their inspection skills, and applying what they have learned in practice. It is hoped that implementation of the Administrative will improve the situation in 2010 and lead to deterrence and a reduction in business software end-user piracy.

**Internet Piracy Grew With Increased Broadband Penetration in 2009:** In 2009, Vietnam once again ranked near the top in terms of growth in broadband penetration (according to Point-Topic). Total Internet usage continued to climb, with VNNIC (the national registry for Vietnam's Internet domain) estimating total usage at almost 22.8 million users (26.6% penetration, up from 20.2 million users and 23.4% penetration as of June 2008) ranking Vietnam seventh in total number of Internet users in Asia.<sup>26</sup>

As a result of Vietnam's rapid growth in Internet penetration, but specifically broadband subscribers, it is not surprising that harm to copyright owners due to Internet-based piracy became much more serious in Vietnam in 2009. Industry has consistently and regularly 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).<sup>27</sup> Industry sources indicate Internet piracy comes in the form of illegal downloads from hosting websites, deep linking sites (e.g., Socbay and Zing), piracy-oriented search

<sup>25</sup> In August 2008, a Memorandum of Agreement was signed establishing the "Partnership in Protection of Software Copyright" between BSA, the Vietnam Software Association, the Inspectorate of the Ministry of Culture, Sports & Tourism (MOCST), and the Copyright Office of Vietnam.

<sup>26</sup> As an example of Vietnam's Internet growth in 2009, according to Point-Topic, Vietnam had the highest growth in DSL connections between the second and third quarters of 2009, at 9.68%, from 2.48 million to 2.72 million (out of a total 2.75 million broadband) connections. Vietnam ranked eighth in the world in total new broadband subscribers added in that same period (adding almost 240,000 new subscribers), and seventh in the world in growth percentage of broadband connections.

<sup>27</sup> The following are all suspect websites as to which MOCST and COV have been informed: 1280.com, 7Sac.com, Baamboo.com, bbs.orzkoo.com, chacha.vn, clip.vn, galaxyz.net, Gate.vn, giaiitri24.vn, giaiitriamnhac.info, hihiehe.com, kenh14.vn, loitraitim.com, nghenhat.info, nhac.vui.vn, nhaccuatui.com, noi.vn, Socbay.com, tamtay.vn, timnhanh.com, Top1.vn, truongton.net, vast.net.vn, Vui.vn, tamtay.vn, top1.vn, xalo.vn, Yeuamnhac.com, yeucahat.com, and Zing.vn.

engines, peer-to-peer (P2P) downloading services, and cyberlockers. Pirates do not discriminate between Vietnamese and foreign works, and the Internet pirates involved offer large numbers of infringing files including local, regional and international works. Informal networks and forums used particularly by students but also by other Internet providers are increasingly used for dissemination of infringing content. Illegal streaming of copyrighted contents of international channels remains a major issue. University networks are increasingly being used for dissemination of infringing content.

In one example of Internet piracy and its ill effects on the Vietnamese people and local rights holders, Vietnam's national television station, VTV, was implicated in online piracy involving television broadcasts. In 2008, VTV held the rights to broadcast the "Ms. World Pageant" live. The pageant's organizers discovered that many online sites (including a website named "Vietnam1TV") directly received signals from VTV and broadcast the shows on their websites. RASS, the right holder in the broadcasts, issued warnings to VTV but the infringement continued. As a result, RASS rescinded the free-of-charge license citing "serious copyright violations."<sup>28</sup> Most of the "Ms. World Pageant" was not shown, causing many of the advertisers to pull out of their ad deals, and costing millions of Vietnamese viewers the chance to see the show. This was the second time VTV allowed its license to be rescinded since 2006. Other examples of this form of piracy include the unauthorized broadcast of music videos and unauthorized archived broadcast programs of music videos made available online. Despite sending numerous warning notices to the SCTV cable system about the unauthorized broadcast of music videos by Yeah1TV on Channel SCTV4 and to Yeah1TV's website (yeah1.com/tivi/) about the unauthorized archived broadcast program of music videos, the operators of these services have not taken any measure to remove infringing content. Administrative complaints have been filed with MOCST against both the Yeah1TV and the Yeah1TV's websites. It is hoped that the infringements can be stopped and that deterrent penalties/remedies will be imposed against these infringing channels and website operators.

Right holders have taken an active approach at self-help measures, seeking numerous takedowns of infringing sites and materials. Unfortunately, the takedown rates have not been particularly good, and brazen Internet piracy has increased. With 682 instances of Internet piracy notified to ISPs and directly to the websites allegedly infringing copyright in 2009, there were only 136 takedowns, for a takedown rate of only 20%. This poor takedown rate is due to the lack of a legal obligation or ambiguity as to the same for such services to take down infringing sites or files. The international record industry group, the International Federation of Phonographic Industries (IFPI) has filed several administrative complaints with the MOCST under the new Administrative Decree. MOCST inspectors have issued warnings and asked for the removal of the infringing content stated in the complaints. However, infringing content can still be found on these sites, continuing to cause damage to the music and record industry.

It is clear that overall, the Internet piracy problem is growing more serious, and the government of Vietnam therefore 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 2010. Target cases should be prosecuted at court against egregious examples of Internet piracy, and administrative authority should be exercised to prevent unfair business practices and address activities of commercial entities that actively facilitate infringement. Finally, government-run networks (including university networks) should be monitored closely to minimize infringing activity.

**Physical Piracy Dominates the Market, Including Imports, Recordable Disc "Burning," and Local Factory Production:** A reported seizure in Ho Chi Minh City on January 6, 2010 of "300,000 discs of all kinds that could be considered pirated," from a plant supposed to be producing blank discs, highlights the continued struggle in Vietnam against piracy.<sup>29</sup> Unfortunately, piracy can still be found everywhere, especially in urban areas, including major piracy hubs like Hanoi, Ho Chi Minh City, Danang, Haiphong, and two border cities Lang Son and Mong Cai. It remains, for example, very easy to buy almost any kind of software at shops on the so-called "PC streets" or other

<sup>28</sup> Other websites illegally retransmitting the VTV signals included VTC.com.vn, PDA.vn, and Clip.vn. See *VTV Loses Miss World Pageant Broadcasting Rights*, Look at Vietnam, December 15, 2008, at <http://www.lookatvietnam.com/2008/12/vtv-loses-miss-world-pageant-broadcasting-rights.html>.

<sup>29</sup> *Vietnam Police Say Pirated Discs Seized*, Agence France Presse, January 7, 2010, at <http://www.france24.com/en/20100107-vietnam-police-say-pirated-discs-seized>.

“CD-DVD” shops. Though MOCST has been supportive in recognizing there is a problem, they have devoted very few resources to deal with piracy across Vietnam. With the development of the Internet, some physical piracy has begun to migrate to smaller provinces like Khánh Hòa, Đồng Nai, Bình Dương and Hưng Yên where Internet connectivity is less developed. The author of a recent article on the topic notes, “[t]hese shops are open, just like any legitimate business.”<sup>30</sup> In fact, for the music industry, with piracy levels still over 90%, financial returns for recorded music sales have dropped so deeply that the companies involved are 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.”<sup>31</sup>

Pirate optical discs in the market come in three varieties: imports, mainly from China; locally produced “burning” onto recordable discs; and factory-produced discs. The majority of pirate VCDs and DVDs of movies are now imported from China. Authorities in Vietnam report eight optical disc plants operating in Vietnam today, with the capacity to produce well above any rational legitimate domestic demand. 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.<sup>32</sup> Vietnamese-sourced pirate products flood the domestic markets and have in past years been found in other Asian countries, Canada, the Czech Republic, and Poland in recent years. The industries also have prior years’ intelligence that syndicates headquartered outside Vietnam have established replication facilities in the Mekong River countries (Laos, Cambodia, Myanmar, Thailand, PRC and Vietnam).

The government must devote greater resources and greater manpower in order to achieve significant reductions in physical piracy. Only a ‘zero tolerance’ campaign, including *ex officio* actions against open and blatant piracy activities of all kinds, with deterrent administrative fines meted out to their maximums, license revocations, shop closures, and criminal penalties, can result in a significant reduction in piracy in Vietnam. A comprehensive regulation to address optical disc pirate production (of the kind discussed above) is needed to curtail pirate factory production, and provisions to license recordable disc production will also help to weed out pirate burn-to-order services.

**Book and Journal Piracy Severely Harms Publishers:** Book and journal publishers continue to suffer from rampant piracy in Vietnam, 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. 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 (mostly of reference books) is growing but is not yet a significant threat in the country. Most universities continue to show a lack of interest in promoting use of legitimate published materials on campuses. Universities should be more active in ensuring that campus facilities, photocopying machines and networks, are used for only legitimate purposes.

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<sup>30</sup> See Dong Ngo, *Vietnam: Where Pirated Apps Match Personal Budgets*, at [http://news.cnet.com/8301-17938\\_105-10122530-1.html](http://news.cnet.com/8301-17938_105-10122530-1.html). Industry notes that the current cost of pirate movie DVDs in Hanoi is between VND15,000 (for a low quality copies) to VND18,000 (US\$0.81 – US\$0.97), and half that for an audio CD.

<sup>31</sup> 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>.

<sup>32</sup> See Dong Ngo, *Vietnam: Where Pirated Apps Match Personal Budgets*, at [http://news.cnet.com/8301-17938\\_105-10122530-1.html](http://news.cnet.com/8301-17938_105-10122530-1.html). The author is quoted 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.”

In 2009, several publishers discovered that their books were being pirated by a particularly egregious domestic publishing company. Repeated requests of the infringer to cease the infringing activity have been ignored, despite the fact that the request issued from COV and MOCST. In July 2009, local representatives in cooperation with a registered book distribution company organized a press conference to call attention to the illegal activities of the infringing publishing house. Following the event, the infringer wrote to the Ministry of Information and Communication accusing the local representatives of slander and of organizing the press conference “illegally” (though on what grounds remains unclear). This act appears to have precipitated the government agencies’ lack of interest in pursuing the matter.

**Signal Piracy:** Vietnam has seen a dramatic fall in illegal pay TV connections since 2007 and a surge in legal subscribers over 2009. 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 Telematics. It appears, however, that VTC is again broadcasting without license Motion Picture Association members’ content, ignoring cease and desist letters. In addition, industry reports that the unauthorized reception and redistribution of foreign satellite channels using illegal decoders remains a problem throughout the country. The cable and satellite group CASBAA reported that in 2009, industry lost \$15 million due to under-declarations and illegal pay TV connections. Almost 1.1 million pay TV connections in the country are illegal, constituting three out of every four such connections.

**Mobile Device Piracy:** With mobile penetration skyrocketing in Vietnam, estimated at nearly 120 million mobile subscribers as of November 2009,<sup>33</sup> or well over 100% mobile penetration, it is no surprise that Vietnamese are increasingly obtaining their content from digital sources. The government of Vietnam must remain vigilant and resist any attempt by pirates to established fixed mobile device piracy shops or services.

**Courts and Judicial Reorganization:** Perhaps the greatest disappointment to IIPA members has been the inactivity of the courts in dealing with copyright infringement issues. No criminal copyright infringement cases have been brought to courts. While inter-governmental discussions have ensued on judicial reforms, there still seems to be great reluctance to apply criminal remedies to even the most egregious cases involving copyright infringement. Equally, there have to date been relatively few civil court actions in Vietnam. The main reason for this is ambiguity within the law, complicated procedures, delays, and a lack of certainty as to the expected outcome.

Overall, there have been very few cases involving copyright reaching final court decision in Vietnam, and thus neither the civil nor the criminal courts have been well tested, and both lack clear direction on how to handle copyright cases.<sup>34</sup> Building IP expertise must be a part of the overall judicial reform effort. Training should be provided to police and prosecutors because they play a very important role in bringing a criminal offense to the court. With regard to the civil courts, we recommend a full training program for specialist judges and other IP professionals, to include training from authorities such as the NOIP as well as training by external organizations who are able to provide knowledge and guidance gained from a wider, more international perspective. Civil judges require training on the determination of compensation for damages together with the calculation of damages.

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<sup>33</sup> Ngo Viet Hung (MIC Officer), *Managing Significant Market Power Enterprises In Vietnam's Telecom Market*, presented at ITU Workshop on Policy and Regulations for Newly Established Regulators in the Asia Pacific Region, December 8-9, 2009, at [http://www.itu.int/ITU-D/asp/CMS/Events/2009/NewRegs/docs/S4\\_Mr\\_Viet\\_Hung.pdf](http://www.itu.int/ITU-D/asp/CMS/Events/2009/NewRegs/docs/S4_Mr_Viet_Hung.pdf).

<sup>34</sup> 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.

## TRANS-PACIFIC PARTNERSHIP

On November 14, 2009, in Tokyo, Japan, President Obama announced that the United States will engage with the Trans-Pacific Partnership and on December 14, United States Trade Representative Ron Kirk formally notified Congress that President Obama “intends to enter into negotiations of the agreement with the TPP countries with the objective of shaping a high-standard, 21st century agreement with a membership and coverage that provides economically significant market access opportunities for America's workers, farmers, ranchers, service providers, and small businesses.”<sup>35</sup> The initial TPP negotiating partners include Vietnam. IIPA has submitted public comments to the U.S. government's Trade Policy Staff Committee as part of its official docket which describes in greater detail the hoped-for results of a TPP negotiation, in the areas of substantive copyright protection, enforcement standards, ensuring the free flow of electronic commerce products and services, and opening markets to trade in copyright goods and services.<sup>36</sup> In particular, opportunities will arise to introduce copyright and enforcement standards consistent with those agreed to by current FTA partners, Australia, Singapore, Chile and Peru, that would greatly benefit the creative communities in all the TPP markets. IIPA hopes and expects that the IPR texts in these agreements will follow the high standards already in place in the FTAs negotiated to date. Vietnam must undertake significant reforms to its legal and enforcement regimes if it is to be able to meet the obligations of the US free trade agreement IPR chapters.

