

**IIPA's 2011  
Special 301 Report  
on  
Copyright Protection &  
Enforcement**



**Submitted to the  
U.S. Trade Representative  
on February 15, 2011  
by the  
International Intellectual Property Alliance**

# TABLE OF CONTENTS

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE 2011 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

SUBMISSION: IIPA Counsel Letter to Stan McCoy, Assistant United States Trade Representative

### APPENDIX A: Country Surveys

#### Priority Watch List

Argentina .....	1
Canada .....	9
Chile .....	22
Costa Rica .....	30
India .....	36
Indonesia .....	49
People's Republic of China .....	58
Philippines .....	76
Russian Federation .....	87
Spain .....	99
Thailand .....	114
Ukraine .....	126
Vietnam .....	136

#### Watch List

Brazil .....	149
Brunei .....	162
Commonwealth of Independent States .....	166
Egypt .....	182
Greece .....	183
Israel .....	192
Italy .....	199
Kuwait .....	210
Lebanon .....	216



Malaysia .....	221
Mexico .....	232
Poland .....	242
Romania .....	252
Saudi Arabia .....	259
Singapore .....	263
Turkey .....	271
<b>306 Monitoring</b>	
Paraguay .....	279
<b>Countries Deserving Special Mention</b>	
Albania .....	286
Bulgaria .....	288
Croatia .....	289
Latvia .....	291
Moldova .....	293
Pakistan .....	295
Switzerland .....	300
<b>APPENDIX B: Methodology Used to Calculate Value of Unlicensed Software, Other Estimated Piracy Losses, Piracy Levels</b>	
<b>APPENDIX C: Chart of Countries' Special 301 Placement (1989-2010) and IIPA 2011 Special 301 Recommendations</b>	
<b>APPENDIX D: IIPA Historical Summary of Countries' Special 301 Placement</b>	



February 15, 2011

*Submitted via regulations.gov*

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

Re: Special 301: Written Submission 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. 82424 (December 30, 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, providing public comments on acts, practices and policies regarding copyright law, piracy, enforcement and market access in selected foreign countries. In this year's filing, including this Submission Letter and appendices, IIPA reports on 40 countries noted in the chart in Section D of this Submission Letter, including 33 which we recommend be ranked on the Special 301 Priority Watch List or Watch List, or monitored under Section 306 of the Trade Act. IIPA has also recommended that one Out-of-Cycle Review (OCR) be conducted later in 2011. IIPA will also request to testify at the March 2, 2011 public hearing on Special 301 by separate cover.

---

## A. THE IIPA'S INTEREST IN THIS FILING AND THE SPECIAL 301 PROCESS

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; and textbooks, trade books, reference and professional publications and journals, in both print and electronic media.

In July 2009, 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 in the U.S. continue to be major contributors to the U.S. economy, accounting for an estimated \$889.1 billion or 6.44% of the U.S. gross domestic product (GDP) in 2007, 22.74% of the growth achieved in 2006-2007 for the U.S. economy as a whole, and 5.6 million workers in 2007 (4.05% of U.S. workers) in 2007.<sup>1</sup> The report notes the high average annual compensation – relative to other American workers – for a worker in the core copyright industries, which was \$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.<sup>2</sup> These numbers confirm the late Jack Valenti’s view of copyright and creativity as “the jewel in the U.S. trade crown.” Other countries’ studies similarly demonstrate the significant linkage between copyright protection and economic development.<sup>3</sup>

What these studies do not reveal are the massive costs (and thus lost potential) due to piracy and other distortions to the marketplace, such as market access barriers, investment barriers, and discriminatory treatment to U.S. firms. In the physical world, content industries contend with those who, in the absence of good protection and enforcement, engage in piracy as a high-profit, low risk enterprise. Unfortunately today, with Internet and mobile piracy, businesses built on copyright are facing incredible threats, as legitimate online business models must compete with the massive proliferation of illegal services that are unencumbered by costs associated with the creation of copyright works or rights clearances. Measuring the costs of piracy and other barriers differs by industry sector. For example, according to the most recent study commissioned by the BSA, preliminary data indicates the commercial value of unlicensed U.S. software in 2010 exceeded \$32 billion per year globally (while the total value of unlicensed software was \$55 billion including non-U.S. firms).<sup>4</sup> Meanwhile, an independent study just released by BASCAP (Frontier Economics), *Estimating the Global Economic and Social Impacts of Counterfeiting and Piracy* (February 2011),<sup>5</sup> estimates the value of digitally pirated music, movies and software (not losses) at \$30-75 billion in 2010 and, at \$80-240 billion by 2015. The scope of online piracy is so immense that a January 2011 study by Envisional concluded that an estimated 23.76% of all Internet traffic worldwide relates to the transmission of infringing content.<sup>6</sup>

---

## B. THE IIPA 2011 SPECIAL 301 SUBMISSION

The IIPA 2011 Special 301 Submission provides information aimed to assist the U.S. government define concrete plans of action for the year ahead and, longer-term, to improve copyright protection, reduce global piracy

---

<sup>1</sup> See Stephen E. Siwek, *Copyright Industries in the U.S. Economy: The 2003-2007 Report*, 2009 (on file with IIPA). The “core” copyright industries are those that create copyrighted materials as their primary product. 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.

<sup>2</sup> For some industries, foreign sales approach or exceed 50 percent of all revenues generated worldwide. For example, In 2007, the Motion Picture Association reported that its all-media sales in non-U.S. markets reached \$20.4 billion.

<sup>3</sup> In 2003, the World Intellectual Property Organization (WIPO) published a guidebook on the economic parameters to develop such studies entitled *Guide on Surveying the Economic Contribution of the Copyright-Based Industries* (WIPO Publication No. 893) (2003), at [http://www.wipo.int/copyright/en/publications/pdf/copyright\\_pub\\_893.pdf](http://www.wipo.int/copyright/en/publications/pdf/copyright_pub_893.pdf). Studies have been done in Australia (2007), Bulgaria (2008), Canada (2006), Colombia (2010), Croatia (2010), Hungary (2006), Jamaica (2008), Kenya, Korea, Latvia (2006), Lebanon (2008), Malaysia (2007), Mexico (2008), the Netherlands (2008), Panama, People’s Republic of China, Peru, the Philippines (2008), Romania (2010), Russia (2010), Singapore (2006), Slovenia, and Ukraine (2010).

<sup>4</sup> BSA’s 2010 statistics are preliminary, representing U.S. software publishers’ share of commercial value of pirated software. They follow the methodology compiled in the Seventh Annual BSA and IDC Global Software Piracy Study (May 2010), <http://portal.bsa.org/globalpiracy2009/index.html>. These figures cover packaged PC software, including operating systems, business applications, and consumer applications such as PC gaming, personal finance, and reference software – including freeware and open source software. They do not cover software that runs on servers or mainframes, or routine device drivers and free downloadable utilities such as screen savers. The methodology used to calculate this and other piracy numbers are described in IIPA’s 2011 Special 301 submission at <http://www.iipa.com/pdf/2011spec301methodology.pdf>. BSA’s final piracy figures will be released in mid-May, and the updated US software publishers’ share of commercial value of pirated software will be available at <http://www.iipa.com>.

<sup>5</sup> Frontier Economics, *Estimating the Global Economic and Social Impacts of Counterfeiting and Piracy: A Report Commissioned by Business Action to Stop Counterfeiting and Piracy (BASCAP)*, February 2011, at <http://www.iccwbo.org/uploadedFiles/BASCAP/Pages/Global%20Impacts%20-%20Exec.pdf>. The report builds on a previous OECD study (*The Economic Impact of Counterfeiting and Piracy* (2008)) that looked at the value of international trade of counterfeit products, updates OECD’s assumptions and examines categories of impact not quantified in the original OECD report, namely, the value of domestically produced and consumed counterfeits, the effects of digital piracy and broader economy-wide effects. The report estimates the global economic value of counterfeiting and piracy to be \$650 billion and estimates that the figure will escalate to \$1.8 trillion by 2015.

<sup>6</sup> Envisional, *Technical Report: An Estimate of Infringing Use of the Internet*, January 2011 (on file with IIPA).



levels, and open markets to U.S. copyright content in the identified countries. Section C of this Submission Letter presents a discussion of "Copyright Industries' Initiatives and Challenges for 2011." Section D provides the IIPA recommendations for the 2011 Special 301 lists. [Appendix A](#) includes all the country surveys.<sup>7</sup> [Appendix B](#) describes IIPA members' methodologies for calculating estimated trade losses and piracy levels. [Appendix C](#) provides a chart of countries/territories' placement on Special 301 lists by USTR since 1989.<sup>8</sup> [Appendix D](#) contains the Special 301 histories of countries/territories on which IIPA has reported, whether recommended for placement on a list this year, deserving special mention, or appearing on past lists.

---

## C. COPYRIGHT INDUSTRIES' INITIATIVES OR CHALLENGES FOR 2011: REDUCE COPYRIGHT PIRACY, REMOVE MARKET ACCESS BARRIERS, STRENGTHEN LAWS

This Submission and its Appendices aim to define and seek implementation of concrete solutions to significant commercial hurdles faced by the content industries of the United States, including business software, motion pictures, entertainment software, recorded music, and book publishing. The following copyright industries' initiatives or challenges all aim to reduce piracy, open markets to legitimate U.S. copyright business, and ensure adequate legal structures are in place to lower and maintain low piracy levels into the future.

### The Need for Deterrent Enforcement Responses to Copyright Piracy

Copyright piracy as we know it today increasingly occurs in ways more sophisticated than the mere duplication and sale of content on physical media. Piracy also includes the unauthorized use of software within businesses (or by governments); the illegal copying, uploading, downloading, making available, communicating, or streaming of copyright materials on the Internet (including at Internet cafés) or mobile networks; the illegal camcording of movies from theater screenings; the illegal photocopying of books or pirate offset printing of popular titles; the illegal public performance or broadcast of audiovisual works or sound recordings; hard-disk loading of software onto computers without authorization or license; and bootlegging, i.e., the unauthorized fixing of a live performance of music as a sound recording, for further duplication and sale. Related to piracy are activities such as the development, manufacture and distribution of circumvention devices used to access and make copies of copyright materials protected by technological protection measures; the trafficking in counterfeit software packaging, labels, holograms, certificates of authenticity, or documentation; and the unauthorized decryption of pay TV signals, as well as other activities facilitating unlawful use of copyright materials.

Too often, whether due to lack of political will or under-developed rule of law, countries fail to address these piracy phenomena effectively. The overarching objective for the copyright industries therefore remains to secure in countries around the world effective legal frameworks capable of providing deterrent enforcement against copyright piracy. Examples of concrete acts that can make a commercial difference (more are described in the specific sections below) include: 1) dedicating enforcement resources commensurate with the scale of the piracy problem, to provide for "effective action" and "remedies that constitute a deterrent"<sup>9</sup> to infringement as the minimum required by the TRIPS Agreement, the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT), through

---

<sup>7</sup> Country surveys were prepared by counsel to the IIPA, Michael Schlesinger, Eric H. Smith, Steven Metalitz, Eric J. Schwartz, and Amanda Denton, and are based on information furnished by IIPA's seven member associations. We thank Kristen Schumacher and Pamela Burchette for their contribution in preparing, producing and distributing this submission. The country reports contain information which should not be construed as providing legal advice.

<sup>8</sup> Fifteen of these countries/territories have appeared on a Special 301 list each year since 1989, and are recommended by IIPA to appear there again. A 1994 amendment to Section 182 of the Trade Act, dealing with identification of "priority foreign countries," provides that the U.S. Trade Representative must take into account "the history of intellectual property laws and practices in the foreign country, whether the country has been identified as a priority foreign country previously, and U.S. efforts to obtain adequate and effective intellectual property protection in that country." Uruguay Round Agreements Act Statement of Administrative Action, *reprinted in* H.R. Doc. No. 103-316, vol. I, at 362 (1994). 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 22 years that Special 301 has been in existence.

<sup>9</sup> 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. Major pirates often manipulate the legal system to evade conviction, or suffer only small monetary fines that utterly fail to discourage them from continuing in their illegal business or others from following their example. Recidivism is endemic in many countries.

civil, administrative, and criminal action, and effective adjudication in the courts;<sup>10</sup> 2) training and empowering enforcement authorities to investigate and prosecute copyright offenses; 3) updating laws and enforcement tools to meet the current piracy challenges, as the nature of these challenges changes, including recognizing the connection between piracy and organized crime;<sup>11</sup> 4) issuing orders or directives to government agencies, entities, contractors, and educational institutions to use only legal software, legal copies of textbooks and other educational materials, and other copyright materials, both because these entities are a large market for such works and because the government's own respect for copyright will set an important example for the private sector; 5) directing government agencies and educational institutions to take appropriate steps to ensure that their networks or computers are not used for infringing purposes; 6) ratifying and fully implementing the WCT and the WPPT; 7) encouraging cooperation by Internet service providers with all content owners, including notice and takedown systems and effective and fair mechanisms to deal with repeat infringers; and 8) enacting and enforcing measures to make it illegal to use or attempt to use an audiovisual recording device to make or transmit a copy of a motion picture.

### Internet and Mobile Piracy

While developments on the Internet and mobile networks have transformed the way we work, learn and play, and have opened up opportunities for faster, more efficient and more cost-effective distribution of information, products and services across the globe, they have also, unfortunately, resulted in massive infringement of music, movies, games, software, published materials and other copyright materials. The January 2011 study by Envisional concluded that an astonishing 23.76% of all worldwide Internet traffic is copyright infringing, broken down by the following technologies: 11.4% of all Internet traffic was illegal BitTorrent downloading; 5.1% of all Internet traffic was illegal cyberlocker downloading; 1.4% of all Internet traffic was illegal video streaming; and 5.8% of all Internet traffic was illegal P2P filesharing or illegal downloads over other filesharing services or sites.<sup>12</sup>

Each industry sector has its own unique experience with the online piracy phenomena most harmful to them, although many share commonalities, particularly as the increase in broadband penetration makes faster and larger downloads and access to copyright materials possible. Online and mobile piracy are by far the greatest priority issues for the music industry, which faces a global Internet piracy problem estimated at 95%. Other industry sectors also view Internet-based infringement as one of the greatest threats to their continued viability. The Entertainment Software Association again undertook a study in 2010 to measure the scope of online piracy through popular P2P networks. Results were compiled across major P2P protocols and involved activity on approximately 230 leading member titles. During 2010, ESA vendors detected more than 144 million connections by peers participating in the unauthorized filesharing of select ESA member titles on public P2P networks through ISPs in more than 200 countries and territories globally. The top five countries in terms of overall detections (Italy, China, Spain, Brazil and France) accounted for more than 78 million detections (54% of the global total) – more than 14-times the number of detections in the United States. It must be stressed that although alarming, these figures provide a snapshot of only one facet of the online piracy

---

<sup>10</sup> In many countries, specialized IP courts have been established, in addition to IP- or cybercrime-intensive investigative units with police and prosecutors. In the most successful examples, such specialized courts or divisions are starting to make a difference in their localities, since they receive specialized training and have a deeper understanding of the nature and harm posed by piracy and IP crime in general.

<sup>11</sup> Piracy has been taken over in many countries by organized crime syndicates; this includes both physical and online piracy phenomena. These highly-organized criminal syndicates, linked across national boundaries, control large amounts of capital, and exploit complex distribution networks. IIPA has long provided examples of the linkages between piracy and violent or organized crime in previous Submissions. A March 2009 study explored the linkages between organized crime and film piracy detailing 14 case studies of film piracy, providing compelling evidence of a broad, geographically dispersed 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. See Gregory F. Treverton et al, *Film Piracy, Organized Crime & Motion Picture Piracy*, RAND Corporation, March 2009, at [http://www.rand.org/pubs/monographs/2009/RAND\\_MG742.pdf](http://www.rand.org/pubs/monographs/2009/RAND_MG742.pdf). That study once again showed that the mark-up for DVD piracy (a relatively low-risk activity) is much higher than that for cocaine and heroine trafficking. The private sector does not possess the tools, nor usually the authority within countries, to investigate and fight organized crime. In addition, such organized groups or other commercial pirates can become violent, and company representatives and counsel have in some countries experienced threats on their lives, physical intimidation, or attacks leading to injury when doing their jobs to investigate piracy, and this has prevented enforcement activity by the private sector in many instances. Therefore, governments must step up to this challenge, including encouraging countries with existing laws, like Hong Kong's Organized and Serious Crimes Ordinance and the United Kingdom's Serious Crimes Act 2007, and those having other procedures that can be employed against organized crime, to bring the remedies within them to bear against syndicate operations involved in piracy, including, *inter alia*, disclosure of information being used to commit piracy and seizure or freezing of assets. As early as 2000, INTERPOL has recognized the need for national and international enforcement authorities to coordinate their efforts and cooperate with IP right holders to fight IP crimes including piracy.

<sup>12</sup> See *supra* note 6.



problem afflicting the entertainment software industry. Indeed, these figures do not account for any downloads made of infringing hosted content, such as infringing games found on “one-click” hosting sites, which appear to account each year for progressively greater volumes of infringing downloads.

The following is a non-exhaustive but illustrative list of examples of forms of online piracy, including some notorious sites implicated in piracy:<sup>13</sup>

- Baidu is an example of a Chinese site offering a “deeplinking” service that collects links to infringing content and provides users the ability to bypass the homepage of another site, instead linking to that content directly. In the case of Baidu, the deeplinks lead to infringing music files for streaming and downloading. It is estimated that almost 50% of all illegal music downloads in China takes place through Baidu.<sup>14</sup>
- P2P protocols like BitTorrent, eDonkey, Gnutella, and FastTrack, and P2P applications like eMule, Kazaa, BearShare, and Limewire, have been used as popular means of distributing infringing content, including music, audiovisual materials, business and entertainment software, and digitized books and journals.<sup>15</sup> Notorious P2P services or sites implicated in infringement include Limewire,<sup>16</sup> Xunlei, verycd.com,<sup>17</sup> BTPig (and progeny including Subpig), Kugou or Kugoo (China), and Chilewarez (now Chilecomparte) (Chile).
- BitTorrent index sites like Torrentz.com (Finland), Isohunt.com,<sup>18</sup> MoNova, BTMon, Fenopy,<sup>19</sup> TorrentPortal, Torrentzap, and BTJunkie.org aggregate and organize links to torrent files, which enable users to download infringing copies of movies, software and games.
- “One-click hosting sites,” colloquially referred to as cyberlockers, are often used by pirates to offer access to infringing content, or hacked or cracked software codes and programs, which users locate through links or advertisements provided on forums, blogs, websites, social networking sites, etc. One-click hosting sites like

<sup>13</sup> We refer to IIPA’s filing in response to the October 1, 2010 request by the Office of the United States Trade Representative on the 2010 Special 301 Out-of-Cycle Review of Notorious Markets, noting USTR’s initiative to include in its Special 301 report a “Notorious Markets” list, a “compilation of examples of Internet and physical markets that have been the subject of enforcement action and merit further investigation for intellectual property infringements.” The 2010 Joint Strategic Plan on Intellectual Property Enforcement stated that USTR, in coordination with the office of the Intellectual Property Enforcement Coordinator, would initiate an interagency process to assess opportunities to further publicize and potentially expand on the notorious markets list in an effort to increase public awareness and guide related trade enforcement actions, and that as a result of that discussion, USTR has concluded that it can further publicize and potentially expand on the notorious markets list by publishing the notorious market list separately from the annual Special 301 report in which it has previously been included, following a separate, dedicated request for comments. See International Intellectual Property Alliance, *Written Submission Re: 2010 Special 301 Out of Cycle Review of Notorious Markets: Request for Public Comment*, 75 Fed. Reg. 60854 (October 1, 2010), Docket No. USTR-2010-0029, November 5, 2010, at <http://www.iipa.com/pdf/IIPAOCRNotoriousMarketsToUSTRFINAL110510.pdf>.

<sup>14</sup> Baidu frequently creates “top 100” charts and indexes inducing users to find and then download or stream infringing music without permission or payment. While a Beijing court ruled that its deeplinking service was not infringing – an unexpected development given prior court decisions (e.g., against Yahoo!China) – there is evidence of Baidu’s contributions to, and profiting from, the infringing activities over its services. Baidu’s deeplinking service also continues to provide infringing products to Hong Kong and Taiwan, as well as being accessible worldwide. Other unauthorized deeplinking music services that offer links to infringing material include SoSo, Sogou and Gougou.

<sup>15</sup> The 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. Most of these services that operate commercially do so by generating significant advertising income and other ancillary revenues through premium memberships.

<sup>16</sup> On October 26, 2010, U.S. District Judge Kimba Wood issued a permanent injunction against the company that operates the popular file-sharing software LimeWire and ordered managers there to disable “the searching, downloading, uploading, file trading...and/or all functionality” of the LimeWire software, Lime Wire announced. The press report noted “LimeWire, the software, was released 10 years ago and quickly emerged as one of the favorite ways to pass pirated music across the Web. Gorton and his company have acknowledged making millions from offering the software.” See Greg Sandoval, *Judge slaps Lime Wire with permanent injunction*, CNet News, October 26, 2010, at [http://news.cnet.com/8301-31001\\_3-20020786-261.html?part=rss&subj=news&tag=2547-1\\_3-0-20](http://news.cnet.com/8301-31001_3-20020786-261.html?part=rss&subj=news&tag=2547-1_3-0-20).

<sup>17</sup> On January 24, 2011, VeryCD.com reportedly suspended all links to movie and music content on the site. Some news sources reported that many file-sharing sites similar to VeryCD, including subpig.net and uubird.com, would shortly follow suit, but these sites were as of early February still in operation. IIPA has consistently included VeryCD as being among the worst copyright infringers on the Internet. This development, if permanent, will represent a significant step forward for IPR in China. We will continue to monitor the situation closely and report any further developments.

<sup>18</sup> Press accounts noted the Isohunt torrent index site was host to over 9 petabytes of files as of October 2010.

<sup>19</sup> Search results for “MoNova,” “BTMon,” and “Fenopy” revealed tens of major motion pictures available for free torrent download, including Blu-ray versions of classic and recent films.



Rayfile, Namipan, and 91files (China); Megaupload<sup>20</sup> and FileSonic (Hong Kong SAR); RapidShare; Hotfile (hosted in Panama); and FreakShare (Netherlands),<sup>21</sup> have been noted for employing business models that induce users to illegally distribute the (mostly illegal) content being stored.

- Infringements on sites like Youku and Tudou, which are “User-Generated Content” (UGC) sites where users upload/make available illegal copies of feature films or TV programs in China, are particularly concerning to the motion picture industry. Linking sites to these UGC sites or to other sites multiply the accessibility to unauthorized content, thereby significantly increasing the harm to copyright companies. Close to half of the illegal content available on the world’s “topsites” is sourced from UGC sites in China.
- Streaming of infringing content occurs on such sites as PPLive and PPStream (China), which are examples of unauthorized IPTV webcasting channels. These sites webcast all kinds of television content without authorization, and TVAnts has been cited as an example of the use of P2P technology to effect real-time illegal streaming of television content and live sporting event telecasts, again, causing significant harm to the motion picture industry.
- The social network site V Kontakte (Russia) (cited as one of the top 40 sites accessed in the world) has been cited as specifically designed and operated to enable members to upload music and video files, hundreds of thousands of which contain unlicensed copyright works, which other members search and stream on computers and mobile devices.
- Sites like KJ Med (formerly Kangjian Shixun - China) are cited as examples of providing/delivering unauthorized digital copies of medical and scientific journal articles on a subscription basis to customers in libraries and hospitals throughout China, with neither the consent of nor payment of a subscription fee to the actual rights holders.
- The distribution and sale of illicit hard goods through online markets, such as auction sites, business-to-business (B2B), and business-to-consumer (B2C) exchanges is a growing concern affecting several of the copyright industries including the business software, book publishing, and audiovisual industries. These sites/services may offer legitimate consumer goods, but many sellers specialize in illegal merchandise. Well-constructed sites and services fool consumers, selling well-packaged but poor quality counterfeit copies of everything from language-learning software to movie and television programming at retail prices. Some sites take active steps to stop and deter the sale of counterfeit goods, while others tacitly condone (and profit from) the illegal conduct. Some examples of the latter are TaoBao,<sup>22</sup> Mercadolibre, and QL.<sup>23</sup> Other online marketplaces, such as Modchip.ca and ConsoleSource.com, sell circumvention devices into countries where such trafficking is illegal.
- Internet cafés continue to provide opportunities, particularly in developing countries, for getting access to infringing music, motion pictures and videogames. The entertainment software industry is particularly afflicted by this form of Internet and end-user piracy, and while 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.

The massive challenge of online piracy requires a multi-faceted approach, but its roots are quite straightforward. Governments around the world must recognize the need for proportionate and effective steps to curb online piracy, and provide adequate legal frameworks for the protection of copyright online, including provisions in line with the two treaties adopted by the World Intellectual Property Organization (WIPO) in December 1996, the WCT and

---

<sup>20</sup> Megaupload entices users to infringe by offering “reward” schemes for numbers of downloads and then fosters further infringement by providing web links (and keys) which are then provided by the subscriber to others via direct e-mail or advertising on other websites to access illegal content. Megaupload users store a massive amount of content, much of it infringing.

<sup>21</sup> FileSonic and FreakShare are cited for their high volume of infringing game files and their low rates of compliance with requests to take down infringing material.

<sup>22</sup> TaoBao (China) has been cited as online marketplaces selling videogame circumvention devices and offering infringing products (books, textbooks) to consumers and businesses.

<sup>23</sup> Mercadolibre and QL are noted for allowing bulk distribution of counterfeit software and pose some of the biggest problems for the business software industry.

WPPT (sometimes referred to as “the WIPO Internet treaties”),<sup>24</sup> provisions recognizing online piracy as a form of cybercrime,<sup>25</sup> and appropriate levels of responsibility for online infringements that foster cooperation among the stakeholders (including ISPs) involved in the online supply chain.<sup>26</sup> Effective enforcement is critical to ensure the healthy development of a legitimate online market and stop or slow the massive harm being caused by online piracy every day.<sup>27</sup>

## Enterprise (Including Government) End-User Piracy of Software and Other Copyright Materials

The unauthorized use of software within businesses, also referred to as “enterprise end-user software piracy,” stands as the principal and most damaging form of infringement to the business software industry today, with the preliminary estimates of the commercial value of unlicensed U.S. software in 2010 exceeding \$32 billion globally (\$55 billion including non-U.S. firms). End-user software piracy rates remained well above 50% in most major developing markets in 2010. Reducing software piracy can have a profound impact on national economies. A recent IDC study for BSA, *Piracy Impact Study: The Economic Benefits of Reducing Software Piracy*, demonstrates through studies of 42 countries that reducing the piracy rate for PC software by 10 percentage points over four years would create \$142 billion in new economic activity while adding nearly 500,000 new high-tech jobs and generating roughly \$32 billion in new tax revenues. Front-loading the gain by lowering piracy 10 points in the first two years would compound the economic benefits by 36 percent, producing \$193 billion in new economic activity and generating \$43 billion in new tax revenues.<sup>28</sup>

Enterprise end-user software piracy occurs when someone in a business enterprise (or government agency) makes the decision to use software (or any other type of protected content) without paying for it. In the most typical example, a corporate entity purchases one licensed (or pirated) copy of software and installs the program on multiple computers. Other examples of end-user piracy include copying discs 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 discs in or outside the workplace. Client-server overuse, another common example of end-user piracy, occurs 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. These enterprises receive the productivity benefits that the software provides, while foregoing the expense of licensed copies of the software, and enjoy an unfair commercial advantage over their law-abiding competitors who pay for their software. The unfair advantage can be understood on a macroeconomic level as well, since this means countries with high piracy levels compete unfairly with countries which have lower rates. For example, China’s 79 percent software infringement rate means that Chinese enterprises competing with U.S. firms pay on average for just over one out of five copies of software they use, while their U.S. counterparts pay on average for four out of five copies.

---

<sup>24</sup> This should include express recognition of protection of reproductions in the online environment, regardless of their duration (i.e., temporary as well as permanent copies capable of being further copied, communicated, or perceived should be recognized), since consumers engage in the full exploitation of copyright materials they license and receive over a network without ever making a permanent copy. This should also include a WIPO treaties-compatible definition of “communication to the public” including an interactive “making available” right.

<sup>25</sup> Governments should look to join and implement the Council of Europe Cybercrime Convention, Budapest, 23.XI.2001, which contains, in Article 10, “Offences related to infringements of copyright and related rights,” an obligation to “adopt such legislative and other measures as may be necessary to establish as criminal offences under its domestic law the infringement of copyright [and related rights] ... where such acts are committed wilfully, on a commercial scale and by means of a computer system,” and which contains in Article 11 the obligation to “establish as criminal offences under its domestic law, when committed intentionally, aiding or abetting the commission” of Article 10 offenses.

<sup>26</sup> Many governments, particularly in Asia and Europe, have recognized the need for urgent steps to curb online piracy, and while not all approaches are favored by all the content industries equally, the goal is the same: to ensure effective action is available in practice against online piracy. There is consensus that bad actors who cause massive harm or profit from their direct involvement in the online infringing supply chain should be held responsible. There is also general agreement that all stakeholders in the online supply chain, including service providers, should have proper incentives to cooperate to eradicate bad behavior, which has traditionally included notice and takedown, and which at least includes effective and fair mechanisms to deal with repeat infringers in the non-hosted environment. The fact is that momentum is building for workable solutions and all recognize that solutions are required and desirable.

<sup>27</sup> IFPI reports in its *Digital Music Report 2011* that “Limewire, the biggest source of infringing downloads in the US, has been declared illegal and Mininova, a major BitTorrent site, shut down its illegal activities. The Pirate Bay was blocked by a court in Italy and its operators’ criminal convictions were upheld by the Court of Appeal in Sweden.”

<sup>28</sup> Business Software Alliance and IDC, *Piracy Impact Study: The Economic Benefits of Reducing Software Piracy*, 2010, at <http://portal.bsa.org/piracyimpact2010/>.

In many cases, enterprise end-user software piracy is attributable to negligence and poor software asset management (SAM) practices. Enterprises can also be victimized by unscrupulous computer manufacturers and dealers who engage in “hard disk loading,” installing copies of software without authorization from the copyright holder onto the internal hard drive of the personal computers they sell.<sup>29</sup> In many cases, however, enterprise end-user piracy is undertaken willfully, with management fully aware and supportive of the conduct. Enterprise end-user software piracy also occurs in government agencies. Often, foreign governments fail to properly procure software for their hardware purchases, which leads to unauthorized use and under-licensing practices. In countries having significant state-owned enterprises (China being just one example of several), this problem is compounded. The principal way to address this is through government software legalization programs, including state-owned enterprises. It is also critical that governments vigorously pursue legalization of software within state agencies to set an example for private sector businesses and lend credibility to government enforcement efforts against software piracy.

Adequate laws prohibiting the unauthorized use of software in a business setting and enforcement of the same are critical to reduce piracy of business software. To effectively enforce against corporate end-user piracy, countries must provide 1) an effective civil system of enforcement, 2) provisional remedies to preserve evidence, including *ex parte* civil search orders in an expeditious manner, in line with Article 50 of TRIPS, 3) adequate compensatory civil damages including additional damages (where possible), and 4) criminalization of corporate end-user piracy as required by Article 61 of TRIPS. The software industry along with IIPA members strongly support the adoption of pre-established (statutory) damages by countries around the world, as mentioned as a possible remedy under TRIPS Article 45, and which will in some countries be required to meet the TRIPS Article 41 test to provide “remedies which constitute a deterrent to further infringements.”<sup>30</sup> Another important way to systematically address software piracy is to implement proven, internationally recognized SAM practices that ensure an enterprise is efficiently managing its software and is not using software beyond what is licensed.<sup>31</sup>

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 a government (for example, a country's education ministry or the university itself if state-run and/or state-owned) is directly involved or directly responsible for the facilities and implements used, including in particular government owned or controlled networks, policies and decrees must be promulgated and strictly enforced to ensure that these facilities are not used for infringing conduct. Governments have an opportunity and responsibility to engage in best practices with respect to the handling of intellectual property issues in the operation of government services, and they should be encouraged to lead by example.

### Implementation of the WCT and WPPT

The WCT and WPPT provide a basic legal framework for the protection of online copyright. These treaties, in force since 2002, now have 88 and 87 adherents, respectively. 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 for the online world, and prohibiting through civil and criminal remedies the production of or trafficking in tools that circumvent technological protection measures used by right holders to prevent access to content or the exercise of exclusive rights. A number of key trading partners, including Canada, New Zealand, and Israel among developed countries, and India, Malaysia, and Thailand among developing countries, have not yet ratified and/or properly implemented these treaties. The United States, which was one of the first countries to implement these

---

<sup>29</sup> Many consumers and many stores in countries surveyed in this Submission engage in “hard disk loading” which is a form of retail piracy.

<sup>30</sup> 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 can avail themselves of statutory damages.

<sup>31</sup> BSA provides tools and resources to help organizations manage software in a way that reduces compliance risks and maximizes return on investment. BSA SAM Advantage is an effort to help companies move more easily toward lasting adoption of the global SAM standards published by the International Organization for Standardization (ISO).

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>32</sup>

### Circumvention of Technological Protection Measures (TPMs)

Copyright owners use technological protection measures (TPMs) to ensure that works made available in the digital and online environments are not easily stolen. For example, game consoles contain TPMs that aim to make it impossible to play infringing copies of games. DVDs are protected by “serial copy management system” (SCMS) to prevent second-generation copying and subsequent distribution or play, directly or over the Internet. Pay TV, premium cable and satellite services, and Internet services providing legitimate downloads or streaming of motion pictures similarly employ access and copy controls. Virtually all software packages are licensed with some type of TPM (e.g., encryption, passwords, or registration numbers). EBooks employ access and copy controls as well.

Unfortunately, just as content owners would take such self-help measures to protect their content in these emerging marketplaces, there are those who not only would like to gain unlawful access to the content or copy it, but increasingly, those who build their business models around providing devices, tools or technologies to fill such demand. The entertainment software industry has seen a proliferation in the development, manufacture and distribution of increasingly sophisticated circumvention devices, tools and technologies used to make and play infringing copies of games. The “mod chip,”<sup>33</sup> “game copier,”<sup>34</sup> and variations of the mod chip including “soft modding” are ravaging the console-based videogame industry and require a strong response in terms of legal measures and enforcement to make space for the sale of legitimate games. Purveyors of these devices are so sophisticated and determined to escape detection that they often separate their products into components, e.g., they ship devices that are only partially functional, intending that the user take steps required (such as downloading software) to restore the circumvention device to full functionality.

One of the key aspects of WCT and WPPT implementation involves adequate and effective protection against the circumvention of TPMs. In order for such protection to be “adequate and effective,” as required by the WCT and WPPT, countries must address acts of circumvention, trafficking in circumvention devices, tools, and technologies, and the provision of circumvention services (such as the installing of “mod chips” into game consoles). Countries must also ensure that both TPMs that control access to content as well as TPMs that prevent the unauthorized copying or other exercise of exclusive rights are covered. Exceptions to protection in this area must be narrowly and carefully crafted to ensure that prohibitions on circumvention are not rendered ineffective. Civil and criminal (and where available, administrative) remedies should be provided. While implementation of TPMs protections has given rise to effective enforcement actions against distributors of unlawful circumvention devices, these efforts are critically undermined by countries that have yet to pass such provisions. Countries that lack TPM provisions, such as Canada, serve as a source of circumvention devices for consumers who live in countries where such devices are rightly prohibited.

### Illegal Camcording of Theatrical Motion Pictures

One of the greatest concerns to the motion picture industry involves illegal recordings of movies from theaters, often just as the window for theatrical exhibition of a film opens. Approximately 90 percent of newly released movies that are pirated can be traced to thieves who use a digital recording device in a movie theater to literally steal the image and/or sound off the screen. The increase in the severity of this problem in recent years tracks the development of camcorder technology that makes detection difficult and copies near perfect. All it takes is one camcorder copy to trigger the mass reproduction and distribution of millions of illegal Internet downloads and bootlegs in global street markets just hours after a film’s release and well before it becomes available for legal rental or purchase from legitimate suppliers.

---

<sup>32</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.

<sup>33</sup> There is a global market for modification chips (mod chips) sold on the Internet and in videogame outlets that, when easily installed into a console (by the user or by the pirate retailer), will bypass the access control “handshake” and allow the play of pirated games.

<sup>34</sup> “Game copier” devices also bypass TPMs to allow for uploading, copying, and downloading of games for handheld platforms.

Studios and theater owners have significantly increased security and surveillance in theaters all over the world to thwart would-be camcorders. Since 2003, the major motion picture studios have employed technology such as watermarking films (independent producers employ this technology as well), which enables film companies to discern the source of a stolen film through forensic analysis and trace it back to the very theater in which it was recorded. In 2010, there were over 1,000 instances of MPAA member company titles illegally recorded from cinemas around the world; approximately 60% were audio captures. This number does not include the numerous independent and local films illegally camcordered, and local and independent producers also suffer gravely from illegal camcording.

Anti-camcording legislation is critical to stopping the rapid increase in camcording. The United States and several other countries now have anti-camcording laws, and some others are actively considering legislation right now (including countries where the problem has grown out of control, e.g., in Thailand).<sup>35</sup> There remain critical steps on top of good legislation that the motion picture industry and cinema owners are pursuing 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

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

### Piracy of Books and Journals

The book publishing industry continues to be plagued by 1) large scale unauthorized photocopying of academic, scientific, technical and medical books, principally on and around university campuses,<sup>36</sup> 2) sophisticated infringing offset print versions of books (essentially akin to counterfeiting),<sup>37</sup> and 3) unauthorized translations of popular books.<sup>38</sup> Photocopy piracy in most countries involves unauthorized commercial copying of entire textbooks by copy shops on and around university campuses, often undertaken on a “copy-on-demand” basis to avoid stockpiling. Book pirates have shifted tactics and are increasingly electronically storing digitized files of books (academic or otherwise) and fulfilling customer requests on a “print-to-order” basis, thereby complicating the enforcement process due to lack of infringing stock-on-hand. Authorities need to recognize this shifting pattern and tailor enforcement efforts accordingly (e.g., by including cyber forensics in their investigations). 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, printing more copies of a title than permitted by their license.

---

<sup>35</sup> 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 United States is taking the necessary steps to provide adequate and effective remedies against camcorder piracy.

<sup>36</sup> Pirate photocopying takes place in a variety of venues, including commercial photocopy shops located on the perimeters of university campuses and in popular shopping malls, at on-campus copy facilities located in academic buildings, libraries and student unions, and in wholly illicit operations contained in residential areas or other underground establishments. Some of these operations are highly organized and networked, and technological advances are making the problem worse, since the shift from physical copy machines to electronic files means shops can print infringing books on demand. 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).

<sup>37</sup> 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.

<sup>38</sup> 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 aggressive action by law enforcement authorities. However, such efforts should be in conjunction with robust efforts by universities and educational institutions (especially state-run or state-funded) to promote appropriate use and copyright policies, in particular the use of legitimate books and journal publications. IIPA urges the U.S. Government to ensure that such acts of piracy are fully covered in all bilateral, regional, and multilateral engagements.

### Optical Disc Piracy

While piracy is migrating to the online space for most of the content industries, piracy of optical disc (OD) products<sup>39</sup> continues to cause major losses to most copyright industries, especially in markets with low Internet penetration, where such formats continue to enjoy considerable market share, or where pirate console-based videogames are popular.<sup>40</sup> In recent years, factory production has somewhat waned as technological developments have meant fewer large-scale factories and more smaller, agile “burning” of music, books and reference publications, games, movies, and business software onto recordable media. CD-R or DVD-R “stack” bays (of ten or twenty discs when “daisy-chained”) are lightweight and can produce multiple discs in minutes. They are being set up in factories but also in the smallest shops (and even in homes) where vendors can “burn to order.” In some countries like China, Vietnam, and elsewhere in Southeast Asia, high-quality counterfeit DVDs and business and entertainment software packages continue to be coveted, and in some cases, fool consumers into thinking they are buying the real thing. Programs such as regularized surprise plant inspections and exemplar (sample) disc collection must continue, and where unlicensed illegal activity is detected, copyright laws and specialized OD laws or regulations should be aggressively enforced, including the imposition of deterrent penalties, license revocations, confiscation of equipment and raw materials, and heavy fines and imprisonment where warranted.

### Pay TV Piracy and Signal Theft

The unauthorized broadcast, cablecast or satellite delivery of motion pictures, as well as other content (music and sound recordings) cost right holders dearly in 2010.<sup>41</sup> Three key problems are identified by the industry. The first is unauthorized cable access, which represents actions by individuals or groups to tap into the lines of legitimate cable TV companies without paying subscription fees. Most illegal taps likely occur on large cable systems in major metropolitan areas (examples in Asia including Manila and Bangkok). The second involves unauthorized operators, including actions by rogue cable companies, who take broadcast signals by unauthorized means (hacked set-top boxes or “overspill” boxes from neighboring countries), replicate the signal and sell it to hundreds or thousands of consumers. These pirate operators do not pay for any of their content. The third is subscriber under-declaration, which represents actions by cable companies who use some legitimate content, but do not pay for all the channels they use, or all the subscribers they serve.

Copyright laws and regulations imposing licensing on distributors of signals have in some countries been effective at weeding out unlicensed television distributors, consolidating the market into legitimate options (Lebanon is one example of this). In countries still experiencing major Pay TV theft, governments must take active steps to enforce.

---

<sup>39</sup> OD 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 high definition formats such as Blu-ray.

<sup>40</sup> Historically, organized piracy groups set up major factories at great expense in the promise of high-profit, relatively low-risk factory piracy. Markets such as China, Macau, Hong Kong, Taiwan, Malaysia, Thailand, Indonesia, and the Philippines in Asia; Russia and Ukraine in Central Asia; Bulgaria in Eastern Europe; even Pakistan in South Asia and Israel in the Middle East, have all at one time or another been afflicted by major factory piracy rings. As a result of this onslaught of factory production, affecting domestic markets and exported to neighboring and regional countries, a swift regulatory and enforcement response was required. IIPA and IIPA members developed tools including draft effective optical disc regulations, and in October 2003, APEC leaders agreed on the need to “stop optical disk piracy” and Ministers endorsed a set of “Effective Practices.” The specialized regulatory framework, including licensing controls on the operation of optical disc mastering and replication facilities; the requirement to use identification tools to identify the plant of production; collecting exemplar discs; and tracking the growth of optical disc production capacity, including the cross-border traffic in production equipment and raw materials, principally optical-grade polycarbonate, has been sought in many countries. Regulations adopted in Bulgaria, China, Hong Kong, Indonesia, Macau, Malaysia, Nigeria, Oman, the Philippines, Poland, Singapore, Taiwan, Thailand, Turkey, and Ukraine, and under consideration elsewhere, accomplish much of what is needed.

<sup>41</sup> The Cable and Satellite Broadcasters Association of Asia (CASBAA) estimated the cost of piracy of Pay TV and signal theft in Asia alone at well over US\$2 billion. See CASBAA, Asia-Pacific Pay-TV Industry 2010, at [www.casbaa.com/publications?page=shop.getfile&file\\_id=67](http://www.casbaa.com/publications?page=shop.getfile&file_id=67).

Pay TV signals are almost always encrypted, so accessing them usually requires the unauthorized decryption of the signal or the unauthorized use of the already-decrypted signal. It is therefore critical that copyright laws not only contain strong provisions prohibiting the unauthorized use (broadcast, communication to the public, public performance, transmission, etc.) of content, but also contain prohibitions on the decryption of encrypted cable or satellite signals, as well as the unlawful onward use of the signals already decrypted (whether lawfully or not). Of particular importance will be protections against the unauthorized retransmissions of such signals, and countries should afford appropriate rights in this area, including in the online environment.

## Market Access

The U.S. copyright industries suffer from myriad market access barriers, investment barriers, and discriminatory treatment, making it difficult to compete in some foreign markets on a level playing field. It is truly impossible to discuss copyright infringement without recognizing the direct relationship between the fight against infringement and the need for liberalized market access to supply legitimate product (both foreign and local) to consumers around the world. We call upon policymakers to recognize and draw on this relationship to help make the reduction of market access impediments a key component of ongoing efforts to combat piracy. 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.

Market access restrictions identified in the IIPA 2011 Special 301 country reports in Appendix A include ownership and investment restrictions; discriminatory or dilatory content review/censorship systems;<sup>42</sup> restrictions on the ability to fully engage in the development, creation, production, distribution, and promotion of copyright materials; the inability in some countries to engage in the import, export, distribution, publishing, and marketing online of reading materials; the maintenance of quotas including screen time and broadcast quotas or complete bans on broadcast of foreign programming or advertising; discriminatory restrictions on the ability to import, license, or distribute copyright content; blackout periods for films; local print requirements; onerous import duties; and even a ban in one country (China) on the manufacture, sale and importation of videogame consoles. Sometimes well-intentioned anti-piracy initiatives, such as labeling (e.g., banderol or hologram sticker programs) or licensing requirements (examples include Thailand's "copyright owner" code requirement) get in the way of legitimate business or even have the opposite effect from that intended, precluding effective protection or enforcement against piracy. In addition, IIPA is concerned about recent policies that attempt to use market access leverage to compel transfers of IP.<sup>43</sup>

---

<sup>42</sup> In China, for example, entertainment software companies continue to face lengthy delays in the censorship approval process, wiping out the very short viable window for legitimate distribution of their videogame products. Further, while piracy enters freely in these markets, countries like China and Vietnam impose content review processes which clear the way for further piracy and, adding insult to injury, are discriminatory to foreign content, further skewing the playing field.

<sup>43</sup> As an example, over the past several years, China has been rolling out a series of policies aimed at promoting "indigenous innovation," with the apparent goal to develop national champions. Of particular concern are policies conditioning market access on local ownership or development of a service or product's intellectual property or aiming to compel transfers of foreign intellectual property to China. U.S. and international industry groups have raised serious concerns that these policies will effectively shut them out of the rapidly growing Chinese market and are out of step with international best practices for promoting innovation. IIPA has shared its concerns as well and strongly believes that the best ways for China to further enhance its innovative capacity are to: further open its markets to foreign investment; provide incentives to innovate by ensuring full respect for intellectual property rights including patents, copyrights and trademarks; avoid policies which establish preferences based on nationality of the owners of the intellectual property rights; and act forcefully and promptly to prevent misappropriation of such rights. On January 19, 2011, the White House "Fact Sheet" on "U.S.-China Economic Issues" (following on the recent JCCT outcomes) included the following important commitments: "The United States and China committed that 1) government procurement decisions will not be made based on where the goods' or services' intellectual property is developed or maintained, 2) that there will be no discrimination against innovative products made by foreign suppliers operating in China, and 3) China will delink its innovation policies from its government procurement preferences." These are welcome commitments, should be communicated to all levels of the Chinese government and should be accompanied by real changes in central and local government procurement practices.



The motion picture industry notes that customs officers increasingly try assessing *ad valorem* duties based on potential royalties generated from a film rather than the accepted practice of basing duties on the value of the carrier medium (i.e., the physical materials which are being imported). This is a growing, dangerous, and very costly phenomenon to the film industry, with Russia and WTO members such as Argentina, Ukraine and Uruguay currently applying *ad valorem* duties on projected revenues, and others (such as Indonesia) considering doing the same. Unfortunately, as governments look for additional revenue sources, it is far too easy to target foreign products entering their market and assess duties on projected royalties. After changing their valuation schemes, India and Ukraine have demanded “overdue” payments for retroactive valuation of audiovisual products entering their market, a practice that disrupts participation in the market and penalizes U.S. companies for their prior success. The International Chamber of Commerce recognized in a policy statement, *The Impact of Customs Duties on Trade in Intellectual Property and Services*, that such a practice distorts markets, increases costs for suppliers and buyers, depresses commercial activity, and impedes the availability of intellectual property in the country imposing the tariffs.

U.S. Government officials, working with their overseas counterparts, should fundamentally reexamine the effectiveness of, and policy justifications underlying, market access prohibitions or impediments that restrict legitimate producers’ ability to compete with pirates, and should strive, as a high priority issue, to open markets to copyright and eliminate or phase out market access barriers including those identified in this year’s IIPA submission.

#### D. IIPA RECOMMENDATIONS FOR THE 2011 SPECIAL 301 LISTS

This year IIPA has analyzed the copyright law and enforcement problems in 39 countries, and has recommended 33 of them for placement on the Priority Watch List or Watch List,<sup>44</sup> or for monitoring under Section 306 of the Trade Act, or as deserving of special mention for copyright-related concerns.

PRIORITY WATCH LIST	WATCH LIST	SECTION 306	COUNTRIES DESERVING SPECIAL MENTION
Argentina Canada Chile China Costa Rica India Indonesia the Philippines Russian Federation Spain Thailand Ukraine Vietnam	Belarus Brazil Brunei Greece Israel Italy Kazakhstan Kuwait Lebanon Malaysia (OCR) Mexico Poland Romania Saudi Arabia Singapore Tajikistan Turkey Turkmenistan Uzbekistan	Paraguay	Albania Bulgaria Croatia Latvia Moldova Pakistan Switzerland
13	19	1	7

<sup>44</sup> Egypt is currently on USTR’s Special 301 Watch List. IIPA’s 2011 recommendation for Egypt is for USTR to “defer” its consideration of Egypt’s status until the political situation has stabilized.



## E. CONCLUSION

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 high levels of protection for copyright, more effective policies and tools to enforce that protection, and freer, more open markets. To meet the constantly evolving threats to copyright worldwide, our country's response must remain flexible, innovative and committed. Special 301 remains one cornerstone of the U.S. response, and we urge USTR and the Administration to use Special 301 and other trade tools available to encourage the countries identified in our recommendations this year to make the political commitments, followed by the necessary actions, to bring real commercial gains to the United States through strengthened copyright and enforcement regimes worldwide.

We look forward to our continued work with USTR and other U.S. agencies on meeting the goals identified in this Submission.

Respectfully submitted,

/Eric H. Smith/  
/Steven Metalitz/  
/Michael Schlesinger/  
/Eric Schwartz/  
/Amanda Wilson Denton/

Counsel for  
International Intellectual Property Alliance

# **APPENDIX A**

## **COUNTRY SURVEYS**

# **PRIORITY WATCH LIST**

# ARGENTINA

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

### 2011 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: IIPA recommends that Argentina remain on the Priority Watch List in 2011.

**Executive Summary:** Rampant piracy in Argentina remains a very low priority for the government and many of its enforcement authorities. The copyright industries report indifference on the part of national authorities in the face of continued growth in the organized production and distribution of pirated materials. The pervasive economic theft via piracy, both hard goods and online, is a huge challenge for the legitimate content industries. A comprehensive national strategy aimed at protecting and enforcing the Argentine Copyright Law is needed 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. 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. Not surprisingly, Internet piracy continues to grow in Argentina. Rights holders are doing their best to take action, but the police corps and the judiciary lack the resources or the awareness to permit effective enforcement against copyright piracy. Furthermore, the government should reconsider its “hands off” approach and work with rights holders and Internet Service Providers (“ISPs”) 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 extensive court delays and the lack of a statutory damages remedy. 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. Rights holders report positive cooperation with Argentine customs authorities.

#### PRIORITY RECOMMENDED ACTIONS FOR ARGENTINA IN 2011:<sup>1</sup>

- 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:
  - Identify major distributors of pirate products in public markets and promote the revocation of licenses to those points of sale.
  - Halt the distribution of pirate and counterfeit merchandise at the “La Salada” Fair and other large, public markets that distribute these infringing products.
- Provide more resources and high-level political support for police Internet crime units to address illegal downloading.
- Instruct prosecutors to seek deterrent criminal sentences on major piracy cases. Encourage judges around the country to resolve these cases expeditiously and to impose deterrent sentences.
- Improve border enforcement, partnering with Paraguayan and Brazilian officials to establish a program to inspect goods in-transit for potential pirate product.

---

<sup>1</sup>For more details on Argentina’s Special 301 history, see IIPA’s “History” appendix to this filing at <http://www.iipa.com/rbc/2011/2011SPEC301HISTORICALSUMMARY.pdf>, as well as the previous years’ reports, at <http://www.iipa.com/countryreports.html>. For a summary of IIPA’s 2011 global issues, see our cover letter at <http://www.iipa.com/pdf/2011SPEC301COVERLETTER.pdf>.



- Push for legislation that will establish clear ISP responsibility for illegal content over their networks and a program to address the issue that includes deterrent level sanctions.
- 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 technical solutions and improve procurement practices.
- Submit legislation to increase the minimum penalty for criminal copyright piracy to two years (the current minimum is one month).

Argentina has been 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. Although the GSP program has lapsed for 2011, if it is restored it will presumably still require beneficiary countries to provide "adequate and effective" protection to U.S. copyrighted materials. During 2010, \$526 million in Argentine products entered the U.S. under the GSP duty-free code. Argentina has been under Special 301 scrutiny for many years.

## COPYRIGHT PIRACY IN ARGENTINA

Argentina suffers from an increasingly high level of street piracy, much of it taking place in large flea markets across the country. Meanwhile, Internet piracy has become rampant, and Peer-to-Peer (P2P) piracy is now the most popular form of music piracy in the country. End-user piracy continues to limit the ability for legitimate business software to enter the Argentinean market. A combination of extremely high piracy and market access impediments makes Argentina one of the least hospitable markets for entertainment software publishers in the region.

Hard goods piracy, La Salada and end-user piracy: The sale of pirate product, including optical discs, by street vendors continues unabated throughout Argentina. 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 local industry representatives estimate that the total sales from La Salada are also on the rise. One report indicated that this market area covers about 2 million square feet, and approximately 50,000 consumers visit daily. 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 in raiding actions and refuse to close stands engaged in the sale of infringing works.

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 (for example, in the 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.

The Business Software Alliance (BSA) reports that physical commercial software piracy has nearly disappeared in Argentina, owing to the realization on the part of the business community of the costly risks involved in infringement suits, on one hand, and the rise in Internet piracy, on the other. Piracy of business software programs among end-users, the most damaging form of piracy, remains quite high, especially in small and medium-sized organizations. This problem involves the federal, provincial and municipal government offices as well as a number of private companies. According to a 2010 report issued by BSA-IDC called *The Economic Benefits of Reducing PC Software Piracy*, the information technology sector's contribution to the Argentine economy could be even bigger if Argentina's PC software piracy rate were to be lowered 10 percentage points over four years. This would create an additional 4,420 jobs, US\$949 million in local industry revenues and US\$202 million in additional tax revenues for

federal, regional, and local governments.<sup>2</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 original equipment manufacturers ("OEM") versions or simply illegal copies pre-installed on computer hard disks. Based on preliminary data, PC software piracy in Argentina increased by one percentage point to 72% in 2010. This represented a commercial value of US\$438 million worth of pirated U.S.-vendor software.<sup>3</sup>

Piracy of music and sound recordings in both the physical and online environment continues unabated in Argentina. Hard goods (physical) piracy of music accounts for 50% of the music market. 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. Buenos Aires and the surrounding areas are the most affected.

The independent sector of the film and television industry (IFTA) reports that Internet and physical piracy of DVDs remains a significant export constraint for independent producers and distributors, the majority of which are small to medium sized businesses. Independent producers partner with local authorized distributors to finance and distribute film and television programming. These authorized distributors find it nearly impossible to compete with pirates. Producers and distributors confirm that DVD sales have been particularly impacted since pirated digital copies are offered for free online and with a similar quality viewing experience as a DVD can provide. Unable to compete with free, legitimate distributors often cannot commit to distribution agreements or offer drastically reduced license fees which are inadequate to assist in financing of independent productions. Piracy undermines and may permanently damage legitimate distribution networks essential to reaching consumers, and leaves little confidence for investment in intellectual property.

Internet piracy: Argentina boasts a 965% growth rate in Internet usage between 2000 and 2010, but this new digital market has been so plagued by piracy that copyright industries are unable to take advantage of Argentina's newly connected population. The country has 26.6 million Internet users, reflecting about 64.4% of the population (according to [internetworldstats.com](http://internetworldstats.com)). The Argentine broadband market remains one of the most developed in South America. However, with the increased availability of pirated content via 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 services (including BitTorrent and eDonkey), and sites offering links to download movies and entertainment software 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. The digital market remains the same in 2010 as in 2009. It represents the 7% of the local music market (including CD sales) and is made up of two segments: mobile (about 68%) and Internet (about 32%). Online music piracy occurs via illicit use of P2P file-sharing, hyperlinks, and cyberlockers. The latest estimate is that 1,293,809,517 million songs are being downloaded illegally in Argentina every year (according to a survey carried out by D'Alessio Irol Consultant for the local IFPI affiliate). The most popular "cyber locker-link-sharing" site in Argentina, called TARINGA, has more than 6,000,000 users. Taringa, notably, is also one of the top five most popular cyber locker-link sites in the world. 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. Rights holders are able to see that 31.94% of the links added daily are removed for reasons of pirate source content.

---

<sup>2</sup>This report is posted on BSA's website at <http://www.bsa.org/idcstudy>.

<sup>3</sup>BSA's 2010 statistics are preliminary, representing U.S. software publishers' share of commercial value of pirated software in Argentina. They follow the methodology compiled in the Seventh Annual BSA and IDC Global Software Piracy Study (May 2010), <http://portal.bsa.org/globalpiracy2009/index.html>. These figures cover packaged PC software, including operating systems, business applications, and consumer applications such as PC gaming, personal finance, and reference software – including freeware and open source software. They do not cover software that runs on servers or mainframes, or routine device drivers and free downloadable utilities such as screen savers. The methodology used to calculate this and other piracy numbers are described in IIPA's 2011 Special 301 submission at [www.iipa.com/pdf/2011spec301methodology.pdf](http://www.iipa.com/pdf/2011spec301methodology.pdf). BSA's final piracy figures will be released in mid-May, and the updated US software publishers' share of commercial value of pirated software will be available at [www.iipa.com](http://www.iipa.com).



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.

During 2010, entertainment software vendors detected 1.44 million connections by peers participating in unauthorized file sharing of select member titles on P2P networks through ISPs located in Argentina, placing Argentina in the top 20 countries in overall detections.<sup>4</sup> Breakdowns by ISP show that Telefonica de Argentina and Telecom Argentina S.A. subscribers account for approximately 79% of this activity occurring in Argentina.

Internet-based piracy prevents the establishment of legitimate online distribution platforms and services for consumers, which independent film producers may use to finance future productions. For independent producers who license content country-by-country, online piracy instantly exports troubled marketplaces and high piracy rates to other markets. The independent production sector is limited in its ability to shift to technology-enabled new business practices that might limit piracy. For example, worldwide same day releases (referred to as “day-and-date” releases) may prove an effective method to curb or delay piracy for major studios that control their own worldwide distribution, but for independents, whose national distributors release on their own schedule, this technique is impossible.

## COPYRIGHT ENFORCEMENT IN ARGENTINA

The limited training, resources, and human capital available to police forces and the judiciary in Argentina make effective enforcement of copyright in the country extremely difficult. Federal and state police forces lack sufficient resources to provide expert reports on seized products, which delays processing cases. There is no dedicated police force to handle piracy cases. The music and 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 also 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. The minimum penalty of one month is so low as to be considered negligible, deterring courts from issuing any prison terms at all. Anti-piracy enforcement actions rely entirely on private sector initiative, resources, and complaints. In addition, civil infringement actions, often brought by the business software community, also face roadblocks with long delays and non-deterrent damage awards.

Software actions: BSA reports cooperation on the part of the police and the courts in general, noting that preliminary measures are executed rapidly. However, BSA has experienced problems with confidential information being leaked to targets of investigation and a general slowness in resolving judicial procedures. The business software industry is unaware of any *ex officio* actions being taken against software piracy. 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.

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 2010, the BSA program in Argentina conducted 71 raids or court actions against commercial computer software end users, and obtained 72 case settlements. 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

---

<sup>4</sup>These figures do not account for downloads that occur directly from hosted content, such as games found on “one-click” hosting sites, which appear to account each year for progressively greater volumes of infringing downloads.

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 commercial software in use and the payment of damages.

**Criminal actions involving hard goods:** The recording industry indicates that both the police and customs authorities do take *ex officio* actions and industry supports those actions. The recording industry 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. They also cooperate in the performance of forensic analysis in order to speed up the process. Unfortunately, the recording industry reports that the number of raids during 2010 is 8% below levels for the same period in 2009. During 2010, rights holders assisted in 309 raids (including street vendors, warehouses, and labs), resulting in the seizure of 3,819,434 million copies of media with infringing content (most of which were CD-Rs) and 2,188 pieces of equipment. In 2010, only 4 new criminal prosecutions were initiated, resulting in two convictions. The poor results for new criminal cases and convictions are mainly due to the low priority that enforcement authorities assign to the piracy problem.

**Actions in the Internet space:** The recording industry continues to be very active in Internet piracy enforcement in Argentina. With the cooperation of ISPs in the removal of hosted content, in 2010 the local organization of the recording industry produced the following take-down results: 27,893 web pages and blogs posts, 851,379 links to cyberlockers containing infringing files, 92,406 forum posts, 10,994 P2P links to infringing content, and 38,545 pre-release copies of sound recordings.

**Inter-industry cooperation on Internet piracy cases:** As the preceding data illustrates, local ISPs are slowly beginning to collaborate in certain limited circumstances, such as taking down infringing sites in very specific instances. 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. In the P2P file-sharing context, most ISPs are not cooperating with rights holders, claiming no responsibility for what users do on their networks. Despite appeals from the sound recording industry to the Ministry of Telecommunications and ISP trade groups, the Argentine authorities have refused to engage in industry talks, leaving rights holders unable to organize roundtable discussions with ISPs on a voluntary campaign to curb piracy. The disengaged attitude of the Argentine authorities has proven to be the most problematic in the region.

The local recording industry has as yet been unsuccessful in attempts to seek ISP liability in the courts. In early 2008, local recording industry filed for preliminary injunctions against two ISPs in Buenos Aires, asking the judge to order the ISP to adopt technical measures (port blocking) to impede the exchange of music files using P2P networks. Both injunctions were granted, but the ISPs appealed the first instance decisions and the injunctions got stuck in the judicial system, leaving no remedy in force. The local recording industry did not appeal one case, and the other case is still pending.

**Slow prosecutions and non-deterrent judgments:** Very few criminal cases reach final sentencing. This problem is due in part to the very formalistic structure of Argentina's judicial system and to the lack of human resources and poor infrastructure in the courts. More importantly, there is a lack of will by both prosecutors and judges to push these cases through. Most copyright infringement cases finish with a suspension of judgment. The music industry reports that there were only two convictions for music piracy in 2010.

Furthermore, Argentina's current criminal provisions for copyright infringement are totally inadequate to address the piracy problem. The minimum penalty is only one month; this minimum penalty should be increased to a minimum of two years. 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 usually results in no jail sentence, or a suspended sentence – because the judges do not consider intellectual property crimes to be serious offenses.

Delays and weak damages in civil infringement cases: The business software industry continues to rely on civil enforcement in Argentina, given the systemic problems with criminal enforcement. Even so, there remain problems in some provincial judicial jurisdictions, where there are procedural delays in obtaining and conducting civil searches in business software piracy cases. Civil actions are also 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.

Border enforcement: The Customs Service, jointly with the military police and coast guard (the "Gendarmería Nacional" and "Prefectura Nava"), has 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 further progress was made with the Customs authorities in 2010, 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. The Argentine Customs, through the unit called "Fraude Marcario," has also seized shipments of blank CDs in activities directed against tax evasion. 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.

Industry trainings and public awareness efforts: The sound recording and business software sectors offer courses and seminars for the judiciary and commercial chambers in Argentina. The national affiliate of IFPI organizes a seminar for judges of various jurisdictions every year. It will also seek the involvement of the Argentine government to address Internet piracy in the coming year. To improve judicial awareness of intellectual property and end user software piracy, BSA has developed a training program for provincial judges, which is pending approval to be conducted in 2011. (For more information, see <http://www.jufejus.org.ar/>.)

## COPYRIGHT LAW REFORM 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 WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty (the "WIPO Internet treaties"), and those provisions are self-executing, taking precedence over national law. Still, further refinements are needed. Specificity in national legislation helps to provide clear "rules of the road" for rights holders, consumers and enforcement authorities, including the courts.

IIPA and its members have identified the following important elements that would benefit from clarifications or express incorporation in the copyright law:

- Provide express protection for the "communication to the public" and "making available" rights as required by WIPO Treaties, to give legal background to digital businesses for authors, performers and phonogram producers;
- Extend the scope of the reproduction right to explicitly cover temporary copies;
- Protect against the act of circumvention as well as the manufacture or distribution of devices aimed at circumventing technological protection measures (TPMs)
- Protect against the removal or alteration of digital rights management information (RMI);
- Increase the minimum penalty for piracy (currently one month under Article 72*bis* of Act 11.723 of the Copyright Act) up to at least two years to apply deterrent sanctions;
- Establish statutory damages provisions in civil infringement cases;
- Explicitly provide for the seizures of infringing equipment;
- Provide clear guidelines regarding liability for ISPs, and include notice and takedown provisions;

- Provide equitable and balanced treatment for all rights holders, treating juridical entities no less favorably than natural persons.

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. In 2005, a bill to amend the criminal chapter of the Copyright Act (Bill 1546-S-05) was introduced in the Senate, but it fell off the docket at the end of 2007. In 2007, the recording industry submitted a new bill (1987-S-2007) to the Senate, and meetings were held in 2008 along with the motion picture industry to expand some provisions of that bill (e.g., adding a 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 TPMs, including the manufacture or distribution of circumvention devices, and the modification or suppression of 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.

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 Gestión Pública—the Undersecretariat for Public Administration) to issue an executive decree that would require government legalization of current business software programs on computers and improve procurement practices. While several “standards” have been issued by the Subsecretaría, the Argentine government has not taken action toward legalizing its software inventories.

## MARKET ACCESS ISSUES

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 2010.

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.” The issue has been presented to courts of second instance in five cases: in two cases, the Court agreed with AFIP, and

in three the Court rejected AFIP's position. Decisions on each side are pending before the Federal Supreme Court (Corte Suprema de Justicia de la Nación). 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:** In September 2010, Argentina's Federal Authority on Audiovisual Communication Services passed a bill that limits advertising on pay TV to six minutes per hour and discriminates against foreign pay TV networks by disallowing advertisers to write off investments in these networks, yet permitting advertisers to write off investments in Argentine pay TV networks.

# CANADA

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2011 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: IIPA recommends that Canada be maintained on the Special 301 Priority Watch List in 2011.<sup>1</sup>

**Executive Summary:** More than fourteen 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 and in legislative best practices worldwide. Bill C-32, tabled in June 2010, is the third copyright reform proposal in 5 years. Like its predecessors, the Bill takes some critical steps forward toward Treaties compliance, including robust anti-circumvention provisions, and includes a new cause of action against online services designed primarily to enable infringement. However, its approach to the role of service providers in combating online piracy is insufficient and deeply flawed, and it would add a host of new exceptions to copyright protection, many of which are inconsistent with Canada's international obligations under the Berne Convention and TRIPS, and significantly broader than those found in other jurisdictions. Canada should be encouraged to enact the bill this year, but only after its major flaws are corrected. 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. While we are encouraged by a few examples of improved enforcement responsiveness against physical piracy, overall the piracy picture in Canada is at least as bleak as it was a year ago, and it is cementing its reputation as a haven where technologically sophisticated international piracy organizations can operate with virtual impunity. To underscore U.S. insistence that Canada finally take concrete 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 2011.

### PRIORITY RECOMMENDED ACTIONS FOR CANADA IN 2011:

#### 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]).
- Enact strong legal incentives for Internet Service Providers (ISPs) to cooperate with copyright owners in combating online piracy, including by limiting the scope of liability safe harbors in accordance with international best practices.
- Establish clear liability and effective remedies against those who operate illicit file-sharing services, or whose actions are otherwise directed to promoting infringement.
- Ensure that any new exceptions or limitations to copyright protection conform to international standards.

---

<sup>1</sup>For more details on Canada's Special 301 history, see IIPA's "History" appendix to this filing at <http://www.iipa.com/rbc/2011/2011SPEC301HISTORICALSUMMARY.pdf>, as well as the previous years' reports, at <http://www.iipa.com/countryreports.html>. For a summary of IIPA's 2011 global issues, see our cover letter at <http://www.iipa.com/pdf/2011SPEC301COVERLETTER.pdf>.



## 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.
- Make the 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

The main legislative and policy challenges that Canada confronts fall into three main categories: (1) bringing its laws into full compliance with the globally accepted minimum benchmarks for modern copyright legislation (the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT)); (2) making the necessary legislative changes to empower customs officials to make *ex officio* seizures of counterfeit and pirate product at the border; and (3) dedicating sufficient resources and establishing adequate policies to ensure effective copyright enforcement efforts within the country. It was in the first of these areas that Canada took a significant step in 2010, with the introduction in June of Bill C-32, Canada's third attempt in five years to bring its copyright law up to modern minimum standards.<sup>2</sup> This legislation, originally promised for the fall of 2009, was delayed so that the Canadian Government could conduct a nationwide "public consultation" on copyright reform.<sup>3</sup> The result is a promising but significantly flawed proposal. While IIPA strongly supports the bill's stated objectives, its actual text fails to achieve them in significant respects. While some of Bill C-32's provisions would bring Canada much closer to compliance with modern global copyright norms, others would take it farther from current best practices and even raise serious questions about compliance with its existing international obligations. A Special Legislative Committee of Canada's Parliament is currently examining Bill C-32. IIPA offers the following comments on the bill.

**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 Canadian websites are involved in the sale of "mod chips" and other hardware and software based circumvention devices to purchasers in

---

<sup>2</sup>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. 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.

<sup>3</sup>This included an online public consultation. One statistical analysis of submissions raised "serious issues regarding the design and results of the public consultations," noting that "70% of the total submissions were 'form letters' originating from a single little-known group of modchip manufacturers." Owens, Noises Heard: Canada's Recent Online Copyright Consultation Process," posted at <http://www.iposgoode.ca/2010/04/noises-heard-canadas-recent-online-copyright-consultation-process/>.



other countries.<sup>4</sup> 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. Legislation 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-32 is a major step in the right direction and largely meets these criteria. IIPA's main concern in this area involves the scope of some exceptions and the provision (proposed section 41.21) authorizing recognition of additional exceptions by regulation. IIPA agrees that such an authorization is prudent to allow the law to adapt to unforeseeable technological and market changes, but the Bill C-32 provisions may cross the line from commendable flexibility to debilitating unpredictability. In particular, we urge that regulations be limited to exempting a class of technological measures from protection against the act of circumvention, not against trafficking in devices or services; the latter, more sweeping exceptions, with greater potential to harm the marketplace, should require new legislation. Second, the authority to recognize further exceptions to the prohibition on the act of circumvention should not extend to requiring copyright owners to provide access to works for beneficiaries of the new exceptions. Third, any additional exceptions recognized should be time-limited, not permanent, so that there will be a re-look at whether the conditions that gave rise to the need for a regulatory exception still exist three or four years later.

**Making Available Right.** Bill C-32 falls short in providing an exclusive making available right for sound recording producers, as required by Article 14 of WPPT. Proposed section 18.(1.1)(a) of Bill C-32 appears to do so (dubbing it a "sole right," like other exclusive rights in the law). However, proposed section 67.1(4)(b) seems to prohibit any lawsuit for infringement of this exclusive right (without Ministerial consent) until a tariff has been filed with the Copyright Board covering the work in question. Such a precondition of prior approval by a government ministry might be suitable for claims of equitable remuneration, but is entirely inapt in the case of an exclusive right.

**Online Piracy:** It is a matter of high priority that copyright reform legislation in Canada effectively address the pervasive problem of Internet piracy. Bill C-32 does include one potentially useful – but seriously flawed – new legal tool in this arena. Otherwise, it largely follows the unsatisfactory path laid down by the two previous copyright reform proposals.

Proposed section 27(2.3) creates a new form of secondary liability for infringement, for providing a service via the Internet which the provider "knows or should have known is designed primarily to enable acts of copyright infringement," so long as some actual (primary) infringement occurs through use of the service. IIPA strongly supports the principle behind this provision, but is deeply concerned that its potential for providing an effective and deterrent remedy will not be realized unless the provision is revised in at least the following ways:

- None of the four "service provider" exceptions should bar claims under this provision. Currently, the hosting and caching exceptions (proposed sections 31.1(3) and (5)) could be used to shield massive commercial enablers from all liability for inducing infringement, depending on their choice of technology for doing so.<sup>5</sup>
- Those liable under the new provision are not subject to statutory damages. Enablers (like Canada's IsoHunt) should not be immune from this effective deterrent remedy.

---

<sup>4</sup>For instance, both the IIPA and Entertainment Software Association identified [www.modchip.ca](http://www.modchip.ca) in response to USTR's [out-of-cycle review](#) of Notorious Markets.

<sup>5</sup>Making the hosting exception inapplicable to enablement claims is particularly critical, since sites that host and stream or permit downloading of illegitimate content are the most significant growing source of illicit distribution of content online.

Bill C-32, like its predecessors, continues to take a blanket immunity approach (rather than a remedial limitation) for a number of network services activities. This casts serious doubt on whether right holders could ever obtain an injunction to prevent infringements carried out using a service provider's systems, e.g., an order removing an infringing file that is being hosted by a service provider. Additionally, contrary to international best practices there are no threshold requirements to qualify for these immunities. Even a provider who took no steps with regard to known repeat infringers would be eligible for full immunity,

The immunities themselves are much too broad. The hosting immunity in proposed section 31.1(5) (read together with section 31.1(6)) is especially problematic since it contains no conditions at all (including with regard to responsiveness to copyright owner notices of infringing activity). It seems that a party who "provides digital memory" for use by others "for the purpose of allowing the telecommunication of a work through the Internet or another digital network" can never be liable for infringing activity that it hosts, unless it knows that a court has adjudged the user's conduct to be infringing. No takedown would ever be required in order to preserve immunity, which the party could enjoy even with respect to infringing material within its knowledge and under its control. This immunity is far broader than safe harbors provided to hosting services elsewhere in the world. Such broad immunities will do little to encourage needed cooperation between network service providers and content owners, and will instead promote lack of accountability and willful blindness on the part of ISPs.

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 observed that enacting such a procedure would be an "effective remedy" for the problem.<sup>6</sup> But the current Canadian Government, like its predecessors, remains steadfastly opposed to the procedure. Bill C-32 continues this unfortunate trend, and provides no alternative expeditious means of removing or disabling access to infringing content hosted online.

Instead, the bill confines itself to the same "notice and notice" regime proposed by the Canadian Government years ago. 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. Yet this value is limited if notice after notice is sent with no prospect of real consequences for the infringing end-user.<sup>7</sup> "Notice and notice" is a complement to, not a substitute for, notice and takedown. Particularly if coupled with an obligation to implement policies for addressing repeat infringers, combining these approaches could be a useful part of a system that gives ISPs strong incentives to effectively address the dissemination of infringing materials.<sup>8</sup>

Similarly, services meeting the exceptionally broad definition of "information location tool" in proposed section 41.27 ("any tool that makes it possible to locate information that is available through the Internet or another digital network"), which arguably could encompass peer-to-peer (P2P) services, BitTorrent trackers, etc., can claim immunity (other than from injunctions) even if they never "take down" links to infringing materials after notice, so long as they pass along those notices.

In sum, Bill C-32 not only fails to address online piracy effectively; it could in fact exacerbate it, because it provides sweeping immunities to network service providers without creating any standards that would provide meaningful incentives for them to cooperate with copyright owners to deal with copyright infringements that take

---

<sup>6</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>7</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.

<sup>8</sup>There are also a number of unanswered questions about the "notice and notice" provisions of proposed section 41.25-26 in Bill C-32, such as how the statutory damages of C\$5,000-C\$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.

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 provides safe harbors to far more than just innocent intermediaries. Such an approach seems inconsistent with the stated intentions of the legislation's drafters, and can hardly be said to comply with the mandate of the WIPO Internet Treaties that national law "permit effective action against any act of infringement of rights covered by this Treaty."<sup>9</sup>

We respect the Canadian Government's efforts to craft a unique "made in Canada" approach to online infringement liability; but that approach 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. Despite the positive signal sent by the new "enablement" prohibition, Bill C-32 fails both tests. We urge that it be amended to correct flaws such as those summarized above.

**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 per work infringed. Bill C-32 takes a step backwards, by limiting statutory damages to a range of C\$100 - C\$5,000 for all infringements carried out by any defendant for "non-commercial purposes." Even this meager award is available only to the first copyright owner to seek a statutory damage award 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 owner's lawsuit was filed. These sharp limitations apply across a much broader range than the comparable provisions of the previous reform bill: institutional as well as individual defendants can invoke them; and since there is no longer a restriction to infringements carried out for "private purposes," it seems likely that acts such as posting copyright material on a website or making it available via P2P technology would qualify, so long as such acts are "non-commercial," a term the bill does not define.

It is likely that these provisions would render the statutory damages option ineffective where it is compellingly needed: in the online environment, including in P2P cases against non-commercial but large scale infringers.<sup>10</sup> For example, where a defendant, without authorization, uploads a work – or hundreds or thousands of works – to a cyberlocker or other Internet location, 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. Canada's existing 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, Article 41. That gap will rapidly reopen if these infringing activities are treated as "non-commercial," thus replacing statutory damages with a de facto C\$100-C\$5,000 retrospective license for unlimited non-commercial infringement by anyone caught uploading any number of infringing copies.

**Copyright exceptions.** Most of Bill C-32 consists of nearly a score of new or expanded exceptions to copyright protection. Many of these raise significant questions. For example:

(1) Fair dealing (sec. 29): "Education" would be added to research and private study as uses that qualify for the fair dealing exception. Because "education" is not defined, this could be a dramatic change, with unpredictable impacts extending far beyond teaching in bona fide educational institutions, and weakening protections for a wide range of works. Under Canadian precedent, consideration of the impact on the market for a work is not the predominant factor in a fair-dealing analysis; and Canadian courts required to give the terms in this section a "large and liberal interpretation"<sup>11</sup>. Book and journal publishers are particularly concerned about the impact on well-established collective licensing mechanisms for administering permissions to copy works for educational use. While a

---

<sup>9</sup>See WCT, Art. 14.2; WPPT, Art. 23.2.

<sup>10</sup>Of course, as already noted, statutory damages would be denied altogether in claims against parties that knowingly enable online infringement, under Sec. 27(2.3).

<sup>11</sup>*CCH Canadian v. Law Society of Upper Canada*, 2004 SCC 13. See also *SOCAN v. Bell Canada et al.*, 2010 FCA 139 (Federal Court of Appeal holding that 30-second previews offered by commercial online music services qualify as copying for "research" for fair dealing purposes).

"market failure" concern may justify extension of fair dealing to parody and satire, such a concern is absent in the case of an "education" expansion of the exception.

(2) Non-commercial user generated content (proposed sec. 29.21): This unprecedented provision allows any published work to be used to create a new work, and the new work to be freely used or disseminated, including through an intermediary, so long as the use or authorization for dissemination (though not necessarily the dissemination itself) is "solely for non-commercial purposes" and does not have a "substantial adverse effect" on the market for the underlying work. The provision substantially undermines the exclusive adaptation right that Canada is obligated under TRIPS and Berne to provide; provides an unjustifiable safe harbor for commercial disseminators; and applies even when the use of the underlying work violates a contract, exposes a trade secret, or requires circumvention of a TPM. In effect, the exception appears to enable wholesale appropriation of an existing work provided some minimal modification is made. At a minimum, the exception requires substantial amendment to meet international standards.

(3) Private copying (proposed sec. 29.22): Any legitimate and legally-obtained (other than by borrowing or renting) copy of a work may be further copied if the reproduction is "used only for private purposes" – a phrase that remains undefined, and may not be limited to the private purposes of the copier. This is a greatly expanded rewrite of the format-shifting exceptions from Bill C-61. It no longer requires format-shifting; applies to all works (including computer programs and cinematographic works on DVD, which were excluded from the exception in the earlier legislation); contains no numerical limitations on the number of copies or for whom they can be made; and is silent on whether the exception trumps a contractual prohibition on copying (the C-61 version did not override a contract when the source copy was downloaded from the Internet). The two main limitations are that the exception does not apply if a technological protection measure has been circumvented, and that all copies made under the exception must be destroyed if the user gives up possession of the source copy. These restrictions are not sufficient to dispel concerns about this extremely broad exception, which requires substantial trimming.<sup>12</sup>

(4) Time-shifting (proposed sec. 29.23): This provision is similar to the one in Bill C-61, except that it trumps any applicable contract or other agreement not to copy. The individual must receive the program legally, must not circumvent a TPM in order to copy, and may make only one copy, keep it no longer than necessary for time-shifting, and use it only for "private purposes." The exception does not apply to material received via an on-demand service (defined in the bill).

(5) Back-up copies (proposed sec. 29.24): Copying of any work, a copy of which the user owns or is licensed to use, is permitted "solely for back-up purposes," and so long as the source copy is non-infringing, no TPM is circumvented, the back-up copy is not distributed, and all back-up copies are destroyed once the user no longer owns or has a license for the source copy. Apparently an unlimited number of copies would be permitted, and there would be no limitation to originals in vulnerable formats. Presumably the more specific (and more limited) back-up copy provision applicable to computer programs under current section 30.6(b) would continue to apply to software, but this should be clarified, and the justification for any broader exception for other works should be explained.

(6) Educational exceptions: Some of these expand on exceptions that are already in the Copyright Act, but others are entirely new: for distance learning (proposed section 30.01); digital reproductions (when the school already has a reprographic reproduction license) (proposed section 30.02 and 30.03); and for educational uses of works "available through the Internet" (proposed section 30.04). This last provision would immunize 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; but the exception would not apply if the user knows or should have known that the work was made available

---

<sup>12</sup>Bill C-32 fails to make the needed legislative amendment to Canada's existing private copying exception for sound recordings (section 80), to clarify that it applies only to individuals who make copies for their own use from recordings they already own. Any broader application of the private copy exception would raise serious questions about Canadian compliance with its WTO TRIPS obligations.

online without consent of the copyright owner. The provision still seems to allow infringement of a work obtained offline so long as the same work is available somewhere online without a TPM. This should be re-examined, taking into consideration both the scope of Canada's existing fair dealing exceptions for research and private study, and applicable international standards. Concerns about these proposed exceptions generally include the practical enforceability of some of the conditions on their exercise, and in some cases their impact on well-functioning established collective management systems for licensing, which seemingly would be replaced by untested compulsory licenses.

(7) Library/museum/archive exceptions: These involve expansions of existing exceptions, notably for inter-library loan. Proposed section 30.2(4) and (5) would take ILL into the wholly digital realm. Under it, libraries may choose to pool their resources and decide to divide the purchasing of printed or digital works (such as professional or scholarly journals) among themselves. Each library would then provide access to their collection of works to the patrons of all other libraries through an on-demand delivery mechanism whether through the Internet or other networked means. With business models facilitating one-off electronic delivery of single articles (from journals or newspapers) continuing to evolve, such an exception is unjustified. It threatens to drastically reduce incentives to explore new business models and new ways of providing consumers access to reading materials when and where they want them. Additionally, though the proposed provision requires that the providing library take measures to prevent further distribution of the digital copies, it fails to define what such measures should be and does not require that the measures actually be effective. 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

(8) Computer program exceptions: The first of these would expand existing section 30.6 so that a licensed user of a computer program, as well as an owner of a copy, could adapt or modify the copy in order to run on a particular computer. This calls into question the principle that any license agreement that is enforceable under general provisions of contract law should govern relations between a software publisher and a user with respect to the software. The second (proposed section 30.61) would create a new exception allowing reproduction of an owned or licensed program for purposes of interoperability with "any other computer program." The latter provision omits many of the safeguards appearing in comparable statutes of most other countries, and when considered in conjunction with the interoperability exception for circumvention, could effectively prevent a company from taking any measures to protect proprietary software from tampering, modification or reverse engineering. This proposal demands close scrutiny.<sup>13</sup>

(9) Temporary copies: Proposed section 30.71 immunizes any copying that "forms an essential part of a technological process," lasts no longer than the duration of the "process," and has the sole purpose of facilitating a non-infringing use. None of the key terms is defined and the word "temporary" appears only in the title of the section. When considered in combination with the wide range of uses that would henceforth be considered "non-infringing," this could prove to be a very broad exception.

**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

---

<sup>13</sup>Under proposed section 30.62, reproduction of a lawfully obtained copy of any work would be allowed when needed for purposes of encryption research, so long as the copyright owner is notified. Under proposed section 30.63, copying of any work for the sole purpose of security testing of a computer, system or network would be allowed with the consent of the owner of the computer, system or network being tested. Both these new exceptions (as well as the interoperability exception discussed in text above) are clearly intended to parallel proposed exceptions to the anti-circumvention provisions discussed above. These exceptions to copyright have the effect of making one of the conditions for each of these circumvention exceptions – that the circumventor (or the trafficker in circumvention tools) not infringe copyright (see, e.g., proposed section 41.12(6)) – a dead letter.

any suspected pirate or counterfeit imports. 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>14</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 2010, the Canadian government completed action on the first of these recommendations, adopting a regulatory change that would bring criminal copyright offenses under the Federal Proceeds of Crime regime. While this is 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 cause serious problems both within the country and 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 were 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 on digital networks.. 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: Canada is home to some of the world's most popular illegitimate Internet sites, including illegitimate P2P download and streaming sites. Canada is viewed as a country in which laws to address digital piracy are weak, ineffective or non-existent, and as a result many sites dedicated to piracy or information sources about them claim that locating or operating in Canada is to their advantage because their services are legal in Canada. Canada has been home to the operators or hosts of five of the world's top ten pirate BitTorrent sites, and it continues to be a major source of online theft in Canada and around the world.<sup>15</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, TV shows,

---

<sup>14</sup>See reports from the Standing Committee on Public Safety and National Security, <http://cmte.parl.gc.ca/Content/HOC/committee/391/secu/reports/rp2985081/securp10/securp10-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>.

<sup>15</sup>The piracy damage inflicted through illicit BitTorrent services is by no means confined to the audio-visual sector. For instance, in 2009 BSA requested the removal of 153,000 torrent files containing BSA member company software from just nine of the largest BitTorrent index sites worldwide. These torrent files were being used by nearly 4 million individuals to download software with a retail value in excess of USD\$2.2 billion.

and other copyright materials. As an example, IsoHunt, the third most popular infringing BitTorrent site in the world, continues to operate with impunity from Canada.<sup>16</sup> It boasts having 40.7 million peers and over 6.7 million active torrents.<sup>17</sup> A U.S. court issued a permanent injunction against IsoHunt after finding that over 90% of the downloads made using IsoHunt's services related to infringing content and that the defendants were liable for inducing infringement.<sup>18</sup> Yet its Canadian operator continues to openly run the site and has commenced an action in Canada seeking a declaration that its operations do not violate Canadian law.

Online piracy of audio-visual material in Canada damages independent producers as well as the major studios. Internet piracy prevents the establishment of legitimate online distribution platforms and services for consumers, which independents can use to finance future productions. The Independent Film and Television Alliance (IFTA) reports that online piracy in Canada remains a significant export constraint for independent producers and distributors, the majority of which are small to medium sized businesses. In a worldwide Internet monitoring program that IFTA 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. Independent producers partner with local authorized distributors to finance and distribute their films and programming. These authorized distributors find it almost impossible to compete with the Internet pirates. Unable to compete with free, legitimate distributors are unable to commit to distribution agreements or offer drastically lower license fees which are inadequate to assist in financing of independent productions.

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 DVDs was being conducted in a very organized fashion. Law enforcement efforts to target specific problem areas, commenced in 2009, continued in 2010. Police activity, including raids, seizures (over 1.4 million pirate DVDs were either seized by authorities or surrendered to industry investigators in 2010) and arrests, was critical to the substantial reduction in the number of illicit vendors operating openly in key malls with a reputation for piracy in the GTA. These activities resulted in 70 arrests and a number of ongoing prosecutions. Toronto Police Services and RCMP engagement with the piracy problem in the GTA has been particularly notable in 2010. Despite the inroads that have been made in 2009 and 2010, continued action by law enforcement will be required to identify a permanent solution to the hard goods problem in small malls and flea markets in the GTA, identify the sources of illicit hard goods and ensure that illicit activity does not return.

Entertainment software: In 2010, the Entertainment Software Association's (ESA) investigations uncovered numerous retail 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 Kijiji and Craigslist. Many pirates also operated stores, often found in malls, including the notorious 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; modified consoles housing hard drives pre-installed with numerous pirated copies of games; and circumvention or modification devices (including installation services). ESA's 2010 enforcement activities resulted in the seizure of thousands of pirated games.

A big obstacle to reducing the level of game piracy in Canada is the low availability of law enforcement resources throughout much of Canada to act against game piracy targets, except in Quebec, where the RCMP has shown itself to be interested and active in pursuing game pirates. Elsewhere in Canada, police action generally depends on one or two interested law enforcement officials, motivated by an ESA training event they attended or a

---

<sup>16</sup><http://torrentfreak.com/top-10-most-popular-torrent-sites-of-2011-110105/#>

<sup>17</sup>[www.iso-hunt.com](http://www.iso-hunt.com), visited 1/31/11, 12:14 pm EST.

<sup>18</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). The U.S. court concluded with respect to IsoHunt and related sites that "evidence of intent to induce infringement is overwhelming and beyond dispute;" that the sites "engaged in direct solicitation of infringing activity" and that their "business model depends on massive infringing use."



working relationship with one of ESA's outside investigators.<sup>19</sup> Unfortunately, even when criminal actions are undertaken and 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. A number of cases in 2010 resulted in modest penalties with no jail time. Until prosecutors advocate more fervently for the imposition of stronger sanctions and Canadian judges consistently mete out sentences that are truly deterrent, piracy in Canada will continue to flourish.

The widespread availability of circumvention devices in Canada, which are not clearly prohibited under Canadian law, also serves to aggravate the piracy problem. As noted earlier, circumvention devices, such as mod chips and game copiers, enable the playback of pirated games by bypassing the TPMs in game consoles. 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 sales of circumvention devices, 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 and then export them to buyers in the United States and other countries where such devices are illegal. Because these pirates recognize no borders, Canada functions as a safe haven from which they can redistribute circumvention devices around the world. In addition, many Canadian websites offer software-based modifications, or "soft mods," which are downloadable files that once installed are capable of defeating game console TPMs in a similar manner as traditional mod chips or game copiers. As soft mods often require some level of expertise to install, vendors are able to charge a premium for soft modding services.

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. During 2010, ESA vendors detected 1.56 million connections by peers participating in unauthorized file sharing of select member titles on P2P networks through ISPs located in Canada.<sup>20</sup>

Business software: The estimated 2010 piracy rate for U.S. vendor business software in Canada was 29%, above that of the U.S., Japan, Australia or many Western European countries, with an estimated commercial value of pirated US-vendor software of \$575 million.<sup>21</sup> In addition to unlicensed use of software by business end users, which accounts for the largest part of piracy losses in the business software sector, online piracy is also a serious problem. For instance, one BSA survey indicated that in the first 9 months of 2010, over 63,000 P2P infringements of selected BSA member company titles by Canadian subscribers to Canadian ISPs were identified. Since this survey did not attempt to encompass all business software applications, all P2P protocols, or all ISPs, this figure is at best indicative of what may be a much more pervasive problem.

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). As a result of mounting complaints from legitimate businesses in the university press industry, an investigative project was initiated to take a closer look at groups involved in the illegal distribution and sale of photocopied university books in Montréal. The investigators found that it was a well-organized practice affecting all the local universities. Early in

---

<sup>19</sup>One ESA member, for instance, reports having received excellent results in working with the Saskatoon RCMP and the Regina Tech Crime Unit, culminating in the arrest of a local man suspected of selling modified game consoles pre-loaded with infringing game software, and the seizure of over 7,000 units of pirated game product.

<sup>20</sup>These figures do not account for downloads that occur directly from hosted content, such as games found on "one-click" hosting sites, which appear to account each year for progressively greater volumes of infringing downloads.

<sup>21</sup>BSA's 2010 statistics are preliminary, representing U.S. software publishers' share of commercial value of pirated software in Canada. They follow the methodology compiled in the Seventh Annual BSA and IDC Global Software Piracy Study (May 2010), <http://portal.bsa.org/globalpiracy2009/index.html>. These figures cover packaged PC software, including operating systems, business applications, and consumer applications such as PC gaming, personal finance, and reference software – including freeware and open source software. They do not cover software that runs on servers or mainframes, or routine device drivers and free downloadable utilities such as screen savers. The methodology used to calculate this and other piracy numbers are described in IIPA's 2011 Special 301 submission at [www.iipa.com/pdf/2011spec301methodology.pdf](http://www.iipa.com/pdf/2011spec301methodology.pdf). BSA's final piracy figures will be released in mid-May, and the updated US software publishers' share of commercial value of pirated software will be available at [www.iipa.com](http://www.iipa.com).

2011, officers of the Royal Canadian Mounted Police Federal Investigation Section conducted four searches in photocopy stores. Some 2,700 counterfeit books and digests were seized as well as a significant quantity of material used for copying. The total value of the books seized is estimated at close to \$540,000. A total of 13 individuals were arrested in the course of the police operations. Charges under the Copyright Act could be filed at the end of the investigation. These businesses had been active for several years. Some used a legitimate front to engage in illegal photocopying of university books. Others rented premises in the vicinity of universities for the back-to-school period and advertised their services through various means. A student showing an ID card could obtain photocopies based on university program course lists, at about a quarter of the list price on average.

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. 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. This indicates that digital music purchases are gaining considerably less traction in Canada than the U.S. – 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>22</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 Canadian Response

These realities point to serious deficiencies in enforcement against piracy. Much of the problem is attributable to Canada’s inability to advance copyright law reform. For example, only when Canada’s copyright law is modernized to include clear criminal prohibitions against trade in circumvention devices 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>23</sup> only the

---

<sup>22</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>23</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 (...continued)

RCMP can carry out an *ex officio* seizure, and coordination between the two agencies is generally not effective. As a result, virtually no seizures at the border have occurred, and Canada's borders are effectively wide open to imports of pirate CDs, DVDs or videogames and other infringing materials. CBSA must be given independent authority to act against any suspected pirate or counterfeit imports. Although the Canadian Government has acknowledged this deficiency and has been studying the issue for years, it has failed to introduce the necessary legislative changes.<sup>24</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. Until Canada adopts a modernized legal regime that includes such tools, prospects for progress against online piracy will remain dim.

However, not all enforcement problems in Canada can be traced to deficiencies in the law. Even when pirate activity is clearly illegal, Canada's response too often falls short. 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>25</sup>

Nevertheless, there are some encouraging signs, notably the increased and largely effective law enforcement engagement against sales of pirate DVDs in the Greater Toronto Area in 2009, as well as the activism of RCMP officers in Quebec in addressing videogame and book piracy, as discussed above. This commendable engagement should be sustained and expanded to other law enforcement agencies. On the whole, though, the Canadian law enforcement commitment to act against retail piracy remains generally under-resourced.<sup>26</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 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. 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. 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>27</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

---

(...continued)

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.

<sup>24</sup>Both parliamentary committees that studied this topic in 2007 called explicitly for such amendments to be enacted.

<sup>25</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>26</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.

<sup>27</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.

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>28</sup> The weak penalties obtained also discourage prosecutors from bringing cases, and encourage recidivism. The new regulations authorizing the confiscation of proceeds of copyright infringement as a remedy in criminal cases could help to interrupt this vicious cycle, but only if prosecutors invoke them and courts implement them vigorously.

The U.S. Government 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>29</sup>

---

<sup>28</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>29</sup>Numerous recommendations of the parliamentary committees echo these concerns.

# CHILE

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2011 SPECIAL 301 REPORT ON COPYRIGHT ENFORCEMENT AND PROTECTION

Special 301 Recommendation: IIPA recommends that Chile remain on the Special 301 Priority Watch List in 2011.

**Executive Summary:** The copyright industries are very concerned about inadequate legal reform and high piracy levels in Chile. Amendments to the copyright law adopted May 4, 2010, show some promising developments for efforts to address online piracy, but generally do not meet the standards required for proper implementation of Chile's FTA copyright protection and enforcement obligations, now several years past due. Hard goods piracy remains at steady levels while Internet piracy continues to grow, a major obstacle for the development of a new digital economy. Industry cooperation with Chilean copyright enforcement authorities generally is good; however, additional resources are still needed to address the low number of street actions, and increased attention on the part of the judiciary is needed to follow through on the positive efforts of the Carabineros and Civil Police. At the end of the day, few copyright prosecutions are undertaken and even fewer result in deterrent sentencing, due largely to inadequate minimum penalties in the law.

The first U.S. trading partner in Central and South America to sign a Free Trade Agreement (FTA) with the United States, Chile has ignored key deadlines for implementation of its FTA obligations. Despite several years of work on copyright- and enforcement-related legislation, the resulting amendments take steps to establish a new voluntary notice system to address online piracy, but on the whole fail to establish adequate tools for the copyright industry and enforcement authorities to enforce against the full spectrum of infringement, especially in the online environment. Nor do the amendments address Chile's FTA obligations on Technological Protection Measures ("TPMs"), a deadline long overdue. Overall, significant changes are needed to improve the legislative protections and enforcement measures for copyrighted works in Chile.

### PRIORITY RECOMMENDED ACTIONS FOR CHILE IN 2011<sup>1</sup>:

- Further amend the copyright law to fully satisfy FTA obligations with respect to: effective Internet Service Provider (ISP) liability provisions, deterrent-level civil and criminal sanctions for copyright infringement, an effective civil *ex parte* search remedy, and the establishment of statutory damages.
- Satisfy FTA and WIPO Internet Treaties obligations to adopt TPMs legislation and enforce anti-circumvention provisions (both criminal and civil).
- Take immediate steps to complete and fully implement the 2001 government software legalization decree, and adopt provisions to regulate the acquisition and management of software by government agencies.
- Through increased resources and coordination, place greater priority among administrative and enforcement authorities on anti-piracy actions, particularly on the Internet and in the streets of Santiago.
- Improve the speed of civil copyright infringement litigation and afford an effective and TRIPs-compliant civil *ex parte* search remedy, both in the law and in-practice.
- Launch a national Internet anti-piracy campaign led by the Ministry of the Interior, setting goals for specific enforcement efforts, improved interagency cooperation, regular reporting on administrative and judicial Internet actions, and enhanced public awareness.
- Strengthen border enforcement with better tracking mechanisms and coordination with rights holders.

<sup>1</sup>For more details on Chile's Special 301 history, see IIPA's "History" appendix to this filing at <http://www.iipa.com/rbc/2011/2011SPEC301HISTORICALSUMMARY.pdf>, as well as the previous years' reports, at <http://www.iipa.com/countryreports.html>. For a summary of IIPA's 2011 global issues, see our cover letter at <http://www.iipa.com/pdf/2011SPEC301COVERLETTER.pdf>.



## COPYRIGHT PIRACY IN CHILE

Widespread “street piracy” has not abated in Chile, and illegal downloading is pervasive and largely unchecked. Although the country is emerging as a sophisticated digital market (broadband is now available to 50 percent of the population, according to [www.internetworldstats.com](http://www.internetworldstats.com)), without effective anti-piracy mechanisms to keep pace with the increase in Internet users and available bandwidth, legitimate online distributors of copyrighted materials face enormous challenges. Internet piracy takes the form of illegal hosted sites, peer-to-peer (P2P) filesharing of infringing content, illegal use of cyberlockers, hyperlinks to infringing materials and, increasingly, illegal mobile and smart phone downloads.

Optical disc piracy, street piracy and border issues: As most of the pirate music consumers in Chile have migrated to the Internet, today street vendors (“*ambulantes*”) primarily sell DVD’s containing movies and music videos. The recording industry, however, reports that optical discs still face a 50% piracy rate of the total market in Chile. Vendors cover their pirate wares with big towels printed with the cover image of movies, games, music, or software. A 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 produce only transitory changes in the street piracy situation. The film, music and business software industries continue to report a recent development in street piracy, called “in-house piracy.” This trend in Chile is driven by street purchasers who seek illegal copies of films, games, and software from individuals with access to copying equipment at work. These in-house vendors use catalogues distributed by email or on paper, receive the requests, fulfill orders and then receive payment from a 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 Peru 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.

Business software piracy: The Business Software Alliance (BSA) reports that, overall, business software piracy neither rose nor fell in Chile during 2010. End-user piracy (the unauthorized use and copying of software by businesses and other enterprises) remains a problem and currently causes the greatest damage to the business software market in Chile. Other significant forms of software theft include unauthorized pre-installation of software by hardware retailers, in-house and external IT advisors who often load unauthorized copies of software onto computers or networks, and Internet piracy. The PC software piracy rate in Chile remained steady in 2010 at 64%, based on preliminary data.<sup>2</sup> This translates to a commercial value for pirated U.S. vendor software of \$161 million.

Because end-user piracy of business software occurs in public agencies as well as private businesses, adopting appropriate provisions to regulate the acquisition and management of software by the government is a critical solution, and one required by the FTA. The new administration in Chile has the opportunity to complete and fully implement the 2001 government software legalization decree. In 2011, BSA plans to increase the number of cease and desist letters it issues and also run more judicial raids at commercial and educational organizations in order to produce more awareness about the need to protect software and halt piracy.

Piracy of music and sound recordings: The recording industry, led by its national group (IFPI Chile), reports that the level of piracy of optical discs remains stable at 50% of the market, while online music piracy is growing. Physical piracy, primarily in the form of pirate CD-Rs and DVD-Rs, is highest in the cities of Santiago, Concepción, Iquique, and Valparaíso. Internet piracy is growing quickly, now exceeding the hard goods problem significantly, as legitimate sales of physical product decline. There were over 8.36 million Internet users in Chile in

---

<sup>2</sup>BSA’s 2010 statistics are preliminary, representing U.S. software publishers’ share of commercial value of pirated software in Chile. They follow the methodology compiled in the Seventh Annual BSA and IDC Global Software Piracy Study (May 2010), <http://portal.bsa.org/globalpiracy2009/index.html>. These figures cover packaged PC software, including operating systems, business applications, and consumer applications such as PC gaming, personal finance, and reference software – including freeware and open source software. They do not cover software that runs on servers or mainframes, or routine device drivers and free downloadable utilities such as screen savers. The methodology used to calculate this and other piracy numbers are described in IIPA’s 2011 Special 301 submission at [www.iipa.com/pdf/2011spec301methodology.pdf](http://www.iipa.com/pdf/2011spec301methodology.pdf). BSA’s final piracy figures will be released in mid-May, and the updated US software publishers’ share of commercial value of pirated software will be available at [www.iipa.com](http://www.iipa.com).

2010 (according to [www.internetworldstats.com](http://www.internetworldstats.com)), but the market for digital music is nearly out of reach for the recording industry. Internet piracy is estimated at 90% of all music consumption in the country. The majority of legitimate music sales over the Internet are downloaded to smart phones. IFPI Chile reports that the recording market for physical copies in Chile suffered a decrease of 1% in 2010. In turn, digital sales increased by 18% mainly due to “mobile” music consumption. Digital sales to computers continue to be heavily affected by piracy, especially via P2P exchanges and links posted on blog, social, and forum websites.

The most common form of Internet piracy is the exchange of illegal files through P2P networks (especially ARES, Gnutella and Limewire) and links to cyberlockers containing infringing content posted on social sites such as Chilecomparte. 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. During 2010, ESA vendors detected more than one million connections by peers participating in unauthorized file sharing of select member titles on P2P networks through ISPs located in Chile.<sup>3</sup> Breakdowns by ISP show that Terra Networks Chile S.A. and VTR Banda Ancha S.A. subscribers account for approximately 65% of this activity occurring in Chile.

The recording industry estimates that about 25% of all downloading and burning is done in Internet cafés. It is addressing this problem by working with local cyber-crime units to raid Internet cafés contributing to illegal downloads, and is considering alternative actions against individual uploaders.

Another growing problem is the cyber links posted on forums and social sites. A clear example of this is the site “Chilecomparte,” one of the most popular social communities on the Internet in Latin America, which allows registered users to post and exchange thousands of music files. Three years ago, IFPI Chile submitted the case to the competent authorities for criminal investigation; the Special Prosecutor’s Office has not pursued it. Today Chilecomparte remains the biggest threat to the music industry in Chile because of the thousands of illegal music links posted in its musical communities.

Camcord piracy: In 2008, the Motion Picture Association (MPA) also saw the first pirated videos to originate from illegal filming in Chilean movie theaters. Known as camcord piracy, this activity was the subject of trainings subsequently conducted for cinema employees on how to spot illegal camcording among moviegoers. MPA is currently supporting a case against an individual arrested in 2009 for camcording in a Chilean theater.

The independent film and television segment of the motion picture industry (IFTA) reports that online and physical piracy remains a significant export constraint for independent producers and distributors, the majority of which are small- to medium-sized businesses. Independent producers partner with local authorized distributors to finance and distribute their films and programming. These authorized distributors find it almost impossible to compete with the pirates. Producers and distributors confirm that DVD sales have been particularly impacted since pirated digital copies are offered for free online and with the same quality viewing experience as a DVD. Unable to compete with free, legitimate distributors are unable to commit to distribution agreements or offer drastically lower license fees which are inadequate to assist in financing of independent productions.

## COPYRIGHT LAW ISSUES IN CHILE

A much anticipated set of amendments to the copyright law went into effect in May 2010, addressing two areas of high importance to rights holders: ISP liability and deterrent criminal penalties. The ISP liability provisions of the new legislation provide a mechanism for a voluntary notice system, and rights holders are monitoring how this system will be tested in the courts. Judicial review requirements for the ultimate removal of infringing content have the potential to undermine the effectiveness of the law. Unfortunately, in other key areas, the legislation was a step backward in efforts to bring copyright protection and enforcement in Chile into the digital era. Also, while maximum

---

<sup>3</sup>These figures do not account for downloads that occur directly from hosted content, such as games found on “one-click” hosting sites, which appear to account each year for progressively greater volumes of infringing downloads.

criminal penalties for repeat offenders were increased to deterrent levels, minimal levels are still available and continue to be favored by Chilean judges. The law establishes a number of exceptions and limitations to copyright that could undermine important copyright protections, and fails to resolve gaps in copyright protection and enforcement in areas including *ex parte* searches and statutory damages. Provisions for the protection of TPMs have not been adopted. Finally, government software legalization has not been adopted. Given each of these shortcomings, Chile is not in compliance with its FTA obligations.

The U.S.-Chile FTA:<sup>4</sup> Since the U.S.-Chile FTA went into force on January 1, 2004, Chile has failed to meet the bulk of its obligations that were due under a series of transition period deadlines, all of which have passed. Each of the following obligations remains outstanding:

- Provide adequate protection to temporary copies (Articles 17.5.1 and 17.6.1).
- Adopt effective provisions on limitations of liability for ISPs and efficient notice and takedown measures (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).
- Provide for the protection of technological protection measures (TPMs) and enforce anti-circumvention provisions against circumvention, including preparatory acts (Required by FTA Articles 17.7.5.a and c, as well as the WIPO Internet Treaties).

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>5</sup>

Copyright law reform adopted in 2010: Chile has been working on legislation to amend its copyright law since 2007 to address some (but far from all) of the FTA issues cited above. Local copyright industry representatives repeatedly raised concerns with Chilean officials and Members of Congress over the years that followed, yet the text originally drafted by the Ministry of Culture moved through the Senate and the House largely unimproved. The Constitutional Court approved amendments to the Chilean Copyright Law on March 31, 2010. The amendments entered into force as Law No. 20.435 upon publication in the Official Journal, dated May 4, 2010. As adopted, the amendments contain significant gaps in the following areas:

- ISP liability: Chile's copyright law as amended creates a "notice plus notice" architecture for hosted content that lacks the threat of any real consequences for typical online piracy, falling short of the "notice and takedown" procedures required by the FTA (the taking down of material is currently only possible with court involvement). It also fails entirely to deal with piracy over P2P networks, a prevalent form of piracy in Chile. Specifically:
  - Chapter III on "Internet Service Providers Limited Liability Provisions" generally tracks the safe harbors in the FTA (articles 85-L to 85-N). However, the new law requires that ISPs have "effective knowledge" before voluntarily removing infringing content – and under Article 85-N such knowledge must be based on notification from a court of law rather than from a right holder. This structure

---

<sup>4</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).

<sup>5</sup>Past IIPA Special 301 submissions have detailed the history of Chile's FTA implementation, and are available at <http://www.iipa.com/countryreports.html#C>.



severely limits the possibility of the voluntary cooperation between ISPs and rights holders that is needed for an effective response to online piracy.