## GENERALIZED SYSTEM OF PREFERENCES

**IIPA Does Not Oppose Vietnam Bid for GSP, But Requests 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.” While the IIPA filing did not oppose granting Beneficiary Developing Country status to Vietnam under the Generalized System of Preference trade program, the filing did note several areas – both market access and IPR deficiencies – in which Vietnam does not fully meet the eligibility criteria, and formally requested that one year after the President designates Vietnam as a beneficiary, a review be scheduled to determine whether Vietnam has made progress in fully 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.

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<sup>35</sup> See United States Trade Representative, *Trans-Pacific Partnership Announcement*, December 14, 2009, at <http://www.ustr.gov/about-us/press-office/press-releases/2009/december/trans-pacific-partnership-announcement>.

<sup>36</sup> International Intellectual Property Alliance, *Public Comment Concerning the Proposed Trans-Pacific Partnership Free Trade Agreement with Singapore, Chile, New Zealand, Brunei Darussalam, Australia, Peru and Vietnam*, 74 Fed. Reg. 66,720 (December 16, 2009).

## **TRAINING AND TECHNICAL ASSISTANCE**

In 2009, the Business Software Alliance provided training to the Provincial Inspectorates of MOCST in three major regions of Vietnam. They organized Software Asset Management (SAM) training for members of the AmCham in Ho Chi Minh City. They also worked with the U.S. Embassy and U.S. Patent and Trademark Office in organizing IPR workshops for “Young Entrepreneurs and Enforcement Authorities (Courts, Procuracy, Economic Police, Customs, Market Management).” In 2010, BSA plans to conduct trainings with MOCST at the end of June, and it is hoped this can lead to a number of end-user piracy raids following the training. IFPI plans to conduct several technical training events to MOCST and other government authorities about investigative techniques to tackle online piracy. The first training in 2010 is expected to be held in late March.

## **306 MONITORING**



# PARAGUAY

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

### 2010 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** IIPA recommends that Paraguay remain under Section 306 monitoring in 2010.

**Executive Summary:** Last year, the bilateral Memorandum of Understanding on Intellectual Property Rights (IPR MOU) between Paraguay and the U.S. was renewed through 2011, and except for enforcement actions taken in August against traffickers in circumvention devices and modded consoles, that represents about all the good news to report last year. There was a disturbing turn of events in 2009 as the special anti-piracy unit (known as UTE) received even less political support from the government, thus putting into question the level of national commitment to promote enforcement of the copyright law. The few copyright sectors that have been working with UTE over the years, have done so with good cooperation and good results, considering the scope of the piracy problem in Paraguay. Seizures of infringing products by UTE dropped in the range of 40-50% last year, compared to 2008.

Regarding piracy, there is no progress--there was no reduction in copyright piracy levels in Paraguay--not in the streets, not at the borders. This market is still one facing primarily physical piracy of hard goods. There continues to be a large scale production by the local blank optical disc plants operating in Ciudad del Este at a rate that far exceeds what the nation could consume, and because of that, these products are exported around the region. The business software sector continues to suffer from end-user piracy, and the government has taken no steps to implement a legalization program among its agencies that it obliged to create. The entertainment software industry reports that Paraguay continued, in 2009, to be the source of a steady flow of illegal and counterfeit games, modified consoles and game copiers that flow into Brazil and neighboring countries. Border enforcement remains ineffective. Corruption and an ineffective judicial system are deeply embedded systemic problems that have provided many roadblocks to criminal enforcement. Last year there was hope that the criminal code amendments that strengthened copyright sanctions would be put in practice, and that the prosecutors and the courts would work together to issue deterrent sentences in piracy cases. Sadly that was not the case, and the industries are not aware of any copyright conviction that resulted in any meaningful sentence. Clearly more judicial trainings on IPR enforcement and the adoption of sentencing guidelines are direly needed, but that alone is not enough to address the systemic problem and tolerance of piracy in this nation. IIPA strongly recommends that the U.S. government maintain far more regularized consultations with Paraguayan authorities on progress being made on-the-ground on MOU elements during 2010.

**Priority actions requested to be taken in 2010:** 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 training for officials in the special anti-piracy unit (UTE) and provide sufficient resources for UTE to hire, train and maintain its inspectors.
- 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.
- Audit large-scale importers of blank CD-Rs who are suspected suppliers of pirate organizations for possible tax evasion and 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.

- Create a Special IP Prosecutor with national competence, such as those set for drugs and corruption.
- Impose deterrent criminal sanctions, as sanctions were strengthened in the 2008 criminal code amendments.
- 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 (a long overdue obligation from the IPR MOU).
- Ease regulations for the destruction of seized evidence.

**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 intellectual property rights system, both law and enforcement. 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. Both governments agreed to extend this MOU until December 31, 2011.

Despite years of work under this MOU framework, Paraguay unfortunately has not met many of the major objectives. It has failed to: (1) significantly reduce the levels of copyright piracy; (2) increase *ex officio* actions at the border; (3) strengthen deterrence by actually imposing mandatory minimum prison sentences on offenders convicted of manufacturing, importing or distributing commercial quantities of pirated or counterfeit goods; (4) provide for the seizure of an infringer's assets upon conviction for commercializing pirate product; (5) find ways to work with the judiciary to promptly resolve pending cases; and (6) increase the terms of copyright protection for all copyrighted materials.

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 2009, \$36.4 million worth of Paraguayan goods entered the U.S. under the duty-free GSP code. More information is available regarding the history of Paraguay in the Special 301 context.<sup>1</sup>

## **COPYRIGHT PIRACY IN PARAGUAY**

There are a variety of forms of piracy impacting the copyright industries in Paraguay, ranging from widespread piracy of physical goods (such as movies, music and recordings, business software and entertainment software on CD-Rs and DVD-Rs and videogames in cartridge format), to unauthorized copies of application software in businesses, to widespread photocopying, especially in/near universities. Internet piracy is also beginning to take root in Paraguay, and this affects different sectors in distinct ways.

Burned copies of CD-Rs/DVD-Rs full of copyrighted content and cartridge-based video games are readily available in Paraguay. This is a very visible form of physical piracy found in Ciudad del Este. Street piracy remain steady, especially in the cities which have borders with Brazil, such as Ciudad del Este, Pedro Juan Caballero and Salto del Guaira. Pirated music and film products as well as copies of business software are easily found at the wholesale and retail levels, such as the San Blas municipal market at the foot of the Friendship Bridge. Significant piracy of mostly music

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<sup>1</sup> For more information regarding the history of Paraguay and Special 301, see Appendices D and E at <http://www.iipa.com/pdf/2010SPEC301USTRHISTORY.pdf> and <http://www.iipa.com/pdf/2010SPEC301HISTORICALSUMMARY.pdf> of this submission. To read IIPA's cover letter to our 2010 Special 301 submission, go to <http://www.iipa.com/pdf/2010SPEC301COVERLETTER.pdf>.

and movies (CD-Rs and DVD-Rs) can be found on the streets of Asuncion. The level of hard goods piracy for recorded music is 99%.

**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. Unfortunately, there was only one major seizure of blank media in 2009. We do not have the official import numbers for 2009. At the local level, there are hundreds of smaller burning labs in Ciudad del Este supplied by pirate kingpins who coordinate their work and provide these labs with blank CD-Rs. Furthermore, Paraguay remains a significant transshipper of pirate products and optical media to its neighbors, especially Brazil.

At last report, blank media plants in Ciudad del Este now produce upward of 400 million units a year, yet they have not been audited in several years. Several years ago, 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. There remains a striking lack of oversight regarding the blank optical plants. There are five optical disc factories, and what is stunning is the increase of output of product from these plants, with output now up to 400 million units in 2009. One (of the plants is believed to have the authorization to legally export their products to Brazil and Argentina.

The entertainment software industry reports that for 2009, the Paraguayan market remains replete with pirated and counterfeit video games. 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 some 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 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 modified game consoles (modified to circumvent the console security systems and permit the use of pirated games) and 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. This sector is also affected by street piracy of pirated and counterfeit products, and the growing availability of the Internet is starting to adversely affect the business software sector. BSA's preliminary estimated losses due to business software piracy in Paraguay in 2009 are \$8 million, with an 82% piracy level.<sup>2</sup> This is a decline from the US\$9 million and 83% in 2008.

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.

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<sup>2</sup> BSA's 2009 statistics are preliminary and represent the U.S. software publishers' share of software piracy losses in Paraguay, and follow the methodology compiled in the Sixth Annual BSA and IDC Global Software Piracy Study (May 2009), available at [www.bsa.org](http://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. Final 2009 BSA statistics will become available later in 2010.

Internet-based piracy in Paraguay has grown as local Internet access is becoming more and 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 are common, 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 noted an increase in national and regional Internet sites offering the sale of hard copy of DVD format video games. In general, 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.

**Few criminal actions, lack of support for UTE within the government:** The historical bright note, the hearty work done by the Specialized Technical Unit (UTE) in the Ministry of Industry and Commerce, dimmed in 2009. 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. The copyright sectors with active campaigns (primarily the software and music industries) have worked well with UTE and its leadership over the years and in 2009 as well.

Unfortunately, it appears that UTE has no political support from most national and local government agencies. The current government of Paraguay has not shown a significant interest in providing any support to the UTE. The present Minister of the Ministry of Commerce and Industry (MIC, which UTE reports to) has no interests in the success of the UTE. UTE also 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 situation with UTE is going from bad to worse in 2010. First, UTE is about to experience a major loss as its successful and aggressive enforcement director, Colonel Cruz, who has been mandatorily retired, effective January 1, 2010, although the President has still not officially signed off on his retirement. There has been no indication of any plans to retain Colonel Cruz separately as a contractor for UTE or to appoint any successor. Second, the UTE remains extremely short-staffed. Most of the officials of the UTE are from the Ministry of Finance. The eight (8) members of UTE that were assigned ("seconded") from the Ministry of Taxes have not had their appointments reauthorized by the Minister of Taxes. As a result, this has effectively dismantled the UTE due a lack of staff. Technically, the only members of UTE that are still authorized to act are Cruz and an UTE member temporarily assigned from the national police.

This entire situation has effectively undermined UTE's ability to sustain its enforcement activities in 2010. The Paraguayan government needs to address this situation immediately by having the Minister of Taxes reauthorize the appointments of the eight tax agents to UTE for 2010, as well as resolving Colonel Cruz's situation. This episode is a sad example of the precariousness of IP enforcement in Paraguay. In large part, this is due to the uncertain status and lack of funding of UTE. The Paraguayan government should resolve this uncertainty by making UTE's status permanent and properly funding this unit and providing its sufficient manpower and resources to address the significant challenge of controlling IP piracy in Paraguay.

In terms of enforcement results, during 2009 the UTE suffered a significant decline in the seizure of all types of contraband goods, including both burned CD-Rs (which include music and films) as well as blank media. Although exact figures are not yet available, UTE sources have estimated the numbers of raids in 2009 were down about 40%, and seizures of illegal music and film products were down at least 50%-60%, compared to 2008. In addition, a key metric --

the value of goods seized--has been utilized by the UTE to determine its effectiveness, and this measure declined from US\$48 million in 2008 to US\$7 million for 2009. The decline in the amount of goods seized was due the lack of political and monetary support from the Paraguayan authorities because 2008 was an electoral year and there was a lack of government interest in IPR protection in 2009.

A key priority has been, for years, the need for Paraguayan officials to 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. Ciudad Del Este continues to be the center of pirate activity. In 2009, no major raids were conducted in the major pirate market of "San Blas" which has more than 250 points of sale containing illegal music and film products. Sanctions against landlords of pirate points of sale are not utilized in Paraguay. According to sources, Paraguayan authorities feel they do not have adequate laws to enforce these types of actions. However, sources inside the UTE advise they have insisted in testing this enforcement tactic but were always denied by the Fiscalia (the district attorney's office).

In years past, the music and motion picture industries were represented by APDIF in Paraguay, and cooperation between APDIF and UTE on investigations, complaints and anti-piracy actions had been good, although the number of raids in 2008 were down from previous years. Last year APDIF closed its office in Paraguay, and local anti-piracy operations were conducted by UTE, with some support for the IFPI Latin American Regional Office. As a result, this industry group no longer files complaints with UTE. For 2009, UTE has reported that its IPR seizure actions involved a value of US\$4.8 million, but no further details were provided.

ESA reports continued cooperation from the UTE, resulting in enforcement actions conducted against 33 individual targets. Ciudad del Este remains the focus of most enforcement, with 31 of the enforcement actions taking place in the city. Ciudad del Este remains home to extensive retail piracy of counterfeit games and peripheral devices, burning labs and storage facilities focused on replicating games on both CD/DVDs and cartridges, and circumvention operations that specialize in the sale of modded consoles and game copiers that are made available domestically and also exported to neighboring countries. In all, UTE led raids resulted in the seizure of over 43,000 pirated games, 140 CD/DVD burners capable of producing untold numbers of additional games, 75,000 counterfeit game covers, and 750 modded consoles/circumvention devices. Although ESA appreciates UTE's enforcement efforts targeted at pirate operations in Ciudad del Este, the ongoing piracy in this area is indicative of the fact that raids are not adequately deterrent in and of themselves. Unless coupled with criminal charges, convictions and deterrent sentences, targets continue to view the seizures as the mere cost of doing business. The effectiveness of raids is further undermined by the fact that targets are regularly tipped off about impending actions, giving them time to remove most, if not all, of their infringing product. In addition to conducting raids, UTE also intercepted a shipment of packages arriving from Syria, containing 3,000 pirated copies of entertainment software.