- Article 85-O requires ISPs to have a contractual policy to cancel the subscriptions of infringers, 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 is unlikely to have any deterrent effect.
- Article 85-U requires ISPs to inform subscribers of notifications from rights holders within five days of receipt, but the law fails to ensure compliance with this notification requirement through any incentives or penalties.
- No civil *ex parte* remedy or statutory damages: No provisions are included to strengthen the civil *ex parte* search remedy, nor are there any provisions establishing statutory damages.
- Overbroad exceptions to protection: The law as adopted contains certain exceptions that appear to be incompatible with the FTA. For example, provisions on reverse-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 is not restricted to achieve interoperability (which is the FTA standard). Exceptions involving libraries could allow libraries to reproduce entire works in digital form without any restrictions on further use, reproduction or distribution. Finally, all enumerated exceptions and limitations to Chile's copyright provisions must be consistent with the three-step test set forth in the FTA, ensuring that exceptions and limitations are not overbroad.<sup>6</sup>
- Low minimum criminal sentences: As adopted, the amendments achieve new maximum prison sentences and fines, which can reach US\$140,000 (2,000 *Unidades Tributarias Mensuales* ("UTMs")) for repeat offenders. The law does not, however, increase the minimum sanctions for infringements. As a result, the copyright industry fears that most judges, who usually apply only the lower limits, will continue to apply these low levels of sanctions. Efforts in 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.
- No protection for Technological Protection Measures: Rights holders remain extremely disappointed that Chile continues to ignore its obligation under Article 17.5 of the FTA to provide adequate legal protection for TPMs used to control access or otherwise restrict unauthorized acts with respect to a protected work.

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 ENFORCEMENT IN CHILE

The copyright industries report good cooperation with Chilean criminal and civil enforcement authorities. However, additional resources are needed to raise street actions to an effective level, and increased attention on the part of the judiciary is needed to follow through on the positive efforts of the Carabineros and Civil Police. Authorities need to take enforcement actions with greater frequency against Internet sites distributing infringing products. Prosecutions for copyright crimes are too infrequent and rarely result in deterrent sentencing, and civil actions face procedural obstacles and delays.

---

<sup>6</sup>Specifically, Article 17.7(3) of the U.S.-Chile FTA provides that "Each Party shall confine limitations or exceptions to rights to certain special cases which do not conflict with a normal exploitation of the work, performance, or phonogram, and do not unreasonably prejudice the legitimate interests of the right holder."

Along with the priorities found in the Executive Summary, IIPA highlights these additional recommended enforcement actions for 2011:

- Instruct the police (Carabineros) to give priority to copyright anti-piracy actions, especially in the cities of Santiago, Iquique, Concepción, and Valparaíso.
- Instruct the civil police and administrative authorities to take actions prohibiting the sale of pirated materials in the streets of major cities.
- Assign more resources to the cyber-police departments of Carabineros and Civil Police in order to double the number of Internet anti-piracy actions.
- Create a coordination authority in the Finance Ministry in order to coordinate all efforts against Copyright Piracy in the country, especially among customs, international airports, seaports, border areas (free-zones), and private sector organizations.
- Pursue more prosecutions and impose deterrent-level criminal sentences.
- 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 CDRs and DVD-Rs, and create an approved importers' register.

**Public-private cooperation:** 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 a forum for rhetorical discussions. In particular, CONAPI failed to address the concerns of the copyright industries in the recent Intellectual Property Law reform, and does not adequately address the Internet Piracy problem.

**Inadequate civil *ex parte* actions and slow civil cases:** Inadequate preparation and training on intellectual property issues for many judges and their staff remains a major problem, along with weak civil provisions. Although the problem has diminished slightly over the years, there is much room for improvement to raise the capacity of the judiciary to understand the nature of copyright cases. 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.

BSA continued to bring only civil actions in Chile last year, conducting almost 50 actions in 2010. Civil *ex parte* actions are a critical remedy for the business software industry. BSA reports that in 2010, Chilean judges continued to improve their response to civil complaints and accepted more BSA requests for *ex parte* raids, which 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, where target companies may learn about a search request before the inspection takes place. This notice violates TRIPS Article 50, and it undercuts the effectiveness of the remedy. BSA continues to move forward on this issue and is hopeful that with the new copyright law, the judges (including the judicial police's IPR branch, BRIDEPI) are improving their understanding of IP issues and software piracy specifically.

**Criminal anti-piracy enforcement:** There are three 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. However, raids are limited to requests from rights holders. Second, the IPR prosecutor's office is not dedicating the time and resources to understand and build Internet piracy cases, while the National Prosecution Office lacks a special branch to investigate intellectual property cases. Finally, even with higher penalties available under the 2010 amendments, judges continue to impose

the minimum available penalties, which are not deterrent. Under the new Chilean Criminal Procedure System, judges continue to follow the principle of *in dubio pro reo* ("when in doubt, for the accused"), typically preferring the lower of the range of penalties. Compounding the problem, the Criminal Procedures Code and the Penal Code treat copyright piracy as a misdemeanor, empowering prosecutors to enter into agreements with the accused to effectively substitute community services and a probationary period for criminal penalties. The General Attorney's office needs to prioritize copyright cases and instruct prosecutors to file criminal charges in important infringement cases.

The recording industry has an active criminal anti-piracy campaign in Chile, but reports disappointing results in 2010. The recording industry's anti-piracy group (IFPI Chile) assisted the police last year and reports that hard goods raids continue to be focused in Santiago and Valparaiso. Most of these raids are requested by the industry rather than being initiated by the local authorities. 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 the direct participation of IFPI. The police are taking *ex officio* actions in cases of street piracy and some laboratories. Customs also works on its own but eventually requests a complaint from the right holders. The recording industry reports that 177 raids on physical piracy were carried out during the year (slightly more than the previous year), and 296,340 pirate copies along with 2,010 CD/DVD burners were seized in the operations. However, police operations rarely result in the arrest of responsible individuals and almost never in effective prosecutions. One individual was arrested and only two individuals were convicted in 2010 for music piracy. These figures reflect the very weak attention of Chilean authorities to the piracy problem.

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, but obtaining follow-through by prosecutors remains difficult. During 2010, through the efforts of IFPI Chile, a total of 143,231 infringing cyberlocker links, 1,991 P2P links and 1,029 forums post were removed. 457 pirate products were also removed from virtual auction sites and 2,318 pre-release music files were removed. As with physical piracy, the industry hopes to continue fighting piracy through local teams. The Specialized Prosecutor's Office continues to show very little interest in prosecuting the social site Chilecomparte for its dedicated pirate music and video components, despite the fact that Chilecomparte is the biggest local online source for unauthorized distribution of pirate music.

The entertainment software industry indicates that [www.h2zone.cl](http://www.h2zone.cl), which is hosted in Chile, is a leading purveyor of circumvention devices, such as game copiers and mod chips. Because Chile lacks adequate legal protection for TPMs, remedies against such distributors are unavailable. Unfortunately, the easy availability of circumvention devices serves as a catalyst for further online piracy, as such devices are needed for games illegally downloaded from the internet to play on a game console.

ISP cooperation: With respect to online hosted infringing content, the recording industry reports that the voluntary notice procedures implemented in the recent copyright law amendments are working adequately to foster cooperation between rights holders and ISPs in cases where content is hosted on the ISP's server. These provisions have just begun to be tested with the first wave of notifications in early 2011, and the willingness of enforcement authorities to reinforce ISP cooperation will be crucial in this effort. In the meantime, no cooperation from ISP's is provided against P2P exchange.

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 in 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: The copyright sectors stand ready to provide trainings to Chilean enforcement personnel. Specifically, BSA has twelve years of experience conducting software anti-piracy actions in Chile and is prepared to work with the competent authorities there to combat copyright infringement. The local music recording industry group, IFPI Chile, regularly participates in training seminars for Carabineros and the Civil Police.

# COSTA RICA

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2011 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: IIPA recommends that Costa Rica be elevated to the Priority Watch List in 2011, primarily motivated by the unprecedented action on the part of Costa Rica to roll back existing protection for performers and record labels, and to replace a regime based on national treatment with a discriminatory one.

Executive Summary: Most disappointingly, the government has taken several recent actions that 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. The newly elected president, Laura Chinchilla, has maintained the same poor level of cooperation with industry as characterized the previous government. As an FTA partner of the United States within the CAFTA-DR, Costa Rica should be held to a high standard of effective copyright enforcement.

The single largest obstacle that the copyright industries face in developing an effective anti-piracy campaign in Costa Rica is the lack of enforcement action, particularly on the part of prosecutors. Many criminal procedures and sanctions were amended in 2008 to facilitate prosecutions, and rights holders are hopeful that the newly appointed Attorney General will follow-through with a more proactive IP enforcement stance. Creation of a specialized IP Prosecutor's Office is long overdue. No progress was made on implementing government-wide software legalization, as required by CAFTA-DR.

### PRIORITY RECOMMENDED ACTIONS FOR COSTA RICA IN 2011:<sup>1</sup>

- Withdraw bill No. 17,719, which implements reservations to international obligations that would result in denying compensation to US performers and record labels, and creates a new exception to performance rights for commercial broadcasters.
- Pass pending legislation to amend the *Ley de Observancia* in order to clearly provide criminal remedies for violations of neighboring rights
- The newly appointed Attorney General should sponsor legislation necessary for the creation and support of a new specialized IP Prosecutor's Office.
- Implement in practice the software asset management practices in government agencies called for in the 2002 Decree and required by CAFTA-DR.
- 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).
- Work with rights holders on developing legislation on the remaining CAFTA issue – implementation of liability of Internet Service Providers (ISPs) – an issue that is still subject to transition.

---

<sup>1</sup>For more details on Costa Rica's Special 301 history, see IIPA's "History" appendix to this filing at <http://www.iipa.com/rbc/2011/2011SPEC301HISTORICALSUMMARY.pdf>, as well as the previous years' reports, at <http://www.iipa.com/countryreports.html>. For a summary of IIPA's 2011 global issues, see our cover letter at <http://www.iipa.com/pdf/2011SPEC301COVERLETTER.pdf>.



- Oppose pending legislation that would impose a series of financial duties on 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, particularly in the form of optical disc (OD) piracy. The level of OD piracy is approximately 60%, which represents over 1 million illegal units sold every year in this relatively small market. Much of this OD piracy involves local CD-R burning. The downtown San Jose area, in particular, is the site of uncontrolled distribution and sale of burned CDs on the streets and in flea markets. 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. Local experts estimate that approximately 20 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, the PC software piracy in Costa Rica is among the lowest in Latin America, at an estimated 59% according to preliminary 2010 data. This low level, however, is due more to cultural reasons 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 the commercial value of pirated U.S.-vendor software in Costa Rica is US\$20 million for 2010.<sup>2</sup>

**Internet piracy:** Internet piracy, as everywhere else in the region, is a growing problem in Costa Rica. There are about 2 million Internet users in Costa Rica, about 44.3% of the population in 2009 (according to [www.internetworldstats.com](http://www.internetworldstats.com)). As Costa Rica continuously achieves wider access to the Internet, its attention to online enforcement will become more important. With more home and business users online, access to pirated products being sold for download or ordered in hard copy from the Internet will continue to rise.

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. 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 ISPs regarding internet piracy on their networks. Costa Rica still has a transition period under CAFTA to address ISP liability matters, but needs to take action in the near term to get ahead of growing online piracy.

## COPYRIGHT AND LEGAL ISSUES IN COSTA RICA

Recent reservations to two treaties and pending legislation affecting the recording industry: The main source of concern for the music industry in Costa Rica is the government's August 2009 action to adopt

---

<sup>2</sup>BSA's 2010 statistics are preliminary, representing U.S. software publishers' share of commercial value of pirated software in Costa Rica. They follow the methodology compiled in the Seventh Annual BSA and IDC Global Software Piracy Study (May 2010), <http://portal.bsa.org/globalpiracy2009/index.html>. These figures cover packaged PC software, including operating systems, business applications, and consumer applications such as PC gaming, personal finance, and reference software – including freeware and open source software. They do not cover software that runs on servers or mainframes, or routine device drivers and free downloadable utilities such as screen savers. The methodology used to calculate this and other piracy numbers are described in IIPA's 2011 Special 301 submission at [www.iipa.com/pdf/2011spec301methodology.pdf](http://www.iipa.com/pdf/2011spec301methodology.pdf). BSA's final piracy figures will be released in mid-May, and the updated US software publishers' share of commercial value of pirated software will be available at [www.iipa.com](http://www.iipa.com).

reservations to the two international treaties protecting neighboring rights (Article 12 of Rome Convention and Article 15.1 of the WIPO Performances and Phonograms Treaty (WPPT)). Those reservations effectively exempt broadcasters from performance rights payments to recording artists and record companies. The Ministry of Culture did not engage the copyright sectors to participate in these legislative initiatives that will have a significant impact on the market for rights holders. In May 2010, the Chinchilla Government published an Executive Decree implementing the reservations into Costa Rican law, despite the President's statements earlier that year that she intended to reverse the reservations. The music industry's business model is transitioning from sale of hard goods to the licensing of transmissions, and removing existing rights to be remunerated for the transmission of music could not be more poorly timed. The Costa Rican Government should make every effort to ensure that performers and producers are being remunerated for the commercial exploitation of their music, and the United States should strenuously object to the introduction of practices that discriminate against U.S. interests.

Legislation has been introduced to codify the contents of this Executive Decree. In October 2009, Bill No. 17719 was presented that would "regulate the promotion and broadcast of musical works and performances of Costa Rican artists and authors by broadcasters." The legislation amends 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. In an environment in which the licensing of signals is largely replacing the sale of recorded music, the government of Costa Rica should reverse these limitations, which will have a very prejudicial impact on Costa Rica's music community.

CAFTA implementation: Costa Rica has yet to fully implement its IPR obligations under the CAFTA-DR. In 2000, Costa Rica amended its 1982 Copyright Law to comply with certain obligations under the TRIPS Agreement and the WIPO Internet treaties (WIPO Copyright Treaty and WIPO Performances and Phonograms Treaty). 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.

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 Rica had \$1.17 billion in exports to the U.S. under the CAFTA-DR. Meanwhile, two important areas among Costa Rica's FTA obligations still need to be addressed.

Internet piracy measures: Costa Rica is obligated to adopt, within 30 months of the FTA entry into force (i.e., July 1, 2011), provisions on the liability for ISPs, including notice and takedown provisions (CAFTA Article 15.11.23). Transparency in the development of the implementing legislation will be crucial to rights holders.

Government software asset management not completed yet: Government legalization of software is a CAFTA obligation that was due upon CAFTA's entry into force. The Costa Rican government commenced efforts on this issue in 2002 with a Government Software Legalization Decree. In 2007 BSA was informed that the National Registry's Copyright Office was receiving data from other government agencies about their software inventories, but the government has made no further progress in implementing the decree.

The Law on Enforcement (*Ley de Observancia*): Amendments to the Law on Enforcement (Law No. 8656 of 11 August 2008 amending Law. No. 8039 of 12 October 2000) went into force in 2010. These provisions address a number of elements of the 2000 law, *Ley de Procedimientos de Observancia de los Derechos de Propiedad Intelectual*, that were not TRIPS-compliant and were impediments to effective enforcement. This law addressed the following CAFTA points in a generally positive manner:

- Ex officio: Provides *ex officio* authority for police to conduct investigations on their own initiative.

- Anti-circumvention: Provides protection and remedies against the circumvention of technological protection measures (TPMs).
- RMI: Provides for protection of rights management information (RMI).
- Statutory damages: Provides for pre-established damages (statutory damages) in civil judicial proceedings.
- Satellite signals: Provides criminal sanctions regarding encrypted program-carrying satellite signals.
- Other civil remedies: Provides civil remedies, including seizures, actual damages, court costs and fees, destruction of devices and products.
- Injunctive relief: The law includes other provisions involving injunctive relief, destruction of infringing materials and equipment, and border measures.

Unfortunately, other key elements of the 2008 amendments were not welcome. Weak implementation of the revised criminal penalties has caused the most concern. The 2008 amendments revised the criminal sanctions for copyright and industrial property infringement, but left many questions about their effectiveness in practice.

- First, the level of fines for criminal copyright piracy was generally raised for most infringing acts but the jail terms were lowered in some cases. For example, the new law actually reduces the minimum penalty from one year down to two months, for certain cases. IIPA and its members had hoped, by contrast, that deterrent level sentences at a minimum of three years would be imposed in practice.
- Second, the provisions provide for fines in the alternative of criminal sentences, allowing judges the discretion to choose fines rather than jail terms, which, not surprisingly, they often do.
- Third, the new Article 55 includes a complicated four-step provision, linking the amount of the damages to the level of penalty; however, nowhere does the law explain how judges will calculate damages in piracy cases.
- Fourth, the amendments do not explicitly put a stop to the common judicial practice of suspending low sentences.

Apart from the lack of political will by prosecutors, several other legal deficiencies have contributed to the problems with poor copyright enforcement in Costa Rica through 2010. 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 police with full *ex officio* authority. Unfortunately, rights holders must still file a complaint (*denuncia*) in order to get a criminal prosecution.
- The objectionable "insignificance principle" ("*principio de lesividad e insignificancia*") was not removed from the Criminal Procedural Code so that it would no longer apply to intellectual property infringements.
- Businesses engaged in piracy operations should be closed.

## MARKET ACCESS CONCERNS

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 before the International Affairs and Foreign Commerce commission at the Legislative Assembly. Although recording industry activity in Costa Rica is low, the industry opposes this bill because it would become an obstacle for labels (both majors and independent) to record locally.

## COPYRIGHT ENFORCEMENT IN COSTA RICA

IIPA and its members have encountered 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 policy adopted by the Attorney General not to 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. The national police and prosecutors are responsible for the anti-piracy actions in Costa Rica. The business software industry continues to have anti-piracy operations in Costa Rica, but there are few to no results to report. Beyond the major problem at the prosecutorial level, enforcement authorities lack equipment (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 raided and 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, or to initiate prosecution.

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. Unfortunately, these actions have not had any impact on the piracy levels due to a lack of intensity in the raids. The recording industry reports that, in 2010, eight raids were carried out, resulting in about 8,000 music seizures (mostly CD-R) seizures. BSA is not aware of any pirated business software being seized in such raids.

The need for prosecutorial attention to copyright crimes: There are two main impediments to effective criminal enforcement in Costa Rica. First, the prosecutors have very negative attitudes toward pursuing copyright cases. Second, government agencies lack the resources necessary to conduct any kind of effective anti-piracy campaigns.

The recording industry has faced roadblocks with the Office of the Attorney General such that no major prosecutions were conducted nor were convictions obtained. The lack of *ex officio* provisions in the current law further impedes any anti-piracy activities. Rights holders continue to be stymied in bringing criminal complaints due to legal determinations of "insignificance of the crime," upon which cases are simply dropped. As a result of the serious deficiencies in copyright enforcement, no convictions in music cases were issued during 2010, and BSA did not seek any criminal actions in 2009.

Procedural delays in criminal cases could be avoided if court officials were to order *ex parte* raids based exclusively on sufficient evidence offered by private plaintiffs, as allowed by the Criminal Procedural Code. Indeed, 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.

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. This practice violates plaintiffs' right to due process, and jeopardizes the success of the action by removing experts who could otherwise provide prosecutors with valuable technical assistance to determine whether an infringement has occurred. Criminal judges should accept the information and evidence offered by private plaintiffs, and order the raid if such information and evidence is sufficient, without requesting prior investigation reports, consistent with Costa Rican legislation.

In addition, long delays in copyright enforcement cases have been a historically serious problem. Several months typically pass 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. Given the significant delays and observed lack of proficiency of prosecutors and judges, the creation of this special office remains a pressing priority. The industries hope that the newly appointed Attorney General, Jorge Chavarria, will push forward legislation to allocate funds and create this office.

**Inadequate civil remedies and long delays:** The civil courts in Costa Rica have practically collapsed; a simple procedure can take months or years, making pursuit of such cases impractical.

**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.

# INDIA

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2011 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: IIPA recommends that India remain on the Priority Watch List in 2011.<sup>1</sup>

**Executive Summary:** India has the potential to be a leading market for the creative industries – both foreign and domestic. The country produces the greatest number of films in the world (1,288 full-length feature films, and a staggering 2,961 films overall), boasts a creative and diverse music market, a prolific publishing industry (70,000 titles in 2009), and a vibrant software market. Key economic studies (including by international organizations like UNCTAD and the Motion Picture Distributors Association) indicate that growth will continue. However, piracy stifles the market and keeps India's creative industries from reaching their potential. Nearly two out of every three software applications is unlicensed. The legitimate music market shrank over 23 percent between 2006 and 2009, according to the Indian music industry group, IMI. Physical piracy displaces legitimate sales. Illegal camcording of movies off the screens in India and pay TV theft rob creators of their due. Print and photocopy piracy continue to hinder the development of the trade and educational publishing markets in India. Increased Internet access and mobile penetration translate to growth in illegal downloads as well as mobile device piracy allowing rampant digital piracy of copyright materials.

The Indian Government, particularly in some localities, has taken some important measures to combat copyright infringement, yet more needs to be done given the scope of the problem. The Indian Government must be more proactive in addressing the concerns of industries which by any measure contribute significantly to India's GDP (for example, it is estimated that software and services industries alone accounted for nearly 5% of the entire Indian GDP in 2008, according to NASSCOM). IIPA welcomes the Indian Government's announced initiative to develop a national IPR policy and to engage with industry stakeholders in this process. It is critical that this effort lead to better coordinated, national government level efforts to bolster IP enforcement. State nodal officers have been established throughout India, but to IIPA's knowledge, they do not take sufficient numbers of *suo-moto* raids (without complaint) to deter physical piracy. Cases that reach the court system experience significant delays in adjudication, usually resulting in non-deterrent fines or sentences. While the current law creates an adequate basic structure for copyright protection, it needs modernization. In this regard, the Copyright Bill 2010 put forward to implement the WCT and WPPT, and make other changes, contains some serious deficiencies that need to be addressed. To achieve Prime Minister Manmohan Singh's call for India to experience a "decade of innovation," the Government of India will have to develop the political will to support creativity and innovation as a driver of economic development for the country, and pass and implement in practice adequate laws for copyright protection.

Priority actions to be taken in 2011:

### Enforcement

- Create a national anti-piracy task force with goals to reduce piracy, *inter alia*, by working with State nodal officers, providing them with significantly increased resources; provide more accountability and power to the recently constituted task force by FICCI under the aegis of the Ministry of Human Resource Development (MHRD).
- 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, including against corporate end-user software piracy.

<sup>1</sup> For more details on India's Special 301 history, see IIPA's "History" appendix to filing at <http://www.iipa.com/pdf/2011SPEC301HISTORICALSUMMARY.pdf>. Please also see previous years' reports at <http://www.iipa.com/countryreports.html>.



- Encourage judicial reform, including accelerating the adjudication process in criminal and civil cases, and imposing deterrent fines and imprisonment; and establish specialized IP courts, judges, and prosecutors.
- Legalize use of books and journals at educational institutions.
- Empower customs to effectuate *ex officio* seizures, followed by destruction, of pirate goods.

#### Legislation

- Ensure the Copyright Bill 2010 contains WCT- and WPPT-consistent protections, and takes into account right holders' comments to the Standing Parliamentary Committee.
- Adopt effective anti-camcording provision, either as part of Copyright Bill or as standalone bill.
- Adopt statutory damages in civil cases; allow restitution to be awarded in criminal cases; and establish enhanced penalties for "pre-release" piracy.
- Reject attempt to recast unauthorized imports as non-infringing, as would result from the proposed revision of Section 2(m).
- Adopt an optical disc law.

#### Market Access

- Eliminate market access barriers, including those imposed on motion pictures, entertainment software and business software.

## PIRACY AND ENFORCEMENT UPDATES IN INDIA

IIPA's previous reports describe in detail various piracy and enforcement issues in India and the harm caused to the U.S. content industries. The following provides updates on ongoing and new issues over the past couple of years.

**Retail Piracy:** The retail trade in pirated hard goods continues to harm the content industries in India. Pirate optical discs remain available openly in major cities, including music, movies, software, and PC ("burned") and console (factory) videogames.<sup>2</sup> 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).<sup>3</sup> 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. There is almost no legitimate rental video market in India, since cottage pirate rental video stores dominate the market. The harm to the motion picture industry due to piracy of films has been well documented, but in Mumbai, DVD piracy at the street vendor level declined due to continual enforcement activities by the Alliance Against Copyright Theft (the Bollywood-Hollywood anti-piracy coalition) and law enforcement.<sup>4</sup> In 2010, AACT was involved in 301 hard goods (DVD) raids in Mumbai and 19 hard goods (DVD) raids across Northern India. 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.

Industry's relationships with law enforcement remained good in 2010, with law enforcement generally willing to conduct complaint-based raids, but not *suo-moto* raids. The music industry reports physical piracy remains serious

---

<sup>2</sup> There were reportedly 36 OD factories in India as of 2009. In recent years, draft optical disc legislation emerged, but a major company in India, Moser Baer, which owns an OD factory in India, opposes the inclusion of blank disc licensing in such a law. Imports of pirate discs, from Malaysia and other Asian countries, also continue to be a problem. The predominant form of optical disc piracy in India is burned recordable 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.

<sup>3</sup> The industry reports that "mod chip" to modify consoles for pirate game play are generally imported from the Middle East and China and sell for around Rs.200 (US\$4.39) to Rs.700 (US\$15.35) per chip.

<sup>4</sup> 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.

with overall seizures in the millions, including some drops in seizures of MP3 discs in the Northern and Southern zones.<sup>5</sup>

**Corporate End-User Piracy of Business Software:** Corporate end-user software piracy – the unauthorized use of software by businesses and organizations – causes by far the largest losses to the U.S. software industry in India. Preliminary estimates by research firm IDC indicate that 64% of PC software deployed in 2010 in India was unlicensed, with the commercial value of such pirated software for U.S. vendors amounting to more than US\$1.05 billion.<sup>6</sup> This represents only modest progress since 2007 when the PC software piracy rate was 69%. Reducing piracy in India would bring benefits to the local economy. A 2010 study done by IDC, sponsored by BSA, entitled *Piracy Impact Study: Economic Benefits of Reducing Software Piracy*, found that decreasing India's PC software piracy rate by ten points over four years would deliver US\$4.7 billion in GDP, \$512 million in tax revenues and nearly 60,000 new IT jobs. The benefits would be even greater if the 10 point reduction was achieved in two years, yielding \$6.1 billion in GDP and \$676 million in tax revenues.

The Business Software Alliance reports continued good relationships with local enforcement authorities in 2010, with especially positive cooperation in the states of Punjab, Delhi, and Maharashtra,<sup>7</sup> and also with the Central Bureau of Investigations (CBI) & Indian Customs. As with retail piracy, police usually act upon the filing of a criminal complaint, but lack the capacity, training, and manpower to institute *suo-moto* cases and investigations. The civil end-user enforcement program relies upon *Anton Piller* orders from the courts to preserve the element of surprise and ensure that evidence is preserved. In 2010, BSA conducted 32 civil actions. BSA also notes greater levels of awareness among the Central Government and certain state governments about software piracy and a greater willingness to collaborate on programs to address this challenge. Specifically, BSA was invited to conduct two workshops on effective software asset management (SAM) within government organizations by the Ministry of IT in 2010 and has been invited to recommend guidelines to better manage the department's software assets. BSA also launched a first ever SAM/legalization program for state-owned enterprises with the support of the State Government of Karnataka, launched a program for the State of Andhra Pradesh with the positive support of that State Government, and in January 2011, initiated SAM and legalization trainings for departments of the State Government of Gujarat upon request.

**Camcording Piracy:** Camcording piracy has emerged in India as a harmful activity to both Hollywood and Bollywood (as well as Tollywood - Telugu films, and Kollywood - Tamil films).<sup>8</sup> In September 2009, a major initiative commenced to train theater employees and increase enforcement against camcording piracy, given the 16 forensic matches traced back to cinemas in India in 2009. Unfortunately, the number of unauthorized camcords in cinemas went up to 25 in 2010. The cooperation of the Indian industry with U.S. industry will hopefully spur passage of anti-camcording legislation and more enforcement against such illegal and harmful activity.<sup>9</sup> There was only one

---

<sup>5</sup> The numbers, compiled by the music industry group, IMI, reveal a dramatic up-tick in pirate DVD seizures in Tamil-Nadu, but drops on other regions of the country. Numbers of raids remained nearly constant year-on-year between 2009 and 2010.

<sup>6</sup> BSA's 2010 statistics are preliminary, representing U.S. software publishers' share of commercial value of pirated software in India. They follow the methodology compiled in the Seventh Annual BSA and IDC Global Software Piracy Study (May 2010), <http://portal.bsa.org/globalpiracy2009/index.html>. These figures cover packaged PC software, including operating systems, business applications, and consumer applications such as PC gaming, personal finance, and reference software – including freeware and open source software. They do not cover software that runs on servers or mainframes, or routine device drivers and free downloadable utilities such as screen savers. The methodology used to calculate this and other piracy numbers are described in IIPA's 2011 Special 301 submission at <http://www.iipa.com/pdf/2011spec301methodology.pdf>. BSA's final piracy figures will be released in mid-May, and the updated U.S. software publishers' share of commercial value of pirated software will be available at <http://www.iipa.com>.

<sup>7</sup> In the IIPA 2010 report on India, we reported that BSA had successfully partnered with the state of Karnataka in executing a software asset management (SAM) program, including recognizing companies for their compliance efforts, and that the state of Maharashtra also launched an educational and awareness program directed at companies in December 2009.

<sup>8</sup> The independent film industry notes that camcording is particularly damaging in India because it has fueled physical and online piracy, negatively impacting worldwide distribution and preventing the establishment of legitimate distribution.

<sup>9</sup> In November 2010, the City of Los Angeles and Indian producers made a Joint Declaration by which they agreed "to develop and strengthen motion picture production, distribution, technology, content protection and commercial cooperation between the two filmmaking communities." See Motion Picture Association, *Historic Cooperation Pact Between Hollywood And Bollywood: City of Los Angeles and Indian Producers To Encourage Joint Film Production and Commercial Cooperation*, November 10, 2010, at <http://www.mppda.in/press/Immediate%20Release%20-%20LAIndian%20Film%20Industry%20Joint%20Declaration%20signing.pdf>.

interdiction in 2010 involving an illegal recording on a cell phone, but no further action has been taken in that or other cases.

**Pirate Printing and Photocopying of Books and Journals:** Piracy of trade books, textbooks, professional books (scientific, technical, and medical), and scholarly journals continued to harm the publishing industry in India in 2010. Book piracy occurs in a variety of ways in the country: unauthorized photocopying, unauthorized compilations in the form of course packs, pirated re-prints of trade titles, and unauthorized and scanned copies of 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 on and around university campuses and in libraries, sometimes even condoned by the institutions. 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. Industry continues to wait, apparently in vain, for MHRD to issue a long-promised government order/circular to all educational and research institutions to combat illegal photocopying on university campuses.

**Internet and Mobile Piracy:** Development of the Internet was relatively slow in India despite universal appeal in the country. As a result, early on, Internet cafés were the primary method of accessing the Internet in India, with reportedly 180,000 in 2009, according to Internet Service Providers Association of India (ISPAI).<sup>10</sup> In recent years, home and business subscriptions from two incumbent phone companies/service providers, and from new entrants like Tata following the breakup of the duopoly, has meant rapid Internet growth, to 71 million by the beginning of 2010 (compared with 52 million in 2009). Broadband penetration has been much slower, but with development of ADSL in the country, there were an estimated 10.52 million broadband users as of October 2010.<sup>11</sup> Mobile penetration consists of a staggering 706.69 million wireless customers, but only two million users reportedly access the Internet via mobile phones due to slow download speeds and the relatively recent launch of 3G.<sup>12</sup>

Internet and mobile piracy causes increasing harm to all the copyright industries in India, via P2P filesharing, BitTorrents, cyberlockers, and auction sites.<sup>13</sup> For the motion picture industry, sites like tamilwire.com, moviesmobile.net, bharatmovies.com, tamilthunder.com, bwtorrents.com, desitorrents.com, tamiltorrents.net, doregama.in, dctorrent.com, hindilinks4u.net, and many others cause significant harm.<sup>14</sup> These sites feast on the demand for local language dubs of U.S. films as well as Indian films.<sup>15</sup> A study undertaken by MPDA has India among the top ten countries in the world for Internet piracy.<sup>16</sup> For the business software industry, Internet piracy takes the form of auction sites and sites offering unauthorized copies of software for download. The entertainment software industry continues to report an alarming rise in online piracy in India, including over eBay India which continues to be a primary point of auction sales of pirated PC games. The music industry reports that Internet piracy has grown and it is estimated that 95% of all such uses are unauthorized. They also report that mobile device piracy, in which retail establishments sell or offer for free flash cards or other storage devices for mobile phones preloaded with music to customers (sourced either from pirate or legitimate CDs or downloaded from pirate websites or through P2P filesharing services), remains a significant problem with similar piracy rates as those experienced in the online

---

<sup>10</sup> Harsimran Julka, *Indian Internet Users Grow to 71 Million: IMRB*, The Economic Times, March 20, 2010, at <http://economictimes.indiatimes.com/infotech/internet/indian-internet-users-grow-to-71-million-imrb/articleshow/5703745.cms>.

<sup>11</sup> Telecom Regulatory Authority of India, *Telecom Subscription Data as on 31st October 2010*, December 24, 2010, at <http://www.trai.gov.in/WriteReadData/traif/upload/PressReleases/780/PRcodiv24dec10.pdf>.

<sup>12</sup> See *supra* note 10.

<sup>13</sup> The independent film and television segment of the motion picture industry (IFTA) reports that Internet piracy remains a significant export constraint for independent producers and distributors, the majority of which are small to medium sized businesses. Independent producers partner with local authorized distributors in India to finance and distribute their films and programming. These authorized distributors find it almost impossible to compete with the pirates. Internet piracy also prevents the establishment of legitimate online distribution platforms and services for consumers, which independents can use to finance future productions.

<sup>14</sup> Pirate Internet sites are rarely hosted/operated in India. They are mainly hosted/operated in Indian immigrant countries.

<sup>15</sup> For example, Vishal Bharadwaj's *Kaminey* was downloaded a record number of times (estimated at 350,000 times) in India and abroad. The situation is equally bad for regional language films with 88 percent of Telugu and 80 percent of Tamil films being downloaded from the internet.

<sup>16</sup> See Motion Picture Distributors Association (MPA) (Prepared by PricewaterhouseCoopers), *Economic Contribution of Indian Film and Television Industry*, 2010, at <http://mpda.in/press/EconomicContribution.pdf>, at 10.

market. The Entertainment Software Association (ESA) reports that during 2010, ESA vendors detected 4.09 million connections by peers participating in unauthorized file sharing of select member titles on P2P networks through ISPs located in India, placing India eighth in overall volume of detections in the world.<sup>17</sup> Breakdowns by ISP show that National Internet Backbone (NIB), Bharti Broadband and Mahanagar Telephone Nigam Ltd. subscribers were responsible for approximately 82% of this activity occurring in India.

Internet enforcement is still nascent in India, and so far, voluntary notice and takedown is not working. The film industry has commenced a site blocking criminal action against 66 pirate websites. Under the criminal laws of Maharashtra, the industry is hopeful that the magistrates will issue such interim site blocking orders (until final adjudication) to ISPs if the operators of the pirate websites fail to show at the criminal proceeding. The domestic recording industry is working intensively with the Mumbai, Delhi and Hyderabad police on Internet piracy issues. A major problem has been locating pirate operating websites. The Indian music industry reported that while enforcement against mobile device piracy has improved, the problem continues to grow. The industry is bringing to the police more than 70 mobile device piracy cases per month. Without a statute dealing with online infringement and the role of ISPs, the industries have had limited success in having pirate content or online pirate services taken down.<sup>18</sup>

**Signal Theft and Public Performance Piracy:** Cable operators in India routinely “underdeclare” the number of subscriptions for which they are being paid, so they pay right holders in movies and television content substantially less than they are rightfully owed. Given the size of the Indian market, the loss to the industry from such levels of underdeclaration is huge, conservatively estimated (from 20% to 80% underdeclaration depending on the location) to be just over US\$1.1 billion in 2009. These practices result in substantial losses in tax revenue to the Indian states, and several of the states have begun complaining loudly about losses. In addition, public performance infringement, including video parlors in small- and medium-sized cities showing pirated film product in competition with legitimate theaters. Public performance piracy is also widespread also for the music and sound recording industry.

**Enforcement Through State Cells in India Could be Enhanced Through National Coordination:** The Indian Government, in its 2010 Special 301 Submission, indicated, “[e]nforcement Cells have been set by the state governments in their respective police headquarters. Nodal officers have been appointed by the state governments to handle IPR related offences.”<sup>19</sup> However, there is no Federal Government-led initiative to coordinate enforcement with and between the state governments. The state cells, first established in 2002, did not run significant numbers of *suo-moto* actions but the local music industry reports some police *suo-moto* raids against physical piracy. Raids are almost always complaint-based, and are usually small-scale, with some exceptions.<sup>20</sup> Each industry has its own experiences with the state authorities. The publishing industry reports that it has received relatively good cooperation from law enforcement authorities in a number of cities including Jabalpur, Gwalior, Delhi, Mumbai, and Kolkata. IMI reports that the cells that function most effectively are in Delhi, Tamil Nadu and Kerala. BSA reports that they work well with the cells in Delhi and Mumbai, as well as with those in Bangalore, Chennai and Hyderabad.<sup>21</sup> For the motion picture and record industries, the Punjab state government established a state cell with to proactively address video and audio piracy, and the collaboration with the local Indian film industry has also led to some joint enforcement work

---

<sup>17</sup> These figures do not account for downloads that occur directly from hosted content, such as games found on “one-click” hosting sites, which appear to account each year for progressively greater volumes of infringing downloads.

<sup>18</sup> In 2009, BSA sent over 1,500 takedown notices to ISPs and the IMI sent over 1,000, with only the occasional takedown.

<sup>19</sup> See Government of India, Ministry of Human Resource Development, Department of Higher Education, Copyright Office, *State – wise Nodal Officers for Enforcement of Copyright: List of the Nodal Officers nominated by States/UTs*, at <http://copyright.gov.in/frmStateWiseListNodalOfficers.aspx>. There was even an anti-piracy coordination cell launched in October 2010 by FICCI.

<sup>20</sup> One exception in 2009 involved a raid involving the largest ever seizure of pirated academic and scientific, technical and medical (STM) books in India. During the last quarter of 2009, a raid in Delhi against a printer, binder and distributor producing pirated academic and STM books revealed 80,000 prints and 124 negatives of a single publisher’s titles on hand. This led to raids on two warehouses belonging to the distributor, leading to at least 160,000 more suspected pirated titles. 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>21</sup> The Mumbai police have both a copyright cell, dealing with OD and other piracy, and a cybercrime cell which deals with software piracy. *Mumbai Police: Organization and Functions*, at [http://www.mumbaiipolice.org/%5Cspecial%5Corg\\_fun5.htm](http://www.mumbaiipolice.org/%5Cspecial%5Corg_fun5.htm).



in Mumbai.<sup>22</sup> BSA has urged specific states who have or are considering state specific anti-piracy legislation to ensure inclusion of software within the scope of the legislation. Submissions have been made to state governments of Delhi, Punjab, Tamil Nadu, and Maharashtra. The State Government of Delhi has so far been the most receptive and indicated that software would find a place in the proposed legislation. We would like to see this move forward in other states as well.

**Civil and Criminal Courts Largely Fail to Deter Piracy:** There remains a lack of overall deterrence in judicial enforcement in India, with some exceptions. Problems usually begin with the raid and lead all the way to final judgment in the courts. The Indian Government, in its 2010 Special 301 Submission, did not have recent statistics available but noted an overall trend of decreasing numbers of raids, arrests, and convictions for copyright violations. The government indicated no further information regarding raids which led to indictments, nor any information about penalties imposed.<sup>23</sup> Court procedures are mired in problems, including lack of training among prosecutors to bring piracy cases, very long delays (both criminal and civil cases, implicating TRIPS Articles 41, 41(2), 42 and 61),<sup>24</sup> occasional obstruction of the raid process or other irregularities,<sup>25</sup> and spoilage of evidence.<sup>26</sup> Police often fail to investigate links up the supply chain to the source of pirate production and investigations are often cursory.

While historically, there had been relatively few convictions for piracy, and mostly non-deterrent fines and no imposition of jail terms, in the past few years, the music industry has experienced some positive success with higher fines and settlement amounts, especially in Delhi.<sup>27</sup> It remains the case, however, that there has never been a criminal conviction for software or book piracy in India. The strongest remedy copyright owners have to date in India involves pretrial detention of up to one year under the Goondas Act, which has had copyright offenses added as a predicate offense in Tamil Nadu. State Governments in Punjab, Delhi and Maharashtra have been asked to include piracy of all forms of copyright products under the purview of the Goondas Act (although Maharashtra already includes “video piracy” in its existing Maharashtra Prevention of Dangerous Activities (MPDA) Act, under which second time offenders can be detained for 90 days without bail). This remedy, which provides a significant deterrent, should be employed in appropriately egregious circumstances.

While most industries rely on criminal enforcement to achieve deterrence, civil procedures can be useful for achieving enforcement objectives in India, depending on the industry. The business software industry has traditionally used civil litigation as the preferred enforcement route, given the difficulties in the criminal system, and given their reliance on interim injunctions and *Anton Piller* orders (e.g., there were 34 of these for BSA in 2009) to avoid spoilage of evidence and to retain the element of surprise.<sup>28</sup> The industry enjoys a very high success rate with respect to the grant of such orders at the Delhi High Court. Unfortunately, in 2010, such enforcement efforts have become much less effective due to judges imposing conditions on such orders.<sup>29</sup> Proper issuance of interim

---

<sup>22</sup> *Other States: Anti-piracy cell for Punjab*, February 27, 2009, at <http://www.thehindu.com/2009/02/27/stories/2009022752740300.htm>. See Sampurn Wire, *Anti-Piracy Raids Seize Close to 15000 Pirated Discs Mumbai Police Along With AA Khan and Associates Conduct Raids Across the City*, Thaindian News, May 13, 2010, at [http://www.thaindian.com/newsportal/entertainment/anti-piracy-raids-seize-close-to-15000-pirated-discs-mumbai-police-along-with-aa-khan-and-associates-conduct-raids-across-the-city\\_100363186.html](http://www.thaindian.com/newsportal/entertainment/anti-piracy-raids-seize-close-to-15000-pirated-discs-mumbai-police-along-with-aa-khan-and-associates-conduct-raids-across-the-city_100363186.html).

<sup>23</sup> See Government of India, *Submission by India Under Special 301 for 2010*, February 26, 2010, at 5 (on file with IIPA). They note twice in the submission “In 2007, 6628 cases of copyright violations were registered by the police. In that year 8149 persons were charge sheeted and 1622 were convicted.” These statistics not only suggest a downward trend in criminal enforcement, but they are too outdated to be able to judge progress and deterrence in the country.

<sup>24</sup> For example, following a raid, police often take up to a year to prepare the charge sheet on a defendant. Industry reports it is not uncommon for a typical open-and-shut piracy case to take four to seven years to adjudication.

<sup>25</sup> Obstruction of the raiding process is still common, with pirates often being tipped off about impending raids.

<sup>26</sup> 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.

<sup>27</sup> The recording industry reports improvements with the Indian courts, with fines of more than Rs.70 lakhs (US\$230,000), and settlements of 40 cases through plea bargaining in Delhi alone. One case in Delhi led to a settlement payment of Rs.14 lakhs (US\$30,000). Criminal convictions began to 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. The Indian music industry (IMI) reported that they received an unprecedented 60 convictions under Section 63 in 2008, which carries far more severe penalties than Section 52A. Fines under this latter section rarely exceed \$1,000 but the offense has historically been far easier to prove.

<sup>28</sup> In addition, BSA has pressed 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.

<sup>29</sup> With periodic changes to the roster of judges on the Original Side Jurisdiction of the Delhi High Court (which is done as a matter of routine and procedure where the roster changes every 6 months), BSA reports: 1) the imposition of security costs on Plaintiffs; 2) the grant of local commission orders without orders to



injunctions and *Anton Piller* orders has over the years encouraged infringers to settle, thus freeing court resources. Civil cases have been less fruitful, but in 2009, BSA got its first civil judgment with a damages award of Rs. 20 lakhs (US\$43,860) as compensatory and punitive damages against a company engaging in the unlicensed use of software. Damage awards have been issued against hard-disk loading of software. The motion picture industry has had some success over the years in using the civil system to obtain preliminary injunctions against pirate cable systems that transmit U.S. films and TV programs without authorization, and these have had some deterrent effect, even though the cases rarely come to judgment.

IIPA has noted in past submissions the hope that court reforms might lead the way to quicker dockets and greater effectiveness in court outcomes. For example, judges in Bangalore have been appointed specifically to hear criminal and civil IP cases in June 2008. Another example of court reforms involved the 2006 Ministry of Home Affairs (MHA)<sup>30</sup> Notice outlining a plea bargaining system under the Criminal Procedure Code. The Tis Hazari court in Delhi approved the Notice and appointed a plea-bargaining judge.<sup>31</sup> In October 2009, IMI was successful in getting a conviction pursuant to this process including a Rs.12 lakh (US\$26,315) criminal fine. Approaches like these could be helpful in clearing backlogged dockets, enforcing deadlines for adjudication/resolution of piracy cases and preventing unjustified continuances, encouraging completion of a set number of cases, adopt further case management techniques and extend plea bargaining further; and, treat piracy as a serious economic crime.

**Enforcement at the Border:** Customs should be empowered to seize *ex officio*, and should destroy pirated goods. IIPA understands that many seized goods have in the past been resold to shops working with the Customs Service. If done more than just in exceptional circumstances, this would amount to a TRIPS violation. 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 of 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

Copyright in India is governed by The Copyright Act, 1957 as amended last in 1999, and related laws and regulations.<sup>32</sup> Amendments to the Copyright Act have been considered for many years (the previous known draft

---

seize and seal computer systems containing pirated/unlicensed software; 3) granting the right to Defendants to obtain back up copies of their proprietary data while at the same time ensuring that the evidence of infringement is preserved in electronic form; 4) assigning a low number of technical experts for large inspections, making carrying out orders more time-consuming and raising court commissioners' fees; and 5) ineffective implementation and lack of deterrence from contempt proceedings against defendants who disrupt or defy *Anton Piller* orders.

<sup>30</sup> See Ministry of Home Affairs, at <http://www.mha.nic.in/>.

<sup>31</sup> *Office of the Chief Metropolitan Magistrate Tis Hazari Courts: Delhi, Plea Bargaining: Practice Directions*, at <http://delhicourts.nic.in/plea%20bargaining.pdf>.

<sup>32</sup> According to the explanation of the Indian Government in its 2010 Special 301 Submission, Chapter XIII of the Indian Copyright Act, 1957 provides for penalties for offences committed under the Copyright Act and empowers the police to take necessary action. These are the following:

- Imprisonment for a term of six months to three years and a fine of Rs. 50,000 (US\$1,096) to Rs. 200,000 (US\$4,385) for the offence of infringement of copyright or other rights under the Act. (section 63).
- Imprisonment for a term of on year to three years and with fine a of Rs. 100,000 (US\$2,192) to Rs. 200,000 (US\$4,385) on second and subsequent convictions. (section 63 A).
- Imprisonment for a term of 7 days to three years and with fine of Rs. 50,000 (US\$1,096) to Rs. 200,000 (US\$4,385) for knowingly using an infringing copy of the computer programme (section 63 B).
- Seizure of infringing copies (Section 64).
- Imprisonment for a term up to 2 years and with fine for possession of plates for purpose of making infringing copies (section 65).
- Disposal of infringing copies or plates used for making infringing copies (section 66).
- Imprisonment for a term up to one year or fine or both for making false entries in the register (section 67).
- Imprisonment for a term up to one year or fine or both for making false statements for the purpose of deceiving or influencing any authority or officer (section 68).
- Imprisonment for a term up to three years and with fine for publication of a sound recording or video film in contravention of provisions of Section 52A (section 68 A).

dated from 2005). On April 19, 2010, the Copyright Bill 2010 was introduced into the Indian Parliament and referred to a Standing Parliamentary Committee which requested comments from stakeholders and held extensive hearings through the summer and fall of 2010. The Bill makes few changes to the 2005 draft but adds a number of new provisions, some of which are troubling to copyright owners. The Bill does not make amendments that adequately implement the WCT and WPPT, nor does it properly address dealing with online infringement/Internet piracy or contain adequate measures promoting ISP responsibility and fostering cooperation with right holders to combat such infringements.<sup>33</sup> IIPA submitted extensive comments to the Bill to the Standing Parliamentary Committee overseeing the MHRD on May 31, 2010 as did IIPA members, MPA and BSA, and many local stakeholders. IIPA members and local stakeholders also presented lists of deficiencies in the Bill in the hearings before the Standing Committee. On November 25, 2010, the Standing Committee issued a detailed report of its views of the Bill<sup>34</sup> and agreed with a number of positions taken by right holders, but failed to recommend changes to remedy key deficiencies outlined in IIPA's and IIPA members' submissions. The Committee's report is not binding on the Copyright Office in the MHRD and it is as yet unclear if even the positive changes recommended by the Committee will be accepted. It is expected that the Amendments may be re-introduced in Parliament during the spring budget session. IIPA urges the U.S. government to engage the Indian authorities on an expedited basis to correct these deficiencies, many of which could result in violation of India's international obligations.

The following is a summary of some of the key issues in the Copyright Bill or other issues to be addressed:

- **Inadequate Protection For Technological Protection Measures Against Unlawful Circumvention:** The Bill left unchanged the previous draft amendments which sought to implement the anti-circumvention provisions (regarding technological protection measures (TPMs)) of the WCT and WPPT. The proposed Section 65A remains seriously deficient, and if enacted in its present form would be incompatible with the WCT and WPPT. The provision: a) does not cover access controls as is required by the treaties, b) covers only the "act" of circumvention and only when the person engaging in circumvention activities acts "with the intention of infringing" only the exercise of exclusive rights, c) does not prohibit the manufacture, importing or trafficking in circumvention devices or services and merely requires that person to keep a "record" of the names and addresses and other "particulars" of the person using such device or service to circumvent,<sup>35</sup> d) does not define an "effective technological measure", e) would permit circumvention to take advantage of any exception, such as fair dealing, contained in the Copyright Act (thereby almost completely eviscerating any protection), f) creates

---

Government of India Submission, *supra* note 23. The Submission also indicates, "The provisions on IP protection in these laws are further supplemented by appropriate provisions for border measures in the Customs Act, 1962, the Intellectual Property Rights (Imported Goods) Enforcement Rules, 2007 and the Department of Revenue Notification No. 49/2007-CUSTOMS (N.T.) dated 8<sup>th</sup> May, 2007 notified under section 11 of the Customs Act, 1962." *Id.* at 9. The Submission indicates, "The Customs authorities are also empowered to take action on their own initiative suspending clearance of goods where they have *prima facie* evidence or reason to believe that the imported goods are infringing the IP rights of any right holder," and notes "In 2008-09, there were 28 cases of suspension of clearance of imported goods on account of IPR infringements. In 2009-10, the number of cases increased to 55."

<sup>33</sup> The Indian Government, not surprisingly, has taken a more generous view of the amendments, stating,

"The Department of Higher Education has moved another proposal to amend the Copyright Act, 1957 in order to address the newer issues that have been seen in the context of the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT), which were negotiated in 1996, (collectively called the Internet Treaties). The proposed amendments would address the challenges posed to the protection of Copyrights and Related Rights by digital technology, particularly with regard to the dissemination of protected material over digital networks such as the Internet, the protection for the authors of literary and artistic works, such as writings, computer programs; original databases; musical works; audiovisual works; works of fine art and photographs."

...

The proposed amendments to the Copyright Act, 1957, *inter alia*, relate to:-

- Provisions to bring the Act in conformity with WCT and WPPT. These include making provision for protection of technological measures of protection used by a copyright owner as well as provision against tampering with Rights Management Information in any work. They also include extending new rights provided to performers, on par with authors, in the WPPT. The Copyright Act already extends the rights available to literary authors to producers of phonograms, which are now provided in the WPPT.
- Provisions to protect the music industry and resolve its current concerns.
- Provisions to address the concerns of the physically challenged and to protect the interests of the author of any work.
- Incidental changes

*Id.* at 11.

<sup>34</sup> Cite to Committee report

<sup>35</sup> With circumvention devices and services widely available globally on the Internet and from sources without any locus in India, it is naive to think that mere "record keeping" obligations can ever come close to meeting the treaties obligation to provide "adequate legal protection and effective legal remedies" against circumvention of TPMs

other overbroad exceptions, and g) provides for only criminal and not civil remedies. The Standing Committee in effect approved this provision as drafted, suggesting that the judiciary could evolve the law to ensure that access to works was facilitated (but not that circumvention activities would be deterred).

- **Online Infringement, and ISP Responsibility:** The Bill does not deal adequately with the issue of online infringement and the role to be played by ISPs over infringements of third parties.<sup>36</sup> Clarity on such issues is indispensable to the fight against online piracy. IIPA urges that detailed provisions which provide expeditious remedies to removing infringing material be adopted, including provisions encouraging ISPs to cooperate with right holders in dealing with online infringements. The industries note that based on their comments, the Parliamentary Committee urged that the Bill be brought in tune with the Information Technology Act, 2000, which provides for power to intercept, monitor or decrypt information through any computer source on certain grounds mentioned therein. The IT Act provides that local ISPs bear responsibility for infringements on their networks after they have been put on notice and have knowledge of infringement. The Committee recommended that a designated authority for managing copyright issues and piracy should be created with sufficient policing powers. Industry is thus awaiting the Ministry of Information, Communications, and Technology issuance of 'comments and explanatory notes' that accompany IT Act Sec 79. These will have significant bearing on the interpretation of service provider liability, and will hopefully inform the direction of the Committee with the Bill on this issue of critical importance to all the content industries.
- **Introduction Of Berne And Trips-Incompatible New Compulsory Licenses:** The Bill extends two existing compulsory licenses, which were applicable only to Indian-origin works, to include all foreign works. The proposed amended Section 31 would extend to foreign works where the author is "dead, unknown, or couldn't be traced." The new Section 31A compulsory license now covers foreign works which have been published or already performed but are not republished, offered anew for public performance or broadcast under reasonable terms. The extension of these compulsory licenses to foreign works clearly cannot meet the three-step test under Berne and TRIPS. The Standing Committee was also concerned about the international implications of these provisions and recommended they be reviewed. Two other new compulsory licenses (Sections 31B and 31D) were proposed for the benefit of the disabled and for the broadcast of literary works, music and sound recordings, respectively. Section 31B fails to contain necessary protections to ensure that such works are not limited solely to the disabled and that they otherwise fully meet the three-step test. The all-inclusive broadcast compulsory license is unnecessary and unprecedented.
- **India Should Adopt an Anti-Camcording Provision:** With the increase in illegal camcording of movies in theaters in India, IIPA calls upon the Indian Government to adopt legislation making it unlawful to use a video camera or other device to make (or attempt to make) a copy of a motion picture while inside a theater, and to prohibit the unlawful onward distribution or transmission (e.g., wireless upload to the Internet) of the camcordered copy. The U.S. has such a statute, and several other countries have statutes or are considering bills prohibiting illegal camcording.
- **Repeal of Protection Against Parallel Imports:** India's regime of national exhaustion has resulted in a vibrant trade in low-cost India-only editions of books, software and other works, and the ability of the Indian copyright industries – a central economic force in India – to acquire rights with the assurance that their important territorial rights will be protected. The Indian government has framed this proposed amendment to Section 2(m) of the Copyright Act 1957 as providing its citizens with greater access to less expensive editions of copyrighted works from abroad, a rather confounding assertion since the lowest cost editions of many copyrighted works are produced in and especially manufactured for the Indian market. Furthermore, a regime of international

---

<sup>36</sup> The Bill deals in a very rudimentary way with this issue, at least in part in Section 52(1)(c), but that treatment is far too terse and oversimplified as to be appropriate for this complex area. IIPA notes, for example, that obtaining a court order within 14 days is required to mandate the taking down of infringing material for which the right holder has provided a takedown notice. The Committee concluded that the 14 day period be "reviewed."

exhaustion will likely make it more difficult to enforce the law against pirate copies entering India. The Standing Committee rejected the arguments of all stakeholders and supported this damaging change.

- **Definition of Commercial Rental (2(fa)):** The Bill proposes substituting the word “hire” with the words “commercial rental” in Section 14(d), along with the addition of a definition of “commercial rental” in Section 2(fa) which excludes rental for non-profit purposes by non-profit libraries and educational institutions without defining those terms. The definition is unclear as to the entities that qualify for the exception, and IIPA is concerned this ambiguity will enable pirates to circumvent the law. The Standing Committee was also concerned about the lack of clarity of this provision and recommended that it be narrowed. We concur with the Standing Committee.
- **Overly Broad Exceptions:** The proposed changes to Section 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>37</sup> b) overbroad exceptions for copying of computer programs, including a provision allowing such copying for any “noncommercial personal use” beyond the usual making of a back-up copy, c) an exception for making transient or temporary copies that goes far beyond what would be permitted, for example, in the EU Copyright Directive, a provision which IIPA considers overbroad in itself, d) an overbroad exception permitting the performance of films in educational contexts and in “clubs”, and e) an overbroad exception with respect to reproduction of books by libraries. These and certain other exceptions would violate India’s obligations under the Berne Convention and the TRIPS Agreement.
- **Limiting Membership in Copyright Societies Only to Authors:** This surprising and unprecedented amendment was recognized by the Standing Committee as unworkable and unnecessary and recommended that copyright society membership also be available to “owners of rights” that are not authors.
- **Unclear Protection For Temporary Copies:** The Copyright Bill defines the reproduction right to include copies “stored” in a computer, and contains a “transient and incidental” copy exception, implying that such temporary copies fall under the reproduction right. Coverage and protection of temporary copies like other copies “in any manner or form” (Berne Convention/TRIPS) should be expressly confirmed (e.g., in the definition of reproduction).

IIPA also calls upon the Indian Government to: 1) deal with damaging “pre-release” piracy, with provisions comparable to those adopted in the U.S. (the Family Entertainment and Copyright Act of 2005, containing effective civil and criminal provisions to deter online pre-release piracy), 2) allow restitution in criminal cases, and 3) adopt statutory damages, since proving actual damages, e.g., in end-user software piracy cases, can be difficult, and in order to expedite the slow civil judicial processes and provide much-needed deterrence to a civil regime which relies almost completely on interim injunctions and *Anton Piller* to deal with piracy.

**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 weighed in. Adopting an effective OD law has long been delayed by the controversy over coverage of blank discs.

**Pending Criminal Procedure Amendments on Arrest:** In our 2009 submission, 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

---

<sup>37</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 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.

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 negative impact in India by undermining an already weak system of deterrence that comes with the threat of arrest and having to post bail.

## MARKET ACCESS ISSUES

As described in detail in previous IIPA submissions, many market access barriers hinder copyright owners' abilities to participate fully in the market in India.

**Motion Picture Barriers, Including Services Taxes and Discriminatory Entertainment Taxes:** The U.S. motion picture industry faces numerous market access barriers, including: 1) the imposition of a 10.3% service tax assessed against the "transfer" of intellectual property rights, 2) inordinately high and discriminatory entertainment taxes on theatrical admissions, including unconstitutional taxes based on the language of the film,<sup>38</sup> 3) foreign ownership restrictions, 4) unreasonable and burdensome documentary demands by Customs (e.g., proprietary and financial documents for the past five years to determine supposedly delinquent taxes, extraction of inflated duty payments for release of goods), 5) double taxation by the Federal Government on the "transfer" or exploitation of copyright, 6) price fixing on tickets in South India as well as quotas on the number of screenings per title per day, 7) onerous regulations on uplink and downlink of satellite signals beaming into India,<sup>39</sup> and 8) disruptive content control rules for television.<sup>40</sup>

**TRAI Ban on Exclusivity and "Must Provide" in the Pay TV Sector:** A January 2007 Telecom Regulatory Authority of India (TRAI) regulation creates a potentially Berne- and TRIPS-incompatible ban on exclusivity (prohibiting broadcasters from granting exclusive contracts with any distributors)<sup>41</sup> combined with a "must provide" requirement (obligating broadcasters to provide channel programming to all requesting distributors on a non-discriminatory basis). This regulation eliminates all potential for competition and any incentive to develop programming or buy any "rights" and should be deleted or significantly altered.

**High Tariffs on Entertainment Software Products:** Entertainment software publishers continue to be hindered by the existence of high tariffs on PC game products (with the applied duty rate currently at 30-35 percent), console game products (tariffs also as high as 30 percent), and game console hardware. Additional taxes compound to create an environment where legitimate commerce in game consoles is virtually non-existent, and where penetration rates of unauthorized consoles are only a fraction of what they would be under less restrictive market conditions. There is also an 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 is severely hampered.

---

<sup>38</sup> Any film not produced in the same language that is predominately spoken in that state is charged a higher tax. The Supreme Court has ruled this to be unconstitutional, but states are still engaged in the practice. Meanwhile, entertainment taxes vary widely among Indian States, ranging from 15 to 40% in some key markets, 40 to 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.

<sup>39</sup> 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.

<sup>40</sup> 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.

<sup>41</sup> 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.

**Double Taxation of Business Software:** 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 or a good. The Finance Ministry has announced that taxation of packaged software will be clarified during the 2011 budget session of the Parliament.

**Technology Mandates or Tech Transfer Mandates:** The business software industry is concerned about several developments that continued to play out in 2010. The first involves new amendments to the IT Act passed in December 2009 (Section 43A related to Data Security and Section 84A related to Encryption) that raised concerns that the government will mandate specific modes and methods of encryption or data security tools and standards.<sup>42</sup> Draft Data Security regulations have recently been circulated for public comments by the Government which avoids technology mandates but would require all corporate entities to either adhere to ISO 27001 data security procedures or apply for Government approval of its security procedures through a common industry association representation. This process should be simplified or clarified to reduce the burden on industry. The second involves the Government of India requiring foreign telecom equipment manufacturers and software providers to transfer technology and share source code with local telecom service providers. This issue has been the subject of high-level engagement by the U.S. and Indian governments and the Prime Minister's Office has called on relevant agencies to review international best practices to determine whether the amendments should be revised. The third involves specific mandates for e-governance or procurement for e-governance. The Ministry of IT has published its policy and although the procurement for standards have been specified to be technology-neutral, the mandatory requirement for royalty free and non-patentable standards for e-governance continues to be a cause for future concern.

## TRAINING AND PUBLIC AWARENESS

IIPA member associations continued to conduct training in 2010. In 2010, BSA recognized 47 companies in Maharashtra for undergoing training and assessments on SAM in partnership with the State Government and FICCI. BSA also participated in several workshops for small and medium enterprises organized by FICCI on the importance of managing and respecting IP in software, launched the first ever SAM program for Public Sector Enterprises in partnership with the State Government of Karnataka and began engagement through initial workshops with the Federal Government, specifically the Ministry of IT. BSA recently launched an educational advertising campaign on genuine software targeted toward both corporate end-users and consumers. BSA continued to use the media to disseminate messages on the perils of non-genuine software as well as data security risks to enterprises through 2010. The local music industry group, IMI, ran intensive training programs and public awareness activities in 2010 for various enforcement authorities from various localities including: a) at-venue trainings, including more than 75 police training programs;<sup>43</sup> b) distance learning, consisting of a training manual created in 14 languages to educate enforcement authorities on various issues; and c) a specially-designed campaign created for MMXIndia (Mobile Music Exchange, the IMI affiliate providing legitimate licenses for mobile music) in Andhra Pradesh Punjab and West Bengal including press and TV advertisements along with programs for both anti-piracy personnel and MMXIndia marketing personnel.

---

<sup>42</sup> The government has recently directed Research In Motion's Blackberry to provide its encryption keys for its enterprise mail servers however RIM has contested this and requested time till January 2011 to develop a solution for the Government's needs without compromising customer privacy.

<sup>43</sup> Programs included 1) "Music Piracy and the Role of Law Enforcement Agencies under the Copyright Act, 1957" in Katihar and Arrah in January 2010 for 40 police officials (including senior officials), 2) "Music Piracy, Concept, Issues and Challenges, etc." in Bhimrao Ambedkar Police Academy, Moradabad in January 2010 for over 400 officers, including senior police officers and investigators, 3) general anti-piracy and performing rights trainings for hundreds of police in Sitamadhi and Baxar (February 2010), Begusarai (March 2010), Indore, Chandigarh, Ernakulam, Calicut, Saraiya, and Gopalganj (June 2010), Kozhikode, Bagaha, and Kishanganj (July 2010), Balia, Begusarai (August 2010), Andhra Pradesh, Mattancherry (Ernakulam District), Thrikkakara (Ernakulam District), Malappuram (Malappuram District), Thirur (Dist. Malappuram District), Perinthalmanna Sub-Division (Dist. Malappuram District) (October 2010), Pala Sub-Division, Kottayam District, Kanjirappally Sub-Division, Kottayam District, Karunagapally Sub-Division, Kollam District, Kollam and Punalur Sub-Divisions, Kollam District (November 2010), Agali Sub-Division, Dist. Palakkad, Alathur Sub-Div. Dist. Palakkad, Palakkad Sub-Div, Thrissur Sub-Division, Irinjalakuda Sub-Division, and Kunnamkulam (December 2010), and 4) an educational talk at Rajasthan Police Academy, Jaipur (July 2010), 5) a seminar in Hyderabad (August 2010).

## GENERALIZED SYSTEM OF PREFERENCES

The GSP statute expired on December 31, 2010. In the past, India enjoyed preferential trade benefits under the program. One of the criteria of the program is that the country provides “adequate and effective protection for intellectual property rights.” In 2010, \$3.48 billion worth of Indian goods entered the U.S. under the duty-free GSP code, accounting for 11.8% of its total imports to the U.S. India needs to endeavor to meet the adequate and effective test under the statute to remain eligible, once it is reauthorized, to continue to receive favorable treatment under the GSP program.

# INDONESIA

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

### 2011 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: Indonesia remains a market rife with physical and online piracy, which, coupled with onerous market access barriers, closes opportunities to the creative industries to supply legitimate product. This situation subsists notwithstanding good relationships between right holders and Indonesian authorities, and in particular, improvements in the cooperation and enforcement efforts against businesses and other organizations that use unlicensed software. One of the greatest frustrations remains the non-transparent and non-deterrent court system, shielding right holders from information about cases directly affecting their interests, and even the Indonesian Government has recognized irregularities in the system negatively affect enforcement efforts. New potential hurdles threaten to make the situation even worse, including a customs valuation method for audiovisual products that is inconsistent with standard international practice, a potential mandated collective licensing window, and potential removal of *ex officio* enforcement authority. Unfortunately, such undue regulatory intervention and overly-protectionist policies affecting the audio-visual sector threaten the continued support and development of that industry. Without a reversal on some of these proposed policies, and without the scaling back of market access barriers, the situation in Indonesia for copyright owners could remain bleak for the foreseeable future. As Internet and mobile penetration deepen, it is critical that Indonesia develop the policies and practices necessary to enforce IP rights on these new developing mediums. We thank the U.S. Government for its continued engagement on these issues.<sup>2</sup>

#### Priority Actions Requested in 2011:

##### Enforcement Issues

- 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.
- Establish a National IP Taskforce website tracking prosecutions completed, including parties, legal basis of the prosecution, penalties assessed, and evidence found during the raid.
- Commit to expand Commercial Courts in Medan, Jakarta, Semarang, Surabaya and Makassar to adjudicate copyright cases, establish special IP courts for criminal cases, with trained judicial officers.
- Follow through on the National IP Task Force's "Campaign" to take deterrent action against all forms of piracy.
- Ensure Directorate of Special Crimes ('Ditreskrimsus') and "Type A" Police Commands run sustained IPR police investigations with deterrent results.
- Retain *ex officio* enforcement authority and provide transparency in raiding.
- 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

- Modernize the Copyright Law (2002): 1) maintaining *ex officio* enforcement authority, 2) establishing landlord liability, 3) providing minimum criminal penalties for copyright infringement, 4) ensuring effective measures are in place to combat online infringements by introducing notice and takedown procedures and taking 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 establishing fair and effective processes for

<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/2011SPEC301HISTORICALSUMMARY.pdf>, as well as the previous years' country reports, at <http://www.iipa.com/countryreports.html>.

<sup>2</sup> The U.S. Government has engaged on IPR issues in the Indonesia-U.S. Comprehensive Partnership plan "to promote better protection and enforcement of intellectual property rights" and through the Trade and Investment Framework Agreement.





dealing with repeat infringers, 5) outlawing illegal camcording, 6) providing WCT and WPPT-compatible rights (including the public performance, public communication and making available rights) for works and sound recordings, 7) fully implementing the WCT and WPPT, and 8) extending the term of protection for works and related rights.

- Ensure copyright infringement is considered a predicate offense under anti-organized crime laws that permit 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; 4) covering imports of raw materials; and 5) ensuring that the Department of Industry collects exemplars.

#### Market Access and Related Issues

- Repeal Film Law that imposes film quota, strict censorship requirements, and other restrictions on film industry.
- Ensure that procurement policies do not impede technology choice with respect to software.
- Revise Customs Law 1995 and associated regulations so that duties are assessed on the basis of the underlying carrier medium.
- Immediately and permanently remove other market access restrictions, including:
  - the requirement to locally replicate all theatrical prints and home video titles released in Indonesia (the requirement was suspended until January 1, 2012 but the suspension should be made permanent).
  - the ban on direct distribution of audiovisual products.
  - the ban on the broadcast of most foreign programming in Indonesia.

## PIRACY AND ENFORCEMENT UPDATES IN INDONESIA

IIPA's previous reports describe in detail various piracy and enforcement issues and the harm caused to the U.S. content industries. The following provides updates on ongoing and new issues over the past couple of years.

**Court System Lacks Transparency, Remains Non-Deterrent:** A major hurdle over the years for copyright owners in Indonesia has been the failure of the court system to properly deter piracy. Most cases brought involve small-scale distribution of pirated materials in the physical environment; very few involve major source piracy, warehouses, or cases against ringleaders up the supply chain. Moreover, of the hundreds of cases investigated by the police, industry reports that only a few are brought before the courts.<sup>3</sup> Further, there is lack of transparency on cases and case results and in the cases industry does learn about, and criminal fines are extremely low and non-deterrent.<sup>4</sup> IIPA recommends establishing a National IP Taskforce website to track case results.<sup>5</sup> IIPA understands that special IP courts have been established under the jurisdiction of five commercial courts in Medan, Jakarta, Semarang, Surabaya and Makassar and that they are handling copyright cases.

**Retain *Ex Officio* Authority for Police, Activate Directorate of Special Crimes, and Establish Directorate of Investigation:** It remains critical in Indonesia, which experiences so much piracy up and down the

---

<sup>3</sup> The Indonesian Ministry of Trade, in its 2009 report to the U.S. Trade Representative in response to Special 301, indicated in a chart form that the Indonesian National Police (INP) had conducted a total of 139 copyright-related raids in 2009, 29 of which had been passed along to the Public Prosecutor for further disposition, while one case had been dismissed for lack of a complete dossier, two enterprise end-user software piracy cases settled, and 107 cases still under investigation at the time of the filing (in February 2010). See Ministry of Trade of the Republic of Indonesia (Dr. Mari Pangestu), *Intellectual Property System of Indonesia*, February 25, 2010 (retrieved at regulations.gov), Table 8.

<sup>4</sup> The local recording industry reports on one pirate CD 'burning' case in Lubuk Sikaping, Padang in which a Public Prosecutor did not accept a statement/affidavit that the suspect had never been licensed to sell the content, but asked the police to investigate further. Eventually, upon complaint to the National Public Prosecutor, the case was brought charging the accused and seeking three years imprisonment. It was only due to the persistence of the industry that this case was brought, and only after significant delay.

<sup>5</sup> All case records are manually written into a log book in each District Court, making it difficult to identify outcomes in particular cases, obtain copies of court decisions, contact public prosecutors requesting updates, and ultimately, leverage publicity on cases of copyright infringement and get the message into the public domain that copyright infringement is a serious violation of the law with serious legal consequences.

supply chain, that police retain flexibility to run raids on an *ex officio* basis.<sup>6</sup> Any amendment which would remove such authority should be rejected. Industry reports that in the end of 2010, a new Directorate of Special Crimes ('Ditreskrimsus') was established to manage all economic crimes, including IPR infringements. In addition, some regional police commands have restructured their internal crime investigation departments, with some classified as 'Type A' Police Commands (headed by a two-star police general) which would separately handle economic crimes, including IPR infringement. IIPA views these developments positively and as an opportunity to empower and train specialized IP police units. At the same time, on the civil side, industry has awaited an implementing regulation establishing the Directorate of Investigation as an umbrella for civil servant investigators to conduct raids; this would be beneficial since it would provide impetus for the Indonesian Government to act on copyright piracy issues more readily rather than remaining largely passive to the problem.

**Enterprise End-User Software Piracy Causes Significant Losses, But Enforcement Cooperation Improved:** The willful use of unlicensed software by businesses and other organizations continues to cause the greatest losses to the business software industry in Indonesia. According to preliminary data from research firm IDC, the PC software piracy rate in Indonesia in 2010 was one of the highest in the world at 87%, and much higher than the median piracy rate for Asian markets. It also represents an increase over the 2009 rate of 86%. The preliminary data also indicates that the commercial value of unlicensed U.S. vendor PC software products in 2010 was \$487 million.<sup>7</sup> Lowering software piracy would bring significant benefits to the Indonesian economy. A 2010 study done by IDC for the Business Software Alliance found that decreasing Indonesia's software piracy rate by ten points over a four year period would add US\$2.43 billion to GDP, generate US\$124 million in additional tax revenues and create 1,884 new IT jobs. The benefits would be even greater if the 10 point reduction was achieved in two years, yielding \$3.18 billion in added GDP and \$162 million in new tax revenues. The Business Software Alliance reports that its relationship with enforcement authorities improved significantly in 2010, especially with the police.<sup>8</sup> In 2010, there were 16 *ex officio* raids initiated by the police against all types of software piracy (including by the Banten Regional Police Command which was also active in follow-up),<sup>9</sup> and 27 raids initiated by police against enterprise end-user software piracy based on BSA complaints. Cases get bogged down, however, when presented to the public prosecutors, who lack knowledge and confidence in prosecuting defendants at the District Court level for unauthorized use of software in a business setting. Court cases are slow to proceed and rarely result in deterrent sentencing.<sup>10</sup>

**Retail Piracy, Mall Piracy, Including Physical and Mobile Device Piracy:** The copyright industries continue to report hard goods piracy as one of their greatest causes of concern, comprising 90% of the retail/mall marketplace for creative content. Jakarta and surrounding areas remain the retail base, distribution hub, and duplication center of the country. Physical piracy includes factory and burned-to-order CDs, VCDs, DVDs and CD-ROMs of music (the record industry notes the market in 2010 was markedly worse), movies (including pirate movies

---

<sup>6</sup> Industry reports that approximately 70% of *ex officio* criminal actions are conducted by the Police outside Java.

<sup>7</sup> BSA's 2010 statistics are preliminary, representing U.S. software publishers' share of commercial value of pirated software in Indonesia. They follow the methodology compiled in the Seventh Annual BSA and IDC Global Software Piracy Study (May 2010), <http://portal.bsa.org/globalpiracy2009/index.html>. These figures cover packaged PC software, including operating systems, business applications, and consumer applications such as PC gaming, personal finance, and reference software – including freeware and open source software. They do not cover software that runs on servers or mainframes, or routine device drivers and free downloadable utilities such as screen savers. The methodology used to calculate this and other piracy numbers are described in IIPA's 2011 Special 301 submission at <http://www.iipa.com/pdf/2011spec301methodology.pdf>. BSA's final piracy figures will be released in mid-May, and the updated U.S. software publishers' share of commercial value of pirated software will be available at <http://www.iipa.com>.

<sup>8</sup> In 2010 BSA signed MoUs with some Regional Police Command units on joint enforcement actions against software piracy, namely Bali Regional Police, North Sumatra Regional Police and East Java Regional Police. Some lower police commands also continue to provide support to combat software piracy.

<sup>9</sup> Industry continues to report that in some cases raids are kept hidden from right holders, as defendants hire highly suspect third-party case brokers to settle the cases with the police; for some police, they will only notify BSA when they cannot settle a case privately. Industry also reports occasional intervention from a higher level police officer to corrupt a particular case.

<sup>10</sup> In 2009, we understand that criminal trials against corporate end-user piracy in the country were concluded in the Semarang District Court in Central Java and the South Jakarta District Court (two cases), compared with 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, and in November 2009, the 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\$1,120), 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.

in or claiming to be in Blu-ray format), software, and published materials, as well as loading software or other copyright materials illegally onto computers or mobile devices at the point of sale.<sup>11</sup> Optical disc replicators/duplicators are sold in these markets as well, facilitating home “burning.” All indicators suggest that criminal syndicates support illegal production and distribution, with burned recordable discs well outnumbering factory discs due to the lower expense and the fact it can be done out of the home. Major cities including Jakarta, Padang, Java Island, Semarang, Medan, Makassar, Bandung, and Surabaya have hotspots replete with pirate materials (notorious spots include Ratu Plaza, Pinangsia Plaza, Glodok, and Ambassador Mall). The Indonesian National Police (INP) ran hundreds of raids in 2010, mainly against small distributors, continuing the trend from 2009, in which INP reported 355 raids, involving 351 suspects, and resulting in seizures of over 2 million discs, mostly movies, followed by music discs, pornography, and software, and 149 duplicators (burners).

**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.

**Internet Piracy:** Internet usage in Indonesia exceeds 30 million users or roughly 12% of the population, and has grown exponentially over the past several years. As a result, online piracy has become a problem,<sup>12</sup> including direct download sites and illicit P2P file sharing, mainly from servers located outside Indonesia (even though they are registered Indonesian businesses run by Indonesian nationals). The evasive behavior of online pirates in Indonesia, switching online locations and website names to avoid detection, using other fraudulent practices, and using offshore servers has created hurdles to effective enforcement. Without a current legal infrastructure on service provider liability, establishing responsibility for online infringements and fostering cooperation with right holders, e.g., through a statutory notice and takedown procedure in the hosted environment and ways to curb non-hosted infringements, right holders lack an effective remedy against online infringement.

Steps should be taken 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 establishing fair and effective processes for dealing with repeat infringers. ISPs participated in a focus group meeting with right holders hosted by the Indonesia ISP Association (APJII), but issues such as the use of offshore servers were agreed to pose challenges under the current laws (for example, such activity is not covered under the Cyber Law). IIPA calls upon the Ministry of Communication and Information to support a strategy to deal with growing Internet piracy. It is also important to devise strategies to deal with fraud occurring over the Internet, such as the use of fake names, addresses, or identities.

---

<sup>11</sup> 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 increased in Indonesia. Mobile device piracy is a highly organized and sophisticated criminal activity, with main business services even offering franchises to smaller vendors.

<sup>12</sup> The independent film and television segment of the motion picture industry (IFTA) reports that online piracy remains a significant export constraint for independent producers and distributors, the majority of which are small- to medium-sized businesses. Independent producers partner with local authorized distributors to finance and distribute their films and programming in Indonesia. These authorized distributors find it almost impossible to compete with the pirates. Producers and distributors confirm that DVD sales have been particularly impacted since pirated digital copies are offered for free online and with the same quality viewing experience as a DVD. Unable to compete with free, legitimate distributors are unable to commit to distribution agreements or offer drastically lower license fees which are inadequate to assist in financing of independent productions.

## MARKET ACCESS AND RELATED ISSUES

**Customs Valuation of Film Imports:** Indonesian Customs has recently implemented (by means of Regulations issued in 2010) its 1995 Customs Law a radical revaluation of import duties on 35mm film which will cost the local and foreign film industries millions per year in additional taxes. The historical valuation of film imports is made on a per-meter basis against the carrier medium, in line with standard international practice. IIPA understands that Indonesian Customs has recently demanded payment of customs duties on the contractual amounts paid by the importer for the exclusive rights to commercially exploit the underlying content contained on the carrier medium (so-called "distribution rights"), i.e., the content of the film, in accordance with implementing regulations released in 2010. The government should reverse this decision and maintain its historical practice of valuation based on the carrier medium, in line with the accepted international practice.

**Ill-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 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 Law is so ill-conceived that even local Indonesian filmmakers came out vehemently against it upon passage.<sup>13</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. The Law would also aim to limit the number of imported films to the benefit of domestic films, among many other ill-conceived features of this law. Industry has been assured that the 60% quota will not be enforced and that the Law is "not intended to restrict" foreign films in Indonesia, but this questions the rationale behind the Law's passage. The Indonesian Film Society (*Masyarakat Film Indonesia*) has sought a constitutional review of the Law which may lead to a judicial review. "Implementing Regulations" have yet to emerge and are pending further public-private consultation between the Ministry of Culture and Tourism and the local filmmaking community. They should at least recognize international best practices including the ability of right owners to determine whether, how, and where their works are made available.

**Local Printing Requirement:** On March 22, 2010, Indonesia's Ministry of Culture & Tourism issued a further two year suspension (until January 1, 2012) of the 2008 MOCT Ministerial Decree No. 55 requiring the local replication of all theatrical prints and home video titles (e.g., DVDs) released in Indonesia. The Decree should formally and permanently be abrogated as soon as possible for several reasons. The regulation, if implemented, would harm local interests in several ways: 1) it would have serious negative consequences on the long-term viability of Indonesia's film industry, 2) it would threaten any incentive for the continued development of local cinemas, 3) it remains opposed by Indonesian filmmakers due to their own concerns about the quality of local labs matching that of overseas facilities, and 4) it could jeopardize arrangements local filmmakers have for post-production work overseas. Far from boosting the local industry as a whole, the Law would appear to be aimed at benefiting only the local duplication facilities. The Regulation also negatively affects foreign motion picture companies' release schedule for the country, and raises concerns over existing local facilities' ability to handle its volume and quality output requirements as well as the security issues.<sup>14</sup>

**Negative Investment List:** The Indonesian Government has claimed its amendments to restrictions of its "Negative Investment List" as a positive development, but the revision, by which "film processing labs" had their restrictions eased to 49%, is only applicable to ASEAN countries, discriminating against U.S. industry.<sup>15</sup> "Film Technical Services" which remain subject to the 100% investment restrictions under the Negative Investment List include picture-taking studios, film dubbing, film duplicating, film making medium, film editing, and film subtitling.

<sup>13</sup> Liz Shackleton, *Indonesian Filmmakers Condemn New Film Law*, September 10, 2009, at ScreenDaily.com. 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.

<sup>14</sup>With respect to home video, the Decree would serve as a barrier as there is unlikely to be any capability to replicate Blu-ray locally in the near future.

<sup>15</sup> The easing of the restriction would have helped a company (one of the duplicating labs which, not coincidentally, would have benefited most from the Print Decree) open a new print lab in Indonesia with backing from a Thai company.

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 No. 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 1) radio and television broadcasting service providers, radio and television broadcasting subscription service providers, and print media information service providers, and 2) film making businesses, film technical service providers, film export and import businesses, film distributors, and movie house operators and/or film showing services. The Broadcast Law allows foreign ownership up to a 20% cap, and 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).

## COPYRIGHT LAW AND RELATED ISSUES

Copyright Law Undergoing Review: Copyright protection in Indonesia is governed by the Law of the Republic of Indonesia, Number 19 Year 2002 Regarding Copyright (effective July 29, 2003).<sup>16</sup> Indonesia joined the WCT on June 5, 1997 (in force March 6, 2002) and the WPPT on February 15, 2005.<sup>17</sup> IIPA understands draft amendments have been prepared, possibly for introduction to the House of Representatives (Dewan Perwakilan Rakyat) by March 2011. IIPA encourages the Indonesian Government to ensure that any proposed changes are open for public consultation and comment, and notes the following key points for any amendments which come forward (including some longstanding issues):<sup>18</sup>

- **Retain *ex officio* Authority:** Apparently, DGIPR has proposed to change the status of the copyright infringement into a complaint-based crime, which under the Indonesian system, would mean removal of *ex officio* raid authority by the police on the basis of the Copyright Law. IIPA recommends retaining *ex officio* raids but imposing a transparency requirement to avoid abuse of power by police officers or the problem of “case broker” payoffs.
- **Provide Minimum Criminal Penalties for All Forms of Copyright Infringement on a Commercial Scale:** 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), but should be provided against sellers of pirate goods and other forms of piracy, e.g., enterprise end-user software piracy, and the Law should retain the maximum sentencing provisions.
- **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 should provide guidance, as it holds criminally liable 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.

---

<sup>16</sup> Undang-Undang RI No. 19 Thn 2002 Tentang Hak Cipta.

<sup>17</sup> Regulations dealing with “rights management information” 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. An April 2003 Report issued by the Indonesian Government indicated, “[t]he 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.” However, no articles in the Patent Law deal with protection of TPMs.

<sup>18</sup> IIPA has in previous submissions commented in detail on the Copyright Law (2002), and provides herein only highlights of significant changes needed in the new amendments. Other issues previously mentioned include: 1) providing TRIPS-compatible protection for pre-existing works and related rights, 2) limiting the private copy exception to a single lawfully obtained copy, and 3) fixing the adaptation right which is curtailed in Indonesia Law in a Berne-incompatible way.

- **Deal Effectively With Online Infringement:** Given the recent growth of Internet connectivity in the country, any amendments should aim at removal of online infringements, promoting service provider responsibility and fostering cooperation with right holders. The law should ensure expeditious removal of infringing content, including statutory notice and takedown as well as effective and fair policies in place by ISPs for dealing with repeat infringers. The law should also ensure assistance to right holders in identifying and removing infringing content and P2P piracy. The law should avoid blanket immunities and ensure that injunctive relief is always available. While the government has enacted a Cyber Law, reported Article 27 does not impose a measure comparable to that in the Council of Europe Cybercrime Convention related to copyright infringement through use of a computer.<sup>19</sup>
- **Include Anti-Camcording Piracy Provisions and Consider Standalone Provisions:** The amendments should define the act of using an audiovisual recording device in cinemas to camcord or record a part of or whole film (or an attempt to do the same) as a strict liability criminal offense.
- **Include Anti-Circumvention Provisions:** As noted, Indonesia joined the WCT and WPPT, but has not implemented Article 27 of the Law on technological protection measures (TPMs). The WCT and WPPT require adequate and effective protections against the circumvention of TPMs used to protect against unauthorized access to, or unauthorized exercise of copyright in, works. Protections should cover the trafficking in circumvention technologies or devices as well the act of circumventing a TPM (and services related to both).
- **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, whether involving pirate distributors or cases in which the infringer achieved an unjust enrichment (e.g., enterprise end-user software piracy), it is 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. Indonesia should establish a statutory damages regime, on the election of the right holder, in civil cases, to foster greater deterrence and ensure adequate compensation is available to right holders in all cases.
- **Confirm WCT- and WPPT-Compatible “Making Available” Right**
- **Provide Rights for Producers of Sound Recordings, Consistent 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), including an interactive “making available” right, as well as exclusive distribution and public performance rights. 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.
- **Avoid Single Window Licensing:** Apparently, the government is considering a plan to mandate collective licensing across copyright categories and set a joint tariff rate. 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 is maintained and market powers can determine the best solutions for both right holders and users. To ensure that these conditions exist in Indonesia, right 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 right holders. Collective Management Organizations (CMOs) should be permitted to operate in a commercial manner, free from interference from the

---

<sup>19</sup> The Council of Europe Cybercrime Convention contains, in Article 10, “Offences related to infringements of copyright and related rights,” an obligation to “adopt such legislative and other measures as may be necessary to establish as criminal offences under its domestic law the infringement of copyright [and related rights] ... where such acts are committed wilfully, on a commercial scale and by means of a computer system,” and Article 11 contains the obligation to “establish as criminal offences under its domestic law, when committed intentionally, aiding or abetting the commission” of Article 10 offenses.

government. There should be no mandatory process for tariff pre-approval. Such a mandatory process is bound to disrupt royalty collection and prejudice right holders by requiring them to bear unnecessary costs associated with rate-setting procedures, and by denying from them the ability to collect royalties set in free and open market conditions.

- **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).
- **Importation Right:** The law should provide right holders the ability to authorize imports.

Other issues which should be dealt with in an amendment or through regulation:

- **Availability of Interlocutory Injunctions:** IIPA members have long awaited an amendment making available interlocutory injunctions ('Anton Piller Orders') against IPR infringers. If not dealt with in the amendment, an implementing regulation should be implemented by the Supreme Court on an urgent basis, to allow right holders to file for injunctions with the Commercial Courts.
- **Establishment of the Directorate of Investigation:** The establishment of the Directorate of Investigation as an umbrella for the civil servant investigators to conduct raids should be accomplished immediately.

**Strengthen 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 as a predicate crime for remedies under its organized crime law, e.g., as grounds for broader criminal investigations, seizure, freezing of assets, etc.

**Optical Disc Regulations Should be Strengthened and Made GATT/WTO-Consistent:** The Optical Disc Regulation (2005)<sup>20</sup> should be updated to: 1) prohibit the unlawful use of or manipulation of source identification (SID) code, including gouging off SID Codes and/or total non-use of SID codes; 2) provide for centralized licensing of production of prerecorded or blank optical discs; 3) remove the Regulations' requirement that imported, pre-recorded discs be marked with identification code, which violates GATT/WTO rules and could have other negative ramifications; 4) adequately cover stampers and masters; 5) expressly cover (imports and) exports of discs, equipment and raw materials; 6) expressly authorize forcible entry in an inspection in case a suspect target refuses entry; 7) require the government to keep records of "permits" and raids run; and 8) expressly impose corporate liability on individuals. Two Ministerial Decrees were issued by the Minister of Trade and Industry, one relating to the importation of machinery, raw material, and optical discs,<sup>21</sup> and another on reporting by registered producers.<sup>22</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.

---

<sup>20</sup> "Government Regulation Number 29 of 2004 Concerning High Technology Production Facilities for Optical Discs" (in force April 5, 2005).

<sup>21</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>22</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.

## TRAINING AND PUBLIC AWARENESS

In 2010, as in previous years, the copyright industries conducted and participated in various training and public awareness activities in Indonesia. The business software industry regularly works with Indonesian police conducting capacity building and education on software licensing and enterprise end-user software piracy, technical aspects in conducting raids, and evidence seizure/preservation methods. In 2010, BSA provided capacity building for police investigators serving in Bali, North Sumatra and East Java Regional Police Commands.

The motion picture industry focused its recent activities on public awareness of the importance of strong copyright protection to the development of the local film industry. For example, in late 2009 MPA hosted (with the Indonesian Embassy) a screening in Washington of the Indonesia movies *Garuda di Dadaku* and *Naga Bonar Jadi*. MPA also supported the 'Democracy Video Challenge,' in which one Grand Prize Winner (from more than 1,600 young artists from 110 countries) came from Indonesia. MPA provided support for the Asia-Pacific Screen Awards (APSA). On August 9, 2010 (and in conjunction with the local film body Balinale), MPA held a Film Forum & Workshop in Jakarta, attended by over 50 Indonesian filmmakers and students who learned about film industry development and infrastructure. In October 2010, MPA supported Balinale on the Bali Film Festival, securing a number of U.S. movies including *Eat, Pray, Love*.

The local recording industry group, ASIRI, remained active in training courses for Indonesian Police Department cadets. ASIRI also focused on arranging group discussions on the draft amendments to the Copyright Law, raising the chief concerns that 1) *ex officio* authority must be maintained, and 2) right holders should not be forced into collective management schemes, including single licensing windows.<sup>23</sup>

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 DGIPR in implementing the laws.

## GENERALIZED SYSTEM OF PREFERENCES

The GSP statute expired on December 31, 2010. In the past, Indonesia enjoyed preferential trade benefits under the program. One of the criteria of the program is that the country provides "adequate and effective protection for intellectual property rights." In 2010, \$1.86 billion worth of Indonesian goods entered the U.S. under the duty-free GSP code, accounting for 11.4% of its total imports to the U.S. Indonesia needs to continue to endeavor to meet the adequate and effective test under the statute to remain eligible, once it is reauthorized, to continue to receive favorable treatment under the GSP program.

---

<sup>23</sup> On November 22, 2010, ASIRI arranged a focus group discussion attended by professionals, lecturers, IPR experts, producers, the CMO for composers and music publishers, a regional police officer and IFPI. On December 6, 2010, a follow-up discussion was held with at least 100 attendees including lecturers, music producers, professionals, and students.



# PEOPLE'S REPUBLIC OF CHINA (PRC)

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

### 2011 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: IIPA recommends that USTR maintain China on the Priority Watch List in 2011.<sup>1</sup>

**Executive Summary:** High copyright piracy levels persist in China, from pervasive use of unlicensed software by businesses and pre-installation of unlicensed software (hard disk loading piracy) at the distribution level, to widespread online piracy of music, films, television programming and other copyright materials, and piracy of hard goods. The continued overall lack of deterrence against piracy, market closures or barriers for creative content (some of which have been found to violate China's WTO commitments), and the imposition or spectre of discriminatory policies toward foreign content, suggest a conscious policy seeking to drive Chinese competitiveness while permitting free access to foreign content through unapproved pirate channels. China's principal reliance on its woefully under-resourced administrative system to deal with IPR infringements rather than through criminal enforcement presents a significant hurdle to effective enforcement.<sup>2</sup>

At the same time, with the launch of a new Special Campaign on IP enforcement, and through commitments made in recent bilateral forums, the Chinese Government has indicated measures it will take to achieve higher levels of copyright protection. Specifically, the recent meeting of the Joint Commission on Commerce and Trade (JCCT) in December 2010 and the summit between President Obama and President Hu in January 2011 resulted in a number of important commitments by the Chinese to ensure legal use of software in the government and state-owned enterprises (SOEs), seek effective measures to deal with Internet infringements (including intermediary liability), deal with digital library infringements, and ensure that China's "indigenous innovation" policies do not effectively limit market access for U.S. intellectual property owners, compel transfers of intellectual property to access the Chinese procurement market, or create conditions on the use of or licensing of U.S. intellectual property.<sup>3</sup> New Opinions on handling criminal copyright infringement cases contain helpful provisions which could foster an effective criminal remedy against online piracy activities. IIPA commends the efforts of the U.S. Government to secure these important commitments. However, as has been the case with past commitments to improve copyright protection and market access made by the Chinese Government, it remains to be seen whether the Chinese will implement them in a sustainable and meaningful way, at the central and provincial levels, to ensure that copyright piracy in all its forms is curbed and to provide a fairer and more open market for U.S. creative content.

#### Priority Actions Requested in 2011:

##### Enforcement

- Increase the number and effectiveness of criminal prosecutions, including against online piracy and those services that facilitate piracy, such as Baidu; bring criminal cases against corporate end-user software piracy; allow specialized IPR judges to hear criminal cases; and move more criminal IPR cases to the intermediate courts.
- Follow through on China's commitments at the recent JCCT and Obama-Hu summit to ensure legal use of software by the government and SOEs by 1) treating software as property and establishing software asset

<sup>1</sup> For more details on China's Special 301 history, see IIPA's "History" Appendix to this filing at <http://www.iipa.com/pdf/2011SPEC301HISTORICALSUMMARY.pdf>, as well as the previous years' country reports, at <http://www.iipa.com/countryreports.html>.

<sup>2</sup> In November 2010, the Chinese Government announced a "special campaign on fighting against infringing IP and manufacturing and selling counterfeiting and shoddy commodities," to last from October 2010 to March 2011. While the industries support sustained enforcement campaigns, this campaign has mostly focused on physical piracy and lacks the permanence to significantly reduce piracy.

<sup>3</sup> See The White House, Office of the Press Secretary, *FACT SHEET: U.S.-China Economic Issues*, January 19, 2011, at <http://www.whitehouse.gov/the-press-office/2011/01/19/fact-sheet-us-china-economic-issues> and United States Trade Representative, *21st U.S.-China Joint Commission on Commerce and Trade: Fact Sheet*, December 15, 2010, at <http://www.ustr.gov/about-us/press-office/fact-sheets/2010/21st-us-china-joint-commission-commerce-and-trade>.



management systems for government agencies, 2) allocating current and future government budgets for legal software purchases and upgrades, 3) implementing software legalization pilot programs for 30 major SOEs, and 4) conducting audits to ensure that government agencies at all levels use legal software and publish the results.

- Increase actions by SARFT, GAPP, MOC, and the Ministry of Industry and Information Technology (MIIT) to revoke business licenses and halt online services that deal in/provide access to infringing materials, and shut down websites that operate without government-issued licenses.
- Enhance “pre-release” administrative enforcement for motion pictures, sound recordings, and other works.
- Crack down on web-based enterprises’ piracy of library academic journals as promised in the 2010 JCCT outcomes, and otherwise take steps to legalize usage of books and journals at universities and by government.
- Combat piracy occurring on mobile networks, such as unauthorized WAP sites, and unauthorized downloading and streaming of infringing music to smart phones.
- Expand resources at National Copyright Administration of China (NCAC), local Copyright Administrations, and Law and Cultural Enforcement Administrations (LCEAs), commensurate with the scale of the piracy problem, for more effective enforcement actions against all forms of piracy.
- Impose deterrent fines in administrative enforcement actions.
- Allow foreign rights holder associations to increase staff and conduct anti-piracy investigations.

#### Legislation and Related Matters

- Follow through on JCCT and bilateral commitments to hold accountable violators of intellectual property on the Internet (including growing hard goods sales on e-commerce sites), including those who facilitate the infringement of others, through appropriate amendments and regulations.
- Confirm that corporate end-user software piracy and hard disk loading of unlicensed software are criminal offenses, including issuing a Judicial Interpretation and amending the Criminal Code and Copyright Law and case referral rules as needed; and remove the “public harm” requirement as a hurdle to administrative enforcement.<sup>4</sup>
- Amend the Copyright Law and subordinate legislation/regulations to ensure full compliance with Berne, TRIPS, and the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT).
- Increase damages against copyright infringers in civil cases to deter piracy and adequately compensate the copyright holders.
- Significantly increase maximum statutory damages of RMB500,000 (US\$75,850) in the Copyright Law and related laws to ensure deterrence in the new technological environment.
- Review and amend the 2006 Internet Regulations to provide for a mandatory “notice and takedown” procedure for hosted content and penalties for non-compliance of right holders’ notices; ensure their effectiveness and implement them with more aggressive administrative and criminal enforcement.
- Amend the Copyright Law to clarify ISPs’ liabilities and introduce measures designed to ensure that there are incentives for active cooperation between Internet service providers and content holders in addressing the use of networks for the transmission of infringing materials in the non-hosted environment, e.g., infringements occurring using peer-to-peer (P2P) filesharing services, web bulletin boards, torrent sites, link sites and cyberlockers.
- Amend the Copyright Law to grant full communication to the public rights for related rights.
- Extend term of protection for sound recordings to at least 70 years from publication, and preferably to match the U.S. term of 95 years from publication, or 120 years from fixation.

#### Market Access

- Bring laws into compliance with WTO panel decision on market access for published materials, audiovisual materials, and recorded music.
- Refrain from implementing “indigenous innovation” policies that discriminate against foreign products or condition market access based on whether a product’s intellectual property is owned or developed in China.

---

<sup>4</sup> The Business Software Alliance reports that administrative officials are often unwilling to act against enterprises engaged in use of unlicensed software due to the vague “public harm” requirement, notwithstanding China’s 2005 declaration that software end-user piracy is considered to constitute “harm to the public interest” and as such is subject to administrative penalties nationwide.

- Ease the many market access restrictions noted in this filing, including the duopoly for theatrical film distribution and the ban on game consoles.
- Withdraw or significantly modify the Ministry of Culture *Circular on Strengthening and Improving Online Music Content Examination* which imposes burdensome procedures for online distribution of sound recordings, new discriminatory censorship procedures for foreign sound recordings, and WTO-inconsistent restrictions on the ability of foreign-invested enterprises to engage in the importation and distribution of online music.

## PIRACY AND ENFORCEMENT CHALLENGES AND UPDATES IN CHINA

Previous IIPA submissions, including those made to USTR in the Special 301 process, those related to China's WTO compliance,<sup>5</sup> those describing "notorious markets,"<sup>6</sup> and the recent submission before the USITC on identification and quantification of piracy in China,<sup>7</sup> have described in detail the many forms of copyright piracy and enforcement challenges in China faced by IIPA members. The following highlights key piracy and enforcement challenges and updates.

**Internet Piracy:** According to the China Internet Network Information Center (CNNIC), China's Internet population stands at 457 million Internet users as of December 2010, with over 66% of them using mobile phones to surf the web, by far the largest in the world.<sup>8</sup> More spectacular is the percentage of those users with high-speed broadband interconnections, at an estimated 450 million users. Of mobile users, 303 million now have mobile Internet access,<sup>9</sup> and there is growing evidence that piracy is taking place directly on mobile devices over wireless broadband networks (3G), and the pre-loading of infringing files on mobile devices is a problem for copyright industries.<sup>10</sup> Of all Internet users, according to CNNIC, 79.2 % use the Internet for "Web music," 66.5 % use the Internet for "Web game," 62.1% use the Internet for "Web video" and 42.6% use the Internet for "Network literature."<sup>11</sup>

These statistics speak volumes, since for most of the copyright sectors, legitimate content is not made available in significant quantities online in China due to the prevalence of piracy, market access restrictions, or other discriminatory measures which effectively keep legitimate content out. Internet piracy of music is an illustrative example, estimated at 99% piracy and fueled primarily by businesses like NASDAQ-traded Baidu, that direct users to infringing content and are supported by advertising.<sup>12</sup> The harm caused by Internet piracy of music can perhaps be

<sup>5</sup> International Intellectual Property Alliance, *China's WTO Compliance: (1) Request to Testify at October 6, 2010 Hearing and (2) Notice of Testimony Regarding China's Compliance with its WTO Commitments*, 75 Fed. Reg. 45693 (August 3, 2010), September 22, 2010, at <http://www.iipa.com/pdf/ChinaWTOrequesttotestifyandtestimonytoTPSCFinal092210.pdf>.

<sup>6</sup> International Intellectual Property Alliance, *2010 Special 301 Out of Cycle Review of Notorious Markets: Request for Public Comment*, 75 Fed. Reg. 60854 (October 1, 2010), Docket No. USTR-2010-0029, November 5, 2010, at <http://www.iipa.com/pdf/IIPAOCRNotoriousMarketsUSTRFINAL110510.pdf>.

<sup>7</sup> International Intellectual Property Alliance, *China: Intellectual Property Infringement, Indigenous Innovation Policies, and Frameworks for Measuring the Effects on the U.S. Economy*, Written Submission, Investigation No. 332-514, 75 Fed. Reg. 25883 (May 10, 2010), July 9, 2010, at <http://www.iipa.com/pdf/IIPACHinaITCWrittenSubmission070910.pdf>.

<sup>8</sup> China Internet Network Information Center (CNNIC), *Statistics Report on the Development of Internet in China*, January 2011, at <http://research.cnnic.cn/img/h000/h12/attach201101211728520.pdf>.

<sup>9</sup> The latest Internet numbers represent significant increases over previous years, especially in the areas of increase in access to the Internet via mobile devices and laptops: 66.2% of all Internet users in China employed mobile Internet as of December 2010, up from 60.8% in December 2009; and 45.7% of all Internet users in China employed laptops for Internet as of December 2010, up from 30.7% in December 2009. Meanwhile, 78.4% of Internet users in China used desktops as of December 2010, still representing a majority of Internet users.

<sup>10</sup> For example, the total value of recorded music sales and licensing in China last year was US\$124 million. Of this, only \$30 million was physical sales. More than 80% of the remaining \$94 million was due to revenue generated through mobile platforms, the greatest single contributor being ringback tones. Given the extremely high piracy rates, it is evident that significant losses accrue due to mobile piracy of copyright materials. Mobile broadband provides instant access to infringing copyrighted material, not only music, but also video, books, software and videogames. The record industry notes that a wide range of unauthorized WAP sites and mobile applications, "Apps" (Apple), and Android and other domestic mobile platforms offer infringing song files for streaming and download. Chinese made mobile phones, e.g., Malata Group, now have built-in features linking the phone to infringing WAP sites such as 3g.cn, aitmp3.com, 3Gwawa.net, wap.kxting.cn, wap.soso.com, to allow mobile phone users to gain access to thousands of infringing song files hosted at remote servers.

<sup>11</sup> See *supra* note 8 above at 31. All these percentages amount to huge spikes in actual numbers of users since the number of overall users went up so significantly. For example, the number of Internet users accessing "Web music" in December 2010 was 12.9% higher than in December 2009. Of the so-called "web entertainment" applications, the greatest increase in the sheer numbers of users was for "Network literature," which saw an increase of 19.8%.

<sup>12</sup> It is estimated that almost 50% of all illegal music downloads in China take place through Baidu. Baidu frequently creates "top 100" charts and indexes inducing users to find and then download or stream infringing music without permission or payment. On January 20, 2010, the Beijing No. 1 Intermediate People's Court found that Baidu's MP3 deeplinking service did not infringe the rights of Chinese and international record companies. The court determined 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 Baidu's

best understood in numbers by comparing the values of China's legitimate market with that of other countries. The value of total legitimate digital sales in 2009 in China was US\$94 million, and total revenue (both physical and digital) was a mere US\$124 million. This compares to \$7.9 billion in the U.S., \$285 million in South Korea and \$142 million in Thailand — a country with less than 5% of China's population and with a roughly equivalent per capita GDP. If Chinese sales were equivalent to Thailand's on a per capita basis, present music sales would be US\$2.8 billion, and even that would represent under-performance and reflect significant losses to piracy. It is fair to say that China's lack of enforcement against music piracy—particularly on the Internet, amounts to more than US\$2 billion in subsidies to Chinese Internet companies who can provide their users with access to music without negotiating licenses therefor. In addition to serious infringement problems with sites like Baidu, Sogou, and Xunlei's Gougou, there are many other websites such as 1ting.com, sogua.com, qq163.com, haoting.com, 520music.com and cyberlocker sites such as Rayfile, Namipan, and 91files which have been implicated in music piracy activities in China. A wide range of recordings have been found on web "forums", such as pt80.com and in-corner.com. These forums direct users to download or stream unauthorized sound recordings stored in Chinese cyberlockers. An increasing number of pre-release albums have been shared by postings at forums which have registered users in the hundreds of thousands — decimating the market for those recordings. Although cease and desist notices have been sent to the administrators of the forums and cyberlockers identified, immediate takedowns of such "URLs" and/or postings are rare. Illegal P2P filesharing remains prevalent in China. Many Chinese-based P2P services, such as Xunlei, VeryCD,<sup>13</sup> etc., assist in large scale illegal file-sharing activities that have caused serious damage to the recording industry. Most of these illegal services offer songs for free, generating income from advertising and other services.

The entertainment software industry continues to report steadily growing Internet piracy of videogames in China. P2P downloads of infringing video game files is fast becoming the predominant form of piracy along with websites that offer infringing video game product that can be accessed from home PCs and from Internet cafés. The Entertainment Software Association (ESA) reports that during 2010, ESA vendors detected 16.7 million connections by peers participating in unauthorized file sharing of select member titles on P2P networks through ISPs located in China, placing China second in overall volume of detections in the world.<sup>14</sup> This comprises 11.57% of the total number of such connections globally during this period. In addition to P2P piracy, China is home to a growing number of online auction and e-commerce sites that serve as platforms for the commercial distribution of pirated game products and circumvention devices. Sites such as Alibaba.com, Aliexpress.com, GlobalSources.com, Made-in-China.com, DHgate.com, Taobao.com, and Tradetang.com are among the top online marketplaces selling videogame circumvention devices, as well as being cited by industry as offering other copyright infringing products to consumers and businesses, including scanned copies of commercial bestsellers (trade books) and academic textbooks. Unfortunately, most of these sites are unresponsive to rights holder takedown requests. Alibaba should, however, be commended for their cooperation with videogame right holders in the removal of infringing items. The Business Software Alliance (BSA) also reports that online distribution of pirated business software including both downloading/linking/P2P sharing as well as online sales is a significant and growing problem.