**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. River smuggling on the Parana River between Ciudad del Este and Foz do Iguaçu continues to increase and very little is done on the Paraguayan side to curtail these activities. Sources inside the special riverine unit of the Brazilian Federal Police have indicated that the smugglers cannot operate freely unless they have support or assistance from the Paraguayan military and navy that control these clandestine routes.

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 recent, major actions (we are aware that UTE did seize one shipment of pirated entertainment software in 2009). Customs has a special unit dedicated to contraband smuggling but they are undermanned and underfunded and at times subject to

political interference. Unfortunately, corruption of customs officials continues to play a major role in improving border enforcement.

The Director of Paraguay Customs in office for nearly all of 2009 failed to take meaningful action on piracy issues and corruption, as evidenced by the continued movement of pirated goods through numerous points of customs entry. Instead, the Director stifled efforts of the Administrative Coordination of Customs Investigations (CAIA) unit to conduct investigations and seizures. The border control unit, DETAVE, continued to be plagued with corruption, focusing sparse enforcement actions on contraband consumable goods. On December 30, 2009, the President appointed a former anti-corruption Prosecutor as Customs Director, who appears to have the will to combat corruption in Customs and take a strong handed approach to piracy and contraband. The U.S. government should use its bilateral consultations with the Government of Paraguay to ask specific questions regarding the activities of Customs in addressing exports from Ciudad del Este, as it is well-known that this area is the source of significant quantities of counterfeit goods exported into neighboring countries.

BSA reports that last year it carried out three channel actions in Asuncion against assemblers who sold illegal pre-installed software.

**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). The copyright industries have long advocated that a Special IP Prosecutor with national jurisdiction (such as those set for drugs and corruption) be created. We are not aware of any progress on this recommendation.

Unfortunately, the quality of work between these two sets of prosecutors varies dramatically. Both the business software and the recording industries 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 Ciudad del Este 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's experience with the three prosecutors in Ciudad del Este has been uneven with ESA's representatives often finding a lack of interest in authorizing enforcement actions against local piracy operations. The effectiveness of enforcement efforts in Ciudad del Este would be greatly enhanced if all of these prosecutors could be properly motivated by their superiors to administer their responsibilities with respect to IP enforcement.

**Need to ease regulations regarding 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.

ESA experienced some poor judicial supervision of seized evidence. UTE actions in August 2009 produced the first enforcement actions targeting circumvention operations, when a number of such operation in Ciudad del Este were raided and a number of games consoles that had been modified to circumvent their security systems were seized. Unfortunately, several weeks later, without any advice to the prosecutor, the judge, upon motion by a defendant's legal representative, authorized the return of game consoles to the defendant upon the removal of the circumvention device from the console. Reportedly, this removal process was not strictly verified by the court and the concern is that many of these consoles were returned along with the circumvention devices. At a minimum, one would expect that any such procedure involving the return of seized merchandise would require advance notice to the prosecutor as well as the victim's representatives.

**Internet enforcement:** To date there have been very few developments in Internet piracy enforcement. 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.

BSA has been waiting for the conclusion of a significant criminal case which is expected during 2010. Three years ago, BSA reported that it brought a case where it worked with authorities to conduct a raid against an Internet pirate who operated internationally. This defendant offered franchises supplying pirated software products targeted at specific professions (e.g. architecture, medicine, law). 213 pirated DVDs were seized, many that were used as masters for these "special packages" of programs, and such packages often included four or five DVDs.

**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. According to sources, there were no IPR convictions in 2009 that resulted in any meaningful jail sentence to date

Two years ago, a problem arose involving 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.

**Delays and low damages in civil cases:** During 2009, BSA conducted 8 civil actions against end users, and filed one civil action (in addition to the 3 criminal actions against assemblers who sold computers with illegal software pre-installed). 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.

**IPR Training Programs:** In December 2009, WIPO in conjunction with the Public Ministry and the MIC held an IPR seminar in Asuncion geared to Prosecutors and enforcement personnel. It was a three-day seminar attended by 50-60 persons. Speakers came from Europe, the US and Brazilian authorities from both the private and public sector. More training is needed especially in terms of dealing with smuggling and organized crime cases. On October 11, 2009, the BSA in conjunction with the supreme court, held a seminar in Asuncion directed to judges especially from the civil forum, about licensing and identification of counterfeit products. The seminar helped judges understand the different licensing systems and the different types of piracy, such sublicensing and "soft-lifting."

## **COPYRIGHT LAW AND CRIMINAL CODE ISSUES IN PARAGUAY**

**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.

**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.<sup>3</sup> The most recent solution was based on a 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 provision (Article 196) to include copyright violation (as defined in Article 184a) as a crime used to facilitate money laundering.

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<sup>3</sup> 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 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**

# HONG KONG

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

### 2010 SPECIAL 301 REPORT ON COPYRIGHT ENFORCEMENT AND PROTECTION

**Recommendation:** IIPA recommends that USTR actively monitor developments in Hong Kong during 2010 with respect to the issues discussed in this Special Mention report.

#### LEGISLATIVE ISSUES

In November 2009, the government of the Hong Kong Special Administrative Region (HKSAR) took another step in the protracted process of updating its Copyright Ordinance.<sup>1</sup> The administration's "Proposals for Strengthening Copyright Protection in the Digital Environment", which were discussed by the Legislative Council's Panel on Commerce and Industry on January 19, 2010, do reflect some forward progress; but much more needs to be done if the formal legislation, now scheduled to be introduced in the second half of 2010, is to respond effectively to the 21st century realities of the digital networked environment. IIPA urges the U.S. government to remain engaged with the HKSAR administration to encourage a positive legislative outcome.

One of the chief challenges remains the regime for dealing with the pervasive problem of online piracy, especially via peer-to-peer (p2p) file-sharing services. The goals are clear: The law must provide sufficient incentives for service providers to cooperate with anti-piracy efforts or face serious liability consequences. A more efficient and cost-effective mechanism must be put in place to legally allow disclosure of other infringers to right holders, so that they may pursue timely remedies against them. 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 November 2009 "proposals" reflect positive momentum in some aspects of meeting this challenge. The HKSAR administration acknowledged criticisms that its earlier drafts took too cramped a view of criminal liability, and now propose that all who initiate unauthorized communication of works to the public, either in the course of for-profit businesses or "to such an extent as to affect prejudicially" the copyright owners, should face criminal sanctions. While it is encouraging that, unlike earlier proposals, the criminal offense is no longer tied to the use of a specific technology ("streaming"), a number of issues require clarification. Hong Kong should spell out that the criminal offense covers all forms of uploading copyright material (including in the p2p context); that a for-profit business could be liable even without evidence that it sought to make a profit from the unauthorized communication itself; and that even a not-for-profit institution could be prosecuted for high volumes of intentional, unauthorized uploading. Hong Kong also needs to clarify that those who induce others to commit infringements (including in the online environment) face both civil and, in appropriate circumstances, criminal liability.

On the difficult issue of providing legal incentives for online service provider (OSP) cooperation with right holders, much work remains. A Tripartite Forum Committee process overseen by the Commerce and Economic Development Bureau has failed to achieve any results, in the view of rights holder representatives participating in the process. The government's most recent proposals continue to take the form of providing a "safe harbor" from infringement liability for responsible OSPs, without first spelling out the OSP's exposure if it fails to qualify for the safe harbor. While this legislative approach makes sense in jurisdictions where principles of secondary or indirect infringement liability are already well established, this is not the case in Hong Kong. Accordingly, Hong Kong should

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<sup>1</sup> The process began with issuance of a consultation document in December 2006.

amend the Copyright Law to state clearly the circumstances under which OSPs may be liable for acts of infringements occurring over their networks.

Perhaps more significantly, the steps that OSPs would have to take in order to qualify for the safe harbor remain unsettled. All that exists is a “rough outline of a Code of Practice,” which was widely rejected by industry observers; and from all reports even this falls short of requiring the level of cooperation needed in order to grapple effectively with online infringements. Without clear legal incentives for ISPs to cooperate with right holders to take down identified infringing material on hosted services, enforcement against online piracy remains ineffective.

One of the most critical shortfalls is the lack of any effective policy to identify and deal with repeat infringers of copyright. The HKSAR administration’s “Proposals” paper pre-emptively dismissed one approach to such a policy – a statutory graduated response system – but offered no alternative. While giving OSPs incentives to pass on to their subscribers notices of infringing activity received from right holders – a so-called “notice and notice” system – could form part of an effective legal response to p2p and other online infringements, it is clearly insufficient by itself if the receipt of repeated notices about the same subscriber carries no consequences. In any case, Hong Kong should require that OSPs implement sound policies on repeat infringers, as a prerequisite to qualifying for any safe harbor from infringement liability.

Disappointingly, the proposals paper showed no forward progress on other important “digital environment” issues. The proposed exception for certain “temporary copies” remains too broad, although IIPA welcomes the invitation of the administration for stakeholders to work with it to “fine tune” the proposal. This should include making the exception inapplicable to copies made in the course of unauthorized transmissions, wherever they originate, and ensuring the right to “opt-out” of caching through the use of appropriate technical means. The administration also continues to reject the introduction of pre-set statutory damages, the best available method of ensuring that victims of infringement – both online and offline – are fully compensated for their injuries, and that further infringements are deterred. Here too, right holders will work with the administration to identify factors for courts to consider in awarding “additional damages” in infringement cases.

The HKSAR government also proposed a “media shifting exception” which is limited to sound recordings. A new exception for media shifting is unnecessary, and likely to have unintended negative consequences. The right holders have never sought to hold anyone liable for this type of private conduct. Moreover, it risks creating a confusing message that any private copying, from any source, is legitimate. Misinterpretation of the exception could negatively impact the legitimate market for the sale of digital recordings. Therefore, if any such media shifting exception is introduced, it must be carefully crafted to apply only to personal use from legitimate sources in small quantities.

The digital environment initiative is Hong Kong’s best opportunity to craft a world-class copyright law for the 21st century. IIPA urges the U.S. government to monitor developments closely in 2010.

# SAUDI ARABIA

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2010 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** Saudi Arabia is currently on the Watch List. On November 9, 2009, IIPA recommended, in USTR's out-of-cycle review (OCR) process, that Saudi Arabia be removed from the Watch list. While USTR has not issued its decision following that review, and based on actions taken by the Saudi government for some but not all industries, IIPA continues to recommend, in this Special Mention submission, that Saudi Arabia be removed from the Watch List. However, this recommendation is based on the Kingdom making continuing progress to reduce high piracy levels in 2010 and to take stronger action in order to ensure effective enforcement in all copyright sectors, in particular, the recording industry and its international repertoire. If that progress is not prompt, continuing and comprehensive, IIPA will recommend that Saudi Arabia be returned to the Watch List before the 2011 Special 301 cycle.

**Executive Summary:** Piracy rates continue to remain higher than any other country in the Gulf region for the motion picture, music and recording and entertainment software industries (in the 90% range) and unacceptably high for the business software and publishing industries. Despite this, however, IIPA took the unusual move, in its OCR submission on November 9, 2009, of recommending that Saudi Arabia be removed from the Watch List in recognition of the significant efforts and commitments made by MOCI Deputy Minister Al-Haazaa to continue to take action against piracy and to achieve the OCR benchmarks identified by IIPA in its February 2009 Special 301 submission. Many of these benchmarks have been, or are close to being, achieved for some industries. The most significant progress will be the promised appeal of one case before the Violations Review Committee (VRC) to the Board of Grievances (BOG) with a recommendation that the infringer be given a prison term. We expect this to occur very soon. In addition, the Ministry of Commerce has undertaken an inventory of its software use and will reportedly complete that review in February 2010 and has committed to purchase legitimate software should illegal software be found in use in the Ministry. The BOG has indicated that it would mete out prison sentences in appropriate cases, and if and when this is done, it will have a major deterrent impact in Saudi Arabia.. However if these and other benchmarks are not met and if piracy rates do not begin to come down,<sup>1</sup> IIPA will recommend that Saudi Arabia be returned to the Watch List before the 2011 Special 301 cycle commences.

**Priority actions to be taken in 2010:** IIPA set out a number of benchmarks for action by the Saudi government in its 2009 submission. These benchmarks, if fully met, would result in the most significant commercial benefits to the copyright industries:

### Transparency

- Fully populate the MOCI's 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;

### Deterrent Enforcement

- 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, one or more cases 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;

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<sup>1</sup> For example, the recording industry reports that its market is collapsing and sales of legitimate CDs have fallen by over 70%,  
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- Publicize widely, and on a regular basis, all these actions, including press statements by high government officials that piracy will no longer be tolerated.

### **Legalize Software Use**

- Make significant progress toward legalizing software use in the KSA government.