For the motion picture industry, the Internet in China presents a monumental opportunity for growth of legitimate online video,<sup>15</sup> but poses equally monumental challenges.<sup>16</sup> The motion picture industry remains

---

operators actively provided full indexes of popular songs, and knew that the sites being linked to were not those of the legitimate licensees of the plaintiffs. In a companion case, the Court held that Sohu/Sogou were not generally liable for its linking service. The Court only held that Sohu/Sogou infringed several tracks that were part of a "notice & takedown" request made by the plaintiffs, although the damages awarded were only RMB1000 (US\$152) per track. There remains evidence of Baidu's contributions to, and profiting from, the infringing activities over its services. Baidu's deeplinking service also continues to direct users in Hong Kong, Taiwan, Singapore, Malaysia, and elsewhere to infringing music files. Perhaps emboldened by the Baidu decision, there are now thousands of websites that offer streams, downloads, or links to unauthorized music files as well as other specialized deeplinking or "MP3 music search engines" such as Sogou, Gougou offering access to thousands of infringing music files for unlimited streaming and download without consent, while generating income from advertising and other services. It is hoped that the 2011 Criminal IPR Opinions will effectively address these services.

<sup>13</sup> Although VeryCD closed its music and movie sections on January 21, 2011, it is unknown whether this is only temporary under the pressure of the special campaign. Also, links to download books and articles are still available.

<sup>14</sup> These figures do not account for downloads that occur directly from hosted content, such as infringing games found on "one-click" hosting sites, which appear to account each year for progressively greater volumes of infringing downloads.

<sup>15</sup> China's "Three Network Convergence" trial presents content owners with new business opportunities, for example, video content transmitted from the Internet to TV sets (IPTV/Internet TV), as well as challenges as broadband speed increases. In the absence of legitimate business opportunities (DVD/BD, PPV, cable TV) due to rampant hard goods and online piracy, China presents real business potential for movie products in the online video space. Arguably, China's Internet

particularly concerned about infringements on sites like Youku and Tudou which are “User-Generated Content” (UGC) sites where users upload/make available illegal copies of their favorite feature films or TV programs in China, which then become accessible to anyone in the world. Linking sites to these UGC sites or to other sites multiply the accessibility to the unauthorized content and thereby significantly increase the harm to the copyright companies. The Motion Picture Association of America continues to report that close to half of the illegal content available on the world’s “topsites” is sourced from UGC sites in China. PPLive and PPStream are examples of unauthorized IPTV webcasting channels out of China, which webcast all kinds of television content without authorization. Such pirated IPTV webcasts damage right holders both in their ability to legitimately license pay television and Internet streaming rights and their ability to foster the deployment of legitimate IPTV distribution platforms.

Other problems include illegal P2P streaming sites, illegal P2P filesharing, online sales of pirated hard goods which in 2010 spread at an alarming speed and scale along with the rapid development of e-commerce in China, and a recent phenomenon of “subtitling/translation” sites engaged in piracy. TVAnts is an example of a Chinese P2P software model which results in real-time illegal streaming of television content and live sporting event telecasts. These sites unfortunately provide an efficient environment for infringing activities online with respect to broadcast content to occur. Streaming sites allow, with or without the downloading client software, the viewing or listening to illegal content directly without making a permanent copy as occurs in a download. Other P2P sites in China, including Xunlei, are P2P filesharing sites by which users download and install the P2P client application, enabling them to search for illegal files on each other’s computers and illegally download the infringing files they want. Several of China’s top e-commerce sites now allow online shop owners to sell pirated DVD/Blu-ray discs without requesting those operating the online shops to provide government-issued AV business licenses. Finally, some “non-commercial” piracy websites (e.g., movie/TV subtitling/translation groups, software/client developers) are increasingly becoming a source of pirated content and activities. Due to the fact that these sites are operated by “volunteers” and are constantly changing IP addresses/servers inside (and outside) China, they pose a serious challenge for right holders.

The publishing industry faces unique challenges on the Internet, involving the commercial distribution of electronic copies of academic, scientific, technical and medical journals by unlicensed commercial entities operating with licensed libraries acting in violation of their licenses. This distribution is not only in violation of the terms of the license but also contravenes Chinese Copyright Law and international norms. The commercial enterprises sell subscription access to the electronic distribution service in direct competition with the legitimate publishers. In 2006, publishers became aware of the then-named “Kangjian Shixun,” now operating as “KJ Med,” which 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 or payment to right holders. This matter was first raised with government authorities in early 2007 but KJ Med continues to operate unimpeded. Many of the articles illegally distributed continue to be provided by a well-known, powerful state-run medical library. Given the lack of action against the site over the past several years, there is heightened concern that copy-cat sites are following the KJ Med model.<sup>17</sup> The issue was again a key agenda item in the 2010 JCCT dialogue and has been followed by positive engagement from NCAC in early 2011; the publishers are hopeful that this engagement will result in meaningful

---

video business is better positioned for the development of pay/subscription-based business models if the problem of piracy can be resolved/contained. Currently, several websites in China are adopting ad-supported online video business models with legitimately acquired content. Many are planning to roll out pay business models (subscription-based, PPV) in 2011.

<sup>16</sup> Online video sites, especially video search engines (e.g., Xunlei) and P2P sites (e.g., UUsee, PPLive) are inspired to enter this new frontier by directly providing OEMs/TV manufacturers with content they “aggregate” from the Internet. Although SARFT has made it clear that all video content transmitted from the Internet to TV sets will need to go through the five “authorized broadcast control platforms,” companies such as Xunlei are likely to find ways to bypass the regulations to work with OEMs and attract customers with the offer of “free content.” The independent segment of the film and television industry (IFTA) reports that Internet-based piracy in China prevents the establishment of legitimate online distribution platforms and services for consumers, which independent producers may use to finance future productions. For independent producers who license content country-by-country, online piracy exports troubled marketplaces and high piracy rates to other markets instantly. The independent production sector is limited in its ability to shift to technology-enabled new business practices that might limit piracy. For example, independents, whose national distributors release on their own schedule, cannot use piracy-averting techniques like “day-and-date” release of their films.

<sup>17</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 Kangjian 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.

action on this matter. On October 28, 2009, Chinese agencies issued 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. Unfortunately it is unclear whether the obligations outlined in this Notice have been carried out, including whether random inspections of library institutions have been conducted. A number of publishers have been working with Taobao to address the rampant copyright infringement occurring on the site. In December 2010, a ten day campaign was launched by Taobao to specifically target online book and journal piracy. This collaborative initiative is welcomed by the publishing industry and it is hoped that this will progress to sustained action by Taobao, which has been cooperating with publishers in this regard.

While home (broadband or not) and mobile Internet usage has become the predominant way Chinese access content online, piracy in Internet cafés remains a major concern, as they make available unauthorized videos and music for viewing, listening or copying by customers onto discs or mobile devices. The recording industry notes that syndicated services have even emerged, which supply website templates, software, and databases containing infringing song files for individuals or Internet cafés to set up infringing music websites with ease.

**Update on Internet Piracy Enforcement – Signs of Positive Movement:** While significant challenges remain, there are at least some signs that the Chinese Government is becoming more active in dealing with online infringements. The outcomes of the recent JCCT plenary session (December 15, 2010) and the subsequent summit meeting between President Obama and President Hu (January 19, 2011) contain important commitments aimed at addressing massive online piracy in China. Specifically, China committed in the JCCT “to obtain the early completion of a Judicial Interpretation that will make clear that those who facilitate online infringement will be equally liable for such infringement.” On January 19, 2011, the U.S. “welcomed China’s agreement to hold accountable violators of intellectual property on the Internet, including those who facilitate the counterfeiting and piracy of others.” Just days before President Hu’s visit to the United States (January 11, 2011) the Chinese Government issued new “Supreme People’s Court, Supreme People’s Procuratorate and Ministry of Public Security Promulgated Opinions on Certain Issues Concerning the Application of Laws for Handling Criminal Cases of Infringement of Intellectual Property Rights,” hopefully leading to stronger and clearer criteria for criminal liability for Internet-based infringements.

These high-level commitments resulted in some progress by the Chinese Government against Internet piracy in 2010, both in terms of administrative measures and seeking criminal prosecutions against infringing sites and services supporting and benefiting from infringement. For example, the Ministry of Culture on December 15, 2010 announced a Notice by which illegal websites not acquiring approval from or registering at provincial cultural departments, would be shut down. The list included 237 music websites, including yysky.com and cococ.com. As of 2009, 89 of these sites had closed. The websites were given a deadline of January 10, 2011 to delete illegal music.<sup>18</sup> While the recording industry welcomes these enforcement actions, the industry is distressed that the Chinese Government also appears to be using censorship as justification for closing websites. As has been established, foreign recordings, in contrast to domestic recordings, must go through a very cumbersome censorship process before they can be released to the online market. Therefore, the prohibition on making available foreign recordings without censorship clearance should not be the basis for acting against licensed music site operators. In fact, many licensed music site operators have already used their best endeavors to satisfy the censorship application requirement. Other developments include the recent arrest of OpenV.com executives and several other criminal investigations that are underway. The recording industry reports that local copyright bureaus recently have come to them requesting support for criminal prosecutions against website operators. As a result, law enforcement agencies appear to have stepped up actions taken against copyright infringers in 2010, especially in combating Internet piracy, in regards to administrative measures as well as criminal prosecution. This increased action has gotten the attention of ISPs who in turn have become more cooperative in their response to rights holders’ requests for takedown of

---

<sup>18</sup> Qiu Bo, *Sites Offering Songs Told to Obey the Law or Face the Music*, China Daily, December 17, 2010, at [http://usa.chinadaily.com.cn/2010-12/17/content\\_11718277.htm](http://usa.chinadaily.com.cn/2010-12/17/content_11718277.htm). Prior to this Circular, in April 2010, MOC announced that it would “request” 117 sites to apply for an MOC Online Cultural Operating Permit. About 30 of the sites had been shut down as of December 10, although some had reemerged.

infringing content/goods on their sites. Finally, on January 24, 2011, VeryCD.com reportedly suspended all links to movie and music content on the site. Some news sources reported that many file-sharing sites similar to VeryCD, including subpig.net and uubird.com, would shortly follow suit, but these sites were as of early February 2011 still in operation. IIPA has consistently included VeryCD as being among the worst copyright infringers on the Internet. This development, if permanent, will represent a significant step forward for IPR in China. We will continue to monitor the situation closely and report any further developments.

Continuing hurdles to more effective enforcement include non-deterrent administrative fine structures (e.g., there is no daily fine for continuing to infringe); inadequate staffing and resources within local administrative agencies responsible for copyright to deal with the task of curbing infringements (including online infringements),<sup>19</sup> and lack of cooperation at the provincial levels generally;<sup>20</sup> unwillingness of authorities or service providers to assist in identifying infringers' locations and identities;<sup>21</sup> lack of a willingness to administer fines against ISPs which do not comply with takedown requests;<sup>22</sup> unwillingness among authorities generally to enforce against Internet cafés (notwithstanding some attempt by NCAC to regulate the use of motion pictures in such premises); and the lack of an effective criminal remedy for online infringement.

**Internet Infringement Case Results Mixed:** The recording industry reports that on August 20, 2010, the operator of an infringing website (7t7t.com) making available infringing sound recordings for streaming and downloading was found guilty by the People's Court in Changshu in Jiangsu Province.<sup>23</sup> The operator was sentenced to a jail term of 6 months, suspended for 1 year, and fined RMB15,000 (US\$2,275). In addition, his earned commission of RMB12,837 (US\$1,950) was confiscated. In January 2011, three operators of another infringing site, Qishi.com, were convicted by the criminal court in Chuzhou in Anhui Province of copyright infringement. One of these operators was sentenced to 5 years imprisonment and was fined RMB1.5 million (US\$227,500). The remaining two were sentenced to jail terms of 3 years and 6 months, and 3 years and 3 months, respectively, and both were subject to a fine of RMB200,000 (US\$30,350). These cases represent a welcome sign in the direction of strengthened judicial results against online piracy. Administrative authorities also appear to be acting more aggressively in coordinating with local public security bureaus to transfer cases for criminal investigation against music streaming websites. For example, the Administration of Culture in Jiangsu Province (JSAOC) transferred a case against 51wma.com to the PSB in Suzhou, Jiangsu Province; the Jin Men PSB in Hubei Province arrested the operator of music98.net; and the PSB in Sichuan province commenced a criminal investigation against 6621.com that led to the arrest of the site operator. These cases are still under investigation and it is unknown whether these actions and deterrent sentences will be meted out after the special campaign. Cooperative arrangements among PSBs in certain localities also seem to be helping create a more coordinated approach to dealing with online infringements.<sup>24</sup> These positive outcomes are in contrast to the unfortunate result in the civil litigation against Baidu.<sup>25</sup>

---

<sup>19</sup> In addition, some government agencies simply do not employ their authorities, for example, the Communication Bureau has the ability to halt Internet access to any infringing websites which does not have an ICP record number, but the authorities seldom exercise this power.

<sup>20</sup> Local protectionism (e.g., Shanghai, Shenzhen) is an issue that prevents effective measures from being taken against pirate Internet sites. The industries report that coordination among enforcement authorities and industry regulators is lacking. Local telecom bureaus are not always cooperative in helping NCAC find evidence and shut down infringing sites. MIIT, SARFT, Ministry of Culture, and GAPP have not provided clear guidance that serious infringements or repeated infringement should result in revocation of the relevant business licenses. As a result, large sites that have been fined several times by NCAC or even found infringing in the civil courts for infringements can still legally operate in China.

<sup>21</sup> For example, 1) the MIIT website and domain name registration process allows for fake IDs to register, making it difficult for right holders to identify infringers, 2) there is no identification authorization process which, coupled with lack of cooperation from ISPs, makes it difficult to find uploaders, 3) authorities that do take enforcement actions are reluctant to share evidence they have collected with right holders to facilitate private remedies like civil lawsuits, and 4) courts are not equipped at present to provide quick and effective evidence preservation proceedings. The implementation of "genuine name/ID" registration (IP address) will have a positive impact on fighting Internet piracy, including video streaming, e-commerce platforms, music sites and others.

<sup>22</sup> The recording industry notes that takedown rates of complaints filed with administrative authorities like MOC, NCAC and SARFT worsened in 2010.

<sup>23</sup> IFPI working with the local Jiangsu PSB conducted criminal investigations into targeted infringing music websites, with copyright holder provision of a large quantity of proof to fulfill the criminal threshold.

<sup>24</sup> On December 7, 2010, Xinhua News reported on the signing ceremony of the agreement on cooperation against online crime by public security bureaus in Hainan Province. The cooperative system involved PSBs in the 11 signatory cities in the Pearl River Delta agreeing to assist one another in conducting investigations to increase efficiency, remove obstacles in evidence collection and reduce cost. A similar cooperative system established in June 2009 led to more than 7,000 leads being handled through the system, resulting in the arrest of 460 suspects in 432 online criminal cases.

<sup>25</sup> See *supra* note 12.



**Enterprise End-User Piracy:** The business software industry continues to face unlicensed software use by enterprises – including private businesses, state-owned enterprises and government agencies – on a massive scale. For 2010, market research firm IDC preliminarily estimates the PC software piracy rate in China to be 79 percent – nearly 8 out of every 10 copies of software deployed last year. This rate is flat from 2009 and has only dropped 3 points since 2006. The preliminary estimated commercial value of pirated PC software in China from U.S. vendors last year was nearly \$3.7 billion.<sup>26</sup> Piracy of U.S. business software in China not only diminishes sales and exports for U.S. software companies, but gives an unfair competitive advantage to Chinese firms that use this unlicensed software without paying for it to produce products that come into the U.S. market and unfairly compete against U.S.-made goods produced using legal software.

A significant hurdle to effectively dealing with enterprise end-user piracy in China is the lack of availability of criminal enforcement against end-user piracy. While the Supreme People's Court (SPC) indicated in a 2007 JI that under Article 217 of the criminal law, unauthorized reproduction or distribution of a computer program qualifies as a crime, authorities remain unwilling to take criminal end-user cases for fear of failing to meet the “for-profit” requirement in Article 217. The Chinese Government should make a clear commitment to criminalize enterprise end user piracy, providing details on the timing, framework and approach, including issuance of a Judicial Interpretation by the Supreme People's Court (SPC) and the Supreme People's Procuratorate (SPP) and corresponding amendments to the Criminal Code and Copyright Law and case referral rules for the Ministry of Public Security and SPP as needed. The 2011 Criminal IPR Opinions could be helpful in this regard, since they define in Article 10(4) the criteria of “for profit” as including “other situations to make profit by using third parties’ works.” Since the unlicensed use of software in enterprises involves reproduction and/or distribution, and since use of unlicensed software lowers costs and allows enterprises to “make profit,” the Opinions appear to support criminalization of enterprise end-user piracy. Another key hurdle is meeting the applicable thresholds, i.e. calculation of illegal revenue or illegal profit, even if determined to be “for profit.” In the meantime, the only avenue for seeking redress over the years have been the administrative and civil systems, which are under-funded and under-resourced, and which generally result in non-deterrent penalties. For example, in 2010, BSA lodged 36 complaints against end-users, including 13 with the local authorities and 23 with the National Copyright Administration for Special Campaign.<sup>27</sup> Unfortunately, in 2010, software end-user complaints shifted jurisdiction from the local Copyright Administrations to the LCEAs; as a result, only ten administrative raids were conducted in 2010. BSA brought nine newly filed civil cases in 2010, five against enterprise end-users, and one involving Internet piracy.<sup>28</sup> There is similarly a need to clarify criminal liability for hard disk loading (HDL) of unlicensed software. There have been a few such cases and at least one is in the preliminary investigation phase by a local PSB. Clarification will be helpful to building a pilot case and developing best practices.

**Government Legalization of Business Software and Related Issues:** Another important issue for the software industry is the need for the Chinese Government to ensure that government agencies at all levels use only legal software. At the December 2010 JCCT and in the joint statement from the summit between President Obama and President Hu in January 2011, the Chinese Government made several significant commitments on software legalization in the government and SOEs. These included: 1) treating software as property and establishing software

---

<sup>26</sup> BSA's 2010 statistics are preliminary, representing U.S. software publishers' share of commercial value of pirated software in China. They follow the methodology compiled in the Seventh Annual BSA and IDC Global Software Piracy Study (May 2010), <http://portal.bsa.org/globalpiracy2009/index.html>. These figures cover packaged PC software, including operating systems, business applications, and consumer applications such as PC gaming, personal finance, and reference software – including freeware and open source software. They do not cover software that runs on servers or mainframes, or routine device drivers and free downloadable utilities such as screen savers. The methodology used to calculate this and other piracy numbers are described in IIPA's 2011 Special 301 submission at <http://www.iipa.com/pdf/2011spec301methodology.pdf>. BSA's final piracy figures will be released in mid-May, and the updated U.S. software publishers' share of commercial value of pirated software will be available at <http://www.iipa.com>.

<sup>27</sup> In 2009, based on BSA complaints, 19 end-user raids were undertaken by the local copyright administrations, 13 of which led to settlements, and only 3 of which resulted in administrative fines. The maximum fine was RMB20,000 (US\$3,033). In many of these cases, there was no seizure of the unlicensed software and computers employing it. This lack of a seizure remedy spills over into civil cases, as civil courts often refuse to authorize evidence preservation against an infringer unless the application is preceded by an administrative action establishing illegal software use or a right holder has obtained especially strong evidence.

<sup>28</sup> BSA filed three civil actions in 2009, and of those and previous cases, six settled. In 2009, major software companies won several civil judgments against those engaged in corporate end-user piracy, including the *Dare Information Industry Ltd. Co.* case; the *Guangdong Huaxing Glass Co., Ltd.* in Fuoshan, resulting in the defendant paying RMB500,000 (US\$75,840) in compensation and RMB1,000,000 (US\$151,680) for software legalization, and the July 2010 *CRS Electronic Co.* case. In which the court granted an evidence preservation order for the first time in an end-user software piracy case and the defendant paid RMB780,000 (US\$118,300) in compensation.



asset management systems for government agencies, 2) allocating current and future government budgets for legal software purchases and upgrades,<sup>29</sup> 3) implementing a software legalization pilot program for 30 major SOEs and 4) conducting audits to ensure that government agencies at all levels use legal software and publish the results.<sup>30</sup> These bilateral commitments have been followed by a number of directives from the Chinese Government implementing processes for software legalization in the government and SOEs. While these commitments and directives are welcome, it remains unclear whether they will be implemented in a meaningful and sustainable manner that results in a significant increase in legal software procurements. Using accounting firms and other credible third-parties to conduct software audits and implementation of internationally recognized software asset management (SAM) practices can help achieve this result. The Chinese Government must also follow through on its commitment in prior years to ensure that all computers produced or imported into China have legal operating systems. Implementation in recent years has been spotty.

**Physical Book and Journal Piracy:** In addition to the Internet issues described above, the U.S. publishing industry continues to suffer from physical piracy including illegal printing of academic books and commercial bestsellers, and unauthorized commercial-scale photocopying.<sup>31</sup> 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. The industry continues to monitor textbook centers and libraries at universities but there appears to be continued improvement in this regard as the presence of pirated books at these venues has markedly decreased. Where pirated textbooks have been found on library shelves, they are out of date editions and thus do not pose a threat to publishers' current legitimate market. The partnership of the Ministry of Education (MOE) with GAPP, NCAC and local authorities remains essential to tackling the ongoing on-campus infringement issues, especially given the large number and wide geographic spread of universities engaged in these practices.

Areas for possible improvement include transparency with respect to inspections, raids and formulation of administrative decisions. In October 2010, publishers worked with the Beijing Cultural Enforcement Department (CED) to conduct a raid against several targets that appeared to be the suppliers and distributors of pirated trade books being sold by itinerant vendors at several high traffic areas in Beijing. Unfortunately, despite good information about the targets, only one target's wholesale premises was actually raided as CED lacked the manpower and resources to conduct simultaneous raids. Despite the presence of Public Security Bureau (PSB) officials, CED refused to raid a storage facility previously identified as associated with the target as it was not open at the time of raid on the target. Though the raid resulted in the seizure of over 300 pirated books, it was disappointing as earlier surveillance had indicated that the combined targets were housing a large volume of apparently pirated books at their various locations. A subsequent raid was executed against the second (of three targets) at which over 1,000 books were seized, although only about 100 were English language titles. There have been no further developments regarding proceedings against the first target, and further action by the authorities against the second target is unlikely. Enforcement efforts such as these continue to be hampered by a general lack of resources leaving the authorities simply unable to handle enforcement against distribution networks or other multiple targets. Similarly the authorities are unable to respond to timely intelligence, a fact which, combined with the authorities' inability or unwillingness to enter unmanned premises, makes evasion by pirates simple and enforcement efforts severely limited in effect.

---

<sup>29</sup> In implementing government legalization, IIPA notes that proper budget allocations should be made not only for the central government agencies but for provincial and sub-provincial levels.

<sup>30</sup> It is our understanding that the government software audit agreed to by the Chinese Government in the summit joint statement involves an audit of agency budgets and spending on software rather than an audit of whether government agencies are using properly licensed software.

<sup>31</sup> Copy shops continued to harm publishers by condoning, or providing as a service, 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 Camcording:<sup>32</sup> The Motion Picture Association of America reports that the number of forensic matches from illegal camcords traced to China increased to 14 in 2010. MPAA also reports that camcording piracy has become a source of pirate films on Chinese UGC sites and as masters for pirate DVDs. SARFT should immediately implement watermarking in theatrical prints and ensure that China Film Group/exhibitors step up efforts to deter illegal camcording. The government should consider a standalone law/regulations (such as that in the United States and several other countries to date). There is evidence that such a statute may be needed in China, as the first camcording case in China (in November 2008), involving a Chinese film, resulted in the three suspects being released by the police.

Other Hard Goods Piracy: Physical piracy remains rampant in China,<sup>33</sup> including the manufacture and distribution of factory optical discs (ODs);<sup>34</sup> the burning of recordable discs either retail or industrial copying using disc drives or towers; “hard disk loading” of software without a license onto computers for sale; production and/or sale of pirate videogames and circumvention devices; the production in China (generally for export) of high-quality counterfeit software packages; and the loading of pirate music on karaoke machines. The piracy levels for video, audio and entertainment software in physical formats continue to range between 90% and 95% of the market. China remains a source country for high quality manufactured counterfeit optical discs, many of which are found throughout the region, in Australia and in European markets such as Italy, Switzerland, Turkey, Poland and the United Kingdom.<sup>35</sup> In 2010, enforcement raids and seizures at the retail, wholesale, warehouse, or other distribution level continued to result in seizures of massive quantities of pirate product. Unfortunately, these “campaigns” do not result in significant improvements in the market for legitimate product.<sup>36</sup> In recent years, the civil courts, particularly the IPR divisions of the courts, have rendered more favorable decisions in copyright infringement cases, including some significant civil remedy awards in cases involving physical piracy.<sup>37</sup>

IIPA members have voiced frustration with thresholds that make criminal enforcement rare. The entertainment software industry in particular registers its frustration in failure of the Chinese Government to bring criminal actions against manufacturers and distributors of pirated entertainment software and circumvention devices.

---

<sup>32</sup> Among the harms of illegal camcording in China is that it fuels rampant online piracy negatively impacting worldwide distribution and prevents the establishment of legitimate online distribution platforms. Camcording also threatens the continued growth of the Chinese theatrical box-office marketplace.

<sup>33</sup> Physical piracy harms the legitimate markets for all IIPA members but in different ways. The recording industry estimated value of physical pirate product was US\$425 million in 2010, with a 95% physical piracy level; this is not an estimate of U.S. losses which greatly exceed this amount. For the independent film producers, physical piracy of DVDs remains a significant export constraint for independent producers and distributors, the majority of which are small- to medium-sized businesses. Independent producers partner with local authorized distributors to finance and distribute film and television programming. These authorized distributors find it nearly impossible to compete with pirates and report that both physical and Internet-based piracy have significantly contributed to the demise of what was left of the home video market in China. Producers and distributors confirm that DVD sales have been particularly impacted since pirated digital copies are offered for free online and with a similar quality viewing experience that a DVD can provide. Unable to compete with free, legitimate distributors often cannot to commit to distribution agreements or they offer drastically reduced license fees which are inadequate to assist in financing of independent productions. Piracy undermines and may permanently damage legitimate distribution networks essential to reaching consumers and leaves little confidence for investment in intellectual property in China. On a positive note, IFTA also reports continued success with its certification program that is operated in conjunction with the Copyright Protection Center of China, an institution directly under the NCAC. This certification program provides an administrative method of preventing false registrations in China. To date, IFTA has issued over 2,950 unique certifications that demonstrate legitimate distribution rights to IFTA member product distributed in mainland China.

<sup>34</sup> Previous IIPA submissions have described in greater detail the number of factories, production over-capacity, inter-changeable production methods (e.g., from music CD to DVD), and fraudulent practices (such as false marking of VCDs or DVDs as “Blu-ray”).

<sup>35</sup> An increasing number of pirate products found or seized around the world have “mould codes” allocated to optical disc plants located in China. Due to the lack of forensic results provided by the “PRC Police Bureau for Disc Production Source Identification Center” to overseas copyright owners, however, insufficient evidence is available to support further actions against these suspected plants. This is due to Chinese Customs adopting a recordation/registration system for the protection of intellectual property rights, rather than a system of random inspections.

<sup>36</sup> For example, IIPA members tracked 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, those studies concluded that pirate product remained available in virtually the same quantities as before the campaign commenced, just in a more clandestine manner; piracy activities also tended to return to normal when the campaign concluded.

<sup>37</sup> Several successful civil judgments against those engaged in “hard disk loading” have been obtained in the past couple of years.

- In July 2009, Microsoft won a civil judgment against Beijing Strongwell Technology & Development, one of the larger custom PC dealers in Beijing.
- In a case against Shanghai HISAP Department Store, the court awarded a total of RMB700,000 (US\$106,175) 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. See <http://www.chinaipr.gov.cn/news/government/283006.shtml>.
- In a case against Beijing Sichuangweilai Technology & Development, one of the larger custom PC dealers in Beijing, RMB460,000 (US\$69,775) was awarded in damages.

In addition, in a case involving infringement of the Graduate Management Admission Test (GMAT), the Beijing No. 1 Intermediate People’s Court found that Beijing Passion Consultancy Ltd. infringed copyright and awarded the plaintiff RMB520,000 (US\$78,875) in damages.

Unfortunately, the methodology used by the Price Evaluation Bureau (PEB) fails to adequately account for the economic impact caused by pirated software and circumvention devices, and as a result, raids that result in the seizure of major quantities of pirated games or circumvention devices are rarely referred to the PSB unless counterfeit hardware is also involved. For instance, a factory was raided in Baiyun, Guangzhou in June 2010, where over 8,000 game copiers (circumvention devices) were seized; a similar raid in Liwan, Guangzhou in March 2010 resulted in the seizure of more than 19,000 pirated game discs. Neither of these raids were transferred for criminal action despite the enormous economic impact that would have ensued had these products made it to the market. PEB should make adjustments to the methodology it uses for assessing the value of seized goods in order to facilitate criminal prosecutions in appropriate cases.

**Public Performance Piracy:** Another abiding problem in China involves the unauthorized public performance of U.S. motion pictures, music videos, and increasingly, music, which occurs mostly unchecked (and unpaid for) in hotels, bars (including “Karaoke” bars),<sup>38</sup> clubs, mini-theaters (like KTV rooms), and karaoke establishments. In addition, there are instances of unauthorized broadcast by cable and/or satellite of the same.

China has long been in violation of its TRIPS/Berne Convention obligation to compensate copyright owners for the broadcast of musical compositions.<sup>39</sup> Finally, on November 10, 2009, 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 this longstanding TRIPS/Berne Convention violation to compensate copyright owners for the broadcast of musical composition. However, 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\$0.05) per minute for music played on the radio or RMB1.5 (US\$0.23) for TV. Advertising revenue for Chinese broadcasting was reported to be US\$10.16 billion in 2008.<sup>40</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 payment scheme is clearly tens of millions of dollars below what would be a fair rate. IIPA has urged that the new tariff be retroactive, at least to the date of China’s joining the WTO, but the new tariff is prospective only.

**Pay TV Piracy:** There were a few incidents of unauthorized use of copyright content during 2010 by broadcast and pay-TV networks in China. While SARFT is normally cooperative in assisting rights owners in responding to complaints filed, more stringent copyright compliance checks should be conducted by SARFT on a regular basis in 2011.

## COPYRIGHT LAW, REGULATIONS UPDATES

The 2001 Copyright Law of the People’s Republic of China,<sup>41</sup> subordinate regulations, judicial interpretations, or “opinions,” provide a sound basis for effective copyright protection on paper. Some of the laws still require clarification or changes to fully meet China’s treaty obligations.<sup>42</sup> With the adoption of the Internet Regulations in July 2006 and the entry into force of the WCT and WPPT on June 9, 2007, the legal infrastructure for effective protection of content online was significantly enhanced. One area of weakness has always been the Criminal Law, including

---

<sup>38</sup> In November 2010, the China Audio-Video Copyright Association brought more than 100 karaoke bar operators in Beijing to court, claiming they supplied unauthorized music to customers.

<sup>39</sup> The recording also notes the desirability of a workable remuneration system for the public performance or other communication/broadcast of their recordings. With the increase in playing of recorded music in commercial premises as a primary form of commercial exploitation of music, public performance, communication to the public and broadcasting income is becoming a major potential source of revenue for record producers.

<sup>40</sup> On Screen Asia, *China in Focus*, April 1, 2009, at <http://www.onscreenasia.com/article-4897-chinainfoocus-onscreenasia.html>.

<sup>41</sup> Previous IIPA Special 301 reports have gone through the legislative landscape in China in detail. This report is intended only to provide a summary of the key legislative and regulatory deficiencies and an update on new developments.

<sup>42</sup> It is worth noting that a Chinese official has acknowledged that further amendments to the Copyright Law are needed. *Interview with NCAC Vice Minister Yan Xiaohong*, June 13, 2007, BBC (republishing and translation of original Xinhua text), June 9, 2007. 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.

Articles 217 and 218 of the Criminal Law of the People's Republic of China (1997) and accompanying Judicial Interpretations.<sup>43</sup>

New Criminal IPR Opinions: On January 11, 2011, the "Supreme People's Court, Supreme People's Procuratorate and Ministry of Public Security Promulgated Opinions on Certain Issues Concerning the Application of Laws for Handling Criminal Cases of Infringement of Intellectual Property Rights" were issued.<sup>44</sup> These Opinions set out some important elements for Internet and related criminal cases and may help clarify and address other ongoing issues related to criminal liability in China. Salient features of the Opinions include:

- Article 10 of the Opinions reportedly provides that in addition to sale, "for the purpose of making profits" includes any of the following circumstances,
  - Directly or indirectly charging fees through such means as publishing non-free advertisements in a work or bundling third parties' works;<sup>45</sup>
  - Directly or indirectly charging fees for transmitting<sup>46</sup> third parties' works via an information network or providing services such as publishing non-free advertisements on the site using infringing works uploaded by third parties;
  - Charging membership registration fees or other fees for transmitting<sup>47</sup> others' works via an information network to members; and
  - Other circumstances that make profits by taking advantage of others' works.<sup>48</sup>
- Article 15 expands the scope of criminal liability by including as subject to accomplice liability "providing such services as Internet access, server co-location, network storage space, [and] communication and transmit channels...."<sup>49</sup>
- The Opinions provide specificity on the thresholds for criminal liability in the online environment. Specifically, Article 13 provides that "[d]issemination of third parties' written works, music, movies, art, photographs, videos, audio visual products, computer software and other works without copyright owners' permission for profit, in the presence of any one of the following conditions, shall be regarded as "other serious circumstances" under Article 217 of the Criminal Law:"
  - illegal operation costs amount to over RMB50,000 (US\$7,585);
  - disseminating over 500 copies of third parties' works;<sup>50</sup>

---

<sup>43</sup> Among other things, the laws contained thresholds that are too high (in the case of illegal income) or unclear (in the case of the copy threshold), require proof that the infringement is carried out "for the purpose of making profits" which was left undefined, fail to cover all piracy on a commercial scale as required by TRIPS Article 61, fail to take into account the WCT and WPPT, only provide accomplice liability as to the criminalization of imports and exports (penalties available are much lower and generally non-deterrent), and leave uncertain the penalties for repeat offenders (the 1998 JIs included repeat infringers but were inadvertently not included in the 2004 JIs).

<sup>44</sup> IIPA does not at present possess a full English translation of the Opinions, but we have received summaries and refer to these herein. In addition to internal summaries, we draw points from Richard Wigley, *New Guidelines for Criminal Prosecutions of Online Copyright Infringement Provide Aid in Fight against Online Piracy*, China Law Insight, January 19, 2011, at <http://www.chinalawinsight.com/2011/01/articles/intellectual-property/new-guidelines-for-criminal-prosecutions-of-online-copyright-infringement-provide-aid-in-fight-against-online-piracy/>.

<sup>45</sup> This last phrase has been alternatively translated as "binding a third party's works with other person's works." See *id.*

<sup>46</sup> This has been alternatively translated as "disseminating."

<sup>47</sup> This has been alternatively translated as "disseminating."

<sup>48</sup> This has been alternatively translated as "Other circumstances that make profits by taking advantage of other's works."

<sup>49</sup> See Wigley, *supra* note 44.

<sup>50</sup> This has been alternatively translated as "aggregate quantity of others' works being transmitted is more than 500 pieces." See *id.* The recording industry notes that differing interpretations have emerged over time and in different provinces with respect to the "500 copy" threshold. It is hoped that the Opinions will confirm that 500 different tracks or clips (or 500 copies of the same track or clip, or a combination) will suffice.

- disseminating third parties' works with the actual number of clicks amounting to over 50,000;<sup>51</sup>
  - disseminating third parties' works in a membership system with the number of members amounting to over 1,000;
  - if the amount or quantities listed in 1 to 4 categories above are not met, but more than half of the amount or quantities in two of the above categories are met;
  - in case of other serious circumstances.
- The Opinions reportedly also clarify that the crime of IPR infringement takes places where 1) the infringing product is produced, stored, transported and sold, 2) the place where the server of the website which distributes and sells the infringing product is located, 3) the place of Internet access, 4) the place where the founder or manager of the website is located, 5) the place where the uploader of infringing works is located and 6) the place where the rightful owner actually suffered from the crime. This reported listing provides extremely helpful guidance to the courts, as it would include the point of transmission, the point of receipt, the location of the server, the location of the key defendants, and any place where onward infringement causes harm to the right holder.<sup>52</sup>

Importantly, the Opinions appear to confirm criminal liability against a web service which does not directly receive revenues from the dissemination of copyright material, but which charges fees indirectly through "non-free advertisements." This clearer understanding of "for the purpose of making profits" in the Criminal Law is welcome. What remains to be seen is how various hosted or non-hosted piracy situations will be regarded under Article 10 or 15 of the Opinions. For example, the second prong of Article 10 seems clearly aimed at infringements over user-generated content sites on which there is paid advertising. Article 15 would appear to reach cyberlockers over which infringement takes place ("network storage space"), infringing streaming sites ("communication and transmit channels"), web-hosting services, ISPs and payment processing companies. It is hoped the Opinions will also address IPR violations on auction websites dealing in hard goods piracy targeted toward foreign markets and services providing access to infringing content through deeplinks, and that they will assist in addressing repeat infringers. To the extent they do not, coverage of such should be confirmed in other laws or regulations. It also remains to be seen how Article 10 ("Other circumstances that make profits by taking advantage of others' works") will be interpreted. It is important to note that the Opinions are not limited to the online environment (dealing with other IPR crimes), and it is hoped that, for example, enterprise end-user piracy of software, which is clearly a circumstance which results in increased profits for an enterprise by taking advantage of others' works, may be regarded as a crime under these Opinions. In the very least, the language lays the groundwork for such liability.

The Opinions also set out important clarifications with regard to thresholds for criminal liability. While it is yet to be seen how these new thresholds will be interpreted in practice, they appear to provide some flexibility and it is hoped they will ease the evidentiary burden to prove criminal liability in the online space. For example, whereas the previous numerical threshold was "500 copies" it now appears possible to prove a combination of elements, e.g., proof of "250 copies" combined with proof that there were 25,000 downloads appears to be sufficient under the Opinions, or as another example, in the case of a membership site, proof of 500 members combined with proof that "250 copies" were disseminated should now suffice for criminal liability. Moreover, it is hoped that the decision as to whether the threshold is met will be vested with the Procuratorate rather than the MPS or PSB. This is because the MPS or PSB, as they have in the past, may claim that the evidence provided by the right holders does not meet the criminal threshold such that they refuse to accept the case at the outset. In fact, it is necessary to require the

<sup>51</sup> This has been alternatively translated as "[w]here others' works being transmitted has been actually clicked for more than 50,000 times."

<sup>52</sup> See *Supreme People's Court, Supreme People's Procuratorate and Ministry of Public Security Promulgated Opinions on Certain Issues Concerning the Application of Laws for Handling Criminal Cases of Infringement of Intellectual Property Rights*, Watson & Band, January 13, 2011, at [http://www.watson-band.com.cn/news/detail?id=182&language=en\\_US](http://www.watson-band.com.cn/news/detail?id=182&language=en_US).

MPS/PSB to conduct further investigation, e.g. the advertising revenue, membership detail, etc. as part of determining whether the threshold requirement is met.

Copyright Law – Some Remaining Issues: The following name just a few remaining issues in need of reconsideration, with mention of any relevant international treaties:

- Temporary Copies (WCT and WPPT): Copyright protection in China should extend to reproductions regardless of their duration (e.g., as long as they can be further reproduced, communicated, or perceived). Neither the Copyright Law nor subordinate laws or regulations (e.g., the July 2006 Information Networks Regulations) confirms such coverage.
- Scope of Coverage of July 2006 Regulations: Although SCLAO's Director General Zhang has taken the position that all rights (and not just "communication to the public") are covered directly by Article 47 of the Copyright Law, and therefore the July 2006 Regulations), language to remove ambiguity would be helpful.
- Service Provider Liability Under the July 2006 Regulations: While the July 2006 Regulations provide for notice and takedown, preserve injunctive relief, and preserve liability in the case of knowledge or constructive knowledge, there are some issues that need to be clarified, especially in light of recent court decisions.<sup>53</sup> For example, under Article 23 of the July 2006 Regulations, it appears clear that ISPs are liable for linking to infringing materials, and Article 23 has been interpreted as such by the Court in the *Yahoo!CN* decision. But the *Baidu* decision casts doubt on whether Article 23 applies to deeplinking in the absence of actual knowledge. It is also important to clarify 1) the adequacy of electronic mail notices, and 2) the requirement that takedowns must occur within 24 hours subject to penalties imposed for non-compliance of right holders' notices<sup>54</sup> and the proviso that ISPs failing to take down sites following compliant notices will be deemed infringers and subject to administrative fines.<sup>55</sup> In addition, the current law does not, but should, provide a fair and effective mechanism to address repeat infringers.
- Compulsory License Under the 2006 Regulations (Berne/TRIPS): Article 9 of the 2006 Regulations sets forth a statutory license, which Director General Zhang has confirmed applies to foreign works which are owned by a Chinese legal entity. Unfortunately, such a compulsory or statutory license would appear to be inconsistent with China's Berne Convention and TRIPS obligations.
- Other Exceptions and Limitations in the 2006 Regulations (Berne/TRIPS): IIPA remains concerned about: (a) potentially overbroad exception as to teachers, researchers and government organs in Article 6; (b) the reference in Article 7 to "similar institutions" which leaves open who may avail themselves of the exception, and the failure to limit Article 7 to "non-profit" entities; and (c) lack of express exclusion of Article 8 to foreign works.<sup>56</sup>
- Communication to the Public for Related Rights (WPPT): The Chinese Government should confirm a full communication to the public right, including public performance, broadcast, simulcast and cable transmission rights for sound recordings as well as works.

---

<sup>53</sup> IIPA notes that a new China Tort Liability Law was enacted and passed by the Standing Committee of the National People's Congress of PRC on December 26, 2009. It came into effect on July 1, 2010. Under Article 36 of the Law, Network Users and Network Service Providers will be held jointly liable for an act of infringement if the Network Service Provider "knows" that a network user is using the network service to infringe others' civil rights but has not taken any necessary measures with respect to such practices. However, a Judicial Interpretation is needed to clarify that the word "knows" under Article 36 of the Tort Liability Law should mean "knows or ought to know" so that it becomes consistent with Article 23 of the Regulation on the Protection of the Right to Disseminate via Information Network.

<sup>54</sup> The January 20, 2010 Declaration on Content Protection contains the principle that takedowns should be accomplished within 24 hours.

<sup>55</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.

<sup>56</sup> Director General Zhang also confirmed that Article 8, which affects publishers, would not apply to foreign works but this should be confirmed in writing and a notice made widely available.

- Civil Pre-Established Damages, and Maximum Administrative Fines: Statutory damages under the Copyright Law (Article 48) should be increased to RMB1 million (US\$151,680, as in the patent law), made per work, and permitted at the election of the copyright owner. In addition, maximum administrative fines should be increased and assessed for each day an infringement persists in order to foster deterrence.
- Protection for Live Sporting Events: The law should be amended to ensure that live sporting events are protected either as works or under neighboring rights (i.e., such that unauthorized retransmission of copyright broadcasts is clearly forbidden).
- Presumptions of Subsistence and Ownership: The Law should be amended to establish clear presumptions of copyright subsistence and ownership.
- Term of Protection: China should take the opportunity while modernizing its law to extend the term of protection to life plus 70 years for works, and to 95 years for sound recordings and other subject matter where the term is calculated other than on the life of the author. Extending term will ensure China is following the international trend and that it will receive the benefit of reciprocal protection in other countries which provide longer term of protection.

Other Regulations – Administrative-Criminal Transfer Regulations: The amended Criminal Transfer Regulations leave unclear whether transfers are required upon “reasonable suspicion” that the criminal thresholds had been met, and thus, some enforcement authorities believe “reasonable suspicion” is insufficient to result in a transfer, requiring proof of illegal proceeds; yet, administrative authorities do not employ investigative powers to ascertain such proof. The “reasonable suspicion” rule should be expressly included in amended transfer regulations.

## MARKET ACCESS AND RELATED ISSUES

IIPA has consistently stressed the direct relationship between the fight against infringement and the need for liberalized market access to supply legitimate product (both foreign and local) to Chinese consumers. Unfortunately, there are a range of restrictions, affecting most of the copyright industries. Some of these must be eliminated as a result of a recent successful WTO case brought by the United States against China (as discussed below). All of them stifle the ability of U.S. rights holders to do business effectively in China.

Chinese market access restrictions include ownership and investment restrictions,<sup>57</sup> a discriminatory and lengthy censorship system (which further opens the door to illegal content), restrictions on the ability to fully engage in the development, creation, production, distribution, and promotion of music and sound recordings,<sup>58</sup> and the continued inability to engage in the import and export, distribution, publishing, and marketing online of published materials in China. They also include the maintenance of a quota of 20 foreign films for which revenue sharing of the box office receipts between the producers and the importer and distributor is possible,<sup>59</sup> the inability to import and distribute films except through the two main Chinese film companies (the duopoly), a screen-time quota for foreign theatrical distribution and foreign satellite and television programming, blackout periods for films, local print requirements, and onerous import duties, all of which close off the market for U.S. produced films and programming.

---

<sup>57</sup> For example, Hong Kong and foreign companies may not invest in any publishing or importing businesses for audio-visual products in mainland China.

<sup>58</sup> For example, the recording industry notes that the MOC Circular dealing with online music contains a restriction on “exclusive licenses” of online music services. Currently, there are less than 20 licensed services in China providing repertoire from non-local record companies. There should not be any problem for MOC to regulate these services and conduct anti-piracy actions against other infringing sites. Record companies should be free to choose their licensees.

<sup>59</sup> The impact of the “quota system” in China on the independent segment of the film and television industry is particularly damaging because most often the independents do not have access to legitimate distribution in China. For example, the recent WTO decision on intellectual property rights said that China could not solely extend copyright protection to works that are approved for distribution in China (i.e., pass censorship) as this inherently damages rights holders who cannot access “approved” distribution in China and whose works are simply not protectable under current Chinese Copyright Law. Similarly, the nontransparent censorship process in China and its multiple levels poses a significant market access barrier to the independents. Local distributors have reported the inability to obtain an official notice of denial from the censorship authorities.



An onerous ban on the manufacture, sale and importation of videogame consoles remains a major barrier.<sup>60</sup> Entertainment software companies also continue to face lengthy delays in the censorship approval process, wiping out the very short viable window for legitimate distribution of entertainment software products. The recently concluded WTO case will hopefully help address some, but not all, and in many cases, not the fundamental issues with respect to access to the Chinese market for U.S. music, movies, and books, and leave untouched many issues for the other industries. IIPA also notes a range of policies that China has developed under the banner of promoting “indigenous innovation” that have the effect of discriminating against foreign products or compelling transfers of technology and intellectual property to China in order to access the market. These policies limit market access for software and other IIPA member products and undermine the IP development of U.S. and other foreign copyright industries.

Previous IIPA filings, including that to the United States International Trade Commission in July 2010, raised the litany of market access issues of concern to the copyright industries.<sup>61</sup> The following provides an update on several significant issues.

**WTO Case Implementation Update:** 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>62</sup> This landmark WTO case will require China to open up its market for these industries in significant ways and hopefully 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 infringement there. Specifically, the Appellate Body affirmed the Panel’s ruling that requires China to:

- allow U.S. companies to import freely into China (without going through the government monopoly) films for theatrical release, DVDs, sound recordings, and books, newspapers, and periodicals. This is a significant market opening result.
- provide market access to, and not discriminate against, foreign companies wishing to distribute their products in China.<sup>63</sup>
- discard discriminatory commercial hurdles for imported reading materials, sound recordings intended for electronic distribution, and films for theatrical release.<sup>64</sup>

Related to this last point, the WTO Panel and Appellate Body, in a technical finding, concluded that they lacked sufficient information to determine whether China’s discriminatory censorship regime for online music violated China’s WTO commitments. However, this was not a “green light” for the Chinese to continue their discriminatory censorship practices. China’s discriminatory regime is both unfair and highly suspect under WTO rules. China further complicated an already unsatisfactory situation by issuing the September 2009 Circular on Strengthening and

---

<sup>60</sup> 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.

<sup>61</sup> See *supra* note 7.

<sup>62</sup> *China – Measures Affecting Trading Rights And Distribution Services For Certain Publications And Audiovisual Entertainment Products*, WT/DS363/AB/R, December 21, 2009, at <http://www.wto.int>. 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).

<sup>63</sup> Specifically, China must fix its measures in ways which will: open its market to wholesale, master distribution (exclusive sale) of books and periodicals, as well as electronic publications, by foreign-invested companies including U.S. companies; permit sound recording distribution services, including electronic distribution, by Chinese-foreign contractual joint ventures, including majority foreign-owned joint ventures; allow the participation of foreign capital in a contractual joint venture engaged in the distribution of reading materials or audiovisual home entertainment products; ease commercial presence requirements for the distribution of DVDs; and do away with China’s 15-year operating term limitation on foreign joint ventures.

<sup>64</sup> For example, China must not improperly and discriminatorily limit distribution for imported newspapers and periodicals to “subscriptions,” and must not limit such materials and other reading materials to Chinese wholly state-owned enterprises, and may not limit the distributor of such reading materials to a State-owned publication import entity particularly designated by a government agency. Finally, China may not prohibit foreign-invested enterprises from engaging in the distribution of imported reading materials.



Improving Online Music Content Examination (issued while the WTO case was being adjudicated and therefore not the direct subject of any Panel ruling). This Circular puts into place a censorship review process premised on an architecture already determined to violate China's GATS commitments—by allowing only wholly-owned Chinese digital distribution enterprises to submit recordings for required censorship approval. When China joined the WTO, it agreed to allow foreign investment in *all* music distribution ventures on a non-discriminatory basis. That includes online music distribution. By excluding foreign-invested enterprises (FIEs) from submitting imported music for censorship review, the Circular denies bargained-for market access and discriminates against FIEs thereby violating China's national treatment obligations. It violates China's accession commitments under the General Agreement on Trade in Services (GATS) and the General Agreement on Tariffs and Trade 1994 (GATT); it also violates China's Accession Protocol commitment to authorize trade in goods by any entity or individual. China must revoke or modify the Circular to fix these problems relating to the rights of FIE's to distribute music online, and the discriminatory censorship processes for treating foreign as opposed to local content.

While the U.S. had also alleged that certain Chinese measures indicated that imported films for theatrical release can only be distributed by two state-controlled enterprises (China Film and Huaxia), whereas domestic films for theatrical release can be distributed by other distributors in China, the WTO Panel (upheld by the Appellate Body) concluded that the duopoly did not constitute a "measure," and cited the lack of any evidence that a third distributor had been denied upon an application from operating in the Chinese market. Were there to be a *de facto* duopoly as to foreign films only that was enforceable by a measure, the Panel and AB reports confirm that China would be in violation of its WTO obligations. The industries view this decision as confirming that, to be consistent with what the Panel and AB reports have said, China must approve applications for other theatrical film distributors in China, a step which would significantly open up this market to competition, and additionally, would open up to competition and negotiation the underlying agreements upon which foreign films are now distributed in China.

The Appellate Body report was adopted by the Dispute Settlement Body on January 19, 2010, and the parties in consultation came to an agreement of 14 months for implementation of the report, so the expiration date for China to implement the market access decision is March 19, 2011. IIPA views it as critical for the U.S. Government to take an active approach to pressing the Chinese Government to implement its commitments arising from the market access case, and to address the two very important issues noted above related to discrimination of foreigners in the distribution of music online and breaking the duopoly for foreign theatrical film distribution in China. Intensive engagement with the Chinese Government is essential to achieving meaningful implementation of the WTO ruling, and thereby make possible broad gains in bringing U.S. creative industries' products to market in China.

**Indigenous Innovation:** Over the past several years, China has been rolling out a series of policies aimed at promoting "indigenous innovation." The apparent goal of many of these policies is to develop national champions by discriminating against foreign companies and compelling transfers of technology. Of particular concern are policies that condition market access (including the provision of government procurement preferences) based on local ownership or development of a service or product's intellectual property or aim to compel transfers of foreign intellectual property and research and development to China. A broad array of U.S. and international industry groups have raised serious concerns that these policies will effectively shut them out of the rapidly growing Chinese market and are out of step with international best practices for promoting innovation. IIPA has shared its concerns as well and strongly believes that the best ways for China to further enhance its innovative capacity are to: further open its markets to foreign investment; provide incentives to innovate by ensuring full respect for intellectual property rights including patents, copyrights and trademarks; avoid policies which establish preferences based on nationality of the owners of the intellectual property rights; and act forcefully and promptly to prevent misappropriation of such rights.

In this regard, it is noteworthy that following the summit between President Obama and President Hu, the joint statement issued on January 19, 2011 indicated that "China will not link its innovation policies to the provision of government procurement preferences." The accompanying the White House "Fact Sheet" on "U.S.-China Economic Issues" issued the same day indicated that:

The United States and China committed that 1) government procurement decisions will not be made based on where the goods' or services' intellectual property is developed or maintained, 2) that there will be no discrimination against innovative products made by foreign suppliers operating in China, and 3) China will delink its innovation policies from its government procurement preferences.

These are all welcome commitments, and follow on JCCT commitments regarding "IPR and Non-Discrimination," and "Government Procurement." They should be communicated to all levels of the Chinese Government and should be effectively enforced to avoid both express and implicit means of discriminating against U.S. and other foreign products in government procurement based on ownership or development of IP.

## TRAINING AND PUBLIC AWARENESS

MPA, IFPI and BSA undertook a number of training and awareness programs throughout China in 2010. The trainings have involved police, prosecutors, judges, customs officials, and administrative agency enforcement personnel. For example, BSA provided Software Asset Management (SAM) training for over 300 enterprises in Beijing, Nanjing, Kunshan, and Guangzhou, facilitated SAM Training for 100 central SOEs and 80 financial companies in Shanghai, and provided SAM tools for a free trial in Shanghai for 10 financial companies. The recording industry group, IFPI, through its Asian Regional Office and its Beijing Representative Office, conducted 14 Internet Training Workshops for NAPP, NCAC, MOC, PSB officials and for Judges between September 2009 and December 2010.

Throughout 2010, MPA continued to engage the local government in trainings and seminars in hopes of raising awareness of piracy and its harm toward developing the creative industry. These efforts included participation in: a seminar in early 2010 for officials from Beijing, Tianjin and Shanghai specifically to promote awareness of the Criminal Law, and discuss the 500 copy threshold;<sup>65</sup> other seminars for government law enforcement officials to highlight the need for judicial protection in China's copyright protection regime; trainings for theater owners to raise the awareness of illegal camcording and consequent harm to the film industry; judges' trainings to highlight Internet piracy issues and share experiences from overseas markets; various industry events (e.g., China Digital TV Summit, China Telecom Business Value Chain Seminar, Beijing Cultural and Creative Industry Expo, and film festivals) to leverage platforms for building anti-piracy alliances and to seek support from relevant parties; copyright verification and online piracy investigation technical trainings for local law enforcement officials; various industry trade shows/film festival forums and the annual copyright expo to highlight the need for copyright protection as necessary in developing the value chain for China's creative industry.

---

<sup>65</sup> MPA reports that only Beijing (Chaoyang District) and Shenzhen have implemented the threshold in practice.

# THE PHILIPPINES

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

### 2011 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: IIPA recommends that the Philippines be elevated to the Priority Watch List. Notwithstanding the enactment of a good anti-camcording law, the Philippine Government has not effectively implemented this new law or addressed other problems identified in IIPA's previous reports and IIPA's December 10, 2010 Out-Of-Cycle Review (OCR) submission.

Executive Summary: With a new President (Aquino) and Cabinet in the Philippines since June 2010, IIPA hoped that a new era would also emerge in the area of copyright protection, taking care of unfinished business left by the previous Administration and Congress. Unfortunately, much remains to be done. Copyright piracy remains a significant barrier to legitimate trade in copyright materials in the Philippines, causing losses to all the industries. Piracy phenomena abound, including growing P2P and other Internet-based piracy (and increasing mobile piracy), software end-user piracy in businesses, illegal camcording of movies in theaters, book and journal piracy, retail shop and mall piracy, Pay TV theft, and some remaining pirate optical disc production being imported or exported. To combat these problems, industry endeavors to work with the Philippine Anti-Piracy Team (PAPT).<sup>1</sup> The agencies under PAPT provided some support for anti-piracy activities again in 2010, including raids on retail piracy and companies engaged in end-user piracy of business software. The authorities have not, however, 1) prosecuted any cases involving illegal camcording of movies under the new statute despite requests and interdictions by cinema security staff, 2) taken steps to significantly reduce Internet-based infringements (under the leadership of any Philippine agency), 3) run surprise and transparent inspections on all optical disc plants and CD-R burning operations in cooperation with industry despite repeated requests, 4) taken significant actions against book or photocopy piracy on or off university campuses, or 5) shut down some of the estimated 800 pirate cable systems, revoking their licenses or permits. The Philippine Government needs to make more effective its anti-piracy activities to reduce piracy levels in the country.

#### Priority Actions Requested in 2011:

##### Enforcement

- Implement Anti-Camcording Act of 2010 with first cases brought against illegal camcording in the Philippines.
- 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.
- Re-establish specialized IP courts and have Supreme Court issue Special IP Court Rules to increase speeds of dockets and enable more cases, including criminal cases, to move forward in the system.
- Issue implementing rules for the penal provisions of R.A. 8792 (Electronic Commerce Act), particularly on piracy.
- Provide adequate funding for OMB, and have OMB run verification visits and ensure their transparency by permitting the presence of stakeholders in plant visits and other operations.
- Clarify the jurisdiction and powers of the National Telecommunications Commission (NTC) and the Commission on Information and Communication Technology (CICT) to enable them to take enforcement actions against online infringements, and create a streamlined procedure to allow complaints to be filed to NTC and CICT.

##### Legislation

- Pass as a matter of first priority amendments to the IP Code to fully implement the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT) and make other important changes.

---

<sup>1</sup> Specifically, IIPA members work with the new leadership of the Philippine National Police (PNP), the National Bureau of Investigations (NBI) (and its Intellectual Property Rights Department (IPRD)), and the Optical Media Board (OMB) (which continues to run raids on an *ex officio* basis but remains inadequately funded).



- Enact and implement legislation to facilitate removal of infringing material or services from the Internet through an effective notice and takedown system, establishing ISP responsibility and fostering ISP cooperation.
- Adopt landlord liability in the law.<sup>2</sup>
- Permit voluntary music collective management organizations (CMOs) to commercially operate without interference from the government.

## PIRACY AND ENFORCEMENT UPDATES IN THE PHILIPPINES

**Lack of Effective Court Remedy Against Copyright Infringement:** Since 2002, there have only been five criminal convictions under the Copyright Act (and three under the Optical Disc Act).<sup>3</sup> To our knowledge there were no criminal convictions in 2010 for copyright piracy. The largest criminal fine ever imposed in the Philippines for copyright piracy was a modest P200,000 (approximately US\$4,550), and in only two known cases did the penalty include imprisonment (in each case, one year, although the defendant in one case absconded and remains at large). Problems begin with the criminal inquest procedure at the Department of Justice and do not cease through the criminal trial. 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 to conclude. During the extended trial period, many problems arise, including: 1) the transfer of prosecutors and judges, 2) the use of delay tactics by defendants' counsel challenging search warrants or seeking further delays due to technicalities, and 3) 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 warrant quashals further discourage right holders from bringing civil cases.

**Establishment of Special IP Courts:** One major step to improve the situation involved the long-promised establishment of specialized IP courts in the Philippines, including criminal trial courts. In 2009, the government held a public hearing for stakeholders and discussed the creation of two or three pilot IP courts with national jurisdiction. Subsequent to that hearing, the IP Office of the Philippines presented proposed rules to the Chief Justice of the Philippine Supreme Court.<sup>4</sup> We are unaware whether the Chief Justice of the Supreme Court has presented the rules

<sup>2</sup> Former President Macapagal-Arroyo, in a 2006 letter memorandum, 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."

<sup>3</sup>

THE PHILIPPINES: CRIMINAL COPYRIGHT CASES RESULTING IN CONVICTION 2002-2010	
TITLE	DATE OF DECISION/LAW
PP v. Abdul Alonto et al.	09 January 2007 (RA 9239: Optical Media Act of 2003)
PP v. Manny Marasigan	05 June 2006 (Copyright infringement)
PP v. Nestor C. Yao; PP v. Nestor C. Yao alias "Jao Jee Hung"	13 July 2006 (Copyright infringement)
PP v. Macacuna Gandarosa Y Basheran & Alinor Pangcatan Y Abobakar	13 November 2006 (RA 9239: Optical Media Act of 2003)
PP v. Asmawe Tantowa, Abdulah Mama, Maraue Orot, Pandaw Orot, Oding Baro	20 December 2006 (RA 9239: Optical Media Act of 2003)
PP v. Eugene Li	10 February 2005 (Copyright and Trademark infringement and Unfair competition)
PP v. Catherine Marquez	22 June 2004 (Copyright infringement)
PP v. Harold Chua	03 October 2002 (Copyright Infringement)

<sup>4</sup> See Editha R. Hechanova, *Special IP Litigation Rules Proposed*, Managing Intellectual Property, December 1, 2010, at <http://www.managingip.com/Article/2365764/Special-IP-litigation-rules-proposed.html?Print=true>.

to the Court *en banc* at this stage. Issuance of those draft rules would be welcome as they would: 1) establish special IP courts with national jurisdiction, in Quezon City, Manila, Makati, Mandaluyong and Pasig, 2) prohibit certain pleadings to avoid delays, 3) provide that judgment can be rendered without trial (on the basis of the position papers, affidavits, documentary and real evidence submitted by the parties), unless absolutely necessary to determine specific factual matters, 4) ensure that any trial or hearing is completed within 60 days, 5) result in judgment within 30 days of receipt of the last memoranda, 6) shorten the period to file pleadings and issue orders, and 7) provide for destruction or impoundment of infringing items, devices, documents, packaging and other materials used to commit the infringing act (allowing for samples and photographs to be preserved and admissible as evidence).

**Effective Search Warrant Procedure in Copyright Cases Needed to Avoid Unjustifiable Quashals:** One of the most problematic aspects of the Philippine court system remains the *de facto* unavailability of search warrants in copyright cases due to unwarranted constitutional challenges by defendants' counsel. Search warrants (including multiple warrants needed to conduct a thorough search of rows of retail stores selling pirated discs), raids, and follow up prosecutions should be obtainable on a transparent, reasonable and timely basis, and warrants should not be quashed without full transparency. The "New Fields,"<sup>5</sup> "Tyger828," "X-Habit"<sup>6</sup> and "Global Team Space"<sup>7</sup> cases exemplify the result of not having dedicated IP courts with expert jurists in the Philippines, and are just the latest examples in a litany of cases in which search warrants for blatant piracy have been quashed and/or pirate goods or materials or implements used in piracy have been returned to defendants.

The 2008 *Powermac Centre Company* case is instructive. The case involved the unauthorized pre-loading of mp3 music files onto iPods by Powermac's retail stores. 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, in which a warrant issued by a police officer personally witnessing acts of infringement was nonetheless quashed.<sup>8</sup> This line of cases, starting with *Solid Laguna*, is inconsistent with the Supreme Court's decision in the *Columbia* case,<sup>9</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. The unavailability of a search warrant remedy calls into question the Philippines' compliance with its TRIPS requirements.

**Camcording Piracy:** The Philippines has become a regional hotspot for illegal camcording of movies at cinemas. There were 20 (19 video and one audio) instances of illegal camcording forensically matched to the Philippines in 2010, despite 22 known interdictions by cinema security staff following the enactment of the new law.<sup>10</sup>

---

<sup>5</sup> On May 20, 2010, the PNP was able to secure search warrants, served on May 24, 2010, resulting in the confiscation of 83 computers loaded with unauthorized and unlicensed software, including 17 counterfeit CD installers of various software titles. The defendant petitioned to quash the warrant, and on July 8, 2010, local BSA counsel received a copy of the Order of the trial court dated June 29, 2010 in which the court directed the "immediate" return of the seized items to the defendant, and despite motions filed to stay the execution of that order, the local sheriff returned the 83 computers to the defendant the same day.

<sup>6</sup> On April 5, 2010, NBI served search warrants on two sister companies, Tyger828 Phils., Inc. and The X-Habit, Inc. for alleged unlicensed use of software, resulting in the confiscation of 26 computers loaded with unauthorized and unlicensed software. The defendants filed a Motion to Quash the search warrants. Without hearing, on August 27, 2010, local counsel was informed by the NBI that the Motion to Quash was granted (by the New Fields judge), although they were not notified by the court until September 1, 2010, citing "lack of board authorizations" authorizing the search warrants. The case is ongoing with a Motion for Reconsideration of the quashals that, to date, has not yet been resolved by the court.

<sup>7</sup> On November 5, 2009, the NBI served search warrants on Global Team Space in which a total of fifty (50) computers loaded with unauthorized and unlicensed software programs. Following the tactic employed in the New Fields, Tyger 828, and X-Habit cases, Global Team Space filed a Motion to Quash before the same court which quashed the search warrants in the previous cases. On October 27, 2010, the same court granted the motion to quash and ordered the return of all seized items, which again was immediately carried out by the Sheriff, despite the timely filing of a Motion for Reconsideration.

<sup>8</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>. The *Telmarc* case came on the heels of another search warrant quashal in the *Solid Laguna* decision, *Sony Music Entertainment (Phils), et al v. Hon. Judge Dolores Español et al*, G.R. No 156804, March 14, 2005. *aff'd* 2007. In the *Telmarc* case, the Supreme Court indicated that for an affidavit to properly support a search warrant, the "oath required must refer to the truth of the facts within the personal knowledge of the applicant for search warrant and/or his witnesses, not of the facts merely reported by a person whom one considers to be reliable" [emphasis added]. Notwithstanding the fact that the claimants took the police officer to the site of the infringement to personally witness the acts being committed, the warrants were quashed.

<sup>9</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>10</sup> Camcording is particularly damaging in the Philippines because it can fuel rampant online piracy, negatively impacting worldwide distribution, and can if left unchecked prevent the establishment of legitimate online distribution platforms. Philippine movie pirates engaging in this activity typically choose films that release earlier than, or day-and-date with, the U.S., and notably, a day-and-date release in the Philippines is still more than half a day earlier than a U.S. release,

Anecdotally, local films seem to receive a longer piracy-free window than foreign films (generally two weeks following their theatrical release). Foreign films are illegally camcordered on or closer to the initial date of theatrical release. Infringing copies of U.S. motion pictures forensically linked to illegal copies made by camcorders in Philippine cinemas are being distributed globally. Pirate versions sourced from illegal camcording are often available the day of 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 U.S. Camcorder piracy in the Philippines has also had a profound negative effect on the local movie theater business in the Philippines. Republic Act No. 100088 was signed into law by former President Macapagal-Arroyo on May 13, 2010,<sup>11</sup> and while the PNP, the NBI and the OMB were named in August 2010 as the key enforcement agencies to head implementation of the law, and PNP officers have attended some industry training, they have still neither visited cinemas nor met with exhibitors to ensure that notices of the new law are being displayed. Industry, after consulting with the new Director General of the IP Philippines, has referred to his office and NBI one criminal syndicate having expanded operations outside of Manila, and investigations remain ongoing.

**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 2010, thereby stunting the growth of the information technology sector. Preliminary estimates indicate the commercial value of unlicensed business software in the Philippines in 2010 was US\$131 million, while business software piracy levels were 68%, above the regional average.<sup>12</sup> A September 2010 study by IDC and the BSA shows that reducing the piracy level by 10 percentage points in the Philippines will lead to job creation in the thousands, the generation of millions in tax revenues and hundreds of millions to the country's GDP.<sup>13</sup>

The business software industry continued to receive good cooperation from PAPT in 2010. In addition, the OMB made visits (*ex officio*) to companies suspected of using unlicensed Business Software Alliance member software. As a result of ongoing cooperation, eight end-user piracy raids were conducted in 2010, with four raids resulting in criminal complaints with the Department of Justice. BSA also reports that, while prosecutors are still not assigned specifically to handle IP cases, the IPO Philippines has initiated a program in 2010 by which prosecutors from the DOJ will be detailed to assist right after enforcement actions are conducted by the PNP. Unfortunately, the New Fields, Tiger828, X-Habit, and Global Team Space cases discussed above resulting in quashals of search warrants are considered low points for the Philippines in terms of software protection over the past several years.

**Internet Piracy:** Internet piracy has worsened in the country and should be dealt with as a high priority by the Philippine Government.<sup>14</sup> Internet usage in the Philippines continued to grow in 2010, with broadband well surpassing the two million subscriber threshold between the two main competitors, Globe and Smart.<sup>15</sup> The overall

---

meaning they are decimating the market not only in the Philippines but around the world. Philippine-traced camcords of *Inception* and *The Losers* were available the same day as their U.S. release. Philippine-traced camcords of *Alice in Wonderland* and *Iron Man 2* were available prior to their U.S. release dates.

<sup>11</sup> See Kaye Villagomez, *Anti-Camcording Bill Passes*, August 14, 2010, at <http://mb.com.ph/articles/272248/anticamcording-law-passed>.

<sup>12</sup> BSA's 2010 statistics are preliminary, representing U.S. software publishers' share of commercial value of pirated software in the Philippines. They follow the methodology compiled in the Seventh Annual BSA and IDC Global Software Piracy Study (May 2010), <http://portal.bsa.org/globalpiracy2009/index.html>. These figures cover packaged PC software, including operating systems, business applications, and consumer applications such as PC gaming, personal finance, and reference software – including freeware and open source software. They do not cover software that runs on servers or mainframes, or routine device drivers and free downloadable utilities such as screen savers. The methodology used to calculate this and other piracy numbers are described in IIPA's 2011 Special 301 submission at <http://www.iipa.com/pdf/2011spec301methodology.pdf>. BSA's final piracy figures will be released in mid-May, and the updated US software publishers' share of commercial value of pirated software will be available at <http://www.iipa.com>.

<sup>13</sup> See IDC and BSA, *The Economic Benefits of Reducing Software Piracy A Report by IDC*, September 2010, at <http://portal.bsa.org/piracyimpact2010/studies/piracyimpactstudy2010.pdf>, which demonstrated that a reduction in end-user software piracy over four years (2010-2013) of ten percent (from 69 to 59 percent) would result in \$329 million in additional revenue to the GDP, \$30 million in tax revenues, and 1,097 new jobs. A reduction of ten percent in just two years would multiply the positive effects.

<sup>14</sup> Internet piracy greatly limits the establishment of legitimate online distribution platforms and services for consumers, harming consumers and right holders alike. Revenue from these platforms and services are critical to financing the development of new creative works. For example, for independent motion picture producers who license content country-by-country, online piracy exports troubled marketplaces and high piracy rates to other markets instantly. The independent production sector is limited in its ability to shift to technology-enabled new business practices that might limit piracy, for example, independents cannot engage in worldwide same day "day-and-date" releases (which may prove an effective method to curb or delay piracy for the major studios) due to the fact that national distributors release on their own schedule.

<sup>15</sup> See *Globe Broadband Subscribers Surpass 1-M*, ABS CBN News.com, November 2, 2010, at <http://www.abs-cbnnews.com/business/11/01/10/globe-broadband-subscribers-surpass-1-m-0>. Globe reported just over 1 million broadband subscribers while Smart had reported 1.3 million subscribers earlier in 2010.



Internet population as well as the mobile population are even more robust, at 29.7 million Internet users (according to Nielson), and more than 80 million mobile users in the Philippines, with increasing mobile broadband Internet (according to Point-Topic, mobile broadband has surpassed fixed line broadband).<sup>16</sup> With this growth in Internet usage has come increasing piracy which must be addressed. For example, steps should be taken against the many sites offering free downloads in exchange for “donations.” A proactive approach including takedowns and blocking of sites engaged in blatant and serious piracy activities should be employed, and action must be taken against commercial pirates who advertise hard goods or downloading onto devices.

Unfortunately, the legal framework and enforcement infrastructure to deal with Internet piracy in the Philippines has not caught 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 system (without relying on court-issued relief) in that law or in the current 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.

In the meantime, existing enforcement authorities are urged to launch a campaign aimed at stopping Internet infringements. The Commission on Information and Communications Technology (CICT) states among its declared policies the establishment of “a strong and effective regulatory system that fosters competition and protects intellectual property rights.” IIPA members welcome CICT’s involvement in combating Internet-based copyright infringements. However, it has become unclear over time who among the National Telecommunications Commission (NTC) and CICT has jurisdiction to enforce against online piracy.<sup>17</sup> Ultimately, NTC and/or CICT must be placed in a good position to take enforcement actions against infringing content in the online environment, and a streamlined procedure should be in place to allow copyright owners to file complaints with the appropriate authority in a more efficient manner. It is also critical that the appropriate government authority take a more active role, for example, through education campaigns to the public, about online copyright protection, and that NTC should help nurture an environment facilitating the development of legitimate electronic commerce for creative industries.

**Mobile Piracy, Including Hard-Disk Loading:** Increasingly, copyright holders are hit hard by the sale of infringing content onto various mobile and electronic devices sold or loaded in the malls and street markets. Vendors in the Philippines have dedicated booths and stalls within shopping malls (shopping areas such as Metrowalk, Makati Cinema Square, and Quiapo) and offer as a service the pre-loading or loading after the sale of content (or “download for a fee”) onto mobile phones, mp3 devices, flash drives, recordable optical discs, and even computer hard drives. The pirate content includes music, videos, software, and published materials, especially medical and nursing titles and trade books. Mobile phone penetration is well above 80% penetration with more than 80 million subscribers. While broadband mobile services remain in their relative infancy, there are increasing reports of infringing wireless application providers (WAP) which provide pirate content directly through wireless communications onto mobile phones/devices. 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 NTC and/or the CICT to act aggressively against piracy and other copyright issues conducted over mobile networks. We also recommend enhancing anti-piracy enforcement work carried out by OMB by including mobile device piracy within its purview.

**Book and Journal Piracy:** Illegal commercial-scale photocopying and the scanning of entire books into digital copies are the predominant piracy problems facing the publishing industry in the Philippines. Online piracy, particularly of medical textbooks, professional books, and trade books, is increasing but is not yet a significant threat.

---

<sup>16</sup> *The Philippines Broadband Overview*, Point-Topic, November 22, 2010, at <http://point-topic.com/content/operatorSource/profiles2/philippines-broadband-overview.htm>.

<sup>17</sup> Although NTC is under the CICT, CICT has reportedly claimed that NTC and not it has jurisdiction. NTC meanwhile denies that it has any power over illegal Internet transmissions (and complaints filed with NTC are being referred back to the IP Philippines, causing further delays and deflections of blame between agencies). The IP Philippines has apparently tried to get the NTC to commit to talking to communication companies and their ISP companies about remedies to minimize piracy, but so far, no result has come from such dialogue.

Photocopy shops continue to operate with impunity on and around college, medical, and nursing school campuses due to a lack of action by law enforcement authorities. Pursuing an enforcement action remains difficult given the burdensome hurdles right holders face (including the *de facto* unavailability of search warrants). 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 unauthorized photocopying and through downloads of unauthorized digital (scanned) 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 notorious for illegal photocopying activities occurring at the many copy shops littering the area. Copyshops also operate in and around hospitals, and near government regulatory agencies. 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. Vendors of pirated books also sell the infringing copies of books door-to-door at doctors’ offices, medical establishments, and trade fairs. 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.

**Retail and Mall Piracy:** While legitimate music sales are slightly up in 2010, chiefly due to better marketing by local distribution channels,<sup>18</sup> 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. In addition to Quiapo, mobile device piracy occurs frequently in booths and stalls within many shopping malls such as Metrowalk, Makati Cinema Square, and Greenhills. Even mainstream malls not known for piracy, such as the SM and Ayala malls are host to downloading stations disguised as repair shops. The sale of cheap pirate and counterfeit optical media (P35 to P100 per disc, or US\$0.80 to \$2.35), whether imported or produced domestically in factories or, more often, burned onto recordable discs, 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. Pirate DVDs also remain at piracy hotspots like Virra Mall, Greenhills Shopping Center in San Juan, and Circle C Mall in Project 8, Quezon City, 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 being an exception to this), IIPA has little information except what has been provided previously by the government,<sup>19</sup> but such government statistics are of little value, since they 1) cover only physical piracy; 2) are cursory and do not answer questions about the true value of the seizures; 3) do not break down seizures by category into piracy (versus counterfeiting); 4) do not indicate the total size and scope of the piracy in the market where the seizure took place; and 5) do not indicate the source of seizure (i.e., small distributor versus source piracy operation). Further, the lack of reporting resulting from seizures makes it impossible to conclude whether these actions have any deterrent effect on piracy (e.g., whether those engaged in piracy ceased their activities).

The Optical Media Board (OMB) continues to provide support and expresses commitment to anti-piracy efforts, but in order for outreach and inspections to take place, IIPA continues to call upon OMB to be properly funded. The Philippine Congress has never taken the important step of properly funding the OMB, but should now do

---

<sup>18</sup> For example, the local music industry reports that legitimate sales of music are up due to more focused marketing of compilations in stores and the launching of TV-based new artists who participate in well-publicized music competitions.

<sup>19</sup> The latest statistics by the IPO Philippines indicated that between January 1 to November 30, 2010, NBI, PNP, OMB, Board of Customs (BOC), and the Food and Drug Administration (FDA) seized slightly over 4.6 million pieces, with an estimated value of 4.36 billion pesos (US\$99.5 million). There is no breakout of product by category. OMB had seizure of the greatest number of pieces, while PNP reported the greatest value of seizures, followed by BOC and then OMB, but the valuation methods and the breakout of products seized is not provided. See IPO Philippines, Summary of IP Enforcement Data, 01 January - 31 [sic] November 2010, at [http://www.ipophil.gov.ph/document/c9a3ab7b\\_Slat2010.pdf](http://www.ipophil.gov.ph/document/c9a3ab7b_Slat2010.pdf).



so to provide the new Chairman with the tools for effective enforcement.<sup>20</sup> OMB should also improve its Licensing Department's function, which is reportedly slowing the release of some members' legitimate products into the market, while illegal products which do not go through licensing come into the country freely. There is also reportedly a lack of transparency in the disposition of cases subsequent to raids which should be remedied.<sup>21</sup>

**Mechanical License Piracy (Karaoke):** Karaoke is 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 many that have not. Exacerbating the problem are a few manufacturing companies which incorporate USB ports onto their karaoke machines which allow the manufacturers or the owners of the machines to add unauthorized copies of tracks, including unauthorized tracks from the manufacturer's websites. A letter has been sent to OMB Chair requesting action against unauthorized Karaoke device distributors. A few Karaoke device distributors have positively responded when demand was made by right holders for the proper payment of royalties. A majority of the device distributors have ignored repeated notices from right holders. These unlicensed devices are sold openly in different market centers all over Metro Manila and the provinces.

**Pay TV (Cable and Satellite) Piracy:** 2010 showed no improvement in the Philippine Government's response to cable piracy. Cable operators continue to steal mostly U.S.-owned broadcast signals and resell them to subscribers without compensation to the right holders. The National Telecommunications Commission continues to renew the licenses of companies engaged in signal theft and no pirate cable company has been sanctioned by the courts or government. No relief to this unending theft is available under current law or through the court system. Under-declaration by legitimate providers also continues to cause losses to content owners, as does individual illegal connections to Pay TV signals. Pay TV theft in the Philippines continues to cost U.S. content owners significant revenues.<sup>22</sup>

**Government Use of Software:** Executive Order No. 262, 2000 entitled "Providing Policies, Guidelines, Rules and Regulations for the Procurement of Goods/Supplies by the National Government" prohibits government from purchasing illegal software and allows only suppliers of legitimate software to participate in government bidding. This EO has yet to be fully implemented, and the government is encouraged to fully enforce the EO and avoid contrary proposals which would restrict or create preferences as to technology choices by government agencies.<sup>23</sup>

**Additional Enforcement Hurdles in the Philippines:** Right holders in the Philippines face the following additional hurdles to enforcement of their rights:

- Right holder inquests and preliminary investigations by the Department of Justice are often delayed by purely bureaucratic signing procedures, as the Chief Prosecutor apparently must sign off on every resolution issued by all prosecutors.

---

<sup>20</sup> For example, the OMB's total budget for 2008 was P27 million (then 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 (then 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 then 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.

<sup>21</sup> For example, the local record industry reports two raids, one on May 17, 2010 of a warehouse in the Quiapo area reportedly leading to the seizure of around 300 boxes of pirated discs, and one on August 17, 2010, in which a large scale sweep of retail pirate shops selling pirate CDs and DVDs occurred in Quiapo. Despite the news coverage of these raids, results in these cases are unavailable.

<sup>22</sup> The Pay TV association overseeing the Asia market, the Cable and Satellite Broadcasting Association of Asia (CASBAA) estimated that revenue losses to the Pay TV industry increased to US\$90.3 million in 2010, up from just over US\$82 million in 2009, with most of the increased losses accruing due to increased under-declaration by Pay TV operators.

<sup>23</sup> We note here legislation introduced from time-to-time which would restrict technology choice. Such approaches should be rejected in favor of technology neutrality when it comes to software usage.

- 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.
- With certain exceptions (end-user raids being one), copyright owners are not permitted or invited to participate in investigations.<sup>24</sup>

## COPYRIGHT LAW AND RELATED ISSUES

Copyright protection is governed under Republic Act 8293, the Intellectual Property Code (IPC) of the Philippines (in force January 1, 1998). Since the time of the Code, various copyright revision drafts have been introduced into each Congress over the years, with the intent to fully modernize the law, fix some deficiencies, and fully implement the WCT and WPPT to which the Philippines acceded in 2002. IIPA supports Senate Bill 2628 introduced by Senator Loren Legarda on December 14, 2010. The latest “substitute” House Bill 3841 contains some but not all of the strong elements in S.B. 2628, and includes some additional problems that do not exist under the current law.<sup>25</sup> Among IIPA’s chief concerns are:

- **Technological Protection Measures:** S.B. 2628 is superior to the alternative drafts in that it contains coverage of TPMs in line with the WCT and WPPT, defining them (in draft Section 171.12) to include both measures used to restrict unauthorized access as well as the exercise of exclusive rights. By contrast, the substitute H.B. has no express coverage of “access control” TPMs.<sup>26</sup> In addition, the substitute H.B. (in draft Section 216.1(b)(i)) contains no prohibition on trafficking in or providing services related to circumvention devices, technologies, or tools, prohibiting only the act of circumvention expressly.<sup>27</sup> Finally, the substitute H.B. deems the circumvention of TPMs merely as an aggravating circumstance, but a corresponding Senate version (S.B. 2487) criminalizes the circumvention of TPMs. Thus the corresponding Senate version is preferable on this point (but still is worse than S.B. 2628 since it lacks a prohibition on trafficking).
- **Civil Damages:** S.B. 2628 is superior to the alternative drafts, as its civil damages provisions set forth the goal of awarding damages which the court “finds to be sufficient to fully compensate the right holder for the injury he has suffered, and sufficient to constitute a deterrent to further infringements.” The substitute H.B. contains no such language. The substitute H.B. retains statutory damages, but sets the minimum very low at US\$1,140 and it is unclear whether the recovery amount is per work or per infringement. In addition, it is unclear whether the statutory damages “in a sum equivalent to the filing fee of the infringement action” is meant as a cap. If so, this will undoubtedly be non-deterrent. IIPA is pleased that the Government of the Philippines is considering a statutory damages option, but it should create a workable remedy that can be usefully employed by right holders in practice.
- **Duty to Account:** The substitute H.B. (in Section 180.5) introduces a new and very confusing provision requiring an “accounting” from an assignee or licensee to a “copyright owner” (which is used interchangeably with “author”). In many countries, a joint author may use a joint work without authorization of the other joint

<sup>24</sup> 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).

<sup>25</sup> The bill substitutes for H.B. 47, H.B. 267 and H.B. 2040. H.B. 267 was introduced into the 15<sup>th</sup> Congress by Representative Juan Edgardo Angara and primarily concerned broadcasters’ and performers’ rights, while H.B. 2040 was introduced by Congressman Irwin Tieng and provides exceptions for translations of printed materials into formats accessible to the visually impaired.

<sup>26</sup> It may be that the drafters intend the phrase “restrict acts ... which are not authorized ... or permitted by law” to include access controls, but the previous wording, “any technology, device or component that, in the normal course of its operation, controls access to a protected work,” is clearer and preferable.

<sup>27</sup> S.B. 2628 Article 229A.1(b) provided that any person who “manufactures, imports, exports, distributes, offers to the public, provides, or otherwise traffics in devices, products or components or offers to the public or provides services, which ... i) are promoted, advertised or marketed for the purpose of circumvention of any effective technological measure; or ii) have only a limited commercially significant purpose or use other than to circumvent any effective technological measure; or iii) are primarily designed, produced, adapted or performed for the purpose of enabling or facilitating the circumvention of any effective technological measure” is guilty of a crime and is assimilated to a copyright infringement subject to civil remedies.

author subject to an accounting, which may have been the intention of the drafters, but the insertion of a duty to account to all licenses or assignments is completely unwarranted and unduly interferes with the exercise of exclusive rights by right holders and impinges on their freely negotiated licenses and assignments. The Section should be removed from the substitute H.B.

- Exceptions: Several exceptions in the substitute H.B. must be examined and altered to ensure they meet the Berne Convention three-step test. For example, the substitute H.B. (Section 185) introduces a new exception to "reproduce" and "distribute" works "in a specialized format exclusively for the use of the blind, visually- and reading-impaired persons," and the term "distribute" is noted to include distributions of "copies made abroad." This should be confirmed to include only copies lawfully made and distributed. Another example is the broadening (in Section 188) of the exception for reprographic reproductions for libraries from a "single copy" to a "limited number of copies" of the work "as may be necessary for such institutions to fulfill their mandate." It is unclear whether this broader exception, with the vague use of the phrase "necessary ... to fulfill their mandate" can pass muster under international treaties to which the Philippines is party. It should be noted that S.B. 2628 contains limiting language, e.g., in draft Section 188.2, the limitation is narrowed to a "single" reprographic copy and subject to the work being "not reasonably available to it through commercial channels." The latter phrase is not included in the new draft bill. A third example is the "decompilation" exception. In S.B. 2628, the appropriately narrowing language allowing decompilation "to the extent that such decompilation is indispensable in order to obtain the information necessary to achieve such inter-operability" was changed to the much broader "to the extent that such decompilation is done for the purpose of obtaining the information necessary to achieve such inter-operability." The narrower formulation should be reinstated.

Other areas in which S.B. 2628 is superior to the substitute H.B.:

- Exploitation Right in Audiovisual Works: S.B. 2628 ensures that the producer of an audiovisual work had the "exploitation" right in the work, not just the right in "exhibition" of the work. While it is usually the case that contractually, the producer will exploit the copyright, clear recognition of this in the statute simplifies the process by which rights licensed can be recognized in the Philippines and recognizes the longstanding commercial practice of the film industry.
- Notice Provision for Liability: S.B. 2628 (Section 216(b)) sets forth that liability attaches, e.g., if a person "benefits financially from the infringing activity of another person who commits an infringement if the person benefiting has the right and ability to control the activities of the other person," whereas the substitute H.B. imposes liability if a person "benefits financially from the infringing activity of another person who commits an infringement if the person benefiting *has been given notice of the infringing activity* and has the right and ability to control the activities of the other person." The additional language represents a major narrowing of the provision; if the intention is to add a knowledge requirement, we propose the language be changed to "has actual or constructive knowledge, or has been given notice of the infringing activity...."
- Importation Right: S.B. 2628 adds "importation" to the current distribution right since it remains a key component of many laws to provide the author with the ability to authorize imports and prevent unauthorized imports.
- Designation of Agent to Enforce Rights: S.B. 2628 adds "or a similar agent" to Section 183, to ensure that right holder representatives can act on their behalf in effectuating protection of their rights in the Philippines. The substitute H.B. Section 183 would not only fail to define the scope of who may enforce rights on behalf of copyright owners, but would introduce a new collective management regime. S.B. 2628 should be followed so that agents can act on behalf of right holders in enforcing their rights in the Philippines.

- **Term Extension:** One of the important changes to be made in the Philippines is the extension of term of protection, to life of the author plus 70 years, or 95 years from publication for works whose term is calculated from such event. Previous bills contained term extension, which would avoid Philippine works and objects of related rights falling into the public domain in other countries on a discriminatory basis, and would bring its law into line with the international trend. It is unfortunate that the substitute H.B. removed this important and positive change.
- **Rights Management Information Protection:** Rights management information provides the basis for online licensing and benefits both right holders and users by certifying the integrity and authenticity of digital works. The draft bill should introduce provisions to prohibit dissemination of copies in which rights management information has been removed or altered and this prohibition should apply to all types of copyright works.
- **Express Coverage of Import, Export, and “Using” an Article “in a Trade or Business” as a Crime:** One of the important achievements created in S.B. 2628 is the clear inclusion of “import,” “export” and the “use of an article in a trade or business” without authorization as a crime. This language should be retained.

**Service Provider Issues:** While the new copyright law, when enacted, will spell out with specificity some important criteria for liability in general, the E-Commerce Law 2000 (Republic Act No. 8792) already deals with the specific issue of service provider liability. First, it states 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 for indirect infringement, i.e., knowingly receiving a financial benefit directly attributable to the unlawful or infringing activity. It then provides 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. The law should be amended to provide for a statutory notice and takedown system (e.g., in the absence of court ordered relief) and policies to effectively and fairly address repeat infringers. Under the current Law, 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.” The Law could also be amended to foster cooperation in investigations into piracy in the non-hosted environment including effective and fair policies to deal effectively with cases of repeat infringers.

**Avoid Burdensome Restrictions on Collective Management of Music Rights, and Allow Collective Management Organizations to Operate Freely in a Commercial Manner:** Unfortunately, since May 2009, the IP Office of the Philippine Government has continued to take steps to impede free contractual relations between music companies and collective management organizations (CMOs) which collect public performance royalties on broadcasts or communications 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) as a result has 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>28</sup> Moreover, there should not be a mandatory process for tariff pre-approval which would disrupt royalty collection and prejudice right holders by requiring them to bear unnecessary costs associated with the rate-setting procedures and by denying them the ability to collect royalties that are set in free and open market conditions.

**Other Draft Legislation:** IIPA supports passage of 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 supports Senate Bill 684, An Act Requiring

---

<sup>28</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.

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 about reports of a Free Open Source Software bill which would require government offices to use open source software and 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.

**Unreasonable Taxes and Duties on Motion Picture Business:** Several taxes/duties imposed on film companies remain inordinately high. For example, U.S. companies are burdened with a 30% income tax on net profits, a 5% withholding tax on gross receipts chargeable to income tax liability, and a 10% tax on the distributor's share of the box office. Import duties are assessed at 15% of the invoice costs, plus freight and insurance, on all prints and trailers imported into the Philippines and related advertising materials are dutiable at a 10% amount. Finally, there is a 15% tax on royalty remittances (to producers) on profit remittances or dividends. These taxes make it impossible to compete with piracy, and very difficult to compete with local right holders who do not have to content with all of these costs.

## TRAINING AND PUBLIC AWARENESS

IIPA members continued to provide and participate in various public awareness and training activities in the Philippines in 2010. The BSA sponsored capacity-building seminars for enforcement agencies in 2009 and 2010. BSA sponsored a capacity-building training seminar for PAPT enforcement agencies (National Bureau of Investigation (NBI), Philippine National Police (PNP) and Optical Media Board (OMB) on December 6, 2010 to prepare the PAPT agencies for the 2011 anti-piracy campaign. The program was aimed to provide the enforcement agents with a big picture on anti-piracy campaigns to emphasize their crucial role in the enforcement process and why the Philippines should honor their treaty obligations. In 2011, BSA will continue to provide programs for law-enforcement personnel regarding software copyright protection and software licensing. Also during 2010, the motion picture industry held eight training sessions on the implementation and enforcement of the Anti Camcording Act of 2010 were attended by a total of 259 theater personnel. MPA representatives also participated in an optical disc enforcement and forensic investigation training workshop coordinated by the USPTO in coordination with the Philippines IPO Philippines and the OMB in Manila on July 15, 2010.

## GENERALIZED SYSTEM OF PREFERENCES

While the GSP statute expired on December 31, 2010, should it be reauthorized, IIPA is considering recommending a review to determine whether the Philippines qualifies for benefits under the GSP program, under which more than US\$733.6 million of Philippine goods, or 10.8% of the Philippines' total imports to the U.S. in 2009, and under which US\$912.9 million of Philippine goods, or 13.0% of the Philippines total imports to the U.S. in 2010 enjoyed duty-free access to the U.S. market.

# RUSSIAN FEDERATION

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

### 2011 SPECIAL 301 REPORT ON COPYRIGHT ENFORCEMENT AND PROTECTION

Special 301 Recommendation: IIPA recommends that the Russian Federation be retained on the Priority Watch List.<sup>1</sup>

Priority Recommendations in Russia – Key Legal Reform and Enforcement Actions: There are many legal reforms and enforcement steps that we detail in this filing. Here is our list of priorities that we recommend to the Government of Russia for 2011:

- Undertake effective actions against Internet piracy – including:
    - (a) takedowns of pay-per-download websites and actions against cyberlockers, BitTorrent sites, unauthorized music services, and Internet cafes, with criminal actions commenced (and deterrent penalties) against owners and operators of such sites; and
    - (b) establishment of a special IP Unit in Department K (and confirming the Department's jurisdiction over copyright infringement cases).
  - Amend the Civil Code, Part IV, to:
    - (a) fully implement the WIPO digital treaties – the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT);
    - (b) provide: (i) incentives for Internet Service Providers (ISPs) to cooperate with rights holders to effectively deal with Internet piracy – in civil and criminal law; (ii) rules that clarify the illegality of providing services that are intended to promote the infringement of copyright and related rights; (iii) injunctive relief and a duty on ISPs to provide information to law enforcement agencies and rights holders; and
    - (c) implement notice and takedown procedures for websites hosting illegal material.
- A set of amendments to the Civil Code, Part IV, was recently prepared by the Center for Private Law – the draft falls far short of implementing the digital treaties, or effectively addressing Internet piracy.
- Bring deterrent levels of criminal actions against retail chains that sell pirated entertainment software, movies and music, businesses using unlicensed software, and organized criminal syndicates involved in piracy.
  - Ensure that state approved monopolies for the collective administration of rights operate in a fair and transparent manner and that copyright owners maintain the right to exercise their rights with respect to Internet distribution as they deem appropriate, free from compulsory licensing or other limitations on the free exercise of rights.
  - Undertake effective measures against illegal camcording of motion pictures in theaters.

---

<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/2011/2011SPEC301HISTORICALSUMMARY.pdf>, as well as the previous years' reports, at <http://www.iipa.com/countryreports.html>. For a summary of IIPA's 2011 global issues, see our cover letter at <http://www.iipa.com/pdf/2011SPEC301COVERLETTER.pdf>.



- Revise the 2004 methodology on the investigation and prosecution of copyright and related rights infringements to ensure that prosecutors fully understand how to and are adequately encouraged to initiate criminal actions, and that there is a consistent and uniform approach to these cases throughout the country.
- Amend the Criminal Code to provide for the establishment of criminal liability against legal entities, including for IPR crimes.
- Adopt optical disc (OD) regulations and proper enforcement actions against these and other production facilities of hard copy materials.
- Strengthen the Administrative Code to establish more deterrent penalties by, for example, setting: (a) fixed fines for violations by legal entities and individuals; (b) fines proportionate to corporate revenues (e.g., as is done for anti-monopoly violations); or (c) a fixed fine for each illegal copy.

Executive Summary of IPR Issues: In 2010, 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 three years, the total number of actions undertaken by enforcement officials has been on a decline, and little, if any, action has been undertaken against a key priority in Russia – Internet piracy. The business software industry has seen a significant decline in piracy rates (a 20% drop from 2005 to 2009), due to a combination of commercial success (driven by government software purchases to legalize the education sector), and effective criminal and civil enforcement directed against end-user piracy. Progress in driving down software piracy rates appears to have stalled over the past year due, in part, to more rapid PC growth in the higher-piracy consumer sector.

However, the business software industry is the only industry with an overall positive story in Russia the past few years. The majority of copyright industries – motion picture, recorded sound, entertainment software, music and book publishing – experienced another year of disappointment in Russia in 2010 because of a lack of focus by Russian authorities on the growing threat of Internet and other digital forms of piracy; ongoing high piracy rates – for hard and digital copies; and fewer enforcement actions undertaken by the authorities in number, size, and scope. While Russia's law allows for decent enforcement against hard goods piracy, it is wholly inadequate for addressing Internet piracy and must be modernized. Even more threatening to the copyright industries are notions circulated in 2010 as private drafts to amend the copyright law to: (a) exempt from copyright liability all third parties – including ISPs even if a piracy problem resulted from the ISPs own design and making, and (b) excuse almost all online infringing activity as “private” copying.

The record industry is particularly concerned about the continued operation of infringing music services, such as the one operated by vKontakte, as well as various pay-per-download services that have taken the place of the infamous allofmp3.com. Peer-to-peer piracy is a major concern in Russia, as it is globally. The government's activities to accredit legal collecting societies have been fraught with problems even though the accreditation process was supposed to curtail illegal activities. The accreditation of only one collecting society (VOIS) to collect on behalf of performers and record companies has resulted in market confusion and serious questions about the government's compliance with Russian law and international norms concerning the fair representation of foreign rights holders. This situation can only be resolved by the Government of Russia which pledged that U.S. rights holders would be fairly represented. Two recent court orders annulling the accreditation (for neighboring rights and blank tape levies) reveal serious problems in the accreditation process; the orders are not yet binding as the cases are on appeal.

The independent film and television segment of the motion picture industry (IFTA) reports that online and physical piracy remain a significant export constraint for independent producers and distributors, the majority of which are small to medium sized businesses. Independent producers partner with local authorized distributors to finance and distribute their films and programming. These authorized distributors find it almost impossible to compete with the pirates and report that piracy in Russia has reached disastrous levels. Producers and distributors confirm that

DVD sales have been particularly impacted since pirated digital copies are offered for free online and with the same quality viewing experience as a DVD. Unable to compete with free, legitimate distributors cannot commit to distribution agreements, or alternatively, they offer drastically lower license fees which are inadequate to assist in financing of independent productions. As a result, piracy is undermining and may permanently damage legitimate distribution networks essential to reaching the consumer and leaves little confidence for investment in intellectual property.

Overall, Russia's enforcement remains deficient – in particular, its criminal enforcement. To curb piracy, it is essential that the Government of Russia pursue an increased number of investigations, particularly against large-scale infringers, and that prosecutors seek, and judges be encouraged to administer, deterrent criminal penalties.

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 many of the copyright industries. But it is the rapid rise in Internet piracy and other forms of piracy – for example, unauthorized camcording of motion pictures in theaters, and unauthorized access to journals online – that are stunting the growth of legitimate markets and investment. In fact, camcord piracy has exploded in the past two years, making Russia the world's leading source of illicit full-video recordings of films from theaters.

A roadmap for success exists: 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>2</sup> The IPR Agreement reflects Russia's acknowledgment of the numerous legal reforms and enforcement steps it needs to undertake to accede to the World Trade Organization (WTO), and 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 (assuming the program is reauthorized). In 2010, Russia benefited from over \$553 million in unilateral duty free Generalized System of Preferences ("GSP") benefits in the U.S. market. 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.

## COPYRIGHT ENFORCEMENT IN RUSSIA

**Criminal Enforcement in General:** Criminal enforcement in Russia remains a priority for IIPA and its members – and unfortunately, almost all criminal enforcement activity by the government was geared toward physical piracy and little, if any, toward digital piracy enforcement, which is a significant and growing threat in Russia today. As a result, few criminal cases have been pursued against illegal website operators. Russian authorities must step up efforts to investigate Internet piracy of business software, 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.

In 2010, the Government of Russia continued to conduct some significant raids and seizures against hard copy pirates, 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 down – again – from previous years. 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. Some examples include: a Saratovskaya regional court sentencing a defendant to

---

<sup>2</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).



two and a half years imprisonment (September 2010); a regional court in Voronezhskaya sentencing a defendant to two years imprisonment (December 2010); an Ivanovo city court sentencing a defendant to 2.5 years imprisonment (December 2010); a Bryansk city court issuing a 2 year (suspended) sentence against a distributor of software via a Bit Torrent tracker (October 2010); a Saratov city court issuing sentences against members of an organized crime group (December 2010) – with the head of the group getting a four year sentence, another member of the group over 3.5 years, and a third a 2 year sentence, as well as assessing fines.

There were also a considerable number of administrative and criminal penalties imposed against illegal hard-copy vendors. The motion picture industry noted improvements at the Gorbushka market (which it regularly inspects). As a result, it now appears that pirated products of motion pictures are not sold at this market (in part, because the Gorbushka market operators are now cooperating with rights holders by terminating lease agreements with detected pirate traders). Although the Entertainment Software Association (ESA) reports that frequent police patrols have resulted in a decrease in the number of small vendors selling infringing game product in many other Moscow markets, sales of pirated games at the Gorbushka market remain a significant problem.

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 Alliance (BSA) reported raids and criminal cases below 2008 levels. There were fewer criminal cases in 2010 (78) than in 2008 (154) against end-users, and in “channel” cases (pre-installed hard disk piracy) about the same – 491 in 2010 versus 496 in 2009. BSA reported that there were 41 verdicts involving end-user piracy, 325 involving “channel” piracy and three involving Internet piracy. The Government of Russia (Ministry of Internal Affairs, MVD) reported 6,118 crimes under Article 146 of the Criminal Code in 2010 – including all intellectual property cases. There were 4,703 criminal investigations and 4,365 cases sent to the courts. Of these, 3,406 individuals were prosecuted, with fines of approximately 1 billion rubles (\$34.1 million). Unfortunately, this reflects overall, a 15% decline in the number of copyright criminal cases from 2009.

The local motion picture industry (Motion Picture Association, MPA) reports that enforcement activity in the past few years, especially in Moscow and St. Petersburg, has remained relatively consistent. They report that 2010 was the first time that the Russian theatrical box office exceeded \$1 billion (reaching \$1.25 billion).

The music industry continues to emphasize the critical need for criminal, rather than civil, enforcement and that such enforcement should be directed against Internet piracy, as well against optical disc piracy – namely against any criminal enterprises dedicated to the manufacture, distribution and sale of pirate materials. 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.

The entertainment software industry reported a decline in the number of criminal actions initiated. It has been suggested that the 2010 reorganization of the Investigative Committee (in charge of IP crimes) may be a factor in the overall decline, in addition to the market shift to, and lack of effective enforcement against, Internet piracy. Also of concern is the reluctance on the part of police to pursue *ex officio* actions against major distributors and manufacturers of pirated entertainment software products. Although police continue to initiate enforcement actions against low-level targets, such as game club owners and individual sellers, these actions generally result only in small to medium quantities of pirated product being seized; the police are not enforcing against major infringers, most notably the owners of retail chains that sell infringing products or the manufacturers of pirated product.

All the copyright industries are being harmed by commercial-scale piracy, which can only be addressed through criminal measures. Civil measures are not capable of providing the requisite level of deterrence. In general, civil enforcement inadequacies include: remedies usually 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.

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. 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 against owners and operators of piratical operations. However, 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. Deterrent criminal penalties are still not being imposed against optical disc plant owners or, with few exceptions, against plant operators (no plant owner has ever been convicted and only a handful of plant managers or employees).

The lengthy criminal 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 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. Enforcement is also hampered, and trials delayed, by the requirement that exemplars be collected only by state officials (or jointly with rightholders), and by a statutory reliance on government expert reports. Delays also result from a lack of subject matter expertise in some cases, as well as a reluctance to use or rely on rights holder expertise on forensic matters (and worse, some local authorities refuse to share any information on cases with rights holders at the investigative stage, impeding the success of these cases). These present arcane and outdated rules relating to expert evaluations create unnecessary delays and costs in litigation. Industry experts should be fully integrated into the judicial process, so we recommend that the rules be modernized for greater efficiency. One way to accomplish this would be for the Supreme Court to issue new guidelines on the admissibility of the testimony of private experts. ESA reports delays in examination reports from government experts, due to a lack of technical expertise – in one case, difficulty in identifying infringing console products. This remains so, even after 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. As an example of the slow pace of enforcement, one case from 2007 (involving 800 pirate discs) was still under investigation at the end of 2010.

Improvements should also be made with respect to court procedure. The criminal procedures generally require that a rights holder request the destruction of the seized goods (or move for recovery of damages) in a separate proceeding before the Arbitration Court – which unnecessarily lengthens the process and makes enforcement even more difficult.

Another recommended measure is the appointment of IPR special prosecutions, investigators, and police officers at both the federal and regional levels throughout Russia. The appointment of specialized IPR 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. IIPA recommends that the Investigations Committee (IC), and the Ministry of the Interior (MOI) and its investigators, continue to work with IIPA members on future training programs. Last, we recommend that the General Prosecutor's Office (along with the MOI and the IC) appoint a government liaison with IP rightholders to more effectively bring criminal investigations and trials to successful conclusions. One enforcement set back: the Duma is expected to pass legislation in 2011 to reduce police personnel across Russia by 20%, and to reorganize Russia's police force.

Internet Piracy Enforcement: The 2006 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) and to investigate and prosecute companies that illegally distribute objects of copyright or related rights on the Internet.” Internet and wireless access by Russian citizens is growing rapidly; according to the ITU, there were 59.7 million Internet users as of June 2010 in Russia – which represents 42.8% of the population (and an increase of 10% since 2009).

One way to accomplish improved criminal Internet enforcement would be to centrally coordinate law enforcement: thus, in addition to bringing more IPR cases and conducting expeditious investigations, prosecutors should coordinate their efforts with the police (as should the investigative departments of the MOI, the Federal Security Service of the Russian Federation (FSB), and Customs, now that they all can initiate criminal cases). 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. A draft is being prepared by the General Prosecutor's Office, but unfortunately, without rights holders' input, to date.

The fundamental enforcement shortcoming is the lack of authority and jurisdiction to act against copyright infringement crimes occurring on the Internet. 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). Although the Federal Department K has equipment and expertise, there is not a single person in the department assigned to the sole task of combating IP crime – which is why IIPA continues to recommend 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 K) within the Ministry of the Interior even though they have occasionally taken action. So, Department K's authority and responsibility to act in cases of online infringement should be clarified and strengthened.

In addition to the pay-per-download and other hosted sites, Russia is home to a number of major BitTorrent indexing sites such as rutracker.org, torrentreactor.net, and BTmon.com (which includes materials from many copyright industries), which are popular channels for illegal peer-to-peer downloading. One particularly problematic site is GameTorrent, a BitTorrent tracker and online pirate discussion forum that is owned by a Russian national, but is currently hosted in Estonia (and neither the ISP nor website owners respond to takedown requests). There are also cyberlockers and hosted download sites for films, video games and music.

vKontakte, the most popular online social network in Russia (93 million registered members worldwide) is the largest single distributor of infringing music in Russia, and one of the largest in the world. It has a functionality specifically designed to enable members to upload music and video files, which includes hundreds of thousands of unlicensed copyright works and recordings. It also has a dedicated content search engine that enables other members to search and instantly stream infringing content; plus, some third party software developers have distributed “apps” to enable non-members to search and download the content available on the site. While vKontakte will generally take down specific content when notified, that is an inappropriate enforcement mechanism for a problem of vKontakte's own making. Although vKontakte added a dedicated music feature, it has no licenses to distribute musical content – it either must eliminate this service, or license it properly. Besides vKontakte, there are a number of other Russian-based sites targeting users outside of Russia. For example, Kino.to is a site that features illegal film and TV materials (mostly in German); it has over 300,000 TV shows and over 66,000 movies – all illegal (and was described in one German magazine as “the biggest German language portal for pirate films” – with revenue of about \$3.5 million Euros a year). To date, cease and desist letters to Kino.to have yielded no results.