### **Other Actions**

In addition to meeting these immediate benchmarks, the government must also take the following additional actions:

- Administrative penalties imposed by the VRC should be increased to provide more deterrence, under the guidance of the Minister and Deputy Minister Al-Hazaa;
- New trained inspectors must be added to the Copyright department at MOCI. Resources are inadequate to deal with the levels of piracy throughout the Kingdom;
- The 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;
- A special cyber crime unit within the Police Committees and an Internet piracy unit at MOCI should be established,<sup>2</sup> and the MOCI should work closely with the Communication and Information Technology Commission (CITC) to take actions against Internet piracy. At present, nothing is being done by the government to address rampant online piracy over P2P networks and enforcement authorities do not take actions to curb copyright infringements committed in this way;
- Enforcement of marketing conditions (such as religious requirements) must be even-handed and translate into raids and takedown actions against pirate product, which is both freely available on the streets and advertised online;
- The CITC must continue blocking 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;
- Amend the Copyright Act to fully implement and ratify, the WIPO Internet Treaties, including ensuring the law provides incentives for ISPs to cooperate with rights holders against online piracy.

For more details on Saudi Arabia's Special 301 history, see IIPA's "History" Appendix to this filing.<sup>3</sup> Please see also previous years' reports.<sup>4</sup>

### **UPDATE ON PROGRESS ON MEETING IIPA'S OCR BENCHMARKS**

**Transparency:** There has been significant improvement by MOCI in this area. Many new cases have been placed on the MOCI website, though the job is not yet fully completed. Translation into English has not yet occurred but H.E. Al-Hazaa has ensured that steady progress has been made and has agreed to work with the private sector to complete the task. Cases in Jeddah or Dammam need to be posted as well. Lawyers for rights holders have also been able to obtain information on the status of their cases, upon request.

<sup>2</sup> Such unit could be based on the model in place in Lebanon.

<sup>3</sup> <http://www.iipa.com/pdf/2010SPECIAL301HISTORICALSUMMARY.pdf>.

<sup>4</sup> <http://www.iipa.com/countryreports.html>.

Rights holders have been able to participate in VRC proceedings upon request and the right to appeal results and penalties to the BOG has been confirmed. Rights holders have now appealed two of the Video Mesfir cases (discussed below) to the BOG and have asked for a term on imprisonment.

The Ministry must continue to post at least all cases now pending (which would include a number of 2008 cases, we believe) and all cases decided in 2009 along with dates of the hearings and any fine handed down. A contractor should be hired to do this, perhaps even a rights holder with a strong interest in getting it done. The VRC has recently been awarding civil damages, which is a major advance, and the amount of damages should be on the website as well. By knowing the fines, and having a real census, rights holders will be able to assess deterrence over time by the size of the fines and damage awards. The Ministry should be encouraged to outsource translating the site data into English. Moreover, the Ministry should put in place mechanisms enabling effective exchange of information and cooperation between KSA enforcement authorities and foreign rights holders whose anti-piracy operations, especially in the Internet sphere, are frequently run from outside the Kingdom. There should be clear information, available in English, on the organizational structure and responsibilities within MOCI as well as named contact persons for handling cooperation with foreign-based anti-piracy teams representing affected rights holders.

**Deterrent enforcement and penalties:** Under HE Al-Haazaa's leadership, raids against street vendors and retail operations have continued at a high and steady rate. The police have been cooperating in many of these raids and on raids against the source of such pirate products. These raids have focused heavily on video, videogame and book piracy. Seizures must now be extended to piracy of music and sound recordings. However, the very high piracy rates that continue to dominate the market in Saudi Arabia suggest that such raids must not only continue, but be significantly expanded, and greater attention paid to criminal enterprises involved in the production and large scale distribution of pirate goods, regardless of whether these relate to music, video, entertainment and business software or books. Enforcement authorities must also adapt their enforcement priorities in line with the changing nature of the piracy problem and the steady shift from physical piracy towards digital piracy (see discussion below)

The Saudi government reported to the U.S. government in October 2009 that it conducted 2,000 raids and inspected 5,000 outlets. It also reported seizure of 3.83 million units of pirate product, all of which demonstrates a significant improvement. The commitment to set up VRC branches in Jeddah and Dammam has also been met. Moreover, the VRC has been clearing many more cases than in the past and administrative penalties have increased, including a few cases involving the maximum penalty of SR 100,000 (US\$26,665).<sup>5</sup> HE Al-Haazaa has been a critical part of these improvements and IIPA members are very grateful for his effective work and his commitment to fighting piracy in the Kingdom.

Obtaining deterrent penalties for all copyright sectors, both at the administrative level and from the BOG, has been the IIPA's highest priority. IIPA, its members and local rights holders have been following all the cases before the VRC involving Video Mesfir, a seven-time-raided pirate operation consisting of a retail outlet and a warehouse. These cases, involving the total seizure of over 100,000 pirate copies along with significant amounts of reproduction equipment, will be the measure of whether the Saudi government can bring real deterrence to this market. Two Video Mesfir cases have also been recently appealed by rights holders to the BOG with a recommended sentence of imprisonment. Both these cases had their first hearing before the BOG on February 16, 2010.

IIPA had expected that, before filing this submission, a formal appeal by the Ministry, under the direction of H.E. Al-Haazaa, of another Video Mesfir case with a Ministry recommendation of imprisonment, would have occurred. We urge that this appeal be taken without further delay and we expect this to happen in the very near

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<sup>5</sup> The VRC has also started awarding civil damages in its administrative cases and in 2008 had done so in 19 cases involving software piracy. The average of the fines and damages was around US\$3,000, which remains too low. The total of all fines and damages in 19 cases were SR148,000 or US\$39,466.

future. This is the most critical benchmark underlying IIPA's recommendation that Saudi Arabia be removed from the Watch List.

As IIPA has highlighted in past submissions, studies have shown that there is little or no fear that any pirate would ever go to jail or that even a significant deterrent fine would be imposed.<sup>6</sup> In the last year, the VRC has succeeded in imposing the maximum fine that it has the authority to impose -- SR100,000 (US\$26,665) in a few larger cases. This is an improvement but only action by the BOG can revitalize the legitimate market for copyrighted works.

With at least two piracy cases before the BOG and a third Ministry-appealed case expected soon, it is now up to that body to finish the task. Judges on the BOG have stated to IIPA and the U.S. government on many occasions that when a case is brought to them, they will not hesitate to impose deterrent jail terms. IIPA will carefully monitor these cases and rights holders are prepared to support the Board in whatever it needs to secure a good result.

**Government legalization of software:** Another of the critical benchmarks in IIPA's 2009 Special 301 and OCR submissions was for the government to begin the task of legalizing its use of software in government ministries. This, along with end-user piracy in businesses, is one of the largest contributors to the losses suffered by the U.S. software industry in Saudi Arabia, totaling an estimated **\$176 million** in 2009 with a piracy rate of **54%**, up 2% from 2008. We also have a recent report that the Commerce Ministry, following the commitment made at last year's IPR Working Group meeting, has hired an outside contractor to upgrade both hardware and software in the Ministry, that this process has begun and is expected to be completed on schedule this month. If illegal software is found, which is almost certain (the piracy rate for software in government is estimated to be 70%), the commitment is to purchase legitimate software to replace illegal software. We also understand that MOCI has undertaken a similar inventory. Our recommendation to remove Saudi Arabia from the Watch List is based on a redeeming of these commitments before the next Special 301 cycle.

**Public awareness campaign:** The final OCR benchmark was for the Ministry to work with rights holders on a public awareness campaign, including widely publicizing the enforcement actions taken by the Ministry, public press statements by high officials that piracy will no longer be tolerated and other public actions by the government in partnership with the rights holder community. Funding has been raised from local rights holder companies and a meeting with the Ministry to kick off a campaign is scheduled for the week of February 15, 2010. IIPA looks forward to this campaign commencing as soon as possible.

### **Update on Progress in Other Areas**

While the government has come a long way to meeting these benchmarks, their completion will only begin the process of reforming a market rife with piracy for years. Piracy levels are not only the highest in the Gulf but they are among the highest in the world. This situation cannot be tolerated particularly given the increasing broadband speeds and penetration in the Kingdom, which means that the already rampant online piracy will affect the Saudi market to a greater and greater extent in line with the roll out of widely available and lower priced broadband networks. All these efforts must continue well beyond these benchmarks, and must include a decisive and comprehensive solution to the problem of internet piracy; The BOG must demonstrate its commitment to deter piracy by tough sentencing, and the government must widely publicize them, Transparency must be improved and the initial efforts to legalize software use in one or two ministries must be extended to all.

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<sup>6</sup> A few of the later Video Mesfir raids were run after the VRC began imposing its maximum sentence. This illustrates vividly that pirates have little concern that the authorities will take significant action against them, other than seizing their pirate product and imposing small fines.

But this is not the end of the task at hand. Other actions include:

**Enforcement against Internet piracy:** The CITC, which regulates the ISPs and telecom in general, continues to block foreign websites, when requested by rights holders, but only on the grounds that they violate Saudi censorship laws. Many of these cases involve both censorship violations as well as infringement and it is imperative for CITC and MOCI to develop comprehensive regulations on addressing copyright violations committed over the Internet. Any solution must include both hosted as well as remotely accessible content. The MOCI also has authority to order a site taken down for copyright infringement and this authority should be effectively exercised in practice. The KSA government and MOCI in particular should engage with rights holders to develop ways to address infringements over P2P networks and non-hosted content in general.

MOCI must have a trained Internet piracy unit in the copyright department with resources and political will (e.g., strong instructions from the Minister). We understand that this is being considered by the Ministry. We call upon HE Al-Haazaa to ensure that this happens in the near term. A cybercrime unit should also be set up by the police.

MOCI has asked for assistance in how to deal with Internet piracy. IIPA has supported USG plans for a training seminar in this area. This should be extended to a wider engagement with rights holders, including their foreign-based anti-piracy teams.

**Enforcement against Pay-TV signal theft 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 have upwards of hundreds/thousands of homes under a single management that 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 afford to pay for premium channels. But enforcement is complicated because 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 the evidence of piracy has conveniently disappeared. The Ministry and the police have indicated that they will begin taking action in this area.

Another major issue affecting Pay TV stakeholders is the illegal importation, distribution and sale of decoder boxes that circumvent encryption technologies. The government is very cooperative in seizing these illegal products, but, as with other kinds of piracy in the Kingdom, penalties are small or non-existent. Far heavier penalties, including referring these cases to the BOG, is critically needed.

**Enforcement against book piracy and music and sound recording piracy:** Publishers have within the last year commenced an aggressive enforcement program. They are receiving good cooperation from the Ministry and regular raids are being run upon request. As noted above, raiding needs to be extended to all sectors, including the music and recording industry which suffers rates of piracy over 90% in the Saudi market, and nearly a 100% online piracy rate. Again, however, without the deterrence brought on by severe penalties imposed by the VRC and BOG, additional raiding will not work a significant change in the market.

**Implement and ratify the WIPO treaties:** Some very slow progress has been made. The government has engaged with WIPO and is preparing questions for WIPO response. This process needs to be speeded up and completed.



# SWITZERLAND

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2010 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** IIPA recommends Special Mention for Switzerland in 2010, and again urges that USTR heighten its bilateral engagement on the issues listed below with a view to Switzerland revising its 2008 copyright law amendments.

**Executive Summary:** 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. For this reason, for the past three years, IIPA and its members have expressed concern over the direction. Swiss effort has taken 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)).

**Priority Actions to be Taken in 2010:** The copyright industries recommend that the following actions be taken by Switzerland in order to ensure the adequate and effective protection of copyrighted materials:

- Revisit its 2008 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 under the WCT, 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, which may violate Switzerland's obligations under TRIPS and the WIPO Internet Treaties.
- Adopt anti-camcording legislation.

### PIRACY AND RELATED CONCERNS

With 5.74 million Internet users,<sup>1</sup> 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 (such as Rapidshare which is hosted in Switzerland) 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](http://www.kino.to), are arguably legal in Switzerland, as long as there is no uploading.

Swiss Internet Service Providers (ISPs) continue to drag their feet in cooperating with right holders in addressing P2P piracy. Meetings convened in 2009 between right holders, the state prosecutor and three major ISPs did not lead to any results, with the ISPs citing data protection and disclosure issues as barring them from participation in a graduated response system and remaining unwilling to take any action before a decision is rendered in the Logistep case, which is currently pending before the Federal Supreme Court. The state prosecutor has indicated its support for greater ISP cooperation, but is also of the view that further discussions with ISPs should be held off until the Logistep decision is rendered. The Swiss copyright industries continue trying to obtain governmental support for such consultations between right holders and the ISP community. Right holders' proposals to amend Article 65 regarding precautionary measures to include a right of information have not been taken up, despite right holders' continued requests.

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<sup>1</sup> [www.internetworldstats.com/europa2.htm](http://www.internetworldstats.com/europa2.htm) (as of September 2009)

In the Logistep case, the Swiss Data Protection Authority rendered a recommendation in January 2008 that it was not permitted to collect IP addresses or to use them in a civil case (stating that the use of IP addresses in civil cases violates the Swiss telecom law, as IP addresses constitute personal information protected under privacy rules). The company Logistep was collecting IP addresses of suspected infringers and turning them over to right 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 had concluded, which the Data Protection Authority said was not permitted.<sup>2</sup> The Federal Administrative Court in June 2009 disagreed and held that privacy concerns and the interests of people whose data were processed were outweighed by the interests of right holders and the public interest not to condone copyright infringement. This case is now pending before the Federal Supreme Court and the judgment is expected in the first quarter of this year. The decision of the Federal Administrative Court clearly shows that ISP cooperation is essential for right holders to be able to effectively address online piracy, and in particular peer-to-peer ("P2P") piracy. The consultations and ISP meetings sought by the Swiss copyright industries will only lead to meaningful results, if the government backs and drives these discussions. At the latest, when the Federal Supreme Court has rendered its decision in the Logistep case, government should actively seek a solution, 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. Right holders' proposals (a) to make clear that the private copy exception should not cover copying from illegal sources; (b) that such copies should not be subject to a general remuneration obligation; (c) to extend the term of protection for performers and producers in sound recordings; and (d) to remove a provision that provided a broad exception to the anti-circumvention/technological protection measures (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 still remains unclear how the mechanism will fulfil its role. Provisions on mandatory collective management must be amended and anti-camcording legislation should be urgently adopted.

All EU Member States have amended their laws to implement the WIPO Internet Treaties since adoption of the EC Copyright Directive in 2001. Switzerland also committed to implement these Treaties on June 21, 2001, when it signed an agreement, which extends the coverage of the EFTA Convention to the protection of intellectual property (Chapter VII, Article 19 and Annex J to the Convention).<sup>3</sup>

**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 Swiss government's Explanatory Memorandum in the "Botschaft" to the draft dated March 10, 2006 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).

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<sup>2</sup> See news report at [http://www.infoworld.com/article/08/01/25/Antipiracy-group-tactics-violate-Swiss-law\\_1.html](http://www.infoworld.com/article/08/01/25/Antipiracy-group-tactics-violate-Swiss-law_1.html).

<sup>3</sup> 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.

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. Such copying is allowed even where payment is made. This is completely inappropriate for a “private copy” exception and is inconsistent with the three-step test in the WCT, WPPT and TRIPS.

**Technological protection measures (TPMs):** Legal protection for technological measures does not satisfy treaty standards and represents a dramatic and trade-distorting 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 to take advantage of any copyright or related rights exception. 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 undermine the legal protection of technological measures and would diminish right holders’ ability to enforce “effective legal remedies” (as required by WCT Article 11) in the event of such circumvention. 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 delivering copyright works to consumers.

On a more positive note, as stated in IIPA’s 2008 and 2009 submissions, 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 three 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. We urge the Swiss government to rethink these provisions.

In addition, some of the penal provisions have been improved. Infringement of copyright and 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 Swiss Francs (US\$92,963).

**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 (to include consideration of the positive effects of use of TPMs for consumers) 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 remains 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. In order to have sufficient deterrent effect, the sentences should preferably be up to a year or longer for the first offense, and a higher penalty for any subsequent offense. Only 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) 2010 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** IIPA submits this Special Mention report primarily to highlight two issues on which Taiwan government needs to take immediate action. On January 16, 2009, Taiwan was removed from the Watch List (for the first time since 1998) in recognition of the effective job that that government has done in curbing piracy. However, in addition to Taiwan taking action on the issues highlighted in this report, the U.S. government must continue to monitor Taiwan's copyright and enforcement regime to ensure that this commendable record is maintained.

**Executive Summary:** While Taiwan has done a good job in forging an effective and deterrent enforcement regime in most areas, piracy issues remain, including high levels of Internet piracy to which this submission is principally addressed, and the continuing need to maintain aggressive prosecutions against end-user piracy of software, against physical piracy generally and against book piracy around college campuses. The key issue now is to ensure the proper implementation of the new ISP law adopted in April 2009 and the TIPO regulations adopted on November 17, 2009 by rights holders and ISPs.

On January 12, 2010, the Legislative Yuan adopted legislation dealing with collective management organizations. That legislation continues to provide overbroad authority to TIPO to fix tariffs for the broadcast of music and sound recordings and continues to allow delays in fixing a tariff and interferes with the ability of rights holders to collect royalties. Another amendment to Article 37 of the copyright law withdraws the ability of rights holders to pursue criminal remedies unless they are members of a collection society. These amendments should be further modified to favor a freer market approach and to remove delays and other deficiencies.

IIPA urges the U.S. government to continue to monitor other issues in Taiwan, including more aggressive enforcement against Internet piracy, end-user piracy of software, piracy of physical product, including entertainment software, and against illegal photocopying of textbooks around university campuses. IIPA again commends the Ministry of Education for its action in dealing with filesharing by students on TANet and other commercial ISPs, but hopes that the same vigorous approach will be extended to other ongoing infringing activities on campus, such as unauthorized photocopying occurring on university campuses. IIPA also urges Taiwan to adopt anti-camcording legislation, to make Internet piracy a public crime and to extend the term of protection for copyright material.

**Priority actions to be taken in 2010:** 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

- Continue aggressive and deterrent enforcement against piracy generally and particularly against piracy on the Internet, end-user piracy of software, against illegal photocopying of textbooks during peak academic copying periods and against piracy of entertainment software;
- Provide improved training and manpower to the IPR police (IPRP) and to the joint Internet infringement inspection special taskforce (JIST).

### Legislation and Related Regulatory Issues

- Issue a notice clarifying that ISPs lose all "safe harbors" under the new ISP law if they do not fully implement a policy of suspending or terminating repeat infringers;
- TIPO must become actively involved in ensuring that ISPs and rights holders negotiate an effective Code of Conduct implementing the "graduated response" obligation in the new ISP law;



- Modify new legislation on collective management to remove impediments to negotiating fair tariffs for the broadcast of music and sound recording and to collecting such royalties;
- Make Internet piracy a public crime;
- 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/2010SPEC301HISTORICALSUMMARY.pdf>. Please also see previous years' reports at <http://www.iipa.com/countryreports.html>.

## **PIRACY AND ENFORCEMENT UPDATES IN TAIWAN**

In 2009, piracy of physical product has continued to decrease. Taiwan is to be commended for reducing industrial (factory) OD piracy and retail OD piracy to very low levels. Enforcement in these areas and cooperation of the enforcement authorities continues to be good. However, Taiwan continues to suffer from high levels of Internet piracy.<sup>1</sup>

**Internet piracy and enforcement:** Over 67% of Taiwan's population used the Internet in mid-2009 (15.4 million users), with broadband connections representing about 75.46% of households (5.64 million).<sup>2</sup> It is the predominant form of piracy for the music and recording and the motion picture industries in Taiwan.

Both the music and recording and the motion picture industries continue to get good cooperation from ISPs in securing takedowns of infringing material in the hosted environment, but no cooperation in dealing with P2P filesharing which accounts for the vast majority of the losses to these industries. Compliance rates in the hosted environment were around 99% in 2009 for the recording industry and around 90% for the motion picture industry. These excellent compliance rates pertained even before the passage of the ISP law and should improve even more. For the music and recording industry, filesharing software services, website, and cyberlocker sites located in China pose serious problems. While FOXY ([www.goFOXY.net](http://www.goFOXY.net)) and its nominal operator were indicted in May 2009, the case remains pending in the courts. FOXY is still operating due to its server being located in the U.S. and reportedly its true operators located in China, making them inaccessible to Taiwan prosecutors. The issue still under consideration by the prosecutors 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."

Two discouraging decisions in Taiwan's trial court in 2009 and 2010 resulted in the dismissal of charges of copyright infringement, twice, against the operators of the infamous website Ezpeer. The basis of the rejection - that local investigators who filed the complaint with law enforcement authorities lacked the proper legal authority to do so - has never been raised and sets a chilling precedent for online rights enforcement in Taiwan. The 2010 decision remains under appeal and both MPA and RIAA/IFPI report continuing good cooperation with enforcement authorities in raiding pirate websites and generally deterrent penalties being issued by the courts. All industries urge that this record continue.

The local recording industry reports that its newest problem is the large quantity of unauthorized music files available from the iTunes store. Cease & desist letters have been sent and discussion with iTunes are continuing.

While enterprise end-user piracy continues to cause the greatest losses to the software industry, Taiwan continues to have the second highest number of online software infringements in Asia. BSA sent out over 32,000 takedown notices through October 31, 2009. It also reports many *ex officio* raids by the enforcement authorities against sites selling software online. About 90% of the online software piracy in Taiwan occurs over P2P services.

<sup>1</sup> End-user piracy of software in businesses also increased slightly from 39% in 2008 to 40% in 2009.

<sup>2</sup> Source: <http://www.twmic.net.tw/download/200307/96305b.pdf>; <http://www.internetworldstats.com/>

Academic publishers also report a significant growth in Internet piracy, much through the Ministry of Education's university intranet system, TANet. Unauthorized access to electronic academic and professional journals compromises legitimacy of licenses, and scanned academic texts and reference books are increasingly subject to P2P filesharing.

All industries report that the Ministry of Education (MOE) has been doing a better job at policing illegal filesharing of movies, music, books, videogames and software. It is enforcing its Action Plan through a special task force set up for that purpose. The recent problem of filesharing moving to commercial ISPs due to bandwidth limitations over TANet was the subject of a November 27, 2009 meeting of this task force, which includes representatives of the local rights holders organizations part of the Taiwan Intellectual Property Alliance (TIPA). At TIPO's request, the MOE agreed to add a regulation extending the ban on use of P2P software by these services, along with the adopting of appropriate measures to prevent P2P and BitTorrent software usage on the campus network. The industries will be monitoring the implementation of these new directives. Since the new ISP legislation also applies to TANet, the MOE has been working with industry in a positive and cooperative way.

Other forms of Internet piracy are also growing. Internet cafés have become hotbeds of piracy of both motion pictures and music.

As discussed further below, the current challenge is to fully implement the new ISP law, with TIPO's required assistance, to forge a workable Code of Conduct among ISPs and rights holders that would result in suspending or terminating the accounts of repeat infringers in the P2P environment.

**Physical piracy and enforcement:** Illegal burning of copyright content onto recordable discs is now clearly the predominant form of optical disc piracy in Taiwan, and all industries report that OD piracy has significantly diminished in Taiwan. For example, the music and recording industry reports estimated losses of **\$4.2 million** due to physical piracy and a piracy rate of **20%**. 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.

**End-user piracy of business software:** The rate of business software piracy increased by 1% from 39% to **40%** from 2008 to 2009, the first increase in many years. Losses remained almost constant at **\$112 million** in 2009 compared to \$111 million in 2008. Like other industries, 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 2009, 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:** While cooperation with the authorities against illegal photocopying of academic material continues to go well, unauthorized photocopying (particularly of higher education and English language textbooks (ELT) remains the most damaging problem for U.S. and Taiwanese publishers in 2009. Illegal photocopying continues to occur both on or near university campuses and the industry's call for *ex officio* action by the police has generally been heeded with respect to off-campus efforts. Indeed, the Taiwan authorities have been of tremendous help to the local publishers in their efforts on IP education and awareness, as well as enforcement actions. However, law enforcement authorities remain reluctant to pursue actions against the copy shops that continue to operate on campuses. While the industry is mindful of the sensitivities that continue to surround law enforcement action on university campuses, law enforcement authorities should also begin to consider how to better address this problem. It remains the case that these on-campus photocopy shops – which are obviously commercial enterprises – continue to provide illegal photocopies of academic materials, and yet there has been little action against such copy shops. Copy shops have also grown more sophisticated in their efforts, generally not keeping stockpiles of unauthorized copies on

hand, but make them to order. Furthermore, print runs are often at night or after hours, with immediate offsite delivery to avoid detection. Advanced investigative techniques are needed and the authorities must continue to concentrate their enforcement efforts during the peak academic book-buying seasons. IIPA and AAP also call upon MOE to continue to aggressively implement its action plan with respect to book piracy. As AAP understands the current situation, the plan involves a “self-assessment” by the university as to its compliance with the MOE action plan. However, there does not appear to be an independent monitoring or audit mechanism through which the MOE conducts its own evaluation of whether the university is in fact complying with the action plan elements. This is a critical element to making an objective assessment of whether a university is undertaking the necessary steps to ensure that its various departments are addressing infringing activity occurring on its campuses. AAP also notes that online piracy, particularly downloads of scientific, technical and medical textbooks and textbooks solutions manuals, is a growing concern. Finally, it remains the case that courts tend to treat book piracy cases rather lightly, typically imposing light penalties or mere probation upon conviction. For enforcement efforts to be effective and begin to positively impact the market, the level of penalties imposed must be sufficiently deterrent. Low fines will not encourage a copy shop to stop its illegal activities but will be viewed merely as a cost of doing business.

## **COPYRIGHT LAW AND RELATED REGULATORY ISSUES**

**Implement an effective “graduated response” system for dealing with P2P piracy:** One important issue in 2010 is implementation of the provisions of the new ISP law requiring ISPs to implement a policy of terminating or suspending the accounts of repeat infringers (the so-called “graduated response,” or “three strikes” mechanism) in the P2P environment. With such a mechanism in place, there is the potential to meaningfully reduce high online piracy levels.

On November 17, 2009, TIPO finalized its regulation to implement the new ISP law. These regulations dealt only with the process of notice and counter-notice and did not set out the basic parameters of how ISPs should implement the new obligation set forth in the amended Article 90*quinquies* requiring ISPs to notify its users of its copyright protection policy and to implement it.

IIPA supports Taiwan’s legislation concerning a “graduated response” system by ISPs and supports the negotiation among rights holders and ISPs of an agreed-upon “Code of Conduct” to govern the operation of such a system. Despite the risk that ISPs could lose all safe harbors extended by the law if they do not promptly and fully implement a “graduated response system, ISPs have been reluctant to sit down with rights holder groups to fashion a Code of Conduct that is efficient, inexpensive and fair to rights holders, ISPs and users.