The response to takedown notices overall in Russia have had mixed and largely inconsistent results with some ISPs cooperating and moving to takedown pirate sites once identified, but most ISPs not willing to cooperate (absent a court order), even with clear evidence of piracy. This is why ISP cooperation, and clear third party liability, are essential. As one example, the ESA reports only one hosted site (narod.ru) generally complied, at all, with its takedown requests, while other sites ignored such requests; still, ESA reports that Russia has risen to one of the top five piratical downloading sources in the world. During 2010, ESA vendors detected 2.92 million connections by peers participating in unauthorized file sharing of select member titles on peer-to-peer networks through ISPs located in Russia, placing Russia tenth in overall volume of detections in the world.<sup>3</sup>

The recording industry reports that paid download sites remains an important source of piracy in Russia along with the peer-to-peer services, and cyberlockers. Although the most notorious website, allofmp3.com, was taken down (in 2007), and has not resurfaced at that Internet address, there are now in excess of 30 similar sites based on the same business model as the original 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). The pay-per-download websites remain a major problem for the music industry. The only solution is to take down the sites, and to criminally prosecute the site operators. Three years after the Russian Civil Code amendments went into force which, among other things, clarified that these types of activities are illegal – with regard to both websites and the rogue collecting societies – they remain unabated.

As noted, the accreditation of VOIS as the only collecting society (it is collecting on the basis of an extended license – i.e., on behalf of record companies and performers who have not authorized that society to collect for them) has resulted in significant problems for the recording industry. The situation remains in flux because of the recent court decisions overturning the accreditation of VOIS. Most U.S. record companies have not entrusted the administration of their rights to VOIS, because the society has not demonstrated compliance, thus far, with international standards in terms of accountability and transparency. In order for U.S. rightholders to be properly represented in Russia, it is essential that VOIS (or whatever society is ultimately accredited) to 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 with reasonable agreements between the respective societies. The Government of Russia must take an active role to ensure this happens. The recent closure of Rosokhrankultura (ROK), and the transfer of its functions (including copyright and related rights administration) to the Ministry of Culture, raises new legal concerns and uncertainties about the existing accreditation of VOIS, and whether the Ministry of Culture or a new federal service under the Ministry of Economic Development (MED) will have the accreditation authority going forward.

Independent film producers are especially concerned about Internet piracy because of its harm to legitimate online distribution platforms and services – harming consumers and rights holders alike. Revenue from these platforms and services, which is licensed country-by-country, is critical to financing the development of new creative works worldwide, since piracy in one territory, harms other markets instantly. The independent film production sector cannot shift easily to new business practices that might otherwise limit piracy. For example, worldwide same day release (referred to as “day and date” release) may prove an effective method to curb or delay piracy for the major studios, which control their own worldwide distribution, but for independents, whose national distributors release on their own schedule, this technique is impossible.

There was one bright spot: the MPAA reported that in August 2010, Russian enforcement authorities took action against filehoster.ru – an infringing cyberlocker and torrent site. The police seized the server and identified 1,112 MPAA-member company titles stored in the site’s library and available for download; old titles were available

---

<sup>3</sup>These figures do not account for downloads that occur directly from hosted content, such as games found on “one-click” hosting sites, which appear to account each year for progressively greater volumes of infringing downloads. These figures likely underestimate the level of peer-to-peer activity surrounding files with Cyrillic file names. These high levels of file sharing activity are estimated notwithstanding the country’s comparatively low broadband penetration.

for download for free, and new titles were offered for download for \$2 (with high-speed downloading offered for an additional \$.60). It is hoped that last year's Interfilm.ru case will start soon – the Russian Ministry Investigation Committee filed criminal charges against the site operator (for \$1.25 billion in damages); the site reappeared in the Netherlands (Leaseweb) and remains operational.

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, download-ebook.org and ebooknetstore.com – continue to harm the market for academic and professional materials. Other sites include pdfchm.com/ and free-file host providers like Paid4share.net, Icefile.info and others. Takedown notices have gone unheeded (non-compliant ISPs include: relcom.ru, agava.ru and 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. 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>4</sup>

The business software industry (BSA) reported only fourteen raids against Internet users or services in 2010 (compared with 25 in 2008), which resulted in the commencement of only four criminal cases (compared with 15 in 2008), and only three convictions (seven in 2008). One bright spot: as a result of cooperation between the MOI Department K and BSA, in October 2010, the first criminal proceeding against an administrator of a website (www.macintosh.cd), that offered DVDs loaded with illegal software, resulted in an injunction and the site being taken down; the operator received a four-year suspended criminal sentence (and in a companion civil case, ordered to pay fines of about US\$27,000).

**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 continued to lag behind levels just a few years ago. In 2010, there were 436 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, only starting to develop enforcement activities. 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 Russia, and the General Prosecutor's Office in relation to implementation of Article 146 of the Criminal Code, although efforts to update the methodology were underway in 2010. In 2010, the police ran more raids against chain retail stores (1,098, up from 1,063 in 2009, and 740 in 2008). A majority of the raids against businesses using illegal software never result in the initiation of an investigation (even where the evidence is strong). The investigators do not consider evidence collected by police during raids as sufficient, but they have been unable or unwilling to provide police with guidelines for evidence collection. Thus, criminal cases, are frequently suspended by investigative authorities or terminated by prosecutors; if they do go forward, they merely go after easy (small) targets like vendors, and not organized criminal enterprises.

The business software industry reported that one of the reasons for the significant drop in piracy rates in recent years, has been 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, BSA continued to report good cooperation with the police and investigators (Investigational Committee of Prosecution, as a result of TAIEX enforcement seminars in 2009 and 2010), and with the Ministry of the Interior, although there was a leveling off of the number of raids, but the Federal Department K officials pledged better cooperation in 2011. Even with significant activity taken against business software piracy, the BSA reported, as preliminary figures, that the piracy rate for PC software in Russia was 70% in 2010 – an increase from 2009, but still down significantly from the 87% level in 2005.

---

<sup>4</sup>Examples include: nowdownloadall.com, idownloadall.com, 10xdownloads.com, idownloadunlimited.com, and nowfreedownloads.com.

Based on preliminary figures, the commercial value of PC software from U.S. vendors pirated in Russia in 2010 was \$1.74 billion.<sup>5</sup>

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 amended and it is reported that the police are undertaking *ex officio* investigations using that law. A new law on police enforcement powers is under consideration in the Duma (it had a second reading on January 28, 2011). In particular, the copyright industries want to ensure that neither of these laws limit the ability of police to undertake raids and to secure evidence, especially against commercial enterprises.

**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 recommend the initiation of criminal cases. Regarding corporate liability, Russia's current Criminal Code does not allow for corporate entities to be held criminally liable. Only a natural person (usually a corporation director) can be found criminally liable for infringement and only upon a showing that he/she had a direct intent to commit the infringement. It is extremely difficult to make such a showing (for example, against the owners of a retail outlet selling pirated product), so many cases are suspended without any penalty. Thus, verdicts are issued against only the retail staff found selling pirate products at the time of a seizure or raid, rather than against a manager or corporate owner, with little deterrence against the retail establishment.

There were a considerable number of important raids against pirate warehouses in 2010, particularly in Moscow and St. Petersburg, and there were a number of large seizures of copyrighted materials at these warehouses. For example, in May 2010, in Khimki near Moscow, a warehouse was raided and 3 million DVDs were seized; a chain of shops belonging to owners of this warehouse were also raided. Also, three raids in three warehouses in the Luzniky market in Moscow resulted in the seizure of 500,000 CDs. In total, the copyright industries reported 11 large raids against warehouses resulting in the seizure of over 10.1 million optical discs.

The Motion Picture Association (MPA) 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 2010. However, FSB did work in close cooperative work with RAPO in 2010 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 2010 included: in June 2010, the St. Petersburg economic crime police raided a DVD plant, seizing three optical disc lines, and a warehouse owned by the plant owners, seizing 300,000 optical discs. And, in December 2010, the FSB in Moscow raided two warehouses over two days at a defense plant, seizing 1.5 million optical discs. In total, RAPO participated in 903 hard goods raids in 2010.

---

<sup>5</sup>BSA's 2010 statistics are preliminary, representing U.S. software publishers' share of commercial value of pirated software in Russia. They follow the methodology compiled in the Seventh Annual BSA and IDC Global Software Piracy Study (May 2010), <http://portal.bsa.org/globalpiracy2009/index.html>. These figures cover packaged PC software, including operating systems, business applications, and consumer applications such as PC gaming, personal finance, and reference software – including freeware and open source software. They do not cover software that runs on servers or mainframes, or routine device drivers and free downloadable utilities such as screen savers. The methodology used to calculate this and other piracy numbers are described in IIPA's 2011 Special 301 submission at [www.iipa.com/pdf/2011spec301methodology.pdf](http://www.iipa.com/pdf/2011spec301methodology.pdf). BSA's final piracy figures will be released in mid-May, and the updated US software publishers' share of commercial value of pirated software will be available at [www.iipa.com](http://www.iipa.com).

Unauthorized camcording in Russian theaters exploded in 2010. Camcording is particularly damaging in Russia because it fuels rampant online piracy which harms worldwide distribution and prevents the establishment of legitimate online distribution. Unauthorized camcording also threatens the continued growth of the Russian theatrical box-office marketplace. There were 75 full video camcords illegally recorded in Russian theaters in 2010, almost double the number from 2009. This problem is particularly devastating in Russia because of the exceptional quality of the materials, which consequently, is in high demand by international copyright thieves who quickly upload these illegal copies to the Internet. Since 2009, there have been 61 interdictions, mostly in Moscow, all by security in the theaters. However, these interdictions have resulted in only two criminal cases being initiated, one has already closed, so there is no deterrence to this activity.

According to the Entertainment Software Association (ESA), video game retail piracy remains significant in Russia, with pirated products still widely available on the street, in underground venues and at markets. Thus, hard copy piracy – factory replicated pirate product – remains predominant, though on a slight decrease as Internet piracy levels are increasing at a rapid pace. Pirated product is also frequently in use at cyber cafes. There is evidence that small vendors selling product in underground alleys and flea markets in central Moscow have disappeared as a result of frequent police patrols. Although pirate product is not sold in major retail chains in Moscow, it is still openly and widely sold in St. Petersburg's largest retail chains and in other cities. Examples include in St. Petersburg at Iceberg, Titanic, Playland and Dubl'Dva; as well as in Music Star (Rostov), Media Star (Zelenograd), Treck (Krasnodar) and Sphera Samara and Discomania (both in Ekaterinburg). ESA reported some successes in raids – with seizures ranging in size from 30 to 19,000 discs – at various locations, including one replication plant warehouse, and another involving an Internet site selling hard copies of pirate product. However, the police continue to focus on “easy” (smaller) targets, and while rights holder cooperation is sought and encouraged (for information on titles and damages, etc.), the cases are mostly targeting small(er) distributors. 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.

The book and journal publishing industry reports that 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, alongside the growing problem of book piracy occurring online. Popular works subject to 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 in universities, where unauthorized photocopying of academic textbooks continues to occur unimpeded, and authorities have shown little interest in proactively addressing the problem. In 2010, however, a number of booksellers, through a letter campaign to university authorities in Vladivostok, Tomsk and Chelyabinsk, succeeded in getting the universities to address piracy occurring on campus. It remains to be seen whether the universities' actions will be sustained or merely a one-off response to the bookseller's campaign. The Government, particularly the Ministry of Education, should take steps to educate their faculties and students as well as to promote the adoption of copyright laws and appropriate use policies among all institutions of higher learning.

**Raids Against Optical Disc Plants:** Although optical disc piracy is no longer the highest priority for IIPA members in Russia, large quantities of discs are still being produced there without licenses. Enforcement against optical disc production is still not effective as evidenced by the continuing operation of many raided plants. It is estimated that about 6 optical disc plants were closed in 2010. 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 2010. In 2010, BSA, MPA and the Economic Security Department of MOI, worked together on a criminal case against a large-scale group illegally producing and distributing CDs and DVDs in the Central District of Russia. BSA members were also able to win a substantial monetary damage award.

**Administrative Enforcement:** BSA reported only 16 administrative court decisions against infringing end-users and only 4 against channel pirates in 2010. This is compared with the 40 administrative court decisions that were resolved in 2007 and 2008 – 35 and 37, respectively, against end-users, and five and three against channel pirates. Over the past few years, the average administrative fine imposed has been about 4,482 to 5,975 rubles (US\$150 to \$200) per case. The Administrative Code (Article 7.12) provides a range of fines on natural persons (1,500 to 2000 rubles), the owners or managers of legal entities (10,000 to 20,000 rubles) and on legal entities themselves (30,000 to 40,000 rubles), as well as permitting the confiscation and destruction of pirated product. Administrative cases are filed by the police or by agencies, but the levying of fines is done by courts of general jurisdiction (natural persons) and arbitration courts (legal entities). Imposing significant administrative fines on legal entities, for example, for the illegal use of software, would have a deterrent effect (and could be imposed in instances when criminal cases end for failing to meet the high evidentiary burdens).

**Enforcement Training:** The copyright industries reported on their continuing participation in many training seminars over the past year with enforcement agencies and judges on how best to fight Internet piracy, as well as hard-copy piracy, and remain ready to continue this cooperation. Program participants included: the Interactive Software Federation of Europe (ISFE), the Business Software Association, RAPO (motion picture producers), and the International Federation of the Phonographic Industry. For example, in a December 2010 cross-industry training seminar, jointly organized by the European Commission (through its Technical Assistance and Information Exchange, TAIEX, program), the Investigational Committee of Prosecution (ICP), and the Russian Academy of Justice Office, over 150 participants attended (including the above-mentioned industry representatives); over 50 heads of the prosecution investigational units, along with judges, investigators and police were trained on enforcement issues. There were other similar programs in March, June and September 2010. In all, there were about four such large-scale training programs in 2010 in Moscow, St. Petersburg, Belokurikha and Ekaterinburg with a total of 350 to 400 enforcement representatives in attendance.

**Optical Disc Plant Licensing and Inspections:** The continued lack of clear authority for optical disc licensing and inspections in 2010 remains an ongoing set-back in the enforcement of optical disc production and distribution regulations in Russia. Even though optical disc piracy is less of a problem than digital piracy, it persists as a problem for some industries. 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 2006 IPR Agreement obligations. 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.

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

## DEFICIENCIES IN THE RUSSIAN LEGAL REGIME

**Overview of Legal Reforms:** Russia has made progress on legal reforms as detailed in previous filings; this year, for example, it added *ex officio* authority to the Customs Code (in force on December 29, 2010) to permit the interdiction of suspected counterfeit and pirated product. However, as noted in the priority list at the outset of this filing, there are many missing pieces to having an effective legal regime – especially one geared to effective Internet enforcement, where the current legal framework cannot address the problem.



The Civil Code, Part IV, in force in 2008, made some improvements, but left many reforms either incomplete (implementation of the digital treaties), or inadequate (ISP liability and the other list of deficiencies noted in previous IIPA filings). A November 2010 draft set of amendments prepared by the Center for Private Law, has some very troubling provisions pertaining to: (i) the liability of ISPs (Article 1253); (ii) technological protection measure exceptions (Article 1299(4)), and (iii) broad exceptions (Articles 1274 and 1275).

Since its adoption, IIPA and its members have commented on three major overarching concerns with the new Civil Code: (a) the lack of clarity; (b) administrative law principles throughout the Civil Code that likely cannot be enforced by civil or criminal procedures; and (c) rules that clarify the illegality of providing services that are intended to promote the infringement of copyright and related rights (for example, by ISPs and other Internet operators to stop online infringement). This latter issue is the principal challenge for IIPA: for Russia to define ISPs, encourage cooperation on Internet piracy with rights holders to effectively deal with Internet piracy – in civil and criminal law, and to adopt secondary liability provisions. If Russia is to foster legitimate electronic commerce and if the rule of law is to apply to the online world, Russia must develop a balanced system of liability provisions that incentivizes ISPs to cooperate in addressing Internet piracy. It is encouraging that Deputy Prime Minister Igor Shuvalov announced in January 2011 that the Government of Russia wants to develop Internet regulations (targeting March 2011) to guarantee compensation and effective enforcement for rights holders, and to ensure the ISPs operate in a responsible manner.

Further, it is critical that Russia amend its regime to allow for injunctive relief, especially in Internet matters. For a detailed list of IIPA comments on the Civil Code see <http://www.iipa.com/rbc/2010/2010SPEC301RUSSIA.pdf> at page 138. In addition to those already mentioned we continue to recommend steps to ensure that 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 2008 Civil Code and the repeal of the copyright law; and, last that Article 1252(5) of the Civil Code, which currently includes remedies for the seizure and destruction of materials and equipment used in infringements, be improved by deleting the exception for the sale of materials by the state for “income,” and by parallel changes in the respective procedural codes.

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 Civil Code, 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 (including the calculation of thresholds in cases where there is no equivalent of a similar legitimate license); the application of provisional measures; and, the application of civil search procedures (especially important for software piracy cases).

# SPAIN

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2011 SPECIAL 301 REPORT ON COPYRIGHT ENFORCEMENT AND PROTECTION

Special 301 Recommendation: IIPA recommends that Spain be elevated to the Special 301 Priority Watch List in 2011.

**Executive Summary:** IIPA welcomes Spain's recent movement toward adoption of the Law on the Sustainable Economy (LES) in early 2011, which would establish a mechanism for the removal of pirated content on hosted websites and would mark an important first step toward combating the significant problem of Internet piracy in Spain. To be effective, it is essential that the law apply either in the language of the law itself or through implementing decrees, to the activities of torrent and link sites that direct users to infringing materials. This would be consistent with representations of the Spanish Government as to the scope of this measure. While this proposed law is welcome, IIPA notes that the procedures contemplated by the most recent version are unnecessarily complicated for what should be a straightforward procedure. The copyright industry is also disappointed that the Spanish government is not presently considering a more robust solution to an Internet piracy problem that has decimated the Spanish market. The highly connected Spanish population remains a market that is largely out of reach for legitimate digital content due to Spain's persistent high levels of Internet piracy, which emerge in particular through peer-to-peer (P2P) platforms that will largely remain unaffected by the currently proposed LES amendments. Active leadership by the Spanish government is needed on all fronts to address the heavy consumption of infringing materials, remove the protective cloak of anonymity, and secure greater cooperation on the part of Internet service providers (ISPs) with respect to the use of their proprietary networks and platforms for infringing purposes. Effective action to combat the theft of creative content is critical to defending Spain's cultural heritage, stopping the hemorrhaging, and expanding economic opportunities.

The sky-high Internet piracy levels in Spain can be attributed to government policies that have created an Internet-wide safe harbor for infringing activities. Spanish enforcement authorities have established the de facto decriminalization of illegal downloading of content distributed via P2P file-sharing (despite provisions in the Copyright Act making it clear that copies made from illegal sources are not private copies). Spain's laws fail to meet the minimum requirements of the EU E-Commerce Directive regarding liability for ISPs, or to establish the necessary tools to obtain the identity of the direct infringer. As a result of these legal defects, police frequently refuse to take Internet enforcement actions. Moreover, private sector negotiations to address online piracy have failed largely for lack of adequate legal or regulatory incentives for ISPs to cooperate. Enforcement authorities are taking some action against street piracy, although amendments to the Penal Code have made enforcement more complicated and driven this activity down in the past year. As a consequence, pirate product remains fairly ubiquitous, and circumvention devices enabling use of illegally copied games are widely available. The business software sector in Spain reports good cooperation with the Ministry of Industry on public awareness efforts and important reductions in the level of certain types of software piracy. However, the industry faces persistent organizational end-user software piracy and remains concerned about the availability, cost, and speed of civil enforcement measures, citing problems such as expensive bonds and low damages.

### PRIORITY RECOMMENDED ACTIONS FOR SPAIN IN 2011:<sup>1</sup>

- Correct the Attorney General's May 2006 Circular that decriminalizes infringing downloads over P2P networks, so that the work of digital enforcement authorities may move forward.

---

<sup>1</sup>For more details on Spain's Special 301 history, see IIPA's "History" appendix to this filing at <http://www.iipa.com/rbc/2011/2011SPEC301HISTORICALSUMMARY.pdf>, as well as the previous years' reports, at <http://www.iipa.com/countryreports.html>. For a summary of IIPA's 2011 global issues, see our cover letter at <http://www.iipa.com/pdf/2011SPEC301COVERLETTER.pdf>.



- Consistent with the 2008 European Court of Justice (ECJ) decision in *Promusicae vs. Telefonica*, develop legislation to allow rights holders to obtain the necessary information to take civil actions in Internet piracy cases.
- Amend Spain's e-commerce laws to adopt the standards required for ISPs to gain effective knowledge of infringing activity under the EU E-Commerce Directive, and to establish a workable notice-and-takedown procedure that ensures action by ISPs upon direct notice from rights holders of infringing activities.
- Expediently pass provisions of the Law on the Sustainable Economy to address web-hosting of pirated content, and, consistent with representations of the Spanish government, ensure their application to linking, indexing and torrent sites, and begin to address all forms of infringing online conduct in a robust manner.
- Take appropriate steps to ensure that circumvention devices are illegal.
- Establish a national authority to coordinate Internet piracy enforcement, 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.

## 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. Piracy of copyright works in Spain takes many forms, including street sales of pirated optical discs, end-user piracy of business software, sale of circumvention devices for the use of illegal copies of videogame software, illegal camcording in theaters, unauthorized public performances of music and sound recordings, and, overwhelmingly, Internet piracy.

Online piracy: With a highly connected population, Spain represents an enormous market of opportunity for audiovisual products, music and sound recordings, and the business and entertainment software industries. Yet the 29.1 million Internet users that comprise 62.6% of Spain's population<sup>2</sup> remain out of reach for legitimate digital content due to Spain's persistent status as one of the world's worst offenders of Internet piracy. Starting in 2007, Internet piracy in Spain exploded, and it has continued to grow at a tremendous rate. Comparative studies by the music, videogame, and motion picture industries demonstrate that Spain has one of the worst Internet piracy problems in the world. Today, according to the Anti Piracy Federation ("FAP"), whose members include film and videogame groups in Spain, 55% of digital piracy in Spain occurs via peer-to-peer (P2P) networks, 34% via hosted websites, and 11% by streaming sites. For motion picture products, Spain ranks consistently among the five worst countries in absolute downloads, and is nearly always the number one major country in the world in terms of per capita exchanges of illegal copies of films. Spain has the worst online music piracy problem among the major European markets, with close to half (45%) of all active Internet users in Spain using services that distribute music illegally – a ratio well above the average among the top 5 EU markets (23%).<sup>3</sup>

Online Music Piracy: 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 fifth of its 2001 size,<sup>4</sup> despite the availability of many legal online services (from Apple's iTunes to Spotify, Deezer, and 7digital). Research by IDC in 2010 found that the Internet music piracy rate in Spain was 97.8%. The value of pirated music in the first half of 2010 was US\$3.6 billion. According to IDC estimates, Spain's legitimate online music market could have been

<sup>2</sup>According to [www.internetworldstats.com](http://www.internetworldstats.com), June 2010.

<sup>3</sup>According to The Nielsen Company, October 2010

<sup>4</sup>The value of recorded music sales in Spain has decreased from €626 million (US\$802 million) in 2001 to just €128 million (US\$171 million) in 2010, which means an 80% decrease in value. In unit terms, sales were 73 million in 2001 and only 16 million in 2010, a drop of 78%. Because of these falling sales, more than 50% of the employees of the music sector have lost their jobs in the last few years.

valued at US\$2.3 billion. IDC also found that almost 70% of Spanish Internet users admit to downloading illegal copyright content (music, film, videogames, and books) via P2P sites (85% in the case of Internet users under 24), and that almost 50% of Internet users downloaded content from direct download sites (75% in the case of those under 24).

In Spain, illegal music offerings on the Internet are available in many formats. According to recent research and surveys carried out by the Coalition of Creators and Content Industries, 60% of Spain's online music piracy problem is via P2P file exchange protocols (eMule, Ares and BitTorrent, mainly); 30% via web pages offering links to infringing music files for direct download; and 10% via other means (blogs, FTP, Cyberlockers and other systems like chat or e-mail that are used illegally to provide access to infringing content). The legitimate online market is already stunted as a result. Meanwhile, another form of piracy linked to the Internet is developing with the online trade of physical product offered by national and international pirate networks that specialize in offering products such as full discography collections of artists and bands, both official and unreleased, as well as film and software. A centralized unit within the Customs Department of the Tax Agency could help reduce this specialized form of Internet piracy.

Piracy also harms music publishers; the National Music Publishers' Association (NMPA) indicates that its Spanish counterpart, SGAE (the collecting society, la Sociedad General de Autores y Editores), reports that widespread Internet-based piracy in Spain undercuts the legitimate market for music publishers and their royalty collections.

Online videogame piracy: The Entertainment Software Association (ESA), representing the videogame industry, also reports that piracy levels in Spain worsened in 2010. Online piracy is now the primary problem for this industry, with illegal downloads clearly overtaking the hard goods piracy problem. More and more of these sites are beginning to include cyberlocker links for direct downloads of infringing material. Two Spanish ISPs (Telefonica de Espana and Jazz Telecom S.A) are among the top 10 ISPs worldwide whose networks were used to facilitate illicit file sharing activity. Without meaningful efforts by these ISPs to cooperate with rights holders and stem infringing activity on P2P networks, the staggering levels of online videogame piracy will continue. ESA reports that during 2010, ESA vendors detected 13.59 million connections by peers participating in unauthorized file sharing of select member titles on P2P networks through ISPs located in Spain, placing Spain third in overall volume of detections in the world.<sup>5</sup> Globally, Telefonica de Espana subscribers accounted for 4.85% of the overall detections during 2010. Widespread availability of circumvention devices and services also significantly contributes to growing Internet piracy, as downloaded infringing video game software can only be played on consoles modified by such devices.

Online audiovisual piracy: The film industry reports that Internet piracy continues to cause the greatest damage to the audiovisual market in Spain, where FAP estimates that more than 400 million films are illegally downloaded every year, including many that have not yet reached the Spanish theatrical market. Between 2006 and 2009, DVD sales declined by 60% (from 300 million Euros to 120 million Euros); the number of video stores has dropped from 12,000 down to 2,000; and movie theatres have lost 200 screens and estimate a 9% reduction from the box office. Piracy levels continued to grow during 2010. According to an IDC study, the value of the audiovisual pirate market in the first half of 2010 was 1.87 billion Euros, with a piracy level of 77.1% for the movie industry.

The independent film and television segment of the motion picture industry (IFTA) reports that online piracy remains a significant export constraint for independent producers and distributors, the majority of which are small to medium sized businesses. 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 piracy rates and easy availability of free illegal copies. Internet piracy prevents the establishment of legitimate online distribution platforms and services for consumers, which independents can use to finance future productions. The independent film and television production sector is limited

---

<sup>5</sup>These figures do not account for downloads that occur directly from hosted content, such as infringing games found on "one-click" hosting sites, which appear to account each year for progressively greater volumes of infringing downloads.

in its ability to shift to technology-enabled new business practices that might limit piracy. For example, worldwide same day releases (referred to as “day and date” releases) may prove an effective method to curb or delay piracy for major studios that control their own worldwide distribution, but for independents, whose national distributors release on their own schedule, this technique is impossible.

Independent producers and distributors confirm that DVD sales in Spain have been particularly damaged, since pirated digital copies are offered for free online and with the same quality viewing experience as a DVD. Unable to compete with free, legitimate distributors cannot commit to distribution agreements or offer drastically lower license fees which are inadequate to assist in financing of independent productions. IFTA reports that the inability of national distributors in Spain to provide any part of production financing is resulting in a decreased ability to create independent films, and in some cases films are not being made at all.

**Street piracy:** Street piracy remains a steady problem for copyright industries in Spain. Copyright industries report that there was no substantial reduction in street piracy during 2010. 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 street “manteros,” who sell from blankets and are relatively fixed in location and maintain more product.

**Street piracy of music and sound recordings:** Physical piracy of music in Spain did not increase in 2010, although some peaks registered in tourist places around the Christmas and summer seasons. The overall average is near 20%, while cities such as Sevilla, Granada, Murcia and Alicante suffer rates reaching over 30%. Also for the first time, the music industry detected pirate CDs of pre-release music in street sales, although this cannot be considered a general trend in Spain. This kind of piracy likely will grow as physical pirate networks compete against growing Internet piracy. While digital piracy today has a bigger impact on music sales, street piracy continues to harm the local industry – 77% of music sales in the country still come from physical formats.

Promusicae, Spain’s national association of record producers, 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 represents 81% of legal music sales. The number of regular pirate CDR/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). The structural situation shown by the Map of Physical Piracy remained the same in 2010, although a general decrease has been seen in the volume of physical piracy of music in favor of film piracy.

**Unauthorized public performances of music and sound recordings:** The music industry in Spain is experiencing a gradual increase of new illegal business niches linked to public performance in entertainment premises. Companies reproduce unauthorized music in both audio and video formats for loading coin activated jukeboxes, or, more and more frequently, place 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 21% in 2010, compared to 2009. According to details from the producers’ collecting agency AGEDI, more than 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, apart from the proposals included in the Sustainable Economy Bill, have been taken to date. In response, the Instituto Ibercrea launched an Internet campaign on behalf of those who lost jobs as a result of Internet piracy, including a petition that had collected 3,260 signatures as of January 2011.

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, making the pirate market nearly the same size as the legal market. While some municipalities have effectively forbidden street vendor activity, Madrid, Barcelona, Valencia, Malaga, Ginón, Vigo, Sevilla, and many towns in the north remain serious concerns. Judicial cooperation is poor, and FAP has to provide experts and evidence storage in most cases; some raids are even conditioned on 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 report that they must pay lower licensing fees due to declining DVD sales caused by piracy.

Camcord piracy: Camcording is particularly damaging in Spain because it fuels rampant online piracy negatively impacting worldwide distribution and preventing the establishment of legitimate online distribution. There were two raids against camcording operators in 2010, which led to the closure of a pirate website, [taquilladivx.com](http://taquilladivx.com). Unfortunately, this is a drop in the bucket in light of more than one hundred illegal movies and soundtracks sourced from Spanish theaters that remain available on international pirate networks. In 2010, 87 audio captures and 9 video captures were stolen from Spanish theaters. MPA has also found Spanish-sourced copies in other markets, particularly in Latin America. Even illegally exchanged P2P movies are sourced locally via camcording in Spanish theaters. 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 film producers' collecting society). The public prosecutors are generally not inclined to prosecute criminal cases.

Entertainment software piracy: Hard goods piracy remains a continuing concern, though growth in online piracy rates represents the biggest threat to the entertainment software industry. The widespread availability of mod chips and game copiers that bypass technological protection measures (TPMs) exacerbates both the online and hard piracy problem, as these devices are needed to produce and play unauthorized copies of entertainment software.

Business software piracy: The Business Software Alliance (BSA) reports several sources of piracy in Spain, among which organizational end-user piracy causes the most economic damage. Small- to medium-sized enterprises (SMEs) in particular contribute to widespread corporate use of unlicensed software. Resellers distribute illegal software openly at shops, and the Internet continues to present challenges.

Spain is a country largely characterized by SMEs, among which levels of piracy are more pervasive than among larger corporations. According to IDC market data, it is projected that the IT industry in Spain will generate a market volume of €21 billion (approximately US\$27.5 billion) by 2013, and will employ directly 102,000 people. According to IDC, if piracy levels were reduced by 10 percentage points within the next four years, at least 2,244 high qualification jobs would be created; US\$538 million would be generated in additional tax income for the Spanish treasury; and the increase for Spain's GDP would be \$US2.923 billion.<sup>6</sup>

BSA recently introduced a study of regional software piracy levels in Spain. The overall piracy rate for the country in 2009 was 42%, with a total commercial value of U.S.-vendor pirated software of \$608 million. BSA's preliminary estimate for 2010 shows a PC software piracy rate of 44%, representing a commercial value of US\$692 million worth of U.S.-vendor pirated software.<sup>7</sup> The regional breakdown for 2009 is as follows:

---

<sup>6</sup>See The Economic Benefits of Reducing PC Software Piracy, available online at <http://portal.bsa.org/piracyimpact2010/index.html>.

<sup>7</sup>BSA's 2010 statistics are preliminary, representing U.S. software publishers' share of commercial value of pirated software in Spain. They follow the methodology compiled in the Seventh Annual BSA and IDC Global Software Piracy Study (May 2010), <http://portal.bsa.org/globalpiracy2009/index.html>. These figures cover packaged PC software, including operating systems, business applications, and consumer applications such as PC gaming, personal finance, and reference software – including freeware and open source software. They do not cover software that runs on servers or mainframes, or routine device drivers and free downloadable utilities such as screen savers. The methodology used to calculate this and other piracy numbers are described in IIPA's 2011 Special 301 (...continued)

Region	2009 Piracy Level	2007 Piracy Level	2009 Ranking	2007 Ranking	2009 Losses*	2007 Losses*
Andalucía	58%	60%	1	1	66 M €	101 M €
Extremadura	56%	57%	2	2	18 M €	13 M €
Comunidad Valenciana	55%	55%	3	3	64 M €	62 M €
Castilla la Mancha	54%	55%	4	4	25 M €	15 M €
Aragón	48%	48%	5	5	17 M €	18 M €
Castilla León	47%	47%	6	6	33 M €	26 M €
La Rioja	42%	42%	7	9	5 M €	2 M €
Cataluña	42%	42%	8	8	79 M €	132 M €
Galicia	41%	43%	9	7	39 M €	27 M €
Asturias	40%	41%	10	10	7 M €	7 M €
Cantabria	38%	40%	11	11	8 M €	5 M €
Baleares	38%	40%	12	12	16 M €	10 M €
País Vasco	37%	38%	13	13	39 M €	37 M €
Canarias	36%	38%	14	14	18 M €	12 M €
Murcia	36%	38%	15	15	14 M €	8 M €
Madrid	32%	34%	16	16	171 M €	155 M €
Navarra	28%	29%	17	17	9 M €	11 M €
AVERAGE SPAIN	42%	43%			631 M €	640 M €

\*This data represents the entire business software sector, and is not restricted to U.S. vendors only.

While some regions, such as Navarra or Madrid, are below or at the same level of piracy as the average European rate, other regions have piracy levels similar to countries like Greece, Egypt or Colombia. This regional piracy study will be used by BSA to increase efforts with regional governments in Spain, and increase their involvement in the fight against business software piracy.

On a more positive note, after a targeted awareness campaign conducted by BSA with the Ministry of Industry, the level of piracy in the specific field of illegal resellers reduced dramatically to 21%. BSA will extend this cooperation with the Ministry toward significant reduction of the level of piracy among small businesses. The Ministry of Industry has confirmed that it will dedicate €300,000 during 2011, to consolidate piracy reductions in the distribution channel and to generate a similar reduction of corporate end user piracy among SMEs. At the present moment the Ministry is starting to design the contents of the campaign for this purpose.

## COPYRIGHT AND RELATED LAWS IN SPAIN

The continued lack of action on the part of the Government of Spain from the legislative, executive, and judicial branches underlies one of the most serious Internet piracy problems in the world. By failing to bring criminal online infringement actions, or to provide rights holders with the necessary tools to bring civil actions or gain cooperation of ISPs, Spain has fallen out of compliance with its EU and international treaty obligations. The adoption of anti-piracy measures in the proposed Law on the Sustainable Economy (LES) would represent an important step toward addressing the significant problem of Internet piracy in Spain. The following areas must be addressed urgently in the coming year:

- Adopt and put into operation a system for the effective removal of hosted illicit content, such as has been proposed in the Sustainable Economy Bill.

(...continued)

submission at [www.iipa.com/pdf/2011spec301methodology.pdf](http://www.iipa.com/pdf/2011spec301methodology.pdf). BSA's final piracy figures will be released in mid-May, and the updated US software publishers' share of commercial value of pirated software will be available at [www.iipa.com](http://www.iipa.com).

- Provide the legal tools for rights holders to combat all forms of Internet piracy, to meet its EU and international obligations:
  - Correct the Attorney General's May 2006 Circular, which instructs that P2P filesharing absent an aim of commercial profit is not subject to criminal charges.
  - Incentivize ISPs to cooperate in efforts to stem infringing filesharing activities.
  - Amend the Spanish e-commerce law so that an ISP can gain effective knowledge that infringement is occurring through its service without a court order.
  - Provide rights holders the ability to bring civil and criminal actions against infringers by allowing them to obtain identifying information, in a manner that respects rights to data privacy.
- Address significant gaps in the Spanish legal infrastructure for the protection of copyright works under technological protection measures (TPMs) from illegal circumvention devices.
- Amend Spanish Intellectual Property legislation to clarify that compensation of damages must be valued at least at 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.

IIPA members welcome corporate liability amendments to the Criminal Code that were introduced in 2010, but other penal code amendments may have a negative impact on criminal raids in the coming year. As discussions move forward on these topics, it is imperative that the Spanish government work with copyright industry groups in a transparent and cooperative way to achieve effective solutions to pervasive Internet piracy.

**Removal of hosted infringing content—The Sustainable Economy Bill:** IIPA supports the enactment of the Sustainable Economy law as a first important step to address hosted illegal content, one of the pervasive forms of Internet piracy in Spain. On December 1, 2009, the Spanish government presented a comprehensive bill called the Law on the Sustainable Economy (the “LES”), that now awaits adoption. Among other measures, the law contains some positive amendments to the Information Society Services and Electronic Commerce Act (the “LSSI”) and the Intellectual Property Law (the “LPI”), and gives an administrative body the authority to examine complaints of hosted copyright infringement from rights holders, and to notify websites of the complaints. This procedure provides for due process to respect the rights of web hosts; however, rights holders await the eventual implementation of such a procedure to determine whether its multiple layers of court review will undermine the law's efforts to encourage swift removal of infringing content.

Under the draft law's procedure, if the owner of a website subject to a complaint were to refuse to submit a convincing rebuttal or take down infringing content, the Commission could order ISPs to block access to the site in question and forward to a specialized tribunal a recommendation to remove the infringing content. The tribunal would hear from the interested parties and then authorize or reject the measure proposed 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. Nevertheless, these actions will allow Spain to move toward meeting its key obligations under the WIPO Internet treaties 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). The proposed law is narrowly tailored to handle hosted piracy specifically; it does not, for example, address copyright infringement committed by end users. The proposed law as currently drafted also does not explicitly apply to torrent and linking sites, which Spanish authorities have assured are covered – a point that should be clarified either in the legislation itself or through subsequent regulations or decrees.

**P2P Enforcement—The 2006 Attorney General’s Circular:** Statements issued by the Attorney General in 2006 de-criminalizing infringing distributions of content by P2P have led to a halt in criminal enforcement actions against illegal filesharing, causing Spain to fall out of compliance with EU Enforcement Directive obligations. Circular 1/2006 from Spain’s Office of the Prosecutor-General (“Attorney General”) explains that unauthorized uploading or downloading copyright protected materials over the Internet, including via P2P systems, does not meet the requirements for consideration as criminal offenses under Article 274 of the Criminal Code unless such acts are “for commercial profit.”

The Spanish government has stated that the Circular is “not binding” on any judge, but in practice it has halted Internet piracy enforcement. Both the police and some criminal courts have pointed to the Circular as justification for not taking action against P2P infringers. The few police actions taken against organized networks and companies that clearly made direct or indirect gains from Internet piracy, including through advertising income, are now being dropped as a consequence of the supposed requirement to establish commercial intent. Most of the cases never even reach the trial stage. Furthermore, in the aftermath of the Circular, Spanish courts have declared that, in criminal actions against websites with links to P2P platforms, there is no criminal responsibility for these kinds of infringements.<sup>8</sup> Criminal Investigation Courts have cited the Circular in finding 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, but the Criminal Investigation Courts continued to disfavor criminal liability in P2P cases in 2010.<sup>9</sup> The Attorney General has refused industry requests to discuss the Circular, which remains in effect five years later. Moreover, the National Police, Technology and Internet Division (the BIT) will no longer engage in raids against Internet sites that facilitate copyright infringement, and is reducing its focus on Internet piracy. The BIT and the Guardia Civil each carried out a few actions in 2010 against the illegal downloading of copyrighted content, though none dealt with music. On the whole, effective police action is not feasible today.

**Inadequate incentives for ISP involvement in the removal of pirated content:** A problematic loophole must be closed in Spain’s Information Society Services and Electronic Commerce Act (the “LSSI”) which, combined with inadequate ISP liability provisions in the copyright law, leaves no incentive for ISPs to cooperate in the removal of infringing online works. In December 2007, the Spanish Parliament approved amendments to the LSSI as part of the government’s “2006-2010 Information Society Development Plan.” Article 16 of the LSSI as amended establishes liability for the ISP if it has effective knowledge of the infringement and does not act diligently to remove or block access to the infringing content. Unfortunately, rights holders cannot establish “effective knowledge” on the part of an ISP by directly notifying a site-operator of the presence of infringing material on their site or service (a standard not in line with Article 14 of the E-Commerce Directive, which refers to “actual knowledge”). Instead, rights holders must take time-consuming steps to submit evidence to a court or administrative body that has previously declared such content illegal. (Up to now, there was no administrative body capable of carrying out this activity, and this obstacle would be amended with the enactment of the proposed LES.) Further, under Article 11.2 of the LSSI, as amended, access may be restricted from Spain to a specific service or content provided from a non-EU State when the “competent authorities” have requested the removal or interruption of such content or service; however, the definition of “competent authorities” is unclear.

---

<sup>8</sup>In 2010 there were several final (unappealable) decisions: CVCDgo.com (Madrid), Etmusica (Huelva), portal VCD/emule24horas (León) and naiadadonkey (Alicante).

<sup>9</sup>See Indicedonkey (Madrid) (Appeal pending); Cinegratis (Cantabria) (Dismissal upheld by the Court of Appeal in June 2010) and Divxonline (Valencia) (reversed in October 2010). The divxonline case was reversed in January 2010 (discussed further, below).

The LSSI, despite its 2007 amendments, ultimately fails to effectively implement the EU E-Commerce Directive. Not only does the LSSI fail to establish an effective notice and takedown procedure, but it contains a confusing and unachievable rule requiring “actual notice” to ISPs for the removal of unauthorized content. The proposed Law on Sustainable Economy would enable an existing administrative authority to take this kind of action; however, the LSSI still fails to meet the obligation under the E-Commerce Directive that hosting providers must remove content when they are aware that the content is illegal.

Identifying online infringers—*Promusicae vs. Telefonica* and the EU Directives: Serious challenges exist in Spain to identify online infringers in both civil and criminal copyright proceedings. The Government of Spain should provide for an effective mechanism through which rights holders can 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 EU requirements, to permit disclosure of the appropriate information so as to facilitate rights holder action. The *Promusicae vs. Telefonica* decision, issued on January 29, 2008 by the European Court of Justice (ECJ), considered the decision of a Spanish court in the course of national proceedings between the rights holders association Promusicae and the Spanish ISP Telefonica, concerning the latter’s refusal to disclose data about its subscribers who had shared or uploaded large numbers of music files via the Kazaa network. The ECJ stated that Member States must allow a “fair balance” to be struck between fundamental rights, including the “right to respect for private life,” and the “rights to protection of property and an effective remedy.”

The Spanish Mercantile Court #5 of Madrid 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 obligations. However, combined with the Attorney General’s 2006 Circular that decriminalized infringements via P2P networks (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 result, Spain fails to provide the “fair balance” required by the ECJ in *Promusicae* – it offers no meaningful manner in which copyright owners can effectively protect rights guaranteed under EU Directives.

Spain also has not properly implemented a related element of the EU Enforcement Directive (2004), which aims in particular to strengthen enforcement in the digital environment. The “right of information” afforded in Article 8 of the Directive allows rights holders to identify infringers and obtain information about infringements. Article 8 permits rights holders to obtain an order requiring an ISP to disclose an infringer’s identity where it appears a website or a user has committed copyright piracy. Unfortunately, the “right of information” in Spain suffers from a burdensome dual commercial scale requirement, applying to both the services provided by the ISPs as well as to the infringements committed by the direct infringer. Under the Directive, however, the commercial scale requirement should apply only to the services provided by the ISPs, not to the acts committed by the infringer. Spain’s erroneous implementation of this element in effect relieves ISPs from any liability to provide the identity of infringing websites or users, making it impossible for rights holders to bring copyright infringement actions.

Yet a further legal obstacle prevents rights holders from accessing the identity of infringers. Spain’s Data Retention Law allows retention and disclosure of personal data only for serious crimes. Under 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 disclosure of personal data in intellectual property crimes is not possible. Because the Data Retention Law also has been interpreted to prevent personal data disclosure in civil proceedings, this law eliminates the possibility to sue P2P infringers, both in the civil and in the criminal courts.

Anti-Circumvention Measures – WIPO Internet treaties obligations: Spain needs to address significant gaps in its legal structure to protect copyright works that are protected by technological protection measures (TPMs) against circumvention devices. 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) (together, the WIPO Internet treaties), and these obligations entered into force on March 14, 2010. However, Spanish courts have erroneously concluded that devices primarily designed for purposes of circumvention are lawful when capable of some ancillary non-infringing use. Although there is a strong case to be made that these courts are improperly interpreting the law, modifications to the law would ensure that the provisions function as intended to effectively prosecute the manufacture and distribution of circumvention devices.

Prosecuting individuals or entities engaged in the trafficking of circumvention devices and/or the provision of services related to circumvention devices remains subject to difficulties despite the fact that such devices are clearly prohibited under the EU Copyright Directive, and Spanish law itself contains similar prohibitions. Article 270.3 of the Criminal Code imposes criminal penalties against the manufacture and distribution of a device or service “specifically intended to facilitate the unauthorized removal or circumvention” of TPMs. Unfortunately, many Spanish courts have interpreted the statute as imposing liability only if the underlying device is entirely incapable of non-infringing uses. As a result, defendants engaged in the commercial distribution of devices primarily used to defeat industry TPMs (and thus enable the use of infringing copies of games) routinely escape liability by simply arguing that such devices are capable of incidental and commercially insignificant non-infringing uses. A large number of high profile dismissals, including most recently in December 2010 (a Barcelona decision regarding the site Chipspain.com), has created the impression among the public that mod chips and game copiers are legal in Spain. Such an interpretation of Article 270.3 is at odds with the plain language of the statute and with Spain’s obligations under the WIPO Internet treaties as well as the EU Copyright Directive. As drafted, liability under Article 270.3 should attach upon a showing that a device is “specifically intended” to effect the circumvention of a TPM.

In the most recent criminal prosecution of a mod chip (or videogame circumvention device) distributor, the Las Palmas Provincial Court affirmed a lower court’s dismissal of the action on the grounds that the devices enabled uses other than the playback of pirated games. The court held that the plaintiffs would be unable to satisfy the “specifically designed” requirement of Article 270.3 of the LPI as a matter of law because the chips could in theory be used for purposes other than facilitating piracy. This construction of Article 270.3 has prevailed in nearly all criminal prosecutions involving mod chips in Spain. It should be noted that BSA reported one positive precedent in Spain in the VESATEC case, in which a company making available circumvention devices through a web site was found guilty. However, the VESATEC case took 12 years to prosecute.

**Additional WIPO Internet Treaties obligations:** Any reform to the copyright legislation in Spain should be adopted in a manner consistent with the two WIPO Internet treaties, to include securing the exclusive right of record producers with respect to the right of “communication to the public” and the “making available” right. Also, the right of remuneration for making available to the public, granted both to audiovisual and musical performers 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 WIPO Internet treaties, and should be eliminated in future copyright law reform.

**2010 Amendments to the Criminal Code:** New provisions in the Criminal Code entered into force in December 2010, bringing mixed changes in enforcement for the copyright industries. In a positive development for the business software sector, the amendments established for the first time in Spain corporate criminal responsibility arising from crimes, including crimes against intellectual property. The amendments expose not only the management of the company, but the corporate entity itself, to liability for intellectual property crimes. Criminal fines up to 288,000 Euros (US\$ 375,000) shall be applicable directly against the assets of the company, and companies found criminally responsible for software piracy could be subject to a range of new criminal penalties, including potentially the termination of the company.

Unfortunately, the penal code amendments reduced penalties and changed the legal nature of the unauthorized distribution of CD-Rs and DVD-Rs containing copyright works when sold by street vendors. Vendors selling pirate products valued under 400€ are no longer subject to criminal liability, and the evidence of an adequate level of economic gain is a particularly evasive element for rights holders to prove. Courts as a result would impose

only fines or community service (from 31 to 60 days). Following these amendments, judges in the Basque region adopted decisions not to prosecute illegal street vendors. This change has led to a significant decrease in street piracy actions on the part of Spanish law enforcement. The Ministry of Justice also rejected industry proposals to amend the penal code to ensure that circumvention devices are illegal. Such an amendment would have brought clarity to the problem rights holders face that the judicial criteria in this field vary depending on the region of the country. These amendments have, unfortunately, undermined one of the few bright spots in Spain's enforcement of copyright.

## COPYRIGHT ENFORCEMENT ACTIONS IN SPAIN

In addition to the priority actions mentioned in the Executive Summary, IIPA encourages the Government of Spain to take the following enforcement steps in 2011:

- Develop and implement an effective national campaign on the importance of intellectual property rights through educational, press and similar public outlets.
- Take actions in well-known markets to combat widespread street piracy, including: (1) actions against labs supplying street vendors; (2) *ex officio* police actions against street sales; (3) increased police coordination; and (4) prosecutors pursuing and courts issuing deterrent criminal penalties.
- Improve cooperation among agencies and with 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 and criminal and civil judges to increase their knowledge of intellectual property rights and the impact of piracy and include intellectual property in law schools' curricula.
- Establish a central unit within the Customs Department of the Tax Agency aimed at the investigation and monitoring of organized networks dealing in piracy of physical and digital goods.

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 2010. In a recent show of astonishing tolerance toward piracy, the mayors of two Catalan seaside resorts stated that they lacked the resources to pursue the high number of street vendors, suggesting that bootleggers move from central and commercial areas to “pirate zones.” Only the sharp reaction by local retailers, FAP, Promusicae, and other rightholders associations led to retraction of the policy one month later. Unfortunately, many other cities, particularly in the northern regions of Galicia and Asturias, continue to tolerate open street piracy. Industry groups report good cooperation with certain enforcement authorities in Spain, but government-wide attention to copyright enforcement is needed. Local and regional authorities must be incorporated in a national action plan to heighten sensitivity to the piracy problem in Spain.

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. BSA has a good relationship with this Ministry, which has, at BSA's request, approved and funded a program to prevent software piracy in the illegal retail channel. BSA has been working with the Ministry of Industry on a public awareness campaign that has resulted in a substantial reduction of software piracy within the distribution channel.

Some rights holders report good cooperation with Spanish police forces, including the National Police, Regional Police, and Guardia Civil, on criminal cases. In contrast, industry groups report a lack of intellectual property awareness among many in the judiciary. Attendance of industry organized seminars among judges and public prosecutors is limited, although attendance among police officials has been very high. Judges and public

prosecutors show little interest in prosecuting IP crimes, and the Best Practices Manual for the prosecution of intellectual property crimes issued by the Spanish Government in July 2008 has not improved the situation.<sup>10</sup>

**Criminal actions involving Internet enforcement:** Due to the 2006 Circular and various court decisions, the police, prosecutors, and the BIT have all significantly reduced work on Internet piracy cases.

According to the local film industry, the few police actions in 2010 against Internet piracy revealed the existence of organized structures offering online movie files, including pre-releases, using registered companies to cover up illegal activities while profiting from the publicity these websites generate. The content is presented in a professional way, very similar to certain illegal physical piracy networks, revealing clear connections between webmasters and illicit camcording incidents in Spain. The Civil Guard carried out four Internet raids in 2010. The "Coalition of Creators and Content Industries," representing record producers, authors, publishers, and representatives from cinema, videogames, and software industries, provided the Ministry of Industry and SETSI with the details for 200 websites offering links to illegal downloads of copyright works, but no action has been taken.

Spanish authorities initiated over thirty legal procedures in 2006 and 2007 after Police operations called "Descargas en la red I" and "Descargas en la red II," but only two so far have resulted in convictions, one of which was issued in 2010.<sup>11</sup> In the aftermath of the Attorney General's 2006 Circular, six of the cases resulted in acquittals at the appellate level. Private prosecutors have stepped in where public prosecutors backed away from these cases, leading to only three appellate decisions in 2010 to uphold criminal liability in Internet piracy cases.<sup>12</sup>

**Police actions and prosecutions involving physical piracy:** Some of the biggest bottlenecks in IP enforcement in Spain include: (a) slowness in the judicial proceedings (an average of 2 to 3 years to obtain a judgment), which is (b) exacerbated by the lack of interest of the prosecutors following the Attorney General's Circular, and (c) the lack of deterrent sentences, which undermines the work of the police actions. An example is the Blubster case: in April 2008, Promusicae filed a case against the Blubster P2P file sharing service, which was followed by a hearing in May 2009. The main petition came along with an injunction that was never served, and the final decision has not been issued.

Additional enforcement problems include:

- Detailed forensic reports must be delivered within the stringent 72 hours deadline set for special procedures called "fast-track trials," the failure of which leads the competent judge to refer the case to an "abbreviated procedure," which is in fact a much longer and less effective process.
- 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 basis; this is hugely inefficient, due to the high cost in human resources and time involved for enforcement agencies.

---

<sup>10</sup>For more details about the manual, see the IIPA's 2010 Special 301 Report on Spain, available at <http://www.iipa.com/rbc/2010/2010SPEC301SPAIN.pdf>.

<sup>11</sup>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) (sites also popular in Mexico), which offered streaming services of Spanish-dubbed recent and new releases for one Euro per film and required visitors to pay for a minimum of ten titles.

At the end of January 2010, the Court of Appeal in Valencia ordered continuation of 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 in part on the Attorney General Circular criteria and in part on the defendant's argument that the site containing links involved no commercial activity directly related to the communication of copyrighted works. However, the appellate court found for FAP, finding that "[d]espite 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."

<sup>12</sup>In 2010, an Alicante Court ordered the blocking of sixteen sites. One of these was the infamous Spatorrent website, one of the largest release sites in Spain and the subject of a lengthy 2009 investigation into a camcording thief.

- 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 monitoring security while pressing for destruction.

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). Unfortunately, regarding digital piracy the number of actions is virtually nil due to the numerous legal deficiencies and loopholes in the digital arena.

The recording industry reports that the criminal activity involved with optical disc piracy in Spain is severe. The industry appreciates the work done by its investigators and the enforcement agencies, which have carried out important operations. Among the most significant actions were: one in Madrid, where the National Police arrested 3 individuals and seized almost 25,000 burnt and blank carriers, 6,000 inlays and 42 burners and other material during a raid; another by the Catalonia autonomous police, Mossos d'Esquadra, in Reus (Tarragona) that resulted in the arrest of 6 individuals and the seizure of 24,500 burnt carriers and 50 DVD-R burners. Another National Police operation was carried out in Hospitalet (Barcelona) in May 2010, which resulted in the seizure of 74 burners in 8 towers and 11,500 recorded carriers, and the arrest of 7 people. In Galicia, the National Police raided in February the premises of a company that supplied night clubs (gentlemen's venues) with jukeboxes containing unauthorized copies of music videos. The police also carried out raids in some of the venues in different Galician provinces and seized jukebox hard drives used for unauthorized reproduction and public performance.

	Actions	Arrested People	Total Carriers	Recorded Carriers		Blank Carriers		Burners	Inlays	Juke-boxes	Hard Drives
				CD-R	DVD-R	CD-R	DVD-R				
2009	3,571	1,820	1,342,451	631,163	680,210	14,256	16,822	928	151,947	11	21
2010	1,788	1,199	792,599	347,828	424,217	10,900	9,654	506	103,664	8	35

Spain: Anti-piracy operations, years 2009 and 2010. The 2010 data above is not yet final as more information may be provided by the enforcement agencies.

FAP reports a precipitous reduction in hard goods raids in 2010, mainly due to the penal code amendments. While in 2009, police conducted over 3000 raids against street vendors, DVD-R labs and distributors, in 2010 fewer than 1000 raids were conducted. A notable raid in July by the Madrid police successfully dismantled a gang engaged in illegal replication and distribution of music, film and videogames. Documents seized in this raid indicate that 1000 units of infringing product were sold daily. This action was held in the larger framework of a special summer campaign coordinated by the national and municipal police. While FAP receives cooperation from the police, 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. By contrast, Barcelona and several Catalan cities have effectively utilized public awareness campaigns on the illegality of street vendor piracy.

For 2010, the local entertainment software industry association, aDeSe, reports a significant decrease in the number of enforcement actions against vendors of pirated entertainment software products. Despite relatively consistent levels of piracy, arrests of vendors dropped from approximately 3,000 in 2009 to fewer than 600 in 2010. Similarly, raids of retail establishments and cybercafés engaged in the sale of illegal product were down from 198 in 2009 to 67 in 2010.

BSA reports that its work in 2010 with the police forces continued smoothly. The police typically seek BSA support to file criminal complaints, as well as industry support in technical experts and other logistics regarding raids. However, nearly all of BSA's judicial cases involve the civil courts. BSA is fully satisfied with its cooperation with the Ministry of Industry. Furthermore, in 2011 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.

The civil courts act reasonably quickly in the granting of *inaudita altera parte* search orders. However, BSA reports 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 often reasonable (between US\$2,300 to \$4,500), in some cases the bonds requested have been so costly (in one instance €120,000, approximately US\$163,090) as to make it impossible to bring the case.
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) now refuse to accept anonymous information as evidence to grant a raid, even if a bond is offered. 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 Vincas"), 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 and civil and criminal judges on copyright issues needs improvement.

## 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 several seminars for police and a seminar for judges.

During 2010, in addition to a training session for judges and public prosecutors hosted by the Ministry of Culture, Promusicae organized and carried out 17 training seminars and courses on intellectual property infringements and also took part in a total of 6 courses held by other associations and police academies, for a total of 1,875 attendees from the Guardia Civil, local police and National Police.

With evidence that, in a difficult economy, larger organizations are turning to unlicensed software, BSA is extending into 2011 its awareness campaign for the 200 major corporations in Spain, with the support of the Ministry of Industry. This has already 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.

## MARKET ACCESS BARRIERS

Film Dubbing (Catalunya): The Catalan regional government adopted new restrictions on films released in Catalunya. Article 18 of the Law on Cinema imposes on the distributors the obligation to dub and subtitle in Catalan – the regional language – half of the analog prints, and all of the digital prints, of any film dubbed or subtitled that is to

be released in Catalonia, with the single exception of European dubbed (not subtitled) films whose distribution amounts to 15 or fewer prints. Similar obligations apply to DVD distribution. This is costly and not warranted by public demand. For independent motion picture producers, for instance, which generally release fewer prints, the per-print costs will be higher, thus constituting higher market access barriers. While promoting "linguistic access" is a legitimate goal, the means are neither suitable nor fair.

**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 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) 2011 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: Thailand should be maintained on the Priority Watch List.<sup>1</sup>

**Executive Summary:** IIPA appreciates the Royal Thai Government's high-level commitment to grow its economy through increased creative output, and its increased transparency with industry, including its timetable for legislative enactments, its increasingly detailed explanations of legislative developments, and its plan to establish more readily available enforcement and case statistics. Based on the proposed timetable of legislative enactments and other expected progress on addressing key copyright industry concerns, we recommended last year that Thailand be lowered to the Watch List. Unfortunately, we have not seen sufficient progress over the past year on key concerns to support a similar recommendation this year.

Keys to our decision include the failure to pass: 1) anti-camcording legislation, 2) legislation to establish landlord liability, and 3) legislation to fully modernize the Thai copyright system, including, *inter alia*: full implementation of the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT); adequate protection for technological protection measures; measures to curb Internet piracy and promote service provider responsibility (including statutory notice and takedown); and deletion of the copyright owner code from the OD law (among other changes to that law). IIPA is also unaware of any progress made in: 1) vesting enforcement authority in the Department of Intellectual Property (DIP) to conduct raids, make arrests, investigate, and commence anti-piracy litigation, 2) increasing resources in the newly created Technology Crime Suppression Division (TCSD) of the Royal Thai Police which will oversee Internet piracy issues, and 3) increasing the number of criminal prosecutions with deterrent sentencing. The above deliverables were understood by the Royal Thai Government as urgent goals of industry to deal with an equally urgent situation on the ground. The industries report continued good relations with the authorities, primarily at DIP, the Economic Crime Investigation Division (ECID) of the Royal Thai Police, and the Department of Special Investigation (DSI). In addition, raids are being run and some criminal cases have been moving forward. Nevertheless, the nature and scope of piracy in Thailand has not improved and may have even worsened compared to last year. Certainly this is the case with illicit camcording in Thailand which increased by 48% in 2010. Further, the Internet poses new threats, including most recently infringing services catered to Thailand on servers located outside Thailand.

### Priority Actions Requested In 2011:

#### Enforcement

- Significantly increase resources for anti-piracy by developing a National Enforcement Plan with specific piracy reduction targets to meet on an annual basis and accountability by enforcement authorities.
- Expand enforcement authority to DIP, increase manpower in enforcement authorities such as the Royal Thai Police's Economic and Cybercrime Division (ECD) of the Royal Thai Police and the newly created Division of Technology Crime, and activate and make permanent the new Central Investigation Bureau (CIB) Police Task Force.
- Investigate and prosecute greater numbers of key piracy cases, with deterrent fines and custodial sentences.

<sup>1</sup> For more details on Thailand, see IIPA's "History" Appendix to this filing at <http://www.iipa.com/pdf/2011SPEC301HISTORICALSUMMARY.pdf>, as well as the previous years' country reports, at <http://www.iipa.com/countryreports.html>. On December 10, 2010, IIPA filed in the out-of-cycle review regarding Thailand. See International Intellectual Property Alliance, *Submission of the IIPA in Docket No. USTR-2010-0035 2010: Special 301 Out-of-Cycle Reviews of the Philippines and Thailand: Identification of Countries Under Section 182 of the Trade Act of 1974: Request for Public Comment*, 75 Fed. Reg. 69519 (November 12, 2010), December 10, 2010, at <http://www.iipa.com/pdf/IIPAThailandandthePhilippinesOCRfinal121010.pdf>. In that filing, IIPA noted that while we had "recommended that Thailand be moved to the Watch List in its 2010 Special 301 report earlier this year in the belief that several key actions would be taken," we had "not seen sufficient progress on most of these," and indicated, "[i]f progress is not made over the next few months, IIPA will re-evaluate its recommendation during the 2011 Special 301 cycle."



- Continue improved 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.
- Address counterfeit book production for export in addition to existing book and photocopy piracy issues.
- Ensure active cooperation of ISPs to prevent online infringement, including effective and fair policies to deal with repeat infringers and measures to address infringements using servers outside of Thailand.
- Increase government support and collaboration on public awareness campaigns focused on corporate end-user software piracy.
- Implement public sector software asset management policies to set an example for the private-sector to follow.

#### Legislative

- Enact legislation to ban unauthorized camcording of movies in theaters.
- Enact copyright amendments to fully implement the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT), including amendments to address Internet piracy and promote service provider responsibility and protection against the circumvention of technological protection measures.
- Joint the WCT and WPPT.
- Enact landlord liability provision.
- Issue sentencing guidelines and adopt minimum sentencing that provides a real deterrent to infringement.
- Make copyright piracy a predicate offense in organized crime statute 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

- Avoid mandates and preferences in government procurement for specific technologies, allowing government agencies to choose the technology that best meets their needs for particular tasks.
- Reduce film import tax from 5 Baht to 0 Baht.
- Reduce Hard Goods Import tax which is currently a staggering 30%.

## PIRACY AND ENFORCEMENT UPDATES IN THAILAND

IIPA's previous reports describe in detail various piracy and enforcement issues and the harm caused to the U.S. content industries. The following provides updates on ongoing or newly emerged issues (failure to mention an issue below does not signify that it has been resolved).

**Update on Out-of-Cycle Review Enforcement Issues:** To our knowledge, no progress has been made to 1) vest enforcement authority in DIP to conduct raids, make arrests, investigate, and commence anti-piracy litigation, 2) increase resources in the newly created Division of Technology Crime which will oversee Internet piracy issues, and 3) increase the number of criminal prosecutions with deterrent sentencing. On the latter point, the Royal Thai Government provided, in its Out-of-Cycle Review submission, aggregate statistics showing 3,551 "arrest cases" by the Royal Thai Police, DSI, Metropolitan Police Bureau, and Provincial Police Region 1-9, with seizures of almost 3.3 million goods.<sup>2</sup> The Customs Department, Ministry of Finance reported 428 "arrest cases" with over 116,000 seized items. As with previous statistics provided, there is no breakout of copyright materials (e.g., from counterfeits), breakout by industry sector, or results from the "arrest cases" to determine whether there is any deterrence other than the actual seizure of the suspected infringing products. No other conclusions can usefully be drawn from these seizures, except we note anecdotally that the number of "cases" is significantly reduced from 2009 levels. In the

<sup>2</sup> Kingdom of Thailand, Ministry of Commerce, Department of Intellectual Property, *Thailand's Implementation on Intellectual Property Rights (January – December 2010)*, December 17, 2010 (retrieved from regulations.gov).

annex to the OCR submission, "Intellectual Property Plan (September to December 2010)," the government indicated that by "October [2010] a dedicated session" would be held between DIP and law enforcement to provide "Increased Flow of Information" in the form of a "joint database on IPR violation which will incorporate information from all agencies concerned, including final judicial decisions and penalties on IPR violations," and recent communications indicate that this meeting has taken place. This level of transparency, again with breakout by copyright and industry sector, would be useful. The Plan also called for "Suppression of IPR violations at all levels, particularly the major infringers and those in the Red-Zone areas," but unfortunately, industry reports that the situation has in fact gotten worse.<sup>3</sup>

**Camcorder Piracy Significantly Worsened in 2010:** The problem of camcording of full-length films in movie theaters in Thailand soared in 2010.<sup>4</sup> Illegal copying of a film in a movie theater is already an infringement under the current Copyright Law, yet the government has done nothing about the problem. The number of incidences detected of illegal camcording of full-length U.S. motion pictures shot up to 34 in 2010,<sup>5</sup> compared with 23 in 2009. This is a 48% increase in the number of camcords sourced from Thailand. While passage of an anti-camcording bill could have proved the difference, and is still sorely needed, the lack of specific *sui generis* legislation may not be used as an excuse for inaction in the face of a deteriorating problem. Although DSI has enlisted industry's support to help identify the primary camcorders syndicate groups responsible for the majority of illegal camcording, the Royal Thai Police do not always cooperate and in some instances, investigations and/or raid schedules have been leaked.

**Internet and Mobile Piracy Exploded in 2010 with Greater Connectivity and Damaging and Evasive Tactics by Online Pirates:** The rapid increase in size and scope of Internet piracy and mobile piracy (through 3G networks) is of alarm to IIPA. Industry reports more than 4,000 websites hosted in Thailand offering illegal music downloads, while the latest trend is for Thai nationals to develop pirate sites on foreign servers that specifically cater to the Thai market. Faster speeds, growing infrastructure, and lower Internet subscription fees (e.g., BHT599, or US\$19.45, per month for 6 Mbps speed) mean roughly 17.5 million Thai had access to the Internet as of June 2010 (according to ITU), or 26.3% penetration, with (fixed line) broadband penetration of at least one million as of June 2010.<sup>6</sup> The online piracy levels for music are estimated at 90%. Broadband and growing 3G mobile access (switching soon to 3.9G) have made it easier for infringers to upload movies to the Internet for widespread distribution through P2P and deeplinking sites and can easily transform those digital downloads to hard goods. Bit torrent index sites and tracker sites are also increasingly being used in Thailand to facilitate the unlawful distribution of copyrighted files.<sup>7</sup> Public and private web bulletin boards (some of which are supported by advertising), and illicit use of free social networking sites, blogs and cyberlockers are just a few of the additional ways Internet piracy is spreading in Thailand.

The relationships between IIPA members and the various policy (e.g., DIP and MICT) and enforcement authorities remain strong, although enforcement is far from effective in driving down online piracy at this critical stage. IIPA members request a significant increase in enforcement activity, which could be encouraged by providing greater resources and training to the various authorities. In particular, the TCSD remains understaffed and needs training.<sup>8</sup>

---

<sup>3</sup> The Plan indicated big cases like the "pirate DVD plant in Pathumtani Province" and "DVD/CD sellers, distributors at Kamnanluk Market in Ratchaburi Province," resulting in seizures of "about 800,000 pirate discs." These actions are certainly helpful and noteworthy but indicate the continuing scope of the piracy problem.

<sup>4</sup> Camcording is particularly damaging in Thailand because it fuels rampant online piracy negatively impacting worldwide distribution and prevents the establishment of legitimate online distribution platforms for independent film producers. Camcording also threatens the continued growth of the Thai theatrical box-office marketplace.

<sup>5</sup> It is the case that camcording of local Thai films is also widespread. A recent survey showed that in the first 10 months of 2010 alone, at least 52 Thai films fell victim to camcording.

<sup>6</sup> Point-topic indicates this number is conservative, however, reporting that only Thailand's largest broadband Internet provider, True Corporation Public Company Limited (formerly Telecom Asia), had 1 million subscribers itself as of mid-2010. See Point-Topic, *Thailand Broadband Overview*, November 22, 2010, at <http://point-topic.com/content/operatorSource/profiles2/thailand-broadband-overview.htm>.

<sup>7</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>8</sup> As of early 2010, the unit had only 20 police officers working in the new Royal Thai Police building, and was short on tools and supplies, with only 10 standalone computers and no high-speed Internet connections. Some personnel lack Internet access, while some lack computer knowledge.

An approach must also be taken to deal with increasing instances of Thai nationals registering sites suspected of involvement in infringing activity through P2P filesharing, deeplinking, and cyberlockers in foreign countries.

The Royal Thai Government could greatly assist right holders in obtaining better cooperation, in particular seeking information regarding online infringers, including IP addresses and names of users or webmasters, either through administrative action (as in the past) or in assistance in obtaining court orders for release of this information. Cooperation in this area has slowed considerably. Third, the Royal Thai Government, e.g., DIP and the Minister of Information and Communication Technology (MICT) can be instrumental in fostering greater cooperation from the ISPs. Industry met with the Thai ISP Association twice in 2010 to ask greater proactive voluntary monitoring of their services to detect online infringement, and takedowns or blocking upon notices (including C&D letters). It is hoped this request will be honored, and it is scheduled for consideration soon. It is noteworthy that some ISPs have been cooperative on a voluntary basis, and for example, in 2010, the local entertainment industry group TECA reported 717 takedowns out of 896 notices, an 80% takedown rate. Finally, to effectively deal with Internet piracy, the government should enact an appropriate legal framework, fostering ISP responsibility and cooperation to deal with online infringements, including statutory notice and takedown, and appropriate and fair measures to deal with repeat infringers in the hosted and non-hosted environments.

Physical Piracy in Retail Hotspots Continued to Dominate the Thai Market in 2010; Updates on CD-R “Burning” Labs and Factories:<sup>9</sup> Piracy worsened in 2010 in the street and retail (mall) markets in Thailand, in places like Bangkok,<sup>10</sup> Phuket, Samui, Pattaya, Chiangmai, and Krabi, despite reported “Red Zone” enforcement activity and “arrest cases” reported by the Royal Thai Government.<sup>11</sup> Physical pirated discs can be found in every type, including local factory pressed discs, “burned” CD-Rs, imported discs from China, and in every format, including MP3 discs, audio discs, VCDs, DVDs, and pirate Blu-ray (often falsely labeled). Imported pirate discs from China are popular since they offer various genres of music, higher-quality packaging, and are affordable at BHT120 (US\$3.88) to 150 (US\$4.85) per disc, even including a “quality guarantee” and return policy. The entertainment industry group TECA estimates the physical music piracy rate at 60%.<sup>12</sup>

Relationships between IIPA members and the enforcement agencies (e.g., ECD, Royal Thai Police) remain strong,<sup>13</sup> but to little effect for most industries. While the Royal Thai Government asserted that there were a significant number of “Red Zone” enforcement actions and so-called “arrest cases,” these actions’ primary targets remain retail establishments and storage units rather than mall owners and sources of piracy, and do not seem to make a marked difference in the availability of product. Music and movie/DVD piracy is the exception which has

---

<sup>9</sup> Piracy has varying negative effects on different industry sectors. As one example, the independent segment of the film and television industry (IFTA) reports that physical piracy of DVDs remains a significant export constraint for independent producers and distributors, the majority of which are small- to medium-sized businesses. Independent producers generally partner with local authorized distributors to finance and distribute film and television programming. These authorized distributors find it nearly impossible to compete with pirates and describe the marketplace in Thailand as stagnant due to the heavy instances of piracy. Producers and distributors confirm that DVD sales have been particularly impacted since pirated digital copies are offered for free online and with a similar quality viewing experience that a DVD can provide. The independent production sector is also limited in its ability to shift to technology-enabled new business practices that might limit piracy. For example, independents use national distributors who release films on their own schedule, and thus piracy-avoiding strategies like worldwide “day-and-date” release are impossible. Unable to compete with free, legitimate distributors often cannot commit to distribution agreements or they offer drastically reduced license fees which are inadequate to assist in financing of independent productions. Piracy undermines and may permanently damage legitimate distribution networks essential to reaching consumers and leaves little confidence for investment in intellectual property in Thailand.

<sup>10</sup> Retail piracy can be found at street markets like Klong Tom, Baan Mor, Saphan Lek, and malls like IT Square and Pantip Plaza. Even in the outskirts of Bangkok, Nonthaburi Province, the District of Mean Buri

<sup>11</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), Pantip 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 Prachuabkirikan 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.

<sup>12</sup> The record industry reports that losses in 2010 for international repertoire stood at US\$11.6 million, representing the value of estimated physical piracy sales, while trade losses would represent a much higher number. This also does not include significant Internet piracy losses. TECA reports the breakdown of physical pirate product in the Thai market at 70% movies, 15% music, and 15% game software. In addition to piracy losses, the record industry notes how this illegal supply chain also denies the Royal Thai Government of significant VAT and corporate tax revenues.

<sup>13</sup> The Thai Entertainment Content Trade Association (TECA) reports cooperation with all governmental agencies is going very well, especially with the DIP in 2010. TECA also reported 184 raids resulting in seizure of thousands of discs in 2010.

become more of an underground activity (sellers only show sleeves, and runners actually go to obtain product when ordered). Also, to our knowledge, no mall-owner liability cases have been brought successfully. None of the notorious marketplaces has been closed to piracy and the industry has not witnessed a significant decrease in the number of pirate vendors. Some right holders even report difficulty getting Royal Thai Police to conduct raids. In 2010, the MPAA's Thailand program and its member companies' licensees participated in raids against 56 shops, 49 street stalls, 1 burner lab, 1 replication facility, and 3 cases referred to it by Customs authorities.

In addition to a much more comprehensive approach to retail piracy that enables authorities to close notorious piracy markets ("Red Zones" and "Yellow Zones") and hold mall owners accountable, IIPA would like to see the Royal Thai Government 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 and foster the growth in the legitimate market.

**Mobile Device Piracy:** Right holders report no improvement in addressing the illegal service by businesses (some former retailers of pirate optical discs) of providing content on mobile devices, thumb drives, mp3 players, and the like. Book and journal publishers have in the past reported occurrences of downloading reference books and dictionaries in a similar manner. 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.

**Corporate End-User Software Piracy Level Remains High, and the Industry is Harmed by Hard Disk Loading and Circumvention of TPMs:** The greatest source of losses to the business software industry is the use of unlicensed or pirate software in the workplace. The PC software piracy rate in Thailand in 2010 remained high at 73%, while the preliminary estimated commercial value of unlicensed software was US\$344 million.<sup>14</sup> Other piracy phenomena harming the business software industry include hard disk loading of illegal software onto computers at the point of sale, and the use of illegal software programs to circumvent technological protection measures (TPMs) used to protect 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 2010 study done by research firm IDC for BSA estimated that decreasing Thailand's software piracy rate by ten points over a four year period would add US\$1.3 billion in GDP to Thailand, produce an additional \$73 million in tax revenues and create 2,175 new high-wage IT jobs. The gains would be even greater if the piracy rate was reduced by ten points over two years, which would yield US\$1.7 billion in GDP and \$96 million in tax revenues.

The business software industry reported that it received good support from ECD in 2010 for end-user software piracy actions, including efficient handling of cases and forwarding of those cases to prosecutors for criminal disposition. ECD showed good knowledge and understanding of software piracy and not only enforced IP laws but also conducted educational programs on use of legal software. BSA also received good support from DIP in building awareness and promoting the use of legal software in the workplace. The Intellectual Property & International Trade (IP&IT) Court was also more consistent in 2010 in its issuance of search warrants (and in its application of criteria for

---

<sup>14</sup> BSA's 2010 statistics are preliminary, representing U.S. software publishers' share of commercial value of pirated software in Thailand. They follow the methodology compiled in the Seventh Annual BSA and IDC Global Software Piracy Study (May 2010), <http://portal.bsa.org/globalpiracy2009/index.html>. These figures cover packaged PC software, including operating systems, business applications, and consumer applications such as PC gaming, personal finance, and reference software – including freeware and open source software. They do not cover software that runs on servers or mainframes, or routine device drivers and free downloadable utilities such as screen savers. The methodology used to calculate this and other piracy numbers are described in IIPA's 2011 Special 301 submission at <http://www.iipa.com/pdf/2011spec301methodology.pdf>. BSA's final piracy figures will be released in mid-May, and the updated US software publishers' share of commercial value of pirated software will be available at <http://www.iipa.com>.

such issuance), even though a certain core group of judges still refuse to issue search warrants.<sup>15</sup> BSA reports 152 raids in 2010. Encouragingly, one end-user criminal case went to trial and resulted in a conviction in 2010. In this particular case, the value of the infringement was BHT2,689,400 (US\$87,500) and the sentence included two fines of BHT75,000 (US\$2,450), levied against both the managing director and the company, with a 3 month prison term against the MD, suspended for 1 year. A civil case was then filed in November 2010 and is pending. There were hearings in December and January 2011, but it is anticipated reaching a verdict will take several months. Based on past decisions in civil cases where there has been a criminal conviction, BSA remains optimistic of a successful outcome.<sup>16</sup>

**Judicial Results Usually Lack Deterrence:** 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 more knowledgeable about copyright cases. The Court's expertise has also led to some more significant civil judgments in recent years. The main problem is non-deterrent criminal sentences of IP infringers. Such sentences are usually very lenient with minimal fines and no custodial sentences, suspension of imprisonment, or the imposition of custodial work orders, even for repeat offenders. One reason is that court officers often seem unsympathetic or hostile to right holders. For example, the entertainment industry association TECA reports that from January to October 2010, there were six suspended sentences,<sup>17</sup> and that in only one case was there an unsuspended prison sentence imposed. That case was tried not against a manager or landlord but against a small distributor.<sup>18</sup> Only 35 of the cases concluded during in the first ten months of 2010 even resulted in a fine, with five being below US\$1,000 and 30 being between US\$1,000 and \$5,000. IIPA believes a comprehensive database of the kind being discussed by DIP and other agencies would be helpful, including concluded and pending cases, their statuses, and the case results obtained. The Court should also issue sentencing guidelines and adopt minimum sentencing guidelines that provide a real deterrent to infringement, as well as applying maximum sentences allowable under the law where warranted.

**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, on and around university campuses, remains the predominant form of book piracy in Thailand. Copyshops 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 publisher, with some producing unauthorized translations of works, inserting the translated material into the compilation, 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,<sup>19</sup> which were of considerable concern as the counterfeit books were finding their way into the U.S. market. While considerable effort was expended by the Royal Thai Government to address this problem,<sup>20</sup> including the formation of special committee to investigate this specific problem, there has

---

<sup>15</sup> On September 8, 2010, the IP&IT Court held a meeting to discuss procedures for issuance of search warrants in criminal cases. The statistics show a gradual increase in the percentage of warrants issued, from below 60% in 2008 to 75% in 2010 (January to August) (431 out of 578).

<sup>16</sup> In IIPA's 2010 report, we noted several civil IP&IT Court verdicts in 2009 for end-user raid actions resulting in some significant civil damage awards, including one case awarding the retail value of the software at legitimate prices (BHT2.5 million or US\$81,200) found on the computers, plus legal fees, interest, and damage to the software copyright holder's reputation. In October 2010, ECD announced it would begin investigations into about 2,000 companies for possible infringement of software copyright, which is also a welcome sign. ECD also sent more than 10,000 postcards to promote the use of legal and properly licensed software in the workplace.

<sup>17</sup> Out of 177 criminal raids during the same time-frame, including 1 VCD raid (the case for which is still pending), there were 171 cases commenced, and there were 166 criminal convictions (of the cases commenced during the period and earlier commenced), while 105 cases remain pending.

<sup>18</sup> On June 15, 2010 the IP&IT court rendered a judgment on a copyright infringement case in connection with an arrest on April 28, 2010 of a pirate trader for 88 pirated music discs. The defendant was sentenced to six months imprisonment and a fine of BHT100,000 (US\$3,250), which was reduced to half (but with no suspension) upon the defendant's confession.

<sup>19</sup> The Thai based-producer and exporter of these pirated books has run a sophisticated operation and network of consignees, using several companies as fronts for the export activities.

<sup>20</sup> In October 2009, the 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

been no progress in the investigations despite interviews conducted by law enforcement of several individuals that are believed to have been involved in distribution of the counterfeit books. It remains the case that no *ex officio* actions are conducted against unauthorized photocopying even though this activity occurs quite openly around universities.

**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. Like the music industry's experience, to evade authorities, vendors often store their pirated product in a separate location, and display only game covers or empty boxes in their stands, using runners to liaise with those somewhat inconspicuously carrying pirated discs in bags around the mall.

**Source Raids Continue to Reveal Organized "Burning" Operations as Well as Factory Piracy:** One of the key challenges behind defeating physical retail piracy in Thailand remains being vigilant against source production piracy in the country. While a major shift has occurred to "burning" content onto recordable media, it remains the case that existing factories can easily migrate into pirate production, and imports of pirate discs, mainly from China, continue to require detection and enforcement by Royal Thai Customs and others. In 2010, several major enforcement actions prove this point. In September 2010, ECD and DIP officers, assisted by industry, raided an unregistered factory in Pathumthani Province, seizing one DVD replicating line and one printing machine, one "plastic injecting mould," along with 98 stampers and 7,000 pirated DVDs including MPA member company titles *Avatar*, *Sex and the City 2*, and *Robin Hood*. Preliminary investigations revealed that the factory, located 25 miles north of Bangkok, had been operating since March 2010 and was supplying pirated DVDs to retail outlets in Bangkok.<sup>21</sup> 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.

**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, and the problem slightly worsened in 2010. The Cable and Satellite Broadcasters Association of Asia (CASBAA) estimates the net piracy costs due to Pay TV theft in Thailand were over US\$241 million, second only to India, and representing one-third of all losses in the Asian markets surveyed aside from India; the lost tax revenues alone from signal theft were upwards of \$76 million in 2009 and grew in 2010.<sup>22</sup> The main source of losses is attributable to illegal distribution of signals,<sup>23</sup> under-declaration of numbers of subscribers of existing services, illegal individual connections<sup>24</sup> and satellite overspill.<sup>25</sup>

---

include DIP, DSI, ECD and Royal Thai Customs. The industry appreciates the vigor with which the Committee and its member agencies are now pursuing investigations into this problem.

<sup>21</sup> Motion Picture Association, *Illegal DVD Factory Uncovered By Royal Thai Police: Clandestine Operation Was Supplying Pirated DVDs To Street Markets In Bangkok*, September 24, 2010 (on file with IIPA). Another case previously reported involved a September 2009 ECD raid on an optical disc plant "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 stampers, molds and printing machines. The plant operator and management team were charged with copyright infringement. The case was sent to the Office of the Attorney-General for litigation, but the owner of the plant successfully petitioned the Court for return of his machines.

<sup>22</sup> CASBAA, *Asia-Pacific Pay TV Industry 2010*, 2011 (on file with IIPA); and CASBAA and Standard Chartered, *Digital Deployment: Asia-Pacific Pay-TV Industry Study*, November 2009.

<sup>23</sup> Pay-TV content is freely stolen and re-sold by hundreds of (but not all) provincial cable operators.

<sup>24</sup> Illegal decoder boxes and smart cards remain widely available in Thailand. Individual hackers also apply for legitimate pay television subscription services and use the Internet to share the smart card with others, collecting a monthly fee from the users of the pirate service. 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-



Premium content such as sporting events in whatever language and movies subtitled in Thai language remain key subjects of piracy, while channels also show the latest run or even pre-release motion pictures (i.e., those that have either not yet been released in the movie theaters in Thailand and/or that have just come out in the movie theaters in the U.S.). They report that a rapidly rising number of Thai households are connected to cable and satellite systems, with particular growth in the satellite sector, and there are now at least four completely unlicensed direct-to-home satellite TV companies operating in Thailand.

The lax attitude of successive previous Royal Thai Government administrations has resulted in endemic signal piracy. Efforts to deal with rampant Pay-TV piracy in Thailand have been frustrated by the regulatory vacuum and gaps in NTC's authority. There is no provision for licensing satellite channels, and therefore no effective government supervision of the content they broadcast. There has been no movement on licensing Thai-origin channels either, and thus, the number of such pirate channels is increasing. CASBAA reports that Thailand is the only sizeable jurisdiction in Asia that fails to exert reasonable controls on the satellite and cable TV channels originating within its territory, and these channels are infecting other markets through satellites over Asia.

**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.

## COPYRIGHT LAW UPDATES/RELATED ISSUES

Neither anti-camcording legislation, nor landlord liability legislation, nor the copyright amendments, have proceeded to passage by or even been introduced into the Parliament.

**Camcording Bill Stalled:** The Department of Intellectual Property commissioned a study which "concluded that Thailand should enact a specific law to tackle illegal camcording activities." The draft Bill, prepared in consultation with stakeholders, was "approved in principle" by the Cabinet on September 14, 2010, but has apparently now stalled once again. Unfortunately, this bill is far from passage into law. The Royal Thai Government, in its Out-of-Cycle Review submission, indicated that the State Council is deliberating questions from Cabinet on the bill and that the Council will seek input from government and industry. Then, should the Cabinet endorse the bill, without conditions, the Council must conduct another reading and then submit the Bill to Parliament.<sup>26</sup> As such, the self-imposed December deadline in the Royal Thai Government's "IPR Plan" for submission of the Bill to the Parliament was not met. The lack of progress on this critical piece of legislation is extremely disappointing particularly as we have seen a surge in illicit camcords sourced from Thailand over this past year. Swift passage along with swift implementation is critical to curb highly damaging illegal camcording.

**Landlord/Secondary Liability Bill Sent Back to MOC:** Legislation was drafted to incorporate liability for someone who "provides physical or digital spaces for infringing activities," according to the Royal Thai Government's Out-of-Cycle Review submission.<sup>27</sup> The legislation was submitted to the Cabinet for approval in March 2010, but was sent back to MOC which has since consulted with the Attorney General, DIP, and the Thailand Trade Representative. While Deputy Minister Alongkorn is supportive, the idea has met with resistance from business owners and other government representatives. IIPA supports swift passage of this Bill, and understands that there are criminal test

---

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.

<sup>25</sup> 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.

<sup>26</sup> See *supra* note 2.

<sup>27</sup> *Id.*



cases which, if liability is found, would prove that landlords can be held indirectly liable under current Thai law.<sup>28</sup> Such test cases, even if successful, should not substitute for a strong civil landlord liability, since it is the dual threat of criminal and civil liability that may create deterrence against mall piracy which remains ongoing throughout these legal and legislative processes. Unfortunately, once again, the December deadline in the Royal Thai Government's "IPR Plan" for the landlord liability Bill to be "approved by the Cabinet and forwarded to the State Council" was not met.

**Prospects Dim for Copyright Legislation Anytime Soon:** While earlier in 2010 it appeared broad-based copyright legislation was being prepared for movement through the Thai Executive toward introduction in the Parliament, this now seems a distant possibility. It has not been mentioned in recent Royal Thai Government documents such as the Out-of-Cycle Review submission of December 2010. IIPA understands that the draft is still being reviewed by the Ministry of Commerce. The draft contains important elements for effective copyright protection in the country, including 1) definition of "communication to the public" to ensure Thailand provides a WCT- and WPPT-compatible right of "making available to the public of works in such a way that members of the public may access works from a place and at a time individually chosen by them," 2) amendment of the definition of "reproduction" to unambiguously cover reproductions in digital form (although it is unclear whether the amended definition expressly includes "temporary" reproductions), 3) inclusion of provisions concerning technological protection measures (TPMs) and the imposition of penalties against offenders (although it is unclear whether the amendment would define TPM to include both access controls as well as copy controls, and whether the act of circumvention as well as trafficking in circumvention devices, technologies, or components, or providing a circumvention service, would be covered, among other questions), 4) inclusion of provisions concerning ISP liability which we understand would be a DMCA-type notice and takedown procedure (although it is unclear what measures are put into place to deal with the non-hosted environment). There are other provisions in the draft law which need to be tailored to the needs of specific industries, or provisions that need to be clarified that are not currently addressed.<sup>29</sup>

**Section 32 and Fair Use Guidelines:** IIPA also continues to call for a narrowing or clarification of Article 32(6) and (7) of the Law, which provides an exception to copyright protection which has been interpreted to allow wholesale copying of academic materials. Thailand should take steps to narrow the relevant provisions to ensure compliance with international norms. DIP has 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 is appreciative of recent efforts, such as sending officers to lecture on book copyright to teachers and librarians, and to explain its guidelines to universities. We request the Royal Thai Government to afford affected stakeholders, such as the publishers and software industry, the opportunity to provide input into the development of such guidelines given their experience in helping formulate similar rules in other countries. A Supreme Court decision (No. 5843/2543 [2000]), on appeal of a criminal copyright case brought against a photocopy shop, did provide some clarification of the research or study exception under Section 32. The Court held that the defendant's activities, photocopying books and producing unauthorized compilations of excerpts for commercial purpose, did not qualify as exempt acts under Section 32.

**Organized Crime Prevention Legislation:** It has long been the case that piracy operations have been connected to organized violent crime, run by those attracted to the low-risk, high profit nature of piracy in Thailand. IIPA has provided many concrete examples in the past of copyright industry representatives or law enforcement

---

<sup>28</sup> The Royal Thai Government's Out-of-Cycle Review submission indicates that in October 2010, they requested the Office of the Attorney General to opine on whether the current Penal Code supports landlord liability, in which case, according to them, "the police will be provided with the legal authority to intensify prosecution efforts against [secondary] infringers immediately." They also have indicated that "the Revenue Department and the Department of Business Development will continue to monitor tax records and balance sheets of the allegedly infringing landlords in order to keep them in check."

<sup>29</sup> There is a proposal to amend Section 66 of the Copyright Act, B.E. 2537 (A.D. 1994) (as amended through 1995). If this is done, corporate end-user software piracy should remain as a compoundable offense or be carved out from the category of offenses considered non-compoundable.

being placed in danger due to violent organized criminals. Unfortunately, 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), notwithstanding the Royal Thai Government's stated intention to include it in amendments.<sup>30</sup> IIPA urges the Cabinet to add copyright piracy as a predicate offense for the MLPSA. The Royal Thai Government should also address the issue of organized criminal syndicate involvement in piracy and counterfeiting operations by adopting more generalized anti-organized crime legislation, including copyright infringement as a predicate offense for remedies such as freezing of assets.<sup>31</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, and specifically offered changes to improve the law.<sup>32</sup> The Act should be amended:<sup>33</sup> 1) 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 commences, which may constitute a Berne-prohibited formality,<sup>34</sup> 2) to require a license for a plant to begin producing optical discs and to provide a license term and renewal process (also, 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), 3) to provide for an automatic permit for export of discs and import/export of machines, stampers/masters and polycarbonate, 4) to provide for seizure, forfeiture, and/or destruction of discs, stampers/masters, or machinery found in violation of the statute infringing copyright or trademark, and 5) to provide for mandatory minimum fines and imprisonment.

## MARKET ACCESS ISSUE UPDATES IN THAILAND

**Avoid Mandates and Preferences in Government Procurement for Specific Technologies, Allowing Government Agencies to Choose the Technology That Best Meets Their Needs for Particular Tasks:** On December 14, 2009, according to press reports,<sup>35</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. IIPA takes no position on any decision freely made by a government agency as to the type of software it wishes to license. However, creating a clear procurement mandate or preference for a particular technology undermines market access for other technologies and limits the ability of government agencies to procure products and services that best meet their needs. 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.

**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

---

<sup>30</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>. 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 BHT200,000 (about US\$6,495).

<sup>31</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>32</sup> *Act of the Production of OD Products*, B.E. 2548 (2005, effective August 29, 2005).

<sup>33</sup> DIP has pledged to the industry that the OD Law would be in the queue for Amendment in 2011, but in the interim, has eased right owners' obligations administratively.

<sup>34</sup> 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. 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> 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).

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>36</sup> on films, audiovisual products, music used for karaoke, and videogames.<sup>37</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, 3) the severe consequences for failure to comply with the ratings and censorship system, of criminal liability including both jail time and a fine, and 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 BHT1 million (US\$32,500) 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.

Royal Thai Government Should Reduce The Film Import Tax from 5 Baht to 0 Baht

Royal Thai Government Should Reduce The Current 30% Hard Goods Import Tax

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.

## TRAINING AND PUBLIC AWARENESS

Copyright owners organized and engaged in numerous anti-piracy trainings and public awareness activities in 2010 in Thailand. BSA collaborated on educational programs on software IP protection in cooperation with DIP, ECD, the Software Industry Promotion Authority (SIPA), public and private sector educational institutions and local authorities. BSA also was involved in trainings with the judiciary and ECD officials. The entertainment industry group TECA and IFPI delivered many trainings and seminars (including government-led trainings, and those organized by international organizations like WIP) for related government agencies regarding investigation techniques, how to distinguish pirated from legitimate product, enforcement techniques, legal controversies, updates on various copyright issues, scientific laboratory forensic techniques, and Internet piracy issues.<sup>38</sup> On August 19, 2010, MPA

<sup>36</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>37</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.

<sup>38</sup> The following is a non-exhaustive list of some of the programs in 2010:

- "Prevention and Suppression of Intellectual Property Infringement," held in June 2010, in which TECA addressed "Deterrence of IP Infringement in the Digital Age" for around 200 Police officers from five different cities.
- "Difficulties in Piracy Suppression: Solutions, Implication and Cooperation Among Relevant Organizations," held June 4, 2010, in which TECA joined a mostly government discussion panel for 150 participants, mostly from the DSI. The purpose of this seminar was to exchange views and opinions among speakers and attendants, as well as to strengthen cooperation and build-up network between governmental and private sectors in order to improve piracy suppression.
- "Copyright in Digital Age," held July 19, 2010, in which TECA was invited by USPTO in association with DIP to give a presentation on the topic of "ISP Liability, Notice and Take Down of Infringing Materials, Copyright Enforcement in the Digital Age."

and Royal Thai Customs jointly conducted training on recognizing counterfeit optical discs for 30 front-line senior officers from the Department of Investigation and Suppression Bureau of the Royal Thai Customs Department in Bangkok. The training provided practical guidelines for the identification of suspected packaging and shipping information, and the identification of counterfeit DVD and Blu-ray discs. MPA also undertook several "Make a Difference" training sessions for theater employees intended to teach cinema staff the importance of anti-camcording initiatives, investigation techniques, and procedures to follow when confronting camcorders.

## GENERALIZED SYSTEM OF PREFERENCES

The GSP statute expired on December 31, 2010. In the past, Thailand enjoyed preferential trade benefits under the program. One of the criteria of the program is that the country provides "adequate and effective protection for intellectual property rights." In 2010, \$3.6 billion worth of Thai goods entered the U.S. under the duty-free GSP code, accounting for 15.9% of its total imports to the U.S. The Royal Thai Government needs to continue to endeavor to meet the adequate and effective test under the statute to remain eligible, once it is reauthorized, to continue to receive favorable treatment under the GSP program.

- 
- "Do ISPs Contribute to Internet Piracy?" held August 19, 2010, in which TECA was invited to share its view on how injured copyright owners could work together with ISPs to fight against Internet piracy while there remains no law on ISP liability in Thailand. There were around 70 attendees, mostly from ISPs, telecommunications companies, and copyright owner representatives.
  - "The Investigation Suppression of Internet Piracy," held on October 27-28, 2010, in which TECA, MPA, AsiaSoft and the Prevention and Suppression of Intellectual Property Infringement Committee (Private Sector) sponsored a two-day seminar with 70 police officers from ECD.

# UKRAINE

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2011 SPECIAL 301 REPORT ON COPYRIGHT ENFORCEMENT AND PROTECTION

Special 301 Recommendation: IIPA recommends that Ukraine be elevated to the Priority Watch List in 2011, as a result of numerous longstanding legal deficiencies and a weak overall enforcement environment.<sup>1</sup>

**Executive Summary:** Both hard copy and digital copyright piracy in Ukraine are rampant and getting insufficient attention from the Government of Ukraine. As a result, piracy rates are exceedingly high – among the highest in Europe. All of the copyright industries – music, film, book and music publishing, and entertainment and business software – report very weak enforcement, especially criminal enforcement. Ukraine Internet penetration is growing fast – it is now estimated that 33.7% of Ukraine's population, or 15.3 million people are on the Internet according to the International Telecommunications Union (a U.N. agency). Along with the growth of Internet use, there has been a sharp increase in the rate of peer-to-peer and website-based Internet piracy. 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 some of the world's top BitTorrent systems, with some sites advertising openly on billboards. As a consequence, legitimate marketplaces cannot develop for copyright materials. Ukraine's many open air markets and street stalls remain replete with illegal copies of recorded music, films, entertainment and business software. In the case of business software, various ministries within the Government of Ukraine (especially the Ministry of Interior, the offices of State Tax Inspection, and the Prosecutor's Office) are blatantly using unlicensed software. This sets a poor example for the business sector, where illegal software use (i.e., end-user piracy) is practically the norm. Moreover, Ukraine remains a global hot spot for high-quality illegal camcords of films that are uploaded to top sites and distributed across the Internet. Irregular and insufficient criminal and border enforcement is causing pirate physical material to flow freely into and out of Ukraine. IIPA recommends that the Government of Ukraine re-double its efforts on-the-ground, that it work to fix the investigative and prosecutorial systems, and that it take steps to improve criminal enforcement against digital and hard-copy pirates. Moreover, as a member of the World Trade Organization (WTO), as of 2008, Ukraine is required to fulfill numerous legal and enforcement (TRIPs Agreement) obligations.

**IIPA Priority Recommendations in Ukraine – Key Enforcement Actions and Legal Reforms:** There are many enforcement steps and legal reforms detailed in this filing. Here is our list of priorities that we recommend to the Government of Ukraine in 2011:

**1. Significantly improve Internet enforcement:** The focus should be to: (1) criminally prosecute the owners of the numerous pay-per-download and BitTorrent sites; (2) criminally prosecute the principals of the rogue collecting societies that claim to offer "licenses" that they do not have the authority to grant; and (3) immediately take down illegal websites, including those relying, in bad faith, on the false rogue collecting society licenses. In 2010, there were many Internet-piracy training seminars held for police and prosecutors, with copyright industry participation. Using the information and skills acquired from these programs, the key enforcement agencies – including, the Ministry of Internal Affairs and General Prosecutors Office – should immediately and effectively take action against Internet piracy in Ukraine. Additionally, the Government of Ukraine should move quickly to propose and adopt amendments to the Law on Telecommunications (in cooperation with rightsholders) to promote a fair and effective response to online piracy.

---

<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/2011/2011SPEC301HISTORICALSUMMARY.pdf>, as well as the previous years' reports, at <http://www.iipa.com/countryreports.html>. For a summary of IIPA's 2011 global issues, see our cover letter at <http://www.iipa.com/pdf/2011SPEC301COVERLETTER.pdf>.



2. Significantly improve criminal enforcement against other forms of piracy: The Government should systematically focus on open air and street market piracy occurring at large outdoor markets and in the streets (at or around underground stations, and near local shops and supermarkets). Ukraine should also take immediate action to prevent the sale of pirated entertainment software products bearing illegitimate holograms at retail chains. There should be long-term closures of illegal businesses, and follow-up raids at stores, kiosks and warehouses. Law enforcement authorities should – using search warrants – enter sales premises and suspected warehouses to seize illegal material, even if such premises/warehouses are closed. Additionally, the Government should focus on: (1) organized criminal syndicates, applying criminal prosecutions and deterrent sentences (to date the Government has relied heavily on non-deterrent administrative penalties); (2) corporate end-user piracy with an emphasis on large-scale infringers (rather than targeting small companies and individuals); and (3) camcording piracy.

3. Adopt necessary legal reforms: Ukraine should enact legislation to fully implement its obligations under WTO TRIPs and the WIPO digital treaties (the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty – to which Ukraine acceded in 2002), as well as addressing existing legal deficiencies that impede enforcement against online piracy. A new Copyright Law draft (Bill #6523) was introduced in the Verkhovna Rada in June 2010 (it passed its first reading in February 2011). If adopted, the bill would make important changes to the Copyright Law and other laws of Ukraine, including provisions regarding temporary copies, damages, and excluding camcording from the scope of the private copy exception. IIPA supports this legislation and urges its immediate passage.

Other key reforms include: (1) amending the Copyright Act and Criminal Code to make camcording illegal (by excluding camcording from any “private use” exception, and criminalizing this activity); (2) amending Article 176 of the Criminal Code to ensure the availability of criminal remedies against online piracy of all works; (3) fixing or abolishing the hologram sticker system; and (4) implementing the 2003 resolution of the Cabinet of Ministers regarding legalization of software in state agencies.

4. Undertake other enforcement measures: (1) Continue enforcement targeted against optical disc media producers, with the imposition of criminal penalties against producers at CD burner operations, as well as optical disc plants. (2) Move more aggressively against infringing cable retransmissions, public performances and broadcasting. (3) Properly implement the Customs Code amendments, in force since February 2007, which provided customs officers with *ex officio* authority. (4) Increase and improve border controls along the Russian border (especially for railroad traffic).

## COPYRIGHT ENFORCEMENT IN UKRAINE

Internet piracy in Ukraine in 2010: The last few years have seen a rapid growth of illicit peer-to-peer hosting and illegal websites, including BitTorrent sites (some of the world’s largest), located in Ukraine, for target audiences primarily in the countries of Western Europe and the United States. This is causing significant harm to U.S. copyright industries. There are numerous open and notorious sites including, for example, extratorrent.com, upload.com.ua, fileshare.in.ua, and torrents.net.ua. Ukraine has many free and pay-per-download music and video websites, as well as streaming services, some aimed at an international audience. One particularly severe case of blatant and open piracy is the filesharing site EX.ua, which in 2010 attracted at least 50% of all the users who upload and download illegally in Ukraine, and whose popularity is growing. In many cities and towns outside Kiev – especially where internet bandwidth is relatively slow – a problem exists with so-called “LAN” (Local Area Networks) sites. These are high speed FTP sites that store massive amounts of content, most of it consisting of infringing movies, music and videogames. Local users can get access to these LAN networks by paying a fee and can then download as much content as they wish; there are no constraints on bandwidth limitations (as they might encounter when visiting infringing sites abroad). It is encouraging that the police have taken an interest in these cases. Some investigations have commenced against LAN sites, including prosecutions (with convictions). But, the problems persist and need additional enforcement attention.

The recording industry reports that paid download sites like mp3fiesta.com remain a major source of piracy in Ukraine (some selling whole albums for \$1). These sites use 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.

In addition to infringing hosted content available for download, another common type of Internet piracy is via mail order – with orders placed on-line and delivered by mail, according to the Business Software Alliance (BSA). 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.

The primary 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 association (IAU) – citing this statutory language – have taken the position that rightsholders need to go after illegal websites directly, without ISP assistance or cooperation. Many of the websites offering pirated material of films, music, videogames and business software, are thriving in part because of the support of local ISPs (there are over 400 ISPs in Ukraine and over 150 sites offering pirated CDs and DVDs). 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. While some ISPs will delete links upon request (MPAA reported over 250 takedown letters in 2010 that were responded to by ISPs), most refuse rightsholders request and will demand court orders. Some ISPs – Ukretelcom and Data Xata – have cooperated with rightsholders, but the majority do not. In December 2008, the IAU agreed to work more forcefully with right holders to reach mutually acceptable solutions to help stem Internet piracy. Unfortunately, these efforts, and others between the Government of Ukraine and various copyright industries, have stalled (despite the memoranda of understanding), which is why IIPA recommends Government involvement to broker a private agreement, or, if that effort fails, the adoption of legal reforms.

Despite claims from the Government of Ukraine that adequate *ex officio* authority exists under current law, police continue to claim they are unable to instigate criminal operations against online piracy unless a rights holder first files a claim for damages. When criminal investigations are undertaken, police efforts are often stymied by a lack of cooperation from ISPs, which often refuse to provide available information on their infringing users. In December 2009, amendments to the Law on Telecommunications (draft # 3271) were proposed but ultimately defeated; they were intended to assist the police in conducting Internet crime investigations by providing subscriber information. 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. Thus, in general, the copyright industries report that the lack of clear prosecutorial and court procedures for Internet-related cases is a block on effective enforcement and that existing procedures are too difficult to be used effectively. Another impediment: procedures require that prosecutors identify the exact name of a website owner and the local network user(s) prior to commencing a case. IIPA recommends the adoption of guidelines and more effective procedures for police, prosecutors and judges for these crimes.

**Hard copy piracy:** The widespread availability of illegal material in open-air markets persists, in such places as: Petrovka and Radiolubitel (in Kiev), Mayak (in Donetsk), and 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. Often times these pirated goods bear wrongly issued holograms which legitimizes the product and makes enforcement challenging.

In 2010, the Motion Picture Association (MPA) described hard-copy piracy of films as consisting of 90% pressed DVDs and 10% burned DVD-Rs (mostly, made in Ukraine), with new movie releases available at markets

(especially in Kiev, Donetsk, Kharkiv, Odessa, Dnipropetrovsk and Lugansk), and at kiosks and vendors – often, within three to five days of theatrical release. The DVD materials are mostly Russia-sourced (camcordered) discs with Russian audio, and contain as many as eight to fourteen titles on each disc. The points of sale – the markets and street vendors – are occasionally raided, but local corruption ensures that these sites are rarely permanently shut-down, and operators rarely criminally prosecuted. One local anti-piracy organization (UAPA) notes that organized criminal groups in Odessa, Donetsk, Zytomir and Kiev have been identified, with stalls/kiosks regularly (weekly) restocked, and supplied with prerelease CDs and DVDs.

For the Entertainment Software Association (ESA), piracy at Internet and cyber cafés or “game clubs” continues unabated, with pirated and/or unlicensed versions of videogame software in wide use. Most of the hard copy piracy is produced in plants for PCs on discs and is manufactured in Ukraine, without licenses and absent any royalty payments to rightful owners. The problems persist despite efforts by police to initiate actions and raids, including seizures at retail outlets, warehouses, and Internet cafes. The significant problem is post-raid investigations (which are unduly lengthy, costly, and non-transparent) and prosecutions – very few cases get to trial. Instead, it is common for cases to be simply dismissed or terminated without explanation, even when high volume seizures are involved.

The camcording of motion pictures, and the quick transference of these illegal copies on the Internet, is a major problem for the motion picture industry. There is a strong relationship between Russian and Ukrainian “release groups” and, hence, the camcording problem in this hot spot region shifts quickly between the two countries. In 2010, there were three camcords sourced from Ukrainian theaters; two were of video material, the other was audio. All were of high quality. The camcord (and Internet release) problem is strongly linked to organized criminal networks operating in Ukraine and Russia. Passage of Bill #6523 is needed to fix the Copyright Law (and Criminal Code) to provide for effective camcording enforcement, particularly with regard to effective enforcement against the “source content” stolen by organized criminal syndicates.

Rogue collecting societies: 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, remains a major problem for the recording industry. 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); the executive order also 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. Despite various attempts by non-representative organizations to cancel the results of accreditation (now for over two years), IIPA supports this accreditation and the reform brought on by Order #1175. Furthermore, in order for authorized collecting societies to function efficiently, we recommend that the regulatory framework increase their authority, including the possibility of inspections, representation in court, and cooperation with law-enforcement agencies.

One positive step was the launch, by prosecutors, of a criminal investigation into the activities of Oberih, the rogue collecting society. Unfortunately, it has taken far too long to conclude an investigation in this case of clear-cut piracy. IIPA calls upon the enforcement officials to quickly conclude their investigation and to 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).

Software legalization: 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 – assigning all procurement authority for software products to one entity, SDIP, in order to try to eliminate the use of pirated software products in the public sector. However, since then, implementation of the program by the government, the largest consumer of illegal software in Ukraine, has been slow. The software piracy rate in state agencies ranges from 54% to 78% based on the government's own estimates. 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 right holders to enforce and publicly educate Ukrainian society about intellectual property rights. Overall, the BSA reports (based on its preliminary figures) that piracy rates for PC software are at 84% – one of the highest in Europe – with a commercial value for pirated U.S.-vendor software of \$189.3 million.<sup>2</sup> The Government of Ukraine should (1) 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 – identifying the steps necessary, making one individual responsible for coordinating implementation (and individuals within each Ministry to carry out the plan).