IIPA encourages TIPO to become involved directly. In its letter, TIPO notes that if rights holders “could reach agreement [on their part], TIPO would be most glad to assist the rights holders and the ISPs to arrive at a consensus at the earliest possible.” After passage of ISP liability legislation, TIPO members met twice with major ISPs (all of which are members of the major ISP organization, TWIA) to seek agreement on how to address this matter. The three-strike definition and process, in particular for P2P infringement, were key issues of both meetings but no consensus was reached. Similar issues were also brought to a public hearing hosted by TIPO on June 30 but again, no concrete conclusion was reached. Recent reports from industry suggest that ongoing cooperation with certain ISPs for certain elements of cooperative enforcement may indeed be feasible. However, IIPA continues to believe that TIPO involvement is critical to completing a workable Code of Conduct among the parties.

**Copyright Examination and Mediation Committee review process must be revised; TIPO should allow commissioned agents to collect royalties:** As noted above, on January 12, 2010, the Legislative Yuan approved amendments to the Copyright Intermediary Organization Act. Those amendments do little to correct the process by which TIPO has the ultimate authority to approve the tariffs for the broadcasting of music and sound recordings. Fortunately, the amendment as passed did, however, establish a four month time limit on TIPO approval of these tariff and requires TIPO to reconstitute its special tariff setting committee to include rights holders as well as users and experts. The amendments did not allow rights holders to use agents to collect these royalties.



One of the major objectives of rights holders is to ensure that their collecting societies minimize overhead and other administrative costs while ensuring that commercial uses are licensed appropriately. In the area of public performance, these cost savings are achieved in part through the use of commissioned agents. Collecting societies around the world depend upon the use of agents to reach commercial users who publicly perform recorded music; to educate them on the need to obtain a license; and to issue relevant licenses.

In Taiwan, the producers' collecting society used to retain commissioned agents to assist in covering different geographical locations more effectively. However, TIPO's ruling from September 2008 denied the ability to continue with this practice.

The inability to use agents for licensing purposes has a direct negative impact on rights holders' licensing activities. It reduces the amount of remuneration collected and results in a large number of businesses operating without a license, denying from rights holders remuneration to which they are entitled, and undermining the rule of law. There is no justified reason to prevent rights holders from using agents for licensing and royalties collection, and the policy underlying the decision against using commissioned agents is unclear. Any concerns relating to licensing practices can be addressed more effectively by e.g. establishing an industry code of conduct on public performance licensing. Such agreed set of rules would ensure that the system is not abused and that users' interests are maintained.

Neither should rights holders of different categories be obliged to collect royalties together through a single society. The provisions granting TIPO authority to designate a single licensing window and set a joint tariff rate cannot be justified (Article 30 of the recent amendment of Copyright Intermediary Organization Act).

Experience has shown that licensing markets function effectively where rights holders remain free to find the most efficient way to administer their rights. Freeing the market from any restrictions means that competition between different players in the market is maintained, and market powers can determine the best solutions for both rights holders and users. To ensure that these conditions exist in Taiwan, rights holders should be allowed to determine for themselves which collecting society to join and entrust their rights, and whether or not to collect jointly with other rights holders. Restrictions on the ability of right owners to collectively manage their rights through different collection societies are ineffective and threaten the development of the licensing market. In particular, an obligation on all rights holders to collect their performance rights jointly would likely result in conflicts on both collection and distribution of royalties. Consequently, such conflicts would impede the proper functioning of the market and negatively impact on users' ability to obtain licenses. The majority of countries in the world leave it for rights holders to decide how to license their rights. Experience has shown that in most countries, rights holders of the same type prefer to administer their rights under one collective management organization. But their freedom to do so and to decide whether to join a particular organization, or establish a new one, should be maintained.

To ensure that the conditions for the development of the licensing market continue to exist, no obligation to offer "single window licensing" and the joint tariff rate should be introduced. One way to address the concerns relating to the large number of societies would be to require rights holders of the same category of rights to administer their rights through one collecting body. This solution can be implemented on a temporary basis for a limited period of time, following which evaluation of its effectiveness can be made.

**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.

**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 D**

## **CHART OF COUNTRIES' SPECIAL 301 PLACEMENT (1989 – 2009) & IIPA'S 2010 SPECIAL 301 RECOMMENDATIONS**

# APPENDIX D: CHART OF COUNTRIES' SPECIAL 301 PLACEMENT (1989-2009) AND IIPA 2010 SPECIAL 301 RECOMMENDATIONS

COUNTRY	IIPA Recommendation Feb. 2010			USTR 301 PLACEMENT (as of April/May of each year)																		
		2009	2008	2007	2006	2005	2004	2003	2002	2001	2000	1999	1998	1997	1996	1995	1994	1993	1992	1991	1990	1989
Algeria		PWL	WL																			
Argentina	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	WL	PWL	PWL	WL	WL	WL	WL
Armenia									WL	WL	WL						WL	PWL	PWL	PWL		
Australia												WL	WL	WL	WL							
Austria													OO	OO								
Azerbaijan						WL	WL	WL	WL	WL	WL											
Bahamas					WL	WL	PWL	PWL	WL + OCR	OCR	OCR											
Bahrain													WL	WL	WL	WL						
Bangladesh																						
Belarus	WL	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	WL	OO	WL	OO							
Bosnia and Herzegovina																						
Brazil	WL	WL	WL	WL + OCR	PWL	PWL	PWL	PWL	PWL	WL	WL	WL		WL	WL	PWL	OO	PFC	PWL	PWL	PWL	PWL
Brunei		WL																				
Bulgaria					WL	WL	WL						PWL	WL	OO	OO						
Burma (Myanmar)																						
Cambodia																						
Canada	PWL	PWL	WL	WL	WL + OCR	WL + OCR	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	OO		WL	WL	WL	WL
Chile	PWL	PWL	PWL	PWL	WL + OCR	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL
Colombia		WL	WL	WL	WL	WL	WL	WL	PWL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL
Costa Rica	PWL	WL	WL	WL	WL	WL	WL	WL	WL + OCR	PWL	WL	WL	WL	WL	WL	WL						
Croatia					WL	WL	WL	WL														
Cyprus														OO	OO	OO	WL	WL	WL	WL		
Czech Republic		WL	WL	OCR							WL	WL	WL	OO								
Denmark											WL	WL	WL	WL								
Dominican Republic		WL	WL	WL	WL	WL	WL	WL	PWL	PWL	PWL	PWL	PWL	WL	OO							
Ecuador		WL	WL	WL	WL	WL	WL	WL			WL	WL	PWL	PWL	WL			WL	WL			
Egypt	WL	WL	WL	PWL	PWL	PWL	PWL	WL	PWL	PWL	PWL	PWL	PWL	PWL	WL	WL	WL	PWL	PWL	WL	WL	WL
El Salvador															WL	WL	WL	WL	WL			
Estonia													OO									
European Union					WL	WL + OCR	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL		
Fiji		OCR																				
Finland		WL																				
Georgia										OCR												
Germany													OO	OO	OO	OO	OO		WL	WL		
Greece	WL	WL	WL						WL	WL	PWL	PWL	PWL	PWL	PWL	PWL	WL	WL	WL	WL	WL	WL
Guatemala		WL	WL	WL	WL	WL	WL	WL	WL	WL	PWL	PWL	WL	WL	WL	WL	WL	WL	WL			
Honduras													WL	WL	OO	OO	OO					
Hong Kong	SM											OCR	WL	WL	OO							
Hungary	WL	WL	WL	WL	WL	WL	WL	WL	PWL	PWL	WL	WL	OO	OO				PWL	PWL	WL		

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COUNTRY	IIPA Recommendation Feb. 2010	USTR 301 PLACEMENT (as of April/May of each year)																				
		2009	2008	2007	2006	2005	2004	2003	2002	2001	2000	1999	1998	1997	1996	1995	1994	1993	1992	1991	1990	1989
Iceland																						
India	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PFC	PFC	PFC	PWL	PWL
Indonesia	PWL	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	PWL	PWL	WL	WL	OO						
Israel	WL	PWL+OCR	PWL+OCR	PWL	PWL	PWL	WL + OCR	WL	PWL + OCR	PWL	PWL	PWL	PWL	WL	OO	OO	OO					
Italy	WL	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	WL									
Japan										OCR		WL	WL	WL	PWL	PWL	PWL	WL	WL	WL	WL	WL
Jordan												WL	WL	WL	OO	OO						
Kazakhstan (GSP)	WL					WL	WL	WL	WL	WL	WL		OO									
Kenya																						
Kuwait	WL	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	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	WL + OCR	WL	WL	PWL	PWL	OCR									WL	WL
Mexico	PWL	WL	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																						
Norway		WL	WL																			
Oman											WL	WL	WL	WL	WL	OO						
Pakistan	WL	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	306	PFC	PWL	WL	OO	OO		WL			
People's Republic of China	PWL	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	WL	PWL	PWL	WL	WL	WL	WL	WL	WL	WL			
Philippines	PWL + OCR	WL + OCR	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 + OCR	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						

## APPENDIX D: CHART OF COUNTRIES' SPECIAL 301 PLACEMENT (1989-2009) AND IIPA 2010 SPECIAL 301 RECOMMENDATIONS

COUNTRY	IIPA Recommendation Feb. 2010			USTR 301 PLACEMENT (as of April/May of each year)																		
		2009	2008	2007	2006	2005	2004	2003	2002	2001	2000	1999	1998	1997	1996	1995	1994	1993	1992	1991	1990	1989
Romania	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	OO	OO	OO	WL						
Russian Federation (GSP)	PWL	PWL	PWL	PWL+OCR	PWL + GSP	PWL + OCR	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	WL + OCR	WL	OO					
San Marino														WL								
Saudi Arabia	SM	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	WL	OO					
Slovak Republic						WL	WL	WL	WL	WL												
Slovenia											OCR											
South Africa												WL	WL		OO	WL						
South Korea			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	WL	OO				WL	WL	WL	WL	WL	WL
Sri Lanka																						
Sweden												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	WL											
Thailand	WL + OCR	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	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	WL											
UAE										WL	OCR	WL	WL	WL	WL	WL	WL	WL	WL			
Ukraine	WL + OCR	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	WL											
Venezuela		PWL	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	WL	OO	OO						
Yemen													OO									

PFC: Priority Foreign Country  
 PWL: Priority Watch List  
 WL: Watch List  
 OO: Other Observations (an informal listing formerly used by USTR)  
 SM: IIPA unranked countries deserving Special Mention  
 OCR: Out-of-cycle review to be conducted by USTR.  
 GSP: GSP IPR review underway (based on copyright industries' petitions)  
 DS: Dispute Settlement

**APPENDIX E**

**IIPA HISTORICAL SUMMARY**  
**OF**  
**COUNTRIES' SPECIAL 301 PLACEMENT**

# APPENDIX E: HISTORICAL SUMMARY OF SELECTED COUNTRIES' PLACEMENT FOR COPYRIGHT-RELATED MATTERS ON THE SPECIAL 301 LISTS

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2010 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

### ARGENTINA

IIPA recommends that Argentina remain on the Priority Watch List in 2010. See IIPA's 2010 report on Argentina at <http://www.iipa.com/rbc/2010/2010SPEC301ARGENTINA.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 and 2009.

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 2010, 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

IIPA did not make a submission on Azerbaijan in 2010, but has in years prior. See IIPA's 2009 report on Azerbaijan at <http://www.iipa.com/rbc/2010/2010SPEC301AZERBAIJAN.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 2010, 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.

In April 2009, USTR noted that as part of its bi-annual review of the operation of the Caribbean Basin Economic Recovery Act, it would review the IPR practices of beneficiaries, including The Bahamas, to assess compliance with the preference program. 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 2010, 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

IIPA did not make a submission on Bangladesh in 2010, but has in various years prior, see IIPA's country page at <http://www.iipa.com/countryreports.html>.

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>. 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 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 2010 report on Belarus at <http://www.iipa.com/rbc/2010/2010SPEC301CIS.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 2010, 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 2009, 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 2010, 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 2010, 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 2010. See IIPA's 2010 Brazil country report at <http://www.iipa.com/rbc/2010/2010SPEC301BRAZIL.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 2008 and 2009.

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 did not make a recommendation on Brunei in 2010, but has in years prior. See Brunei's country report at <http://www.iipa.com/rbc/2010/2010SPEC301BRUNEI.pdf>.

In 2008, IIPA recommended that Brunei be placed on the Watch List; however, USTR did not include Brunei on any lists in 2008. IIPA recommended that Brunei be placed on the Priority Watch List in 2009, and USTR included Brunei on the Watch List.

## BULGARIA

IIPA did not make a recommendation on Bulgaria in 2010, but has in years prior. See Bulgaria's country report at <http://www.iipa.com/rbc/2010/2010SPEC301BULGARIA.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 2010. See IIPA's country reports page at <http://www.iipa.com/countryreports.html> for previous years' reports. 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 2010, 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 2010, IIPA again recommends that Canada remain on the Priority Watch List. See <http://www.iipa.com/rbc/2010/2010SPEC301CANADA.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 but it remained on the Watch List. After IIPA again called for elevation in the 2009 cycle, USTR elevated Canada to the Priority Watch List in April 2009.

## CHILE

In 2010, IIPA recommends that Chile remain on the Priority Watch List. See IIPA’s 2010 Chile country report at <http://www.iipa.com/rbc/2010/2010SPEC301CHILE.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 both 2008 and 2009.

## COLOMBIA

IIPA did not make a 2010 recommendation on Colombia, but has in years prior. 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 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 has maintained Colombia on the Watch List in 2007, 2008 and 2009.