**Hologram Sticking:** All of the copyright industries – music, film, entertainment and business software companies – report persistent problems with the administration of the current hologram sticking system which was adopted in 2000. In short, the system has failed as an enforcement tool, and should either be abolished or completely revised. As a result of ineffective oversight by Intelzakhist, the body responsible for administration of the hologram system, holograms are often issued on the basis of false contracts and licenses. Here are four examples from 2010 of the problem: Intelzakhist delivered 12,500 holograms to an unauthorized distributor of a videogame (and not only was the government unaware of the circumstances, but it never commenced a criminal investigation). In another, a Ukrainian “distributor” represented itself as an authorized distributor of a videogame by producing falsified power of attorney documents from a Hong Kong entity; it was able both to obtain false holograms and to prevent the issuance of legitimate holograms to the proper rights holder. Unauthorized music compilations of 100+ tracks in mp3 format on each CD (featuring “the best hits” of well-known artists) are widely available with holograms. Last is the example of the widespread sale of discs with Xbox games bearing holograms in many retail outlets throughout the country, in spite of the fact that the right holders do not distribute these titles in Ukraine. In sum, the system has done considerably more harm than good to the interests of legitimate copyright owners while it has permitted suspect companies (based on false contracts and unverified licenses) 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. This makes the pirate product “de facto authorized” by the state for distribution which means it cannot be (or is not) seized by law enforcement officials.

For some industries, one out of every two products seized is labeled with a false hologram, and for others (for example, the motion picture industry), all illegal copies seized had false holograms. Were the hologram requirement effectively administered it could potentially benefit rights holders. However, in practice, the hologram requirement actually benefits those engaged in the distribution of pirated product. Consequently, IIPA recommends an immediate moratorium on the hologram regime. While IIPA favors abolishing the system entirely, in the alternative, IIPA recommends a complete revision of the law to bring transparency to the hologram sticker administration procedures (along with proper enforcement). One “fix” would require 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 would assist right holders in tracking applications. In

---

<sup>2</sup>BSA's 2010 statistics are preliminary, representing U.S. software publishers' share of commercial value of pirated software in Ukraine. They follow the methodology compiled in the Seventh Annual BSA and IDC Global Software Piracy Study (May 2010), <http://portal.bsa.org/globalpiracy2009/index.html>. These figures cover packaged PC software, including operating systems, business applications, and consumer applications such as PC gaming, personal finance, and reference software – including freeware and open source software. They do not cover software that runs on servers or mainframes, or routine device drivers and free downloadable utilities such as screen savers. The methodology used to calculate this and other piracy numbers are described in IIPA's 2011 Special 301 submission at [www.iipa.com/pdf/2011spec301methodology.pdf](http://www.iipa.com/pdf/2011spec301methodology.pdf). BSA's final piracy figures will be released in mid-May, and the updated US software publishers' share of commercial value of pirated software will be available at [www.iipa.com](http://www.iipa.com).

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 their management, type of business activity and a short description of all software products manufactured and/or distributed. However, the registry was never properly set up.

**Broadcast and public performance piracy:** Broadcast television piracy is a major problem for the motion picture, music publishing and recording industries – both with regard to regional and nationwide broadcasts. Broadcasting, cable retransmission, 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 (including the largest state-owned broadcaster), restaurants, bars, shopping malls, sports clubs, etc. – refuse to pay royalties to the relevant authorized collecting societies. IIPA continues to recommend that the Government of Ukraine create a database, inspect commercial users, set a goal to bring these 90+% piracy levels down below 50% in one year (by relying on regional police economic crime units and state IP inspectors), and subject unauthorized users to administrative and criminal prosecutions. The law should also be clear that such wholesale blatant copyright and related rights infringements could lead to station broadcast license suspensions or cancellations from the state.

**Criminal enforcement:** The most significant shortcoming in the Ukraine enforcement regime has been the absence of effective criminal prosecutions and deterrent sentencing which are necessary to combat digital and hard-copy piracy. Despite 2006 amendments to the Criminal Code (Article 176) to significantly lower the previously too-high threshold for criminal prosecution, the current threshold is still high. The threshold is now 9410 UAH or \$1184 USD (as of January 2011, including inflationary adjustments). This high threshold serves as a bar to effective criminal enforcement and results in less effective administrative actions in lieu. This is particularly true for online piracy matters where the valuation of damages (by law enforcement agents, prosecutors and the courts) is too difficult to calculate absent an official methodology, thus preventing the initiation of criminal investigations and prosecutions. Additionally, enforcement officials have applied the threshold on a per-rightsholder basis, which means that when illegal material is seized, if the material for each rightsholder does not exceed the threshold, the criminal case does not proceed. This and other procedural problems hampers needed criminal enforcement. Other procedural problems include: (a) the use of expert evidence; (b) treatment of repeat offenders; (c) needed changes in the Criminal Code or Criminal Procedure Code to avoid delays and case dismissals; and (d) Supreme Court guidelines for judges on sentencing and to develop expertise on IPR cases. Provisions do exist in the Ukrainian Criminal Code (e.g., Article 28) for prosecuting organized groups or criminal organizations, including those engaged in IPR offenses, but the provisions have been under-utilized by prosecutors.

Enforcement efforts are further hampered by a lack of resources. The Government established a specialized unit for intellectual property rights crimes within the Economic Crime Division in the Ministry of the Interior with exclusive authority to deal with intellectual property rights crimes. This was a positive step, but the current number of 100 officers (down from 133 in 2010) serving in that division for the entire country is simply insufficient for conducting effective and systematic actions to deter piracy. This number should be increased to at least 260 officers. Out of this number, there should be a team of officers dedicated exclusively to copyright and related rights violations, and these officers should be provided with effective training (including IT skills), equipment, high-speed broadband connection, etc.. Similarly, the current number of state IP inspectors in SDIP empowered to combat various IPR infringements throughout the 25 regions of Ukraine is inadequate (at the end of 2010, there were only 15 inspectors for a country of 46 million). That number should be increased to 25 at a minimum, so that each region has at least one dedicated inspector. In populated cities such as Kiev (2.5 million people), Kharkyv (1.5 million), and Dnypropetrovsk, Odessa and Donetsk (with a combined 1+ million), to be effective, we recommend a team of at least 3 inspectors as the minimum number available. (In 2009, a Cyber Crime Unit was created within the Ministry of the Interior; the MOI is currently being reorganized and it is not clear if it will address copyright piracy issues in the future.) Other agencies – Tax Administration and the Security Service – are not actively engaged in IPR enforcement.

Raids, Seizures and Other Enforcement Actions in 2010: The Motion Picture Association of America (MPAA) reports seizures in 2010 totaling about 2.6 million optical discs, with a total of 960 criminal investigations commenced, and administrative measures applied in about 4,700 cases. The administrative actions were mostly undertaken against stores, kiosks and other street piracy, as in recent years; unfortunately, 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 315 *ex officio* raids – 78 relating to CD sellers, 218 to end-users, 22 to hard disc loaders and only two to Internet piracy. These raids resulted in 208 criminal cases commencing; of these, 62 cases were sent to the courts for their consideration. These numbers were almost identical in number to the 2009 figures. Almost every request for assistance by rights holders for raids against suspected targets was denied by law enforcement agencies.

ESA, like other copyright industries, reports continued frustration with the pace at which investigations are undertaken and the rarity with which cases reach trial. Officers often refuse to proceed with investigations or to transfer cases in a timely manner to prosecutors, even when high volume seizures are involved. In some instances, ESA member companies did agree to support cases (as complainant), at the request of prosecutors, only to incur great expenses, and were provided with little or no information about progress of the case. In rare instances in which cases do make it to court, there is a high likelihood that judges will dismiss the case. In one 2007-initiated matter, the case was transferred to the court in 2010 (after three and half years), and was then dismissed by the judge because of the three-year delay (reasoning that it could not find criminal liability). In another case re-classified by a judge from an administrative to a criminal case, the investigator in charge refused (two times) to open the criminal case, and the case was closed. These give clear examples of the enforcement hurdles that the copyright industries face in Ukraine – ineffective investigations and prosecutions and non-deterrent sentencing for the few cases that do reach trial (BSA reports that only 10% to 15% of filed criminal cases end up in court and of those, only 15% result in sentences). Ukrainian tax authorities will exercise enforcement authority, and initiate cases, usually against retail pirates (as administrative actions).

Also in 2010, the MPAA reported six criminal cases commenced against the owners of FTP servers in several cities; also, criminal cases were commenced against the owners of local networks (for example, “Deeptown” in Sevastopol and “EmiliaNet” in Odessa), but they ended in suspended sentences. In May 2010, in Odessa, the first ever criminal case against a torrent server/service was launched; the server contained over 16,000 unauthorized works. However, a lower court ruling against the owner was reversed on appeal and the case was closed without any sentence. A case was commenced in April 2010 involving camcording in Bateria Petrivka Cinema – the investigation is ongoing; it is related to an earlier case in 2010 involving numerous illegal camcordings and the distribution of films made from those camcordings, all by one organized enterprise.

One positive note: in December 2010, in Lugansk, the owner of streaming movie sites (novoaydar.com.ua and cinemaxx.net.ua) was sentenced to three years imprisonment with an additional year of probation. This was the first ever verdict against the owner of a streaming site (and was based on a complaint filed in May 2010 by UAPA).

A few examples of raids, seizures and criminal investigations undertaken in 2010 include:

- A January 22, 2010 raid in Lugansk against a network of shops that seized 1 million optical discs, including newly released movies. The raid was carried out with the assistance of UAPA, and revealed not only shops, but warehouses and printing plants as well. The investigation revealed that as many as 50 people were engaged in the business – making it the largest operation ever revealed. The criminal cases – using the organized crime provisions of the law – are proceeding (that is, an investigation at the pre-trial stage).
- Other major raids in: January 30, 2010 in Kiev – seizing 70,000 DVDs and PCs; December 2010 in Donetsk seizing 160,000 DVDs, printers, 170,000 inlays, and including a warehouse raid in Kramatorsk; October

2010 in Kiev seizing 50,000 optical discs (mostly, videogames plus movies); December 2010 a warehouse raid in Kiev seizing 25,000 DVDs with hologram stickers, 36,000 inlays and boxes. There were also major raids reported in these cities: Krivoy Rog (Dnepropetrovsk region), Kharkov, Kirovograd and Melitopol (Zaporizhya).

**Optical Disc Piracy and Enforcement:** There is currently no evidence of large-scale industrial production of pirated optical discs in Ukraine – at least not of music and film material; however, 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. A multi-agency order signed into law in November 2009 (with the approval of 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) to improve IPR protection, has been wholly ineffective.

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. There are, at present, eight optical media disc plants (producing CDs, DVDs or both) in operation in Ukraine.

**Ineffective Border Enforcement:** Customs officials were granted *ex officio* authority to properly conduct enforcement investigations (in amendments to the Customs Code in 2004 and 2006). For example, under Article 203-1 of the Criminal Code, 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). Unfortunately, Customs authorities are not sufficiently engaged in enforcement measures. 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 address the problem. The State Customs Service of Ukraine (SCSU) has the authority to stop importations in violation of the law. Thus, although *ex officio* authority was a positive step, it is under-utilized. The Government should expand the specialized intellectual property rights unit within the Customs Service (and not rely on a centralized bureaucracy), and provide it with sufficient resources to effectively stop illegal material at the border.

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 right holders. 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. Under the Copyright Law, the non-payment of private copying levies does not constitute an infringement of copyright and related rights. There is, therefore, no viable mechanism for enforcement of the law, and widespread violation thereof, undermining the rule of law.

## LEGAL REFORMS

A history of the key legal reforms made by Ukraine in the past few years is available on the IIPA website at <http://www.iipa.com/rbc/2010/2010SPEC301UKRAINE.pdf>.

In sum, the six most important missing elements 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 sticking program; and (6) clear criteria for the operation of collecting rights societies (so that only organizations with a majority of relevant repertoire of material can be authorized).

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 2003 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 so that the law itself is clarified. The other amendments – noted above – need to be adopted to improve digital enforcement rights and fully implement the digital treaties.

One positive note: in June 2010, the Supreme Court – in a resolution – declared that the storage of illegal copies of software in a computer memory could be a copyright infringement.

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 or storage of such copies is not.

Moreover, three other important changes to the Copyright Law should be adopting with amendments to: (1) Article 52 to allow licensees of foreign music companies to be treated equally to local right holders; (2) constitute as an infringement of copyright and/or related rights either the non-payment of music rights royalties or of private copying levies; and (3) add statutory damages and/or a system of enhanced damages in order to adequately compensate right holders and deter further infringement.

**Anti-Camcord Legislation (Copyright Law amendments):** The illicit recording of a movie in a theater remains the single most prolific source of movie piracy in Ukraine which is why an amendment is needed. Draft bill #6523, currently under consideration by the Verkhovna Rada, includes an anti-camcording amendment that would specifically exclude camcording from the scope of the Copyright Law's private copy exception. 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); as noted, the threshold for criminal responsibility under Article 176 remains high.

Amendments we recommend include: fixing Article 176 of the Criminal Code to clearly apply to all forms of piracy (i.e., on the Internet), not only (as it clearly does now) to hard-copy piracy. 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. In addition, relevant criminal sanctions should be included in the code for intentional infringements related to the obligation to pay music rights royalties.

The Criminal Procedure Code must also be fixed in law and practice so that police can act *ex officio* to initiate criminal intellectual property cases. Ukrainian criminal procedures in practice (although not required by the code) currently require right holders to file complaints to initiate actions which acts as a bottleneck to successful enforcement. The Criminal Procedure Code should be changed so that police initiate intellectual property criminal cases and investigations for submission to the court; it must also be clear that the police (as they sometimes do in software cases) have the authority to hold confiscated products and equipment for use at trial.

**WIPO Digital Treaties:** In 2001, Ukraine acceded to the two “digital” treaties – the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonogram Treaty (WPPT), in force in March and May 2002, respectively. The Copyright Law of 2001 included amendments intended to implement these treaties. Unfortunately, the amendments fell short of complete and effective implementation, especially with regard to technological protection measures (requiring proof of “intentional” circumvention, which could prove a major impediment to protection). Ukraine needs to fully implement the treaties with amendments to its copyright law, 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.

**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. Further amendments have been proposed, but never adopted, to increase the maximum fines, which IIPA recommends. 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. One of the biggest hurdles to overcome in the Administrative Code of Ukraine (Article 51.2) is the requirement to prove intent of the infringer. Intent is certainly relevant in criminal proceedings, but it has no relevance in administrative sanctions, and should be deleted from the code.

**Customs Code:** The Customs Code of Ukraine (amended in 2006; effective March 2, 2007) provides clear *ex officio* authority (Article 257) to customs officials. But, for suspected illegal material, a monetary threshold remains. Also, 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. While some administrative improvements have been made in recent years, IIPA recommends the abolishment of the registration system altogether; it is an unnecessary maze of regulations which interferes with effective border enforcement.

**Market Access:** There are three market access issues that the motion picture industry is confronting: (1) a March 18, 2010 statute requiring all film prints to be produced locally (which has created uncertainty for distributors because of conflicting information from the government); (2) a January 2008 law requiring all foreign films to be dubbed, voice-over translated, or subtitled in Ukrainian; and (3) changes in the Customs Code valuations (beginning in November 2009) based on projected royalties, rather than the underlying media (and confusion resulting from proposed retroactive implementation of these rules).

**Generalized System of Preferences:** In 2010, Ukraine benefited from over \$39.1 million in unilateral duty free Generalized System of Preferences (“GSP”) benefits in the U.S. market; in 2008, that figure was over \$105 million. The U.S. Government should continue to consider Ukraine's compliance with the “adequate and effective protection” obligations of GSP, as part of its review under the GSP program (assuming the program is re-authorized), as well as in the Special 301 context.

# VIETNAM

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

### 2011 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: Vietnam should be elevated to the Priority Watch List in 2011.<sup>1</sup>

Executive Summary: IIPA had hoped that the 2005 passage of the IP Code in Vietnam, revisions to the Penal Code, and a nationwide judicial reform process would lead to steady improvements in copyright protection, allowing a legitimate creative marketplace to emerge in Vietnam's thriving marketplace of over 89 million people. Unfortunately, physical piracy remains largely unchecked, and the increased uptake and capacity of broadband and mobile Internet improvements in the country have led to a severe increase in the trade of illegal copyright files online. Technological advances in Vietnam have outpaced the government's response to copyright policy issues, further exacerbating the piracy problem, and notwithstanding that the Vietnamese have long recognized that piracy in the country is increasingly "sophisticated" and involves violations of "[m]ost of the objects of the rights."<sup>2</sup> The Vietnamese Government has taken some enforcement actions, but with an undue focus on administrative measures as opposed to implementing a strong criminal remedy (the current Criminal Code remains in violation of Vietnam's commitments under the Bilateral Trade Agreement), refused to lift onerous market access restrictions, and even overlooked pay TV signal theft by the government-controlled system, VTC. Vietnam, which has seen its economy grow an average of 7.2 percent per year over the past decade, witnessed exponential growth in its bilateral relationship with the U.S. (700% increase since the BTA), and come to rely on the United States as an extremely important export market, must now hold up its part of the bargain to address copyright piracy and related concerns.

#### Priority Actions Requested in 2011:

##### Enforcement

- Devote greater resources and Ministry of Culture, Sports and Tourism (MCST) Inspectorate and Economic Police manpower to running raids and bringing cases under the Criminal Code through targeted criminal actions, e.g., against online piracy, retail and source piracy, CD-R burning labs, end-user piracy of business software, reprinting/photocopying facilities, etc.
- Take effective action against well-known sites whose business models are based on providing access to infringing content, including in particular those sites identified in this report.
- Enforce the Administrative Remedies Decree, imposing maximum penalties.
- Adopt a more coordinated and robust policies to reduce online and mobile piracy, including a regulatory approach (notice and takedown) and mechanisms to recognize service provider responsibility and foster service provider cooperation in combating infringement and thereby demonstrate best practices for the private sector to follow.
- 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.

##### Legislation and Market Access

- Issue Inter-Ministerial Circular to implement the revised Penal Code, in line with Vietnam's BTA obligation, by i) clarifying that the Code applies to online distributions/offers to distribute, and ii) providing detailed interpretations of "commercial scale" infringements that include infringements undertaken without a profit motive.
- Join the WIPO Copyright Treaty (WCT) and WIPO Performances and Phonograms Treaty (WPPT).
- Ensure procurement policies do not impose preferences for open source or other software or technologies.

<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/2011SPEC301HISTORICALSUMMARY.pdf>, as well as the previous years' country reports, at <http://www.iipa.com/countryreports.html>.

<sup>2</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>.





- Adopt a decree on ISP liability that clarifies the secondary liability of ISPs for copyright infringement, avoids blanket immunities for intermediaries and requires ISPs to take responsibility and to cooperate with right holders to combat online infringements both in the hosted and the non-hosted environment.
- Afford U.S. right holders greater access to the Vietnamese market, by eliminating foreign investment restrictions and other entry barriers with respect to production, importation and distribution of copyright materials whether in the physical or online/mobile marketplaces.
- 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 the international trend (life of the author plus 70 years).

## PIRACY AND ENFORCEMENT CHALLENGES IN VIETNAM

**Courts and Judicial Reorganization:** The inactivity of the courts in dealing with copyright infringement issues is a major disappointment. To IIPA's knowledge, no criminal copyright infringement case has ever been brought to the courts in Vietnam. 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 reasons for this are ambiguity within the law, complicated procedures, delays, and a lack of certainty as to the expected outcome. 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 case to the court. With regard to the civil courts, full training programs should ensue for specialized judges and other IP professionals, to include training from authorities such as the National Office of Industrial Property (NOIP) as well as training by external organizations. Civil judges require training on the determination of compensation for damages together with the calculation of damages.

**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 enterprise end-user software piracy rate in Vietnam remained among the highest in the world at 82% in 2010, and preliminary data indicates the commercial value of unlicensed software in Vietnam remained quite high at US\$208 million.<sup>3</sup> A 2010 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\$1.17 billion to Vietnam's economy, create 2,100 new high-wage high tech jobs and generate an additional \$60 million in tax revenue.

In 2010, the MCST Inspectorate carried out four raids against corporations using unlicensed software, based on complaints lodged by the Business Software Alliance. While the Economic Police worked well in teams with the MCST Inspectorate during the enforcement actions, no criminal cases were brought based on these (or any prior) raids, although a civil case is being considered. Administrative fines arising out of end-user software piracy actions continue to result in non-deterrent fines, in amounts below the cost of having purchased legal software. It is reported that low fines result from reluctance to consider the legitimate value of the products infringed rather than the "pirate value." The authorities have also never taken *ex officio* raids against businesses engaged in software end-user piracy.

---

<sup>3</sup> BSA's 2010 statistics are preliminary, representing U.S. software publishers' share of commercial value of pirated software in Vietnam. They follow the methodology compiled in the Seventh Annual BSA and IDC Global Software Piracy Study (May 2010), <http://portal.bsa.org/globalpiracy2009/index.html>. These figures cover packaged PC software, including operating systems, business applications, and consumer applications such as PC gaming, personal finance, and reference software – including freeware and open source software. They do not cover software that runs on servers or mainframes, or routine device drivers and free downloadable utilities such as screen savers. The methodology used to calculate this and other piracy numbers are described in IIPA's 2011 Special 301 submission at <http://www.iipa.com/pdf/2011spec301methodology.pdf>. BSA's final piracy figures will be released in mid-May, and the updated US software publishers' share of commercial value of pirated software will be available at <http://www.iipa.com>.



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>4</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. Unfortunately, this interest has not translated into increased deterrence through greater numbers of actions, criminal prosecutions, or deterrent administrative.

Internet and Mobile Piracy Grew With Increased Internet, Broadband, and Mobile Penetration in 2010: Once again in 2010 and into 2011, growth in Vietnam's Internet usage out-paced much of the world. There were almost 26.5 million Internet users throughout Vietnam as of November 2010, or around 30% penetration, up from 26.6% in 2009, according to Trung Tâm Internet Việt Nam-VNNIC (the national registry for Vietnam's Internet domain).<sup>5</sup> This number keeps Vietnam ranked seventh in Asia in total number of Internet users.<sup>6</sup> Broadband usage expanded rapidly in 2010, up to 3.6 million broadband subscribers or 4% of the total population. Meanwhile, mobile penetration continued to skyrocket in Vietnam in 2010, with an estimated 133 million mobile subscriptions as of June 2010,<sup>7</sup> having exceeded the 100% mobile penetration rate in 2009. The most significant statistic related to mobile, however, is the number of 3G network users, which was up to 9 million users by the end of 2010, according to the General Statistics Office of Vietnam and the Ministry of Information and Communications. This increased penetration in Vietnam opens up opportunities for faster, more efficient and more cost-effective distribution of information, products and services, but unfortunately has resulted in a proliferation of copyright infringements over services and sites which require a response by the Vietnamese Government.

While locally hosted streaming/download websites, for example, zing.vn, slightly decreased in 2010 according to the record industry, other forms of online piracy such as deeplinking sites providing access to infringing materials continued to proliferate, e.g., Baamboo.com, Socbay.com, and Tamtay.cn, forum sites, e.g., forum.trasua.vn; kenh14.vn (the video player for which is powered by Baamboo.com), livevn.com, rap.vn, trasua.vn, and truongton.net,<sup>8</sup> and video sites,<sup>9</sup> e.g., clip.vn, giaiTri24.vn, kine.vn, onlinemtv.net, and timnhanh.com. Industry continues to notify the Vietnamese Government 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>10</sup> Other forms of Internet piracy in Vietnam include piracy-oriented search engines, including Baamboo.com, Socbay.com, Tamtay.cn, and xalo.vn,<sup>11</sup> peer-to-peer (P2P) services specializing in pirate copyright content, e.g., up.4share.vn, and cyberlockers used for piracy, e.g., megashare.vnn.vn, mega.1280.com, share.megapluus.vn and azsharing.com. University networks are increasingly being used for dissemination of infringing content. Partly due to the lack of enforcement actions taken by the Vietnamese Government, piracy at music portal sites, e.g., noi.com, mp3.zing.vn, nhac.vui.vn and yeucahat.com, have become rampant as advertising income provides the incentive to conduct such infringing services.

Hosted music streaming or download sites such as chacha.vn, ngenhac.info, nhaccuatui.com, etc. are still active, notwithstanding the fact that industry filed complaints with MCST in 2009 and 2010. Many advertisements can be found at these websites which are placed by well-known brand names. While the infringements under hosted streaming or download sites are still rampant, there has been an increase in "mobile" piracy over the year. With proliferating mobile device use, but more significantly, increased connectivity through 3G networks, right holders now

---

<sup>4</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 (MCST), and the Copyright Office of Vietnam.

<sup>5</sup> See <http://www.thongkeinternet.vn/jsp/trangchu/index.jsp>.

<sup>6</sup> See *Asia Internet Usage and Population*, Internet World Stats, at <http://www.internetworldstats.com/stats3.htm>.

<sup>7</sup> Vietnam Ministry of Finance, *Vietnam Telecommunications Update*, Vietnam Financial Review, August 14, 2010, at [http://www.vfr.vn/index.php?option=com\\_content&task=view&id=1103&Itemid=4](http://www.vfr.vn/index.php?option=com_content&task=view&id=1103&Itemid=4).

<sup>8</sup> Informal networks and forums used particularly by students but also by other Internet providers are increasingly used for dissemination of infringing content.

<sup>9</sup> Illegal streaming of copyrighted content of international channels remains a major issue.

<sup>10</sup> MCST and COV have been informed of the following websites: 1280.com, 7Sac.com, Baamboo.com, bbs.orzko.com, chacha.vn, clip.vn, galaxyx.net, Gate.vn, giaiTri24.vn, giaiTriamnhac.info, hihiehe.com, karaoke.com.vn, kenh14.vn, livevn.com, loiTraiTim.com, ngenhac.info, nhac.vui.vn, nhaccuatui.com, noi.vn, onlinemtv.net, rap.vn, Socbay.com, tamtay.vn, timnhanh.com, Top1.vn, truongton.net, vast.net.vn, VietGiaiTri.Com.Vn, Vui.vn, tamtay.vn, top1.vn, xalo.vn, Yeah1.com, Yeumnhac.com, yeucahat.com, and Zing.vn.

<sup>11</sup> Industry indicates that both bamboo.com and xalo.vn have diversified their services to include video and an mp3 search engine.

face two major challenges. First, the loading by mobile device vendors of illegal copyright content onto the devices at the point of sale remains a hindrance to the development of the legitimate market in Vietnam for mobile content. More damaging was the development in 2010 of illegal music channels or “apps” set up to be accessed on mobile platforms, without any intervention from the authorities to cease such activities. As an example of this phenomenon, sites like Socbay.com offer illegal downloads of ringtones to mobile phones, but Socbay has now developed a mobile “app” called Socbay iMedia which provides a variety of unauthorized entertainment content, including *inter alia*, music files. This second phenomenon will, if allowed unchecked, threaten the entire online/mobile market for music and other copyright materials into the future and must be addressed.

Right holders have once again taken an active approach at self-help measures in 2010, seeking numerous takedowns of infringing sites and materials. Unfortunately, takedown rates in response to right holder notices to services providers is woefully low, for example, the takedown rate was around 13% for the music industry. Vietnamese law remains ambiguous with respect to thresholds for ISP liability for online infringement. As a result, ISPs are generally uncooperative with right holders in addressing infringements over their services or in responding to takedown requests. The problem is further compounded by existing administrative enforcement remedies being rendered ineffective by: 1) the lack of an effective procedure to deal with online piracy administrative complaints; 2) a heavy burden on right holders for production of evidence and proof of actual damages (as opposed to regarding advertising revenues and other commercial advantage as sufficient proof of damage); 3) continued rudimentary issues related to MCST knowledge of and ability to identify and effectively deal with online infringement cases; 4) lack of compliance with administrative orders, since some infringing websites do not comply with the orders issued by MCST, and some websites merely remove infringing “URLs” without ceasing the infringing operation. The International Federation of Phonographic Industries (IFPI) has filed several administrative complaints with the MCST under the new Administrative Decree against music streaming and deeplinking sites and a TV channel. MCST inspectors have issued warnings and asked for the removal of the infringing content identified in the complaints. However, only about 20% of the sites have removed infringing content. Infringing content can still be found on the remaining sites, continuing to cause damage to the record companies.

With the seriousness of the Internet and mobile piracy problem,<sup>12</sup> the Vietnamese Government needs to devote additional resources, time, expertise, and equipment, in order to build capacity, train its officers, and ultimately, take needed actions to reduce this threat to legitimate content businesses in 2011. Target cases should be prosecuted against egregious examples of Internet and mobile 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, and should adopt zero-tolerance policies to minimize infringing activity.

Physical Piracy Dominates the Market, Including Imports, Recordable Disc “Burning,” and Local Factory Production: Evidence of physical piracy can still be found everywhere in Vietnam, 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 “CD-DVD” shops.<sup>13</sup> 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. Vietnamese-sourced pirate products flood the domestic markets and have been found in other Asian countries, North America, and Eastern Europe. In fact, for the music industry, with piracy levels still over 90%, financial returns for recorded music sales have dropped so deeply

---

<sup>12</sup> For example, the independent film and television segment of the motion picture industry (IFTA) reports that online and physical piracy remains a significant export constraint for independent producers and distributors, the majority of which are small to medium sized businesses. Independent producers partner with local authorized distributors to finance and distribute their films and programming. Unable to compete with free, legitimate distributors are unable to commit to distribution agreements or offer drastically lower license fees which are inadequate to assist in financing of independent productions. Piracy is undermining and may permanently damage legitimate distribution networks essential to reaching the consumer and leaves little confidence for investment in intellectual property.

<sup>13</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 have previously reported eight optical disc plants operating in Vietnam today, with the capacity to produce well above any rational legitimate domestic demand.

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.

Though MCST has been supportive in recognizing the 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. 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>14</sup> 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, seizures of pirate imports and pirated product destined for export by the Border Guard, and criminal penalties can result in a significant reduction in piracy in Vietnam.

**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 and unauthorized photocopies. 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 much of the 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. In 2009, AAP member representatives informed authorities of a printer and book store owner engaged in unauthorized re-printing of ELT reading materials. Law enforcement raided the bookstore premises twice (in December 2009 and March 2010), seizing 38,764 pirated books. A fine of VND 500 million (US\$25,700) was imposed but has yet to be collected from the pirate. Instead, the perpetrator is reportedly appealing the imposition of the fine, and in the meantime, is continuing to operate his bookstore under a different name and remains in the business of selling pirated books.

**Signal Piracy:** While Vietnam's Pay-TV sector is one of the fastest developing markets in the Asia Pacific, with 4.2 million overall connections as of May 2010, the legitimate Pay-TV market development is being held back by signal piracy in Vietnam.<sup>15</sup> Urban cable systems are prone to "line tapping" and signal theft by individual consumers, while cable companies continue engaging in "under-declaration" by which they fail to pay for the full number of customers to whom they provide programming, and also use unlicensed content (including unauthorized broadcasts of DVDs directly over their channels). "Overspill" is also a problem in Vietnam as cable operators capture signals from neighboring countries' satellite systems. These are endemic problems which the government should address. A relatively new and dangerous problem in Vietnam involves the operation of websites which steal Pay-TV signals and stream them onto the Internet. Several sites have been identified streaming premium content channels without authorization, mainly focusing on motion pictures or sports content.<sup>16</sup>

Vietnam Television Corporation (VTC), operated by the Ministry of Posts and Telecommunications, continues broadcasting foreign content, including Motion Picture Association of America members' content, without a license to do so. In addition, industry reports that the unauthorized reception and redistribution of foreign satellite channels using illegal decoders remains a problem throughout the country. According to the Cable and Satellite Broadcasters Association of Asia (CASBAA), the cost of pay-TV piracy in Vietnam increased 20% to almost US\$18 million in 2010, attributable to more than 1.1 million illegal connections (307,000 illegal individual connections or overspill, and

---

<sup>14</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>.

<sup>15</sup> Cable and Satellite Broadcasters Association of Asia (CASBAA), *CASBAA Release - Vietnam Pay-TV in Bloom*, May 7, 2011, at <http://www.casbaa.com/media-and-resources/news-center/casbaa-news/casbaa-news-archive/55-casbaa-release-vietnam-pay-tv-in-bloom>.

<sup>16</sup> One example of a website with questionable content has adopted the name of a well known U.S. sports broadcaster without authorization, and is reportedly live-streaming unauthorized content from that broadcaster, and others.

825,000 under-declarations or illegal distributions). On top of this increase in lost revenues are the lost opportunities due to the restrictions placed by the Vietnamese government on the number of international channels. Even with the current 170 TV channels of all kinds in Vietnam, foreign right holders are being denied access to the Vietnamese market. The music industry also reports that along with developments in IPTV, music and music video signals are being exploited without obtaining permission from or making payments to right holders.

## COPYRIGHT LAW AND RELATED ISSUES

Criminal Code Violates Vietnam's BTA Obligations; Inter-Ministerial Circular Should Ensure Full Compatibility with BTA: Vietnam's 2009 revisions to the Criminal Code included a new Article 170a criminalizing "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 constitutes a significant 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, including acts of infringement defined therein, violations involving circumvention of technological protection measures (TPMs), decryption of encrypted satellite signals, and other acts. Article 170a did improve Vietnam's statutory framework in two respects: 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 notes that the revised Criminal Code violates Chapter II, Article 14 of the Bilateral Trade Agreement (2001) (BTA) with the United States,<sup>17</sup> in which Vietnam agreed to criminalize all "infringement of copyright or neighboring rights on a commercial scale." Thus, the Vietnamese Government should also 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 previous 2008 Criminal Circular). 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 the revised Criminal Code also places Vietnam in violation of 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 the BTA, recognizing that resolution is also imperative to Vietnam's successful participation in the TPP.<sup>18</sup>

An Inter-Ministerial Circular to implement the revised Criminal Code is to be issued. IIPA understands the drafting team is headed by the Inspectorate of the Ministry of Science & Technology. In such a Circular, the government of Vietnam should 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>19</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 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,

---

<sup>17</sup> See *Agreement Between The United States of America and The Socialist Republic of Vietnam on Trade Relations*, July 13, 2000 (BTA).

<sup>18</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>19</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.

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: Decree No. 47/2009/ND-CP, on "Handling Administrative Infringement in Copyright and Related Rights" (Administrative Decree), 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>20</sup> MCST has indicated the government is working on an additional Decree to institute the higher administrative penalty structure. While the Decree and administrative enforcement in general should not be viewed as a substitute for a workable and deterrent criminal remedy in Vietnam, IIPA members believe that swift implementation in practice of the remedies in the Administrative Decree can begin to deter piracy and send a strong signal that violations of the IP Code will not be tolerated.

Copyright Law and Implementing Regulations to IP Code Remain Incompatible with the BTA and Potentially Vietnam's Other International Obligations: IIPA has commented in previous submissions<sup>21</sup> regarding the Intellectual Property Code (2005)<sup>22</sup> and the 2009 amendments to that Code.<sup>23</sup> The law, and the Civil Code which remains as a vestigial parallel law, are subject to an implementing Decree which is reportedly undergoing further revisions.<sup>24</sup> The laws, while not entirely in compliance with Vietnam's international or bilateral obligations, represented a major modernization, including implementation of the WCT and WPPT, and Vietnam should now be encouraged as an immediate next step to join those Treaties. The following issues are identified for ongoing consideration as Vietnam's policy makers and legislators continue to make adjustments:

- **Importation Right (BTA):** BTA Articles 4.2(a) and 4.6(b) require Vietnam to provide an exclusive importation right. The law with regard to related rights violates Article 4.6(b) of the BTA. While Article 30 provides a right to "distribute copies to the public," 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. 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.
- **Term of Protection (BTA):** The 2009 amendments did not meet the BTA obligation to increase the term of protection for sound recordings to 75 years from publication (or 100 years from fixation, if not published within 25 years of fixation). Article 34(2) of the IP Code therefore still violates BTA Article 4.4. When the government does go forward and amend the law to fix this BTA deficiency, it should follow the international trend to extend term of protection for works as well to life of the author plus 70 years.

---

<sup>20</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\$25,700). 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.

<sup>21</sup> See, e.g., International Intellectual Property Alliance, *Vietnam*, in 2009 Special 301 Submission, at <http://www.iipa.com/rbc/2009/2009SPEC301VIETNAM.pdf>.

<sup>22</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>23</sup> 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.

<sup>24</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>. IIPA understands that The amendment of Decree No.100 is submitted to the government and waiting for the comments and opinions from the government. In addition to the remaining issues discussed in the text hereinbelow, members have indicated it would be helpful if the government considered introduction of a provision making pre-established (statutory) damages available, upon the election of the right holder. Statutory damages can be very important in civil cases in circumstances in which the amount of reproduction or distribution having occurred is difficult to calculate. Such damages systems have been adopted in many countries.

- **Internet Rules to Clarify Service Provider Responsibility and Promote Service Provider Cooperation:** Laws in Vietnam dealing with Internet issues and service provider responsibility include the Information Technology Law (2007),<sup>25</sup> and Decree No. 55 on the Management, Provision and Use of Internet Services (2001) (Internet Decree).<sup>26</sup> The Information Technology Law apparently provides a broad exemption for information transmitted over or stored on their network.<sup>27</sup> The Internet Decree, by contrast, contains helpful language on service provider issues. Article 6(1) provides, “[i]nformation stored, transmitted and received on Internet must comply with the corresponding provisions of the Press Law, Publication Law, Ordinance on the Protection of the State’s Secrets and other law provisions on intellectual property and Internet information management.” Article 6(2) provides, “[o]rganizations and individuals providing and/or using Internet services must be responsible for the contents of their information stored and/or transmitted on Internet.” To create meaningful copyright protection online in Vietnam, the laws must be tailored to foster service provider responsibility. This can be done initially by creating mechanisms including statutory notice and takedown to deal with infringement in the hosted environment. With increasing broadband penetration and mobile piracy, fostering responsibility (especially when the service provider knows or has constructive knowledge of infringing activity) including other measures to deal with the non-hosted environment will also be important. The government must engage ISPs, most of which have ties to Vietnamese Government agencies, and adopt policies so that they can easily stop online infringements and repeat infringers from engaging in such illegal activities. IIPA understands Vietnam may be working on changes to the Internet Decree and would look forward to reviewing a draft when made available.
- **Making Available Right:** The Implementing Decree does not expressly confirm that Article 30(1)(b) provides producers of sound recordings with a WPPT-compatible right of “making available” as required by Article 14. Either 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, or Article 23(4) of the Decree should be made applicable, *mutatis mutandis*, to Articles 29 and 30 of the IP Code (covering related rights) to ensure full implementation of the WPPT.
- **Technological Protection Measures (WPPT):** 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.”
- **Restrictions on IP Rights:** IIPA remains concerned about Article 7(2) (which potentially gives the State unchecked power to decide when a right holder may exercise rights and under what circumstances), Article 7(3) (which permits the State to take away copyright altogether or restrict the ability of a right holder to exercise lawful rights), and Article 8 (which establishes impermissible content-based restrictions of protection under copyright, similar to a provision in the Copyright Law of the People’s Republic of China which was found by a WTO panel to violate China’s WTO obligations). The scope of Article 23 also remains ambiguous. These articles must be made compatible with Vietnam’s commitments under bilateral and international copyright agreements and treaties.
- **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

<sup>25</sup> Law No. 67/2006, enacted by the National Assembly on July 29, 2006 (into force January 1, 2007).

<sup>26</sup> Decree No. 55/2001/ND-CP of August 23, 2001 on the Management, Provision and Use of Internet Services.

<sup>27</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.

35 of the Implementing Regulations establishes the supremacy of copyright over related rights. This should be remedied.

- **Exceptions Overly Broad, and Impermissible Compulsory Licenses:** 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. Article 25 further codifies a broad broadcasters’ compulsory license as to all works except cinematographic works. Notwithstanding the attempt to limit the scope of the compulsory license to the three-step test, the simple addition of the language of the test will not avoid any compulsory arrangement from colliding with it. 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 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 (BTA, Berne, TRIPS):** Article 203 of the IP Code 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.”<sup>28</sup> The Vietnamese Government has taken the position that nothing in Article 203 requires a registration certificate as a formality and that it affords a presumption of ownership without production of a certificate. Vietnam must adhere to the “no formalities” principle of Berne and TRIPS, and Article 3.2 of the BTA.<sup>29</sup>
- **“Compelling Distribution or Use for Non-Commercial Purpose of Goods, Materials and Implements”:** Articles 202(5) and 214(3) of the 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 Vietnam’s BTA (Article 12.4) and TRIPS obligations.<sup>30</sup>

**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 key aspects of an effective optical disc regulatory scheme.

<sup>28</sup> Articles 208(1) (regarding provisional measures) and 217(1)(a) (with respect to border measures) of the Code apply the same standard of proof as Article 203.

<sup>29</sup> 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.”

<sup>30</sup> 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.



## 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. These restrictions contribute to the lack of a robust and competitive marketplace for content, and limit investment in the creation of new Vietnamese cultural materials. Thus, the vicious cycle of high piracy rates and little to no market access continues. To facilitate commercial development of Vietnam's cultural sector, Vietnam should look to internationally accepted standards and practices which are premised on the understanding 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>31</sup> Unfortunately, Vietnam's restrictive policies on foreign investment operate as a limitation on investment in cultural production, thus, undermining this objective.

IIPA has included extensive discussions of various market access barriers in previous submissions. The following provides a summary and, where applicable, updates.

- **Government Procurement Preferences in the Software Market:** 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," and the Ministry of Information and Communications reiterated this goal in a 2008 clarification stating choosing open source would be "*contributing to reduce software copyright violation.*" On December 14, 2010, the Ministry of Information and Communications held a seminar at which it once again strongly voiced its preference for open source software, which would necessarily limit technology choice in Vietnam. IIPA takes no position on the decision made by a company or a government agency as to the type of software it wishes to license. However, creating a clear procurement preference harms companies that rely on software copyright for their livelihoods, since it denies such legitimate companies access to the market. 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.
- **Restrictions on Trading Rights for Films and Distribution Services:** Importation (trading rights) and distribution of 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.
- **Laws Leave Potential Quotas In Place:** IIPA has in previous submissions noted the concern over potential quotas for foreign film projection in Vietnam in the Cinematography Law as amended. Such quotas should be

---

<sup>31</sup> See Asia-Europe Meeting (ASEM) Seminar on Cultural Diversity in Hanoi on Dec. 15, 2008, discussed in *Vietnam Prioritises 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).



disfavored. Certain articles also endanger to television broadcast market, for example, Article 35(2) 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>32</sup> Such quotas are disfavored and should be lifted.

- **Foreign Investment Restrictions:** Foreign investment in Vietnamese theaters is limited to 51% and must be through joint ventures.
- **Government Monopoly 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 Filmed Entertainment:** 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 an additional 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.
- **Onerous Market Access Restrictions on the Music 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.<sup>33</sup> 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. In order to enable lawful trading and curb copyright piracy in Vietnam, foreign record companies should be given an unrestricted right to import legitimate music products into Vietnam and to establish music publishing houses and websites to publish and distribute legitimate music products in Vietnam.
- **Discriminatory Consumption Tax on Imported Game Products.** A draft decree of the Ministry of Information and Communication targets games for a discriminatory 30% special consumption tax imposed only on imported

<sup>32</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>33</sup> 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.

online and offline games.<sup>34</sup> Official blocks on user access to Facebook affect both Facebook-based games themselves and a key marketing channel for games offered to the public.

- **Onerous Market Access Restrictions on the Online Game Industry:** Vietnam is the largest online game market in Southeast Asia, where more than 10 million Vietnamese play online games and domestic game suppliers (many using imported games) generated \$130 million in revenue during 2009. The Vietnamese Government exercises strict control over the country's online games market through an onerous licensing process. Game operators without a license are foreclosed from the market. Unfortunately, the Vietnamese Government has banned issuance of new licenses for online games and has banned advertising of online games, with a disproportionate impact on foreign game publishers. Obtaining a license requires the approval of three separate government ministries, and is limited to companies that are at least partially domestically owned. During the second half of 2010, the government placed a moratorium on new game licenses, making it impossible for new entrants to tap the Vietnamese market.

## TRANS-PACIFIC PARTNERSHIP (TPP)

On December 14, 2009, United States Trade Representative Ron Kirk formally notified Congress of President Obama's intention to negotiate with the TPP countries – including Vietnam – with the objective of shaping a high-standard, broad-based regional agreement.<sup>35</sup> IIPA has submitted public comments to the U.S. Government's Trade Policy Staff Committee which describe in greater detail the hoped-for results of a TPP negotiation, including a high-level IP chapter, including high-level substantive copyright protection, high-level enforcement standards, provisions ensuring the free flow of electronic commerce products and services, and obligations to open markets to trade in copyright goods and services.<sup>36</sup> In particular, enhancement of copyright standards and enforcement consistent with those agreed to by current FTA partners, Australia, Singapore, Chile and Peru, and an expansion of these protections to other countries in the region including Vietnam will contribute to U.S. job growth, an increase in exports, and economic recovery in line with the Administration's goals. The level of IPR protection for the TPP should be consistent and co-extensive with the FTAs between the U.S. and its current FTA partners.

Vietnam has taken strides in its substantive laws which make meeting the legal and enforcement obligations of previous U.S. free trade agreement IPR chapters less challenging. At the same time, as noted, Vietnam has some of the most restrictive market access barriers in the world, and IIPA urges USTR to seek through the TPP negotiations opportunities to address the range of market access impediments identified herein. The TPP e-commerce chapter, and the TPP's market access provisions for services and investment, should require TPP partners to eliminate discriminatory taxes and policies and open Vietnam's market to foreign competition. We remain hopeful that Vietnam's participation in TPP negotiations will aid in the elimination of such discriminatory barriers.

## GENERALIZED SYSTEM OF PREFERENCES

On August 4, 2008, IIPA submitted a filing to the GSP Subcommittee of the Trade Policy Staff Committee of the United States in response to a Federal Register notice 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. The GSP statute

---

<sup>34</sup> See Article 14 of draft decree, at <http://mic.gov.vn/layknd/Trang/duthaonghidinhhuongdanmotsodieucualatcongngghethongtinvedichvucongngghethongtin.aspx>.

<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). See also International Intellectual Property Alliance, *"Participation of Malaysia in the Trans-Pacific Partnership Trade Negotiations" IIPA Request to Testify and Testimony Regarding "Negotiating Objectives With Respect to Malaysia's Participation in the Ongoing Negotiations of a Trans-Pacific Partnership (TPP) Trade Agreement,"* 75 Fed. Reg. 64778 (October 20, 2010).

expired on December 31, 2010, but should it be reauthorized, the piracy and market access barriers highlighted in this report are key reasons Vietnam should be scrutinized closely before being granted beneficiary status under the GSP program.

## TRAINING AND TECHNICAL ASSISTANCE

In 2010, the copyright industries at various times had the opportunity to provide training and technical assistance to officials in Vietnam. In particular, the Business Software Alliance provided training to Provincial Inspectorates of MCST in three major regions of Vietnam, organized Software Asset Management (SAM) training for members of AmCham in Ho Chi Minh City, worked with the U.S. Embassy and USPTO in organizing IPR workshops for young businesspeople and enforcement authorities (courts, Economic Police, Customs, Market Management), and are acting as a partner with the STAR Project in the field of IPR protection. In 2011, BSA plans to provide judges with software piracy cases, and plans to provide SAM training (as in previous years) for state-owned enterprises. IFPI plans to conduct several technical training events in 2011 for MCST and other government authorities about investigative techniques to tackle online piracy. Aside from industry training, the World Intellectual Property Organization has been involved in providing some level of training on copyright protection. IIPA hopes WIPO will continue to impress upon the government of Vietnam the importance of joining the WCT and WPPT (particularly since Vietnam's drafters and legislators long ago concluded they should implement those treaties).

# **WATCH LIST**

# BRAZIL

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2011 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: IIPA recommends that Brazil remain on the Watch List in 2011.<sup>1</sup>

**Executive Summary:** Notwithstanding some recent progress, high levels of copyright piracy pose serious challenges for all sectors of the copyright industry in Brazil. The challenge is especially acute in the online environment, where legitimate services find it difficult to establish a foothold because so much pirate product is readily available through peer-to-peer piracy, links to offshore cyberlockers, and other channels. There are some encouraging signs of increased cooperation with online service providers to combat this problem, but the government needs to get off the sidelines and actively promote greater cooperation. Meanwhile, serious problems persist with “hard goods” piracy, book piracy (especially of educational materials), camcord piracy, and end-user piracy of business software. Devices to circumvent the technological measures employed to protect videogames are widely available, decimating the legitimate market for console videogames.

The government has taken steps to improve enforcement against copyright infringement – including raids of black markets and border seizures – but there is still a lack of sufficient deterrence due to a number of factors: prosecutions rarely follow arrests, convictions are rare, punishments are light, and judicial processes are protracted. The copyright industries continue to work well with the National Council to Combat Piracy and Intellectual Property Crimes (CNCP), which needs more resources to carry out its ambitious mandate. Internet piracy, and CNCP’s commitment to sponsor roundtables aimed at inter-industry cooperation, must be accorded a higher priority. CNCP’s strategies aimed at education, enforcement and expansion of commercial opportunities must be maintained and intensified. Universities must be prodded to legalize use of academic materials on their campuses. Judicial reforms are needed so that both criminal cases, and civil actions against business end-user pirates, reach conclusions more quickly and with fewer procedural obstacles.

Proposals to amend the copyright law, and to provide a legislative framework for the Internet, were both released for comment in 2010. Both are in need of significant revision in order to provide adequate protections for Brazilian and foreign creative works. Finally, Brazil should move to dismantle daunting market access barriers faced by several copyright industries.

### PRIORITY ACTIONS REQUESTED TO BE TAKEN IN 2011:

#### Enforcement

- Provide enhanced resources to the CNCP to complete existing priority projects under its national plan and initiate new ones.
- Under the leadership of the CNCP and with the express support of the Brazilian Government, set up new roundtable negotiations between right holders and the ISP industry aiming to achieve a cross-industry agreement to combat Internet piracy in Brazil.
- Give higher priority to *ex officio* criminal actions against those engaged in major online piracy activities or knowingly providing the means for doing so.
- As steps toward a deterrent enforcement system, establish a national program to train judges, prosecutors, and police officers on IPR law and enforcement measures; implement judicial policies that expedite criminal

<sup>1</sup>For more details on Brazil’s Special 301 history, see IIPA’s “History” appendix to this filing, at <http://www.iipa.com/pdf/2011SPEC301HISTORICALSUMMARY.pdf>, as well as the previous years’ reports, at <http://www.iipa.com/countryreports.html>. For more on IIPA’s global issues, see IIPA’s 2011 Cover Letter to this 301 submission at <http://www.iipa.com/pdf/2011SPEC301COVERLETTER.pdf>.



copyright investigations; and establish specialized IPR courts with copyright responsibilities in key jurisdictions.

### Legislation and Regulation

- Review the Copyright Law reform legislation to correct fundamental problems, including by narrowing any new limitations and exceptions, and bringing provisions on technological protection measures (TPMs) and online piracy into line with global best practices.
- Refocus any legislative framework for the Internet to reflect the critical role of copyright protection in promoting the healthy growth of e-commerce, including by authorizing right holders, Internet service providers (ISPs) and consumers to enter into constructive and cooperative voluntary agreements and procedures to combat online piracy.
- Enact legislation to facilitate copyright prosecutions and to clarify forfeiture and destruction remedies.
- Remove market access barriers, including high tariffs and taxes placed on entertainment software and consoles, and avoid excessive restrictions in the audiovisual sector.
- Avoid technology-specific mandates and preferences in government procurement, allowing government agencies to choose software and other IT products that best meet their needs for particular tasks.

Brazil has been a major beneficiary country of the U.S. Generalized System of Preferences program (GSP), which provides it with preferential access to the U.S. market. Although the GSP program has lapsed for 2011, if it is restored it will presumably still require beneficiary countries to provide “adequate and effective” protection to U.S. copyrighted materials. During 2010, \$2.1 billion worth of Brazilian goods entered the U.S. under the duty-free GSP code.

## COPYRIGHT PIRACY IN BRAZIL

Internet piracy is a major challenge for all copyright-based industries doing business in Brazil. Piracy involving hard goods – mostly CDs and DVDs carrying pirate content, but also devices that circumvent access controls – continues to be a key concern for several sectors, while the business software industry continues to combat high rates of end-user piracy by corporations and other enterprises, and the book publishing industry confronts widespread unauthorized photocopying of educational materials.

1. Internet piracy. There are an estimated 75.9 million Internet users in Brazil, which represents about 38% of the country’s population. Over the past decade, Internet use has increased more than fourteen-fold in Brazil.<sup>2</sup> But the development of a robust legitimate marketplace in delivering copyrighted materials to these users has been stunted by the prevalence of online piracy.

The Internet piracy problems in Brazil involve two main distribution channels. The first is file sharing through peer-to-peer (P2P) networks, the most popular of which are BitTorrent for audiovisual content and ARES for music files. The second involves links to cyber-lockers where pirate material is stored. This second channel has been growing rapidly in recent years; it probably now accounts for the majority of the online pirate music market. (Brazilian websites that directly host pirate content remain relatively rare.)

Increasingly, these links are propagated through popular social networks such as ORKUT, as well as through blogs and forum sites.<sup>3</sup> In recent years, ORKUT has been the biggest source of illegal music files in Brazil through “music communities” organized for the sole purpose of posting cyber-locker links to complete-career

---

<sup>2</sup>See <http://www.internetworldstats.com/stats10.htm#spanish>, reporting an increase of 1419%, based on data from “Nielsen-Online, ITU and trustworthy local sources.”

<sup>3</sup>ORKUT is one of the most popular social sites in the world with more than 60 million registered users, 50.5% of them from Brazil. It ranks 103rd in the world in terms of traffic volume, according to Alexa.com, and ranks 13<sup>th</sup> in Brazil.

recordings of national and international acts. Around half a million registered users are actively engaged in downloading music files from these virtual communities in Brazil. ORKUT has recently taken some positive steps towards addressing this problem, as discussed below.

Similarly, the Motion Picture Association (MPA) reports that cyberlocker services such as RapidShare and Megaupload are the main sources of online piracy of audio-visual product in Brazil. The Business Software Alliance (BSA) also reports that the use of the Internet as a means of advertising illegal software, along with the unauthorized electronic distribution of illegal software, continue.

Taken together, these forms of online piracy have crowded out efforts to develop legitimate online distribution channels for copyright works in Brazil. This has been extremely damaging to the music industry and has virtually foreclosed the growth of a legitimate online music sector.

With regard to videogames, the market for pirate games, whether delivered online or via hard goods, has been enabled by the absence of enforceable legal remedies against game copiers, mod chips, and similar devices that circumvent technical measures used by game publishers and game console manufacturers to prevent piracy. As a result, most game consoles in use in Brazil (as many as 95% according to local industry representatives) have been modified to enable the use of pirated copies of games, and such games dominate the market. When such pirate-ready consoles are available to the public in "Lan Houses" and Internet cafes, the damage to the legitimate market increases further.

Industry research helps to document the alarming scope of the online piracy problem in Brazil. The Entertainment Software Association (ESA) reports that during 2010, ESA vendors detected 9.2 million connections by peers participating in unauthorized file sharing of select member titles on P2P networks through ISPs located in Brazil, placing Brazil fourth in overall volume of detections in the world.<sup>4</sup> Two of the top ten ISPs implicated in P2P detections globally during 2010 (Tele Norte Leste Participações S.A. and Brasil Telecom) are Brazilian.

The independent segment of the film and television industry (IFTA) reports that Internet-based piracy remains a significant export constraint for independent producers and distributors, the majority of which are small to medium sized businesses. Internet-based piracy prevents the establishment of legitimate online distribution platforms and services for consumers, which independent producers may use to finance future productions. For independent producers who license content country-by-country, online piracy instantly exports troubled marketplaces and high piracy rates to other markets.

2. Hard goods piracy. For several reasons, pirated hard goods remain widely available in Brazil, even as more of the piracy problem is shifting to the Internet. First, there are large-scale distribution networks that involve thousands of street vendors; established facilities (such as gas stations) which blanket the major highways; and stalls in camelodromos (street markets). Second, there is a large supply of blank media used to burn pirate CDs and DVDs. An estimated 800 million blank media discs (CD-Rs and DVD-Rs) enter Brazil each year from ports throughout the country, mainly from Paraguay, China, Hong Kong and Taiwan. Third, organized crime groups operate at the border with Paraguay, and also control a complex chain for distribution of pirate DVDs across Brazil.

Physical piracy of entertainment software remains quite prominent in Brazil's two largest markets, Sao Paulo and Rio de Janeiro, and is also prevalent in Minas Gerais, Pernambuco, Brasilia, Belo Horizonte and other cities. Pirate games are sold on discs (even for games published for platforms that use other media, such as Nintendo DS cards). Most of the pirate discs are produced by local disc-burning operations, which source their master copies either from counterfeit imports or, increasingly, from downloads of versions of pirated games on the Internet. Of course, one of the most significant hard goods problems for the entertainment software sector is the

---

<sup>4</sup>These figures do not account for downloads that occur directly from hosted content, such as games found on "one-click" hosting sites, which appear to account each year for progressively greater volumes of infringing downloads.

ubiquitous sale of circumvention devices, such as mod chips for consoles such as Ps2, Nintendo Wii and Xbox, and the R4 modification for Nintendo DS units, at prices as low as US\$45-50. As noted above, these devices are the gateway to game piracy, since without them users are unable to play pirate games on these platforms. Game copiers and mod chips generally are produced in Asia and many are flown into Brazil from abroad, along with some high-end counterfeit games and cartridge products. There is also a steady flow of modified consoles entering Brazil from Paraguay, most of these modified in modding operations in Ciudad del Este.

Hard goods piracy in the music sector is less visible than before. As more and more music piracy shifts to the Internet, street sales shift more toward pirate DVDs. However, major retail centers for pirate CDs persist in the streets and flea markets of Sao Paulo, Sao Paulo State, Rio de Janeiro, Belo Horizonte and Recife.

MPA reports that the most harmful form of audiovisual piracy for its members in Brazil is hard goods piracy, which is fueled by illicit camcording of movies in theaters. Contrary to public perception that DVD piracy had leveled off, it increased in Brazil's streets and markets, primarily because the pirate distribution channels formerly dedicated to the distribution and sale of music CDs have shifted to DVDs. Most of the pirate audiovisual products are burned CD-Rs or DVD-Rs, and are locally reproduced in hundreds of facilities of varying sizes throughout the country. Pirated film products also enter from Paraguay, and smugglers are moving to Guaira, Ponta Porã and Corumbá. The large pirate black markets are a problem, as are strategic point of sales for certain street vendors. All of these create serious economic harm for legitimate business, especially local movie theaters, video rental stores, and the home entertainment market. Street sales of pre-release pirate DVDs (before the release of legal DVD and during theatrical release window) are especially damaging.

Independent producers and distributors confirm through IFTA that DVD sales in Brazil have been negatively impacted since pirated digital copies are offered for free online and with the same quality viewing experience as a DVD can provide. Unable to compete with free, legitimate distributors are not able to commit to distribution agreements or offer drastically lower license fees which are inadequate to assist in financing of independent productions. The independent production sector is limited in its ability to shift to technology-enabled new business practices that might limit piracy. For example, worldwide same day releases (referred to as a "day-and-date" release) may prove an effective method to curb or delay piracy for the major studios, which control their own worldwide distribution, but for independents, whose national distributors release on their own schedule, this technique is impossible. The local Brazilian copyright community, including the Brazilian theatrical box-office marketplace, is equally impacted by the damage from piracy and the shrinking of the local distribution channels while piracy remains rampant.

3. Business software piracy. The Business Software Alliance (BSA) reports that software piracy in Brazil continues to include unlicensed software use by businesses and other enterprises; 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. 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 the Brazilian population in general.

BSA reports that the preliminary PC software piracy rate in Brazil in 2010 was 56% (unchanged from 2009), with an estimated commercial value of pirated PC software from U.S. vendors of \$1.2 billion.<sup>5</sup> There has been some reduction in software piracy levels in recent years, due to good coordination by the CNCP, better public awareness,

---

<sup>5</sup>BSA's 2010 statistics are preliminary, representing U.S. software publishers' share of commercial value of pirated software in Brazil. They follow the methodology compiled in the Seventh Annual BSA and IDC Global Software Piracy Study (May 2010), <http://portal.bsa.org/globalpiracy2009/index.html>. These figures cover packaged PC software, including operating systems, business applications, and consumer applications such as PC gaming, personal finance, and reference software – including freeware and open source software. They do not cover software that runs on servers or mainframes, or routine device drivers and free downloadable utilities such as screen savers. The methodology used to calculate this and other piracy numbers are described in IIPA's 2011 Special 301 submission at [www.iipa.com/pdf/2011spec301methodology.pdf](http://www.iipa.com/pdf/2011spec301methodology.pdf). BSA's final piracy figures will be released in mid-May, and the updated US software publishers' share of commercial value of pirated software will be available at [www.iipa.com](http://www.iipa.com).



and improved enforcement. This decline is a move in a positive direction, but more progress is needed in a market that is as rapidly growing as Brazil. Moreover, a 10 point reduction in the software piracy rate would yield significant benefits to the Brazilian economy.<sup>6</sup>

4. Book Piracy. 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. The Ministry of Education and university and college administrators need to work with the enforcement authorities to address the rampant unauthorized photocopying occurring on and off campus. Additionally, authorities should conduct effective enforcement against copy shops, located on and around university campuses that produce unauthorized copies of books and related teachers' notes. The most immediate concern of academic publishers in Brazil is the problem of university administrative rules that purport to authorize high-volume infringements of foreign works, including by commercial, for-profit copy center. (See discussion below under legislation.) 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.

5. Camcord piracy. 90% of all pirated movies originate as illegal camcords. Unauthorized in-theater audio camcording spiked in Brazil beginning in 2008 and continued to increase in 2010. There was a 31% increase in audio captures from Brazilian theaters in 2010, with a decrease in the number of video source captures. Audio tracks are stolen from Brazilian theaters and married with high quality video captures made available online. This infringing product is then disseminated across the Internet and burned onto DVD-Rs which are then distributed to Brazil's many black markets.<sup>7</sup> Only one camcording pirate was caught in Brazil in 2010, attempting to steal a Brazilian film, "Tropa de Elite 2". IFTA reports that camcording is particularly damaging in Brazil because it fuels rampant online piracy, negatively impacting worldwide distribution and preventing the establishment of legitimate online distribution platforms.

6. Piracy at the border. Brazil's extensive border is 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. Also, with increasing import control 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.

## COPYRIGHT ENFORCEMENT IN BRAZIL

### Enforcement Overview

The challenges of enforcement against piracy in Brazil have been extensively detailed in past IIPA filings. The picture remains largely the same in 2010. Many raids against hard good piracy operations are carried out, and considerable pirate product is confiscated. But these raids rarely lead to effective prosecution or deterrent sentencing. Law enforcement needs more resources; and the coordination among different levels of government should be improved. But until the system delivers deterrent penalties, pirates can simply treat dealing with the enforcement regime as a manageable cost of doing business. And until the government begins to engage the

---

<sup>6</sup>According to a 2010 report issued by research firm IDC for BSA, a 10 point reduction in the PC software piracy rate in Brazil over four years would - create 12,300 new IT jobs, \$3.9 billion in added GDP and \$888 million in new tax revenues. If this reduction were achieved over two years, the benefits would be even greater, with \$5.2 billion added to GDP and \$1.1 billion in new tax revenues. See The Economic Benefits of Reducing PC Software Piracy, available online at <http://portal.bsa.org/piracyimpact2010/index.html>.

<sup>7</sup>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.

growing menace of online copyright piracy, the prospects, for all copyright sectors, of establishing robust e-commerce marketplaces in Brazil for copyright materials will remain bleak.

#### A. The Bilateral Consultative Mechanism

Since its inception in 2006, the Bilateral Consultative Mechanism has provided the framework for a U.S.-Brazilian dialogue regarding copyright enforcement matters.<sup>8</sup> IIPA uses the same framework to introduce its reporting on copyright enforcement trends during 2010. The BCM items include:

(1) *increase anti-piracy raids in well-known marketplaces*

Enforcement cooperation with industry is generally good. The number and quality of police raids targeting hard goods piracy continue to grow. For example, ESA, through its anti-piracy partner in Brazil ABES, supported police in 724 raids in 2010, leading to the seizure of over 1.5 million pirate discs (27% more than in 2009). The Brazilian recording and audio-visual anti-piracy organization APCM reports that a total of 3,686 raids were conducted by police authorities in 2010. This is a 2.5% increase from 2009. These raids resulted in the seizure of 3,516,121 music CD-Rs and 19,176,143 DVD-Rs containing movies. Regarding blank media, 2,713,241 CD-Rs and 11,968,783 DVD-R's were seized.

The problem remains, however, that even successful raids are not sufficiently followed up with successful prosecutions of pirates. Moreover, Brazilian authorities are taking virtually no enforcement actions in the fastest growing marketplace for copyright piracy in Brazil – the Internet – even though the police have by now developed considerable experience in investigating other aspects of Internet crime.

(2) *encourage the establishment and formation of joint state and municipal anti-piracy intellectual property rights (IPR) task forces to focus on priority locations*

Besides the initial task forces set up in Sao Paulo, Rio de Janeiro, Minas Gerais, Bahia and Pernambuco, BSA reports that special task forces are also active in Rio Grande do Sul, Brasilia, Espirito Santo, and Goias. ESA reports that the cooperation between levels of government in Sao Paulo City and State is especially noteworthy; the City has hired knowledgeable anti-piracy personnel from the State police ranks, and these new hires have performed well in neighborhoods such as Lapa, Pinheiros, and Bras. An equally pressing need, however, is for the development of specialized IPR enforcement police units at the state and local levels. Only one new unit was inaugurated last year, in Blumenau, Santa Catarina state.

(3) *take enforcement actions on the Brazil-Paraguay border, both on-land and on-water*

While border enforcement continues, seizures of blank media decreased by 61% in 2010. 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 600,000 pirated video games in 2010. APCM reports that some 19.2 million units of pre-recorded CD/DVDs were also seized – a 47% increase over 2009.

Border enforcement would be enhanced if Brazilian authorities better coordinated with their Paraguayan counterparts in exchanging intelligence and coordinating enforcement efforts. Customs enforcement would also be much enhanced if cases of interdiction were referred to the appropriate authorities for criminal prosecution.

---

<sup>8</sup>For further background on the Bilateral Consultative Mechanism, see <http://www.iipa.com/rbc/2006/2006SPEC301BRAZIL.pdf>.

(4) *enhance deterrence through criminal prosecutions and the application of deterrent penalties*

This remains a serious deficiency in the Brazilian system. Industry associations uniformly report that the great majority of persons arrested never face criminal prosecution. Even for those who are charged, cases are usually dropped or suspended indefinitely. Due to huge case backlogs and other systemic problems, those cases that are prosecuted to a verdict take three to four years before sentencing, and deterrent penalties are rarely imposed.<sup>9</sup>

The police do not have deadlines to complete investigations and deliver results to prosecutors. As a result, investigations may take up to five years, with the interested rights holders having to push the process every step of the way. Judges could ameliorate this problem, because every six months police authorities must request from criminal judges a formal authorization to keep the investigation “open” for evidence collection. Normally, these extension requests are granted automatically. The Supreme Court and the state level supreme courts must instruct criminal judges everywhere in the country to limit the number of extensions 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.

Another systemic shortcoming is that 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 experts. The process of identifying and verifying low-quality pirated products is not difficult and should not require highly trained experts. The appointment of specialized IPR experts at the “*Instituto de Criminalística*” (CSI Institute of Brazil) with the capacity for full-time dedication to piracy cases would also help address the problem.

Additionally, prosecutors and judges lack specialized training in IPR cases. There is no national program to train judges, prosecutors and police officers on IPR law and enforcement programs. Although most of the training seminars or workshops for judges, prosecutors and police officers are organized and financially supported 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 2010, the music industry provided trainings for judges in Curitiba and Florianopolis; ESA participated in an international IP and high tech seminar in Florianopolis at which half the 100 or so attendees were judges or prosecutors; and BSA took part in IPR-focused seminars organized by the Rio de Janeiro National Institute of Law and Criminal Studies, the Rio de Janeiro Federation of Industries and other bar groups.

Creating a specialized court for copyright matters, at least in a few major jurisdictions such as Rio de Janeiro and Sao Paulo, would help address this problem and would also lead to more expedited case processing. The Industrial Property Law (Law No. 9279, which entered into effect in May 1997) authorized the judiciary to create specialized IPR courts, but this authority has never been exercised with respect to copyright.

Finally, criminal penalties imposed on pirates are too frequently suspended.<sup>10</sup> Since prosecutions take so long to reach final disposition, a defendant who may have been caught multiple times is treated as a “first offender” so long as none of the prosecutions is complete; and a suspended sentence for a first offender is treated as almost an inalienable right in the Brazilian legal system, so long as the defendant agrees to provide minimal monetary compensation to the victim. In sum, from initiation of the case through its conclusion, Brazil’s criminal justice system does not adequately deter copyright piracy.

---

<sup>9</sup>None of ESA’s raids in 2010 resulted in a conviction. APCM reports only two convictions arising from raids in 2010. Overall, APCM notes that convictions increased from 254 in 2009 to 534 in 2010, but more than 80% of these resulted in the minimum 2-year sentence, which was usually suspended, so that few if any pirates serve time in jail.

<sup>10</sup>The Brazil Series case, discussed below, is a welcome exception to this rule. The site owner has been imprisoned and is also being pursued for other crimes.

- (5) *pursue federal government-sponsored educational and media anti-piracy campaigns, working with the private sector to raise public awareness of the anti-piracy fight*

CNCP has been involved in some important anti-piracy media and educational campaigns, most recently the release by the National Cinema Agency of four films directed to young audiences about the harmful cultural and economic effects of piracy. These were screened in 700 top theaters at the end of 2010. CNCP also joined in partnership with the American Chamber of Commerce and private sector groups including BSA to coordinate a "School Project." Finally, a training "Road Show," carried out by industry groups in conjunction with CNCP, visited 11 cities in 2010 with separate presentations to law enforcement agents, student groups and business about the importance of combating software piracy.

- (6) *continue working with the industry through the CNCP*

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. Local representatives of the leading copyright industry groups participate actively in CNCP and the level of cooperation continues to be high. CNCP has taken some steps to prioritize efforts and target resources. However, in general, 2010 was not a fully productive year for CNCP, due to leadership and membership changes.

In its second national plan launched on May 28, 2009, the CNCP identified five top priority projects for 2010. Only the first of these – the Piracy Free City program – was noticeably active in 2010. Its goal is to actively involve municipal governments in the fight against piracy by creating incentives and establishing local strategies to pursue piracy. The first agreements to participate were signed in December 2009, and in 2010 the programs kicked off in Sao Paulo, Brasilia, Curitiba and Sao Luis. In all participating cities, the program launch was followed by anti-piracy training programs for municipal enforcement agencies, in which copyright industry groups actively participated. CNCP should continue and grow this program in 2011, and must also insure that these programs address the broad range of piracy concerns, including unlicensed use of software by businesses (business end-user piracy).

An important CNCP priority for the year involved Partnerships and Cooperation with Internet Service Providers. The goal is to create mechanisms with the ISPs to prevent the distribution of pirate products over the Internet. Unfortunately, there is no real progress to report on this important project, and it seemed to receive very little attention from CNCP in 2010. In great part, this reflects a lack of political will. As discussed below, some government agencies have given ambivalent or even negative messages about encouraging greater cooperation from service providers in the fight against online piracy. The uncertain status of legislation on Brazil's proposed Internet regulation may also provide a rationalization for CNCP's inaction on this priority. Whatever the explanation, it is clear that this is a major piece of unfinished business, either for CNCP, or for whatever government entity is in the best position to provide incentives for the partnership and cooperation that is needed to effectively combat online piracy.<sup>11</sup>

## B. Internet Enforcement

Effective enforcement against the growing problem of Internet piracy in Brazil will require positive and active cooperation among right holders and Internet service providers (ISPs). This cooperation is forthcoming in some areas, including (to an increasing extent) in one of the two main channels for online piracy, links to cyberlockers propagated through social networks and other means. However, in the other critical channel, p2p trafficking in pirated works of all kinds, little cooperation has been shown. The Brazilian government, which has been sidelined on this

---

<sup>11</sup>The other three CNCP priorities for 2010 were: Legal Fair: 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; Shops Against Piracy: to unite shop owners nationwide against piracy, and to improve public awareness about the harmful effects of piracy; and Anti-Piracy Portal: to develop an interactive communication portal, including educational and promotional campaigns, to improve communication with the public and present national efforts to fight piracy. The status of these three projects is unclear.

issue over the past year, needs to get actively involved in convening roundtable discussions that can lead to progress on this critical issue for the future of the marketplace in copyright works.

An important step forward was taken in mid-2010, when the social networking service ORKUT began the removal of virtual communities deeply engaged in piracy. These communities offer their participants literally millions of links to cyber-lockers (mainly located outside Brazil) where pirate music, films, videogames and software can be obtained. ORKUT now receives a weekly list from the recording industry identifying the communities involved, and within 5 business days they are generally removed from the service. In the last half of 2010, over one million links to pirate material were removed in this way. While the recording industry appreciates this level of cooperation, much more work remains to be done. Entire communities dedicated to offering infringing music are still present on ORKUT; new communities re-form to offer the same services and must be subject to new notices. More illicit links may be posted every week than are removed through the new system. Still, this is a critical positive step toward the proactive cooperation that is needed.

Cooperation continues in other areas as well. ISPs continue to respond reasonably promptly to requests from right holders to take down infringing content on hosted sites that are making pirate material available, although as noted this is not the main venue for online piracy in Brazil. ESA reports that the dominant Internet auction service, Mercado Livre, removes advertisements for pirate products almost immediately after receiving notice from right holders. The recording industry in Brazil has a similar cooperation agreement with Mercado Livre that allows local anti-piracy groups to remove illicit content promptly after detection. Overall, Mercado Livre remains one of the most cooperative digital businesses in the region.

Unfortunately, this cooperation does not extend to working together to fight the pervasive piracy of all forms of copyright material carried out via P2P services. Brazilian laws and regulations provide no incentive for ISPs to pass on notices to their subscribers who misuse their access to engage in P2P piracy, nor to exclude repeat infringers from continued use. Consequently they do nothing, and this channel for piracy proliferates unchecked.

Clearly, the missing piece of this puzzle is active government involvement to bring ISPs and right holders together to find effective means to deal with the most serious forms of online piracy, and to prevent its further growth. The CNCP assigned itself this responsibility two years ago, following an initiative from the Ministry of Culture in 2008, but has failed to deliver. To the contrary, some government agencies have impeded the search for cooperation. In 2009, when the Ministry of Justice asked several agencies for comments on a proposal for a “warning system” through ISPs to customers whose IP addresses were identified by rights holders as “heavy uploaders” of film and music content, the consumer protection agency (DPDC) opposed it on the stated grounds that an ISP sending warnings to their customers at a third party’s request would violate the subscriber’s right to privacy, and the proposal was derailed. At the Ministry of Justice’s request, the DPDC (which reports to Justice) was asked to reconsider its position, but to date its opinion remains unchanged.

In 2010, a legislative draft for Internet regulation (discussed below) seemed to require a court order for sending any warning notices, and even to prohibit the voluntary actions ISPs are now taking to remove access to pirated hosted content. As a result of this counter-productive signal, the CNCP mandate to convene an inter-industry roundtable is at a standstill. IIPA hopes the new Brazilian government will revive this CNCP initiative, and send a clear signal that effective cooperation against the piracy that now blights the online marketplace is in the best interests of Brazil’s economic, technological and cultural development.

There is also an important role for criminal enforcement against serious online copyright crimes. Legislation on the books would provide a framework for this, and Brazilian enforcement authorities have considerable experience in investigating online crimes in other areas. Some criminal cases have been pursued in the past 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. In a positive development, the Brazil Series case, in which the investigation began in 2007, was concluded in 2010. The Brazil Series site had approximately 40,000 users every

month, and its owners also owned four other sites that sold illegal content. The owner, a Peruvian, has been imprisoned and is also being pursued for several other crimes.

However, there is some indication that progress in this area has stalled. The recording industry reports that currently not a single police unit anywhere in the country is conducting a serious investigation in the online piracy area. In view of the significant damage that pirates inflict on Brazil's economy and culture, police authorities must accord a much higher priority to criminal investigations of online piracy. In particular, authorities should take *ex officio* actions against 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.

### C. Enforcement against End-User Software Piracy

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 properly licensed software). BSA's enforcement campaign is based on a cease and desist letter procedure aimed at legalizing use of business software, escalating to the filing of civil lawsuits against specific companies that will not agree to purchase needed licenses. In 2010, BSA started 215 civil actions against end-users in the first 11 months. While this enforcement campaign is effective in its overall goal – to encourage businesses to legalize their software use – some problems have been encountered in the courts. Many judges have insufficient knowledge of copyright law, and huge backlogs are commonplace. Cases usually take from 18 months to 4 years just to come to trial in the first instance, and repetitive appeals can require up to 12 years to finally resolve. Brazilian courts continue to require extremely high fees for forensic experts who conduct searches and seizures and analyze the results, and for bonds. On average, BSA has paid up to US\$5,000 for experts' fees and up to US\$25,000 as bonds, but in some cases, courts have demanded multiples of these sums, and BSA has had no option but to terminate the cases. This situation has remained unchanged since 2005. BSA supports legislative reform to permit foreign sampling and private sector assistance in the forensic work.

For cases that succeed in running this gauntlet, satisfactory judgments can be obtained, except for some courts that simply order companies to pay the license fee they would have had to pay in the first place for the software they have been using without authorization, without any additional penalty. This lacks any deterrence and encourages companies to wait until they are sued before legalizing their software use.

BSA urges authorities to make more use of the "fiscal crime" provision in the 1998 Software Law. Under that law, tax evasion that frequently characterizes acts of software piracy can be pursued by the tax authorities as a public action, independent of BSA's civil actions against software piracy. Such tax evasion cases would have the potential for a significant impact on lowering software piracy in Brazil, especially by medium-sized and large companies.

## LEGISLATION AND REGULATION IN BRAZIL

During 2010, two important law reform projects in Brazil were opened to public comment: a draft proposal from the Ministry of Culture to revise the 1998 Copyright Law, and a seemingly more embryonic proposal from the Ministry of Justice on possible Brazilian legislation of a legal framework for use of the Internet. IIPA submitted comments on both proposals. We understand that both are now under review by the respective ministers of the new administration.

A. Copyright Law Reform. While the draft Copyright Law reform proposes a number of improvements to current law, it also raises a number of concerns for the copyright industries. These include the following:

- The draft proposes many new exceptions and limitations to copyright that are unnecessarily broad and inconsistent with a workable balance between protections and exceptions. Concerns include a broad new

general exception for a number of socially beneficial uses, as well as exceptions for interoperability, access by the disabled, and out of print works, all of which lack critical definitions. It was not clear that these new exceptions would be limited by the three-step test set forth in Article 13 of the TRIPS Agreement.<sup>12</sup> Moreover, it is important that there be language clearly specifying that with regard to computer programs the exceptions that apply are those found in Brazil's Software Law.

- The draft proposal fails to close significant gaps in Brazilian law's safeguards for technological protection measures (TPMs) used by copyright owners to control access to or copying of their works. In particular, the law should cover both access controls and copy controls; should prohibit not only the act of circumvention of TPMs, but also trafficking in circumvention devices and services; and should include criminal remedies for making or distributing circumvention devices. As noted above, these shortfalls in Brazilian law have led to a virtually unregulated market in game copies, mod chips and other circumvention devices, which have themselves opened the door to a videogame market completely dominated by pirate product. The draft law would worsen the situation, by weakening even the inadequate laws currently on the books with a broad exception for any act of circumvention carried out for the purpose of exercising any limitation on copyright. Given the breadth of some of these exceptions, as noted above, this exception clearly threatens to swallow what exists of the rule against circumvention of TPMs.
- The draft proposal represents a missed opportunity to address the critical area of online piracy, and in particular to provide legal incentives (such as through secondary liability provisions) to encourage cooperation between online service providers and right holders in dealing with online piracy.

IIPA is encouraged by preliminary indications that the new Minister of Culture will carefully review the 2010 draft proposal, as well as the comments received, before putting forward a revised draft for legislative action. We urge the Minister to use this opportunity to correct the shortcomings in the 2010 draft and to address the fundamental issues which this draft overlooks. The goal should be a law that enhances the protection of copyright and neighboring rights, and thus promotes production of new original works, in the face of technological developments that have effectively eroded the ability of right holders to enforce their rights.

B. "Marco Civil" Internet Legal Framework. This proposal, prepared by the Center for Technology and Society from Fundacao Getulio Vargas and the Justice Ministry, fails to recognize the importance of protecting copyright in the online environment as an essential ingredient for the healthy growth of electronic commerce. In addition, the draft would create impediments to effective copyright enforcement on the Internet; pre-empt the potential use of a number of mechanisms to address online piracy; and create broad immunities from liability without any conditions to cooperate in dealing with those who employ Internet access to commit copyright theft. As noted elsewhere in this submission, the release of the draft Internet legal framework bill was perceived in many quarters as a statement discouraging voluntary cooperative anti-piracy measures, and thus cast a pall over efforts to convene a roundtable for candid discussion of such voluntary measures. IIPA is pleased that this proposal will be subject to further review and examination, and looks forward to participating in an effort to develop a balanced legal framework for the Internet and e-commerce that includes an appreciation of the importance of copyright protection as a critical framework element.

#### C. Legislation/Regulation Impacting Publishers.

- University Administrative Rules. Academic publishers in Brazil remain concerned over the continued influence of Resolution No. 5213/2005, an administrative rule implemented by the State of São Paulo University (USP). This rule allows (1) reprographic copying of portions of books by commercial, for-profit copy centers and (2) copying of foreign works that are "not available in the Brazilian market" without a

---

<sup>12</sup>Article 13 of TRIPS provides: "Members shall confine limitations or exceptions to exclusive rights to (1) certain special cases which (2) do not conflict with a normal exploitation of the work and (3) do not unreasonably prejudice the legitimate interests of the right holder." [Numbering added]

license. "Not available in the Brazilian market" is not defined, but reports indicate that this criterion has been interpreted to mean 1) where a book is not written in Portuguese and 2) is not for sale in the nearest bookstore. In practice, it has allowed the copying of a work or book in its entirety – a practice that exceeds what is allowable under international norms. Several years ago, publishers presented a formal request for revocation of this rule to USP, but were rebuffed, the argument apparently being that the rule is "constitutional" as it grants access to education and knowledge. The rule established a terrible precedent and should be revoked, or at a minimum, revised to conform to international standards.

- Objectionable copyright bills regarding student copying. Bill No. 131/06, presented in the Senate, appeared to establish that a student could copy 25% of any work without remuneration to the rights holder. Academic publishers (local and international) already face rampant unauthorized photocopying of books and journals in educational institutions, and legislation of this sort would have exacerbated the problem. With a new government in place, the bill is reportedly on hold. This legislation requires significant revision, and we urge the new government to ensure that it meets the TRIPS three-step test for exceptions to protection.
- Bill regarding electronic public availability of information produced with public funds by higher education institutions. Bill No. 1120-2007 would create an electronic government portal through which technical and scientific research generated at higher education institutions using public funds would be made publicly available. The proposed law should be carefully crafted to ensure that publications that publish peer-reviewed research, or research produced by third parties that were not government funded, are not lumped into the general category that the legislation seeks to cover. The bill reportedly remains under consideration by the legislature but its status is unclear.

D. Proposed legislation related to enforcement. For the past several years, copyright industries and the CNCP have worked to develop and introduce legislation to strengthen Brazilian measures and penalties for copyright infringement. Currently there are several proposals that the industries have worked to present both to the Congress and through the CNCP. IIPA encourages positive action on these bills.

- Bill on forensics and destruction of illegal products. In May 2008, a Special Commission to Combat Piracy (CEPIRATA) was created by the Chamber of Deputies 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 bill 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.
- Bill on destruction and forfeiture of equipment used to produce pirated goods. One topic addressed by CEPIRATA but omitted from bill 5057/2009 was the destruction of seized pirate product and forfeiture of equipment used to produce it. A new bill (8052/11), introduced on the last day of 2010, would fill this gap, while also authorizing an expert report to be based on sampling of the goods seized.
- Other enforcement legislation. Draft law 2729/03 would modify the Criminal Code, the Criminal Procedure Code, the Industrial Property Code, the Copyright Law and the Software Law to facilitate the search, seizure and destruction of pirated goods. It also contains other valuable improvements, including criminalizing the advertisement of pirated goods, the distribution of instructions on how to manufacture counterfeit goods, and the purchase of pirated goods intended for resale; increasing the minimum penalties for IPR infringements



to avoid conditional suspension of prosecutions;<sup>13</sup> and providing prosecutors with the authority to pursue criminal actions in the absence of a rights holder action.

## MARKET ACCESS AND RELATED 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 acquire 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:** Brazil's high tariffs and taxes on videogame products continue to plague the entertainment software industry and serve as a significant barrier to market entry and as a spur to the pirate market. Cumulatively, tariffs and taxes can nearly triple the price of a legitimate copy of videogame software, compared to a smuggled copy that reaches the consumer without paying these fees. A customs ruling in early 2010 exacerbated the problem of high tariffs, ordering that import fees be imposed on the copyright value of imported games, rather than on the (much lower) value of the magnetic media in which they are embodied. The practical effect was a sharp increase in the cost of importing legitimate games into Brazil. A court decision handed down on December 17, 2010 has suspended the effect of the customs ruling but may be subject to modification. With regard to internal taxation, 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. In particular, the 50% federal tax on entertainment consoles has contributed significantly to the slow entry of console manufacturers into the market, and to the flood of grey market, pre-modified consoles and pirated software into Brazil. The federal government must address this problem so that the purveyors of pirated products do not continue to thrive at the expense of legitimate businesses.

**Foreign ownership restrictions and content quotas bills on the audiovisual sector (PLS 210/07 and PL 29/07-PLS 116/10):** 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 ISPs and telecoms that distribute local content. These bills would not only harm foreign entities, but also impair the continued growth of the Brazilian audiovisual industry as a whole. After significant discussion throughout 2010, the House of Deputies modified and approved the bills. The current text sent to the Senate would impose local content quotas for pay television to be enforced by ANCINE, the national film agency, and delegate to ANCINE unprecedented powers to limit advertising and direct business activities. It would also set rules on technological convergence, opening the way for telephone companies to compete with cable operators in offering content and broadband service. Currently the Bill is being analyzed by the Senate's Constitutional and Justice Commission, and will also need review by the Science and Technology Commission; the Economic Affairs Commission; the Education, Culture and Sports Commission; and the Consumers Defense and Environment Commission. While MPAA supports expanding the number of platforms on which consumers can enjoy legitimate content, it is concerned that local content quotas will limit what consumers experience and push consumers towards illegitimate sources of content.

---

<sup>13</sup>This is a serious problem for the software industry. Because the minimum penalty under Brazil's separate software law is only one year, criminal infringement cases brought by the software industry are subject to automatic suspension of prosecution under Law 9099.95. Increasing the minimum penalty would eliminate this automatic suspension and ensure that more software piracy cases are actually prosecuted.

# BRUNEI DARUSSALAM

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2011 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: Brunei Darussalam should be placed on the Watch List.<sup>1</sup>

**Executive Summary:** While having the ninth highest per capita income in the world (purchasing power parity of \$50,300 as of 2010, and higher than the United States),<sup>2</sup> Bruneians have not supported a legitimate market for copyright materials. The music industry had celebrated the cleaning up of the retail market, but music piracy has sadly re-emerged. Further, with the Internet population being over 85 percent of the country as of June 2010 (up from only 46% just three years ago), the problem of Internet piracy has grown with illicit P2P filesharing becoming more rampant. Service providers have been doing little to cooperate to ensure people are using legitimate product while the absence of any enforcement and ISP liability laws compound the problem. Although music in the form of “Ring Back Tone” subscriptions, ringtone and full song downloads are widely and commercially available both over cellular communication networks and over the counter, there are presently no license agreements in place for such digital music exploitation. End-user piracy of business software remains a problem in Brunei; preliminary data indicates the commercial value of unlicensed U.S. software in 2010 was \$7 million, with a piracy level of 66%.<sup>3</sup> IIPA requests that the market once again be cleared of pirate product to facilitate a legitimate copyright marketplace.

### Priority Actions Requested in 2011:

- Have Commercial Crime Unit (CCU) run a new sweep of the pirate retail markets in Brunei on an *ex officio* basis.
- Impose an additional condition of licensing all retailers under the existing Miscellaneous Licences Act (Chapter 127 – Act No. 6 of 1979) that these retailers commit NOT to deal with pirated optical discs or digital music. The Government should have the authority to terminate the trading license based on official report or Statutory Declaration from right holders that this commitment is not being fulfilled.
- Royal Brunei Customs should clean up the pirate retail markets on an *ex officio* basis given that the burden of proof that duties have been paid is on the pirate retailers. As import duties must be paid on all imported optical discs, Customs may seize all imported optical discs for nonpayment of such duties under the Brunei Customs Import Duties Order, 2007 (Notification No. S45).
- Formally warn/encourage the cellular communications and Internet service provider companies to take steps to ensure that their platforms and networks are not used to facilitate copyright infringement.
- Establish effective enforcement practices for the Internet, including amendments to the Electronic Transactions Order (2000) to provide for service provider responsibility for copyright infringements and therefore to promote service provider cooperation with right holders to halt online infringement.
- Have the Ministry of Education (MOE) prioritize IP awareness in schools on top of their existing ICT curriculum, including showcasing their role in managing use of copyright, encouraging students at all levels, including K-12 and university, to use genuine copyright materials, and fostering all students’ and businesses’ awareness of their obligations to respect and follow intellectual property laws.

<sup>1</sup> For more details on Brunei, see IIPA’s “History” Appendix to this filing at <http://www.iipa.com/pdf/2011SPEC301HISTORICALSUMMARY.pdf>, as well as the previous years’ country reports, at <http://www.iipa.com/countryreports.html>.

<sup>2</sup> See *World Factbook, Brunei*, at <https://www.cia.gov/library/publications/the-world-factbook/rankorder/2004rank.html?countryName=Brunei&countryCode=bx&regionCode=eas&rank=9#bx>.

<sup>3</sup> BSA’s 2010 statistics are preliminary, representing U.S. software publishers’ share of commercial value of pirated software in Brunei. They follow the methodology compiled in the Seventh Annual BSA and IDC Global Software Piracy Study (May 2010), <http://portal.bsa.org/globalpiracy2009/index.html>. These figures cover packaged PC software, including operating systems, business applications, and consumer applications such as PC gaming, personal finance, and reference software – including freeware and open source software. They do not cover software that runs on servers or mainframes, or routine device drivers and free downloadable utilities such as screen savers. The methodology used to calculate this and other piracy numbers are described in IIPA’s 2011 Special 301 submission at <http://www.iipa.com/pdf/2011spec301methodology.pdf>. BSA’s final piracy figures will be released in mid-May, and the updated US software publishers’ share of commercial value of pirated software will be available at <http://www.iipa.com>.



## PIRACY AND ENFORCEMENT UPDATES IN BRUNEI DARUSSALAM

**Retail Music Market Piracy Reemerges:** Pirate optical discs containing music are once again openly offered for sale in retail outlets. In 2009, an anti-piracy campaign involving the Royal Brunei Police Force (RBPF), Attorney General's Chambers (AGC) and the local recording industry group had successfully eradicated 90% of music piracy from the retail markets.<sup>4</sup> Unfortunately, the Brunei Government has insisted upon right holder interventions and involvement at every step of the enforcement process.<sup>5</sup> The local recording industry association conducted a new market survey in November and December 2010, and found eleven shops still openly selling pirated music discs, while three others were selling discreetly under-the-counter to regular customers without displaying the music CDs. Despite two raids by the Royal Brunei Police, the pirate retailers remain in operation and have grown stronger. For example, the biggest pirate 'emporium' known as Yajuta or w.w.w.video has since opened two more outlets selling 100% pirate music discs.

**Growing Internet and Mobile Piracy:** Brunei boasts an Internet penetration of over 85 percent as of the second quarter of 2010 (341,000 Internet users out of nearly 400,000 inhabitants in the country), according to the Bruneian Authority for the Info-Communications Technology Industry (AiTi).<sup>6</sup> As a result, the problem of Internet piracy has grown, with virtually 100% piracy of digital music used in Brunei, including infringing downloads and ringtones. As of February 2010, the estimated mobile penetration was well over 100 percent, at 430,000 mobile subscriptions.<sup>7</sup> The Brunei Government should ensure that with the development of broadband comes an increased awareness of the need to enforce rights in the online space.<sup>8</sup> To date, Brunei Internet service providers have not cooperated with right holders, in part likely due to the fact that they are quasi-government entities related to AiTi. In addition to unlicensed use by Brunei's two cellular communications companies, it is estimated that approximately 30 mobile phone retailers are providing illegal music downloads.

**Pirate Exports:** The Recording Industry of Malaysia (RIM) reports that pirates in Brunei produce discs for export, transported by road to the town of Limbang in Sarawak, Malaysia (on the island of Borneo). Thus, not only is the Bruneian market wholly controlled and operated by infringers, but it also contributes to the availability of pirated products in neighboring markets such as Malaysia.

**Government Role in Piracy:** In the past, there have been suggestions that the pirate syndicates which own and run pirate retail outlets have links or close ties with the government of Brunei, further complicating enforcement efforts. Any such issues that exist must be overcome to successfully defeat piracy in the country. In the Internet environment as well, it appears that Internet service providers believe that they are well-situated and need not cooperate with right holders. At the same time, to the extent illegal actors are willing to legitimize their business practices and go legitimate, industry supports such efforts, and the Brunei Government's position should be to require legalization of all copyright practices or face stern enforcement.

---

<sup>4</sup> The Government of Brunei, in its 2010 Special 301 Submission, highlighted this development eradicating music piracy, but did not provide much evidence for steps taken to strengthen the enforcement hand of the government, e.g., by passage of copyright amendments to add *ex officio* enforcement authority. See Brunei Darussalam, *Intellectual Property Rights in Brunei Darussalam in 2009*, February 2010, filed with regulations.gov (on file with IIPA).

<sup>5</sup> For the 2009 campaign, the local recording industry group sent legal notices to suspect shops and did evidentiary purchases and lodged police reports, making obtaining search warrants easier. However, the Government has also indicated on some occasions that without right holder presence, they cannot act. This requirement, up to and including requiring right holders to be present in the country for enforcement to ensue, has discouraged legitimate business from being in Brunei.

<sup>6</sup> AiTi, *ICT Indicators 2006-2010*, at <http://www.aiti.gov.bn/statistics.html>.

<sup>7</sup> Amir Noor, *Mobile Trump PCs in Internet Use*, The Brunei Times, February 3, 2010, at <http://www.bt.com.bn/news-national/2010/02/03/mobiles-trump-pcs-internet-use>. There were more than 400,000 mobile subscribers at the end of 2008 based on estimates provided by the two major cellular communications companies in Brunei. Lost mobile revenue to the music industry, based on an estimated 7.5% of total mobile subscribers purchasing monthly ring back tone subscriptions for 2008, was US\$700,000. The Recording Industry of Malaysia (RIM) also remains unaware of any legal site offering Malay or international repertoire for sale. A new project to provide broadband via underwater cabling will bring greater connectivity in the future. Hadi Dp Mahmud, *Wider Broadband Wireless Access Soon*, The Brunei Times (online), November 25, 2008.

<sup>8</sup> The independent film and television segment of the motion picture industry reports that generally, online piracy remains a significant export constraint for independent producers and distributors, the majority of which are small to medium sized businesses. Unable to compete with free, legitimate distributors are unable to commit to distribution agreements or offer drastically lower license fees which are inadequate to assist in financing of independent productions.

## COPYRIGHT LAW UPDATES AND RELATED ISSUES

Copyright Ordinance and Related Legislation: The Emergency Copyright Ordinance (2000), modeled on the 1988 UK Act, took effect in May 2000. The Ordinance provides some tools to combat copyright piracy, including civil and criminal remedies and the confiscation and destruction of infringing equipment and materials. The Ordinance also addresses key Internet issues, such as those in the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT), like temporary copies, a WIPO Treaties-compatible definition of “communication to the public” including an interactive “making available” right, and prohibitions against trafficking in devices which circumvent technological protection measures (TPMs), although the TPM provisions do not fully implement the WCT and WPPT requirements. However, the law does not provide authorities with *ex officio* raiding powers, and thus, Brunei remains stuck in a complaint-based system. A draft amendment would provide the Attorney General's Chambers with *ex officio* authority, which will be helpful overall in creating a more workable enforcement structure in the country. IIPA understands the legislation is stalled, however. The copyright laws should also be updated to provide, *inter alia*, statutory damages (e.g., US\$650 per infringing copy), landlord liability, heavier criminal fines (also possibly per-copy based on statutory damages), modernized provisions regarding the sufficiency of affidavits or statutory declarations in court, and presumptions of subsistence and ownership in line with international treaties and best practices.

Measures to Address Internet Piracy: Brunei's laws do not adequately address online infringement. The Electronic Transactions Order, 2000 provides a near-total exemption from civil or criminal liability for a service provider that provides infringing materials over its services. Under Section 10 of the Order, “A network service provider shall not be subject to any civil or criminal liability under any rule of law in respect of third-party material in the form of electronic records to which he merely provides access if such liability is founded on ... the infringement of any rights subsisting in or in relation to such material.” Section 10 leaves open the possibility of a contractual arrangement to take down infringing materials, or a “written law or by a court to remove, block or deny access to any material.” The Order does not create adequate incentives for service providers to cooperate with right holders in upholding their digital rights. The Order should be amended to make service providers responsible for infringements transmitted over their networks when they fail to act responsibly and should also provide mechanisms to foster cooperation, including notice and takedown, and effective and fair repeat infringer policies for non-hosted infringements.

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

## TRANS-PACIFIC PARTNERSHIP (TPP)

On December 14, 2009, United States Trade Representative Ron Kirk formally notified Congress of President Obama's intention to negotiate with Trans-Pacific Partnership countries with the objective of shaping a high-standard, broad-based regional agreement.<sup>9</sup> Negotiations are proceeding apace with an aggressive schedule and a goal toward completion in 2011. IIPA has submitted public comments to the U.S. Government's Trade Policy Staff Committee which describe in greater detail the hoped-for results of a TPP negotiation, including a high-level IP chapter, including high-level substantive copyright protection, high-level enforcement standards, provisions ensuring the free flow of electronic commerce products and services, and obligations to open markets to trade in copyright

---

<sup>9</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>.

goods and services.<sup>10</sup> In particular, enhancement of copyright standards and enforcement consistent with those agreed to by current FTA partners, Australia, Singapore, Chile and Peru, and an expansion of these protections to other countries in the region will contribute to U.S. job growth, an increase in exports, and economic recovery in line with the Administration's goals. The level of intellectual property rights protection for the TPP should be consistent and co-extensive with the FTAs between the U.S. and its current FTA partners. To demonstrate its commitment to a strong TPP, and that it is deserving of the benefits of an open U.S. market as a result of a free trade agreement with the United States, the Government of Brunei should take needed steps to ensure that it overcomes its label as a piracy haven and that it will support a strong substantive and enforcement IP chapter in the TPP.

---

<sup>10</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).

# COMMONWEALTH OF INDEPENDENT STATES

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

### 2011 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

IIPA recommends that the following five Commonwealth of Independent States (CIS) countries – Belarus, Kazakhstan, Tajikistan, Turkmenistan and Uzbekistan – should be placed on the Watch List for 2011. All but Kazakhstan were on the Watch List in 2010; Kazakhstan was not listed in 2010, and we believe should be elevated to the Watch List for 2011. All five countries are failing to comply with existing bilateral and/or multilateral treaty obligations to provide adequate and effective protection and enforcement – in each country report we specify the details of the deficiencies.

Each of the five countries, of course, have their own copyright laws, treaty accessions and ratifications, and variances in other issues. However, IIPA has combined the reports of these five countries into a single report because the overwhelming majority of issues in each country are based upon similar bilateral agreements (negotiated and signed separately) with the United States in the mid-1990s, and, they have similar legal reform and enforcement scenarios. The U.S. trade agreements conferred Normal Trade Relations (then known as “Most Favored Nation”) on each country in exchange for a series of legal reforms, 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) 2011 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: IIPA recommends that Belarus remain on the Watch List in 2011.

Priority actions requested to be taken in Belarus in 2011 – Key Legal Reforms: There are a number of serious legal deficiencies that are preventing effective enforcement in Belarus. The IIPA recommends the following changes to the Government of Belarus as legal reform priorities:

- 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.
- Amendments to the Copyright Law (1998) to fully implement the WIPO digital treaties (WIPO Copyright Treaty, WCT and the WIPO Performances and Phonograms Treaty, WPPT). Such amendments would include:
  - a) Revising the current anti-circumvention and copyright management information provisions which are not now fully compatible with the WIPO digital treaties because they do not provide “effective legal remedies” (e.g., in accordance with Article 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.
  - b) Protecting “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.
- 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\$4,020).
- Amendments to the Criminal Code (or Criminal Procedure Code) to permit the confiscation and destruction of manufacturing equipment used to produce pirated material.
- Amendments to the Criminal Procedure Code to provide the proper *ex officio* authority for police officials to initiate copyright criminal cases and investigations.
- Amendments to the Administrative Code to provide *ex officio* authority to administrative officials to commence investigations and cases. At present, a statement from a right holder 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.
- 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.
- Amendments to the Civil Code to provide the proper *ex parte* search provisions for effective enforcement against end-user pirates.

- 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 correct, the law 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.

Summary of U.S. – Belarus IPR Issues: 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. It has been nearly 18 years, and still Belarus has not adequately implemented the IPR obligations in that agreement.

In April 2010, the U.S. Trade Representative – while retaining Belarus on the Watch List – noted that the U.S. remained “concerned about Belarus’ delayed implementation of IPR commitments under the United States-Belarus Trade Relations Agreement...Amendments to the copyright law are still needed to implement obligations of the WIPO Internet Treaties. In addition, the government should take action to ensure the use of licensed software by government entities. Counterfeit and pirated goods, including pre-release films, continue to be widely available. Enforcement officials continue to lack *ex officio* authority to investigate, seize infringing goods, and prosecute IPR cases, and Belorussian law does not allow adequate scope for *ex parte* searches. Reports indicate that IPR enforcement remains largely non-existent...The United States continues to urge Belarus to strengthen its IPR laws and to take enforcement actions against piracy and counterfeiting.”

Belarus is a member of all of the relevant IPR treaties, including the Berne Convention (1997), the WCT (2002), the WPPT (2002), and the Geneva Phonograms Convention (2003). It was not until 2002 that Belarus joined any neighboring rights treaty – joining both the Geneva Phonograms and the WPPT that year. However, the delay of many decades (Geneva was put into force in 1971), allowed a large back-catalog of unprotected sound recordings to flourish in the marketplace, making enforcement that much more difficult, even today. In addition, Belarus has not fully implemented the digital treaties, nor adopted basic digital piracy enforcement steps, such as “notice and takedown” procedures.

In the past, IIPA and USTR reported on the troubling problem of optical media production facilities migrating into (and out of) Belarus from neighboring countries; in the past two years, we have had no reports of such cases.

IIPA continues to urge the Government of Belarus to improve its border enforcement – to prevent any optical disc or other hard-copy production plant 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 Vigmplast optical disc replication plant is operating near Minsk; it has two lines and an estimated plant capacity of seven 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. As noted above, there are nine IIPA priority legal reforms that we recommend.

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, including steps against digital piracy, and against hard copy piracy – 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 2010. In recent years, the industries reported a trend of raids by the enforcement agencies (a positive step), but these raids were aimed only at small-scale retailers of illegal material. Raids against small-scale retailers have little deterrent effect on the overall piracy problem. Furthermore, the administrative fines imposed, even against these retailers, have generally been insignificant.

# KAZAKHSTAN

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2011 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: IIPA recommends that Kazakhstan be placed on the Watch List in 2011.

Priority actions requested to be taken in Kazakhstan in 2011 – Key Legal Reforms: There are several needed legal reforms – all tied to improving enforcement – that remain in Kazakhstan. IIPA recommends that the Government of Kazakhstan should adopt the following changes:

- In the Civil Code: provide proper *ex parte* search provisions for effective enforcement against end-user pirates.
- 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 rights holders to works and sound recordings.
- In the Customs Code: provide *ex officio* authority for customs officials to seize illegal material and to commence their own investigations and criminal cases.
- 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.
- In the Administrative Code: provide *ex officio* authority for administrative officials 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.
- Adopt a proper regulatory scheme, including criminal penalties, for the production and distribution of optical disc material and equipment.
- Summary of U.S. – Kazakhstan IPR Issues: 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 – in the past several years. As noted above, 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 (but were not acted on in 2010) to the Copyright Law, as well as revisions to the Customs Code (to provide *ex officio* authority). These, and other IPR issues on legal reforms and enforcement of IPR, have been discussed in the past several years with the U.S. Government in bilateral talks with Kazakh officials as part of World Trade Organization (WTO) accession.

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.

**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. The 2004 amendments took over 10 years to adopt, which, in the interim flooded the market with (now illegal) back-catalog material. 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.

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 for its consideration as it moves toward WTO accession reforms. 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 2011.

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 against hard-copy piracy. 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.

Enforcement: The Government of Kazakhstan has made strides to improve its enforcement regime, with its noted legislative reforms and with ongoing police activities. However, for the past three years, there has been 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 2010 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 2010 figures), that the piracy rate for business software in Kazakhstan was 76% and the commercial value of pirated software was \$49.1 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 \$61 million in 2010 (and additionally, \$48 million in 2009). 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)

### 2011 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: IIPA recommends that Tajikistan remain on the Watch List in 2011.

Priority actions requested to be taken in Tajikistan in 2011 – Key Legal Reforms: There are a number of serious legal deficiencies in Tajikistan that make the IPR regime in Tajikistan inconsistent with international obligations, including the WIPO digital treaties. IIPA recommends the following legal reforms to improve the IPR regime in Tajikistan:

- Adherence to the Geneva Phonograms Convention (or, in lieu, the WIPO Performances and Phonograms Treaty - WPPT).
- Amending the Copyright Law to: (a) comply with the WIPO Copyright Treaty (WCT) and the WPPT – including basic protections for copyrighted materials on the Internet – 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); protection for the use of technical protection measures applied by rights holders to works and sound recordings; effective legal remedies against those who engage in acts of circumvention or distribute circumvention devices; (b) provide protection for pre-existing works and sound recordings for a minimum of 50 years (and preferably, 70 years); and (c) delete the onerous contract regulations.
- Amending the Civil Code to provide the proper *ex parte* search provisions for effective enforcement against end-user pirates.
- Amending the Criminal Code to cover all IPR violations of “works” and “neighboring rights.”
- 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.
- Amending the Criminal Code to set the penalties for IPR violations to deterrent levels (for example, to 500 times the minimum wage).
- Amending the Criminal Code (or Criminal Procedure Code) to permit the confiscation and destruction of manufacturing equipment used to produce pirated material.
- Amending the Criminal Procedure Code to provide the proper *ex officio* authority for police officials to initiate copyright criminal cases and investigations.
- Amending the Administrative Code to provide *ex officio* authority to administrative officials to commence investigations and cases.
- 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.

Summary of U.S. – Tajikistan IPR Issues: 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 2010, the U.S. Trade Representative – in retaining Tajikistan on the Watch List – noted that Tajikistan “has yet to fully implement its IPR commitments under the 1993 U.S.-Tajikistan Trade Agreement. Tajikistan made progress in 2009 by acceding to the WIPO Copyright Treaty and by amending its Administrative Code in an effort to implement Article 18 of the Berne Convention to provide protection for certain preexisting works. The United States encourages the Ministry of Culture to continue working towards accession to the WPPT in 2010. Tajikistan does not provide protection for U.S. and other foreign sound recordings, and concerns remain over the lack of proper *ex officio* authority for criminal and border enforcement, and over insufficient criminal penalties for IPR infringement.” 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 18 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 WPPT. Instead, on May 19, 2008, Tajikistan joined the Rome Convention. 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, noted above, 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.

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 right holder to file a statement and set of documents for border enforcement. These regulations are cumbersome and an ineffective tool that IIPA recommends should be repealed.

There has not been a single criminal IPR case reported under the existing laws. Nor has there been a single case reported under the Administrative Code. The Administrative Code, last revised in 1999 (Article 158-2), provides levies, fines, and seizure of illegal copyright and neighboring rights material. The copyright industries have no reports concerning enforcement activity in Tajikistan.

On December 10, 2002, the U.S. and Tajik Presidents signed a joint statement reaffirming the relationship between the two countries and “recognizing the importance of . . . the rule of law” as well as pledging to work together on economic and political reforms. IIPA recommends that the Government of Tajikistan affirm this statement by meeting its obligations and amending its relevant IPR laws and engaging in effective enforcement. The U.S. Government and Tajik Government signed a Trade and Investment Framework Agreement (TIFA) on June 1, 2004 to enhance trade and investment between the two countries, and have since held talks in the context of the TIFA, to further improve trade relations.

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) 2011 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: IIPA recommends that Turkmenistan remain on the Watch List in 2011.

Priority actions requested to be taken in Turkmenistan in 2011 – Key Legal Reforms: The basic copyright and related laws, enforcement provisions, and treaty accessions for a modern IPR regime are absent in Turkmenistan. As a result, the IIPA recommends the following IPR legal reforms in Turkmenistan:

- Adherence to the Berne Convention.
- Adherence to Geneva Phonograms Convention.
- Adherence to the WIPO digital treaties – the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT).
- 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 works in the digital era – such as the use of technical protection measures applied by rights holders to works and sound recordings. The law should also protect pre-existing works and sound recordings for a minimum of 50 years (and preferably, 70 years). 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.
- Amending the Civil Code to provide the proper *ex parte* search provisions for effective enforcement against end-user infringers.
- Amending the Criminal Code to raise the penalties for IPR violations to deterrent levels (for example, to 500 times the minimum wage).
- 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 provide any effective enforcement.
- Amending the Criminal Code (or Criminal Procedure Code) to permit the confiscation and destruction of manufacturing equipment used to produce pirated material.
- Amending the Criminal Procedures Code to provide the proper *ex officio* authority for police officials to initiate copyright criminal cases and investigations.
- Amending the Administrative Code to provide *ex officio* authority to administrative officials to commence investigations and cases.
- 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.



Summary of U.S. – Turkmenistan IPR Issues: 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. Eighteen years later, Turkmenistan has not implemented the IPR obligations in that agreement.

In April 2010, the U.S. Trade Representative – in retaining Turkmenistan on the Watch List – noted “Turkmenistan has yet to implement the IPR provisions of the 1993 U.S.-Turkmenistan Trade Agreement (Bilateral Trade Agreement). Turkmenistan has not joined the treaties identified in the Bilateral Trade Agreement, including the Berne Convention, Geneva Phonograms Convention, and the WIPO Internet Treaties. The Civil and Criminal Codes provide some degree of protection against IPR infringement; however, Turkmenistan still must adopt explicit and comprehensive administrative and civil procedures and criminal penalties for IPR infringement. Turkmenistan has not adopted a separate copyright law and does not provide protection for foreign sound recordings and preexisting works. IPR enforcement is inadequate in part because Customs officials do not have *ex officio* authority to interdict suspected infringing material at the border. The United States urges Turkmenistan to adopt the necessary legal reforms to implement its obligations under the Bilateral Trade Agreement, and to improve its IPR regime.” Turkmen officials participating at a U.S. Patent and Trademark Office (GIPA) program in December 2009, said that Turkmenistan planned to join the Berne Convention and the Geneva Phonograms Convention in 2010, but alas, it did not meet that goal.

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 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 and have subsequently held talks in the context of the TIFA, to further improve trade relations.

# UZBEKISTAN

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2011 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: IIPA recommends that Uzbekistan remain on the Watch List in 2011.

Priority actions requested to be taken in Uzbekistan in 2011 – Key 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:

- Revoking 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 for pre-existing works compliant with Berne and the U.S. bilateral agreement.
- Adherence to the Geneva Phonograms Convention.
- Adherence to the WIPO digital treaties – the WIPO Copyright Treaty (“WCT”) and the WIPO Performances and Phonograms Treaty (“WPPT”).
- Correcting deficiencies (and some uncertainties) in the Copyright Law of 2006, including:
  - i. Providing protection for pre-existing works and sound recordings for a minimum of 50 years (and preferably, 70 years).
  - 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. Clarifying the scope and application of the rental right for audiovisual works and computer programs (Article 21).
  - iv. Complying with the digital treaties (WCT and WPPT) – by improving 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.
- Amending the Civil Code to provide the proper *ex parte* search provisions for effective enforcement against end-user pirates.
- Amending the Criminal Code to include “neighboring rights” violations (the current code only applies to infringements of “works”).
- Amending the Criminal Code to raise the penalties for IPR violations to deterrent levels (for example, to 500 times the minimum wage).

- 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.
- Amending the Criminal Code (or Criminal Procedure Code) to permit the confiscation and destruction of manufacturing equipment used to produce pirated material.
- Amending the Criminal Procedures Code to provide the proper *ex officio* authority for police officials to initiate copyright criminal cases and investigations.
- Amending the Administrative Code to provide *ex officio* authority to administrative officials to commence investigations and cases.
- 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.

Summary of U.S. – Uzbekistan IPR Issues: 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 seventeen years after the 1994 Trade Agreement, some of the most basic protections continue to be denied right holders 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 that Convention and the 1994 Trade Agreement).

In April 2010, 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. Uzbekistan’s copyright law does not provide protection for preexisting works for U.S. and other foreign sound recordings. Uzbekistan has not joined the Geneva Phonograms Convention. Enforcement remains weak and criminal penalties for IPR violations are not sufficient to provide a deterrent effect. Additionally, amendments are needed to provide enforcement officials, including Customs officials, with *ex officio* authority to initiate enforcement actions and investigations. The United States will continue to work with Uzbekistan through its WTO accession process and the ongoing review under the U.S. Generalized System of Preferences program.” As a result of its ongoing failures to improve its IPR regime, 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

---

<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 official English translations of these laws/regulations).

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 Four of the law). The Copyright Law could have benefited from more input by copyright rightholders, and as a result, is either missing key provisions (protection for pre-existing works and sound recordings), or has several unclear or incomplete protections, such as, those pertaining to technical protection measures).

In 2005, Uzbekistan adhered to the Berne Convention (effective April 19, 2005). Unfortunately, Uzbekistan made a reservation to its accession regarding Article 18 that denies protection for pre-existing works from the United States and all other Berne countries. This reservation, as noted by WIPO and other copyright experts to the Government of Uzbekistan, is in contravention to the Article 18 obligations of Berne (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 five 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 above – with some additional detail.

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, one draft (2004) 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: 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 have since held talks, in the context of the TIFA, to further improve trade relations.

In 2010, Uzbekistan benefited from \$2.1 million worth of GSP benefits (compared with \$414,000 for all of 2009). 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 have been reports of some actions against retail shops that sell pirated product, which if true, are a positive step.

The IFPI reports there are no known optical media plants in Uzbekistan.

# EGYPT

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2011 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: Given the recent political developments on the ground in Egypt, and the evolving nature of current events, we recommend that USTR defer any Special 301 decision with respect to copyright or market access until the situation stabilizes.

For details on Egypt's Special 301 history, see IIPA's "History" Appendix to this filing at [http://www.iipa.com/pdf/2011SPEC301HISTORICAL\\_SUMMARY.pdf](http://www.iipa.com/pdf/2011SPEC301HISTORICAL_SUMMARY.pdf), as well as the previous years' country reports, at <http://www.iipa.com/countryreports.html>.



# GREECE

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2011 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: IIPA recommends that Greece remain on the Watch List in 2011.

**Executive Summary:** The level of copyright piracy in Greece remained high in 2010 and has gone nearly unnoticed under the present Administration, which has still neglected to implement the comprehensive intellectual property rights (IPR) action plan that was proposed in February 2009. IIPA is concerned that, as the adverse economic effects of government austerity measures take hold in the country, already-high levels of piracy in Greece will increase.

The copyright industries have concerns about the effect that public-sector cuts may have on legal acquisition and use of software by government agencies. Regarding software piracy by businesses, efforts by the Authority for the Prosecution of Financial Crimes (SDOE) – formerly the tax police (YPEE) – to issue software audit letters to small- and medium-sized companies did not improve in 2010. This follows a drastic decline in its efforts over the past several years. The unauthorized photocopying of books and journals continues to occur on and near university campuses. Physical piracy of many copyrighted products remains a problem in the cities and on the streets, although the level of street piracy is declining as Internet piracy takes hold of the Greek market. Discussions between the content industry and Internet Service Providers (ISPs) have been unsuccessful and need stronger political engagement by the government. The Greek government did take important enforcement steps in 2010, including shutting down the BitTorrent tracker site Gamato.info; however, attempts to combat illegal peer-to-peer (P2P) file-sharing are frustrated by data protection laws that impede investigations and litigation against infringers. Despite good cooperation with the police on physical piracy raids, the overall enforcement system in Greece fails to tackle the endemic piracy problems. The municipal police cannot 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 often receive suspended sentences. The copyright industries worked with the Greek Copyright Office to develop proposed amendments to the Copyright Law that have not moved forward since 2009. Some promising legal reforms were adopted in 2007 but are still not fully in force. High level leadership is needed to push through proper legislation and effective judicial action to address the physical and digital piracy that has plagued Greece for years.

### PRIORITY RECOMMENDED ACTIONS FOR GREECE IN 2011<sup>1</sup>

- Establish a national campaign for 2011 to involve rights holders, increase raids and prosecutions, allow cooperation from the Immigration and Municipal police in anti-piracy cases, encourage criminal non-suspended sentencing, and conduct public awareness and training.
- Initiate greater involvement by SDOE in anti-piracy actions affecting all copyright sectors, expanding on the work they are doing in the software sector.
- Take action against copy shops making illegal photocopies of books around university campuses, 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 instruct courts to issue deterrent sentences without suspension, including imprisonment and fines as provided by the law.

---

<sup>1</sup>For more details on Greece's Special 301 history, see IIPA's "History" appendix to this filing, at <http://www.iipa.com/pdf/2011SPECIAL301HISTORICALSUMMARY.pdf>, as well as the previous years' reports, at <http://www.iipa.com/countryreports.html>. To read IIPA's cover letter to this Special 301 submission, go to <http://www.iipa.com/pdf/2011SPECIAL301COVERLETTER.pdf>.



- Direct specialized IPR courts to focus on IPR cases and expand their jurisdiction to criminal copyright cases.
- Legislate to provide Municipal Police the authority to arrest and prosecute street vendors for IPR crimes.
- Circulate the government's proposal to amend the Copyright Law, which should, at the very least, provide the same level of protection for technological protection measures (TPMs) utilized in software that is currently afforded to other classes of works.
- Consistent with the 2008 European Court of Justice (ECJ) *Telefonica* decision, amend data protection laws to allow disclosure of the identification of infringers and other necessary information for rights holders to protect their rights in court.

## COPYRIGHT PIRACY IN GREECE

Hard goods piracy remains entrenched in cities throughout the country, and presents a formidable enforcement challenge, despite many raids and good cooperation between enforcement authorities and rights holders. Scattered distribution channels are sourced mainly by small laboratories hidden in residential apartments. Meanwhile, Internet piracy experienced a set-back in 2010 following several successful and highly publicized raids and arrests. With the growth of broadband connections, Internet piracy remains a threat especially in the audiovisual and sound recording sectors. Even after the popular torrent site Gamato.info was shut down in March 2010, a small number of local illegal websites remain. 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 in availability of pirated material over the Internet. Slow but steady improvement in reducing the PC software piracy rate in Greece reversed in 2009 and began to creep back up. Preliminary data indicate that trend continued in 2010, with the piracy rate increasing by one percentage point to 59%.<sup>2</sup> The improvement experienced in the last decade can be attributed largely to the work of YPEE (now SDOE) in sending software audit letters to small- and medium-sized businesses. Recent increases, conversely, are likely due to the lack of action taken by SDOE in 2009 and the first half of 2010, combined with the economic crisis facing the country. Within the EU, Greece has the third highest piracy rate (behind Bulgaria and Romania). It is imperative that SDOE ramp up its efforts at least to pre-2009 levels, and to follow up audit letters with 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 substantially improved. Clearly, there is a network of illegal immigrants operating at all levels from manufacturing to retail distribution of pirate music products, and this accounts for over 95% of the pirate physical market. Piracy of sound recordings and music in Greece represents around 70% for both international and local repertoire. To be clear, the legitimate market for physical copies of recorded music remains in disarray.

---

<sup>2</sup>BSA's 2010 statistics are preliminary, representing U.S. software publishers' share of commercial value of pirated software in Greece. They follow the methodology compiled in the Seventh Annual BSA and IDC Global Software Piracy Study (May 2010), <http://portal.bsa.org/globalpiracy2009/index.html>. These figures cover packaged PC software, including operating systems, business applications, and consumer applications such as PC gaming, personal finance, and reference software – including freeware and open source software. They do not cover software that runs on servers or mainframes, or routine device drivers and free downloadable utilities such as screen savers. The methodology used to calculate this and other piracy numbers are described in IIPA's 2011 Special 301 submission at [www.iipa.com/pdf/2011spec301methodology.pdf](http://www.iipa.com/pdf/2011spec301methodology.pdf). BSA's final piracy figures will be released in mid-May, and the updated US software publishers' share of commercial value of pirated software will be available at [www.iipa.com](http://www.iipa.com).

<sup>3</sup>According to a 2010 report issued by BSA-IDC, the information technology sector's contribution to the Greek economy could be even bigger if Greece's software piracy rate were to be lowered 10 percentage points over the next four years. This would create an additional 1,313 high-tech jobs, \$512 million in new economic activity, and \$157 million in new taxes by 2013, with 68% percent of those benefits expected to remain in the local economy. In addition, the study finds that the benefits are compounded by reducing software theft at a faster rate: If Greece were to reduce piracy by 10 points over the next two years instead of four, it would boost the economic activity and tax gains by 35 and 36 percent respectively. See *The Economic Benefits of Reducing Software Piracy In Greece*, released September 15, 2010, and is available online at <http://www.bsa.org/idcstudy>.



However, Internet-based piracy is rapidly growing, particularly in the form of cyber-lockers containing, and forums referring to, infringing content. This is a primary area in which industry action requires government support, not least in ensuring ISP cooperation.

The legitimate audiovisual market has shrunk considerably in Greece. More than 2,000 video stores have closed in the last two years, and thousands of jobs in the audiovisual sector have been lost. Local representatives of the Motion Picture Association (MPA) report that the Internet is the major source of illegal content for optical disc manufacturers, 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.

The independent sector of the film and television industry (IFTA) reports that Internet-based and physical piracy of DVDs remains a significant export constraint for independent producers and distributors, the majority of which are small- to medium-sized businesses. Independent producers partner with local authorized distributors to finance and distribute film and television programming. These authorized distributors find it nearly impossible to compete with pirates. Producers and distributors confirm that DVD sales have been particularly impacted since pirated digital copies are offered for free online and with a similar quality viewing experience as a DVD can provide. Unable to compete with free, legitimate distributors are often cannot to commit to distribution agreements or offer drastically reduced license fees which are inadequate to assist in financing of independent productions. Piracy undermines and may permanently damage legitimate distribution networks essential to reaching consumers and leaves little confidence for investment in intellectual property.

Illegal commercial-scale photocopying of academic textbooks continues in Greece, causing significant damage to higher education textbook publishers.<sup>4</sup> Photocopy shops near university and college campuses continue to process orders for entire classes of students, and produce, quite unimpeded, cover to cover, bound unauthorized copies for distribution to students. Major universities all over Greece are affected, although unauthorized copying activity occurs more often at private colleges.

Internet piracy: As the Greek population is increasingly connected to an Internet marketplace with unfettered access to pirated material, rights holders struggle to market legitimate digital content. The scope and depth of Internet piracy in Greece began to soar in 2008 as Internet accessibility outpaced government enforcement online. There are now nearly 5 million Internet users in Greece, representing about 46% of the population (according to [www.internetworldstats.com](http://www.internetworldstats.com)). Among these, 2.15 million had broadband connections by the end of September 2010, an increase of nearly 20% over the previous year, according to EETT (the Greek National Regulating Authority for Telecommunications). Peer-to-peer (P2P) file-sharing of infringing content, and cyber-lockers containing pirated material (with relevant links offered through forums), have become very popular. Download sites are also a growing problem, and some illegal sites hosted in Russia (such as [music-bazaar.com](http://music-bazaar.com) and [legalsounds.com](http://legalsounds.com)) remain frequently visited by Greek users. These trends continue, despite the March 2010 shut-down of the BitTorrent tracker site Gamato.info, a facilitator of large-scale piracy of music, film, games, and books. The site was estimated to be the 13th most popular website in Greece before its closure. 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.

During 2010, ESA vendors detected 1.95 million connections by peers participating in unauthorized file sharing of select member titles on P2P networks through ISPs located in Greece, placing Greece sixteenth in overall volume of detections in the world, and sixth in detections per capita and per Internet user.<sup>5</sup> Breakdowns by ISP show

---

<sup>4</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>5</sup>These figures do not account for downloads that occur directly from hosted content, such as infringing games found on "one-click" hosting sites, which appear to account each year for progressively greater volumes of infringing downloads.

that OTEnet S.A., FORTHnet SA, Tellas S.A. and Hellas On Line S.A. subscribers account for approximately 83% of this activity occurring in Greece.

Internet-based piracy prevents the establishment of legitimate online distribution platforms and services for consumers, which independent film producers may use to finance future productions. For independent producers who license content country-by-country, online piracy exports troubled marketplaces and high piracy rates to other markets instantly. The independent production sector is limited in its ability to shift to technology-enabled new business practices that might limit piracy. For example, worldwide same day releases (referred to as a “day-and-date” release) may prove an effective method to curb or delay piracy for the major studios, which control their own worldwide distribution, but for independents, whose national distributors release on their own schedule, this technique is impossible.

## COPYRIGHT ENFORCEMENT IN GREECE

Establishing copyright protection and enforcement as a priority for the government of Greece is imperative. The copyright industries report that their working relationships with the Greek police in 2010 continued to be good. For example, Greek police forces drew public attention to anti-piracy efforts in an important shut-down of the BitTorrent site Gamato.info in March 2010. After raids in four different cities, acting in coordination with local film and sound recording representatives, the activity led to the arrest of six individuals. However, industry relationships with the tax police (SDOE) were strained through the first half of 2010 due to SDOE’s inactivity against piracy. Fortunately, matters improved during the second half of 2010, when new leadership of SDOE’s directorates showed greater willingness to work with the copyright industries to combat piracy. Overall, the principal challenges for copyright enforcement in Greece remain unchanged: prosecutors must place greater priority on copyright crimes, courts need to facilitate speedier cases with deterrent sentences, and government leaders need to establish the tools for ISPs and rights holders to cooperate against Internet piracy.

**Comprehensive Action Plan on the Protection of Intellectual Property Rights:** The government of Greece needs to focus high level attention on the many copyright enforcement challenges rights holders face. Several years ago, the Ministry of Foreign Affairs led the formation of an Interministerial Steering Committee to ensure more efficient coordination of all intellectual property initiatives for the prevention of piracy and counterfeiting. 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.

In February 2009, the Coordination Committee issued a 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. Unfortunately, the Interministerial Committee took no action on the plan. In fact, the Committee has not met since the replacement of the government in October 2009, and it has not issued the required annual reports. It has also failed to respond to meeting requests by right holder organizations. The OPI (Hellenic Copyright Organization) in the past has organized or attended seminars but has not been at all effective in pressing the relevant ministries to enforce and enact effective legislation. The copyright industries urged the Committee at the time it was formed to take several important actions, which remain outstanding: to coordinate enforcement efforts at an operational level, including the effective implementation of the administrative fine regulation and the ministerial decree on street vendors; to adopt procedures for ISPs to deal effectively with repeat infringers; and to develop and fund public awareness and education efforts, all working with industry.

Significant drop in actions by the tax police on business software cases: Until 2009, BSA reported continued good cooperation and communication with YPEE and its successor organization, SDOE. For example, SDOE 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 tax controls, and (c) imposing an administrative penalty when illegal copies of software were found. These software anti-piracy administrative efforts by SDOE all but stopped for most of 2010, and BSA's relationship with SDOE worsened. Lack of transparency has also been an issue, since SDOE does not release enforcement metrics, BSA does report that SDOE issued two waves of software audit letters to small- and medium-sized businesses in the second half of 2010, though few responded to them. SDOE should be obliged to perform specific numbers of audits per year and to publicize all the results online and in the media. BSA also urges that SDOE publish monthly statistics on the number of such raids and the resulting administrative fines imposed. BSA would like to see a more systematic follow-up of warning letters and more raids against non-responsive companies. The Greek Government should publicly commit to fight software piracy, an action that would increase public awareness regarding the risks of using illegal unlicensed software and codify the government's commitment to protect intellectual property.

New Financial and Cyber Crime Division and Special IPR department: A positive development in IPR protection during 2010 was the adoption of the new Greek Tax Law 3842/2010 (Article 88) which established the Special IP Protection Department of the Directorate of Special Cases of SDOE, specializing in the protection of IPR and combating counterfeit products. In addition, in 2011 a new Department of Cyber Crime Unit within the Ministry of Citizen Protection (former Ministry of Public Order) is slated to be established, which will be independent from SDOE and manned with officers specialized on IPR issues.

Need to implement administrative fines in software and sound recording piracy cases: Enforcement authorities have not yet implemented the innovative law amendment adopted in January 2007 that introduced administrative fines for software infringements. The national police and tax police (SDOE) 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 audit letters sent by the tax police. Proper implementation, as industry has proposed, would: (a) apply a more effective deterrent of administrative fines to be paid before legal proceedings, (b) expand the scope of the regulation to include DVDs, (c) establish authority to inspect establishments (café, restaurants, etc) where there may be illegal reproduction of phonograms for public performance, (d) include the checking of companies' software compliance in SDOE's daily controls and posting the statistics of the results and the total amounts of the imposed administrative fines online.

Suspects caught with infringing music and software simply refuse to pay fines for pirated CDs, preferring to face a full trial where judges are known to issue light penalties that are often suspended (despite the available fines of €1,000–10,000 (US\$1,335–\$13,350), depending on the quantities seized). The Ministry of Culture ignored suggestions of the recording industry and the local collecting society for music rights (AEPI) in issuing a directive on procedural details, resulting in a new law that is so vague and full of gaps that the police are reluctant to proceed on the basis of the administrative fine procedures. The only new fine legislated is regarding the use of phonograms in cafes and restaurants that are copied/stored in hard drives without permission. IFPI is pressing SDOE to initiate inspections in such enterprises.

Civil infringement actions on business software: BSA has no major issues to report regarding civil litigation during 2010. Search orders are normally granted without major difficulties and parties typically settle the cases out of court. BSA reports the following civil action results against end-users in 2010: Seven civil raids executed, 53 warning letters sent, 12 follow up letters sent, one civil action heard and three settlements completed. BSA has not filed any civil lawsuits seeking damages, only applications for injunctions.

Criminal actions (raids): Although the copyright industries report good cooperation with law enforcement authorities in Greece, judicial inability to follow through with speedy prosecutions and deterrent sentences is a major obstacle to progress against piracy in Greece.

The motion picture industry reports positive anti-piracy activity on the part of Greek police, but notes that the related court procedures face expected delays. Authorities raided 70 sites in 2010, largely against video clubs and small scale laboratories and distributors of pirate DVD-Rs. In the same year, the number of seized optical discs increased from 61,199 in 2009 to 95,000. As a result of those raids, authorities confiscated 369 pieces of duplication equipment, including DVD-Recorders and hard discs, and closed down eleven sites, arresting the administrators on felony charges. Unfortunately, it is estimated that court hearings on those charges will not be scheduled for two to three years. The valuable support of the Greek Cyber-Crime Unit of Thessaloniki can be credited for the fact that the bulk of the Internet cases and arrests took place in North Greece. In another positive development in early 2010, the electronic crime squad in Athens and Thessaloniki arrested ten individuals engaged in pay television fraud across the country, on charges of violating intellectual property and subscriber television services legislation.

The recording industry reports that its work and relationship with police authorities, especially in Athens, remained very good in 2010, leading to 768 cases in 2010. Greek police and customs authorities continue to take *ex officio* actions. Criminal actions in 2010 were up 9% in comparison to 2009. There has been a slight increase in the number of raids (768 in 2010, 702 in 2009) where IFPI Greece has participated, with smaller amounts of confiscated products (453,179 discs in 2010 compared to 505,806 discs in 2009) and lower statistics in “quality” targets such as optical disc burning labs and distribution centers (290,049 discs in 36 raids in 2010, compared to 322,706 discs in 34 raids in 2009).

The authorities should take more serious note of the problem of illegal commercial-scale photocopying of academic textbooks in Greece. Efforts are needed to begin to address the large scale, commercial, unauthorized photocopying in which copy shops are engaged through effective enforcement. 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. Thus, it becomes incumbent upon university and college administrators to implement policies that promote the use of legitimate materials on campus, and to ensure that their faculty and students are acting accordingly. Last year, several publishers dialogued with the University administrators of some of the country's largest educational institutions, encouraging the administrators to educate their students about appropriate use of books and journals, and noting that the use of unauthorized photocopies of textbooks on campus would not be tolerated. The enforcement problems are only exacerbated by the difficulty of gathering evidence of infringement due to the increasing “print to order” nature of the copy shops. Where an enforcement action actually progresses to a case, the delays endemic to the system inevitably derail any hoped for deterrent effect. For example, a case initiated by publishers still remains pending, four years after the 2007 raid from which the case arose. There have been numerous postponements, with the case not even being heard on the scheduled date, and given that hearings are scheduled some 7-8 months apart, whatever deterrence may have achieved by the imposition of appropriate penalties is perhaps long past.

Challenges in the courts—long delays, non-deterrent sentences: The Greek judicial system remains a major hindrance to effective IPR enforcement. Delays and non-deterrent sentences remain at the same level. The specialized IP courts in Athens and Piraeus only deal with civil and not criminal cases, and therefore are ineffectual against piracy. Greek prosecutors, especially at the local level, have largely ignored Supreme Court circulars directing them to prioritize IPR cases. Although this appears slowly to be changing in major Greek cities such as Athens, Thessaloniki, and Patras, more improvement is needed. Apart from the First Instance Court of Athens (which hears cases and renders judgments fairly quickly), when copyright cases do receive prosecutorial attention in Greece, they face inordinate delays and time consuming procedures. Courts disregard measures requiring defendants to appear for hearings, and as a result most felony defendants are not present before the Court of First Instance or the Court of Appeals. Judges vary in practice from region to region, and often lack adequate knowledge for sophisticated IPR issues.

Most copyright cases in Greek courts result in suspended sentences. Judges often defy sentencing guidelines and insist on leniency for first offenders, suspending penalties and eliminating fines. A one-year imprisonment sentence by law may be reduced to three to four months and suspended for three years, and the €3000 fine (US\$3,860) is simply stricken entirely. Meanwhile, some First Instance Courts (especially in Athens, Piraeus, and Thessaloniki) now follow the law with non-suspendable sentences or fines, but defendants may launch an appeal at which point the Appeals Court often annuls the fines. Often, 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 these and in felony courts, when the case reaches hearing after two to three years' time, if the defendant cannot be located, the result is equivalent to an acquittal. The situation could be improved if the Immigration Service and the Municipal Police could be directed to assist with court appearances in anti-piracy actions.

Special IP Courts: Specialized IP civil courts have been established in Athens, Piraeus and Thessaloniki. The copyright industries will continue efforts to expand such courts to the city of Patras, to encourage their judges to be relieved of other (non-copyright) duties, and to expand the scope of these courts to criminal copyright cases.

Actions against Internet piracy: The most serious obstacle rights holders face in pursuing online infringers is the inability to work with ISPs to identify the perpetrators of illegal activity. Greek ISPs do cooperate with rights holders in cases involving websites hosting infringing material, but these cases are few. In the more prevalent file-sharing environment, ISPs refer to data protection legislation and the possibility of government sanctions to avoid cooperation. As a result, Internet investigations in Greece can go so far as identifying an infringing IP address but cannot uncover an infringer's name or physical address without a court or prosecutorial order. 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 even felony copyright infringement.

Negotiations between copyright rights holders and ISPs went forward for more than two years under the auspices of the Hellenic Copyright Office (OPI), whose aim was for ISPs to adopt voluntary measures to decrease Internet piracy. The Ministry of Justice further promised to support the inclusion of felony copyright infringement as grounds in the data protection law for disclosure of personal data. Unfortunately, the negotiations came to no result and the data protection provisions remain unchanged. All the promises by the various Ministries proved to be empty, and rights holders have found no genuine intention on the part of the State to address piracy concerns.

## COPYRIGHT LAW REFORM AND RELATED ISSUES

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. The copyright industries have offered a variety of legislative and administrative solutions to address difficulties and gaps in measures necessary to strengthen copyright enforcement. Some of these have been implemented, and others are still under development.

Possible reform of the Copyright Act: A Legislative Committee in the Hellenic Copyright Office (OPI) under the Ministry of Culture completed work to propose further reforms to the Greek Copyright Act at the end of 2008, but those plans appear to have broken down. During that process, the copyright sectors offered various proposals that would, among other things: strengthen court-imposed fines and sentences against suspension or non-payment, establish specialized police units, and encourage ISP coordination on copyright infringement matters. However, the Committee was unable to release its work for public review before the change in government took place in 2009. It is unclear whether this effort will move forward, but any future consultation process should 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 2010. 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.

Civil procedure law reform on search orders: In 2009, a problematic 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 issuance of the order, a provision that would limit greatly the effectiveness of such orders. This legislation remains pending and there is no estimate as to when it might pass.

Problems with obtaining access to personal data from ISPs: As discussed in the enforcement passages 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 (2225/1994), which lays down the principles applying to the disclosure of personal data of violators using telecommunication systems. The Ministry of Culture is staunchly opposed to supporting such an amendment and has referred the question to the Ministry of Justice, where rights holders have little optimism for progress. The ex-Minister of Justice had promised to reform the law to address felony copyright infringement, and the bill was forwarded by the Hellenic Copyright Office (OPI) to the Ministry of Justice, but was put on hold in late 2008. The copyright sectors are seeking reforms here similar to those reforms they are seeking in discussions with OPI on the Copyright Act.

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) *Promusicae vs. Telefonica* 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 suggesting that measures should be taken so as not to turn the Internet to a criminal haven, where violators exploit legislation on personal data protection that was designed for the protection of personal rights. When Internet crimes are involved, the prosecutors believe, there can be disclosure of personal data. However, such statements from the chief prosecutor do not bear the strength of law and, while they are binding on prosecutors, may not be adopted by courts. It remains imperative that the government enact relevant legislation supporting this critical component of an effective campaign against Internet piracy. In the interim, the recording industry has filed preliminary measures against ISPs regarding specific infringing website activity, and expects a hearing in mid-2011.

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 make arrests, insist on 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. Greek Law 3731/2008 provides the general provisions of jurisdiction of the Municipal Police, but the law does not explicitly provide for the arrest and prosecution of street vendors for IP infringements. Reports also suggest that amendments have been proposed to this Decree that would simplify the procedure for the seizure and destruction of pirate products. 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. In recent years, the Athens School of Judges and Prosecutors introduced an intellectual property course, and OPI organized seminars among the legal departments of the IPR organizations. However, more IPR training and education for police, prosecutors, judges, and customs officials is urgently needed. With respect to trainings for SDOE, there were no relevant seminars in 2010, but BSA is planning to offer seminars on detection of illegal software to the officers of the new Special IP Protection Department of SDOE in 2011.

# ISRAEL

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2011 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: Israel should be on the Watch List.<sup>1</sup>

Executive Summary: Israel, which on September 7, 2010, became the 33<sup>rd</sup> member of the Organization of Economic Co-operation and Development (OECD),<sup>2</sup> and whose economic power matches that of the likes of South Korea and the European Union in terms of per capita GDP, has lagged behind in terms of protecting creative output of Israelis and foreign creators. Stark examples are easy to find – the Israel Export & International Cooperation Institute (a joint venture between the Israeli Government and the private sector to promote Israel's exports) indicates that out of US\$64 billion exported to the world in 2008, filmed entertainment made up a meager US\$50 million. Tellingly, neither music nor books appear on the list. While software exports are high (\$3.6 billion), the value of unlicensed U.S. business software in the market is also too high.

A key reason the Israeli creative market remains under-developed is a lack of commitment to the strongest, most modern copyright protections. Israel remains one of only two OECD members that have not implemented key provisions of, or joined, 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.<sup>3</sup> Piracy remains an issue in Israel including PC software piracy which remained at 33%, representing a commercial value of pirated U.S.-vendor software of US\$70 million in 2010, according to preliminary data.<sup>4</sup> End-user software piracy still is not criminalized in the country as required by TRIPS. One major and longstanding issue for the audiovisual industry remains the resistance of Israeli cable operators to compensate copyright owners for unauthorized uses of their works through retransmissions of broadcast television signals, despite court decisions confirming remuneration must be paid for unauthorized retransmissions. Israel's Internet usage continued to increase in 2010, and along with it, so did infringing activities online. Right holders' ability to take action to stop online infringement has been significantly limited by a recent Supreme Court ruling, which held that courts are not empowered under Israel's existing legal framework to order ISPs to disclose the details of their users.<sup>5</sup> In 2010, Israel ranked second among all countries in terms of per capita detections of peers participating in unauthorized file sharing of select entertainment software titles. Serious commercial piracy still cannot be addressed in the country effectively, as the number of police officers in the IPR Units remains too low. In addition, 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.

<sup>1</sup> On February 17, 2010, USTR announced the result of its Out-of-Cycle Review (OCR) of Israel. In that announcement, USTR indicated an "understanding was reached" with the Israeli Government on "improving data protection, the term of patents on pharmaceuticals, and provisions on publication of patent applications in Israel," and that "[i]n recognition of Israel's agreement to move forward on legislation to amend its IPR laws, and once the appropriate legislation is submitted to the Knesset, the U.S. Trade Representative will move Israel from the Special 301 Priority Watch List to the Watch List." USTR also indicated that "as soon as the legislation is fully implemented, Israel will be moved off the Special 301 list altogether." IIPA has consistently recommended that Israel remain on the list until copyright issues are resolved. For more details on Israel's Special 301 history, see IIPA's "History" Appendix to this filing at <http://www.iipa.com/pdf/2011SPEC301HISTORICALSUMMARY.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, *List of OECD Member countries - Ratification of the Convention on the OECD*, at [http://www.oecd.org/document/58/0,3746,en\\_2649\\_201185\\_1889402\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/document/58/0,3746,en_2649_201185_1889402_1_1_1_1,00.html).

<sup>3</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>4</sup> BSA's 2010 statistics are preliminary, representing U.S. software publishers' share of commercial value of pirated software in Israel. They follow the methodology compiled in the Seventh Annual BSA and IDC Global Software Piracy Study (May 2010), <http://portal.bsa.org/globalpiracy2009/index.html>. These figures cover packaged PC software, including operating systems, business applications, and consumer applications such as PC gaming, personal finance, and reference software – including freeware and open source software. They do not cover software that runs on servers or mainframes, or routine device drivers and free downloadable utilities such as screen savers. The methodology used to calculate this and other piracy numbers are described in IIPA's 2011 Special 301 submission at <http://www.iipa.com/pdf/2011spec301methodology.pdf>. BSA's final piracy figures will be released in mid-May, and the updated US software publishers' share of commercial value of pirated software will be available at <http://www.iipa.com>.

<sup>5</sup> Civil Leave to Appeal 4447/07 *Rami Mor v Barak* (Supreme Court, 25 March 2010). The case dealt with online defamation, but the ruling is not limited to defamation cases.





## Priority Actions Requested in 2011:

### Enforcement

- Enforce court decisions ordering Israeli cable operators to compensate copyright owners for unauthorized retransmissions of television broadcast signals containing their works, and establish a fair remuneration structure going forward.
- Ensure courts impose higher damages that create a deterrent to further infringements.
- 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.
- Establish national and independent unit specifically to prosecute piracy cases, and give such cases priority attention for expeditious handling and processing in the courts.

### Legislation

- Amend the Copyright Act, *inter alia*, to confirm criminal liability against enterprise end-user software piracy, provide minimum statutory damages, prohibit circumvention of technological protection measures and the trafficking in circumvention devices, and establish effective means for enforcement against online infringement.
- Clarify the scope of ISP liability for authorizing infringements and provide incentives for them to help right holders tackle online infringement, including takedowns and effective and fair repeat infringer policies for the online space. Pass legislation allowing courts to order Internet service providers to disclose the details of online infringers

### Market Access

- Scrap regulation prohibiting foreign television channels from carrying some advertising aimed at the Israeli market.

## PIRACY AND ENFORCEMENT UPDATES IN ISRAEL

Previous reports and filings include discussions of piracy and enforcement challenges faced in Israel. The following section provides brief updates on piracy and enforcement issues in Israel.

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, AGICOA filed a claim *eleven* years ago on behalf of its members seeking compensation for the unauthorized 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 WCT). Most of AGICOA's claims, filed after many years of trying to come to terms with cable operators directly, have gone unresolved.<sup>6</sup> It seems clear from the disregard of the Israeli courts and the failure by Israeli cable operators 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 a fair settlement for past failure to compensate right holders, together with a reasonable agreement with AGICOA for payments going forward. In a previous Israeli Government 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

---

<sup>6</sup> 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.

settlement discussions both for past violations of copyright laws by cable operators and for fair payments going forward.

**Business Software End-User Piracy Causes Harm to U.S. Software Houses:** The Business Software Alliance reports that, while the level of business software end-user piracy has remained relatively low in the past few years, more can be done to decrease the US\$70 million in value of U.S.-vendor unlicensed software, which translates to direct harm felt by U.S. software companies in the Israeli market. 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 2010 by International Data Corporation for BSA demonstrated that reducing the PC software piracy rate in Israel by ten percentage points in four years (from 33% to 23%) would deliver US\$799 million in new economic activity, 3,207 new IT jobs, and \$430 million in additional tax revenues by 2013.<sup>7</sup> Front-loading the benefits by reducing software piracy ten points in the first two years of the same four-year period compounds the economic benefits, delivering US\$1.07 billion in new economic activity and US\$582 million in new tax revenues. Often, in the Israeli context, small companies do purchase legal software, but engage in under-licensing, while large organizations are seeking volume licensing solutions which make life simpler for both the software companies and the organizations.

Industry reports disappointment that no court has ever awarded the maximum statutory damage award (NIS100,000, or US\$27,000) and thus the increased maximum in the 2007 Copyright Law is dead letter. Decisions by Israeli courts have created uncertainty about whether right holders can pursue copyright remedies against parties who, by virtue of their violation of the terms of an End User License Agreement (EULA), have forfeited their authorization to use the software. BSA reports that where end-user software piracy has been detected, and court cases brought, in some busier districts (such as Tel Aviv district court) cases slow and a first hearing can take up to six months to obtain.

**Book Piracy:** In 2009, publishers became aware of a growing problem of illegal photocopying occurring at copy shops on at least two university campuses. 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. Certain universities also offer print-on-demand services where a student can request that a customized course pack be printed, for a fee, and likewise post excerpts taken from U.S. books on the institution's intranet for student use. The publishers' permission was not obtained and neither have royalties for such use been paid.

**Physical Piracy:** Commercial piracy of music product remains a major problem in Israel, with an estimated three million counterfeit CDs sold annually, 95% of which are infringing CD-Rs burned in small homemade labs. While the police IP Unit has taken some steps to deal with this problem, more action is needed and the Unit does not have the required resources and manpower to address the problem effectively.

**Internet Piracy:** It is well documented that Israelis love using the Internet, with latest figures showing an average use of 2,300 minutes per month, second in the world only to Canada.<sup>8</sup> More than 5.3 million Israelis, close to three quarters of all Israelis use the Internet (2009), with almost 1.7 million broadband subscribers as of 2008 (according to ITU). As such, Internet infringements have unfortunately increased in Israel, e.g., illegal P2P filesharing, infringements using BitTorrent, accessing infringing files through deeplinking sites, and illegal uses of web bulletin boards and cyberlockers. The recording industry estimates that over 90% of all music transmitted over the Internet in Israel is infringing. The Entertainment Software Association (ESA) reports that during 2010, its vendors detected 2.32

---

<sup>7</sup> Business Software Alliance and IDC, *Piracy Impact Study: The Economic Benefits of Reducing Software Piracy: Israel*, 2010, at [http://portal.bsa.org/piracyimpact2010/cps/cp\\_israel\\_english.pdf](http://portal.bsa.org/piracyimpact2010/cps/cp_israel_english.pdf).

<sup>8</sup> Sharon Bauder, *Canada, Israel Rank Highest in Internet Usage*, VJ Virtual Jerusalem, January 11, 2011, at <http://www.vjnetnews.com/articles/0,7340,L-4007770,00.html>.

million connections by peers participating in unauthorized file sharing of select member titles on P2P networks through ISPs located in Israel, placing Israel fourteenth in overall volume of detections in the world and second in per capita detections.<sup>9</sup> Breakdowns by ISP show that Bezeq International-Ltd, Golden Lines Cable and NetVision subscribers account for approximately 86% of this activity occurring in Israel.

The Israeli Government has in the past recognized the importance of dealing with the problem of online piracy,<sup>10</sup> but so far little has been done to address the problem. Government enforcement authorities (police, tax authorities, customs) are uninvolved in online enforcement, and the criminal liability of online infringers under existing law remains unclear. As a result, civil action remains the only course of action available to right holders to deal with infringement. Regrettably, the ability to bring civil litigation has now been severely hampered by a March 2010 decision of the Supreme Court holding that Israeli courts are not empowered to issue disclosure orders against ISPs. Although the court's ruling rests on procedure (that existing court rules do not provide a basis for such orders), the ruling means that right holders cannot obtain the details of anonymous infringers for the purpose of bringing litigation against them.

With no criminal enforcement and limited ability to bring civil action, local industry depends on voluntary cooperation from ISPs to deal with online piracy, and industry groups report a generally satisfactory level of cooperation. Nevertheless, in light of the Supreme Court decision, legislation setting out a procedure for disclosure of infringer details is urgently needed. The Supreme Court, in its ruling, called upon to legislators to rectify the problem and pass legislation explicitly granting courts the powers to order disclosure. Recent reports indicate that the Ministry of Justice is working on legislation, but to date no draft has been published for comments. Until such legislation is passed, right holders are left with no ability to take action against anonymous infringers.

## COPYRIGHT LAW UPDATES AND RELATED ISSUES

Copyright law in Israel is governed by the 2007 Copyright Law. The law creates a basic structure for protection of U.S. copyright in Israel, but still may not be fully compatible with Israel's international obligations, and should be modernized including, *inter alia*, to bring it into compliance with the WCT and WPPT.

- No Protection Against Circumvention of Technological Protection Measures: Israel is one of the only OECD members that has not protected technological protection measures from unlawful circumvention, or the trafficking in circumvention technologies or devices or the providing of circumvention services. The Israeli Government points out in written filings that Israel is not a member of either the WCT or WPPT so it is under no obligation to introduce protections of TPMs. This is true, but the government is incorrect to suggest that authors oppose or do not rely on TPMs to make content available in the digital environment. Protection against circumvention of TPMs remains a vital part of development new distribution models for the digital and online environments. WIPO advocates such protection, noting, "it is not sufficient to provide for appropriate rights in respect of digital uses of works, particularly uses on the Internet ... no [digital] rights may be applied efficiently without the support of technological measures of protection .... There was agreement that ... appropriate legal provisions were needed to protect the use of such measures." The Israeli Government is also incorrect to assert there is a "lack of uniform implementation worldwide," as there are over 100 countries/territories as of February 2011 that had fully or partially implemented the anti-circumvention obligations, had already committed to, or had draft legislation which would provide such protection.

---

<sup>9</sup> These figures do not account for downloads that occur directly from hosted content, such as infringing games found on "one-click" hosting sites, which appear to account each year for progressively greater volumes of infringing downloads.

<sup>10</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.

- **Need to Criminalize Enterprise End-User Software Piracy:** The Israeli Government has taken ambiguous positions over the years as to whether end-user software piracy constitutes a crime in Israel. This situation makes deterrence very difficult as to end-user piracy, since it means BSA has had to rely on bringing civil cases against enterprise end-user software piracy. In those cases there is invariably a lack of deterrence. The Israeli Government has in previous submissions excused its failure to criminalize this commercial form of piracy, indicating that "Business Software End user liability is addressed by Israeli copyright law" and asserting that "Israel has some of the world's lowest rates of business software piracy." They have more recently helpfully indicated that "[c]riminal liability may also inure provided that the software has been distributed on a commercial scale." The dissemination of software within a business setting constitutes such commercial scale distribution. IIPA is interested in exploring this theory for criminal liability in Israel under the new Law (and the Israeli Government's interpretation in its filings). 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. To the extent the current law does not criminalize unlicensed use of software, the government should amend the law.
- **Minimum Statutory Damages Needed:** Currently, under Section 56 of the Copyright Law, 2007, statutory damages range between no damages and NIS100,000 (US\$27,000), replacing the old minimum of NIS10,000 (US\$2,700) and maximum of NIS20,000 (US\$5,400). While the higher maximum is very helpful, the fact that there are no longer minimum statutory damages has harmed enforcement. To illustrate, while some courts have awarded zero damages against some infringers, no court has ever awarded any amount approaching the NIS100,000 (US\$27,000) maximum. This absence of a certain deterrent outcome for infringers has negatively affected copyright owners' ability to seek redress effectively. For example, the Business Software Alliance, which operates its program through warnings and the elimination of illegal uses, has been stymied in its efforts due to the lack of an effective statutory damage remedy. The lack of such a remedy has also had a negative impact on enforcement against resellers (who are also subject to the same civil damages regime). It should further be noted that 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. Finally, the question arises whether pre-established damages should be available on a per-copy basis, or only on a per-work basis. Recent judgments regarding software copyright infringements have resulted in one statutory damage award per software title infringed, regardless of how many copies were infringed (though the number of infringing copies may be considered in the court's determination of the amount of the award).
- **Establish Fair and Effective Means For Enforcement Against Online Infringement:** As noted, the Israeli law (and interpretation in the courts) is evolving with respect to online infringements, although the decisions are mixed. The Israeli Government has indicated in the past action toward examining legislation to deal with the issue of ISPs and their indirect responsibility for infringements taking place over their services, but apparently there is no proposal before the Knesset. Any initiative adopted should foster cooperation with right holders in taking down infringing conduct, including a notice and takedown mechanism, preserve injunctive relief in all cases foster cooperation in investigations into piracy in the non-hosted environment including effective and fair policies to deal effectively with repeat infringers.
- **Protection for Foreign Phonogram Producers on Basis of National Treatment Desired (Sections 8, 10):** Under the 2007 Law, foreign right holders in sound recordings (other than U.S. sound recordings which enjoy national treatment on the basis of bilateral arrangements) were denied equal treatment and could be denied rights, and therefore payments, for their sound recordings in Israel. The government 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.<sup>11</sup>

---

<sup>11</sup> 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. 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 should apply to U.S. recordings. 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 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 Section appears to create a default rule allowing the transfer with 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>12</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 made with the consent of the owner of rights in the country of manufacture and imported into Israel . This

---

<sup>12</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.

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 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 has in previous submissions discussed 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. Exceptions raising cause for concern include:
  - The public performance exception in educational institutions (Section 29) (e.g., where sound recordings are concerned, the exception should be limited to teaching or examination purposes only).
  - The computer program exceptions (backup and interoperability) (Section 24) (e.g., the exception allowing for reproduction or adaptation for purposes of interoperability and for other purposes should be made consistent with the European Directive on the Legal Protection of Computer Programs, Articles 5 and 6 in order to appropriately narrow the exceptions).
  - The temporary copy exception (Sections 26) (while Sections 11(1) and 12(4) confirm that temporary copies are protected in Israel, the exception in Section 26 is vague enough to cause concern, e.g., “to enable any other lawful use of the work,” is overly broad).
  - The library/archive exception (Section 30) which as written fails to meet the Berne Convention and TRIPS standard for exceptions; *cf.* 17 U.S.C. § 108(d) and (e) (U.S. Copyright Act) which 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.

## 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) 2011 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: Italy should remain on the Watch List in 2011.

Executive Summary: The high level of physical, digital, and end-user piracy in Italy has grown far beyond the scope of what positive, but so far inadequate, efforts are being made by Italian law enforcement authorities. Meanwhile, regulatory and legislative proposals demonstrate hopeful breakthroughs in some areas, and cause for concern in others.

Online piracy rates in Italy are among the highest in the world, and remain an important concern for copyright sectors across the board. IIPA members will watch closely in 2011 for positive results from the December 2010 resolution of the Italian Communications Regulatory Authority (AGCOM), proposing a number of measures to open the online market to legitimate content and address online piracy. To fully address online piracy, however, further improvements in civil, administrative and criminal enforcement will be needed. The Data Protection Authority and Italy's civil courts have interpreted privacy laws in such a way as to immunize heavy online infringers against civil enforcement measures. Enforcement authorities continue to be generally cooperative in conducting raids, but raiding activity declined for most industries overall in 2010. Many factors have made it difficult for copyright owners to secure effective enforcement, including a lax attitude by the courts; insufficient resources for the civil IP specialized courts; reluctance to issue *ex parte* search orders in end-user software piracy cases (together with increasingly unrealistic threshold levels for evidence to be provided by the copyright holder to obtain such an order); generally non-deterrent penalties; and inadequate legislation. The Supreme Court recently held that self-employed professionals involved in software piracy would not be subject to criminal liability, making it virtually impossible to prosecute software pirates engaged in the professions. Legislative concerns remain in 2010, including a pending Bill ("*processo breve*") which, if adopted, could result in the dismissal of many criminal copyright cases.

### PRIORITY RECOMMENDED ACTIONS FOR ITALY IN 2011:<sup>1</sup>

- 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;
- Take additional criminal actions against P2P services that meet the criteria for injunctions and liability established in the PirateBay decision and order ISPs to block access to those services;
- Encourage government efforts to produce concrete plans for ISP cooperation and an effective remedies system, including finalizing and implementing the AGCOM proposal for addressing online piracy;
- Eliminate legal obstacles for rights holders to gather non-personally identifying IP addresses and, consistent with the European Court of Justice (ECJ) decision in the *Promusicae v. Telefonica* case, identities of infringers to take appropriate civil actions for the protection of their rights in the online environment;
- Effectively enforce the anti-camcording law to curb the increasing problem of theatrical camcord theft and theft of dubbed soundtracks;
- Eliminate the stickering requirement, at least with respect to business and entertainment software and recorded music;

---

<sup>1</sup>For more details on Italy's Special 301 history, see IIPA's "History" appendix to this filing at <http://www.iipa.com/rbc/2011/2011SPEC301HISTORICALSUMMARY.pdf>, as well as the previous years' reports, at <http://www.iipa.com/countryreports.html>. For a summary of IIPA's 2011 global issues, see our cover letter at <http://www.iipa.com/pdf/2011SPEC301COVERLETTER.pdf>.



- Clarify that professionals, like corporations, who infringe copyright on software in the framework of their activities are criminally liable under Art. 171bis of the Copyright Act.

## COPYRIGHT PIRACY IN ITALY

Internet piracy generally: Internet piracy continues to grow in Italy, in a variety of forms. In fact, Italy may now have the most significant online piracy problem in the world. Where illicit peer-to-peer (P2P) filesharing once held the position as the single most damaging form of piracy online, sites linking to infringing content, including to foreign cyberlocker sites, now also are gaining in popularity. Mobile device piracy of music and videogames is also growing rapidly. Because enforcement activities to date have fallen woefully short of addressing such an abundance of illegal material, the country's market of 30 million Internet users – the fourth largest in the EU – is largely inaccessible to legitimate digital content providers.<sup>2</sup>

ISPs are still uncooperative in efforts to tackle illegal file sharing and other copyright infringements online. Some of the copyright sectors report that website operators were more responsive in the past year to takedown notices; still, the existing takedown process is too cumbersome to be completely effective against hosted piracy, and it addresses only a fraction of the Internet piracy problem. The initiative of Italy's Regulatory Communication Authority (AGCOM), launched in December 2010 and detailed below under "Reform for Cooperation on Internet Piracy," shows promise to address some of the escalating problems that rights holders face online, but does not appear poised to address problems related to P2P piracy directly.

Online piracy of music and sound recordings: The recording industry reports that, according to the Tera Consultants study, online music piracy accounts for losses of \$200 million in 2010—far higher than what the industry generated in legitimate sales. The local recording industry associations, FIMI and FPM, report that more than 7 million people were using P2P networks for illegal uploading and downloading of music files in 2010. While piracy of physical product still remains around 23% of the market, 95% of the global music downloads are unauthorized.

Online piracy of entertainment software: The Entertainment Software Association (ESA) reports that during 2010, ESA vendors detected 30.6 million connections by peers participating in unauthorized file sharing of select member titles on P2P networks through ISPs located in Italy, placing Italy number one in overall volume of detections in the world – as well as number one in detections per capita and number one in detections per Internet user.<sup>3</sup> Connections through Italian ISPs comprise a staggering 21.15% of the total number of such connections globally during this period. Breakdowns by ISP show that Telecom Italia subscribers were responsible for approximately 51% of this activity occurring in Italy and more than 10% of global detections during 2010.

Online piracy of audiovisual works: The Motion Picture Association (MPA), through its local affiliate the Audiovisual Antipiracy Federation (FAPAV), reports that the overall incidence of audiovisual piracy in Italy grew by 5% over the previous year,<sup>4</sup> much of this due to online piracy, for a total loss of €496 million (US\$670 million). Of the 106 million units of total legitimate sales lost in this sector in 2010, 50 million of it is attributable to online piracy. In 2010, the growth of illegal streaming or illegal downloading of TV series/shows was 13 % for series and 11% for shows, including sporting events. P2P piracy and forums directing users to illegal copies of movies continue to damage the industry, while cyberlocker sites and links to them have caused a dramatic worsening in online piracy of motion pictures in Italy. A phenomenon unique to the audiovisual industry is the illicit recording of Italian language audio tracks in theaters immediately following a film's release, which are then added to good quality pirate video found on the Internet. According to FAPAV's research, in 2010 an estimated 384 million total infringements took place, an increase of almost 30 million over the previous year. The highest incidence of piracy was attributable to

<sup>2</sup>There are an estimated 30 million Internet users in Italy as of June 2010, a 51.7% penetration rate. <http://www.internetworldstats.com/stats4.htm#europe>.

<sup>3</sup>These figures do not account for downloads that occur directly from hosted content, such as infringing games found on "one-click" hosting sites, which appear to account each year for progressively greater volumes of infringing downloads.

<sup>4</sup>According to the FAPAV/IPSOS research, Italy's piracy rate for 2010 was 37%.



males between the ages of 15 and 34. Video rentals have suffered the most significant damage, losing 48% (nearly 50 million rentals) to piracy in 2010, followed by digital television and satellite subscriptions. Theatrical sales suffered a loss of nearly 17 million tickets.

The independent segment of the film and television industry (IFTA) reports that Internet-based piracy has affected business in Italy and prevents the establishment of legitimate online distribution platforms and services for consumers, which independent producers may use to finance future productions. For independent producers who license content country-by-country, online piracy instantly exports troubled marketplaces and high piracy rates to other markets. The independent production sector is limited in its ability to shift to technology-enabled new business practices that might limit piracy. For example, worldwide same day releases (referred to as “day-and-date” releases) may prove an effective method to curb or delay piracy for major studios that control their own worldwide distribution, but for independents, whose national distributors release on their own schedule, this technique is impossible.

Online piracy of business software: The Internet is a growing source of unauthorized productivity software and contributes to this sector's piracy losses. Cracked software, illegally downloaded using false codes or certificates of authenticity (COAs), is increasingly commonplace. Illegal software is available via infringing filesharing services, from illicit websites, and through infringing use of cyberlockers, and auction sites. The Internet is also a major source for manuals and packaging. Organizations dedicated to cybercrime exacerbate these problems as they continue to grow in technological sophistication.

Online piracy of books and journals: The publishing industry reports that online piracy of books and journals, affecting foreign and local publishers alike, continues to increase. Most infringing files are scanned copies of print editions, but publishers also report an alarming increase in the number of digital primary and supplementary materials made available online.

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 – increased to 50% of the market in 2010 and is the second highest in Western Europe, behind only Greece at 59%. According to a 2010 report prepared for BSA by market research firm 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 7,538 jobs, US\$5.2 billion in local industry revenues, and nearly US\$1.8 billion in additional tax revenues.<sup>5</sup> The commercial value of pirated US-vendor software in Italy in 2010 was nearly US\$1.2 billion, based on preliminary data.<sup>6</sup>

Camcord Piracy: The level of camcord piracy in Italy rose again in 2010, which is particularly disappointing given that Italy was the first EU country to adopt an anti-camcording law. The problem in Italy is a lack of enforcement and the fact that it takes literally years to move a criminal complaint. Audio captures is the biggest problem in Italy; camcord thieves capture the Italian audio track and marry it to a video capture available online. In this way, the infringer can select the highest quality visual image and pair it with an Italian soundtrack; the product is then uploaded to the Internet and burned to discs to be sold through street vendors. In 2010, there were 71 audio captures and 4 video camcords sourced to Italy. There were no interdictions.

---

<sup>5</sup>The *Economic Benefits of Reducing PC Software Piracy*, commissioned by BSA and conducted independently by International Data Corporation (IDC), released September 15, 2010, looks at the bottom-line economic benefits of reducing piracy in 42 countries that together account for 93 percent of the total packaged software market. It is available online at <http://www.bsa.org/idcstudy>.

<sup>6</sup>BSA's 2010 statistics are preliminary, representing U.S. software publishers' share of commercial value of pirated software in Italy. They follow the methodology compiled in the Seventh Annual BSA and IDC Global Software Piracy Study (May 2010), <http://portal.bsa.org/globalpiracy2009/index.html>. These figures cover packaged PC software, including operating systems, business applications, and consumer applications such as PC gaming, personal finance, and reference software – including freeware and open source software. They do not cover software that runs on servers or mainframes, or routine device drivers and free downloadable utilities such as screen savers. The methodology used to calculate this and other piracy numbers are described in IIPA's 2011 Special 301 submission at [www.iipa.com/pdf/2011spec301methodology.pdf](http://www.iipa.com/pdf/2011spec301methodology.pdf). BSA's final piracy figures will be released in mid-May, and the updated US software publishers' share of commercial value of pirated software will be available at [www.iipa.com](http://www.iipa.com).

Piracy of physical product generally: Organized criminal syndicates remain heavily involved in the production and distribution of infringing product, particularly in Southern Italy.

Business software: As a fast-growing market for consumer PCs, Italy faces a new trend in the increasing reuse of old computers, which often contain pre-installed pirated software.

Entertainment software: Unauthorized copies of games downloaded from the Internet are of no use without circumvention devices, which enable users to play unauthorized copies on game systems as well as to make infringing copies of games. ESA reports that software-based circumvention of technological protection measures (TPMs) is increasingly a top issue for the industry. Meanwhile, Italian vendors continue to traffic in the circumvention devices that foster the high game piracy rate in Italy. Hard goods piracy of videogames is a significant ongoing problem in Southern Italy; elsewhere physical piracy is quickly being replaced by Internet piracy. Pirated goods are imported from Asia primarily into San Marino, destined not only for Italy but also other European markets.

Audiovisual works: MPA reports an increase in traditional physical piracy in Italy during 2010, up 3% from last year. Physical piracy still accounts for 24% of total infringements, the most problematic form being pirate DVD-Rs sold in fleas markets and by street vendors. Unauthorized public performances and local signal theft are prevalent, albeit on a decreasing scale and predominantly in the Campania region. Satellite signal theft and smart card piracy remain at low levels, due to the new Seca 2® encryption system.

IFTA reports that physical piracy of DVDs remains a significant export constraint for independent film producers and distributors, the majority of which are small- to medium-sized businesses. Independent producers partner with local authorized distributors to finance and distribute film and television programming. These authorized distributors find it nearly impossible to compete with pirates and report that the Italian marketplace has been decimated by piracy. Producers and distributors confirm that DVD sales have been significantly impacted since pirated DVDs are readily available on the street, at kiosks and in shops throughout Italy. Unable to compete with free, legitimate distributors often cannot commit to distribution agreements or they offer drastically reduced license fees, which are inadequate to assist in financing of independent productions. Piracy undermines and may permanently damage legitimate distribution networks essential to reaching consumers and leaves little confidence for investment in intellectual property in Italy.

Books and journals: Unauthorized and uncompensated photocopying continues to plague academic publishers. 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.

## REFORM FOR COOPERATION ON INTERNET PIRACY

Italy adopted the "*Decreto Roman*" in 2010, assigning Italy's Regulatory Communication Authority (AGCOM) with the responsibility to establish rules for the protection of copyright over the Internet. In December 2010, AGCOM approved a resolution identifying several measures to address Internet piracy, primarily on hosted websites. Specifically, AGCOM put forth the following recommendations, which, in principle, have the support of the copyright industries, but are in need of fine-tuning:

- A four-step "notice and take down" procedure, applicable to websites hosted in Italy offering legal and illegal content, and foreign-hosted websites offering only illegal content: First, the rights holder contacts a website or

ISP to request removal of pirate product or links which could promote piracy (such as torrent search engines or indexes of infringing files available on other websites or cyberlockers). Second, if removal does not occur within 48 hours, the copyright owner notifies AGCOM. Third, AGCOM initiates communication with the website or ISP. Finally, upon a determination that infringement has occurred, AGCOM orders removal of the infringing content, subject to sanctions of up to €250,000 as set forth in Article 1, section 31, Law n. 249/1997.

- IIPA welcomes the adoption of a notice and take down framework, but remains concerned that the proposed procedures may not address sites that facilitate infringement by aggregating links to infringing material, and that they lack a means for encouraging ISPs to implement policies for addressing repeat infringers. Moreover, AGCOM's proposal would apply only to site operators, as opposed to hosting providers, creating a concern that rights holders will be left without remedy in the event that the site operator is not easily identifiable. The proposal should, therefore, also obligate hosting providers to remove infringing content upon notice from a rights holder.
- Establishment of a roundtable discussion held by AGCOM of the technical issues surrounding the implementation of the proposed measures.
  - The copyright industries look forward to continued engagement with AGCOM in this effort.
- A review of the Italian copyright law by the Government and Parliament.
  - The IIPA recommends that consideration of the data protection law be included as a crucial component to these initiatives, so that the momentum behind the AGCOM proposal may also drive the government and Parliament to establish either a firm basis in the law, or a specific process or authorization approved by the Italian Data Protection Authority, to address P2P piracy. Italian law currently does not incentivize ISPs to cooperate with rights holders with respect to material transiting their networks (the mere forwarding of infringement notices to potentially infringing subscribers is routinely refused), and has been interpreted by the Data Protection Authority and the courts so as to block rights holders even from identifying infringers for purposes of civil actions.
- Promotion of a broad legal offer of audiovisual content and removal of the current barriers to the legal offer of audiovisual content by favoring access to premium content and platform interoperability; and exploration of the adoption of extended collective licenses, experimental forms of legal consumption, and secure payment systems.
  - IIPA encourages Italy to open the market for legitimate content by moving forward with efforts to combat the pervasive online availability of pirate products in the country. The development of business models is best left to the market and does not require intervention.
- Development of educational and informational activities on copyright protection addressed to end users, and especially to young people.
  - IIPA members welcome efforts by AGCOM to promote campaigns for better awareness of the importance of copyright protection for the creative industries.

The resolution was the outcome of a series of informal stakeholder and public consultations, which were initiated by AGCOM in early 2010. Copyright industry representatives report good cooperation with national regulators in this effort. The recommendations will undergo formal public consultation in the first months of 2011, after which the proposals must be approved by the AGCOM governing body before they will go into effect. In addition to laying the groundwork for a more efficient notice-and-takedown procedure, adoption of the recommendations would be an important step in combating the common misperception in Italy that certain infringing activities, such as providing links to pirate content on foreign sites, are not illegal.

On a separate track, the Anti-Piracy Technical Committee established in early 2009 by the Italian Government (under the Office of the Presidency of the Council of Ministers and coordinated by Prof. Mauro Masi) resumed some sporadic activity in 2010. While previously ineffective, the Anti-Piracy Committee held a meeting at

the beginning of 2011 to affirm its interest in the AGCOM process. Local industry has recommended that the Committee develop supportive and complementary activities to the AGCOM initiative.

## COPYRIGHT ENFORCEMENT IN ITALY

Some key Internet-specific enforcement obstacles remain in Italy. In addition, a number of weaknesses in the overall Italian enforcement system prevent the copyright industries from obtaining effective remedies and deterrent penalties against all forms of piracy, whether of physical goods, online, or by software end-users. While the Italian Supreme Court has confirmed that the criminal courts can order site blocking measures to deal with sites like the PirateBay, the civil courts have thus far misinterpreted Article 8.3 of the Copyright Directive and failed to provide for meaningful injunctive relief against service providers that allow access to rogue sites and facilitate copyright infringement on a massive scale. The dismissive attitudes of public prosecutors and judges represent a significant bottleneck to the forward progress of copyright enforcement cases. While police forces reportedly are cooperative in enforcement actions and some members of the judiciary have begun to demonstrate a better understanding of issues such as anti-circumvention laws and anti-piracy generally, certain recent court decisions stand out as disheartening setbacks for the copyright industries. A coordinated government approach is needed for an effective anti-piracy campaign in Italy.

**Internet Piracy Enforcement:** Several actions against Internet piracy in the past two years demonstrate that, in cases where rights holders take initiative and have a strong footing in the law, anti-piracy efforts have the support of law enforcement. Still, online enforcement in Italy's court system is severely hampered by (1) inadequate legislation and lack of judicial will and training for effective criminal actions, and (2) a lack of civil enforcement due to limitations on monitoring and collecting Internet piracy data, based on Italy's Privacy Code and the March 2008 ruling of the Data Protection Authority.

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. Italy thus joined Sweden, Denmark and the Netherlands in declaring PirateBay a criminal enterprise. The site operators were held criminally liable for distribution in Italy to Italian users, even though the site is located outside of the country. The court confirmed that precautionary measures (including the seizure of even a foreign-hosted website) to prohibit the continuation of the crime can be issued by courts on the merits, and that courts may order, by way of injunction, ISPs to block access to the site under the EU's E-Commerce Directive.

Italy has a known history of copyright cases being misrepresented by Internet/consumer groups and telecommunications-backed press. Propagation of distorted versions of the facts continues to be a problem. In fact, a 2009 IPSOS-FAPAV study on film piracy in Italy found that 63% percent of those interviewed deemed audiovisual piracy to be of little consequence. Equally disappointing, the study also found that 70% of those interviewed understood that piracy is a crime. Unfortunately, Italian press and organized "netizens" have launched a campaign against the AGCOM resolution, misrepresenting the recommendations and alleging that the implementation of the recommendations would be akin to "flat-lining" the Internet.<sup>7</sup>

Other Internet piracy enforcement efforts in the courts have been wholly unsuccessful, and civil courts to date have not granted injunctions. Civil enforcement against Internet piracy is severely hampered by the Rome High Court's interpretation of Italy's Privacy Code 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

---

<sup>7</sup>See <http://www.sitononraggiungibile.it>.

Privacy Code.<sup>8</sup> Unless rights holders can obtain IP addresses and thereafter the names of subscribers via a civil court order, civil enforcement on Internet infringement will be as a practical matter impossible.

In another online piracy case, in 2009, FAPAV sent a cease and desist letter to Telecom Italia requesting the blockage of major infringing websites and for measures to 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. The Data Protection Authority joined the case to challenge the methodology FAPAV used for the piracy data it submitted to the court, but FAPAV demonstrated that no privacy rights had been infringed in the process. In April 2010, the Court rejected FAPAV's request that Telecom Italia block access to infringing websites, accepting the ISP's argument that such legal actions were only appropriate against the host providers of the websites in question. This was despite specific ECJ jurisprudence ruling that Article 8.3 injunctions were also available against access providers and the fact that the above cited Supreme Court ruling was directed at access providers as the key intermediaries for site blocking. However, the Rome Court also rejected allegations that FAPAV violated the Privacy Code, and ordered the provider and other ISPs to report complaints and cooperate with judicial and administrative authorities against piracy infringements. After this partial success, the case is now continuing on the merits but is expected to drag on for a number of years, demonstrating the elusiveness of swift and effective judicial action against Internet piracy.

**End-user software piracy:** In December 2009 the Italian Supreme Court issued a decision creating a major impediment to software piracy enforcement. The case held that unincorporated professionals (such as architects and engineers) 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, even for the same behavior that would render a company criminally liable under this provision. The decision limits criminal enforcement against non-corporate professionals, among whom the piracy rate is believed to be even higher than among companies.

**Criminal enforcement:** The recording, audiovisual, entertainment and business software industries all report continued good cooperation with the Italian police forces (including the Italian Fiscal Police (*Guardia di Finanza*, or GdF) and local police forces) during 2010. However, the problem of slow court processes and lack of deterrent penalties overall have limited the deterrent effect of police action and cooperation. Prosecutors are slow to bring criminal copyright cases. 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, often two to three years or more pass before final judgment, significantly reducing the deterrent value of the increased raiding activity undertaken by the police. Criminal sanctions in practice vary from four months to one year, including in cases of repeat infringers, for whom the law provides a minimum term of one year.

Few judges and prosecutors have expertise in copyright issues, a particular difficulty for cases brought under local jurisdiction. 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 provides amnesty for criminal convictions (including for piracy) with jail terms of less than three years. The law has reinforced the general perception in Italy that the probability of actually being punished is low, and 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

---

<sup>8</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 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.

cap the length of criminal trials would, if adopted, put an end to more than 90% of all copyright trials pending before the courts.

The business software industry reports that its relationship with enforcement authorities remains generally good, particularly with GdF, which is the primary agency responsible for software piracy enforcement. Prosecutors and judges continue to show a lack of interest with criminal enforcement of IPR violations. In 2010, 92 criminal raids were carried out against end-user piracy with the support of BSA, and an estimated 1000 pirate products were seized for a total value of approximately 1,500,000 Euro. The result is worse than last year, due to the fact that the industry bears the cost of providing technical expertise in police raids, a situation that is an increasing burden.

The entertainment software industry also reports a positive working relationship with the GdF. During 2010, ESA, through its local affiliate AESVI, reports having seen an increasing number of *ex officio* enforcement activities carried out by local police on videogames piracy, and supported the following activities: 51 raids; criminal charges brought against 59 individuals; and 301 modchips, 2,552 game copiers, 127 circumvented or counterfeit consoles, 459 counterfeit gaming peripherals, and 3,739 burned discs or pirated files seized. The industry faces delays, however, on the part of public prosecutors. Italy's statutes prohibit circumvention devices aimed at the technological protection measures (TPMs) utilized by the video game industry to prevent the unlawful copying and unauthorized playback of games. Courts have not been uniform in the application of these laws, but have begun to demonstrate greater sensitivity to the importance of TPMs to the industry. The Italian Supreme Court confirmed once again in 2010 that devices designed to circumvent TPMs in game consoles are proscribed under existing law. However, notwithstanding the unambiguous ruling from the Supreme Court, the Reviewing Court of Florence once again issued a contrary ruling in 2010, contributing to the perception among much of the public that mod chips and game copiers are legal. Indeed, legitimate retailers report that this misconception is so widespread that they routinely have to turn away customers who inquire about the availability of circumvention devices. Unfortunately, however, consumers in search of circumvention devices have no difficulty obtaining circumvention devices from online retailers or from Italy's many street vendors and markets.

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 is very positive and led to successful operations. In particular, major cases in 2010 included the seizure of Linkstreaming.com, the biggest streaming site in Italy for music and movies; the seizure of labaia.net (the Italian version of Pirate Bay); the takedown of 10 major p2p hubs; the seizure and take down of 50 web networks for the streaming of musical videos and other copyright protected materials (movies, live sport events). Other criminal cases have been carried out against eBay illegal auctions. The notice & take down system is now up and running and led to the removal of 160,000 infringing links to illegal music files. Operations against neighboring rights evasion continued in 2010. Radio stations, web radio, discos, music providers, and gyms have been targeted and more than 70 criminal cases were started in 2010. The co-operation with FAPAV (local MPAA branch), AESVI (Italian Entertainment Software Association) – both now members of FPM – and SKY Tv Italy proved to be very successful in the effort to fight digital piracy.

MPA, through FAPAV, reports that the police continue to support FAPAV's efforts yet lack necessary resources. In 2010, the FAPAV and FPM, the local film and music industries, worked together with local police to close four of the most important streaming and downloading pirate sites in Italy. In 2010, law enforcement authorities worked with rights holders in the seizure of 170,000 audiovisual files, 6,000 illegal burned optical discs, criminal charges against four individuals, and sanctions totaling €23 million (US\$31 million). Operations marked the first application of Italian law against consumers of pirated content, pressing charges against 38 individuals identified from seized hard disk records. Italian authorities brought about the closure of the largest file streaming/downloading web site (linkstreaming.com) of unauthorized films, the most popular web-network for live streaming of sport events (calciolink.altervista.org), and two major sources of illegal streaming of audiovisual content (calcion.altervista.org and channeltv.altervista.org). In September, the IT Police of Genova brought to a successful conclusion the Operation "Vedogratis 2," and the GdF subsequently brought charges against a few dozen of its main subscribers for illicit

downloading. In 2010, the local film and music industries worked to remove an estimated 10,000 links to unauthorized content (including recent theatrical releases and TV series) hosted on websites and cyberlockers. As for other copyright industries, the primary bottleneck to effective enforcement is the dismissive attitude of the Italian judges towards piracy in general.

Moreover, the repeated instances of granting amnesty to criminal infringers, including in the 2006 “Pardon Law” mentioned above (and similar actions taken in prior 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. 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. 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: Specialized IP civil courts suffer from a lack of resources that can mean major delays in proceedings. For example, the Milan Court – which handles the vast majority of copyright cases in Italy – as of today only has 5 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 creating further delays in civil proceedings.

BSA continues to use the civil court system for enforcement against business users of unauthorized software. Civil raids undertaken by BSA in 2010 resulted in the seizure of illegal software valued at €580,000 (US\$800,000). BSA also reports that in some courts, including specialized IP courts, there has been an increasing reluctance to award *ex parte* search orders in a timely fashion or at all. There has also been a tendency to raise the threshold for evidence that must be provided by the copyright holder to obtain the order, creating a chicken-and-egg problem: Courts require direct evidence of infringement by private entities in order to issue a search order; but such information can only be obtained through execution of a search order. The reluctance of courts to issue search orders *ex parte*, and the tendency to impose evidentiary burdens that are impossible for right holders to meet, together make defending software IP rights a practical impossibility. The specialized IP courts still are responsible for 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

Data protection and online enforcement: 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 above).

Amendments to the copyright law: Past efforts to amend the Italian copyright law have included elements that would have weakened copyright protection and enforcement. While many of these particular proposals were not

adopted, some troubling elements did recently come into effect. An amendment to Article 70 of the copyright law allows the uploading to the Internet of images and sounds without permission or payment, so long as the resolution is low and the purpose is educational. This overbroad exception calls into question Italy's international treaty obligations. Another amendment was passed to Article 71<sup>septies</sup> extending 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 and international norms with respect both to the reproduction and making available rights, and sought EU 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 law.

**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.

**Amend Article 171<sup>bis</sup> of the Copyright Act:** The Italian Supreme Court has held self-employed professionals are not within the scope of Article 171<sup>bis</sup>, which requires that, for criminal liability to attach the infringing act had be carried out by corporate entities acting for commercial purposes. An amendment to Article 171<sup>bis</sup> 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<sup>bis</sup> 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.

Article 181<sup>bis</sup> 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

---

<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. (...continued)



the Italian Constitution. As a consequence, IIPA urges that Article 181*bis* be revised to exempt all software from the stickering requirement. 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. IIPA supports these calls.

Other deficiencies remain in the enforcement system and should be eliminated. The 2005 “Cirelli Law,” and the 2006 “Pecorella” and “Pardon” Laws<sup>10</sup> all have taken their toll by undermining the deterrent effect of the enforcement system.

---

(...continued)

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) 2011 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: IIPA recommends that Kuwait remain on the Watch List in 2011.<sup>1</sup>

**Executive Summary:** Over the past five years, copyright protection in Kuwait has improved for most industries due to cooperation with the Kuwaiti Ministry of Commerce (MOC), which has taken the primary role in enforcing copyright in the country.<sup>2</sup> Piracy problems remain, and non-deterrence in the courts remains a key hurdle to limiting piracy in Kuwait. IIPA also highlights the copyright law reform process ongoing in Kuwait. The Kuwaiti Government is considering a draft which appears intended to bring the current Copyright Law 1999 into compliance with TRIPS, create a more deterrent criminal penalties structure, and implement and join the WIPO Copyright Treaty (WCT) and WIPO Performances and Phonograms Treaty (WPPT). IIPA recommends immediate passage of the draft Law, with changes including those outlined below to ensure full TRIPS compliance and compatibility with the WCT and WPPT, and other important changes to improve copyright protection and reduce piracy.

### Priority Actions Requested In 2011:

#### 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 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 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 otherwise modernize the Copyright Law to meet the requirements of the TRIPS Agreement, implement (and join) the WCT and the WPPT and update the law to effectively address online piracy.

## PIRACY AND ENFORCEMENT UPDATES IN KUWAIT

**Business Software End-User Piracy:** The business software industry continues to be harmed by business software end-user piracy. According to preliminary data, the PC software piracy rate in 2010 was 59% (a slight decrease from 60% in 2009), corresponding to a commercial value of US\$39 million for pirated U.S.-vendor software

<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/2011SPEC301HISTORICALSUMMARY.pdf>, as well as the previous years' country reports, at <http://www.iipa.com/countryreports.html>.

<sup>2</sup> Other agencies previously involved include the Kuwaiti Ministry of Information (MOI), Kuwaiti Customs, and the Kuwaiti Ministry of the Interior (Police). In 2010, for internal political reasons, copyright enforcement moved jurisdictionally from the MOI to the MOC. It should be noted that this move, made after 14 years of working with MOI, represents a shift in enforcement, since the MOC only deals with trademark infringements, until they can build capacity and train staff for copyright offenses. In the meantime, copyright owners are being required to provide trademark registrations and other information about common law trademarks in order to continue to receive seamless enforcement of their rights in Kuwait. IIPA asks the U.S. Government to watch this development closely to ensure that 1) the failure to provide a trademark registration does not pose a bar to enforcement in Kuwait, and 2) the MOC's capacity and training is sufficient so they can continue the tradition of good enforcement built up in the MOI over the years.



(up from \$37 million in 2009).<sup>3</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 2010.

**More Enforcement Needed Regarding Hard-Disk Loading and Pirate Resellers:** Two other major problems facing the software industry are the preloading of PCs with unlicensed or pirated software (so-called hard-disk loading) and pirate sales in the retail markets. Much of this activity takes place in Hawalli, Bin Khaldoun street, and the Al Fahahil area. Industry regularly brings enforcement leads to the Ministry of Commerce in Kuwait. The industry reports only three raids against pirate resellers in 2010. Industry would like to see more raids focused on pirate resellers of software and hard-disk loading in 2011. In addition, for those raids which are 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:** 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 was 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 UPDATES AND RELATED ISSUES

**Current Law (1999 Decree) Remains TRIPS-Incompatible and Contains Ambiguities; Draft Law Would Mark a Major Improvement With Some Additional Changes:** Copyright protection in Kuwait is governed by the Copyright Law, Decree No. 64/1999 (effective February 9, 2000).<sup>4</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>5</sup> Kuwait, an original member of the WTO, has joined neither the Berne Convention (the substantive portions of the Berne Convention are incorporated by reference into the TRIPS Agreement) nor the Geneva (phonograms) Convention. Kuwait should join

---

<sup>3</sup> BSA's 2010 statistics are preliminary, representing U.S. software publishers' share of commercial value of pirated software in Kuwait. They follow the methodology compiled in the Seventh Annual BSA and IDC Global Software Piracy Study (May 2010), <http://portal.bsa.org/globalpiracy2009/index.html>. These figures cover packaged PC software, including operating systems, business applications, and consumer applications such as PC gaming, personal finance, and reference software – including freeware and open source software. They do not cover software that runs on servers or mainframes, or routine device drivers and free downloadable utilities such as screen savers. The methodology used to calculate this and other piracy numbers are described in IIPA's 2011 Special 301 submission at <http://www.iipa.com/pdf/2011spec301methodology.pdf>. BSA's final piracy figures will be released in mid-May, and the updated US software publishers' share of commercial value of pirated software will be available at <http://www.iipa.com>.

<sup>4</sup> Originally, the Copyright Law was passed as Decree Law No.5/1999 Relating to Intellectual Property Rights, published in the official *Gazzet*, 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 *Gazzet*, issue 445 on Jan. 9, 2000.

<sup>5</sup> See, e.g., International Intellectual Property Alliance, *Kuwait*, at <http://www.iipa.com/rbc/2009/2009SPEC301KUWAIT.pdf>.

those treaties as well as the WCT and WPPT. The Government of Kuwait is currently undergoing a copyright law reform process, with a new draft intended to meet TRIPS requirements and make other important changes. IIPA has preliminarily reviewed an informal translation of the draft Law and, based on this preliminary reading, supports its immediate passage with some important changes including those noted below.<sup>6</sup> The following should be viewed as non-exhaustive and preliminary comments on the draft Law.

- **Draft Would Improve Penalty Structure:** The criminal provisions in the current Law provide for a maximum fine of 500 Kuwaiti Dinars (approximately US\$1,775) or up to one year of imprisonment, or both penalties (to be raised by “not [more] than [half][sic] for recidivists”). These penalties are not “sufficient to provide a deterrent” as required by the TRIPS Agreement. This is the most important element of the law which must be remedied. The draft Law provides two levels of criminal penalties. For copyright infringement (including express mention of “making available” works “through computer systems,” on the “internet” or by “other means” for a minimum two month prison sentence and/or a fine of KD250 (US\$888) to KD50,000 (US\$177,600). Recidivists apparently receive both a minimum six month prison sentence and a fine of KD1,000 (US\$3,550) to KD100,000 (US\$355,000). For violations involving technological protection measures or end-user piracy (uploading or storing on a computer any copy of computer programs, applications or databases without a license from the author, the neighboring right holder or their successor), the penalty is a minimum three month prison sentence and/or a fine of KD1,000 (US\$3,550) to KD100,000 (US\$355,000). Recidivists apparently receive both a minimum nine month prison sentence and a fine of KD5,000 (US\$17,760) to KD200,000 (US\$710,400). IIPA supports this amendment, although it would still be preferable if on first offense a mandatory sentence included both imprisonment and a fine for deterrent effect.
- **Draft Would Implement WCT and WPPT But Clarifications Sought on Technological Protection Measures (TPMs):** The current Law does not implement the WCT and WPPT. The draft Law would confirm protection of reproductions regardless of their duration (i.e., temporary copies) and appears in the definition to provide a “communication to the public” right which includes an interactive right, includes exclusive rights of “transmission via information or communication networks” for works and an express “making available” right (“in any way” or “other means”) for related rights.
  - **TPMs:** With respect to technological protection measures (TPMs), the draft Law would make it a crime (with strict criminal penalties, especially as to recidivists) to “manufacture, import, or export” ... “any equipment, devices or instruments designed or prepared specifically to circumvent the protection technology,” as well as the act of “disabling or impairing” a TPM. There are shortcomings in the TPMs provision, including the apparent limitation on the types of circumvention devices covered (“designed or prepared specifically to circumvent”). It is also unclear from the syntax (in translation) whether the trafficking needs to be proved to be “for the purpose of sale, rental, circulation or transmission.” Proof of this purpose should not be required, as proof of the way in which devices, technologies, or services are marketed should be sufficient. Civil damages should be provided for violations involving circumvention of TPMs. Finally, IIPA is concerned about the “Explanatory Memo for Law No. ( ) of 2011 Regarding Copyright and Neighboring Rights” which appears to say that “the relevant parties to whom the exceptions contained in Articles 44 and 45 apply” shall be permitted to “contravene or disable” TPMs “in order to benefit from such exceptions.” The draft Law does not so indicate so it would not appear that TPMs can be broken for such purposes. IIPA cautions that the WCT and WPPT requirement that TPMs protection be “adequate and effective” cannot be met unless any exceptions considered are narrowly tailored (i.e., not entirely co-extensive with all copyright exceptions).
- **Draft Would Provide Adequate Term of Protection for Computer Programs and Compilations of Data:** The current Law fails to provide computer programs and compilations of data with at least a TRIPS-compatible term of protection. The draft Law remedies this problem. The Kuwaitis take the opportunity presented by the draft Law

---

<sup>6</sup> We note we only have access to a very informal and unofficial translation, so our comments herein are limited to the extent we cannot verify the complete accuracy of the translation we possess.

and follow the modern trend (more than 80 countries have greater than TRIPS minimum terms) to protect works for life plus 70 for works of natural authors, and 95 years from publication for audiovisual works and sound recordings.

- Draft Would Provide Rental Right for Sound Recordings and Computer Programs: There is no express rental right for sound recordings and computer programs in the current Law. The draft Law would remedy this.
- Draft Would Provide Border Measures: The current Law contains no border measures as required by TRIPS Articles 51-59. The draft Law would provide border measures.
- Draft Would Fix Point of Attachment Issues: The current Law contained ambiguities with respect to point of attachment, e.g., for performers. The draft Law would remedy this issue.
- Draft Would Vest Appropriate Rights in Producers of Audiovisual Works: The panoply of exclusive rights for producers of audiovisual works according to Article 25 of the current Law is unclear. The draft Law would provide appropriate exploitation rights in producers of audiovisual works.

There remain some issues which should either be clarified or amended prior to passage of the draft Law.

- Availability of *Ex Parte* Civil Searches Should be Confirmed: The current Law does not expressly provide for civil *ex parte* search orders, as required by TRIPS Article 50. The draft Law does not contain an express provision for *ex parte* orders, although draft Article 52 seems to provide for provisional measures, including issuing an order to seize pirate copies, as well as materials, tools and implements used in the infringement. It should be confirmed that this order is to be granted on an *ex parte* basis in line with TRIPS.
- Presumptions of Ownership and Subsistence of Copyright Should be Confirmed: 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>7</sup> The draft Law provides the Berne authorship presumption in Article 1(3), but there remains no presumption of subsistence and no provision expressly applying the presumptions to related rights.
- Provision for Adequate Civil Compensation, Including Statutory Damages, Attorney Fees, and Costs Missing: The current law only contains rudimentary discussion of compensatory damages, and there is no structure in place for statutory damages, attorneys fees or costs. The draft Law does not appear to fix this deficiency.
- Proposed 'Developing Country' Compulsory License Should be Reconsidered, Must be Made (Berne- and) TRIPS-Compatible: Article 14 of the current Law amounts to an unacceptable compulsory license that is TRIPS- (and Berne-) incompatible. The draft Law provides in Article 43 for any person to "request the ministry to grant him a personal license for the reproduction, translation, or both together" ... "in order to meet educational needs of all types and levels." The terms of Article 43 require "fair compensation" and expressly require that steps two and three of the three-step test be met. Article 43 also provides for the license to be limited to a particular "time frame and place." These are helpful narrowing provisions, but implementing regulations must ensure (Berne- and) TRIPS-compatibility including meeting all the strict requirements of the Appendix. Also, the Berne Appendix is expressly reserved for "developing" countries, so we question whether Kuwait, having the eighth highest per-capita GDP in the world, should be able to enact such a compulsory scheme.

---

<sup>7</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.

- **Ensure Exceptions (Including Software “Adaptation” Exception) are Appropriately Narrow and Meet International Treaties’ Test:** Any exceptions adopted in Kuwait must meet international standards and the three-step test of the Berne Convention and incorporated into the TRIPS Agreement. For example, the draft Law provides for a “single” back-up of a computer program, but also allows a “single” copy “in order to adapt the program, even if such adaptation exceeds the scope necessary for using such program.” Such copy or adaptation, in order to meet the international treaties’ test, 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 draft Law provides that the “original or adapted copy must be destroyed upon the expiration of the holder’s title.”
- **Law Must Provide TRIPS-Compatible Remedy as to “Materials and Implements”:** Article 42 of the current 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.” The draft Law does not remedy this deficiency, since Article 52 provides for “seizure of the materials used in republishing or reproducing this work, performance, phonogram or broadcast program, on condition that these materials be fit only for republishing said work, performance, phonogram or broadcast program.” The TRIPS language is clear and Kuwait must provide a TRIPS-compatible remedy.
- **Moral Rights Provisions Must Avoid Impingement With the Exclusive Adaptation Right:** The moral rights provisions in the current Law exceed what is provided for in Article 6*bis* of the Berne Convention, and could collide with the exclusive right of adaptation, which would be a violation of TRIPS Article 9.1. The draft Law contains modified rights which come closer to the Berne requirements, and the request to “withdraw” a work from circulation could occur only “should serious reasons arise,” and requires “payment in advance” of “fair compensation,” although it remains worrisome that “substantial changes” can be ordered by a Court of First Instance.

Some needed reforms are not covered at all in the current Law or the draft Law.

- **Law Fails to Provide for Internet Service Provider Responsibility and Foster Cooperation, Through Statutory Notice and Takedown and Policy to Deal With Repeat Infringers:** The current Law contains nothing regarding how service providers should cooperate with right holders to address online piracy. The draft Law does not but should include principles of liability to hold those who facilitate infringement on the Internet accountable, and should 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 effectively with repeat infringers.
- **Current Laws Do Not Mandate or Foster Government Legalization of Software and 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 that we are not aware of, the Kuwaiti Government should share this information.
- **Law Does Not 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. The draft Law does not cover such acts.

- **Law Does Not 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, including where such copies were made with the authorization of the author, performer, or producer of the phonogram (i.e., parallel import protection). The draft Law does not expressly cover parallel imports.

# LEBANON

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2011 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: Lebanon should remain on the Watch List in 2011.<sup>1</sup>

**Executive Summary:** With political events concerning the current Lebanese government coalition still unfolding,<sup>2</sup> the current business climate in Lebanon has become somewhat unstable and the prospects for the future uncertain. Understanding these facts, IIPA makes this submission in the hope that stability can be restored and that Lebanon's development goals, including its WTO accession process, can be resumed. IIPA has noted incremental progress in copyright protection in previous submissions and in recent testimony before USTR, although problems remain.<sup>3</sup> In this submission, IIPA highlights the importance for Lebanon to establish a proper legal framework for copyright protection, including online, and to fully implement those laws to reduce piracy and foster growth in the creative sectors in Lebanon.<sup>4</sup>

### Priority Actions Requested in 2011:

- Ensure that draft amendments to the Lebanese Copyright Law (1999) are compatible with major international copyright treaties, including the TRIPS Agreement and the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT).
- Pass accession legislation to permit Lebanon to join the Berne Convention (Paris 1971 text), and deposit the ministerial acts of ratification of the WCT and WPPT with WIPO in Geneva.
- Ensure that the special police bureau, the Cyber Crime and Intellectual Property Rights Bureau (CCIPRB) Unit, continues actively running raids against piracy targets, including end-user software piracy, and take steps to provide the Unit with *ex officio* raiding authority, authority to employ investigative techniques to detect piracy practices (such as "hard-disk loading"), and a regular operating budget.

## COPYRIGHT LAW AND RELATED ISSUES

The Lebanese government has been working on amendments to the Copyright Law (1999) and related laws in order to ready itself for World Trade Organization accession and to implement the relevant international treaties related to WTO accession.<sup>5</sup> These include most notably the TRIPS Agreement, the Berne Convention to which Lebanon has expressed interest in ratifying the latest text (1971 Paris text),<sup>6</sup> and the WCT and WPPT, both of which Lebanon ratified on March 6, 2010, by the National Assembly passage of Laws No. 77 (WPPT) and 78 (WCT). Under Lebanon's Civil Law system, international treaties are self-executing, and therefore Lebanon is currently bound by

<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/2011SPEC301HISTORICALSUMMARY.pdf>, as well as the previous years' country reports, at <http://www.iipa.com/countryreports.html>.

<sup>2</sup> See, e.g., Paul Kujawsky, *Hizbolla Dissolves Lebanese Government Over Impending Indictments*, Examiner.com, January 14, 2011, at <http://www.examiner.com/middle-eastern-policy-in-los-angeles/hizbolla-dissolves-lebanese-government-over-impending-indictments>.

<sup>3</sup> Since late 2006, the United States and Lebanon have been party to a Trade and Investment Framework Agreement. See *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). Copyright protection issues should be a permanent part of the TIFA agenda.

<sup>4</sup> In July 2007, the World Intellectual Property Organization released Roger Malki's report, *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, while 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>5</sup> See Tamara Qiblawi, *Beirut Boosts Efforts to Protect Copyright Owners*, The Daily Star, December 10, 2010, at [http://dailystar.com.lb/article.asp?edition\\_id=1&categ\\_id=3&article\\_id=122371](http://dailystar.com.lb/article.asp?edition_id=1&categ_id=3&article_id=122371). This article cited a recent World Intellectual Property Organization meeting at which Economy Ministry Director General Fuad Fleifel asserted that the government has intensified its campaign against intellectual property rights violations in recent months by increasing surveillance and urged copyright owners to make use of special judicial courts.

<sup>6</sup> Lebanon currently adheres to the Rome (1928) text of the Berne Convention. In 2007, legislation was prepared and forwarded to the National Assembly to ratify the Berne Convention 1971 Paris text; passage of this legislation would be a welcome development.





both treaties. Nonetheless, the government of Lebanon should take immediate steps to complete the ministerial act of depositing their ratifications at WIPO. It is important that the government implement these accords into domestic legislation and deal with outstanding WTO/TRIPS accession issues.

The current Copyright Law provides a sound basis of protection of works and objects of related rights (sound recordings and performances).<sup>7</sup> At the same time, there are some deficiencies which must be addressed as part of Lebanon's WTO accession process and otherwise result in a more effective statute. These include (but are not limited to) the following issues:<sup>8</sup>

- The presumption provisions are incomplete and need to be strengthened for WTO/TRIPS compatibility (and should be made equally applicable to related rights).
- 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). The amendments must ensure proper point of attachment for U.S. works, sound recordings and performers for WTO/TRIPS compatibility.
- Works and sound recordings are not explicitly given full retroactive protection in line with WTO/TRIPS standards.
- Article 25, providing a broad exception allowing copying of software, and even as limited by Decision No. 16/2002 (July 2002), 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 prejudice of copyright owners. As such, Article 25 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).
- The current "private" copy exception (Article 23) must be re-examined in light of new technologies and recalibrated to ensure it does not collide with international treaties standards.
- The current 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.
- The law does not fully implement the WCT and WPPT.
  - Amendments should ensure explicit protection for temporary reproductions, as well as a WCT- and WPPT-compatible "making available" right for authors, producers of sound recordings, and performers.
  - Amendments should also ensure protection against the unlawful circumvention of technological protection measures, and the trafficking in (and providing services as to) circumvention devices and technologies used by copyright owners to protect their works from unlawful access or exercise of exclusive rights. Remedies should include both civil and criminal provisions. Amendments should also protect rights management information (RMI) in line with the WCT and WPPT.

---

<sup>7</sup> The law includes civil remedies and criminal penalties against copyright infringement, the possibility of confiscation of illegal products and equipment, and closure of businesses engaged in pirate activities. The law also outlaws the trafficking in satellite or cable decoders (i.e., devices that receive, or arrange the receipt of, unauthorized transmissions of broadcasts "dedicated to a section of the public who pay a fee to receive such broadcasting").

<sup>8</sup> A more 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>.

- Amendments should deal with online piracy, including notice and takedown provisions, and provisions to ensure that Internet service providers take responsibility for, and have incentives to cooperate with right holders in dealing with, online infringements.
- Amendments should be made to the current law (e.g., Article 17) to preserve the ability of parties to freely contract with respect to copyright licenses and transfers, including ownership issues, to avoid collisions with the exercise by copyright holders of exclusive rights guaranteed by international treaties. The law should not restrict parties' ability to freely contract, nor interpret private agreements by statute.
- The amendments should ensure that moral rights (Articles 21 and 44) abide by the Berne Convention (and the WPPT) and do not impinge on or otherwise interfere with the exercise of economic rights guaranteed by the law (and the Berne Convention and TRIPS).
- The amendments should provide that deposit should be voluntary, and that any presumption must not act as a formality to protection or enforcement under the law.
- In line with the international trend, Lebanon should extend terms of protection to life of the author plus 70 years, or 95 years in the case of sound recordings and audiovisual works.
- Enforcement measures should be strengthened to, among other things: 1) strengthen civil remedy measures to ensure adequate compensatory damages are available (measured by the legitimate retail price of the good infringed) and provide for pre-established damages; 2) increase the minimum and maximum criminal fines to ensure deterrence; 3) ensure that criminal penalties apply to infringements which may cause significant damage to the market notwithstanding the motive of the infringer; 4) ensure that a provisional and criminal seizure, forfeiture, and where applicable, destruction remedy is available; 5) provide for information sharing by civil, criminal, and border officials regarding evidence of infringement and those participating in such activities; and 6) provide adequate border measures against both imports and exports (as well as in-transit materials).

## PIRACY AND ENFORCEMENT UPDATES IN LEBANON

Piracy Challenges Remain Largely Unchanged in 2010: Notwithstanding the incremental progress noted at the outset of this report, piracy continues to harm right holders in Lebanon.<sup>9</sup> Piracy phenomena include end-user piracy of business software, cable and pay TV piracy, retail piracy (of movies, music, entertainment software/games, business software, published materials), 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 mobile devices (either mobile downloads or resellers pre-loading content), hard-disk loading of software onto computers at the point of sale, and the sale of circumvention devices, particularly pay TV decoders. Meanwhile, the industries reporting data show continuing high piracy levels notwithstanding incremental progress. For example, the Business Software Alliance reported a 72% piracy level in 2010, still well above the worldwide average. BSA also reported that preliminary estimates of the commercial value of unlicensed U.S.-vendor software

---

<sup>9</sup> Failure to mention any specific issue previously noted by the IIPA should not necessarily be taken as an indication that the problem has been resolved.

was \$28 million in 2010.<sup>10</sup> It has been demonstrated that the Lebanese government is losing out as well due to piracy, in terms of lost taxes, social security contributions, and earnings.<sup>11</sup>

Enforcement Cooperation with CCIPRB Good, Although They Lack *Ex Officio* Authority and a Formal Budget: Industry reports continued good relationships with those in the Ministry of Interior's CCIPRB,<sup>12</sup> which provides raid support upon request.<sup>13</sup> IIPA members believe it is important that CCIPRB have *ex officio* raiding authority so that CCIPRB can proactively address and investigate piracy cases. 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 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 receive assistance on computer crime issues. Finally, the CCIPRB Unit should be given a formal budget to help the Unit become even more stable and effective in its functioning.

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. Prosecutors, starting with the Chief Public Prosecutor, will not take action without complaints from right holders, and will not employ tools that would strengthen their hand such as informants.<sup>14</sup> Once a case is brought to court, right holders experience 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 seriously consider 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

IIPA continues to urge a certain level of training and technical assistance in Lebanon so that officials are 1) more aware of the importance of IP laws and their enforcement in Lebanon, including commitments under the international treaties which Lebanon has joined or is preparing to join; and 2) more willing to employ effective tools for deterrent enforcement. IIPA continues to participate when requested in technical trainings and visitor programs, having hosted the most recent visitor program in September 2010.

---

<sup>10</sup> BSA's 2010 statistics are preliminary, representing U.S. software publishers' share of commercial value of pirated software in Kuwait. They follow the methodology compiled in the Seventh Annual BSA and IDC Global Software Piracy Study (May 2010), <http://portal.bsa.org/globalpiracy2009/index.html>. These figures cover packaged PC software, including operating systems, business applications, and consumer applications such as PC gaming, personal finance, and reference software – including freeware and open source software. They do not cover software that runs on servers or mainframes, or routine device drivers and free downloadable utilities such as screen savers. The methodology used to calculate this and other piracy numbers are described in IIPA's 2011 Special 301 submission at <http://www.iipa.com/pdf/2011spec301methodology.pdf>. BSA's final piracy figures will be released in mid-May, and the updated US software publishers' share of commercial value of pirated software will be available at <http://www.iipa.com>.

<sup>11</sup> 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.

<sup>12</sup> As of 2009, the CCIPRB Unit comprised 33 total officers (15 ranking officers and 18 junior officers).

<sup>13</sup> For example, in 2010, BSA initiated a criminal complaint in the South of Lebanon that resulted in the raid of five outlets selling pirate software in the city of Saïda in the South of Lebanon.

<sup>14</sup> Industry has tried to convince the Chief Public Prosecutor, but to no avail, to allow the police to use special "informants" who would not encourage pirate traders but, e.g., would report when buying hardware if a seller voluntarily offered to load pirate software onto a computer. As a result, outlets selling computers continue to load pirate software onto computers, so-called "hard disk loading," with impunity as industry has no support from the police or prosecutors in providing evidence of such illegal activity. Computers are now either being delivered to the homes of buyers or are handed over to the buyer at a fixed time to avoid detection.

## MARKET ACCESS AND RELATED ISSUES

Censorship: The censorship rules in place in Lebanon have at times created barriers to full market access for the recording industry. Although becoming slightly more flexible over the past couple of years, numerous recordings have failed to qualify under the government's opaque content review criteria. Censorship rules should be applied with great restraint, on a non-discriminatory basis, and according to transparent criteria.

## GENERALIZED SYSTEM OF PREFERENCES

While the GSP statute expired on December 31, 2010, should it be reauthorized, the Petition filed by the IIPA to review whether Lebanon should continue to receive Generalized System of Preferences (GSP) duty-free treatment for many of its goods imported into the United States should remain ongoing at least until the enactment of the draft legislation currently being considered.<sup>15</sup> The GSP program has been important to Lebanon's economy. In 2009, Lebanon imported almost \$43.6 million worth of products into the United States duty-free under the GSP program, or 56.5% of its total imports into the United States. In 2010, Lebanon imported almost \$38.4 million worth of products into the United States duty-free under the GSP program, or 45.7% of its total imports into the U.S.

---

<sup>15</sup> 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.

# MALAYSIA

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2011 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: Malaysia should remain on the Watch List.<sup>1</sup> In addition an out-of-cycle review (OCR) should be conducted during 2011 to assess Malaysia's progress toward carrying out the priority action items set forth below and to evaluate Malaysia's Special 301 status in light of such assessment.

Executive Summary: Malaysia stands poised to set itself apart from its regional neighbors in creating a modern copyright protection and enforcement system. A new draft amendment to the Copyright Act 1987 would make some important improvements to the law, seeking to implement the WIPO Copyright Treaty (WCT) and WIPO Performances and Phonograms Treaty (WPPT), putting into place mechanisms to remove illegal content and halt activities of websites and services involved in infringement (including those outside Malaysia), and adding a new stand-alone protection against the unauthorized camcording of movies in a theater. Malaysian authorities continued to work with right holders against physical piracy, which resulted in some significant seizures, and undertook efforts against other problems like enterprise end-user software piracy, software piracy in new computers and piracy of published materials. Internet connectivity, especially broadband, has increased dramatically in the past year, creating an urgent need for a framework to address the proliferation of online piracy that is likely to follow. The Trade Descriptions Order 2010 will hopefully help curb the sale of illegal, unlabeled product. IIPA notes the positive outcome in the ODVD optical disc piracy litigation. At the same time, the dismissal of the Basic Electronics case is deeply disappointing, as is the lack of transparency with regard to the reasoning behind that decision. It reemphasizes the need to formalize and expand the specialized IP courts, along with training of key officers to handle important IP cases such as Basic Electronics. The publishing industry reports a lack of standard enforcement procedures, leading to some uneven enforcement, and other industries report the need for computer forensics training to deal with online piracy and for investigations up the supply chain from distributor to source. IIPA supports Malaysia's inclusion in the Trans-Pacific Partnership (TPP) containing a strong forward-looking IP chapter.

### Priority Actions Requested in 2011:

1. Provide transparency on the Basic Electronics litigation result, explaining the reasoning behind the dismissal and options for redress against blatant acts of piracy in the future by the same company or others.
2. Assign more dedicated judges to the Criminal IP courts, especially in Kuala Lumpur, and establish 15 Criminal Sessions courts around the country.
3. Clean up rampant optical disc piracy and mobile device piracy in shopping malls, night markets and other fixed premises in the Klang Valley by, *inter alia*, instructing 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 effectively address this problem; and enforce the Trade Descriptions (Optical Disc Label) Order 2010, following up with prosecutions with the ultimate goal of jail sentences as a strong deterrent.
4. Pass 2010 Copyright Amendment Bill, with fixes as enunciated in this document to ensure compliance with international norms, foster effective cooperation by service providers with right holders in combating online infringement (including notice and takedown), achieve full implementation of the WCT and WPPT (and commence the process to join those treaties) and provide landlord liability.
5. Publicize a substantial number of successful convictions by the IP courts where jail sentences or deterrent fines were meted out.
6. Implement a government-led software audit initiative to drive the use of legal software in the corporate sector.
7. Reestablish autonomous enforcement by the Ministry of Domestic Trade, Co-Operatives and Consumerism's (MDTCC) enforcement division (where officers trained in enforcement decided when and where to conduct

<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/2011SPEC301HISTORICALSUMMARY.pdf>, as well as the previous years' country reports, at <http://www.iipa.com/countryreports.html>.



enforcement actions), including on an *ex officio* basis and without Malaysian Administrative and Diplomatic Service (MADS) involvement.

8. Make a renewed push for university legalization, and specifically, get the Ministry of Higher Education to start a campaign toward legalizing textbook “adoption” practices.
9. 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, to allow inspections at any location and at any time, day or night, and to make other needed changes.
10. 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 UPDATES IN MALAYSIA

IIPA's previous reports describe in detail various piracy and enforcement issues and the harm caused to the U.S. content industries.<sup>2</sup> The following provides updates and new issues that arose throughout 2010 and early 2011.

**Basic Electronics Case:** The criminal case against Basic Electronics (M) Sdn. Bhd. as well as its directors was dismissed with little transparency from the Prosecutor's office. This case, dating back to a raid in 2004 that yielded more than 880,000 pirated entertainment software discs, suffered from delays, postponements, and procedural missteps (e.g., the charges finally entered in October 2006 were based on less than 1,000 discs that were verified). MDTCC even secured one of the many continuances in 2008, again without notifying industry. Industry has sought more information from MDTCC about any possible appeal or next steps but has not been able to learn the detailed grounds for the decision. At the time of the seizure, Basic Electronics was one of the world's largest manufacturers and distributors of pirated PC game product, and is believed to have spanned Malaysia, Thailand, and Singapore, with exports worldwide of pirated PC games. IIPA registers deep disappointment about the method of handling this case, and wishes to understand the reasoning behind the decision and what can be done to ensure Basic Electronics and others do not continue in the business of game piracy.

**Hard Goods Piracy, Including Night Market Piracy, Remains A Dominant Concern in Malaysia, Despite Good Enforcement Cooperation:** Hard goods piracy, including distribution of local and imported factory-produced optical discs<sup>3</sup> and “burned” recordable discs (CD-Rs and DVD-Rs) reemerged in Malaysia in 2009 and remained problematic in 2010. In particular, night market piracy stalls flourish in different locations in Malaysia notwithstanding significant information supplied to the Government of Malaysia on a continual basis.<sup>4</sup> In several fixed premise locations in Klang Valley, Penang and Johor Bahru, pirates still openly sell illegal products, harming all the industries' legitimate businesses.<sup>5</sup>

The industries experienced generally good cooperation in 2010 against hard goods piracy. The industries report there has been a slight improvement in response times to complaints since establishment of the joint

---

<sup>2</sup> For example, the record industry experienced physical piracy losses of US\$16.3 million in 2009 with a 50% piracy level, but this represented only the value of pirate physical media, and additional significant losses are attributable to online piracy, mainly using P2P services. The commercial value of unlicensed software is reported *infra*.