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 2010, IIPA recommends that Costa Rica be elevated to the Priority Watch List. See IIPA's 2010 Costa Rica country report at <http://www.iipa.com/rbc/2010/2010SPEC301COSTARICA.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, which entered into force on January 1, 2009. After the FTA enters into force in Costa Rica, it will cease to benefit from a variety of U.S. trade programs. In 2009, IIPA recommended that Costa Rica be placed on the Watch List and that is where USTR kept this country last year.

## CROATIA

IIPA did not make a submission on Croatia in 2010, 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 2010, 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 2010, 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. USTR included the Czech Republic on the Watch List in April 2009.

## DOMINICAN REPUBLIC

IIPA did not file on the Dominican Republic in 2010, 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, and did not supply a recommendation in 2009. USTR kept the Dominican Republic on the Watch List in 2009.

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 2010, 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. Again in April 2008 and 2009, 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 remain on the Watch List in 2010. See IIPA’s 2010 Egypt country report at <http://www.iipa.com/rbc/2010/2010SPEC301EGYPT.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 and kept it there in 2009 despite IIPA’s 2009 recommendation of Priority 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 2010, 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 2010, 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.

## FIJI

IIPA has not made any submissions on Fiji, but in April 2009, USTR decided to hold an out-of-cycle review of Fiji's IPR practices.

## GEORGIA

Georgia does not currently appear on any of the USTR lists. IIPA did not make a submission on Georgia in 2010, 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 2010, 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 2009.



## GREECE

IIPA recommends that Greece remain on the Watch List in 2010. See <http://www.iipa.com/rbc/2010/2010SPEC301GREECE.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, and USTR did so, and kept Greece on this list in 2009 as well.

## GUATEMALA

IIPA did not make a submission on Guatemala in 2010, 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 2007, 2008 and 2009. .

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, the country ceased to benefit from a variety of U.S. trade programs (such as GSP and CBI).

## HONG KONG

In 2010, IIPA again includes Hong Kong in its Special Mention section. See IIPA's 2010 report on Hong Kong at [http://www.iipa.com/rbc/2010/2010SPEC301HONG\\_KONG.pdf](http://www.iipa.com/rbc/2010/2010SPEC301HONG_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, 2008 and 2009, IIPA included Hong Kong in its Special Mention section.

## HUNGARY

IIPA recommends that Hungary remain on the Watch List in 2010, where it has appeared since 2003. See IIPA's 2010 Hungary country report at <http://www.iipa.com/rbc/2010/2010SPEC301HUNGARY.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 and 2009, and USTR retained Hungary on this list in both years.

## ICELAND

IIPA did not make a submission on Iceland in 2010, 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 2010, IIPA again recommends that India remain on the Priority Watch List. See IIPA’s 2010 India country report at <http://www.iipa.com/rbc/2010/2010SPEC301INDIA.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- 2009, 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 2010, IIPA recommends that Indonesia remain on the Priority Watch List. See IIPA's 2010 Indonesia country report at <http://www.iipa.com/rbc/2010/2010SPEC301INDONESIA.pdf>.

IIPA has closely monitored developments in Indonesia since 1985, when, in its first submission to USTR on piracy, IIPA named Indonesia as Asia's second worst pirate country. In 1987, following a petition by IIPA to revoke Indonesia's GSP benefits, Indonesia adopted an improved copyright law and, in 1989, entered into a bilateral copyright agreement whereby U.S. works and sound recordings acquired protection under Indonesian law. Although government initiatives virtually wiped out audio piracy in 1988 and made great progress against videocassette piracy in 1991 and 1992, Indonesia remained on the Watch List continuously from 1989 through 1995, because piracy of U.S. books and computer software soared over the years, and extensive market access barriers hampered the entry of U.S. companies into the Indonesian market. These continuing problems led USTR, on IIPA's recommendation, to elevate Indonesia to the Priority Watch List in 1996, where it remained through 1999.

In 2000, IIPA recommended that Indonesia be lowered to the Watch List "[i]n recognition of the adverse conditions under which market liberalization, anti-piracy, and copyright law reform efforts must proceed in Indonesia." USTR agreed, and Indonesia appeared on the Watch List in 2000. In 2001, IIPA recommended that Indonesia be elevated back up to the Priority Watch List, due to the continuing domination of piracy in the market, and the emergence of optical disc piracy in Indonesia. USTR agreed, noting in its April 30, 2001 Special 301 Announcement that "[p]iracy levels in Indonesia's enormous market for copyright and trademark goods are among the highest in the world." The announcement pointed out that "[i]t is becoming increasingly apparent that, as other countries in the region intensify their fight against copyright infringement, audio and video pirates are finding refuge in Indonesia." In 2002, IIPA once again recommended that Indonesia remain on the Priority Watch List, noting its concern over rising optical disc pirate production in the country, and its defunct court system. USTR kept Indonesia on the Priority Watch List, noting "a troubling increase in illegal production lines for optical media and pirated books far beyond Indonesia's domestic consumption capacity," and a "judicial system [that] continues to frustrate right holders with years of delay and a pronounced lack of deterrent penalties." In 2003, IIPA once again recommended, and USTR agreed, that Indonesia should remain on the Priority Watch List. In its announcement, USTR noted, "overall protection of intellectual property rights remains weak." IIPA recommended that Indonesia remain on the Priority Watch List in 2004, and USTR agreed. The 2004 Special 301 Announcement noted that progress in the area of strengthening IPR, particularly in the area of enforcement against piracy and counterfeiting, "has been

inconsistent.” USTR decided in its Special 301 2005 Announcement to keep Indonesia on the Priority Watch List and conduct an OCR. Although USTR acknowledged some IPR progress in Indonesia, namely the approval of optical disc regulations, it was noted that “serious concerns remain, however, over numerous issues, including: lack of effective IPR enforcement; the adequacy of the new regulations to reduce the production, distribution, and export of pirated optical media products; trademark infringement; and deficiencies in Indonesia’s judicial system.” In January 2006, USTR completed its OCR of Indonesia.

In February 2006, IIPA recommended that Indonesia remain on the Priority Watch List. While commending Indonesia for taking steps to fight production and retail piracy, as well as re-establishing a Ministerial-level National IP Task Force, USTR noted that serious concerns remained and retained Indonesia on the Priority Watch List for 2006, with an OCR to assess progress. USTR urged Indonesia to enforce “its IPR laws effectively and in a deterrent manner against piracy and counterfeiting,” by “conducting seizures of pirated goods and the machinery used to make them, by arresting and prosecuting IPR infringers, and by ensuring that courts impose jail sentences for IPR crimes and that offenders actually serve such sentences.” On September 15, 2006, IIPA recommended that Indonesia be lowered to the Watch List, with the condition that, should the Indonesian Government fail (a) to follow up these raids with arrests and successful prosecutions of main perpetrators of these piracy operations (i.e., managers and owners, not mere employees), and (b) to make improvements in enforcement against: book piracy, namely, photocopy piracy (mainly on university campuses), print piracy, and unauthorized translations; end-user software piracy (where piracy levels are the third worst in the world); and signal theft piracy, that Indonesia should once again be moved to the Priority Watch List in the 2007 Special 301 cycle. In November 2006, USTR lowered Indonesia to the Watch List concluding:

[T]hat throughout 2006, Indonesia bolstered implementation of its regulations designed to stop illegal production of pirated optical discs such as CDs and DVDs by controlling the licensing of factories and conducting raids against pirate optical disc production facilities. Indonesia’s authorities also conducted numerous raids on retail outlets selling pirated goods.

The United States indicated in its announcement that it would closely monitor Indonesia’s progress and notes that “sustained efforts and continued progress on key IPR issues will be essential to avoid a future return to the Priority Watch List.” 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. IIPA’s 2009 recommendation was Priority Watch List, which was USTR’s April 2009 decision as well.

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 2010 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 on the Watch List in 2010, as it recommended in its out-of-cycle review submission in November 2009. See IIPA’s 2010 Israel country report at <http://www.iipa.com/rbc/2010/2010SPEC301ISRAEL.pdf> and the out-of-cycle review submission at <http://www.iipa.com/pdf/IIPAIIsraelOCRsubmissionFINAL110909.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. In 2009, IIPA recommended that Israel be placed on the Watch List, but USTR again placed Israel on the Priority Watch List with and out-of-cycle review.

## ITALY

IIPA recommends that Italy remain on the Watch List in 2009. Italy has appeared on the Watch List since 2001. See IIPA's 2010 Italy country report at <http://www.iipa.com/rbc/2010/2010SPEC301ITALY.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. In 2009 IIPA recommended that Italy be maintained on the Watch List; USTR kept it on the Watch List in April 2009.

## 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

IIPA did not file on Japan in 2010, but has in years prior. 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 2010, IIPA highlighted copyright concerns and included Japan in its Special Mention section.

## JORDAN

IIPA did not file on Jordan in 2010, but has in years prior. See IIPA's 2009 Jordan country report at <http://www.iipa.com/rbc/2009/2009SPEC301JORDAN.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 2009, 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 2010, from which it has been off since April 2006. See IIPA's 2010 Kazakhstan country report at <http://www.iipa.com/rbc/2010/2010SPEC301CIS.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 2009, USTR did not include it on any 2009 lists.

## KENYA

IIPA did not make a submission on Kenya in 2010, 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 2010. See IIPA's 2010 Kuwait country report at <http://www.iipa.com/rbc/2010/2010SPEC301KUWAIT.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.

Since 2007, IIPA has recommended that Kuwait remain on Watch List, and through 2009, USTR has agreed with IIPA's recommendation.

## 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 2010, 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 2010, 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 2010, 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 2010. 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.<sup>1</sup> On all of these occasions, IIPA states its view that the GSP Subcommittee should recommend to the President that he make a determination that Lebanon fails to meet the eligibility requirements of the GSP program, and remove Lebanon’s eligibility to participate in the Program until such time as it has achieved adequate and effective copyright protection and enforcement as contemplated by the GSP statute.

USTR, in its 2003 Special 301 decision in May, reiterated the concern of the U.S. Government regarding “Lebanon’s severe copyright piracy problem and the lack of a comprehensive government commitment to eliminate piracy and foster legitimate business.” The decision continues:

Despite the entry into force in 1999 of a new copyright law, there has been little action by Lebanon against piracy. Some raids of pirate store and operations occurred in 2002, leading to the first sentencing of a software pirate and financial penalties in other cases. However, pervasive cable piracy continues to undermine legitimate theatrical, video, and television service providers. Overall Lebanon had made little progress in 2002 in addressing its significant IPR deficiencies. The United States urges the Lebanese Government to press forward with its recent proposal to draft a law regulating the cable television industry and to mount an aggressive campaign against pirates. End-user piracy of computer software is widespread among large companies, banks, trading companies, and most government ministries. Also troubling is an overly broad software exception for certain educational uses in the new copyright law that seriously undermines the viability of this market for legitimate products. Book piracy also remains a serious problem . . . A committed and vigorous program to enforcement\*\* intellectual property rights, particularly copyright protection, is essential to the success of the Lebanese Government’s efforts to reform its economy, increase trade and foreign direct investment and prepare for accession to the WTO.

IIPA recommended Lebanon be maintained on the Priority Watch List in 2004 due to the continued dominance of pirated product in the market. USTR agreed, keeping Lebanon on its Priority Watch List in 2004. While USTR commended Lebanon for many of the positive changes it had made in 2003, including a “crackdown on illegal cable operators, a large scale raid on pirated DVDs, movement toward full legalization of government software [and] increased *ex officio* inspection along the borders,” USTR noted rampant piracy in Lebanon, a slow and inefficient judiciary, the country’s failure to join the latest text of the Berne Convention, or ratify the two WIPO Treaties, the WCT and WPPT. In 2005, IIPA recommended, and USTR agreed, to keep Lebanon on the Priority Watch List. In its Announcement in April 2005, USTR praised Lebanon for conducting IP product raids and for its judicial and border enforcement activities. It was decided however, that Lebanon would remain on the Priority Watch List.

In 2006 IIPA once again recommended that Lebanon remain on the Priority Watch List and, noting that Lebanon fails to meet the criteria for benefits under the GSP trade program, recommended that the GSP benefits be immediately suspended. Reiterating the continuing concerns from earlier years including 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. IIPA recommended that Lebanon be placed on the Watch List in 2009; USTR again agreed and placed Lebanon on the Watch List.

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<sup>1</sup> On October 7, 2003, IIPA testified regarding the deficiencies of Lebanon’s protection of copyright that warranted immediate suspension or withdrawal of Lebanon’s GSP benefits. On February 14, 2004, IIPA provided the GSP Subcommittee a copy of IIPA’s February 2004 Special 301 report on Lebanon to supplement the public GSP file on this investigation. On May 25, 2004, IIPA wrote to the GSP Subcommittee advocating the immediate suspension or withdrawal of Lebanon’s GSP benefits for its continuing failure to comply with the IPR obligations under the GSP program. On November 9, 2005, IIPA filed a pre-hearing Brief advocating withdrawal of GSP benefits, and on December 14, IIPA filed answers to post-hearing comments (the GSP hearing was held on November 30, 2005).

## LITHUANIA

IIPA did not make a submission on Lithuania in 2010, 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 2010 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 2010, IIPA recommends that Malaysia remain on the Watch List with an out-of-cycle review to be conducted this year. Malaysia has been on this list since 2002. See IIPA's 2010 Malaysia country report at <http://www.iipa.com/rbc/2010/2010SPEC301MALAYSIA.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.