<sup>3</sup> Malaysia remains a producer and supplier of pirate optical discs. In January 2010, Royal Malaysia Police raided a licensed optical disc replicating factory engaged in the production of infringing DVDs containing movies and game files. While the raid resulted in the seizure of nearly 14,000 infringing DVDs, the authorities estimated that the facility was capable more than 17.5 million pirated optical discs per year.

<sup>4</sup> 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 historically taken little action in respect of the availability of pirated music, movies, and other copyright materials at night markets, notwithstanding voluminous reporting by industry about mall and night market piracy.

<sup>5</sup> For example, the independent sector of the film and television industry (IFTA) reports that physical piracy of DVDs remains a significant export constraint for independent producers and distributors, the majority of which are small- to medium-sized businesses. Independent producers partner with local authorized distributors to finance and distribute film and television programming. These authorized distributors find it nearly impossible to compete with pirates and report that piracy in Malaysia continues to be a heavy burden. Producers and distributors confirm that DVD sales have been particularly impacted since pirated digital copies are offered for free online and with a similar quality viewing experience as a DVD can provide. Unable to compete with free, legitimate distributors are often cannot to commit to distribution agreements or offer drastically reduced license fees which are inadequate to assist in financing of independent productions. Piracy undermines and may permanently damage legitimate distribution networks essential to reaching consumers and leaves little confidence for investment in intellectual property.

government-private sector (copyright industries) task force. The motion picture industry reported 235 enforcement actions in 2010, ranging from retail, warehouse, and factory and burner lab raids. Seizures out of these actions included 2 seized production lines, 417,093 pirate factory optical discs, 82,339 burned pirate optical discs, and 543 DVD-R burners. They also report 111 court actions filed in 2010.<sup>6</sup> The Entertainment Software Association (ESA) reports 18 raids, resulting in the seizure of more than 850,000 pieces of infringing game product and leading to 54 arrests.<sup>7</sup> Unfortunately, the effectiveness of these raids was undermined by the fact that authorities pursued only 4 criminal cases. The local recording industry lodged 665 complaints with the Malaysian Government and there were 90 enforcement actions and 60 court actions filed in 2010 related to music piracy.

A chief hurdle to enforcement against physical fixed premises and night market piracy over the past couple of years was the decision by MDTCC not to take enforcement without a complaint, but in 2010, the relevant authorities, including the police and the MDTCC, did take *ex officio* actions. Raid results were impressive (albeit aggregate numbers of raids were lower than a couple of years ago when MDTCC coordinated its activities itself without the intervention of MADS), including hundreds of thousands of pieces, and seizures of major equipment used to engage in piracy. The chief problem lies with the non-deterrent results of these raids and actions, for example, retail raids do not lead to permanent closures. Most sites raided are back in operation 48 hours or less after the action was taken. There is also a lack of follow-up investigation up the supply chain and a need for in-depth investigations on these sites' owners.

**Internet Piracy Increases Due to Spike in Internet and Broadband Penetration:** Malaysia had nearly 17 million Internet users by the middle of 2009, or roughly 60% Internet penetration. Broadband penetration grew as well, reportedly reaching 55.6 percent of all Internet users by the end of 2010.<sup>8</sup> Faster and more readily available broadband Internet raises the concern of increasing online infringement of all copyright content, whether direct infringing downloads from websites, illicit P2P filesharing (a major issue for the motion picture industry), infringements using BitTorrent sites (game piracy is often accomplished using this technology), accessing infringing files of third parties through deeplinking, auction or advertising sites (for hard goods sale or delivery), illicit MP3 download sites, or infringing use of "blog spots," social networking sites, or cyberlockers.<sup>9</sup> During 2010, Entertainment Software Association vendors detected 1.07 million connections by peers participating in unauthorized filesharing of select member titles on P2P networks through ISPs located in Malaysia.<sup>10</sup> Breakdowns by ISP show that Telekom Malaysia Berhad subscribers account for approximately 83% of this activity occurring in Malaysia.

The government has moved quickly to shut down some websites hosting illegal content upon complaint, and industry reports that some ISPs have been cooperative in taking down illegal content and infringing sites as well as

---

<sup>6</sup> Aggregate statistics also show that there were 253 arrests and 4 convictions in 2010, but no further details are readily available, e.g., as to whether the criminal convictions are for cases commenced in 2010 or prior years, nor is sentencing information available.

<sup>7</sup> For example, acting on a tip-off, MDTCC officers with support from the local industry raided a clandestine factory on March 2, 2010 in the industrial area of Selangor. The raiding party found and arrested five men operating the optical disc production lines, and two DVD replicating lines and over 5,000 pirated DVDs were seized, including *Case 39, Ninja Assassin* and *Alvin and the Chipmunks: The Squeakquel*. See Motion Picture Association, *Five Arrested in Raid on Clandestine Factory by Malaysian Authorities: MDTCC Operation Also Results In Seizure Of Two Replicating Lines*, March 3, 2010 (press release, on file with IIPA). On June 30, 2010, a team of 15 MDTCC enforcement officers, the K-9 unit and local industry raided a location used for almost a year as a warehouse of pirated DVD games in another industrial area of Selangor. A total of 700,000 pirate games (including 560,000 Sony Playstation 2, 105,000 Microsoft Xbox360 and 35,000 Nintendo Wii discs), packed in spindle of 100s, were seized. However, there were no arrests made in connection with the action.

<sup>8</sup> *Broadband Penetration Rate Exceeds Target To Reach 55.6 Per Cent, Says Najib*, Bernama, January 13, 2011, at <http://kpdnkk.bernama.com/news.php?id=556307>. In addition, the government is to establish 430 more community broadband centers nationwide in the next two years, in addition to the 246 current centers, according to Information Communication and Culture Minister. *430 More Community Broadband Centres In The Offing*, Bernama, January 18, 2011, at <http://kpdnkk.bernama.com/news.php?id=557548>.

<sup>9</sup> Internet-based piracy harms independent film producers since it prevents the establishment of legitimate online distribution platforms and services for consumers, which independent producers may use to finance future productions. For independent producers who license content country-by-country, online piracy can lead to high piracy rates in-country but also raises the threat of exporting the same to other markets instantly. The independent production sector is limited in its ability to shift to technology-enabled new business practices that might limit piracy. For example, worldwide same day releases (referred to as a "day-and-date" release) may prove an effective method to curb or delay piracy for the major studios, which control their own worldwide distribution, but for independents, whose national distributors release on their own schedule, this technique is impossible. Thus, it is particularly critical for the health of independent film producers that online piracy in Malaysia be prevented.

<sup>10</sup> These figures do not account for downloads that occur directly from hosted content, such as games found on "one-click" hosting sites, which appear to account each year for progressively greater volumes of infringing downloads.



other self-initiated measures.<sup>11</sup> Other ISPs have not been as cooperative, but industry has been able to obtain takedowns by having MDTCC invoke the provisions in the Communications and Multimedia Act 1998 (CMA).<sup>12</sup> The Malaysian Communications and Multimedia Commissions (MCMC), as the regulators of ISPs, should get more actively involved since MCMC could have at least as great, if not greater, an effect on obtaining takedowns compared with MDTCC notices. The entertainment software industry has also reported that MDTCC and the MCMC responded to complaints from rights holders, and successfully shut down three Malaysian sites that were engaged in the sale of infringing game products.

A major reason ISPs do not cooperate without significant pressure is the lack of an adequate legal infrastructure establishing responsibility and fostering cooperation with right holders. The Copyright Act amendments will hopefully change this situation. The government has also reportedly indicated an interest in dealing more generally with cybercrime, and thus should look to join and implement the Council of Europe Cybercrime Convention.<sup>13</sup> Other major impediments in addressing Internet piracy include the lack of relative know-how among enforcement authorities in dealing with online infringements, and a lack of adequate devoted resources. For example, the authorities do not have experience on forensics for Internet investigations. Also, MDTCC only has two officers responsible for Internet piracy and their main role is to compile information on self-help actions taken by right holders. It is hoped that the Copyright Act amendments and proper implementation including computer training and greater devotion of human and capital resources will foster a more active role for MDTCC, including *ex officio* authority to tackle Internet piracy.

**Enterprise End-User Software Piracy Harms Software Companies:** The willful use of unlicensed or underlicensed 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.<sup>14</sup> After remaining essentially flat for several years, preliminary data indicates that the PC software piracy rate fell by 2 percentage points last year to 56%, with the commercial value of unlicensed software in Malaysia being \$207 million, again a slight decrease from 2009 numbers.<sup>15</sup> BSA has excellent working relationships with the MDTCC. BSA and its

---

<sup>11</sup> In 2010, many service providers continued to be cooperative in taking down infringing material within 48 hours of receipt of a notice. Some service providers were tracking P2P users and taking steps to make it more difficult for those engaging in massive file sharing to continue doing so. During 2010, 29 websites containing motion picture piracy online were taken down by ISPs and web host services. The local music and recording industry group reported a 79% takedown rate, with 38 takedowns out of 37 notices sent. A single notice may be sent for more than one case. In total, there were 48 cases in 2010. The group also reported statistics which detail the growing size and scope of the Internet piracy problem. It reported 6,619 links to cyberlockers containing allegedly infringing files, with 32 links on YouTube and 3 pre-release links (i.e., links to pirate recordings of records not yet released in the commercial market).

<sup>12</sup> *Communications and Multimedia Act, 1998* (CMA), 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." The CMA therefore states the important principle that network facilities should not be used to break the laws of Malaysia, and the language above sets 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.

<sup>13</sup> *Government Looking Into Ways To Tackle Cyber Crime*, Bernama, January 17, 2011, at <http://kpdnkk.bernama.com/news.php?id=557241>. According to the article, the Malaysian Deputy Home Minister has indicated the government is "looking into amending relevant legislation to tackle cybercrime." The Council of Europe Cybercrime Convention contains, in Article 10, "Offences related to infringements of copyright and related rights," an obligation to "adopt such legislative and other measures as may be necessary to establish as criminal offences under its domestic law the infringement of copyright [and related rights] ... where such acts are committed wilfully, on a commercial scale and by means of a computer system," and Article 11 contains the obligation to "establish as criminal offences under its domestic law, when committed intentionally, aiding or abetting the commission" of Article 10 offenses.

<sup>14</sup> 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.

<sup>15</sup> BSA's 2010 statistics are preliminary, representing U.S. software publishers' share of commercial value of pirated software in Malaysia. They follow the methodology compiled in the Seventh Annual BSA and IDC Global Software Piracy Study (May 2010), <http://portal.bsa.org/globalpiracy2009/index.html>. These figures cover packaged PC software, including operating systems, business applications, and consumer applications such as PC gaming, personal finance, and reference software – including freeware and open source software. They do not cover software that runs on servers or mainframes, or routine device drivers and free downloadable utilities such as screen savers. The methodology used to calculate this and other piracy numbers are described in IIPA's 2011 Special 301 submission at [www.iipa.com/pdf/2011spec301methodology.pdf](http://www.iipa.com/pdf/2011spec301methodology.pdf). BSA's final piracy figures will be released in mid-May, and the updated US software publishers' share of commercial value of pirated software will be available at [www.iipa.com](http://www.iipa.com).



members, working with MDTCC, carried out 43 criminal end-user software piracy raids in 2010.<sup>16</sup> Problems remain with prosecution, as there have been few cases to-date where the companies raided have been convicted.

**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 movies 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).<sup>17</sup> These copies are then distributed to pirate “dealers” throughout the world and over the Internet. There has yet to be prosecution of a case in Malaysia, despite 63 interdictions since 2006. As such, a specific amendment criminalizing camcording is imperative.

**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. The prior practice of standalone computers loaded with unauthorized or pirated copies of games has migrated to a “client-server” model, in which the unauthorized software is installed at the server level on-site (or more recently, offsite by third parties), and customers’ machines are granted access to the same copy on the server.

**Book Piracy Updates:** Rampant unauthorized photocopying on and around university campuses continues to plague book publishers in Malaysia. The situation has not improved, and arguably has worsened. Pirates have changed their mode of operating and are now printing directly from soft copy scans of textbooks saved on computers or portable hard drives, making detection and identification of infringement more difficult. Very few copy shops stockpile copies, and where copies have already been produced, this stock is kept at various locations to avoid detection. Other activities making piracy harder to detect include the setting up of shop facilities in gated residential areas, where a front guard can warn pirates of incoming authorities, or storing pirate stock in vans for delivery to customers and difficult detection by authorities. Piracy of books online is also reportedly on the rise, with students claiming that certain titles are available either for download or for copying (even from their university library).

In 2010, several successful raids were conducted. In January 2010, MDTCC with support from industry carried out productive raids on five photocopy shops located near University Putra Malaysia, seizing several photocopy machines and hundreds of infringing copies of books. In June and July 2010, raids were conducted at several photocopy shops near universities in Kuala Lumpur, Perak and Selangor, resulting in the seizure of photocopy machines and hundreds of infringing copies of books. These are welcome developments, but can only deter if they result in adequate penalties that are publicized to dissuade shops from continuing their activities.

Prior reports have highlighted the overall lack of deterrence, due to lack of standard procedures, onerous requirements like statutory declarations *prior* to raids for books (not knowing such books will be found in the raid), failure to raid at the most opportune time (the first two weeks of each school session), lack of sufficient resources or teams to run multiple simultaneous raids, failure to seize photocopy machines used to infringe, and failure to consider a small number of photocopies as infringement. Authorities regularly fail to seize most of the photocopy machines used in the infringing acts, notwithstanding that Section 44(2) of the Copyright Act 1987 provides clearly that “[c]ontrivances used or intended to be used for making infringing copies or capable of being used for the purpose of making infringing copies” are subject to seizure. Authorities have required the photocopier to actually be in use, photocopying a textbook or other reading material for the machine to be subject to seizure. Even then, not all such machines are seized. Authorities have also been reluctant to seize photocopy machines with hard drives or which are connected to computers storing soft copies of scanned textbooks when infringing books are not actually being reproduced at the time of the raid. Questions have also arisen as to whether legitimate books supplied by students as masters to facilitate photocopying are subject to seizure (either a library copy or lecturers’ copy); there is no doubt such “masters” are tools or implements used in the commission of the infringing act and therefore should be subject to seizure.

---

<sup>16</sup> This compared with 37 criminal end-user raids carried out in 2009, leading to 5 criminal cases, and 30 end-user raids in 2008, leading to 6 criminal cases.

<sup>17</sup> Camcording is particularly damaging in Malaysia because it can fuel rampant online piracy negatively impacting worldwide distribution and prevent the establishment of legitimate online distribution platforms. Camcording also threatens the continued growth of the Malaysian theatrical box-office marketplace.

Where further investigations and prosecutions occur, they remain slow and mired in problems, ranging from lost documents, turnover in personnel handling the cases, late notice of court hearings (i.e., subpoenas are usually served on publishers or its counsel only a few days prior to the hearing date), and a general lack of preparation on the part of the officers handling the cases. In all, publishers would like to see activation of investigations upon the filing of a complaint or *ex officio* based on detection of infringement, the development and implementation of standard operating procedures for book raids, increasing the numbers of prosecutions and success rates with deterrent penalties, and destruction of pirated books seized. It is unfortunate that despite the raids, copy shops simply resume their illegal activities as there is no deterrence in the system. Pirates know that raids rarely progress to prosecution, and where they do, the process is fraught with problems as to be largely ineffective.

Regarding university legalization, 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, but apart from periodic distribution of public awareness information there has been little progress in this area. 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 copyright policies to use only legitimate materials by students.

**Mobile Piracy on the Rise in Malaysia:** Infringements over wireless mobile networks is a growing concern in Malaysia. The Malaysian Communications and Multimedia Commission (MCMC) estimates that mobile penetration in Malaysia exceeded 100 percent by the end of 2009.<sup>18</sup> There are more than 30 million mobile subscribers, and recently there has been a major push into 3G services, with around 21% of the total mobile subscriber base being 3G subscribers by end of 2009.<sup>19</sup> In addition to mobile downloads, mobile device piracy, in which infringing files are loaded onto mobile devices at fixed locations, remains a serious piracy problem for the music and publishing industries in Malaysia. Many fixed locations engage in unlawful uploading/downloading of full tracks and ringtones both wireless and through over-the-counter sales and publishers report some downloading of reference books and dictionaries onto mobile devices.

**IP Courts in Malaysia Must Deal Effectively With Backlog and Issue Deterrent Sentences:** IIPA applauded the establishment of the first IP courts launched in July 2007 in Kuala Lumpur, Penang and Johor to deal specifically with copyright and other intellectual property matters. Members report a significant court backlog leading to delays in case adjudication, with some exceptions. At least 175 criminal cases remain pending, many of which were lodged in previous years, and cases from five years ago are only now being disposed of (where no guilty plea is recorded). Of the cases concluded this past year through December 2010, only two jail terms have actually been served and of the twelve known cases resulting in criminal fines, five fines were either under US\$1,000 or between US\$1,000 and US\$5,000.<sup>20</sup> IIPA urges the 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. In addition, court processes could be improved, from the activities of police and prosecutors preparing case files for prosecution, to sentencing by the courts. Prosecutors should undergo rigorous training in all aspects of court procedure, in particular criminal procedure, as well as the requirements of the specific law (i.e. the Copyright Act) and use other statutes to effectively diminish the effects of piracy, such as the Anti-Money Laundering Act 2001. For example, under this law, charges which have minor errors may be amended orally or in writing and do not have to be withdrawn and refilled (as has happened in one copyright case, leading to the defendant absconding).

---

<sup>18</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).

<sup>19</sup> *Malaysia - Telecoms, Mobile and Broadband*, Research and Markets, May 2010, at [http://www.researchandmarkets.com/reports/991951/malaysia\\_telecoms\\_mobile\\_and\\_broadband.pdf](http://www.researchandmarkets.com/reports/991951/malaysia_telecoms_mobile_and_broadband.pdf).

<sup>20</sup> 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\$6,560) this hardly constitutes a deterrent.

In one remarkable exception, in December 2010, a trader who had been charged with possession of 6,500 copies of pirated music recordings in 2008 was found guilty by the Sessions Court in Putrajaya and faces a fine of RM13 million (US\$4.3 million, equivalent of RM2000 or US\$656 per infringing copy) or a 2 year jail term in default. This huge fine is now pending on appeal to a higher court.

## COPYRIGHT LAW AND RELATED ISSUES

Copyright Law Reform Underway: Copyright protection in Malaysia is afforded under the Copyright Act of 1987, as amended through 2006. Various amendments have strengthened copyright protection over time.<sup>21</sup> On December 15, 2010, a new Bill proposing amendments to the Copyright Act 1987 was tabled for first reading in the Dewan Rakyat.<sup>22</sup> This draft followed a consultation process (which unfortunately proved insufficient and somewhat *ad hoc*) by the Malaysian Intellectual Property Office (MyIPO) in May 2010 and then consideration by the Attorney General's office.<sup>23</sup> IIPA commends the government for moving forward with copyright reform to implement the WCT and WPPT (presumably with the aim to join those treaties), and to introduce important protections<sup>24</sup> and enforcement remedies (like a new anti-camcording provision in Section 43A) that will contribute to the adequacy and effectiveness of Malaysia's copyright system and confirm Malaysia's role as a regional leader in the area of protection of the rights of creators. IIPA is nonetheless concerned with some of the proposals. The following are non-exhaustive comments on some of the key features of the draft, including some draft provisions which may require amendment prior to passage to meet the apparent aims of the drafters, full implementation of the WCT and WPPT, and to keep Malaysia in compliance with its international obligations.

- **Technological Protection Measures (TPMs):** The Bill includes amendments to Malaysia's current laws concerning the circumvention of TPMs and the trafficking in circumvention devices or services. In light of Malaysia's participation in the TPP, it is essential that copyright reform efforts are consistent with international best practices as reflected in the WCT and WPPT. Unfortunately, the proposed provisions may fall short of the WIPO Internet Treaties' obligation to ensure coverage of both copy controls and access controls. Draft Section 36A(1) indicates two kinds of TPMs the circumvention of which is prohibited, namely, a TPM "that is used by the owner of the copyright in connection with the exercise of his rights under this Act," and a TPM "that restricts acts in respect of his works which are not authorized by the owner concerned or permitted by law." This dual approach to prohibiting circumvention is well understood to include access controls. However, the draft amendment to Section 3 would define a TPM as "any technology, device or component that, in the normal course of its operation, effectively prevents or limits the doing of any act that results in an infringement of the copyright in a work." This definition casts doubt on the intended coverage of access controls per se, because the circumvention of an access control does not necessarily result in an infringement of copyright. To ensure that the proposed TPM provisions provide adequate legal protection for access control TPMs, the definition of TPM should be amended to read: "any technology, device or component that, in the normal course of its operation, effectively controls access to a protected work or prevents or limits the doing of any act that results in an infringement of the copyright in a work." [emphasis added]
- **New Browsing Exception Confirms Temporary Copy Protection But Should be Narrowed:** The Bill proposes in Section 13 creating a new exception for "the making of a transient and incidental electronic copy of a work made available on a network if the making of such copy is required for the viewing, listening or utilization of the said work." This is too broad and it will be difficult to justify it as compatible with the Berne three-step test

---

<sup>21</sup> The 2003 amendments, for example, strengthened criminal penalties to up to five years and fined RM20,000 (approximately US\$6,560) 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. The Copyright (Amendment) Act 2003, Act A1195 (effective August 14, 2003).

<sup>22</sup> Steven Patrick, *New Law to End Illegal Downloading of Music and Movies*, The Star, November 27, 2010, at [http://www.malaysianbar.org.my/legal/general\\_news/new\\_law\\_to\\_end\\_illegal\\_downloading\\_of\\_music\\_and\\_movies.html](http://www.malaysianbar.org.my/legal/general_news/new_law_to_end_illegal_downloading_of_music_and_movies.html).

<sup>23</sup> IIPA submitted comments to MyIPO and the AG's office.

<sup>24</sup> Examples of additional measures of note include TRIPS-compatible protection for "compilations of data," and WCT/WPPT protections against the unlawful use of rights management information.

(and therefore TRIPS). An exception in the online environment for transient reproduction may be acceptable if it is confirmed that such is a lawful use and from a lawful source (i.e., is caused by one who, by way of the authorization of the copyright owner or by operation of law is entitled to make that transmission), is part of an otherwise lawful transmission in a network between third parties by an intermediary, and has no independent economic significance.<sup>25</sup> A safeguard should also be considered to ensure that such copy entails the automatic deletion without enabling the retrieval of the work for any purpose other than to perceive it. The Malaysia provision as drafted contains none of these safeguards. The term “utilization” must also be struck as overly broad. The provision must be reconsidered and redrafted with the above considerations in mind in order not to collide with Malaysia’s international obligations. One positive feature of a more narrowly crafted “transient” reproduction exception is that it will confirm the coverage otherwise in Malaysia of temporary copies under the reproduction right, although this should be made explicit in the definition of “reproduction” in Section 3 of the Act.

- **Statutory Damages:** IIPA commends the Malaysian Government for introducing statutory damages, in the amount of MYR25,000 (US\$8,195) with a maximum of MYR500,000 (US\$164,900). Statutory damages act as a strong deterrent. It remains unclear whether, by procedure, the plaintiff will be able to elect statutory damages (this is not expressly stated, rather, the provision indicates “the court may grant” the relief). Allowing a plaintiff to elect statutory damages anytime before final judgment would be preferable, since the plaintiff has the burden of proving the scope of infringement and may be in the best position to know whether statutory damages will be a suitable alternative to actual damages (it also avoids the potential pitfall of a judge imposing statutory damages when in fact actual damages would be higher). Further, we note with concern that statutory damages may not be awarded in cases involving trafficking in circumvention devices, and that collective works<sup>26</sup> are to be considered “one work” for the purpose of statutory damage awards.
- **Civil Damages – Innocent Infringer:** The Bill introduces (in newly amended Section 37(6)) an “innocent infringer” provision which denies actual damages (but not profits or statutory damages) to one who “at the time of the infringement or commission of the prohibited act the defendant was not aware, and had no reasonable grounds for suspecting, that the act was an infringement of the copyright or prohibited under section 36a or 36b.” We urge the drafters to reconsider this subsection. Copyright infringement should remain a strict liability tort in Malaysia to ensure that there is an “effective” remedy available for infringement as required by the TRIPS Agreement. By contrast, the U.S. “innocent infringement” mitigation lowers (but does not eliminate) statutory damages, not actual damages, and then, only when the *“infringer sustains the burden of proving, and the court finds”* that the infringer was not aware and had no reason to believe that his or her acts constituted an infringement of copyright. Finally, and not insignificantly, this innocent infringer provision means remedies against unlawful circumvention under the Bill will almost certainly be inadequate – i.e., in a TPMs trafficking case, one violating the trafficking provision who could somehow demonstrate no knowledge or constructive knowledge would have practically no remedy imposed against it (since statutory damages are already carved out of the remedies available for illegal trafficking in circumvention devices).
- **Anti-Camcording:** IIPA applauds the Malaysian Government for introducing in draft Section 43A a new anti-camcording provision. This new strict liability offense against one who “operates an audiovisual recording device in a screening room to record any film in whole or in part,” and the separate offense for an “attempt” to do the same, will be extremely helpful in the fight against this harmful form of piracy in Malaysia. IIPA also proposes that it be an offense to further reproduce, distribute, communicate to the public, or transmit recordings of a film under Section 43A(1). A similar prohibition was in the previous draft.

<sup>25</sup> See, e.g., European Union, *Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society*, Official Journal L 167, June 26, 2001, Art. 5.1, at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32001L0029:EN:HTML>.

<sup>26</sup> A “collective work” is then defined in new Section 37(10)(b) as “a work in which relevant materials, constituting separate and independent works in themselves, are assembled into a collective whole.” It is assumed that individual sound recordings would each be regarded as “one work” notwithstanding that they also may be assembled into albums, but this could be usefully clarified.

- **Service Provider Liability:** The Bill encourages the active cooperation of Internet service providers with rights holders to prevent the use of networks for the commission of infringing acts, including but not limited to requiring the termination of accounts of repeat infringers. As currently drafted, the Bill addresses (in new Sections 43B through 43I) provisions related to service provider liability for various infringing activities occurring over its services. Around the world, and in Malaysia, the role of intermediaries in the chain of distribution of copyright materials is of increasing importance.<sup>27</sup> Legislative approaches to dealing with ISPs' roles and liability rules should foster ISP cooperation in shutting down growing online piracy, and should be crafted, *inter alia*, to 1) avoid blanket immunities for intermediaries from copyright liability, 2) preserve injunctive relief, 3) provide effective and expeditious notice and takedown/counter-notification, and 4) require adoption by ISPs of a repeat infringer policy.<sup>28</sup> The Bill, while imposing a 48-hour rule for takedown upon notice (we recommend 24 hours as a more suitable timeframe to preserve the effectiveness of the measure), does not accomplish the aims set out above in 1, 2, and 4. Certain changes could ensure a workable approach by which creators and intermediaries work together in the online space to foster a healthy environment for electronic commerce.<sup>29</sup> We strongly encourage the U.S. to engage with the Government of Malaysia, in line with IIPA's noted concerns, to address these points.

The Bill also unfortunately left out certain key provisions in previous iterations, most notably, the provision on landlord liability<sup>30</sup> which regrettably was removed after lobbying by landlords, and no further consultation with other stakeholders. Other issues that are not covered by the draft amendments include:

- The possibility of recovery of costs and attorneys fees.
- Mandatory minimum jail sentences for piracy.
- Presumptions in the law as to copyright ownership or subsistence of copyright. Section 42 (which states that an affidavit or statutory declaration is *prima facie* evidence of facts contained therein) should be properly

---

<sup>27</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 by which Malaysia is now bound:

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.

<sup>28</sup> One provision the new law does propose is authorizing a court to order a service to disable access to an online location situated outside Malaysia or to terminate an account in cases where infringing material provided via "Transmission, routing and provision of connections," has been identified to come from such online location or location of account.

<sup>29</sup> As IIPA has noted on previous occasions, the service provider provisions should be reconsidered to avoid the following pitfalls, among others:

- The Bill 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. The current Bill does not accomplish this.
- The Bill 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. This is not accomplished in the Bill.
- The Bill should provide for expeditious takedown of infringing activity by service providers in the case of a notice. The "48 hours" requirement is reasonable, but there is, for example, no 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).
- The Bill 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. The Bill does not accomplish this.
- The Bill could contain a mechanism to obtain expeditiously from a service provider information in its possession identifying the alleged infringer.

<sup>30</sup> Five known civil actions have been 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. The head of MDTCC had made public statements that the Copyright Act would be amended so that action can be taken against owners of business premises who allow their tenants to carry out illegal activity. It is therefore highly unfortunate that this draft provision was removed from the earlier draft.

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.

- Deem infringing, in civil cases, the "possession and control" of infringing copies.
- Provide term extension to "life plus 70," and 95 years from publication for films and sound recordings, etc.
- Amend Section 52 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.

Trade Descriptions (Optical Disc Label) Order 2010: Effective May 7, 2010, the Trade Descriptions (Optical Disc Label) Order 2010 was issued by the Minister of Domestic Trade, Co-Operatives and Consumerism (MDTCC), making it a crime to, among other things, supply an optical disc without a requisite label, and presumably enabling MDTCC to authorize administrative actions against violators, whether manufacturers or distributors. 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. Right holders have done their best to comply with the Regulations. However, for example, in a recent informal survey, over 50% of games found in Malaysian markets did not have the requisite labels. MDTCC has indicated to industry that the Regulations would be enforced immediately.

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.

Employ Organized Crime Legislation: With the involvement of organized criminal syndicates in certain piracy operations in the country, the Government of Malaysia should employ the Anti-Money Laundering and Anti-Terrorism Act of 2001 in cases involving copyright infringement.<sup>31</sup>

---

<sup>31</sup> Other laws, such as those criminalizing fraud, tax evasion, false documentation or names and addresses, should also be brought to bear in piracy cases to address the organized crime/IP nexus in Malaysia.

## TRANS-PACIFIC PARTNERSHIP (TPP)

On December 14, 2009, United States Trade Representative Ron Kirk formally notified Congress of President Obama's intention to negotiate with Trans-Pacific Partnership countries with the objective of shaping a high-standard, broad-based regional agreement.<sup>32</sup> Negotiations are proceeding apace with an aggressive schedule with a goal toward completion in 2011. IIPA has submitted public comments to the U.S. Government's Trade Policy Staff Committee which describe in greater detail the hoped-for results of a TPP negotiation, including a high-level IP chapter, including high-level substantive copyright protection, high-level enforcement standards, provisions ensuring the free flow of electronic commerce products and services, and obligations to open markets to trade in copyright goods and services.<sup>33</sup> In particular, enhancement of copyright standards and enforcement consistent with those agreed to by current FTA partners, Australia, Singapore, Chile and Peru, and an expansion of these protections to other countries in the region including Malaysia will contribute to U.S. job growth, an increase in exports, and economic recovery in line with the Administration's goals. The level of IPR protection for the TPP should be consistent and co-extensive with the FTAs between the U.S. and its current FTA partners. On November 10, 2010, IIPA filed prepared and detailed testimony, which it delivered on November 19, 2010,<sup>34</sup> strongly supporting Malaysia's participation in the TPP.

## MARKET ACCESS AND RELATED ISSUES

**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.

**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.

## 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 2010. The Motion Picture Association of America's local group engaged in training activities, conducting trainings focused on Internet piracy and forensics (physical and online) trainings; such training activities will continue into 2011. In 2010, four trainings were provided for MDTCC, totaling 100 attendees. Three of the seminars focused on "Understanding the Optical Disc Act and Internet Forensics" (in February, June, and July) and one focused on "the Fight Against Piracy" (in July).

---

<sup>32</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>33</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).

<sup>34</sup> International Intellectual Property Alliance, "Participation of Malaysia in the Trans-Pacific Partnership Trade Negotiations" IIPA Request to Testify and Testimony Regarding "Negotiating Objectives With Respect to Malaysia's Participation in the Ongoing Negotiations of a Trans-Pacific Partnership (TPP) Trade Agreement," 75 Fed. Reg. 64778 (October 20, 2010).



# MEXICO

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2011 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: IIPA recommends that Mexico be retained on the Watch List in 2011.<sup>1</sup>

**Executive Summary:** In 2010, while hard copy piracy remained at about the same level as in 2009, Internet piracy continued to grow as broadband penetration increased across Mexico. Piracy in Mexico is now prevalent in hard copy and via the Internet, and is found in myriad venues: CD-R and DVD-R burning of music, audiovisual and videogame discs; unauthorized camcording in theaters; unlicensed use of software in corporate and government settings; unauthorized photocopying at universities; and widespread sale of all hard copy material in street markets. The Mexican authorities, notably the Attorney General's Office (the PGR – responsible for federal criminal enforcement), Mexican Institute of Industrial Property (IMPI – responsible for administrative actions under the Copyright Law) and INDAUTOR (the author's rights institute with enforcement responsibilities as well), have worked well with rights holders, including IIPA members, but these authorities need increased resources and training, and are hampered by a number of statutory deficiencies in dealing with the size and scope of the problem. One significant reform in 2010 was the long-sought enactment of an amendment to the Criminal Code to provide *ex officio* authority in copyright infringement cases (in force, June 28, 2010).

While cooperation with the federal authorities was good, state and municipal government anti-piracy efforts continue to be weak, with few of these local entities working at all on combating illegal trade and piracy. Thus, a key missing element is a high-level national anti-piracy plan that both enhances and coordinates federal, state and municipal enforcement activities. Some recent efforts have focused exclusively on Internet piracy. Three years ago, a coalition of rights holders started meetings with Internet service providers, under the auspices of the Mexican communications ministry, and tried to reach an agreement on cooperative efforts to address this problem. But those talks stalled due to opposition from the Communications Secretary and the Federal Commission of Telecommunications (COFETEL). In late 2009, 37 civil organizations representing copyright industries, other rights holders and collecting societies formally established the "Coalition for the Legal Access to Culture" (CALC), with the hope of improving Internet enforcement by offering various public and private sector solutions. In addition to the other challenges, the Mexican enforcement system is hampered by a lengthy list of legal deficiencies, including the need to fully implement the WIPO digital treaties.

### Priority actions requested to be taken in 2011:

The copyright industries recommend the following enforcement and legal reform priority steps to the Government of Mexico:

#### Criminal Actions, Raids and Prosecutions

- Develop a national "ex officio" anti-piracy campaign to address well-known street markets and distribution centers responsible for the sale of vast quantities of pirated goods, including cooperation with municipal authorities to revoke operational licenses, and to focus on corporate end-users with unlicensed software and other materials.

---

<sup>1</sup>For more details on Mexico's Special 301 history, see IIPA's "History" appendix to this filing at <http://www.iipa.com/rbc/2011/2011SPEC301HISTORICALSUMMARY.pdf>, as well as the previous years' reports, at <http://www.iipa.com/countryreports.html>. For a summary of IIPA's 2011 global issues, see our cover letter at <http://www.iipa.com/pdf/2011SPEC301COVERLETTER.pdf>.





- Create a fully empowered IP Intergovernmental Committee with authority to coordinate the various enforcement bodies including police and prosecutors, and to implement a national plan, including coordination with the PGR's Organized Crime Division to act against major organized crime syndicates engaged in large-scale IP piracy operations.
- Address illegal photocopying by copyshops on or near major university campuses, and engage university administrations to encourage the use of legal materials by students and lecturers.
- Coordinate the various police agencies (the federal police (PFP), the fiscal police (SAT), and military police) to identify and target individuals responsible for the large-scale distribution and importation of pirated goods. Additionally, the government should set goals and augment the tax authorities' anti-piracy actions, including inspecting enterprises for software license compliance.
- Re-launch the inspection program (by Customs) and adopt a maximum quota on blank media importations used for the pirate market.
- Ensure that seized goods are destroyed in a timely manner to prevent the reentry of infringing product into the market. Relevant rights holders should be notified of the destruction of infringing goods.

#### Administrative Enforcement

- Provide IMPI with additional resources (including personnel) to conduct inspections, and allow IMPI's regional officers to become enforcement inspectors to conduct raids in their localities. Encourage IMPI to expeditiously issue its decisions (the motion picture and software industries reported progress in 2010).
- Provide INDAUTOR with more resources and facilities to increase its mediation capabilities, particularly by providing more mediators and mediation rooms, and requiring more expeditious notices to rights holders.
- Require the Secretary of Education to instruct INDAUTOR to expedite the publication of tariff rates for the public performance of sound recordings by TV and radio stations in Mexico (such rates are required in accordance with the Copyright Act and Mexico's international obligations).

#### Prosecutions, Judges and Courts

- Encourage prosecutors to take *ex officio* actions against all forms of piracy, to focus on prosecuting individuals arrested in such actions, and to seek deterrent sentences, including jail time. Also have the Supreme Court issue an advisory on this point to criminal judges nationwide. 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 Mexico's TRIPS obligations.
- Create specialized IP courts for criminal matters. Continue to provide, and expand on, IPR enforcement training for law enforcement officials, prosecutors and judges. Provide sufficient resources for the new IP magistrates within the Tax Court.
- Allow civil damages to be additionally awarded to plaintiffs in administrative and criminal cases.

## Legal Reforms

- Support passage of legislation to impose criminal penalties for the unauthorized camcording of films in theaters.
- Develop legislation calling for ISPs' cooperation to address online piracy following the direction of the CALC initiative, and including notice and takedown procedures.
- Implement the WIPO digital treaties – in the Copyright, Industrial Property, Criminal and Criminal Procedural Codes.
- Amend the Criminal Code and the Copyright Law to facilitate the imposition of 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 (the recent internal software audit undertaken by IMPI is a positive example).
- Enact legislation, similar to the bill recently approved by the Mexican Senate (and consistent with administrative authority powers) to enhance the enforcement capabilities of IMPI by: (1) providing for increased penalties against enterprises that refuse entry to IMPI inspectors ("door closures"); and (2) establishing a presumption of infringement in such cases.
- Strengthen administrative enforcement by: (1) providing tax crime prosecution authority; (2) increasing administrative sanctions; (3) allowing electronic (photo and video) evidence taken during inspections.

## COPYRIGHT PIRACY IN MEXICO

Here is a snapshot of the nature of piracy and ongoing enforcement problems in the past year:

Hard goods piracy: The most effective strategy against hard goods piracy is to focus enforcement efforts on the manufacturing and distribution networks, and on street and market sales. The main distribution centers for optical disc piracy – of music, film, entertainment and business software CDs and DVDs -- remain as follows: Tepito, Plaza Meave, Eje Central, Plaza de la Computación, Lomas Verdes, Bazar Pericoapa in Mexico City; La Cuchilla in Puebla; Las Pulgas in Monterrey; and San Juan de Dios in Guadalajara. Tepito and San Juan de Dios are the dominant sources for manufacturing and sale, along with growing problems at Plaza de la Computación and Plaza Meave. IIPA recommends focusing on these four locales, with a more systematic approach to identifying and prosecuting the criminal organizations operating in these (and the other) markets.

In 2006, the film and music industries combined their anti-piracy operations into the Association for the Protection of Film and Music (APCM). APCM reports that hard goods piracy for 2010 in the film and music industry was about 85%. Flea market piracy remained at a constant level, and is especially problematic in Mexico City, Guadalajara and Monterrey. 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 is like a video club with pirated products). Vendors also make available infringing copies of any catalog product or TV series, often with a 24-hour turnaround time.

Much of the pirated product in Mexican markets is locally manufactured, so controlling blank optical media imports is very important. Mexico imports much of its blank media from Taiwan; the main ports of entrance are

Manzanillo, Matamoros, Reynosa, and Laredo. The street markets have discrete distribution chains and often involve criminal syndicates.

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 found in most major markets (cited above), particularly Tepito and San Juan de Dios. 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 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.

The independent film and television segment of the motion picture industry (IFTA) reports that online and physical piracy remain a significant export constraint for independent producers and distributors, the majority of which are small to medium sized businesses. Independent producers partner with local authorized distributors to finance and distribute their films and programming. These authorized distributors find it almost impossible to compete with the pirates and report that piracy in Mexico has reached disastrous levels. Producers and distributors confirm that DVD sales have been particularly impacted since pirated digital copies are offered for free online and with the same quality viewing experience as a DVD. Unable to compete with free, legitimate distributors cannot commit to distribution agreements, or alternatively, they offer drastically lower license fees which are inadequate to assist in financing of independent productions. As a result, piracy is undermining and may permanently damage legitimate distribution networks essential to reaching the consumer and leaves little confidence for investment in intellectual property in Mexico.

Internet piracy: Internet piracy is growing, as Internet use grows in Mexico: there are now an estimated 30.6 million Internet users in Mexico, representing 27.2 % of the population; in 2000, only 2.7% of the population had Internet access (according to [www.Internetworldstats.com](http://www.Internetworldstats.com)).

The most prevalent platforms for unauthorized downloads are peer-to-peer (P2P) filesharing, sites dedicated to providing links to infringing hosted content, cyberlockers, forums, BitTorrent index sites and blogs. Among other places, pirate servers have been specifically identified as 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.

With the migration of customers from hard copy to downloading and mobile phone usage, peer-to-peer is the most prevalent source of music piracy, with ARES, Gnutella and BitTorrent dominating, as well as "linked" piracy on blogs and forum sites. "Blogspot," a Google service, has been widely used, but Google Mexico has recently started reacting positively, blocking links in response to takedown notices sent by APCM. The Motion Picture Association (MPA) notes that a recent IPSOS survey found a 400% increase in Internet piracy with 96 million illegal movie downloads in 2010 compared with 24 million in 2009. Internet piracy is also directly related to "source" piracy – the camcording of films that are then uploaded onto the Internet and available by all of these means. The same study accounts for 5.7 billion illegal music files downloaded in Mexico during 2010 by over 15 million Internet users; this is a 13% increase from 2009. Independent film producers (IFTA members) are especially concerned about Internet piracy because of its harm to legitimate online distribution platforms and services – harming consumers and rights holders alike. Revenue from these platforms and services, which are licensed country-by-country, is critical to financing the development of new creative works worldwide, since piracy in one territory harms other markets instantly. The independent film production sector cannot shift easily to new business practices that might otherwise limit piracy. For example, worldwide same day release (referred to as "day and date" release) may prove an effective method to curb or delay piracy for the major studio producers, which control their own worldwide distribution; but for independents, whose national distributors release on their own schedule, this technique is impossible.

End-user piracy: The Business Software Alliance (BSA) reports that its primary concern in Mexico remains the unlicensed use of software by enterprises (end-user piracy). The PC software piracy rate in Mexico was 60% in 2010, with the estimated commercial value of unlicensed software for U.S. vendors at \$594 million.<sup>2</sup> Illegal software is available at street markets (by “carpeteros”), and at on-line auction sites, specialized download sites and file-sharing sites.

In addition, “white box” vendors (small local assemblers or non-brand name vendors of computer hardware) continue to be a considerable source of software piracy (usually hard disk loading). BSA partners with IMPI to conduct a large number of inspections (cifras).

Circumvention activity continues to be a significant problem for the Entertainment Software Association (ESA), 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”). ESA members have not sought 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. Increasingly, consumers in Mexico source their circumvention devices from online auction sites. The widespread availability of circumvention devices underpins the growing problem of online piracy of entertainment software in Mexico. In 2010, ESA vendors detected more than one million connections by peers participating in unauthorized file sharing of select member titles on peer-to-peer networks through ISPs located in Mexico, placing Mexico in the top 25 countries in overall detections.<sup>3</sup> Breakdowns by ISP show that subscribers to Uninet S.A. de C.V. account for approximately 76% of this activity in Mexico.

Camcord piracy: The illegal recording of films in Mexican theaters continues to cause significant harm to the U.S. motion picture industry. In 2010, 33 films were stolen from Mexican theaters; 31 of these were video captures. In 2010, three professional camcorders were apprehended in Mexico; it is estimated that they are responsible for approximately 40% of the material identified from Mexico. This underscores the organized and profit-driven nature of this crime. As major blockbuster theatrical release dates in Mexico and the U.S. begin to coincide, Mexico has become a source of Spanish-dubbed camcords which are then made available online. The enforcement challenge in Mexico remains the same: the police cannot arrest an individual camcording unless there is also evidence of a distribution. To sustain a successful prosecution under the current law requiring proof of intent to distribute, investigators have 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 film to be widely distributed; by that time, grievous harm has resulted. This is a terribly inefficient use of government resources, has little deterrent effect, and is causing grave economic damage.

Book and journal piracy: Unauthorized photocopying of academic materials at copy shops in and around university campuses continues to be problematic. Though unauthorized copying is well-known on campus, university administrators have done almost nothing to address the problem. The production of unauthorized compilations or course packs consisting of unlicensed content from a variety of publishers is also commonplace. In some cases, materials taken from U.S. books are posted on the institution’s intranet for faculty and student 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

---

<sup>2</sup>BSA’s 2010 statistics are preliminary, representing U.S. software publishers’ share of commercial value of pirated software in Mexico. They follow the methodology compiled in the Seventh Annual BSA and IDC Global Software Piracy Study (May 2010), <http://portal.bsa.org/globalpiracy2009/index.html>. These figures cover packaged PC software, including operating systems, business applications, and consumer applications such as PC gaming, personal finance, and reference software – including freeware and open source software. They do not cover software that runs on servers or mainframes, or routine device drivers and free downloadable utilities such as screen savers. The methodology used to calculate this and other piracy numbers are described in IIPA’s 2011 Special 301 submission at [www.iipa.com/rbc/2011/2011SPEC301METHODOLOGY.pdf](http://www.iipa.com/rbc/2011/2011SPEC301METHODOLOGY.pdf). BSA’s final piracy figures will be released in mid-May, and the updated US software publishers’ share of commercial value of pirated software will be available at [www.iipa.com](http://www.iipa.com).

<sup>3</sup>These figures do not account for downloads that occur directly from hosted content, such as games found on “one-click” hosting sites, which appear to account each year for progressively greater volumes of infringing downloads.

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. The local reprographic rights organization, 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 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 Camara 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.

## COPYRIGHT ENFORCEMENT IN MEXICO

### Criminal Enforcement

Structural reforms and jurisdictional issues: There are several "structural" reforms or agency actions that could improve criminal enforcement. First, effective coordination and communication among the municipal, state, and federal governments could greatly improve criminal enforcement. Only four of Mexico's 32 state governments cooperate on IPR enforcement -- 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; but even with such regulations, few local anti-piracy actions have been taken. Priority states to focus on coordinated federal-"local" efforts include: the Federal District, Nuevo Leon, Jalisco, Mexico State, Puebla, Morelos, Baja California Norte, Veracruz and Michoacán.

A second goal is further improving the activities of the PGR (the Attorney General's) criminal actions. Most notably, legislation was enacted in 2010 giving PGR the authority to take *ex officio* actions against copyright infringement. We commend this development and urge PGR to use this new authority aggressively against all forms of copyright infringement. The copyright industries are also applying the "Ley Federal de Extinción de Dominio" (Federal Law for Property Forfeiture) to piracy cases. The PGR anti-piracy coordinating committees are proving effective in several states, including Nuevo Leon, Morelos and Puebla. Another matter is the experience IIPA members are facing with organized crime cases. The PGR has a special piracy unit, the "Subprocuraduría Especializada en Investigación de Delitos Federales (SEIDF), which has worked effectively with industries and achieved significant results in some key markets. However, this unit is under-resourced to effectively dismantle the organized crime networks. There is also a PGR Organized Crime Investigative Division (PGR-SIEDO,) with excellent investigators and attorneys and resources that the other divisions do not have -- including paid informants, wire-tapping authority and witness-protection programs. We recommend better coordination between PGR-SIEDO and PGR-SEIDF. Criminal prosecutions are a major concern for APCM Mexico. Criminal sentences are rare given the number of raids and cases commenced; additionally, more resources and training is needed.

The Mexican Tax Administration (SAT) can use its inspection power to review companies for their use of legal software, which should be encouraged and can serve as a powerful deterrent to unlicensed software use by business enterprises. Also, the Scientific Police of the Secretaria de Seguridad Publica are assisting rights holders by providing information on illegal software websites. Regarding Customs Office enforcement, the recording industry and others report that much of the pirate material is produced locally, but that the raw materials are imported -- blank CD-Rs, blank DVD-Rs, jewel boxes and burners. Although these importations are not considered a crime, there have been coordinated administrative actions by the PGR, SAT and APCM resulting in significant seizures of illegal imported raw material.

Another enforcement mechanism is to have the Federal Bureau of Consumer Interests (PROFECO) use its *ex officio* powers for consumer protection to stop street market piracy. Unfortunately, PROFECO lacks the human and financial resources to properly conduct raids, and needs police assistance to protect its personnel during raids. There have been training programs undertaken by industry, and we recommend the PROFECO be properly resourced to undertake action against street markets.

Summary of some criminal actions in 2010: In 2010, APCM reported a good ongoing level of cooperation with PGR on film and music actions. There were 2,667 criminal actions conducted across Mexico against physical piracy, directed at 147 laboratories, 880 warehouses, 373 street and 1,011 cyber-cafes; online, there were 702,119 takedowns and other removal of content by administrative or criminal action; and there were 3 border actions. As a result of these actions, there were 196 arrests, 41 indictments, 24 sentences and 32 individuals that are currently in prison for IPR violations. IMPI carried out 90 inspection visits; 24 defendants received sentences of over 4 years. A total of 6.1 million recorded CD-Rs and over 7.67 million DVD-Rs (motion pictures) were seized during police raids.

The ESA's anti-piracy enforcement program had several noteworthy actions in 2010 and was able to overcome previous 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 2010; the Specialized IP Unit seized over 90,000 pirated games and 2.9 million counterfeit game covers. ESA also procured PGR's help in conducting three raids in Tepito, which yielded over 154,000 pirated games across multiple platforms. More importantly, the multiple raids on Tepito resulted in dismantling burner labs and storage facilities capable of producing millions of pirated products (roughly 565 burners were seized). While ESA regards the 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. The two specific game piracy centers raided in Mexico City (by PGR) included: Pericoapa (August), a popular retail center that has housed pirate vendors for years; and Plaza Meave (April), a significant retail and distribution center. The raids resulted in seizing more than 6,000 illegal game copies. ESA looks forward to sustained PGR efforts in 2011, especially to keep these markets from returning to former piracy levels. However, without follow-up investigations on the supply chains and criminal prosecutions, recidivism rates remain extremely high. There was an overall increase in the number of criminal convictions in 2010 (26 compared to just 3 in 2009), but the prosecutorial and conviction rates remain very low. Last, the effectiveness of raids is further undermined by PGR seized goods finding their way back into the black market because they are not expeditiously destroyed; PGR should adopt a policy to expeditiously destroy infringing goods.

Judicial issues: One continuing weak spot in Mexican IPR enforcement is the judiciary – the absence of IPR expertise by judges (re-enforcing the need for special IP judges and courts), the non-deterrent sentencing in many or most cases, and persistent problems with civil litigation.

While cooperation between rights holders and the PGR is very solid, IPR prosecution is being hampered by a lack of proper resources, training (despite many programs), and a shortage of deterrent sentences. The number of cases is still far below what is needed to have any significant effect on the marketplace (as APCM reported in 2010, only 24 sentences were handed down). IIPA recommends that Mexico consider the adoption of mandatory sentencing regulations for criminal copyright cases, and/or that the Supreme Court issue its own recommended guidelines to assist judges with the imposition of deterrent sentences.

Mexico's three-tiered civil procedure system, involving actions in the first and second instance, and the Amparo hearing makes civil litigation more complicated, time consuming, and costly for rights holders. Another concern is the delays in resolving cases. There have been some recent improvements: for example, Mexican law now grants full validity to electronic documents and discovery, although, some judges are not yet familiar with these rules. Of serious concern is the fact that Mexican civil enforcement lacks *ex parte* measures on civil procedures to stop serious infringements and avoid the destruction of evidence. In this way, Mexico is not in compliance with the TRIPS agreement (effective measures). Additionally, there are no injunctions granted by civil courts to halt infringements, seize allegedly infringing merchandise or to gather evidence (and avoid its destruction). The other

major impediment is that damages can only be collected after an infringement decision has become *res judicata*. This can mean an eight to ten year process of litigation in IMPI, the Tax Court and the Circuit Courts, with an additional two years to claim damages after *res judicata*, in a civil court. This *res judicata* prerequisite for copyright infringement damages was set by the Supreme Court in 2008.

## Administrative Enforcement

There are two administrative agencies that work on copyright matters in Mexico: IMPI and INDAUTOR; both are also very actively engaged in public awareness campaigns.

IMPI: In 2010, IMPI undertook 1,213 actions against enterprises infringing software licenses (994 *ex officio* actions and 219 *ex parte* raids, also known as “full raids”). BSA reports that in 2011 it will launch a new campaign to audit major federal agencies and private companies in Mexico with IMPI's cooperation. While BSA and other right holder groups enjoy significant cooperation and coordination with IMPI on enforcement actions, IMPI's efforts could be enhanced with new statutory authority providing for increased penalties and the establishment of a presumption of infringement in cases where enterprises refuse entry to IMPI inspectors (so-called “door closures”). Additionally, investigations should be conducted more rapidly, and evidence preserved immediately upon discovery of a presumptive infringement (including evidence discovered by the authorities during inspections, even if that evidence is not listed on the inspection order).

The music industry reports that for the second year in a row, IMPI continued its actions against cyber cafés offering access to peer-to-peer 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.

In 2010, the Motion Picture Association (MPA) launched the third phase of an anti-piracy campaign with CANACINE, with the support of both IMPI and PGR (and PGR created a 1-800 number for anonymous tips to report piracy). The industries continue to work with enforcement authorities on training programs to improve overall enforcement.

INDAUTOR: The IIPA members continue to recommend additional training for its staff on key copyright matters, and that public awareness initiatives should continue to issue general information about the importance of copyright to the local culture and economy.

INDAUTOR also is responsible for supervising the collecting societies in Mexico. This includes the authority to issue tariff rates for the broadcasting of sound recordings in TV and radio stations; rates were due by the end of 2009, but have not yet been issued. A tariff proposal was under consideration two years ago by the Federal Market Commission (COFEMER) responsible to evaluate the impact of the future rates on the Mexican economy, with additional steps necessary before publication of the official tariff. The recording industry continues to work closely with INDAUTOR on this matter and is hopeful for a quick and favorable resolution. INDAUTOR needs to take steps to complete the procedure, and publish the rate, within a reasonable timeframe.

## Online Enforcement

Legal reforms: There are several legal deficiencies hampering effective online enforcement: first, 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. Second, specific provisions in the Telecommunications Law prohibit ISPs from disclosing customer's personal information to rights holders seeking civil recourse against alleged infringers. The absence of clear law results in a lack of certainty for ISPs on how to react to Internet piracy and to notice and takedown notifications from the copyright industries. Some IIPA members report cooperation with hosted content take downs, but most said there was “no cooperation” or “very little”

cooperation. Because ISPs are not allowed to provide information on alleged infringers, rights holders must bring a criminal action to the PGR to obtain those details. Additionally, ISPs have been reluctant to include clauses in their subscriber agreements to permit terminations if subscribers infringe intellectual property rights.

Generally, file-sharing committed through P2P networks is not considered a serious legal violation by the civil courts. 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. APCM reports very few Internet piracy cases filed last year mainly due to the lack of adequate criminal provisions as described above. Two noteworthy cases include: the arrest of a member of a dominant Tijuana camcording gang which operated through scenelatina.org and an FTP server; and, the arrest of the administrator of two FTP services out of the State of Mexico

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. Some of the key sites taken down include: "Imperialatino.net" with over 600 thousand music tracks; viciowarez.com which had attracted over 150,000 users (over 300,000 tracks); and, DARK-VILLE offering over 200,000 music and movie links. APCM reports that it issued 934 cease and desist letters for music and movies content; it worked to take down 13 hosted web pages; 109,149 blog post permalinks; over 8 million peer-to-peer links; 1.6 million cyberlocker links; 203,016 forum posts; and 4,235 pre-release music files.

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. In November 2009, the CALC was formed with 37 founding members to promote and defend copyrights and related rights threatened by physical and online piracy, working with different government entities and federal authorities. The CALC has also focused on legislative reforms, including: addressing private copy issues and promoting cooperation between right holders and ISPs to address piracy in the online environment. New legislation is expected to be introduced in 2011. IMPI has also been working with ISPs and rights holders to develop "cooperative models" for fast and efficient disabling of infringing websites.

## Border Enforcement

There remain formal, onerous requirements to initiate border actions in Mexico. For example, Customs authorities will 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; this is because Customs does not have authority to detain a shipment for more than a few hours. We recommend greater cooperation between these two agencies to improve border enforcement, and to expedite the procedures by which Customs may make immediate seizures of clearly infringing products. Additionally, the Customs Code needs to be amended to grant customs officers *ex officio* powers.

In 2007, the PGR established a task force with Customs, the Ministry of the Economy and private sector representatives (music and film), to monitor and develop intelligence on blank media imports. IIPA continues to recommend cooperation between U.S. and Mexican customs authorities 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 Mexico (to avoid Mexican taxes). As a result of training programs with Customs, the U.S. Embassy and industry, blank optical media importations have decreased, but they still persist (with over 500 million units of blank media still crossing the border annually, with much of it going, ultimately to the markets in Tepito, La Cuchilla, Las Pulgas, and San Juan de Dios).

In 2008, Customs began an anti-piracy initiative to: (1) conduct regular trainings of Mexican officials at various ports on intellectual property enforcement issues and the identification of various types of pirated product; and (2) hold monthly meetings with industry members to review the results of the trainings and to make



improvements in border enforcement. ESA reports a positive impact from its ongoing training efforts with Mexican Customs officials, resulting in a good number of detention notifications and seizures of pirated game product from diverse ports, including in particular Guadalajara and Monterrey. Increased training opportunities with Customs should help continue this positive trend in 2011. ESA is likewise pleased by an improvement in the level of support from Customs in dealing with shipments of circumvention devices. The BSA reports Customs authorities have undertaken effective seizures in 2010 of imported illegal software and of computers containing illegal software.

## COPYRIGHT AND RELATED LAWS IN MEXICO

Federal Law on Copyright (1996, as amended): Amendments to Mexico's 1996 Copyright Law entered into force on July 24, 2003; regulations to implement these amendments were issued in September 2005. Mexico acceded to both the WIPO Treaties (the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty) in 2002, but has yet to publish the WCT and WPPT Agreed Statements. There are many remaining deficiencies in the Copyright Law (including long-standing NAFTA and WTO TRIPs obligations); and the digital treaties have not been implemented. IIPA has detailed our list of recommended amendments in prior filings. It is available at: <http://www.iipa.com/rbc/2010/2010SPEC301MEXICO.pdf>.

Pending Legislation: As we have noted, there are a number of important legal reforms needed for effective enforcement in addition to Copyright Law amendments. These include:

- A bill to amend the Criminal Code to punish – with a prison term (3 to 10 years) and fines – the unauthorized camcording of films in theaters. The legislation needs to eliminate any required proof of commercial intent;
- A bill (in the Copyright Law or Criminal Code) to establish criminal sanctions for the distribution or trafficking in devices used for the circumvention of technological protection measures (TPMs). The bill should include “acts” as well as devices, components and services;
- A bill to adopt CALC proposals to promote cooperation between right holders and ISPs;
- Amendments to the Law of Industrial Property to provide IMPI with enhanced enforcement capabilities, including increased penalties and a presumption of infringement in cases where enterprises refuse entry to IMPI inspectors (“door closures”).

IPR Training and Public Awareness: The IIPA member associations and individual companies continue to conduct training and information seminars for Mexican enforcement officials, and remain ready to continue to do so. In addition to the Customs training programs already described above, and the other training programs for IP enforcement officials, some of the IIPA member associations have been working on programs to improve public awareness and appreciation for intellectual property among Mexican consumers, particularly for younger age groups. For example, in 2010, ESA, MPA and others, worked with the Ministry of Education in sponsoring an IP education campaign entitled, “Mexico Gana con el Original” (“Mexico Wins with the Original”) aimed at school children in grades 3-6 in schools throughout Mexico City. The support of the Ministry was critical to promoting the visibility and access of this campaign, which involved in an essay-writing contest that culminated in a televised awards ceremony where the winners in each grade group were featured on the broadcast of the “Ninos Once” program. IIPA members see these education efforts as an important complement to enforcement efforts and look forward to continued support from the Ministry for the 2011 version of the campaign.

# POLAND

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2011 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: IIPA recommends that Poland be placed on the Watch List in 2011.

Executive Summary: IIPA appreciates the efforts the Government of Poland has undertaken in general to improve intellectual property rights protection and enforcement, which led to its removal from the Watch List last year. However, the copyright industries continue to face significant hurdles to effective protection and enforcement for their content in Poland and thus, IIPA believes Poland should now be included on the Watch List.

Since Poland was removed from the Special 301 Watch List in 2010, the Government of Poland has not made progress on the previously announced IPR strategic plan, and the Ministry of Culture has failed to announce a new three-year plan or to move forward with its Interministerial Team in 2011. As a result, there is currently no national strategy to address piracy. Police and public prosecutor's offices still need coordinating centers, and there is no meaningful effort to conduct copyright cases generally, or to undertake actions to address a growing problem of the markets along the Polish-German borders. While there was indeed some progress in lowering piracy levels, which also contributed to Poland's removal from the Watch List in 2010, copyright holders continue to face significant difficulties enforcing their rights. Locally burned pirated products continue to be sold on the streets and in flea markets, though some industries have reported marginal improvements in this area. Open-air markets along the German border sell pirated and counterfeit products that hurt legitimate industries in Poland and Germany. There has been no progress on banning the sale of optical discs in the local marketplaces. The business software industry continues to experience high rates of unlicensed software use in the business sector and has launched a number of collaborative efforts with the Government of Poland to raise public awareness about this problem. 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 substantial amount of cooperation between industry and police to take action against online infringements and hard goods piracy, numerous prosecutorial bottlenecks ultimately prevent cases from moving forward. The continuing failure to impose deterrent penalties against copyright infringers, or issue transparent reports of the results of court procedures, contributes to the challenge in Poland, as does the frequent termination of preliminary proceedings. 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 are underway.

### PRIORITY RECOMMENDED ACTIONS FOR POLAND IN 2011:<sup>1</sup>

In light of the experiences of the copyright industry in Poland during 2010, the top enforcement priorities for the IIPA (many of which are outstanding actions from the government's IPR strategic plan for 2008-2010), are:<sup>2</sup>

- Revitalize the Intergovernmental Team for Counteracting Infringements of Copyright and Related Rights, and form a new strategy focusing on legal reform, strengthening enforcement resources, and cooperative dialogues.
- Enforce local sale bans on pirate optical disc (OD) product, and introduce and implement criminal sanctions to the Copyright Law to monitor production and sale of OD in markets both at the border and on the streets.

<sup>1</sup>For more details on Poland's Special 301 history, see IIPA's "History" appendix to this filing at <http://www.iipa.com/rbc/2011/2011SPEC301HISTORICALSUMMARY.pdf>, as well as the previous years' reports, at <http://www.iipa.com/countryreports.html>. For a summary of IIPA's 2011 global issues, see our cover letter at <http://www.iipa.com/pdf/2011SPEC301COVERLETTER.pdf>.

<sup>2</sup>For details, see IIPA's 2010 submission at <http://www.iipa.com/rbc/2010/2010SPEC301POLAND.pdf>.



- Strengthen the divisions within police units which are responsible for Internet monitoring and gathering evidence for criminal proceedings so that more actions can be pursued.
- Appoint and train specialized IPR prosecutors and harmonize evidentiary procedures.
- Facilitate increased *ex officio* actions under the copyright and criminal laws.
- Introduce anti-camcording legislation.
- Withdraw the reservation to Article 12 of the Rome Convention.
- Clarify the law on the protection of technological protection measures to eliminate the need for evidence of an infringement, and provide for protection against the distribution of software-based circumvention devices.
- Expand the Ministry of Economy initiative to promote implementation of software asset management practices in other ministries and create a best practice for private businesses.
- Efficiently utilize newly enacted authority provided to tax inspectors to verify software license compliance in businesses.

## COPYRIGHT PIRACY IN POLAND

Piracy of copyright works continues to harm the markets for legitimate sales of film, music, books, entertainment software, and business software in Poland. Sales of pirated physical goods by street vendors and in open markets have decreased slightly in recent years, particularly in Warsaw, but continue to be visible in other large cities and along the Polish-German border. Internet piracy, meanwhile, has increased, and is a problem for all of the copyright sectors.

Business software piracy in organizations (end-user piracy). The Business Software Alliance (BSA) reports that the unauthorized copying and use of software by 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 downloaded from online auction sites and hyperlinks. BSA's preliminary estimate from research firm IDC on the PC software piracy rate in Poland in 2010 is 54%, unchanged from 2009. That corresponds to a commercial value of pirated U.S.-vendor software of US\$311 million in 2010.<sup>3</sup> BSA has collaborated with the Ministry of Economy to improve public awareness and promote software asset management in businesses under its "Zrób to Samo" (Do the SAMe) campaign. The aim of the campaign is to encourage Polish entrepreneurs and public offices to implement a Software Asset Management (SAM) program, including software audits, by promoting a case study example of SAM good practices at the Ministry of Economy along with other marketing initiatives for IPR awareness among small- and medium-size businesses. More efforts like this by the Government of Poland to promote the acquisition and use of legal business software would benefit the Polish economy.<sup>4</sup>

---

<sup>3</sup>BSA's 2010 statistics are preliminary, representing U.S. software publishers' share of commercial value of pirated software in Poland. They follow the methodology compiled in the Seventh Annual BSA and IDC Global Software Piracy Study (May 2010), <http://portal.bsa.org/globalpiracy2009/index.html>. These figures cover packaged PC software, including operating systems, business applications, and consumer applications such as PC gaming, personal finance, and reference software – including freeware and open source software. They do not cover software that runs on servers or mainframes, or routine device drivers and free downloadable utilities such as screen savers. The methodology used to calculate this and other piracy numbers are described in IIPA's 2011 Special 301 submission at [www.iipa.com/pdf/2011spec301methodology.pdf](http://www.iipa.com/pdf/2011spec301methodology.pdf). BSA's final piracy figures will be released in mid-May, and the updated US software publishers' share of commercial value of pirated software will be available at [www.iipa.com](http://www.iipa.com).

<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 September 2010 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 generate \$1.1 billion in GDP, (...continued)

Hard goods piracy – optical disc piracy, street piracy, and the outdoor markets. Hard goods piracy of copyrighted materials continues in Poland, but is on the decline relative to the increase in Internet piracy. Local industry reports that large-scale piracy at open street markets is no longer the problem it was four or five years ago, although piracy of film, music, and software products continues at Polish-German border as well as in Krakow and Wroclaw (albeit from a smaller number of vendors and in lesser amounts). 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.

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 hard copy music piracy in Poland at the overall level of 25% (and slightly higher, 27%, for U.S. repertoire). 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 center for illegal distribution. Pirate copies can still be found at marketplaces in Cracow and Wroclaw. However, after successful raids by border guards at local marketplaces along the Polish-German border, the supply of pirate discs has significantly diminished; this is a significant success. As discussed below, Internet piracy is the greatest threat to the music and recording market, occurring predominantly via infringing cyberlockers, hyperlinks and peer-to-peer (P2P) services, as well as mobile piracy. Most often the Internet Service Providers (ISPs) react promptly to ZPAV's notices and remove infringing content. As far as illicit P2P file-sharing networks are concerned, the ISPs prefer to co-operate with the police. The level of physical piracy remained the same from 2009, but Internet piracy estimates 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\$130 million in 2010, the bulk of which was due to Internet piracy.

The Entertainment Software Association (ESA) reports that the physical piracy market now primarily consists of domestically burned pirated optical disc goods, available largely from flea markets and street vendors or sold through Internet advertisements. For at least one ESA member company, physical piracy in Poland has decreased significantly while legitimate product sales increased in 2010. Burned pirate copies of games are more readily available in places other than the major cities. However, the main channel for piracy is via P2P networks.

The vast majority of cases initiated by local enforcement relate to pirate product burned for personal use or distribution among peers, and a very small portion of this pirate product is for commercial sale. According to the Motion Picture Association (MPA) and its local Polish organization FOTA, the problem of movie piracy in Poland has undergone a major shift in 2010, migrating from street piracy to online piracy which is now the most serious problem for the motion picture industry. Locally burned discs, which increasingly contain multiple titles, and imported Russian-made pressed discs, still 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 two up to eight movies. Infringing use of P2P networks as well as cyberlockers (chomikuj.pl and wrzuta.pl) and illegal streaming websites are the most prevalent sources of unauthorized online 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

---

(...continued)

\$155 million in new tax revenues, and an additional 1,812 IT jobs. The benefits would be even greater if Poland achieved a 10 point reduction over two years, which would generate \$1.4 billion in GDP and \$209 million in tax revenues.

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. The growth of Internet access in Poland, including broadband connections, is fast outpacing government efforts to control Internet piracy. As a result, the estimated 22.4 million Polish Internet users (58% of the population, according to [www.internetworldstats.com](http://www.internetworldstats.com)) represent an increasingly challenging market for legitimate content providers to reach. As films are more readily available online, the motion picture industry reports a reduction in rental shops and the volume of rental DVDs distributed in Poland. Internet websites offering an exchange of links to illegal content were very active. Illicit 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”). BSA continues to report that much of its Internet piracy concern in Poland relates to websites offering illegal copies of software for download and resale, but illicit P2P use is also increasing. A significant increase in infringements is being noted on social networking websites such as: wrzuta, chomikuj, and pobieraczekcommercial. A worldwide Internet monitoring program that IFTA conducted in the last quarter of 2009 for 90 of its Members films recorded over 4.5 million instances of infringements via P2P networks and almost 50,000 instances of OSP infringement. Poland ranked in the top ten countries for illegal downloading with over 150,000 instances of infringements over P2P networks.

Internet piracy of video games continues to rise, and in 2010 Poland ranked among the top ten countries worldwide in terms of unauthorized file sharing on P2P networks. The Entertainment Software Association (ESA) reports that during 2010, ESA vendors detected 3.64 million connections by peers participating in unauthorized file sharing of select member titles on P2P networks through ISPs located in Poland, placing Poland ninth in overall volume of detections in the world.<sup>5</sup> Pirate videogames are also readily available for purchase on Polish Internet auction sites such as Allegro.pl.

## COPYRIGHT ENFORCEMENT IN POLAND

The national anti-piracy plan. In 2000, the Polish government created an “Intergovernmental Team for Counteracting Infringements of Copyright and Related Rights,” to be headed by the Ministry of Culture and including the participation of the key Polish enforcement agencies on intellectual property rights issues (including the Ministry of Justice, the Ministry of Interior and Administration, and Police Headquarters) as well as copyright industry participants. The Intergovernmental Team issues strategic plans every three years. In mid-2008, the Government of Poland adopted an IPR strategic plan for 2008-2010. In November 2009, the 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). However, the Intergovernmental Team no longer meets, and local industry reports that the Ministry of Culture has reduced its engagement in IPR enforcement issues.

Local industry representatives report that, as of the end of 2010, the government has not yet adequately addressed several key elements of the strategic plan of 2008-2010. At the time of the Mid-Year Report, the police were able to report a few high-profile criminal cases against Internet piracy. Moreover, BSA has had a successful collaboration with the Ministry of Economy on programs to promote software asset management in business. However, there is still much room for improvement, especially with respect to bringing criminal copyright prosecutions through to judgment. Leads provided by industry to police are often not taken by prosecutors, who especially turn

---

<sup>5</sup>These figures do not account for downloads that occur directly from hosted content, such as games found on “one-click” hosting sites, which continue to account each year for progressively greater volumes of infringing downloads.

away complicated criminal cases. 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 undertaken due to budget cuts.

Police enforcement generally. IIPA members report good cooperation with Polish law enforcement, but cite a need for better resources and training. Border and street market enforcement remains a priority for many rights holders. Meanwhile, greater expertise and cooperation are needed to tackle rising Internet piracy.

One ESA member reported assisting in about 850 new cases referred by Polish enforcement in 2010, but that this was a decrease from 2009. Most cases involved small numbers of product. Only about 14% of all new cases involved more than 10 copies of pirated product and about 5% involved more than 100 pirate copies. The largest seizures were of about 140 pirate copies and the average seizure was of 25 pirate copies. The actions supported by ESA's member involved mainly PC games, but also console games.

Enforcement by tax authorities. IIPA welcomes the enactment into law during 2010 of amendments to the tax law that broaden the powers of tax inspectors to reveal, combat and prevent crimes and offenses against intellectual property. This came into force in the summer of 2010. BSA has assisted in a training for tax inspectors to facilitate use of this authority and looks forward to seeing it used by tax inspectors on a regular basis during 2011 to verify software license compliance and create a significant deterrent of software piracy by businesses.

Enforcing local sale bans on pirate optical disc product, and monitoring markets both at the border and on the streets. Although local copyright industry representatives report progress on reducing street and open market piracy, pirate optical discs continue to be available throughout Poland. While pirate sound recordings are less prevalent at border markets, DVD-Rs are still widely available at the borders, and pirated product of music, film, and software are available in large quantities in Wroclaw, Krakow, and other marketplaces outside of Warsaw.

Local governments should be encouraged to introduce bans on the sale and distribution of pirated optical discs at local marketplaces. Regular monitoring of producers and distributors of pirate optical discs by these law enforcement agencies is also recommended. In most cases, the State Treasury owns and leases the land where bazaars and outdoor markets are situated. A simple and fast solution would be an obligation for market administrators, imposed by local authorities as a condition of a land lease, to include in their rules and regulations a provision that bans pirated optical discs at marketplaces, followed by consistent enforcement of this rule by the marketplace's security agencies. Unfortunately, IIPA members have noted no progress toward implementing this oft-recommended simple solution.

According to local recording industry's statistics, law enforcement agencies (Customs and Police) at near-border markets as well as at flea markets in Wroclaw and Krakow conducted 43 raids and 43 preliminary criminal proceedings. The music industry's losses in these cases were estimated at 452,099 PLN (US\$158,076), and 19,461 carriers in different formats were seized.

Enforcement authorities should continue to monitor markets along the Western border of Poland. The activity of the police and border guards at bazaars and outdoor markets in this area should be increased. The same individuals control and organize the replication of CD-Rs and production and distribution of counterfeit cigarettes – all dedicated to the German market. The international recording industry (IFPI) conducted a review of 10 markets at the end of July 2009. These markets were predominantly at the Polish-German border but also included internal cities. Approximately 70% of the markets contained stalls openly selling counterfeit material. The material was high quantity, and was sold openly by stall holders without fear of penalty. The industries recommend further monitoring of marketplaces in Krakow and Wroclaw.

Strengthening police actions against Internet piracy. The copyright industries continue to report good cooperation with Polish police. However, rights holders note that Polish enforcement authorities still lack experts trained in IP crimes and need financial resources to obtain experts' opinions in complex cases including Internet

piracy cases; the failure to do so has resulted in investigation delays. Continued cooperation between industry, Polish police, and their respective information technology teams should be supported to improve Internet piracy actions. This should include using government resources to provide 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 be an important step forward. In addition, the number of police officers who investigate copyright infringement cases is insufficient. Local industry reports that in many units, teams dealing with Internet crimes are limited to one or two officers, a problem that significantly limits the actions that can be brought for copyright infringement. Following a number of budget cuts, police also have shown resistance to undertaking complex cases because of concerns about "covering costs" for forensic experts for secured hard drives. Further, the expertise of police IT specialists is not honored by the courts – the courts require an independent expert, which is quite an expense for the police.

With respect to music piracy actions, in 2010, ZPAV reports: 1,730 criminal cases in total were instigated (177 hard goods and 1,553 Internet piracy). At least 283 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 1.07 million PLN (US\$374,545), and the estimated value of losses in Internet cases (estimated on the basis of materials) was 16.6 million PLN (US\$5.8 million). One example of a major action included: a September 8, 2010 raid by the Polish Police securing over 90 hard drives and servers of the Silesian Technical University containing over 150TB of illegal software, music and films. The action was aimed against what was supposed to be the largest warez infrastructure in Europe and was part of a European police operation against The Pirate Bay. The police are supportive in P2P piracy actions, and the music and business software industries report a certain level of cooperation with ISPs as well. Polish ISPs react promptly to ZPAV's notices and remove infringing music. As far as illicit 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 90% 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.

Appointing specialized IPR prosecutors and harmonizing evidentiary procedures. IIPA strongly recommends the appointment of prosecutors who possess the specialized knowledge that is indispensable in copyright cases (including end-user piracy of software by businesses, illegal optical disc production, and all forms of Internet piracy) within the General Prosecutor's Office and within prosecutors' offices across Poland. Local entertainment software representatives report that the investigation and prosecution stages continue to be lengthy, with an average duration of a case from initiation to verdict of from one to three years, though there was a slight improvement in this area in 2010. BSA further reports that prosecutors continue to mishandle the initial proceedings of cases due to a lack of expertise in the field. They either require full evidence of infringement before initiating a case, or decide not to conduct raids – the key element to securing evidence of infringement for software enforcement. In one case, a prosecutor dismissed a case against an end-user who claimed he downloaded the software from the Internet – the prosecutor reasoned that since software is generally available online, the consumer could not be expected to know that the software in question (in this case valued at US\$100,000) was illegal. In another case, upon receiving from rights holders a motion for prosecution, the prosecutor asked the president of the target company to produce all license agreements in the company's possession rather than investigating what software was actually installed in the target's computer system. Prosecutors continue to avoid initiating complicated cases in general. The government did undertake two training programs for enforcement representatives on IPR matters in 2010. IIPA also recommends training for specialized prosecutors within Prosecutors Offices to improve the efficiency of copyright cases.

Facilitate *ex officio* actions for all forms of copyright under the copyright and criminal laws. In Polish law, software cases are initiated *ex officio* based on the Criminal Code; however, the Copyright Law requires an application from a harmed party before actions may be initiated regarding film and music piracy, a problem particularly in cases of Internet piracy. 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 and public prosecutors). Regrettably, years have passed and the Government of Poland has thus far failed to move forward with any specific proposal to address this.

Some IIPA members noted that prosecutors take too few *ex officio* actions, where *ex officio* authority is available, due to burdensome procedural requirements. For example, prosecutors often refuse to proceed on a case unless all concerned rights holders confirm that they will support the case. Rights holders who do join cases face additional hurdles, as they must agree to appear when summoned as witness, often times only to confirm information that was already provided in a sworn statement. There is a continued need for prosecutors to be able to conduct actions more independently; *ex officio* criminal actions should not be suspended based on the failure of all injured parties to join the case.

Ongoing, systemic problems with prosecutions and the judiciary. Rights holders continue to encounter unnecessary delays in the courts, particularly in Poland's larger cities. Criminal procedures as a general matter need to be made more efficient and streamlined, and more IP experts need to be appointed and trained for quicker progress. More transparency is also still needed; rights holders that join cases as claimants should be regularly informed of progress and results. Finally deterrent penalties should be imposed. 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 to improve the IPR competency of judges.

One problem that has plagued the judiciary in Poland for years appears to be improving for at least one of the copyright sectors. The entertainment software reports that one member, which had about 1,000 cases pending in Polish courts in 2010, was informed of only 7 cases that were dropped by the prosecution (for insufficient evidence). A few cases were dropped because all of the injured parties did not join the criminal proceeding (obviously, a problem for the other parties in the case). In 2010, one ESA member reported only a small fraction its cases had any progress or results. Cases that were resolved in 2010 resulted mainly in small fines of about US\$50 to US\$100, and in exceptional cases fines reached US\$900. ESA reports that infringers usually pay small fines, but refuse to pay higher fines. All of the few prison sentences issued in 2010 for ESA cases were suspended.

IPR Trainings. The copyright industries continue to participate in seminars for law enforcement agencies. For example, the music industry (ZPAV) occasionally participates in and co-organizes training seminars for police, border guard officers, and customs officials. However, ZPAV's workshops are no longer included in the curriculum of the Police Academy in Szczytno and Police Education Centre. 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 Headquarters a ceremony for the best police units that deal with IP crimes and award the so-called "Golden Badge" prizes. However, more training is required, particularly for prosecutors. FOTA regularly organizes or participates in trainings and seminars for customs, police and border guard officers. Such seminars focus on new methods of piratical activity and smuggling routes. Every year there are more than 15 such seminars or training programs.

## 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 was expected to evaluate possible amendments to the Copyright Law to improve copyright protection in the online environment, and to focus on precise definitions of terminology and



specific forms of infringements and offenses. Unfortunately, the "Internet Team" did not continue its work in 2010, and no future plans have been announced

Reform is needed to address obstacles faced by the music and recording industries, in particular, in bringing criminal Internet actions. Specifically, ISPs asked by the police to provide data regarding suspected infringers are often unable to identify the infringer, either because they do not keep logs or a given IP address is used by a few or even a hundred users. Such obstacles require a reform in the Telecommunications Law. The process of cooperation with ISPs to address this type of problem has begun but will require further encouragement on the part of the government, including the Ministry of Culture and National Heritage, to produce concrete solutions.

BSA reports that the Ministry of Administration and Interior is working on a new notice and takedown procedure to address web-based piracy. In January 2011, the Ministry issued a draft summary describing changes to be introduced in the e-commerce regulations. The draft will undergo consultations within the government. Specifically, the Ministry proposes to introduce a detailed notice and takedown procedure that would also include a possibility to file a counter-notice.

Introducing criminal sanctions to Copyright Law regarding the monitoring of optical discs production. The Government of Poland issued a decree in 2004 that regulates and governs the production of optical discs. Since its enactment, the copyright industries have expressed concerns about effective enforcement given the lack of criminal sanctions in that decree for the failure to perform reporting obligations. 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 still pending for the introduction of necessary amendments to the Copyright Law and a decree by the Ministry of Culture.<sup>6</sup>

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.

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.

Clarifying and expanding Poland's TPM provisions. Poland's technological protection measures (TPM) provisions are not currently sufficient to reduce the prevalence and widespread availability of circumvention devices. Because it is difficult, if not impossible, to effectively enforce against individual acts of circumvention, the WIPO Performances & Phonograms Treaty (WPPT) and the WIPO Copyright Treaty (WCT) – which Poland acceded to in 2003 and 2004, respectively – require that protection extend to "preparatory acts," such as the manufacture and distribution of circumvention devices, including those implemented in software. To fulfill its international obligations, Poland should extend coverage to preparatory acts of circumvention in the form of software.

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 WCT and WPPT and of the EU Copyright Directive were adopted in 2004 (published on April 30, 2004); no new revisions were contemplated in 2010. The

---

<sup>6</sup>For more details and the history of this issue, see IIPA's 2010 submission at <http://www.iipa.com/rbc/2010/2010SPEC301POLAND.pdf>.

2004 amendments contained several improvements, including provisions regarding the regulation of optical disc production (issued in June 2004). Unfortunately, the 2004 amendments failed to fully comply with the WCT and WPPT, and also fail to fully implement various EU Directives. No legislative discussions on the amendments are pending. Below is an illustrative listing of some of the troubling issues, where key deficiencies continue to include:

- Inadequate legal protection of TPMs – 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 and overbroad exceptions to protection, including the private copy exception. 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 Berne, in Article 5.5 of the EU Copyright Directive, in the WCT and WPPT, 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 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.

Copyright amendments in the area of collective rights management were adopted and entered into force on October 21, 2010. The provisions introduce extensive procedures for adopting tariffs for the exploitation of copyrighted works by the Copyright Law Commission. The provisions are currently in the process of being implemented. Representatives of the Ministry of Culture and National Heritage have been actively involved in the development of collective management reform to improve the position of rights holders in fixing tariffs and in the system of the Copyright Law Commission’s operation. As proposed, the amendments went 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 rights holders with adequate representation in the process of tariff creation by the Copyright Law Commission. Rights holders will monitor implementation of the amendments as adopted to determine whether concerns are resolved in 2011.

## MARKET ACCESS ISSUES IN POLAND

Broadcast quotas. MPAA 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, goes beyond what is prescribed in the EU's Television Without Frontiers Directive (even under its new form as the Audiovisual Media Services Directive), and 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 burden MPAA member companies with the cost of financing the government's cultural policy. Further, the language of the law appears to place a double taxation burden on distributors, including MPAA members.

Foreign ownership restrictions. Foreign ownership in a broadcasting company is limited to 49% (according to Article 35 of the 1992 Radio and Television Law). MPAA recommends 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) 2011 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: IIPA recommends that Romania remain on the Watch List in 2011.

**Executive Summary:** The high level of commitment that the Romanian Government demonstrated five years ago to reduce copyright piracy, by charging police, prosecutors, and the courts to take sustained and concrete enforcement actions, has all but disappeared. A government decision in 2010 to give jurisdiction over IPR crimes to a lower set of courts is indicative of a newly lax attitude toward intellectual property enforcement in general. At the same time, the tools to take action against increasing levels of Internet piracy are not available. The Romanian Government needs to implement the EU Data Retention Directive in a manner that clarifies data privacy procedures for online enforcement authorities while facilitating the collection of crucial evidence in cases of copyright infringement, including in cases of peer-to-peer (P2P) piracy.

Piracy is widespread in Romania for all forms of copyright materials, and much of it now is taking place largely on online. Copyright industries reported generally good cooperation with Romanian police authorities during 2010, but the number of raids and actions against hard goods piracy, end user piracy, and Internet piracy have decreased significantly due to lack of resources and a visible de-prioritization of IPR enforcement on the part of the government. Unfortunately, what results the police have produced are undermined by enforcement breakdowns at the prosecutorial level. Although cooperation with prosecutors is good, they continue to close many piracy cases based on a perceived "lack of social harm," among other reasons. Prosecutions, which already face delays and result in non-deterrent sentencing, could be further weakened by the November 2010 law moving the competence for criminal copyright cases to the lower First Instance Courts, which benefit from none of the IPR expertise or training that has been invested in the Tribunal-level prosecutors and Tribunals over the years. While the Romanian Copyright Office (ORDA) has improved its turnaround time in forensic examinations for enforcement activities, copyright industries remain troubled by other ORDA administrative practices, including its ineffective hologram requirements. 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.

### PRIORITY RECOMMENDED ACTIONS FOR ROMANIA IN 2011:<sup>1</sup>

- Senior levels of the Romanian Government should express a coordinated commitment to eradicate copyright piracy, providing the necessary resources and authority to all enforcement authorities to take sustained and concrete actions to support that commitment.
- 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.
- Give courts with IPR-trained Tribunal-level prosecutors and judges jurisdiction over copyright criminal cases and instruct courts to prioritize IPR cases, including Internet piracy cases.
- Ensure that appointed specialized IPR prosecutors operate in a transparent manner, communicate with rights holders' representatives, and provide results by swiftly initiating and indicting criminal infringement cases.

---

<sup>1</sup>For more details on Romania's Special 301 history, see IIPA's "History" appendix to this filing at <http://www.iipa.com/rbc/2011/2011SPEC301HISTORICALSUMMARY.pdf>, as well as the previous years' reports, at <http://www.iipa.com/countryreports.html>. For a summary of IIPA's 2011 global issues, see our cover letter at <http://www.iipa.com/pdf/2011SPEC301COVERLETTER.pdf>.



- Impose deterrent, non-suspended sentences (in criminal courts) and fines, and avoid 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.
- With respect to ORDA, (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.
- Include rights holders in any legislative consultation process to amend the copyright law or other laws.

## COPYRIGHT PIRACY IN ROMANIA

Internet piracy: As the Romanian population became more Internet savvy in 2010,<sup>2</sup> peer-to-peer (P2P) file-sharing continued to grow, and was the primary cause for a recent decline in hard goods piracy. Although more online pirates in Romania are accessing illegal content at home, 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 business software sector reports again in 2011 that it has seen a growth of Internet-based piracy of business software applications in Romania, most commonly via the illicit use of peer-to-peer ("P2P") filesharing and Torrents. Online ordering of pirated goods continues, in which customers respond to online advertisements by submitting orders via e-mail, or through websites promoting pirated software for downloads.

The Entertainment Software Association (ESA) reports that during 2010, ESA vendors detected 2.52 million connections by peers participating in unauthorized file sharing of select member titles on P2P networks through Internet Service Providers ("ISPs") located in Romania, placing Romania thirteenth in overall volume of detections in the world.<sup>3</sup> Breakdowns by ISP show that Romania Data Systems subscribers account for approximately 53% of this activity occurring in Romania.

The level of Internet piracy in Romania in recent years has become so high that the music industry has struggled to develop new legitimate on-line services, while existing services face unfair competition from the massively available pirated free offer. The main segment of music Internet piracy has involved the illicit use of P2P file-sharing, yet the growing use of cyberlocker sites to distribute infringing music files is close behind. Encouragingly, the administrators of such sites typically cooperate in taking down infringing links.

In 2009 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. 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 end-user piracy (both in companies and in private homes) and illegal distribution (such as hard-disk loading and distribution of home burned ODs) continue to do the most damage to the industry. Under-licensing of software products is a significant problem. Overall, the level of piracy in the sector remained steady between 2009 and 2010 at 65%. BSA reports that, based on preliminary data, the commercial value of pirated US-vendor software in Romania

<sup>2</sup>There are about 7.8 million Internet users in Romania, about 35.5% of the country's population (as of June 2010, according to [www.internetworldstats.com](http://www.internetworldstats.com)).

<sup>3</sup>These figures do not account for downloads that occur directly from hosted content, such as infringing games found on "one-click" hosting sites, which appear to account each year for progressively greater volumes of infringing downloads.

rose to \$127 million in 2010.<sup>4</sup> Hard goods piracy was on the decline in the past year, which can be attributed to the heavy increase in Internet piracy and determined enforcement actions. BSA appreciates the work of the police in taking anti-piracy actions and the government in taking significant steps to legalize its own software. However, one issue that law enforcement has not yet confronted is the phenomenon of pirated software installation performed by retail PC shops. Because the service is offered at the home after purchase, raids and prosecutions of the activity are very difficult.

Hard goods piracy: Widespread CD-R and DVD-R burning serves as the main source of physical piracy in Romania. Burning operations are often controlled by organized criminal groups. As has been the trend for several years, pirate discs are sold via Internet sites or press advertisements, then are delivered by mail or personally on the streets. The levels of optical disc piracy in Romania have declined somewhat in recent years, as Internet piracy has become more popular.

The Entertainment Software Association (ESA) reports that the piracy its members face in Romania is quickly changing. While physical piracy still appears in street markets, retail stores, and Internet cafés, the problem is quickly migrating online as Romanians have turned to downloading pirated games at home. With respect to audiovisual piracy, pirate content can now be purchased in high definition, and sold stored on hard discs through online auction website advertisements and e-mail offers. Pirate DVDs, even of new releases, continue to appear on the streets and in flea markets.

## 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: Local industries remain unable to enforce their rights in copyright works against online infringement in the aftermath of a now-defunct Data Retention Law (no. 298 of 2008), which in October 2009 the Constitutional Court found unconstitutional due to the fact that “it allowed Police Officers to commit abuses.” The law was enacted to implement the EU Data Retention Directive, and created a new “serious crime” warrant requirement that hindered the ability of Romanian police authorities to seek the identities of online infringers. Since the law was repealed, however, as a practical matter rights holders are now unable to gather the evidence needed to bring effective Internet piracy cases. Although the Copyright Law and Law on Electronic Commerce contain elements that should establish a role for ISPs in online anti-piracy actions, currently ISPs in Romania will not cooperate in such actions until new legislation is adopted to address data retention. Romania will need to adopt new legislation to transpose the Data Retention Directive, which should be clear 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.

The Romanian Copyright Law addresses the unauthorized sharing of copyright works through both uploading to and downloading from the Internet, but is not clear as to the responsibility of ISPs specifically.<sup>5</sup> Meanwhile, Romania’s Law on Electronic Commerce (Law No. 365 of 2002) provides that an ISP should suspend Internet access of a client upon notification by the authorities that the client has engaged in an act of infringement.

---

<sup>4</sup>BSA’s 2010 statistics are preliminary, representing U.S. software publishers’ share of commercial value of pirated software in Romania. They follow the methodology compiled in the Seventh Annual BSA and IDC Global Software Piracy Study (May 2010), <http://portal.bsa.org/globalpiracy2009/index.html>. These figures cover packaged PC software, including operating systems, business applications, and consumer applications such as PC gaming, personal finance, and reference software – including freeware and open source software. They do not cover software that runs on servers or mainframes, or routine device drivers and free downloadable utilities such as screen savers. The methodology used to calculate this and other piracy numbers are described in IIPA’s 2011 Special 301 submission at [www.iipa.com/pdf/2011spec301methodology.pdf](http://www.iipa.com/pdf/2011spec301methodology.pdf). BSA’s final piracy figures will be released in mid-May, and the updated US software publishers’ share of commercial value of pirated software will be available at [www.iipa.com](http://www.iipa.com).

<sup>5</sup>See Article 1432 of the Copyright Law (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.)

The ISP can suspend a client's services only through the disposition of the designated public authority (ANRCTI) or through a court order, based on a complaint of an interested party. Unfortunately, the authority (ANRCTI) cannot act in response to infringements of the copyright law, but only in cases of infringement of the E-Commerce Law. Further, the E-Commerce Law is ambiguous. It provides for the liability of ISPs in cases where they do not take action if (a) they learn about the illegal/infringing nature of information stored, or (b) they facilitated access to such information (by search instruments and links). In the case of facilitation, however, such illegal/infringing nature must be confirmed by a competent public authority. With respect to hosted information, it is not clear on what criteria the ISPs must consider the information to be illegal or infringing, which 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.

**Copyright law reform:** The 1996 Romanian Copyright Law has been amended a number of times in the past decade, including in 2004, 2005, and 2006,<sup>6</sup> often to bring the law into compliance with EU Directives. The overall legal structure is generally good but unfortunately Romanian law is not yet fully compliant with the WIPO Copyright Treaty ("WCT") and the WIPO Performances and Phonograms Treaty ("WPPT"), the EU Copyright and Enforcement Directives, or the WTO Trade Related Aspects of Intellectual Property Rights ("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.

The Constitutional Court recently resolved a concern with Article 121(2) of the Copyright Law in an April 29, 2011, decision. The article in question would have denied protection in the form of retransmission royalties to audiovisual works broadcast on must-carry television stations and retransmitted by cable operators; an approach that would violate protections required under Berne Convention's Article 11*bis*(2) and the WTO TRIPS Agreement. The Court declared those provisions as not being in compliance with Article 53 of the Romanian Constitution, prohibiting limitations on the exercise of property rights.

Most recently, in August 2010, the Ministry of Culture requested comments on draft amendments to the Copyright law that contains both good and bad provisions for the copyright industries. The draft would solve an issue long faced by the business software industry that computer search warrants must be requested in addition to location search warrants.<sup>7</sup> Unfortunately, the draft also includes decreases of penalties for some copyright crimes. It is not yet clear when or how the draft will go forward.

In 2009, a group of collecting societies 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 following subjects, which were included in the proposal, remain of concern to rights holders: (1) 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; (2) the amendment of several articles regarding the collective management system for the related rights in the case of radio broadcasting; and (3) the elimination of the search warrant prerequisite for raids at companies.

**ORDA, the hologram system and ineffective administrative enforcement:** The music industry has for many years called for an abolition of the ORDA registration and hologram system, given its historical ineffectiveness regarding enforcement and its penchant for corruption. ORDA issues holograms for every optical disc (audio, video,

---

<sup>6</sup>For a detailed history of these amendments, see the IIPA's 2010 Report at <http://www.iipa.com/rbc/2010/2010SPEC301ROMANIA.pdf>.

<sup>7</sup>A search warrant can be issued only by a court after the commencement of the criminal investigation (Law No. 161 of 2003). But 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, which can limit the number of *ex officio* police raids dramatically because police raids depend upon input from the rights holders. The solution is simple—the law should be amended to provide that the mere verification of the existence of software installed on computers should not require such a search warrant. BSA hopes that this issue can be included in the copyright law reform process.

software) that is released commercially. All copyright industries agree that this system produces more bureaucracy than help in anti-piracy activities and, for a variety reasons, is a model that has proven over time and in many countries to be ineffectual. 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, while for example other additional fees (3% added to the sale price of DVDs or other tangible supports) are paid by the film distributors for the film fund administered by the Film Office. The copyright industries also have voiced concerns with a November 2008 decision regarding ORDA that added more provisions regarding tariffs, the use of expert reports, and the use of the “encouragement” fund for ORDA personnel. 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’ organizations to act as court experts in copyright infringement and piracy cases.<sup>8</sup>

Government software legalization: BSA reports that in July 2010, the National Authority for Regulating and Supervising Public Procurement (ANRMAP) issued a draft amendment of the secondary legislation of public procurement (Government Ordinance no. 925 of 2006) for which the business software sector submitted a proposed revision that would allow contracting authorities to ask for statements of licenses for software used by bidders for public procurement contracts, and actual documentation of licenses upon winning a bid. Previous efforts were underway to amend the Ordinance to require software distributors to inform customers about software piracy risks. However, the current legislative draft was promoted without this provision. The process of amending the Ordinance is currently blocked, but should be encouraged to move forward including the contemplated requirements for distributors.

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.

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 October 1st, 2011. In a positive move, Law No. 278 of 2006 introduces 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

We have seen what Romanian law enforcement authorities can accomplish when the government prioritizes intellectual property enforcement at a high level. However, particularly in the past year, the country has shown noticeable disinterest in the face of continuously problematic levels of piracy. While the police and administrative enforcement authorities remain cooperative (if short on resources), problems in the judiciary increased in 2010.

Of particular concern, a new law went into effect on November 26, 2010 in Romania, providing that all criminal copyright cases will be heard by courts of lower instance than the courts having jurisdiction in the past. The First Instance Courts will hear initial cases rather than the Tribunal courts, the latter having been the beneficiary of considerable prosecutorial training from the private sector, which will now go to waste. Moreover, the last instance court will be one of the 15 Romanian Appeal courts, rather than the High Court of Cassation and Justice. All civil copyright cases will continue to be heard by the Tribunal courts. The maneuver might have been intended to simplify

---

<sup>8</sup>For further details, see the IIPA’s 2010 Report at <http://www.iipa.com/rbc/2010/2010SPEC301ROMANIA.pdf>.



and accelerate the movement of IP cases through the judiciary, but the lasting effect will be to reduce the level of appreciation for the seriousness of copyright crimes by presenting cases before an inexperienced judiciary. This development is a quite literal indication that copyright crimes are of a lessening priority to the Romanian government.

The Intellectual Property Working Group, formed in 2006 as a form of private-public partnership, in recent years has become less active and is in need of more engaged leadership. 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. 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. 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. The entertainment software industry and the business software industry report, on a positive note, that ORDA has supported forensic operations in 2010 with almost no delays.

In 2010, BSA reports that the number of raids conducted by the police dropped significantly, and the public prosecutors continued to drop cases. Although the industry reports a positive relationship with low and mid-level enforcement authorities (who take on *ex officio* actions as well as industry referrals), generally speaking IPR enforcement is clearly no longer a priority for the Romanian authorities. Many of the police officers specifically appointed to handle IPR cases reduced their attention to IPR cases in 2010, partly for economic reasons. Furthermore, the department of IPR crimes within the General Inspectorate of Police was without a director beginning in mid-2010; this vacancy makes organized actions less likely and sends a message to the field that IPR is not a priority. Direction within the agency is needed to retain a police force focused on specialized IPR actions.

In 2010, BSA had 319 new raids (more than 271 end-users, more than 29 for resellers/distribution, and 19 for Internet piracy)—a major decrease from the 500 raids conducted in 2009. At the end of 2010, 34 cases resulted in convictions, and over 20,000 optical discs were seized. Unfortunately, raids against large companies were down. On a brighter note, there were frequent raids against hard disk loaders, which is a BSA priority in Romania.

On a very positive note, BSA reports that Romanian courts passed the first conviction in a torrents-related case in 2010. Although the court did not find adequate evidence for charges against an end-user for unauthorized making available to the public of copyrighted material, the court was able to convict the target on the basis of advertising revenues from the use of pirated material. In less positive developments, BSA reports that prosecutors dropped two major cases in 2010. In one case, the Public Prosecutor's Office of Timis found there to be no social harm despite damages amounting to more than US\$170,000. In another case, the Public Prosecutor's Office of Cluj dropped a case with damages of over US\$80,000 because the defendant company's representatives did not appear at the hearing.

BSA is now promoting a tax police initiative in Romania, to draw the attention of fiscal authorities to the value of tax revenue that could be recuperated by legitimizing software use. A BSA-IDC study released in November 2010 demonstrated that a drop of 10% in the software piracy rate could add US\$573 million to Romania's GDP and US\$87 million to state tax revenue.

The music and recording industry has a 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. There are currently two civil cases pending regarding the liability of the Internet providers for the content made available to the public.

The film industry reported that two pilot enforcement initiatives were launched in 2010. In one of the cases, a search warrant resulted in seizure of computers and high capacity hard discs, from which illegal content was used to load hard disks that were then offered for sale.

The entertainment software industry reports continued cooperation from local police in Romania, although both the police and prosecution need significantly more training and resources. Relationships with law enforcement continue to be positive and cooperative, and local police initiate cases involving cross-industry pirated product, often actively seeking member company assistance in the course of investigations. Unfortunately, cooperative efforts with law enforcement were often undermined once cases were referred to prosecutors. Because prosecutors view IP offenses as trivial, cases are all too often dismissed for “lack of social harm,” and such dismissals are almost always upheld on appeal. When cases are not dismissed, prosecutors tend not to pursue deterrent penalties, even for repeat offenders. In the rare event that an investigation results in a case brought before a court, it generally takes between two and four years for completion of the trial. Moreover, courts typically only impose suspended sentences combined with nominal fines, resulting in very little deterrence.

**Enforcement activities of ORDA:** In addition to its administrative duties (explained above), ORDA has some competencies in criminal enforcement matters. After raids are conducted, the police send seized product to ORDA for forensic examination. ORDA examines the seized products and issues a technical report certifying which goods are pirated. This technical procedure has been a lengthy one in years past; however, rights holders report that there were fewer delays in 2010. The average processing time is about two to three months, although in one unusual case, the verification process and the issuance of the technical report took only ten 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 or she considers there to be sufficient evidence for conviction. In practice, only ORDA provides expert reports, and there are no 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.

**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 establish a case; the lack of “social harm” involved; and fear that taking a particular case might trigger a negative reaction in the media. Romanian courts remain reluctant to impose deterrent penalties. Small fines, minimal damages, and suspended jail sentences continue to be the norm. The entertainment software industry reports that for one member, only 20 cases resulted in a court verdict and penalty in 2010, which amounts to 40% of cases brought. The usual penalty is suspended imprisonment of about 18 months and a small fine, a decrease of 6 months from the previous year. The same member also reported no effective jail sentences in 2010, and that defendants ordered by court to pay damages typically do not comply.

**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. Industry representatives have observed an average amount of time needed to obtain a criminal court decision of 29 months, the shortest period being about one year and the longest over four years.

**IPR trainings and public awareness:** The film industry participated in an Internet enforcement training seminar organized in Bucharest in 2010 by the Romanian Police Inspectorate and Prosecutor General Office. BSA plans to organize a training seminar for police officers and prosecutors in early 2011, when new prosecutors and judges to be handling IPR crimes will be appointed. Private sector members of the IP Working Group also plan to organize a training seminar for newly appointed IP prosecutors.

# SAUDI ARABIA

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2011 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: IIPA recommends that Saudi Arabia be returned to the Watch List.<sup>1</sup> In the 2010 Special 301 cycle, IIPA supported USTR's removal of Saudi Arabia from the Watch List, based on actions taken by the Saudi Government in 2009 and early 2010. However, IIPA noted that if continuing and comprehensive progress was not made to reduce high piracy rates through the imposition of deterrent penalties and other actions, IIPA would recommend that the Kingdom be placed on the Watch List for the 2011 Special 301 cycle. As detailed below, such progress has not been made.

Executive Summary: As we have noted for many years, piracy rates are higher in the Kingdom than in any other country in the Gulf region for the motion picture, music and recording industries (in the 90% range) and unacceptably high for the business software, entertainment software and publishing industries. Despite this, however, IIPA recommended that Saudi Arabia be removed from the Watch List and noted the excellent efforts which were then being 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. IIPA concluded that, for example, the promised appeals of the Video Mesfir cases from the Violations Review Committee (VRC) to the Board of Grievances (BOG) with a recommendation that the infringer be given a prison term, would "very soon" result in a judgment of imprisonment – the first such judgment ever, and a key to bringing deterrence to the market. That optimism was misplaced and now one year later, the BOG has still refused to act on these appeals. Other benchmarks were also very close to being achieved and we had every reason to believe they would be. Unfortunately, almost no progress in meeting these benchmarks has been made – piracy rates remain unacceptably high, the government has made no progress in legalizing its software use, and other deterrent enforcement actions have not resulted in reduction in piracy rates, as promised.

Remaining benchmarks from IIPA's 2010 Submission include:

### Deterrent Enforcement

- Re-commence a zero-tolerance policy toward street vendor piracy in the major cities until it becomes a *de minimis* problem.
- Complete the appeals of the Video Mesfir cases at the Board of Grievances (BOG) with a sentence of imprisonment and authorize appeals of other cases involving major seizures with the Minister recommending sentences of imprisonment, signaling to citizens that piracy crimes will receive deterrent penalties and especially imprisonment in appropriate cases.
- 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 within the KSA Government.

### 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.

Other Priority Actions to be Taken in 2011:

- Administrative penalties imposed by the VRC should be increased to provide more deterrence, under the guidance of the Minister and new Deputy Minister Eid Al-Hoot.

---

<sup>1</sup> For more details on Saudi Arabia, see IIPA's "History" Appendix to this filing at <http://www.iipa.com/pdf/2011SPEC301HISTORICALSUMMARY.pdf>, as well as the previous years' country reports, at <http://www.iipa.com/countryreports.html>.



- While a small number of new trained inspectors have been added to the Copyright Department at MOCI in Riyadh, resources there are inadequate and are almost totally lacking in the rest of the Kingdom to deal with continued high levels of piracy. A prosecutor must be appointed to handle cases before the VRC.
- 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 is critical and has yet to be ensured.
- A special cyber crime unit within the Police Committees and an Internet piracy unit at MOCI should be established, 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 should act on its own to block sites engaged in infringement; The VRC must act to impose deterrent penalties for Internet infringements.
- 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 Saudi Customs must impose fines on importers of seized product;
- The Copyright Act must be amended 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.

## UPDATE ON PROGRESS ON MEETING IIPA'S BENCHMARKS

Deterrent Enforcement and Penalties: In 2009, under HE Al-Haazaa's leadership, raids against street vendors and retail operations continued at a steady rate, but apparently with some fall off. The Arabian Anti-Piracy Alliance (AAA) which conducts raiding and enforcement activity on behalf of the motion picture, entertainment software, and publishing industries in Saudi Arabia reported that in 2010 they were involved in 175 raids and seizures of 137,179 units of pirate product. AAA reports that this is but a small fraction of the pirate product that pervades the marketplace. The lack of inspectors at the copyright department (reportedly there are only four in Riyadh at this time and two in Jeddah) is the principle cause for the apparent fall off in raiding and the expectation that the Ministry would appoint at least ten trained inspectors in Riyadh alone was never realized. The failure of the Ministry to appoint more inspectors is the cause and no progress can be made until this is done. Moreover, the Ministry had also been urged to appoint a prosecutor to take charge of cases before the VRC and this has also not occurred, contributing significantly to the lack of deterrent penalties at the VRC. As requested in IIPA's 2010 submission, raids need to be increased and extended to piracy of music and sound recordings. Enforcement authorities have so far failed to adapt their enforcement priorities in line with the changing nature of the piracy problem and the steady shift from physical piracy towards Internet piracy (see discussion below).

In our 2010 submission, IIPA reported that the VRC had been clearing more cases than in the past and that administrative penalties had increased, including a few cases involving the maximum penalty of SR100,000 (US\$26,665).<sup>2</sup> HE Al-Haazaa had been a critical part of these improvements. Unfortunately, this trend has not continued and penalties are no longer on the upswing, despite continued efforts by the head of the Copyright Department, Rafiek Al-Okaily. Obtaining deterrent penalties for all copyright sectors, both at the administrative level and from the BOG, has been the IIPA's highest priority. IIPA's recommendation to remove Saudi Arabia from the

---

<sup>2</sup> The VRC had 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. This trend needs to continue.