IIPA recommended that Malaysia be placed on the Watch List with an out-of-cycle review in 2009. USTR kept Malaysia on the Watch List in 2009 but did not choose to conduct an out-of-cycle review.

## MEXICO

IIPA recommends that Mexico be elevated to the Special 301 Priority Watch List in 2010. See IIPA's 2010 Mexico country report at <http://www.iipa.com/rbc/2010/2010SPEC301MEXICO.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. IIPA recommended that Mexico be placed on the Priority Watch List in 2009, yet USTR kept Mexico on the Watch List that year.

## MOLDOVA

Moldova does not currently appear on any of the USTR lists. IIPA did not file on this country in 2010. 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 2010, 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 2010, 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 2010 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

IIPA did not file on Nigeria in 2010, but 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 2010, 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 be lowered to the Watch List in 2010. See IIPA's 2010 Pakistan country report at <http://www.iipa.com/rbc/2010/2010SPEC301PAKISTAN.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. In 2009, IIPA recommended that Pakistan be elevated to the Priority Watch List, and USTR did so. 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 2010. 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 2010, IIPA recommends that Paraguay remain under Section 306 monitoring; see IIPA's 2010 Paraguay country report at <http://www.iipa.com/rbc/2010/2010SPEC301PARAGUAY.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 and 2009, 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 2010, IIPA recommends that USTR maintain China on the Priority Watch List. See IIPA's 2010 People's Republic of China country report at <http://www.iipa.com/rbc/2010/2010SPEC301PRC.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 in 2008 and 2009, and USTR kept China on this list both years.

## PERU

IIPA recommends that Peru be placed on Watch List. See IIPA's 2010 Peru country report at <http://www.iipa.com/rbc/2010/2010SPEC301PERU.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. In 2009, IIPA recommended that Peru remain on the Watch List. 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, which 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, although ATPA has been extended for Peru).

## THE PHILIPPINES

IIPA recommends that the Philippines be elevated to the Priority Watch List with an out-of-cycle review in 2010. See IIPA’s 2010 Philippines country report at <http://www.iipa.com/rbc/2010/2010SPEC301PHILIPPINES.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. In 2009, IIPA recommended that USTR be elevated to the Priority Watch List; USTR retained the Philippines on the Watch List but agreed to conduct an out-of-cycle review. In the out-of-cycle review, IIPA recommended elevating the Philippines to the Priority Watch List. See <http://www.iipa.com/pdf/IIPAPhilippinesOCRsubmissionFINAL110909.pdf>.

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 2010. See IIPA's 2010 Poland country report at <http://www.iipa.com/rbc/2010/2010SPEC301POLAND.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 2009, IIPA recommended that Poland remain on the Watch List and that is where USTR kept this country.

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 2010. 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 2010. See IIPA's 2010 Romania country report at <http://www.iipa.com/rbc/2010/2010SPEC301ROMANIA.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 and 2009, IIPA recommended that Romania remain on the Watch List, and USTR kept Romania there.

## RUSSIAN FEDERATION

In 2010, IIPA recommends that Russia remain on the Priority Watch List. See IIPA's 2010 Russia country report at <http://www.iipa.com/rbc/2010/2010SPEC301RUSSIA.pdf>.

In its 1995 submission, frustrated by the lack of progress in criminalizing piracy, IIPA recommended Russia for the Priority Watch List. USTR moved Russia from the Special Mention category in 1994 to the Watch List for 1995. Also in 1995, IIPA petitioned to remove Russia's status as a "beneficiary developing country" under the Generalized System of Preferences (GSP) program. The GSP program expired on July 31, 1995 and was not renewed again until October 1996. During this hiatus, IIPA's petition was, in effect, not accepted. In February 1996, IIPA urged that Russia be named a Priority Foreign Country. USTR kept it on the Watch List, subject to an OCR, which occurred in December 1996. USTR again decided to keep Russia on the Watch List at that time (because of the expected passage of the criminal law amendments).

In our February 1997 submission, IIPA again pressed for a Priority Foreign Country designation if by April 1997 Russia had not taken a series of steps, including commencement of major enforcement actions, and the introduction of legislation providing full retroactive protection for both pre-1995 sound recordings and pre-1973 works. Some more aggressive enforcement actions were undertaken during this period, but there was no movement on even drafting a bill (or decree) on retroactive protection and little optimism that this would soon occur. Shortly following its submission, IIPA again petitioned USTR to deny Russia duty free trade benefits under the GSP program, for its clear failure to provide “adequate and effective” protection for U.S. copyrighted works. USTR moved Russia up to the Priority Watch List in its April 1997 announcement and later again denied IIPA’s GSP petition. During the first year (1997) following adoption of the new criminal provisions making piracy a crime with real penalties, there was some progress in the enforcement area. In particular, raids commenced and some administrative actions were concluded; two criminal convictions with very low penalties were reported, only later to be voided by a government amnesty at the beginning of 1998. There was no progress at all with the legislative agenda concerning retroactivity or correcting other enforcement deficiencies. From 1998 through 2002, IIPA recommended that Russia remain on the Priority Watch List because of massive piracy losses, a rapidly growing optical media piracy problem, virtually no enforcement or deterrent system, and some deficiencies in the IPR regime, particularly around retroactive protection for sound recordings. In its 2002 announcement, USTR noted provisions in Russia’s enforcement regime that “appear to be inconsistent with the TRIPS Agreement and the intellectual property rights provisions of the 1992 U.S.-Russian Federation Trade Agreement.”<sup>2</sup> USTR also pointed to other problems such as weak enforcement and “[l]ack of an effective OD law.”

The USTR 2003 Special 301 Report notes that Russia made considerable progress over the last year in revising intellectual property laws, but still needs amendments to the copyright laws in order to be compliant with TRIPS. Increasing piracy of optical media and ineffective enforcement of intellectual property laws remain serious problems, so Russia was kept on the Priority Watch List in 2003. IIPA recommended and USTR agreed that 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 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 and 2009, IIPA recommended that Russia remain on the Priority Watch List, and USTR retained Russia on this list both years.

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.

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<sup>2</sup> This agreement, originally concluded with the Soviet Union in May 1990, was re-signed on behalf of the Russian Federation by President Yeltsin in June 1992 and put into force at that time by granting MFN treatment to Russia. The agreement was also the model for trade agreements signed with all the other countries of the CIS during the next two years.

## SAUDI ARABIA

IIPA includes Saudi Arabia in its Special Mention section in 2010. See IIPA's 2010 Saudi Arabia country report at <http://www.iipa.com/rbc/2010/2010SPEC301SAUDIARABIA.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. In 2009, IIPA recommended that USTR place Saudi Arabia on the Watch List and conduct an out-of-cycle review. USTR did place Saudi Arabia in the Watch List with an out-of-cycle review.

## 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 recommended that Singapore appear on the Watch List in 2010. See <http://www.iipa.com/rbc/2010/2010SPEC301SINGAPORE.pdf>.

Singapore does not currently appear on any of the USTR lists. Singapore, notorious as the "world capital of piracy" until the late 1980s, changed course and rigorously enforced its 1987 copyright law for several years thereafter. In 1994, IIPA recommended that Singapore be placed on the Watch List, reporting that Singapore had become a major transshipment point for pirated copyrighted works, and that its government virtually refused to pursue criminal prosecutions against flagrant software piracy. USTR decided to place Singapore in its Other Observations category. In 1995, USTR elevated Singapore to the Watch List, citing weakened patent protection, and it remained there in 1996 and 1997, primarily because of its failure to bring its copyright laws up to the standards of the TRIPS Agreement. In 1998, IIPA called for Singapore to be elevated to the Priority Watch List, stressing that Singapore's unique "self-policing" system was inadequate to deal with rising levels of digital piracy, and that further legislative improvements, and better regulation of optical media production facilities, were urgently needed. Agreeing that the "self-policing" policy was "outdated and ineffective," USTR decided to keep Singapore on the Watch List for 1998, citing evidence of more active government enforcement against piracy, as well as the progress made toward achieving TRIPS-consistent copyright law.

In 1999 and 2000, IIPA recommended and USTR agreed that Singapore remain on the Watch List. In the May 1, 2000 Special 301 Announcement, USTR noted that while "[o]verall piracy rates in Singapore decreased slightly during 1999 the open retail availability of pirated CDs, VCDs and CD-ROMs in notorious shopping malls and at stalls continues to be a serious problem." IIPA made no recommendation regarding Singapore in 2001 or 2002; USTR did not place Singapore on any list in either of those years. IIPA highlighted Singapore in the Special Mention section of its 2004 Special 301 report, noting the continuing problem of "illegal photocopying of textbooks and academic journals," and concerns over the export of pirate optical media discs." In its 2005 Special 301 Report, IIPA recommended that the U.S. Government initiate the dispute settlement procedures of the U.S.-Singapore FTA during 2005 to require Singapore to fully meet its FTA obligations, including some critical areas in which Singapore's law (at that point) failed to fully comply with the FTA. On August 15, 2005, the Copyright (Amendment) Act 2005 went into force in Singapore, for the most part culminating that country's efforts to bring its law into compliance with the copyright-related provisions of the U.S.-Singapore Free Trade Agreement. In 2006, IIPA included Singapore in its Special Mention section because of two legislative issues of major concern to copyright owners that were not addressed in recent legislation: adequate treatment/protection of non-interactive digital audio transmissions; and protection against unauthorized (parallel) imports, as well as, among other piracy and enforcement concerns, increasing evidence of pirate production in Singapore for export. 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 included Singapore in its Special Mention section. Singapore did not appear on any of USTR's list in 2008 or 2009.

## SLOVAK REPUBLIC

IIPA did not file on the Slovak Republic in 2010, 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 2010, 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 did not make a recommendation for South Korea in 2010, but has in years prior; see IIPA's country page at <http://www.iipa.com/countryreports.html>.

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. In February 2009, IIPA again recommended that South Korea remain on the Watch List, but USTR removed South Korea from Special 301 in April 2009.

## SPAIN

In 2010, IIPA recommends that Spain stay on the Watch List and that an out-of-cycle review be conducted later this year. See <http://www.iipa.com/rbc/2010/2010SPEC301SPAIN.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. In 2009, IIPA recommended that Spain stay on the Watch List and that USTR conduct and out-of-cycle review; USTR kept Spain on this list in April 2009.

## SWEDEN

In 2010, IIPA did not make a recommendation for Sweden.

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, and recommended Sweden be placed on the Watch List in 2009. Sweden currently does not appear on any USTR list.

## SWITZERLAND

IIPA included Switzerland in its Special Mention section in 2010. See IIPA's 2010 report at [www.iipa.com/rbc/2010/2010SPEC301SWITZERLAND.pdf](http://www.iipa.com/rbc/2010/2010SPEC301SWITZERLAND.pdf). In 2008 and 2009, 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 2010, IIPA includes Taiwan in its Special Mention section. See IIPA's 2010 Taiwan country report at <http://www.iipa.com/rbc/2010/2010SPEC301TAIWAN.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 Special 301 and the Watch List. In 2009, IIPA included Taiwan in its Special Mention section. Taiwan did not appear on any 2009 USTR lists.

## TAJIKISTAN

In 2010, IIPA recommended that Tajikistan remain on the Watch List. See IIPA's 2010 country report at <http://www.iipa.com/rbc/2010/2010SPEC301CIS.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 2009, IIPA recommended that Tajikistan remain on the Watch List where it had appeared since 2000. USTR again included Tajikistan on the Watch List in April 2009.

## THAILAND

In 2010, IIPA recommends that Thailand be lowered to the Watch List and that an out-of cycle review be conducted later this year. See IIPA's 2010 Thailand country report at <http://www.iipa.com/rbc/2010/2010SPEC301THAILAND.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 and 2009, IIPA recommended that Thailand remain on the Priority Watch List, with an out-of-cycle review. In 2009, USTR included Thailand on the Priority Watch List.

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 2010, IIPA recommends that Turkey remain on the Watch List. See IIPA's 2010 Turkey country report at <http://www.iipa.com/rbc/2010/2010SPEC301TURKEY.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 2009, IIPA recommended that Turkey remain on the Watch List, and USTR again placed them on the Watch List.

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 2010, IIPA recommended that Turkmenistan remain on the Watch List. See IIPA's 2010 country report at <http://www.iipa.com/rbc/2010/2010SPEC301CIS.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 and 2009. USTR placed Turkmenistan on the Watch List where it had appeared since 2000.

## UKRAINE

IIPA recommends that Ukraine remain on the Watch List in 2010. See IIPA's 2010 Ukraine country report at <http://www.iipa.com/rbc/2010/2010SPEC301UKRAINE.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 was 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 2010, but has in years prior; see IIPA's country page at <http://www.iipa.com/countryreports.html>.

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 2010 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 2010 Uzbekistan country report at <http://www.iipa.com/rbc/2010/2010SPEC301CIS.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 and 2009, IIPA recommended that Uzbekistan remain on the Watch List, where it had appeared since 2000, and USTR maintained this country on the Watch List both years.

## VENEZUELA

IIPA did not make a submission on Venezuela in 2010, 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 or 2009; however, USTR retained Venezuela on the Priority Watch List in both years. Venezuela is a beneficiary country of the Generalized System of Preferences (GSP) trade program.

## VIETNAM

In 2010, IIPA recommends that Vietnam remain on the Watch List. See IIPA’s 2010 Vietnam country report at <http://www.iipa.com/rbc/2010/2010SPEC301VIETNAM>.

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 and 2009, IIPA recommended that Vietnam remain on the Watch List, and USTR retained Vietnam on the Watch List in both years.

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