Watch List in 2009 to 2010 was based primarily on the understanding, confirmed by an IIPA visit with the BOG in June 2010, that a judgment of imprisonment by the BOG in the Video Mesfir cases was imminent. Video Mesfir is a seven-time-raided pirate operation consisting of a retail outlet and a warehouse, which involved the total seizure of well over 100,000 pirate copies along with significant amounts of reproduction equipment. Two of these cases received their first hearing before the BOG on February 16, 2010 and one case received the necessary recommendation of the Minister of Culture and Information that the BOG impose a sentence of imprisonment. A year later, the BOG is still sitting on all the Video Mesfir cases. Without concluding these appeals and imposing a sentence of imprisonment, there is little hope that piracy rates can be brought down in the Kingdom.

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>3</sup> In 2009, 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 trend has not been sustained. With at least three piracy cases before the BOG including a Ministry-appealed case, there is now no excuse for not taking immediate action. In June 2010, the judges on the BOG reiterated to IIPA and the U.S. Government that when a case is brought before them, they will not hesitate to impose deterrent jail terms. Why this has not occurred is without explanation or justification.

Government Legalization of Software and Enterprise End-User Software Piracy: Another of the critical benchmarks in IIPA's 2010 Special 301 submission 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. The rate of PC software piracy in the Kingdom was 50% in 2010. That represented pirated U.S.-vendor software with an estimated commercial value of \$189 million.<sup>4</sup> In 2010, IIPA reported on apparent efforts of the Commerce Ministry, following the commitment made at the 2009 IPR Working Group meeting, to upgrade and legalize its software use. We were told then that that process had begun but the industry was never made aware that the effort was completed. MOCI was to have also undertaken an inventory, but again no results were ever made available to industry. Furthermore, many discussions over the last year between industry and government designed to make progress on legalization (the piracy rate for software in government is estimated to be 70%) have yielded no gains. The making of imminent progress on this front was a key element of IIPA's recommendation to remove Saudi Arabia from the Watch List. Since there has been no progress made, the Kingdom should now be restored to the Watch List.

No progress been made to legalize software use in government, and in addition, industry now reports a sharp increase in counterfeit software being sold to ministries as part of hardware purchases. This ominous development should have led to immediate enforcement action against such vendors. It was requested by industry but the Ministry has so far not taken action, months after the initial discovery. The computers purchased with such software were merely returned to the vendor.

Transparency: While in 2009 and 2010, there was significant progress in posting new cases on the MOCI website, H.E. Al-Haazaa's commitment to complete population of cases on the website (and to have them translated into English) by Ramadan in 2010 was not fulfilled and little progress has been made since in completing this task. Rights holders had been able to participate in VRC proceedings upon request and the right to appeal results and penalties to the BOG has been confirmed. Right holder lawyers continue to be able to obtain information on the progress of cases at the VRC and to participate in VRC proceedings upon request. The Ministry has yet to put into

---

<sup>3</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.

<sup>4</sup> BSA's 2010 statistics are preliminary, representing U.S. software publishers' share of commercial value of pirated software in Saudi Arabia. They follow the methodology compiled in the Seventh Annual BSA and IDC Global Software Piracy Study (May 2010), <http://portal.bsa.org/globalpiracy2009/index.html>. These figures cover packaged PC software, including operating systems, business applications, and consumer applications such as PC gaming, personal finance, and reference software – including freeware and open source software. They do not cover software that runs on servers or mainframes, or routine device drivers and free downloadable utilities such as screen savers. The methodology used to calculate this and other piracy numbers are described in IIPA's 2011 Special 301 submission at <http://www.iipa.com/pdf/2011spec301methodology.pdf>. BSA's final piracy figures will be released in mid-May, and the updated US software publishers' share of commercial value of pirated software will be available at <http://www.iipa.com>.

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.

## UPDATE ON PROGRESS AND PROBLEMS IN OTHER AREAS

**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. Efforts have been ongoing to convince MOCI to set up an Internet piracy unit within the Copyright Department and to undertake siteblocking actions directly, rather than through the CITC, which MOCI has the authority to do. It is imperative for both 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 and address infringements over P2P networks. IIPA reported in 2010 that the Ministry was considering establishing such a unit and reviewing MOCI authority in this area, and, as well, working more closely with CITC. This was also a topic of discussion during IIPA's visit to the Kingdom in June 2010. Unfortunately, no progress on this front has been made. Nor has a cybercrime unit been set up within the police, as requested in 2009 and 2010. MOCI must also engage with 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. 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 had indicated that they would begin taking action in this area. Some actions have indeed been taken, including letters written to the compounds by then Deputy Minister Al-Haazaa. Complaints made to the VRC have simply not been acted upon.

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.<sup>5</sup> 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 about by the imposition by the VRC and BOG of significant penalties, merely conducting more raids will not work a significant change in the market.

**Implement and Ratify the WIPO Treaties:** Some very slow progress has been made through 2009 and none thereafter. The government has engaged with WIPO and in early 2010 was reportedly preparing questions for WIPO response. We have heard no word whether further progress has been made. This process needs to be accelerated and completed.

---

<sup>5</sup> The industry conducted 55 raids against book shops, seizing over 900 pirated books.

# SINGAPORE

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

### 2011 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: IIPA urges USTR to place Singapore on the Special 301 Watch List.

Executive Summary:<sup>1</sup> 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. Online piracy continues to threaten Singapore's market for copyright works, especially music. The government's response remains clearly inadequate, both in terms of its continued refusal to bring public prosecutions of online music pirates, and its failure to bring Internet Service Providers into a cooperative stance with rights holders. Both these shortfalls also raise serious FTA compliance issues. 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 also should join the global trend and outlaw camcording in its cinemas, before a festering problem becomes more serious; should consider upgrading (to deterrent levels) its criminal penalties for trafficking in circumvention devices and services; and should reconsider its "cross-carriage" requirements that threaten to distort the pay TV market by eliminating the ability of copyright owners to enter into exclusive licensing arrangements.

### ACTIONS THAT THE SINGAPORE GOVERNMENT SHOULD TAKE IN 2011:

- Fulfill its FTA obligations by bringing public prosecutions against significant instances of online music piracy.
- 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.
- Enhance enforcement against end-user business software piracy, and fulfill its FTA obligations, by protecting informants, adopting a reasonable construction of the "wilfulness" requirement, and increasing potential criminal penalties.
- Adopt a more aggressive stance in combating offline copyright crimes, and improve enforcement against imports of piratical music CDs.
- Adopt legislation specifically outlawing camcording in Singapore cinemas, and facilitate online enforcement by rectifying through legislation the deficiencies identified by Justice Woo in the *Odex* decision.
- Consider increasing criminal penalties for trafficking in circumvention devices and services such as "game copiers" and "mod chips" for game consoles.
- Drop or revise cross-carriage requirements to preserve licensing rights of content owners.

### COPYRIGHT LAW AND ENFORCEMENT ISSUES

2011 marks six years since Singapore's landmark Free Trade Agreement with the United States (the "USSFTA"), and specifically since its copyright law and enforcement obligations came into force. For the most part this agreement has been a success for the copyright industries.<sup>2</sup> Unfortunately, in some key areas, the full potential

---

<sup>1</sup>For more details on Singapore's Special 301 history, see IIPA's "History" appendix to this filing at <http://www.iipa.com/rbc/2011/2011SPEC301HISTORICALSUMMARY.pdf>, as well as the previous years' reports, at <http://www.iipa.com/countryreports.html>. For a summary of IIPA's 2011 global issues, see our cover letter at <http://www.iipa.com/pdf/2011SPEC301COVERLETTER.pdf>.

<sup>2</sup>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 (...continued)



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:

**Active Engagement Needed in Enforcement Against Online Piracy.** The recorded music marketplace in Singapore is under serious stress. Sales of physical product (CDs) is in free fall, with 2010 revenues less than half what they were in 2004. 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.

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 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 over 100% in 2009.<sup>3</sup> In this highly connected, technologically savvy city-state, online music piracy is thriving, via forum sites, unauthorized portal sites, cyberlockers, and especially peer-to-peer (p2p) file sharing. One leading Internet Service Provider (“ISP”) in Singapore, 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.

Prevalent online piracy in Singapore also injures other copyright sectors beyond music. The Motion Picture Association (MPA) reports extensive traffic in illegal copies of motion pictures via p2p networks. Total unauthorized activity in Singapore is estimated at over 300,000 incidences per month on average. The Entertainment Software Association (ESA) also identifies Internet piracy as a serious problem in Singapore, both via p2p services and illegal sites from which pirate games may be downloaded. During CY 2010, ESA vendors detected over 693,000 connections by peers participating in unauthorized file sharing of select member titles on P2P networks through ISPs located in Singapore, placing Singapore ninth worldwide in per capita detections.<sup>4</sup> Breakdowns by ISP show that SingNet Pte Ltd subscribers account for approximately 53% of this activity occurring in Singapore.

The response of the Singapore government to these depredations 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. 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 recording 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. In October 2009, a complaint was filed with IPRB against a forum site hosted in Singapore that featured infringement of music. When the recording industry asked about the status of the case in December 2010,

---

(...continued)

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.

<sup>3</sup>According to statistics published by the Infocomm Development Authority of Singapore, the household broadband penetration rate rose from 42.3% in 2004 to 142.2% in 2009. Mobile phone penetration rate also exceeds 100%.

<sup>4</sup>These figures do not account for downloads that occur directly from hosted content, such as games found on “one-click” hosting sites, which appear to account each year for progressively greater volumes of infringing downloads.



IPRB claimed that they were “looking into the cases.” However, it was revealed that the hosting of the site moved to another jurisdiction in February 2011 and nothing has been done to stop the infringement from spreading outside Singapore. Other copyright sectors confirm this portrait of governmental passivity in the face of a serious threat from online piracy. For example, MPA representatives were invited to make a presentation on Internet piracy and graduated response to a group of public and private sector representatives in March 2010, but nothing further came of it, despite repeated requests.

IPRB’s consistent refusal to investigate online 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.” Six 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 only path open to it to combat criminal infringements online; and the government’s failure to bring criminal actions is a significant part of the explanation for the indisputable fact that online music pirates are simply not being deterred in Singapore.

The fight against online 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. In 2009-2010 alone, some 218 letters were sent, listing 3,787 IP addresses of infringing p2p users. Every six months, industry compiles these reports and identifies to the ISPs the apparent repeat infringers among their subscribers. These notices, and requests for the suspension of the accounts of repeat infringers, have been almost completely ignored.<sup>5</sup> 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. The entertainment software industry experience is similar. ESA last year stopped sending notices to local ISPs regarding infringing activities of their subscribers detected by ESA’s monitoring, as ISPs never responded nor gave any indications that they were taking any remedial actions.

Singapore’s government has a responsibility to contribute to solving this problem. 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, Article 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.” Article 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 Article 16.9.22.b.i.A. On paper, Singapore implemented this obligation in Rule 8 of the Copyright (Network Services Provider) Regulations 2005, requiring providers to implement repeat infringer policies. 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.

---

<sup>5</sup>One ISP responded by asking the recording industry for more details regarding the list of repeat infringers. The industry provided them, and has never heard anything further from the ISP.

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. Cooperation must include, but should not be limited to, forwarding to subscribers any notices received from right holders regarding specific infringements detected, as well as 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 and pervasive problem.

As a further obstacle to enforcement against online infringement, Singapore law still makes no provision for agents or authorized representatives acting on behalf of copyright owners to apply for pre-trial discovery in order to identify online copyright infringers. This legislative deficiency, as measured against Singapore's obligations under the US-Singapore Free Trade Agreement, was observed by Justice Woo Bih Li in the March 2008 *Odex* decision.<sup>6</sup> Primary or subsidiary legislation needs to be enacted to fix this problem.

**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 35% in 2009 to 34% in 2010, corporate end-user piracy continues unabated, with an estimated commercial value of pirated US vendor software in the Singapore market of US\$114 million.<sup>7</sup>

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>8</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. Six 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>9</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>10</sup> No new cases have been brought by police since 2007. This history casts considerable doubt on Singapore's compliance with its commitments under the USSFTA.

---

<sup>6</sup>*Odex Pte Ltd v. Pacific Internet Ltd* [2008] SGHC 35 (see paragraphs 31-37 of the decision).

<sup>7</sup>BSA's 2010 statistics are preliminary, representing U.S. software publishers' share of commercial value of pirated software in Singapore. They follow the methodology compiled in the Seventh Annual BSA and IDC Global Software Piracy Study (May 2010), <http://portal.bsa.org/globalpiracy2009/index.html>. These figures cover packaged PC software, including operating systems, business applications, and consumer applications such as PC gaming, personal finance, and reference software – including freeware and open source software. They do not cover software that runs on servers or mainframes, or routine device drivers and free downloadable utilities such as screen savers. The methodology used to calculate this and other piracy numbers are described in IIPA's 2011 Special 301 submission at [www.iipa.com/pdf/2011spec301methodology.pdf](http://www.iipa.com/pdf/2011spec301methodology.pdf). BSA's final piracy figures will be released in mid-May, and the updated US software publishers' share of commercial value of pirated software will be available at [www.iipa.com](http://www.iipa.com).

<sup>8</sup>See USSFTA, Art. 16.9.21.a.i.

<sup>9</sup>This case was *Public Prosecutor v. PDM International Pte. Ltd.*, which concluded in April 2006.

<sup>10</sup>The defendants in these two cases were (1) Boonty and (2) Wang & EF Tan.

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. The net effect of these shortcomings has been to strip section 136(3A) of any deterrent effect.

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 justifiably 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, or sealing court records to protect informants' identities; but these efforts have been unsuccessful. Until the police and prosecutors can agree upon a means for protecting informants (or courts agree to grant search warrant applications based on hearsay evidence) it will be all but impossible to generate leads for prosecutions.

A case that BSA attempted to bring in December 2010 illustrates the problem. The three informants in this case (former employees of a company allegedly using a significant amount of unlicensed business software) had signed Statutory Declarations and had therefore given evidence on oath of the alleged infringement, thus exposing themselves to prosecution if they had in fact been lying. BSA submitted a complaint based on these sworn Statutory Declarations. However, although BSA sought to protect the informants by requesting the court to seal their Statutory Declarations or redact their identifying information, the court was unable to accede to this request as there is no express provision in the law allowing this in criminal cases. As one of the informants believed that her current employment would be affected if the information became public, BSA withdrew the evidence so as not to jeopardize her employment, and as a result it was not possible to obtain a search warrant on the target infringing the law. This case clearly demonstrates the need to provide some means of protection for informants, even if only in some administrative or limited form, such as allowing the court to withhold the identities of informants or disclose them subject to certain conditions.

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 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\$15,700) 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>11</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.

---

<sup>11</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 S\$50,000. Similarly, section 49 of Singapore's trademark law authorizes significantly higher fines of up to S\$100,000 for willful trademark counterfeiting.

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).<sup>12</sup> 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.

Limited progress against Hard Goods Piracy of Music and Movies. What remains of the legitimate market for music CDs has had 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. In 2010, the music industry reports some improvement in the IPRB's previously passive pattern in responding to such hard goods piracy; but there is still no cohesive or consistent Singapore Police policy in fighting IP crime. IPRB conducted two rounds of raids in the Chinatown area in April and July 2010, raiding a total of 8 locations selling pirate CDs, and initiating criminal prosecutions. Another raid in July targeted two shops and kiosks selling hard disks pre-loaded with karaoke videos. However, no one has been charged as of January 2011. The recording industry filed five new complaints involving four makeshift stalls selling pirated music products at Chinese New Year trade fairs and one retail stall on January 20, 2011. However, IPRB has responded that the industry should consider a "collaborative approach," i.e., private prosecution, as the targets do not represent "the upper echelons of the syndicate."

MPA reports on an April 2010 raid in Sim Lim Square that seized 480 units of pre-loaded media players (containing unauthorized copies of films and TV shows) and led to 14 arrests, and reportedly at least one shopkeeper was fined. An emerging "hard goods" problem involves "dongle" devices that provide delivery of Internet streaming services. Approximately 5-10 different types are being sold in Sim Lim Square. These small Internet-accessible black boxes with USB and HDMI access ports connect directly to the television which is then routed to a variety of infringing online sites (typically Chinese) containing movies, TV shows, sports programming, etc. They sell for about S\$200 (US\$156) and are marketed as an "alternative to expensive monthly cable television bills."

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, or at least should amend its Declaration for Censorship Submission forms to require applicants to indicate (in the form of a statutory declaration) the source of such acquisition, as industry has previously requested. 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 existing authority to detain shipments of suspected infringing CDs *ex officio*.

---

<sup>12</sup> See Public Prosecutor v. PDM International Pte. Ltd. [2006] SGDC91.

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 2010, six individuals were caught camcording in Singapore cinemas, but the government declined to prosecute any of them. MPA has established that pirate copies of at least two titles that are widely available online were sourced to camcording occurring in a Singapore cinema. A specific criminal provision against camcording has proven to be a critical anti-piracy tool in many countries that have adopted it. Singapore should follow suit promptly, without waiting until the problem becomes more widespread.

**Deterring Trafficking in Circumvention Devices and Services.** ESA reports that Singapore's government continues to have an excellent record of cooperation and partnership with the entertainment software industry on enforcement efforts against retail outlets for pirate games in hard copy format, which have driven this form of piracy down to low levels, and on educational initiatives aimed at increasing the public's awareness of the importance of protecting copyright. There is, however, a persistent concern with respect to the sale of circumvention devices, which enable the play of pirated games on consoles. Although Singapore police have undertaken some high profile raids on targets engaged in the distribution of large quantities of circumvention devices, the eventual lenient sentences and penalties imposed on most defendants undermines efforts at curtailing the trade in circumvention devices.

In light of reductions in the availability of hard copy pirated entertainment software, the continued prevalence of modified consoles and circumvention devices in Singapore strongly suggests that existing legal sanctions are insufficient to create deterrence. The maximum penalty for trafficking in circumvention devices – two years' imprisonment or a fine of S\$20,000 – is far less than the penalties for the sale of pirate games – S\$10,000 per article up to S\$100,000 and/or imprisonment up to five years. Furthermore, since the fine authorized under Section 261C does not vary based on the number of circumvention devices, a high-volume distributor is exposed to the same maximum fine as a low level distributor. The problem is further exacerbated by the Court's reluctance to impose meaningful sentences against defendants charged with selling circumvention devices or modified game consoles. Yet the sale and supply of modified consoles and circumvention devices inflicts far greater damage to the market than the sale and supply of pirate games. The buyer or user of a modified game console, or of game copier cards, may stop buying legitimate software altogether, instead downloading pirated games from the Internet to meet his or her needs, thereby fostering multiple acts of infringement.

Singapore should re-examine the current penalties for criminal violations of its technological protection measures provisions (Section 261C) and consider revising them to bring them in line with the penalties for criminal copyright infringement. Moreover, judges should be encouraged to impose sufficiently stern criminal sentences to serve as a deterrent to future sales of circumvention devices.

**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. While it appeared that some progress was being made with respect to curtailing unauthorized photocopying and the sale of pirated books on university campuses, in 2010 a rather prominent bookstore on the campus of a well known university was found selling photocopied books. University administrators should do more to address unauthorized photocopying occurring in and around university campuses, including adopting appropriate use policies and educating their faculty and students on the importance of respecting and protecting intellectual property.

## MARKET ACCESS ISSUES

In March 2010, Singapore adopted amendments to its Code of Practice for Market Conduct in the Provision of Mass Media Services. In effect, the government unilaterally abolished exclusive licenses of content for subscription television programming, requiring that all subscription television services make available the channels they have licensed from content owners to all other subscription television retailers on a so-called “cross-carriage” basis. This drastic curtailment of the freedom of copyright owners to enter into commercially sound exclusive licensing deals is unprecedented elsewhere in Asia. It is unjustified by market conditions, injects government deeply into private contractual arrangements, and threatens to stifle further innovation in the packaging and delivery of new content to Singapore consumers. It also raises significant questions under the US-Singapore FTA, and concerns about Singapore’s fulfillment of its obligations under the TRIPS Agreement. IIPA urges Singapore to reconsider these amendments, which have not yet been implemented, and to modify them as needed to conform with Singapore’s bilateral and multilateral commitments.

# TURKEY

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2011 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: IIPA recommends that Turkey remain on the Watch List in 2011.<sup>1</sup>

**Executive Summary:** The Government of Turkey continues to make incremental progress in the fight against piracy and the development of a modern IP system. Nonetheless, the value of unlicensed software use in Turkey is enormous, book piracy continues to hinder the development of the publishing industry, and Internet piracy has grown in recent years, on top of traditional physical (OD) piracy. The EU accession process and the “Twinning Project” with EU Member State Governments has led to engagement on enforcement issues and an invigorated legislative process. Legislation is expected in 2011 to complete EU Directive implementation, including implementation of the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT). Meanwhile, the 2009 launch of the “Framework for Strategic Economic and Commercial Cooperation” will hopefully lead to greater engagement between the United States and Turkey on important copyright and enforcement issues. 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.”

### Priority Actions Requested in 2011:

#### Enforcement

- Improve coordination and cooperation between authorities, police, judiciary and anti-piracy commissions in cities other than Istanbul, Ankara and Izmir.
- Increase the number of specialized IP courts throughout Turkey in cities other than Istanbul, Ankara and Izmir, and address and eliminate hurdles experienced in the different IPR courts.
- Ensure courts issue preliminary court injunctions in a timely and effective manner.
- 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 an active role in significantly reducing Internet piracy by, *inter alia*, establishing a special division within the IP Police.
- Reconfirm through a formal circular that Police and Inspection Committee members have *ex officio* raiding authority against sales of copyrighted materials on streets and in public places as well as banderole violations.
- Take significant steps to legalize large- and medium-sized businesses engaged in end-user software piracy.
- Take significant raiding actions against illegal commercial photocopying and organized pirate printing of books.

#### Legislation

- Amend the copyright law further to fully implement the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (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.
- Take urgent action to legalize all use of software in the public sector by government agencies, employees, contractors and grantees, including implementation Circular No. 2008/17.

<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/2011SPEC301HISTORICALSUMMARY.pdf>, as well as the previous years' country reports, at <http://www.iipa.com/countryreports.html>.



## PIRACY AND ENFORCEMENT UPDATES IN TURKEY

Previous IIPA reports have discussed piracy and enforcement challenges faced in Turkey in detail. The following provides brief updates on piracy and enforcement issues over the past couple of years (failure to mention a specific issue does not signify that it has been resolved).

**Enterprise End-User Software Piracy and Hard Disk Loading:** Unauthorized use of business software by corporate end-users causes significant losses for copyright holders in Turkey. The preliminary estimate by research firm IDC (prepared for BSA) of the PC software piracy rate in Turkey in 2010 is 62%, only one point lower than in 2009, with the commercial value of unlicensed U.S. vendor software estimated to be \$235 million.<sup>2</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. A third problem noted in Turkey involves software such as serial crackers and key generators used to gain unlawful access to software. This is reportedly a common problem in Turkey, and a legislative fix to outlaw circumvention of technological protection measures or trafficking in circumvention devices is needed. Reductions in business software piracy would result in positive gains for Turkey’s economy. A study released in 2010 by IDC and BSA found that reducing the PC software piracy rate in Turkey by 10 percentage points over four years would generate \$783 million in GDP, \$154 million in additional tax revenues and 2,180 new IT jobs. The benefits would be even greater if this reduction was achieved in two years, which would yield over \$1 billion in GDP and \$205 million in additional tax revenues.<sup>3</sup>

The business software industry reported generally good cooperation from the dedicated Special IP Police established in the larger cities to combat enterprise end-user software piracy. Business software right holders collaborate during raids, which are conducted on the basis of search warrants, against resellers of pirated software and enterprise end-users of unlicensed software. In 2010, approximately 50 raids were conducted against corporate end-users. Improving cooperation and awareness in the smaller cities and suburbs could increase efficiency and reduce end-user software piracy levels throughout Turkey.

**Internet Piracy Explodes in Turkey, and Mobile Increases Dramatically:** Over 41% of households in Turkey had Internet as of August 2010, and 43% of the population (roughly 33.5 million) use the Internet, according to the Turkish Statistical Institute.<sup>4</sup> Around seven million of those users had broadband access as of June 2010, according to the OECD. Mobile penetration in the country has also grown despite over-regulation, and the top mobile provider, Turkcell, reported it had six million 3G users accessing the Internet using their mobile phone services as of July 2010, so the overall number of mobile web users is undoubtedly higher.<sup>5</sup> As a result of these developments, Internet usage of copyright materials has begun to displace physical product in Turkey, and Internet piracy has significantly worsened. Internet piracy in Turkey takes on many forms, including illegal P2P filesharing, pirate video hosting sites, deeplinking sites to pirate materials, forums providing direct download links to pirate materials, cyberlockers hosting pirate content, and torrent sites (employing swarm technology for faster downloads of pirate material). All creative content owners – of music, movies, business and entertainment software, and books – are victims of Internet piracy. Sites (suspected of being hosted outside Turkey) make available for download pirated

---

<sup>2</sup> BSA’s 2010 statistics are preliminary, representing U.S. software publishers’ share of commercial value of pirated software in Turkey. They follow the methodology compiled in the Seventh Annual BSA and IDC Global Software Piracy Study (May 2010), <http://portal.bsa.org/globalpiracy2009/index.html>. These figures cover packaged PC software, including operating systems, business applications, and consumer applications such as PC gaming, personal finance, and reference software – including freeware and open source software. They do not cover software that runs on servers or mainframes, or routine device drivers and free downloadable utilities such as screen savers. The methodology used to calculate this and other piracy numbers are described in IIPA’s 2011 Special 301 submission at <http://www.iipa.com/pdf/2011spec301methodology.pdf>. BSA’s final piracy figures will be released in mid-May, and the updated US software publishers’ share of commercial value of pirated software will be available at <http://www.iipa.com>.

<sup>3</sup> Business Software Alliance and IDC, *Piracy Impact Study: The Economic Benefits of Reducing Software Piracy: Turkey*, 2010, at [http://portal.bsa.org/piracyimpact2010/cps/cp\\_turkey\\_english.pdf](http://portal.bsa.org/piracyimpact2010/cps/cp_turkey_english.pdf).

<sup>4</sup> Turkish Statistical Institute, Prime Ministry, Republic of Turkey, *Information and Communication Technology (ICT) Usage Survey in Households and Individuals*, 2010, Press Release No. 148, August 18, 2010, at <http://www.turkstat.gov.tr/PreHaberBultenleri.do?id=6308>.

<sup>5</sup> Ercan Ersoy, *Turkey’s Mobile Leader Blames Regulator*, Hurriyet, July 29, 2010, at <http://www.hurriyetdailynews.com/n.php?n=turkey8217s-mobile-leader-blames-regulator-2010-07-29>.



copies of dictionaries, online journals, textbooks and grammar reference books, and are thus a threat to the English language teaching (ELT) market. The trading of hard goods and circumvention devices through websites, mostly auction sites, or through newsgroups, also remains of concern. During 2010, Entertainment Software Association vendors detected 1.26 million connections by peers participating in unauthorized file sharing of select member titles on P2P networks through Internet Service Providers located in Turkey.<sup>6</sup> Breakdowns by ISP show that Turk Telecom subscribers account for approximately 79% of this activity occurring in Turkey.

In previous years, IIPA members reported cooperation among service providers in fighting Internet piracy, as "Additional Article 4" of the Copyright Law (added in 2004) provides a basic structure for service provider cooperation.<sup>7</sup> The Government of Turkey, in its 2010 Special 301 Submission noted, "[a]ccess is blocked by court to 213 web sites regarding music which have breached the law. 766 denunciations in music have been made regarding copyright infringements. With the warning of the right owner collective societies, the works subject to infringement have been removed from the content."<sup>8</sup> While this continued enforcement cooperation is welcome, the main issue faced in enforcement of Internet piracy is identifying perpetrators who often use privacy services provided by ISPs making it impossible to locate them. More efficient and immediate cooperation should be established between law enforcement and ISPs to avoid infringers concealing their identity, and local ISPs should work together with law enforcement and not demand an official order or request of a prosecutor's office or a court before offering assistance. Legislation reconfirming ISP responsibility and fostering cooperation could be important to shift ISPs from their current tendency not to cooperate. As an immediate first step to achieving this objective, the government should convene meetings of affected sectors to discuss ways to work cooperatively toward halting the transmission of illegal copyrighted materials on telecommunications networks.

**Book Piracy 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, nonfiction, school books, college textbooks, supplements, dictionaries, ELT texts, and scientific, technical and medical (STM) materials. Illegal photocopying is especially prevalent on and around university campuses but law enforcement agencies remain reluctant to take action on campuses. 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 book piracy issues with the Ministry of Culture, the Ministry has not responded to these concerns. However, there has been greater cooperation with the Turkish Police Force resulting in raids against entities engaged in unauthorized photocopying activities.

**Retail Piracy (Optical Discs), Mobile Device Piracy, "Mod Chips":** Physical piracy remains a major hurdle to the growth of legitimate creative industries in Turkey, notwithstanding significant raiding and seizures of pirated products by the authorities. Past IIPA reports have detailed the migration to "burned" recordable discs<sup>9</sup> from imported factory discs (although these still can be found), and mobile device piracy, through which 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. IIPA has highlighted the decrease in street sales over the years due to the

---

<sup>6</sup> These figures do not account for downloads that occur directly from hosted content, such as games found on "one-click" hosting sites, which appear to account each year for progressively greater volumes of infringing downloads.

<sup>7</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 more than one week (to Turkish Telecom), and access to the sites in question is blocked.

<sup>8</sup> Republic of Turkey, Prime Ministry, Undersecretariat for Foreign Trade, General Directorate of Agreements, *Protection of Intellectual Property Rights in Turkey*, February 2010 (on file with IIPA).

<sup>9</sup> Shops 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. Illegal CD-R copies of music played at tourist hot spots, hotels, bars and clubs are sold "on the spot." Moreover, most of the source music played in bars and discos derive from illegal copies or Internet downloads.

ban on illegal street stalls. One recent phenomenon noted is the increase in sale and servicing of “mod chips” installed into videogame consoles to play illegal games. Of course, the “mod chips” being installed would have little value without the pirated games, and there is continued evidence of imports of these into Turkey. The increase in “mod chip” circumvention highlights the need for a legislative fix prohibiting the act of circumvention of TPMs (like the handshake in consoles which is broken by mod chips), and the trafficking in circumvention devices (including the service of installing mod chips).

**Banderol Enforcement Results in Huge Seizures, But Authorities Otherwise Lack *Ex Officio* for Piracy in Streets and Public Places:** Enforcement against physical piracy has generally been strong in Turkey, with thousands of raids and seizures of millions of discs again in 2010. Most raids and seizures in Turkey are effectuated through the banderol system, which provides the only clear *ex officio* authority in the Police and Inspection Committee members, pursuant to Article 81 of the Copyright Law. IIPA has noted in past reports some concerns about the integrity of the system,<sup>10</sup> but also, the need for an automated system and for industry representatives to be able to participate in the administration of the banderol system. It seems that both these developments are occurring. In 2009, the Ministry of Culture and Tourism completed the virtual automation system enabling online applications for registration of banderols, obtaining banderols, and certifying them. In the Government of Turkey’s 2010 Special 301 Submission, they noted, “software regarding automation system has been received and the background of a common database has been established ... in order to establish an efficient rights chasing system; a system will be launched which would be open to the access of all stakeholders of the intellectual property system and will be using an electronic signature background, and all registration and banderole operations will have to be approved by the relevant collective society.”

The Government of Turkey indicated in its 2010 Special 301 filing that in 2009, out of more than 3,600 raids, 1.3 million non-banderoled CDs and VCDs were seized (a downward trend from previous years), and that 1.7 million non-banderoled DVDs were seized (more than three times as many as in 2007). The biggest change in 2009 was the increase in seizures of suspected pirate books, which topped 1.9 million in 2009 (compared with just 243,000 in 2007 and 577,000 in 2008). These numbers are impressive, but they also indicate the continued size and scope of physical piracy in Turkey. Confirming *ex officio* authority in the specialized IP units under the Ministry of Internal Affairs, Security General Directorate of the Police (Special IP Police), for street piracy and piracy in public places, would complement the Police and Inspection Committee members’ current activities under the banderol system.<sup>11</sup>

**Specialized Courts Working, More Needed in Underserved Areas:** IIPA commends the Government of Turkey for its establishment of 23 specialized IP courts,<sup>12</sup> and the establishment of a special prosecutor’s bureau responsible for IPR investigations.<sup>13</sup> IIPA members would be greatly served by the establishment of specialized courts in other areas, i.e., in cities other than Istanbul, Ankara and Izmir. IIPA has noted several successful verdicts in recent years in copyright cases in previous submission; nonetheless, we note some continuing problems. The

---

<sup>10</sup> Over the years, IIPA has raised concerns about leaks of banderols, and has questioned whether the system functions well as a deterrent. There have been very few cases against the unauthorized use of banderols, and 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. The Government of Turkey in its 2010 Special 301 Submission notes, “The Ministry of Culture and Tourism published a circular for the Provincial Culture and Tourism Directorates in order to enable the proper assessment of the banderole and certificate applications and eliminate the inconsistencies. In the circular, a number of measures were involved, including the rules that “[a]ll the copies of the work shall be physically inspected before the banderoles are given,” and “[f]or the suspected banderole applications, the General Directorate shall be informed and the Inspection and Certificate Commission shall be activated.” See *supra* note 8.

<sup>11</sup> 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 were unsure whether the law provided them with such authority. Other districts 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, i.e., that Police may still exercise *ex officio* authority as to street piracy or piracy in public places.

<sup>12</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>13</sup> In its 2010 Special 301 Submission, the Government noted, “a special bureau responsible for IPR investigation has been established in the public prosecutor’s offices of seven cities (Adana, Bakirkoy, Beyoglu, Kadiköy, Kartal, Istanbul, Izmir) where annual number of investigations on IPR is more than 500,” and that “[i]n 234 public prosecutor’s offices, one or more than one public prosecutors have been assigned for IPR investigations (There are totally 707 public prosecutor’s offices in Turkey).” See *supra* note 8.

Government of Turkey, in its 2010 Special 301 Submission, noted court statistics for 2007 and 2008. The 2008 case disposition statistics show clearly that, other than Istanbul and one court in Izmir, the backlog of both civil and criminal cases is growing.<sup>14</sup> The Government's statistics identify some other glaring problems, most notably, the lack of overall deterrence in results.<sup>15</sup> Other problems include 1) most criminal cases end in suspended sentences which encourages recidivism;<sup>16</sup> 2) many sentences are reversed on appeal which encourages recidivism; 3) preliminary court injunctions are difficult to obtain (this is a general problem experienced in Turkish courts); 4) obtaining a criminal search warrant in some districts is difficult;<sup>17</sup> 5) there is no Berne-compatible presumption of ownership;<sup>18</sup> 6) private sector experts are not permitted to identify pirate materials (at present, external experts are appointed by the civil courts);<sup>19</sup> 7) there remain difficulties in storing large amounts of pirate materials.<sup>20</sup>

## COPYRIGHT LAW AND RELATED ISSUES

Copyright protection in Turkey derives from Law No. 5846 (1951), which was last amended by Law No. 5728 (2008). The Government of Turkey's 2010 Special 301 Submission indicated, "[t]echnical study regarding the Draft Law Amending Certain Articles of Law No: 5846 have been completed in order to accomplish full harmonization with the EU Acquis. Draft Law will be presented to the opinions of relevant institutions and collective societies in the following period."<sup>21</sup> Some IIPA members' industry comments have already been provided to the government,<sup>22</sup> and apparently a new consultation process has begun with a Ministry of Culture draft, which is expected to be considered in 2011.<sup>23</sup> There are several points which the new law (or related regulations, circulars, etc.) should address in

<sup>14</sup> For example, the Istanbul courts are dealing with the backlog through disposing of criminal cases at almost a 2:1 ratio, but they are still transferring many thousands of cases to the next year's docket. Other courts in Ankara, Izmir, and elsewhere did not fare as well. Of course, disposition of large numbers of cases does not result in deterrence but hopefully over time may lead there.

<sup>15</sup> For example, in 2007, of the 6,484 criminal cases under Law No. 5846, from which 6,693 were accused, over one-third of the cases resulted in acquittal or dismissal. Of the convictions, over 2,700 resulted in imprisonment and almost 2,000 of which resulted in a fine, but of those, we know that most sentences were suspended or were appealed. It is telling that of the over 200 civil cases under Law No. 5846, there were only four settlements, but over 100 dismissals or other negative dispositions. The Government of Turkey's Submission also notes that the Supreme Court upheld 40 copyright case decisions, but reversed 30 copyright case decisions, but this information is practically of little use without knowing the specifics of these cases.

<sup>16</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 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>17</sup> In some districts, public prosecutors require search warrants from judges to approve any raid action in anticipation of a criminal case. In those districts, search warrant applications must be made to standard criminal courts (via prosecutor's offices). The criminal courts in some instances have been reluctant to grant search warrants without substantial evidence, which can only be obtained via the raid, hence, a Catch 22 situation is encountered.

<sup>18</sup> Article 75 of the Copyright Law requires submission of documents that prove ownership. IIPA members have reported burdensome documentary requirements, such as the demand on U.S. publishers that notarized translations of original contracts between the author and publisher be produced in order to prove copyright ownership for each title, at quite substantial fees. Article 75 and these requirements in practice appear to hinder the right holder from being able to exercise its rights and thus may collide with Article 15 of the Berne Convention.

<sup>19</sup> In line with the EU Twinning Project's goals, such changes would bring Turkey's practice into line with similar practices adopted in the European Union.

<sup>20</sup> 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, as we reported in the 2010 report, the 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 an 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.

<sup>21</sup> See *supra* note 8.

<sup>22</sup> Industry comments focused on the following issues, among others:

- 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 right holders" 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>23</sup> From our local counsel: The Ministry of Culture shared a draft law amendment with the right holder associations in 2010 to collect their views, but this may not be the final one. The current status is that the draft is at the Ministry; waiting to be delivered to the Parliament for initiation of the enactment process. Due to the approaching general elections, the draft law amendment may not be passed by the Parliament in the first half of 2011)

particular, including the following:

- Fully Implement the WCT and WPPT: Turkey joined the WCT and WPPT effective November 28, 2008. The law should be amended to fully implement those treaties, including strong and effective protection against circumvention of technological protection measures (defined to include access controls and controls on the exercise of exclusive rights), and prohibitions on the trafficking in circumvention devices and technologies or providing circumvention services.
- Confirm *Ex Officio* Authority as to Street/Public Place Piracy: The government should confirm *ex officio* authority for street and public place piracy to specialized IP units under the Ministry of Internal Affairs, Security General Directorate of the Police (Special IP Police), e.g., by issuing a formal circular, so they can combat copyright such piracy without need of a complaint.
- Availability of 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.
- Foster Effective Enforcement Against Online Infringement: The enactment of Additional Article 4 in 2004, along with Law No. 5651 Regarding Regulation of Publications on Internet and Combating Crimes Committed Through Such Publications (2007), provided what was thought to be a basis for notice and takedown in Turkey. Article 9 of Law No. 5651 provides that persons who claim their rights were infringed may apply to a content or hosting provider for removal of the content, with takedown within 48 hours, and judicial review upon a refusal to takedown (this is a weakness since most notice and takedown systems call for automatic takedown upon the filing of a proper notice). However, infringement of intellectual property rights was not explicitly included. IIPA 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 repeat infringers.
- Criminalize Infringement Without Regard to Commercial Intent: 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.
- Reinstate Manager/Shareholder 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>24</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.

---

<sup>24</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).

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. Unfortunately, the government has not implemented the Circular. Public sector administrators should train users to avoid the use of pirated software. Some 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 powerful example for businesses and consumers in Turkey.

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>25</sup> Unfortunately, the Regulation suffers from two major weaknesses: 1) the certification authority is overly broad, veering into legitimate businesses with legitimate business models (in sectors where the risk of piracy is low), and which in the Internet environment will be burdened by the certification requirement while those engaged in online piracy will ignore it;<sup>26</sup> and 2) 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.<sup>27</sup>

RTÜK (Radio and Television Supreme Council of Turkey)<sup>28</sup> Failure to Enforce Licensing As Pre-Condition to Broadcast: The 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. RTÜK has not enforced against broadcasters who broadcast without a license.<sup>29</sup> Under the Law, the failure to sign licensing agreements with collecting societies should be subject to administrative fines from TL125,000 (US\$78,700) up to TL250,000 (US\$157,420) and closure of the radio or TV station.

## TRAINING AND PUBLIC AWARENESS

Prior years' IIPA reports have detailed descriptions of IIPA members' involvement in training and public awareness activities in Turkey. In the Government of Turkey's 2010 Special 301 Submission, they reported training and capacity building activities, both domestic programs<sup>30</sup> and those run in conjunction with the EU Twinning

---

<sup>25</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>.

<sup>26</sup> The Regulation covers "[m]ovie theatres and similar places undertaking public display and transmission of cinematographic films," "[p]remises ... importing, distributing or selling empty fixing materials," "[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," and companies engaging in Internet distribution. This broad certification authority undercuts the purpose of the legislation, since legitimate businesses will be burdened while illegal businesses will never come forward to be certified. This has already proved to be the case, since back in 2005, MOCT could not get all the optical disc plants to register.

<sup>27</sup> The remedies for operating an optical disc plant without certification should include seizure and forfeiture of all equipment and goods found in such a plant, closure of the plant, and criminal liability including deterrent fines and imprisonment, including individual liability to pierce the veil of the company engaging in production without a certificate.

<sup>28</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>29</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.

<sup>30</sup> Domestic programs reported by the Government of Turkey included:

Project.<sup>31</sup> In 2010, IIPA members continued offering training programs for judges, public prosecutors and police, and frequently work together with competent authorities through organizing law enforcement operations, attending seminars, sponsoring awareness activities, etc.

## GENERALIZED SYSTEM OF PREFERENCES (GSP)

The GSP statute expired on December 31, 2010. In the past, Turkey enjoyed preferential trade benefits under the program. One of the criteria of the program is that the country provides “adequate and effective protection for intellectual property rights.” In 2010, almost US\$793 million worth of Turkish goods entered the U.S. under the duty-free GSP code, accounting for almost 19% of its total imports to the U.S. Turkey needs to endeavor to meet the adequate and effective test under the statute to remain eligible, once it is reauthorized, to continue to receive favorable treatment under the GSP program.

- 
- “Enforcement Problems on Fight against Intellectual Property Right Frauds,” organized in cooperation with the Ministry of Culture and Tourism in Antalya, in October 2009, including a total of 168 participants, including DG Copyright and Cinema, 110 police chiefs, prosecutors, judges, Municipality Police and Inspection Commission members.
  - IPR awareness training in Istanbul, İzmir and Bursa, including 173 police chiefs and 458 police officers.
  - Police and three judges participation in TAIEX Training Seminar on the fight against Intellectual & Property Right Frauds organized in Athens/Greece in June 2009.
  - Police participation in Fifth INTERPOL IP Crime Training Seminar in Ostia, Rome, Italy in November 2009.
  - Police participation in Inter-Regional Symposium on Enforcement of Intellectual Property Rights (WIPO, State Office of Industrial Property of Republic of Macedonia (SOIP)), in Macedonia/Skopje in October 2009.
  - Police participation in Europol Working Group meeting on Intellectual Property Rights Infringements, in Europol/Hague in October 2009.

<sup>31</sup> The Twinning Project's 2009 program, “*Support to Turkish Police in Enforcement of Intellectual and Industrial Property Rights*” (TR.06.03.08-TR061BJH05) was reportedly conducted in order to “strengthen the administrative and technical capacity of the Turkish National Police in the enforcement of intellectual and industrial property rights and improve cooperation with other enforcement bodies and right holder associations, in line with European Union legislation and practices.” The institutions involved in the Project included the Turkish National Police (State Security Department, Anti-Smuggling and Organized Crime Department and Criminal Police Laboratory Department), the Ministry of Justice (General Directorate of the European Union), the Ministry of Culture and Tourism (General Directorate of Copyright and Cinematographic Works), Undersecretariat of Customs (General Directorate of Customs) and the Turkish Patent Institute. The Project included twenty activities and involved 702 participants. Included among the components of the program were “Strengthening the capability of the police in the fight against piracy and counterfeiting (including Assessment of current awareness and capacity improvement needs on IPR of different provincial police units, judiciary and selection of adequate trainees.” Also included were “train the trainer” programs and “specialist training seminars” involving police chiefs, judges, prosecutors, Customs officials, police from the “Provincial Directorates State Security Divisions,” and police from “IPR Offices of Adana, Ankara, Bursa, Diyarbakır, İzmir and Istanbul Provincial Directorates,” and six training seminars for Police through an “Intellectual Property Crimes Specialist Training” program for 193 police officers from 81 Provinces.

## **306 MONITORING**

# PARAGUAY

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

### 2011 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: IIPA recommends that Paraguay remain under Section 306 monitoring in 2011.

**Executive Summary:** In 2009, Paraguay and the United States renewed the bilateral Memorandum of Understanding on Intellectual Property Rights (IPR MOU) through 2011, but Paraguay's weak enforcement activity against high levels of the most basic forms of piracy remains unchanged. Following a year of mostly disappointing developments in the Paraguayan specialized anti-piracy unit, in 2011 the copyright industries seek national commitment and follow-through in the government's recently renewed focus to copyright enforcement.

The Paraguayan market is one still mired in physical piracy. There was no reduction in copyright piracy levels in Paraguay in 2010, either in the streets or at the borders. There continues to be large scale production of blank optical discs by plants operating in Ciudad del Este at a rate that far exceeds what the nation could consume, and these products are exported throughout the region. Border enforcement remains ineffective. Paraguay also remains the source of a steady flow of illegal and counterfeit games, modified consoles and game copiers that flow into Brazil and neighboring countries. The business software sector continues to suffer from end-user piracy, and the government has taken no steps on its commitment to implement a legalization program among its agencies. In 2009, the government withdrew political support for the special anti-piracy unit (known as UTE), after which the UTE was revived at a severely diminished capacity. Restructuring of the UTE in early 2011 provides some room for optimism that this one-time bright spot in Paraguayan enforcement authorities will regain its status as an effective and proficient law enforcement body. Corruption and an ineffective judicial system are deeply embedded problems that hinder effective criminal enforcement and prevent meaningful sentences. Finally, industry still seeks implementation of criminal code amendments to strengthen copyright sanctions.

#### PRIORITY RECOMMENDED ACTIONS FOR PARAGUAY IN 2011:<sup>1</sup>

- Establish a specialized IPR Court with national competence, authorization to take independent actions across the country, and a staff of trained IPR judges and prosecutors.
- Facilitate swift and deterrent convictions by removing corrupt expert witnesses and judges, providing for the proper handling of pirate product evidence, and imposing deterrent level sanctions provided by the 2008 Criminal Code amendments.
- Support the restored authority of the special anti-piracy unit (UTE), by ensuring effective leadership and providing sufficient resources to hire, train and maintain its inspectors.
- Investigate and conduct raids against the large-scale distribution points operating in Ciudad del Este as well as the sources of local production.
- Continue to increase actions at the border to control the spread of pirate product across the region.
- Issue and implement a software legalization decree (a long overdue obligation from the IPR MOU).

<sup>1</sup>For more details on Paraguay's Special 301 history, see IIPA's "History" appendix to this filing, at <http://www.iipa.com/pdf/2011SPEC301HISTORICALSUMMARY.pdf>, as well as the previous years' reports, at <http://www.iipa.com/countryreports.html>. To read IIPA's cover letter to our 2011 Special 301 submission, go to <http://www.iipa.com/pdf/2011SPEC301COVERLETTER.pdf>.





The IPR Memorandum of Understanding and Action Plan: Both the Paraguayan and the U.S. governments have invested years of effort to improve the laws and enforcement mechanisms in the Paraguayan intellectual property rights system. On December 19, 2003, both nations agreed on a Memorandum of Understanding on Intellectual Property Rights (IPR MOU), which will remain effective 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.

Generalized System of Preferences: Paraguay has been a beneficiary country under the U.S. Generalized System of Preferences program (GSP). Although the GSP program has lapsed for 2011, if it is restored it will presumably still require that a beneficiary country provide "adequate and effective" protection to U.S. copyrighted materials. During 2010, \$43.9 million worth of Paraguayan goods entered the U.S. under the duty-free GSP code.

## 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 and near universities. The country is a major source of manufactured and trans-shipped pirate products throughout the region. 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 pirated content and illegal 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 remains steady, particularly in cities bordering Brazil, such as Ciudad del Este, Pedro Juan Caballero and Salto del Guaira. Pirated music and film products as well as unauthorized copies of business and entertainment 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, mostly of music, movies, and videogames (CD-Rs and DVD-Rs), can be found on the streets of Asuncion.

Optical disc piracy levels remain high. Despite a decrease in overall importation of blank media, the amount of optical media legally imported into Paraguay continues to exceed possible legal use. Moreover, any decrease in imported blank media has been offset by the five large optical disc factories operating in the Province of Alto Parana, where Ciudad del Este is located. At the local level, there are hundreds of smaller burning labs in Ciudad del Este supplied by syndicates who coordinate their work and provide these labs with blank CD-Rs. Furthermore, Paraguay remains a significant source of transshipped 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 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 only one of the plants is believed to have the authorization to legally export their products to Brazil and Argentina.

The problems confronting the entertainment software industry in Paraguay have remained remarkably similar over the years. The Paraguayan market remains completely overwhelmed by counterfeit and pirated video games and circumvention devices, and continues to serve as a trans-shipment point for syndicates who bring in such goods from overseas with the intent of distributing them throughout South America. Circumvention devices, including modchips, game copiers and USB-based modification software, are freely imported into Paraguay, often declared as "parts." In addition, modification software is downloaded and used in modification labs to modify significant quantities of consoles so that they can play pirated games. Large scale, underground piracy targeting primarily wholesale buyers in Brazil, as well as domestic street vendors, continue to be the principal problems. The city of Ciudad del Este continues to be the focal point of piratical activities in Paraguay, largely due to ineffective enforcement on the Paraguay/Brazil border between Ciudad del Este and the Paraguayan city of Salto del Guairá. Three other commercial concentrations are increasingly prominent with respect to the flow of infringing products: Pedro Juan Caballero, Salto del Guairá, and Encarnación.

The business software industry reports that end-user piracy in businesses and government agencies continues to cause the most economic harm for this sector. Corporations place orders via email to receive pirate software from hired distributors. Pirate organizations offer illegal compilations of programs, including technical software for particular business sectors, 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, and the growing availability of the Internet is starting to adversely affect the business software sector.

Internet-based piracy in Paraguay has grown as local Internet access is becoming more and more affordable, although the growth in digital piracy is limited as broadband connections are few and slow in Paraguay. Many of the popular cyber cafés installed illegal games and software on their computers. Consumers use Internet forums to offer pirate products and upload links to free hosting sites such as Megaupload or Rapidshare, but also use websites to order 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 continue to be largely ineffective in deterring widespread piracy. Government policies in 2010 derailed the ability for specialized law enforcement authorities to conduct anti-piracy actions. Meanwhile, incremental improvements in border enforcement have barely begun to tackle Paraguay's long-time status as the source of illicit products throughout the region. Within the judicial system, rights holders face poor engagement on the part of prosecutors, procedural obstacles regarding the retention of seized evidence and expert witnesses, long delays, and non-deterrent sentences. A specialized IPR court is needed to overcome enforcement hurdles resulting from an untrained, and often corrupt, judiciary.

The direction of the Specialized Technical Unit (UTE) is in flux: The Specialized Technical Unit (UTE) in the Ministry of Industry and Commerce suffered devastating setbacks between 2009 and 2010, and rights holders will be watching closely as efforts to revitalize the unit in early 2011 develop. Historically the one agency of the Government to independently investigate, collect evidence and seize products, the UTE was stripped of its ability to unilaterally pursue investigations and was forced to rely on leads provided by industry. 2010 saw further setbacks to the UTE. The original UTE team, in whom considerable training and experience had been invested, was replaced with a new coordinator and sub-coordinator along with a new three man team. While some of the members had an investigative background, none had experience in anti-piracy investigations. Moreover, the new coordinator is a political figure who also holds another position within the Ministry of Industry and Commerce. In addition, the US Embassy suspended funding provided to the previous unit, leaving the team with no means of mobility to investigate and conduct operations. In September, the sub-coordinator resigned from the unit as did the three other members, leaving only the coordinator to operate UTE. As a result of UTE's instability, many private sector entities who had

conducted joint operations with the previous UTE unit suspended cooperative efforts. ESA reports that UTE undertook very few raids on behalf of the video game industry, and that those that were undertaken were rendered ineffective by UTE's lack of resources and experience.

On a more positive note, President Lugo signed a decree in November reestablishing the UTE and, for the first time, providing it with government funding, an indication that the unit may finally have political support from the current administration. In January, Paraguay finalized its national 2011 budget, and allocated UTE an operational budget of approximately US\$459,603. At the close of 2010, polygraphs of potential new members of the unit, proposed by the Ministry of Industry and Commerce, Ministry of Finance and the Ministry of Interior, were being finalized. The members selected began training in early January, 2011, through the USAID coordinated Plan Umbral II, together with the U.S. State Department (INL). There has been no concrete movement, however, to replace the current coordinator with an individual with more experience in investigations and IPR operations.

**Improvements in border enforcement:** Cross-border piracy continues to be a significant problem that is subject to far too little effective action on the part of Paraguayan authorities. Brazilian traders pass easily over the Friendship Bridge to purchase counterfeit and pirate products. Brazilian authorities on the other side of the river are unable to sufficiently stem illegal trafficking, 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. Improvement of border enforcement including the interception and seizure of pirate products and contraband PC hardware and the inspection of blank optical disc media, is critical to fulfilling Paraguay's obligations under its MOU with the United States.

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 business software industry reports that the new customs authorities are more efficient and produced improved procedures in 2010. The entertainment software industry, however, remains frustrated with Paraguayan customs, and reports that authorities failed to seize any piratical goods at the border relating to video games, circumvention devices, or modified consoles in 2010.

**Other law enforcement bodies on the whole are ineffective:** As a result of previous changes in UTE, ESA indicates that its relationship with the unit has worsened since 2009, and operations with UTE that had been conducted since 2007 halted in 2010. ESA also reports that, although it initiated raids of 14 targets involving hard goods in 2010, the principal police force responsible for IPR enforcement, the Economic Offenses Police, continues to be plagued with corruption; as a result, officers are used only as security support at the time of the raid.

Meanwhile, BSA reports that no major actions involving the massive imports of optical discs were publicized for 2010 by the Direction of Intellectual Property within the Ministry of Industry, nor were actions taken by the Ministry of Industry, the Ministry of Finance, or any District Attorneys regarding tax evasion on the imports of optical discs.

BSA also continues to report unnecessary enforcement delays in Ciudad del Este, as well as information leaks that lead to unsuccessful investigations. Requests for a warrant and a search and seize order involve lengthy waiting periods, during which informants within the court give notice to the targets in time to vacate the premises before a raid is conducted. In those cases in which the prosecutors of Ciudad del Este have conducted successful raids, they fail to seek deterrent sanctions.

A key priority in 2011, as has been for years, is 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. Sanctions against landlords of pirate points of sale are not applied in Paraguay. According to sources, authorities feel they are not

authorized to take action against landlords; in the past, sources inside the UTE explained that attempts to apply landlord liability laws were denied by the Fiscalía (the district attorney's office).

**Government software regulation:** The government of Paraguay has taken no steps to issue or implement a software legalization program among its agencies, an important obligation under the country's MOU with the United States.

**New Structure of Specialized IPR Prosecutors Units:** Paraguay's specialized IPR prosecutor units, formerly known as the "Trademark Units," recently have undergone restructuring and were replaced by the UEPI- Unidad Especializada de Propiedad Intelectual. A new IPR Prosecutor has been placed in Encarnación, a major land port for containers entering Paraguay from Argentina, and the Attorney General is expected to place two additional prosecutors there. The new specialized IPR unit will have "nationwide competence," an element that copyright industries have long sought. Specialized IPR Public Prosecutors are also now empowered to investigate tax evasion cases. However, under the new structure the prosecutors will still depend on judges in local jurisdictions to issue raid warrants, which could diminish the positive effects of nationwide prosecutorial jurisdiction.

ESA reports that in 2010, one particular IPR prosecutor in Ciudad del Este has proven to have a thorough understanding of the law as it relates to circumvention devices and has taken effective actions when presented with a seizure request generated by the private sector.

**The Courts:** Copyright industries express significant frustration with the state of the judiciary in Paraguay. Courts handling intellectual property cases are replete with deficiencies: Judges are inexperienced in IPR and have little appreciation for copyright enforcement; *ex officio* prosecutorial actions, already rarely if ever taken, have been called into question; evidence is poorly supervised and rarely destroyed after convictions (and in some cases has disappeared, with broken security seals left uninvestigated); corrupt expert witnesses are common; cases face years of delays; and sentences are not deterrent.

**Specialized IPR Court:** A trained and dedicated specialized IPR court that works effectively with specialized IPR prosecutors is badly needed in Paraguay. Local representatives indicate that the composition of the IPR court in Ciudad del Este is questionable, and that a number of cases have been plagued by "irregularities." In February, the Supreme Court issued a resolution requiring a judge to accompany all IPR and tax raids and container inspections in Ciudad del Este. A second resolution, issued in April, designated two specific judges as the only judges allowed to issue raid warrants or authorize container inspections in trademark and Customs cases, and directed that the judges must personally attend these actions. While the text of the second resolution only covers trademark cases, in practice this power was immediately extended to cover copyright cases as well. The outward goal of the two resolutions was to increase transparency and coordinate actions; unfortunately, the designated judges have no additional training in IPR. However, in practice, this has become the IPR court in Ciudad del Este. An unfortunate result of the resolutions has been the reduced role of the IPR Prosecutors, some of whom have specialized IPR training, in carrying out the raids.

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.

**Ex officio prosecutorial actions:** The Supreme Court is now reviewing the decision of an appeals chamber declaring that, in IP infringement cases, each action must be individually initiated. If affirmed, the decision would undo the ability of prosecutors to take *ex officio* actions, a crucial element in anti-piracy activities.

**Supervision and Destruction of seized evidence:** In 2010, Paraguay passed penal code reforms that proscribe the distribution of circumvention devices. Some Prosecutors have begun to embrace the penal code

reforms, and now conduct raids without hesitation. Others, however, are reluctant to seize the entirety of illegal merchandise in a given raid, limiting seized goods to only those products of companies represented by the attorneys in the instant case. Furthermore, due to poor security in the prosecutors' warehouse, modified consoles are normally left in the custody of the defendant. On several occasions, consoles retained under judicial orders and in the control of defendants have been removed and altered. Judges, however, take no notice of the blatant violation of the judicial orders, making prosecution futile. Many judges simply do not believe that modified consoles should be destroyed due to their high value, and believe that circumvention devices may have legitimate uses. Others have taken more inexplicable steps: in one case of pirate merchandise discovered within the defendant's store and home, the evidence was proven to be illegal but the defendant was found to be innocent, and the court ordered the seized merchandise to be returned to the defendant. (That case is currently undergoing further review.)

Meanwhile, despite numerous ESA seizures, to date, no modified consoles have been destroyed in Paraguay. Current destruction procedures 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 costs related to 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 refused to pay higher sums in accordance with the new decree; however, the reduced fees appear now to have been accepted. Despite this, one ESA member reports that it continues to be charged destruction fees from seizures that were conducted 4-5 years ago.

Expert witnesses: There has been little improvement in the area of corrupt experts and judges in Paraguayan courts. Rights holders have recently experienced problems coming up against expert witnesses that are paid by defendants but have little or no qualifications. The problem is massive and widespread. In 2008, the Supreme Court suspended authorizations of new expert witnesses, but the problem persists. In a recent court case involving consoles that had previously been verified as modified (i.e. the technological protection measures circumvented), a judge permitted additional exams by a "neutral" expert who then convinced the judge to release the consoles to the defendant. Judges continue to use a long standing "2 to 1" practice, citing to two expert witnesses hired by defendants to report that product is authentic against one expert declaring the product not authentic. In this manner, judges are able to wash their hands in cases in which pirated product is returned. The inclusion of an IP Expert witness in the UEPI unit may be a step in the right direction if honest, competent individuals are appointed. Local business software representatives highlight that promising expert witness regulations have been endorsed by the Supreme Court, and are now under review.

Internet enforcement: To date there have been very few developments in Internet piracy enforcement. The local ISPs are cooperating responsively to protect copyright, but only in the limited circumstances when they are required to provide information by judicial order. Currently there is no specific legislation regarding ISP liability. Many providers assume that they are subject to general liability principles in the Civil Code, though this has not yet been tested.

Anti-corruption measures: The Supreme Court has displayed unwillingness to investigate allegedly corrupt judges, even though Plan Umbral I created mechanisms to file a complaint and request an investigation against judges involved in cases of corruption. In practice, the Supreme Court has disregarded the findings of investigations and failed to sanction or remove corrupt judges. As there is no mechanism for anonymous filings, rights holders fear that filing a complaint will prejudice judges in pending cases.

Criminal sanctions are not deterrent: Despite reforms to the Criminal Code, prosecutors do not press for deterrent level sanctions, and judges similarly do not impose deterrent sanctions in criminal copyright cases. As a result, the relatively low fines that can be expected, should a defendant be convicted, have become a simple business expense for IP criminals.

Delays and low damages in civil cases: BSA faces ongoing 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, a problem that creates a danger of leaks.

IPR Training Programs: Judges in Paraguay, in particular, are in dire need of training in the importance and operation of intellectual property enforcement. In August 2010, ESA co-sponsored training for officials from the Asuncion Prosecutor's office, Customs, the UTE, and Treasury; however, not a single Prosecutor or assistant attended. Training should be required for Judges and Prosecutors, who should not be permitted to send their assistants to attend as their replacement. BSA reports that it has conducted several seminars in the past two years for the benefit of public prosecutors forensics officials, public prosecutors, and judges.

## COPYRIGHT LAW AND CRIMINAL CODE ISSUES IN PARAGUAY

Cybercrime law: A draft Cybercrime Law was recently presented to the government, and should be adopted and implemented in the near term. As Internet piracy rates gradually increase in the country, so do cases of identity theft. Paraguay should consider updating its laws to deal with illicit activities online.

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 modern standards. In recent years, the copyright industries have focused on enforcement objectives, including reform of the criminal code. 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: Paraguay achieved important reforms to its criminal code that have not been fully implemented in practice. IIPA and its members worked with the government for years to try to fill the troubling gaps in the criminal code and strengthen enforcement remedies for copyright infringement. After a comprehensive effort, amendments to the Criminal Code (formerly Law No. 1160/97) were approved in Law No. 3440 of July 16, 2008, and entered into force in July 2009. This legislation makes copyright infringement a major crime, upgrading infringement to a felony. The amendment significantly increases the maximum penalties of copyright infringement up 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 legislation unfortunately keeps a minimum penalty of one month for some infringing acts, and as the industries have long complained, this discretionary low minimum penalty may lead judges to refuse to issue jail sanctions, instead issuing only fines. 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.

## MARKET ACCESS ISSUES IN PARAGUAY

In a concerning development, the Executive Branch is now attempting to mandate the use of open source software in public offices. Such a policy would undermine the principle of technological neutrality in government IT acquisitions.

## **COUNTRIES DESERVING SPECIAL MENTION**

# ALBANIA

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

### 2011 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Recommendation: IIPA recommends that the U.S. Government should actively monitor developments in Albania during 2011 with respect to the issues discussed in this Special Mention report.

Executive Summary: Several copyright industries, including the motion picture industry and the business software industry in particular, note significant enforcement problems in Albania. According to preliminary Business Software Alliance (BSA) estimates, the software piracy rate in Albania in 2010 was 73%, and the corresponding commercial value of unlicensed software put into the marketplace there was \$5.1 million.<sup>1</sup> This ranks Albania behind only the Republic of Montenegro (79%) in piracy in the Western-Balkans peninsula.

In general, Albania's legal framework for IPR protection is sufficient; a new (and improved) Copyright Law is expected to be considered by the Parliament in 2011 to implement key European Union directives (such as the 2004 Enforcement Directive). Passage of the law is also necessary to implement the Government of Albania's "Intellectual Property Rights Enforcement Strategy 2010-2015" which established a dedicated interagency detail (an *ad hoc* IPR "Inspection Agency") for combating IPR enforcement. One other addition to the legal framework was adopted in 2009 (implementing the 2003 European Council Regulation No. 1383/2003) to provide customs officials with *ex-officio* authority to suspend the release of goods or to seize goods on sufficient grounds. In addition to this authority, customs actions can also be undertaken on a rights holder's request.

Despite these encouraging legal reforms, enforcement activity by government authorities is described as "virtually non-existent" – for most copyright industries, and especially in the case of the business software industry.

Inspectors of the Albanian Copyright Office (the agency with responsibility for monitoring and surveillance of the marketplace for copyright materials) lack both the personnel and expertise to act properly and efficiently. There are only three inspectors nationwide, and other major resource shortcomings, in addition to a lack of knowledge, experience and training in the inspection and prosecution of copyright cases (especially software piracy cases). This, despite several training programs undertaken by and with rights holders in the past few years. To date, the authorities have not launched any raids against suspected infringers of business software. The same is true for customs officials – where training, personnel, and experience is also lacking (in the new department handling IPR matters) – and there have been no software piracy seizures or actions either using their *ex officio* authority or upon a request filed by a rights holder.

One particular problem in Albania has been television piracy. There are over 60 public and private channels in Albania and many stations continue to broadcast U.S.-owned motion pictures without a license. In some cases, the materials have been licensed to certain stations in Albania, and other stations simply take and rebroadcast them without a license. The National Council of Radio and Television (NCRT) has issued fines against some of the

---

<sup>1</sup>BSA's 2010 statistics are preliminary, representing U.S. software publishers' share of commercial value of pirated software in Albania. They follow the methodology compiled in the Seventh Annual BSA and IDC Global Software Piracy Study (May 2010), <http://portal.bsa.org/globalpiracy2009/index.html>. These figures cover packaged PC software, including operating systems, business applications, and consumer applications such as PC gaming, personal finance, and reference software – including freeware and open source software. They do not cover software that runs on servers or mainframes, or routine device drivers and free downloadable utilities such as screen savers. The methodology used to calculate this and other piracy numbers are described in IIPA's 2011 Special 301 submission at [www.iipa.com/pdf/2011spec301methodology.pdf](http://www.iipa.com/pdf/2011spec301methodology.pdf). BSA's final piracy figures will be released in mid-May, and the updated US software publishers' share of commercial value of pirated software will be available at [www.iipa.com](http://www.iipa.com).





broadcasters, but the fines have not been a deterrent penalty. This is because only the local tax authorities have the ability to execute (collect) the fines, and they are not doing so, despite a Memorandum of Understanding between the NCRT and the tax authorities. Both the individual rights holders (the studios), and the Motion Picture Association of America (MPAA) have sent cease and desist letters to individual stations, but to no avail. The stations continue to broadcast unlicensed material, and the current enforcement regime in Albania has either been unable or unwilling to stop this activity.

In sum, passage of the new Copyright Law and the establishment of the *ad hoc* IPR Inspection Agency are the two top priorities on the legislative side. Other priority actions include: (a) amending the current Criminal Code to give state prosecutors *ex officio* authority to prosecute copyright infringements; and (b) improving the resources, training and expertise of both the Albanian Copyright Office and the Albanian Customs IPR Department in order to enable these authorities to start effectively pursuing IPR enforcement.

# BULGARIA

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2011 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: IIPA recommends that the U.S. Government should actively monitor developments in Bulgaria during 2011 with respect to the issues discussed in this Special Mention report.

Executive Summary:<sup>1</sup> The recording industry, in particular, reports that the enforcement situation in Bulgaria has rapidly worsened in recent years. According to the Recording Industry Association of America (RIAA), numerous download pirate sites, Bit Torrent sites, Rapidshare sites and widespread peer-to-peer piracy in Bulgaria, make it virtually impossible for a legal online music market to develop. There are currently seven existing legal music services available in Bulgaria, which have been struggling to survive in a marketplace with an online piracy rate of 99%. In short, the enforcement authorities are not making sufficient efforts to create a viable place for legal online music services to get established. The music industry reports good cooperation with the Cyber Crime Unit within the Enforcement Directorate (called the “Counteraction to Organized and Serious Crime” and previously known as the General Directorate to Combat Organized Crime). However, the actions of this unit alone cannot significantly reduce the availability of infringing music services. Rather, it will take the concerted efforts of the other competent enforcement authorities to achieve some success: namely, the Ministry of Culture and the Council on Electronic Media. Unfortunately, to date, these authorities have not been using their administrative enforcement powers to assist rights holders with enforcement, even when infringements have been brought to their attention.

In addition to online streaming and downloading piracy, there is widespread broadcast piracy. The Government of Bulgaria has taken little action against, and in so doing signals tacit approval for, broadcast piracy which is pervasive – the piracy rate is estimated to be 95%. This persists even as Bulgarian law (and European Union directives) require licenses for the commercial use of sound recordings on broadcast and cable television programs. This out-of-control situation has persisted for almost two years now, and represents a profound failure of the rule of law in Bulgaria.

In addition to this alarming enforcement situation, there are troubling legislative reforms being considered. The Bulgarian Parliament is set to vote on a bill to amend the existing Copyright and Related Rights Act which, if adopted, could have a devastating impact on the recorded music market in Bulgaria. In particular, the bill's many flaws include: (1) an accreditation procedure for collecting societies which would undermine the existing collective rights management system in Bulgaria; (2) a government-monitored tariff setting procedure under which the market value of copyright works would no longer be the relevant criterion for rate setting; (3) the proposed elimination of simulcasting and webcasting as separate uses for which rights holders are entitled (currently) to equitable remuneration; (4) a set of provisions that in the aggregate would all but eliminate royalties from private copying levies -- one of the only current sources of revenue in the difficult Bulgarian music marketplace; and (5) a failure to repeal existing law which limits the freedom to enter into contracts for more than five years, which is inconsistent with traditional copyright industry practice. Last, the only positive elements of the draft amendments, including particular provisions on administrative measures for combating online piracy, were removed from the proposed amendments. In short, the amendments are moving forward in the face of widespread opposition on a range of issues, and from a large coalition of local and international rights holders, and without consideration of international (and European Union) copyright laws and practices.

---

<sup>1</sup>For more details on Bulgaria's Special 301 history, see IIPA's “History” appendix to this filing at <http://www.iipa.com/rbc/2011/2011SPEC301HISTORICALSUMMARY.pdf>, as well as the previous years' reports, at <http://www.iipa.com/countryreports.html>. For a summary of IIPA's 2011 global issues, see our cover letter at <http://www.iipa.com/pdf/2011SPEC301COVERLETTER.pdf>.



# CROATIA

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

### 2011 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: IIPA recommends that the U.S. Government should actively monitor developments in Croatia during 2011 with respect to the issues discussed in this Special Mention report.

Executive Summary:<sup>1</sup> Weak enforcement of IPR crimes has been a significant problem for all copyright rights holders, with particular problems reported by the recording industry and the business software industry. The level of software piracy for last several years has remained at about the same, very high, level. According to preliminary Business Software Alliance (BSA) estimates, the software piracy rate in Croatia in 2010 was 55%, and the corresponding commercial value of unlicensed software put into the marketplace there was \$45.7 million.<sup>2</sup> Recorded music piracy has grown 10% in the past few years, with Internet piracy of sound recordings now estimated at 90%.

Priority actions to be taken in 2011: The main reasons for the poor copyright enforcement are a lack of training by enforcement authorities (police, prosecutors and judges), an ineffective administrative system for stopping basic infringing activity, and an overall weak legal apparatus.

Piracy and enforcement deficiencies: For the police, a basic problem is the absence of any incentives or motivation to commence criminal IPR cases – that is, any government pronouncements that IPR enforcement is a priority. For those few cases that do commence, there are administrative and procedural hurdles that prevent cases from coming to courts or any final disposition. In general, the criminal system – which is the backbone of IPR enforcement in most developed countries – offers little protection for U.S., foreign or Croatian rights holders. The copyright industries report that half of all IPR cases end in acquittals, with the other half resulting in a suspended sentence, with or without minimal fines, regardless of the facts or damages to rights holders at issue.

More minor cases – that is, misdemeanor cases – are more “efficient” than felony criminal cases. There are a greater number of raids undertaken against smaller distributors and the like, but the ultimate outcome is the same: most infringers have their cases dismissed due to the expiry of time (under the statute of limitations – as a result of investigative or prosecutorial delays that often last over a year); approximately 20% of offenders are found guilty and fined, with minor monetary damages.

The Croatian misdemeanor court procedures regularly proceed without the notification of or participation of rights holders, either of which would improve enforcement (and such notification is a requirement of the Law on Misdemeanors). This prevents rights holders from properly protecting their rights and property and seeking damages in alternative civil procedures or settlements, because once misdemeanor cases are dismissed, rights holders cannot

<sup>1</sup>For more details on Croatia's Special 301 history, see IIPA's "History" appendix to this filing at <http://www.iipa.com/rbc/2011/2011SPEC301HISTORICALSUMMARY.pdf>, as well as the previous years' reports, at <http://www.iipa.com/countryreports.html>. For a summary of IIPA's 2011 global issues, see our cover letter at <http://www.iipa.com/pdf/2011SPEC301COVERLETTER.pdf>.

<sup>2</sup>BSA's 2010 statistics are preliminary, representing U.S. software publishers' share of commercial value of pirated software in Croatia. They follow the methodology compiled in the Seventh Annual BSA and IDC Global Software Piracy Study (May 2010), <http://portal.bsa.org/globalpiracy2009/index.html>. These figures cover packaged PC software, including operating systems, business applications, and consumer applications such as PC gaming, personal finance, and reference software – including freeware and open source software. They do not cover software that runs on servers or mainframes, or routine device drivers and free downloadable utilities such as screen savers. The methodology used to calculate this and other piracy numbers are described in IIPA's 2011 Special 301 submission at [www.iipa.com/pdf/2011spec301methodology.pdf](http://www.iipa.com/pdf/2011spec301methodology.pdf). BSA's final piracy figures will be released in mid-May, and the updated US software publishers' share of commercial value of pirated software will be available at [www.iipa.com](http://www.iipa.com).



re-file their claims. Unfortunately, the courts often defend their inactivity by maintaining the importance of the independence and secrecy of their proceedings and justify this status by disallowing public comments or participation (i.e., by rights holders) in pending legal proceedings.

In general, the Croatian online piracy enforcement resources are sorely lacking. For instance, currently, there are only two police officers nationwide who are even working on online IPR criminal cases. In fact, the enforcement authorities report that no police officer has online IPR enforcement as a full-time job, but rather the police – generally, untrained in this area – are supposed to work on these issues in addition to their regular assignments. Most judges and prosecutors are also not trained in copyright enforcement measures in general, and certainly not on Internet piracy enforcement procedures and issues.

The copyright industries report that there were 70 fewer cases in 2010 from 2009 for Internet piracy activities, and only 2% of all IPR cases were for digital piracy. One hindrance to enforcement has been a misinterpretation of the copyright law that many otherwise infringing activities are permitted by “private copying” exceptions.

In one instance, the recording industry reported on a Russian-run pirate pay-per-download website in Croatia. Evidence was provided to authorities to commence a criminal investigation, but no action was taken by Croatian authorities, and no information provided to the rights holders even after repeated requests. The recording industry does report that some ISPs will respond to notice and takedown requests, even if the police and other enforcement agencies will not commence cases against those who do not respond. One problem in Croatia has been the absence of legal Internet services, although the music industry reports that in 2011 it will launch at least one legal downloading service.

Civil cases, when they are filed, are lengthy and expensive. Although *ex parte* preliminary proceedings are available in theory, they are only rarely utilized by enforcement authorities, further diminishing the effectiveness of IPR enforcement – especially against end-user piracy. On average, when these proceedings are used, they take twice as long (by several weeks) as similar proceedings in other Central European countries.

Overall, the Croatian legal framework is comparable to that found in other Central European countries (and is generally harmonized with the European Union directives). In fact, legal reforms, for now, are not the focus of IIPA's attention – rather, enforcement is the priority. While the overall legal framework is comparable to other countries, the civil and criminal enforcement procedures are lagging behind other Central European countries. Most troublesome is the fact that active cooperation between enforcement agencies, the district attorneys and the courts, and with rights holders, remains a significant problem, and is a key reason why enforcement and prosecutions remain weak in Croatia. The police have agreed to at least one enforcement training program in 2011 that will include rights holder participation, which is encouraging.

# LATVIA

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2011 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: IIPA recommends that the U.S. Government should actively monitor developments in Latvia during 2011 with respect to the issues discussed in this Special Mention report.

Executive Summary:<sup>1</sup> Several copyright industries report poor enforcement persists in Latvia, but in particular, the business software industry reports both high piracy rates and a weak enforcement apparatus. According to preliminary Business Software Alliance (BSA) estimates, the software piracy rate in Latvia in 2010 was 56% (the same as in 2009), and the corresponding commercial value of unlicensed software put into the marketplace there was \$16.9 million.<sup>2</sup> That rate has remained high at businesses and government bodies – that is, end-user pirates utilizing unauthorized software throughout these private and public organizations.

The Business Software Alliance (BSA) reported that during 2010, the number of *ex officio* undertaken by the police against software pirates declined by approximately 70% compared with the same number of actions in 2009. Further, they reported that there were no court convictions in 2010 in any software copyright cases. The Latvian judicial process has several shortcomings including: very lengthy proceedings; an unreasonably high evidentiary burden; and, judges reluctant to properly adjudicate copyright cases. In addition, penalties for copyright infringements are minimal (usually comparable to the fines assessed for minor administrative offenses), and, in a number of cases, infringing goods have been returned to the pirates. In sum, the majority of courts do not comprehend the seriousness of the harm – both social and economic – that results from IPR infringements, and are not treating these cases properly.

Priority actions to be taken in 2011: IIPA recommends that the Latvian judiciary both speed up its proceedings, including the investigations and prosecutorial activities, and, when copyright cases do go to court, that they impose deterrent penalties in such cases. We also recommend a relaxation of the onerous evidentiary burdens regarding the preparation of expert reports in criminal cases (especially those involving computer programs).

One way to improve enforcement would be to improve both the communication and cooperation among all enforcement authorities, including: the Economic Police, the Municipal Police, the Financial Police, Customs, and the prosecutors and judges, as well as more effective cooperation between authorities and right holder organizations. Another avenue for improvement would be for the Government of Latvia to become a role model for the public by legalizing its own software use, which it has, to date, failed to do. It would also be helpful for all of the enforcement agencies to be tasked publicly with making IPR protection a priority.

---

<sup>1</sup>For more details on Latvia's Special 301 history, see IIPA's "History" appendix to this filing at <http://www.iipa.com/rbc/2011/2011SPEC301HISTORICALSUMMARY.pdf>, as well as the previous years' reports, at <http://www.iipa.com/countryreports.html>. For a summary of IIPA's 2011 global issues, see our cover letter at <http://www.iipa.com/pdf/2011SPEC301COVERLETTER.pdf>.

<sup>2</sup>BSA's 2010 statistics are preliminary, representing U.S. software publishers' share of commercial value of pirated software in Latvia. They follow the methodology compiled in the Seventh Annual BSA and IDC Global Software Piracy Study (May 2010), <http://portal.bsa.org/globalpiracy2009/index.html>. These figures cover packaged PC software, including operating systems, business applications, and consumer applications such as PC gaming, personal finance, and reference software – including freeware and open source software. They do not cover software that runs on servers or mainframes, or routine device drivers and free downloadable utilities such as screen savers. The methodology used to calculate this and other piracy numbers are described in IIPA's 2011 Special 301 submission at [www.iipa.com/pdf/2011spec301methodology.pdf](http://www.iipa.com/pdf/2011spec301methodology.pdf). BSA's final piracy figures will be released in mid-May, and the updated US software publishers' share of commercial value of pirated software will be available at [www.iipa.com](http://www.iipa.com).



## Enforcement

The IPR Enforcement Division of the State Police that was established in 2006 was, unfortunately, closed in 2010. Although some of its former staff joined the Cybercrime Division under the Economic Police, IPR issues are no longer a priority for the Cybercrime Division. As a result, IPR enforcement efforts continue to be ineffective. We highlight the following issues and recommend that they be the focus of enforcement in 2011:

- The widely available copies of illegal prerecorded optical media (DVDs, CDs etc.) containing musical recordings and software – including both pirated and parallel import copies – coming from Russia.
- The sale of pirated products sold in flea markets across the country. For example, at the largest illegal marketplace in Riga, the police have completely discontinued their efforts to stop sales of pirated goods because of the complex evidentiary burdens and the high bar for proving infringement in IPR cases.
- Internet piracy cases, which in 2010, were not being prosecuted at all even as illegal file sharing became commonplace. In 2005, an Internet case was initiated by Microsoft (for the sale of counterfeit CDs containing Microsoft software being sold on an eBay site); damages were estimated above \$3 million. To date, the court has not rendered even a preliminary judgment in the case.

## Legislation

In sum, IIPA believes that most of the basic critical legal reforms are in place, but on-the-ground enforcement remains weak. However, some legislative reforms are still necessary.

The criminal procedural provisions are archaic and result in substantial difficulties during prosecutions, especially because they call for the securing of detailed (and unnecessary) expert reports in all copyright infringement cases before criminal actions can be undertaken. At the same time, the police are reluctant to verify accounting documents of pirate software resellers, or to question employees during raids – either of which would be very useful for completing an investigation. In many cases, the courts drop charges against the owners or managers of companies using unlicensed software because of a lack of evidence (since the burdens are so high); these burdens require proof of either “individual” guilt or the direct intent of the individual – both of which are very difficult hurdles to overcome.

Amendments in 2006 to the Copyright Law and Civil Procedure Act incorporated WTO TRIPS-mandated civil *ex parte* search procedures. However, the courts remain reluctant to effectively apply these provisional measures, and require an onerous burden to obtain an indictment (even though the goods seized can be used in a later infringement action). Additionally, plaintiffs are required to post bonds (deposits) at very high rates -- generally the equivalent of the likely amount of the claim; this is very discouraging to rights holders wishing to bring legitimate claims.

Last, the Copyright Law (Art. 69.2) provides for the ability to claim damages in copyright infringement cases, but the amount of that compensation cannot exceed the amount of the license fee that the right holder would normally receive. This is not only not a deterrent to piracy, but acts to encourage infringement, since infringers know that they will likely not pay any more than a licensing fee if they are caught infringing.

# MOLDOVA

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

### 2011 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: IIPA recommends that the U.S. Government should actively monitor developments in Moldova during 2011 with respect to the issues discussed in this Special Mention report.

Executive Summary<sup>1</sup>: Several copyright industries, including the business software industry and the motion picture industry in particular, note significant enforcement problems in Moldova. In short, the industries report that there is little, if any, sustained and consistent IP enforcement activity and not enough public awareness on the basics of copyright protections and rights, all of which resulted in a drop off in enforcement activity in 2010, and sustained high piracy rates.

According to preliminary Business Software Alliance (BSA) estimates, the software piracy rate in Moldova in 2010 was 90% – an unacceptably high rate, and the corresponding commercial value of unlicensed software put into the marketplace there was \$19.1 million.<sup>2</sup> One of the hindrances to effective enforcement is the lack of IPR training and experience by the police, prosecutors, and judges, responsible for dealing with copyright enforcement matters. In 2010, the number and size of raids undertaken against suspected infringers decreased; most investigations (cases) were closed without a trial or conviction. This is due, in large measure, to the low priority given IPR enforcement, and the competence of the enforcement authorities.

One prime example: the largest “national” torrent tracker responsible for copyright infringement in Moldova was closed by the authorities in November 2010. Within a few weeks, the same service was up and running with virtually the same illegal content. In addition, no criminal investigation or case has been commenced against either the owners or operators of this illegal service and site.

The copyright industries report that in 2010, 15 new criminal investigations for IPR cases were commenced. Of this total the following were reported:

- Two matters were closed and one is on appeal.
- Two cases are still pending in a Moldovan court.
- Four matters are still under investigation and no cases have commenced (or been dismissed).
- Six investigations were terminated before cases could even commence.

Priority actions to be taken in 2011: IIPA recommends that the Government of Moldova should make the following its IPR enforcement priorities in 2011:

---

<sup>1</sup>For more details on Moldova’s Special 301 history, see IIPA’s “History” appendix to this filing at <http://www.iipa.com/rbc/2011/2011SPEC301HISTORICALSUMMARY.pdf>, as well as the previous years’ reports, at <http://www.iipa.com/countryreports.html>. For a summary of IIPA’s 2011 global issues, see our cover letter at <http://www.iipa.com/pdf/2011SPEC301COVERLETTER.pdf>.

<sup>2</sup>BSA’s 2010 statistics are preliminary, representing U.S. software publishers’ share of commercial value of pirated software in Moldova. They follow the methodology compiled in the Seventh Annual BSA and IDC Global Software Piracy Study (May 2010), <http://portal.bsa.org/globalpiracy2009/index.html>. These figures cover packaged PC software, including operating systems, business applications, and consumer applications such as PC gaming, personal finance, and reference software – including freeware and open source software. They do not cover software that runs on servers or mainframes, or routine device drivers and free downloadable utilities such as screen savers. The methodology used to calculate this and other piracy numbers are described in IIPA’s 2011 Special 301 submission at [www.iipa.com/pdf/2011spec301methodology.pdf](http://www.iipa.com/pdf/2011spec301methodology.pdf). BSA’s final piracy figures will be released in mid-May, and the updated US software publishers’ share of commercial value of pirated software will be available at [www.iipa.com](http://www.iipa.com).



- Raise public awareness on the importance of IP protection and rights through joint educational and public relations campaigns between the government and rights holders. This would also include organizing conferences focusing on the value of IPR in general, and on the importance of enforcement to help local and foreign rights holders establish a legitimate marketplace in Moldova. One such program could follow up on the EU project called: "Support to Implementation and Enforcement of Intellectual Property Rights in the Republic of Moldova" (which commenced in November 2010).
- Increase the number of training programs for police, prosecutors, and judges on the basics of IPR protection and enforcement – including a focus on online piracy problems.
- Increase the overall number and size of raids and cases against IPR infringers.

Although the copyright industries generally report that the Moldavian IPR legal infrastructure is sound (and, for the most part, harmonized with European Union directives), implementation of its laws, and on-the-ground enforcement is lacking in overall numbers of raids and seizures, and criminal cases and convictions compared with other countries in the region.

In short, IPR protection is not a high priority for the Government of Moldova, and significant investments made by the copyright industries in past training programs for local law enforcement officials has been wasted investments to date. Thus, despite the good relationships between right holders and the Anti-Fraud Police and IPR Crimes Department of the General Public Prosecutor's Office, the number and quality of raids has decreased in the past year. The police lack sufficient resources, equipment and expertise to effectively conduct raids, and the storage and inspection of seized pirated materials remains a major concern for rights holders. Moreover, the lengthy court proceedings mean that the copyright industries cannot secure effective enforcement and cannot get a strong foothold in a legal marketplace in Moldova. One suggested starting point for enforcement would be for the courts to issue civil injunctions in a matter of days (three days to three weeks is the average in Central Europe) against end-user and other pirates. In Moldova, this process currently takes longer than six months – just one indication of the overall weak enforcement climate in Moldova.



# PAKISTAN

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2011 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation:<sup>1</sup> IIPA submits this Special Mention filing to note some improved cooperation in the past year with low- or mid-level Pakistani authorities, and highlight Pakistan's market potential for publishers. At the same time, IIPA notes the publishers still face a market primarily dominated by piracy, and the Pakistani Government seems to lack political will to impose deterrent remedies to reduce piracy. Three areas of focus in 2011 should include:

- Law reform: The government has indicated interest in modernizing its law and joining the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT), and the government needs to repeal the TRIPS-incompatible royalty-free compulsory license under Article 36(3) of the copyright law and ensure mandatory minimum sentencing is available so piracy cases have a deterrent effect.
- Judicial reform: Court officials must come to recognize piracy as a serious commercial infraction against the state, and changes could usefully include sentencing guidelines imposing mandatory minimum sentencing to avoid recidivism.
- Enforcement reform: While available on paper, *ex officio* authority seems to be missing in practice, which should allow authorities to take enforcement action on an *ex officio* basis on suspicion of piracy and without a complaint.

The United States holds Trade and Investment Council meetings under the 2003 Trade and Investment Framework Agreement,<sup>2</sup> and we strongly urge the U.S. Government to pursue these issues in that forum, with the IPO, through engagement with judicial officials, and through ensuring changes are made allowing the Federal Investigations Agency (FIA) to take actions when piracy is suspected without the need for a complaint. We also urge the authorities to take actions against enterprise end-user software piracy and hard-disk loading piracy, including running inspections against businesses suspected to be engaged in the unauthorized use of software, bringing prosecutions where warranted, and seeking deterrent sentences at court.

### PIRACY AND ENFORCEMENT UPDATES IN PAKISTAN

Previous IIPA reports discussed the many piracy challenges faced in Pakistan.<sup>3</sup> The following provides brief updates on the book piracy problem, enterprise end-user software piracy, and overarching issues related to the enforcement system<sup>4</sup> and the courts.

---

<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/2011SPEC301HISTORICALSUMMARY.pdf>, as well as the previous years' country reports, at <http://www.iipa.com/countryreports.html>.

<sup>2</sup> United States Trade Representative, *Joint Statement from U.S. Pakistan Trade and Investment Council Meeting*, April 26, 2010, at <http://www.ustr.gov/about-us/press-office/press-releases/2010/april/joint-statement-us-pakistan-trade-and-investment-cou>. USTR noted, "[t]he parties ... discussed a full range of investment climate issues, including intellectual property rights concerns...."

<sup>3</sup> Losses due to piracy of business software in 2010 are estimated at US\$79 million with an 82% piracy rate. The methodology used by IIPA member associations to calculate estimated piracy levels and losses is described in IIPA's 2010 Special 301 submission at [www.iipa.com/pdf/2011spec301methodology.pdf](http://www.iipa.com/pdf/2011spec301methodology.pdf). BSA's 2010 statistics are preliminary, representing U.S. software publishers' share of software piracy losses in Pakistan. They follow the methodology compiled in the Seventh Annual BSA and IDC Global Software Piracy Study (May 2010), available at <http://portal.bsa.org/globalpiracy2009/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> In the government of Pakistan's February 2010 review of its performance on IP issues throughout 2009, the government noted, "IPO-Pakistan, since its establishment in 2005, have developed a coordination system with enforcement agencies especially Federal Investigation Agency (FIA), Pakistan Customs, Pakistan Electronic Media Regulatory Authority (PEMRA), Police Department and Private Sector Detection Agencies." See Government of Pakistan, *2010 Special 301 Review: Progress Made by Pakistan in IPRs Enforcement During 2009*, February 25, 2010, submitted to regulations.gov (on file with IIPA).



**Book Piracy Remains Dominant, Although Raids Are Beginning to Have an Impact:** Pakistan remains a predominantly pirate book market, although print piracy is slowly giving way to pirate photocopying. The Urdu Bazaars in Karachi and Lahore remain major sources of pirated books in the country, though book piracy has spread beyond the Bazaars. Pirates now focus attention on illegal photocopies made from one master/source copy legitimately purchased online or overseas, and slapping on a higher-quality color-printed book cover. The printing of title covers has taken on a new dimension, since pirates now often print the pirated book obscuring the authors' names, publishers' names, logos, ISBN numbers, etc. Print piracy consists of smuggled books from Iran and Afghanistan by land, or overruns by legitimate printers in Pakistan. Unauthorized India-only reprints are also being imported into Pakistan. All types of books are pirated, from English language novels to fiction and non-fiction trade books.

The publishers operating in Pakistan report that overall the situation in Pakistan has improved slightly due to increased raiding activity, and that piracy levels are proportionately similar to Bangladesh, Iran, and Sri Lanka. The authorities, especially the Federal Investigations Agency (FIA),<sup>5</sup> Islamabad, have taken some timely and positive actions against book piracy in the Urdu Bazaars.<sup>6</sup> The chief piracy hurdles in the country include: 1) lack of *ex officio* enforcement authority among the Police or the FIA (although FIA has been good about taking raids upon complaint based on information provided by publisher representatives identifying the target and its location); 2) lack of political will even when complaints are lodged, e.g., the Intellectual Property Office of Pakistan (IPOP) is inactive and disengaged in part due to in-fighting and the Police are preoccupied with other criminal activity in the country, and 3) lack of understanding, even among the Pakistani authorities, of jurisdiction over piracy cases, and bureaucracy; and 4) lack of deterrence in cases from raid to court. Industry has met with the Pakistani Intellectual Property Services (PIPS/G9) about approaches to book piracy in Pakistan and solutions proposed.

**Educational Book Sector Experiences Significant Piracy:** Piracy remains serious on university campuses, estimated at 90% piracy, where campus book stores stock pirated books, and some university professors even inform pirates of the books they intend to assign to their class, and pirates 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. The piracy of English language teaching (ELT) books used at universities and language schools is of particular concern (language schools charge a consolidated fee covering tuition and the cost of books, but then provide pirated versions of ELT books). Among the worst offending universities in this respect are the College of Business Management in Karachi, Punjab College of Business Education in Lahore, and NED University, 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. The potential market for elementary and high school materials in English (EIH market) is immense given the number of children in English language schools, but unfortunately, these schools routinely feature pirate versions of books.

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<sup>7</sup> has been to instruct university librarians not to purchase pirated books, but whether the institutions comply is not monitored. It has been difficult to get law enforcement for raids on university campuses due to fears of backlash from students. There is also no built-in mechanism in the university campuses to monitor the presence of pirated books.

---

<sup>5</sup> In Pakistan's February 2010 Special 301 filing, they note, "FIA's Advisory Committee on IPR enforcement was established for effective coordination with right holders and to remove unnecessary hindrances in IPR enforcement," and also note that "IPC Investigation Field Units have been put in place throughout Pakistan on regional basis," and "IPR Intelligence Units are also being established." IIPA is unaware of how these units are functioning but hopes that they will help in the fight against book piracy and other infringements in the country. See *id.*

<sup>6</sup> A recent Supreme Court of Pakistan decision reportedly confirmed that the Federal Investigation Authority is authorized to entertain complaints from private individuals involving copyright infringement under the Copyright Ordinance 1962, and may also investigate and run inspections regarding such complaints.

<sup>7</sup> The 2010 Pakistani Government Special 301 submission indicates, "IPO has established a sub-committee of Central Enforcement Coordination Committee with members from Higher Education Commission (HEC), National Book Foundation (NBF) and IPO to devise solutions to eradicate book piracy." We urge these authorities to focus on such efforts and move from their positions regarding a royalty-free compulsory license under the current Copyright Ordinance. See *infra*.

**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 Ordinance (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.

**Courts Require Sensitization to IP Theft as an Economic Crime:** The copyright industries' experiences with the courts in Pakistan have been mixed over the years, but in general, criminal court cases involving book piracy have not resulted in either timely or deterrent outcomes. 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 = US\$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. There are also indications that the judges, applying sympathy to defendants, consistently permit delays, issue acquittals even in open-and-shut piracy cases, or apply non-deterrent sentences. For example, one publisher reports 12 cases in Karachi, Lahore and Rawalpindi lower courts pending for many years. There is also evidence of inadequate investigations by the police, some tampering with evidence and even some undue influence.

**Influence of Organized Crime in Piracy:** We have heard several disturbing incidents involving organized book pirates who may have influence with local political party leaders and area police. Industry representatives have received threatening phone calls from pirates. In Karachi, an Urdu Bazaar shop keeper who had been raided is suspected of being involved in property damage against one of the publishers' sales outlets. In Lahore, similar incidents occurred, including one in November 2010, resulting in injuries to FIA officials. These incidents are the exception in recent years, since persuasion, sustained campaigns, and dialogue have led to greater cooperation and assistance from the unions running the bazaars.

**Business Software End-User Piracy Is Endemic:** Despite significant public awareness and enforcement drives by the Business Software Alliance over the past several years, enterprise end-user software piracy remained a serious problem in 2010, as 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 recent study by International Data Corporation with the Business Software Alliance 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>8</sup>

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. By contrast, 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.

---

<sup>8</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).

Internet Piracy: Internet use continues to rise in Pakistan. Pakistan had 11.5% penetration rate as of June 2010, with more than 20.3 million, according to ITU, with an estimated 320,500 broadband connections in 2009, according to Point-topic.<sup>9</sup> As a result, online piracy in Pakistan increased in 2010. Publishers report that reference books, online journals, and trade books are being digitized and provided by schools. Thus far, no steps have been taken to address increasing online piracy or illegal digitizations.

## COPYRIGHT LAW AND RELATED ISSUES

Copyright Reforms Should Move Forward, as Current Ordinance Fails to Deter Piracy: Copyright protection in Pakistan is provided under the Copyright Ordinance, 1962 (as last amended in 2000). The Ordinance provides generally strong tools to fight piracy.<sup>10</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). Unfortunately, the *ex officio* authority is not exercised. Other problems in the Ordinance (including those mentioned in previous IIPA submission) should be remedied through amendments, and the law should otherwise be modernized to make it compatible with the WCT and WPPT, in line with the IPO's stated intent to implement these treaties.<sup>11</sup>

- **Non-Deterrent Criminal Penalties:** Criminal penalties 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 increased to PKR500,000 (US\$5,900), reasonable by any estimation, the law would stand a much better chance at achieving deterrence.
- **Berne-Incompatible Royalty-Free Compulsory License for Books:** One of the most significant deficiencies in the Ordinance is Section 36(3) that allows a royalty-free compulsory license of books. This royalty-free compulsory license, which has been used by the National Book Foundation to create unauthorized reproductions of books, is incompatible with Pakistan's obligations under the Berne Convention and TRIPS.
- **WCT and WPPT:** The Ordinance should be amended to fully amend the WCT and WPPT, including: 1) ensuring broadcasting and public performance rights for phonogram producers, and 2) providing an exclusive communication to the public right, including the interactive "making available" right. The amendments should also protect against the circumvention of, or trafficking in devices, components, or other technologies used to circumvent, technological protection measures (defined to include both technologies that control access and that prevent the exercise of exclusive rights).

---

<sup>9</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>10</sup> Previous IIPA submissions have discussed the weaknesses in the current Ordinance in greater detail. 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\$1,180) (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. The Ordinance also includes, as an example, provisions enabling the Registrar to monitor exports, with the ability to inspect and seize pirated goods leaving Pakistan. The 2010 Pakistani Government Special 301 filing also indicates that improvements have been made to Customs provisions in the Customs Act, 1969, including 1) documentary proof may be submitted by any right holder to the Preventive Collectorate, Karachi to seize a consignment which is violating IP rights; 2) Sections 15 and 16 of the Customs Act, 1969 have been amended to include IPR violations and counterfeit goods under the list of items that are prohibited for import and export, for which strict penal actions such as detention, seizure and confiscation are available remedies under Section 156 of the Act; and 3) some "books" were seized in 2009, although the main focus of Customs appears to be on counterfeit goods, not copyright piracy. See Government of Pakistan, 2010 Special 301 Submission, *supra* note 4.

<sup>11</sup> We note here the support of The Pakistan Software Houses Association for IT and ITES (P@SHA) and Center for International Private Enterprise (CIPE) in their 2009 report of recommendations. Included in the IP recommendations is for the Government of Pakistan to "[a]mend the Copyright Ordinance 1962 to provide for protection as available under the WIPO Treaties and additional provisions as provided under the Digital Millennium Copyright Act 1998. See CIPE and P@SHA, *Business Agenda for the Pakistan IT & ITES Sector 2009*, at 10. The report usefully notes, "[t]he need for Pakistan to invest in its creativity ... is so important that it directly equates to our strategic national interest," and "IPR protection of digital rights is vital for not just FDI, but also for Pakistani businesses and for the protection and security of the intellectual capital and innovation of Pakistan's dynamic youth, researchers, and entrepreneurs." *Id.* at 10-11.

- Amend Laws to Deal With Online Infringements: Given the rise of Internet piracy in the country, IPOPP should propose amending the law (or issue regulations) to provide proper incentives for service providers in the online space to cooperate with right holders to takedown infringing content (including a robust notice and takedown system) and deal with the non-hosted environment including illegal P2P filesharing including an effective and fair repeat infringer policy. The Prevention of Electronic Crimes Ordinance 2007, which criminalized certain computer activities, lapsed in the first quarter of 2010 and has not been re-enacted, but in any event, the laws should be amended to provide a remedy for copyright infringement consistent with the Council of Europe Cybercrime Convention (2001).<sup>12</sup>

## GENERALIZED SYSTEM OF PREFERENCES

The GSP statute expired on December 31, 2010. In the past, Pakistan enjoyed preferential trade benefits under the program. One of the discretionary criteria of the program is that the country provides “adequate and effective protection for intellectual property rights.” In 2010, US\$165.0 million worth of Pakistan’s goods entered the U.S. under the duty-free GSP code, accounting for 4.7% of its total imports to the U.S. Pakistan needs to continue to endeavor to meet the adequate and effective test under the statute to remain eligible, once it is reauthorized, to continue to receive favorable treatment under the GSP program.

---

<sup>12</sup> The Council of Europe Cybercrime Convention contains, in Article 10, “Offences related to infringements of copyright and related rights,” an obligation to “adopt such legislative and other measures as may be necessary to establish as criminal offences under its domestic law the infringement of copyright [and related rights] ... where such acts are committed wilfully, on a commercial scale and by means of a computer system,” and Article 11 contains the obligation to “establish as criminal offences under its domestic law, when committed intentionally, aiding or abetting the commission” of Article 10 offenses.

# SWITZERLAND

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2011 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: IIPA recommends that USTR actively monitor developments in Switzerland during 2011 with respect to the issues discussed in this Special Mention report, and urges that USTR heighten its bilateral engagement with Switzerland on the following priorities.

Executive Summary: On September 8, 2010, the Swiss Federal Supreme Court held that the IP addresses of Internet users sharing pirate material over publicly available networks – a crucial piece of information needed to bring an online infringement action – are protected by Switzerland's strict data protection laws. The decision, issued by Switzerland's highest court and supported by the Swiss Data Protection Authority (FDPIC),<sup>1</sup> required Logistep AG to stop collecting the IP addresses of suspected infringers that it turned over to right holders for purposes of pursuing civil actions. The decision renders subsequent online copyright enforcement actions in Switzerland very difficult, as rights holders are now proscribed from analyzing the IP addresses of suspected infringers, notwithstanding the fact that such information is made publicly available by users who participate in P2P file sharing on public networks. In several pending criminal cases against copyright infringers, the defendants are claiming that the investigations are based on information gathered in violation of the Swiss Data Protection Act.

### PRIORITY RECOMMENDED ACTIONS FOR SWITZERLAND IN 2011:<sup>2</sup>

- Amend the Data Protection Act and, if necessary, the Copyright Act in Switzerland to permit the collection of data available over digital networks for the purposes of enforcement of copyright against infringing activity.
- 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.

### PIRACY AND RELATED CONCERNS

Already considered a safe haven for top-level source piracy oriented towards the German and worldwide markets, Switzerland now risks losing a greater number of its 5.74 million Internet users<sup>3</sup> to illegitimate markets for copyrighted content. In the aftermath of the Logistep decision, the MPA reports that civil enforcement actions against online piracy in Switzerland now face even greater challenges. German release groups continue to use Switzerland as a base for recording soundtracks and for maintaining their file-servers. Cyberlockers (such as Rapidshare, hosted in Switzerland) that are used to store and distribute infringing content also present a problem with an ever growing number of portal sites and forums offering links to such content. Since Switzerland's copyright law contains a private copy exception with no expressly-stated legal source requirement, downloading and streaming from servers operated by pirates outside Switzerland, such as [www.kino.to](http://www.kino.to), are being portrayed as legal in Switzerland by the press and anti-copyright activists, as long as there is no uploading.

---

<sup>1</sup>See <http://www.edoeb.admin.ch/aktuell/01688/index.html?lang=en>.

<sup>2</sup>For more details on Switzerland's Special 301 history, see IIPA's "History" appendix to this filing at <http://www.iipa.com/rbc/2011/2011SPEC301HISTORICALSUMMARY.pdf>, as well as the previous years' reports, at <http://www.iipa.com/countryreports.html>. For a summary of IIPA's 2011 global issues, see our cover letter at <http://www.iipa.com/pdf/2011SPEC301COVERLETTER.pdf>.

<sup>3</sup>According to <http://www.internetworldstats.com> (as of June 2010).



Concerns with the Copyright Act and other areas: On July 1, 2008, the Swiss law implementing the 1996 WIPO Internet Treaties entered into force. Right holders' proposals in a number of areas were not approved. Since 2008, IIPA continues to have concerns with several other areas related to Switzerland's law which lead to severe problems.

First, the private copy exception in Article 19 of the copyright law is too broad, and has been interpreted to allow the making of copies of works or phonograms that come from unlawful sources. This is completely inappropriate for a "private copy" exception and is inconsistent with the three-step test in the Berne Convention, the WIPO Internet treaties, and the WTO TRIPS Agreement.

Second, Swiss law allows acts of circumvention of technological measures "for the purposes of a use permitted by law" (Article 39(a)(4)), an exception that is also far too broad, particularly given the inappropriately wide scope of the private copying exception. Taken together, these exceptions would allow individuals to circumvent access or copy control measures in order to copy from illegal sources and share with friends.

Third, IIPA has a number of concerns with a review mechanism ("observatory") created to monitor "misuse" and "the effects of technological measures," as set out in a draft decree implementing Article 39b of the Copyright Act that entered into force on July 1, 2008. It still remains unclear how the mechanism will fulfill its role, but the decree focuses its attention very narrowly on abuse of technical measures and could undermine the observatory's authority to act as a fair mediator.

Fourth, the new Articles 22a to 22c regarding mandatory collective administration provide overbroad benefits to state-licensed broadcasting organizations, at the expense of record producers and artists.

Fifth, Article 60(2) of the Swiss Copyright Act caps the remuneration payable to right owners (usually collected via collecting societies) at 10% of the licensees' income for authors and 3% for neighboring right owners. The Swiss artists and record producers requested collecting society "Swissperform" to start arbitration proceedings against this cap as the codified cap (1) has the effect of an expropriation and devaluation of the intellectual property rights of Swiss right owners, (2) is not in line with the notion of "equitable remuneration" contained in international copyright conventions such as Article 15 of the WIPO Performances and Phonograms Treaty and (3) curtails the freedom of right owners to negotiate their "equitable remuneration." Furthermore, it does not reflect the higher income shares negotiated by other European collecting societies. On November 4<sup>th</sup> 2010 the Swiss Arbitration Commission dismissed Swissperform's complaint on the ground that the above cap was in line with Swiss law. Hence, Swissperform has stated that it will initiate ordinary court proceedings in early 2011.

Sixth, there is a need for camcording legislation to combat the illicit recording of movies at movie theaters, a major source of pirated motion pictures on the Internet, as well as on street corners and flea markets around the world. These issues were not adequately addressed in 2010.

Finally, the Swiss Federal Institute for Intellectual Property is focused on strengthening patent and trademarks, where Switzerland has a strong export industry, and provides little support to strengthening copyright law and its enforcement.

# **APPENDIX B**

## **METHODOLOGY**



# APPENDIX B: METHODOLOGY

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2011 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.

Commercial value of pirated software is 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 U.S.-vendor portion of that commercial value is 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 2011 report to U.S. Trade Representative, BSA's statistics for 2010 are preliminary. Final data for 2010 will be released in May 2011.

## ENTERTAINMENT SOFTWARE

In select countries, the Entertainment Software Association (ESA) has provided estimates of the overall number of connections made, during 2010, by users of leading peer-to-peer (P2P) protocols for purposes of making unauthorized copies of particular ESA member game titles. The methodology underlying these estimates is as follows:

Vendors for ESA's online enforcement program monitor for connection activity involving approximately 230 of ESA members' leading game titles on major public P2P networks. The data is broken down, by country, based on the country of operation of the ISP.

This data is only a subset of the overall downloading activity occurring during the monitoring period, as it accounts only for file sharing connections made through certain P2P protocols (BitTorrent, eDonkey, Gnutella, Ares) for purposes of sharing particular game files, but does not include downloads of those files that occur directly from hosted content, such as games found "one-click" hosting sites, such as rapidshare.com.

Because it is premised on a selection of ESA member game titles, this methodology does not take into account piratical activity involving unmonitored member titles and titles of non-member publishers. In addition, this methodology likewise does not take into account piratical activity for unverified copies of titles being shared on P2P networks.

Inferences regarding detections per capita and detections per internet user rely on data from the *CIA World Factbook* (<https://www.cia.gov/library/publications/the-world-factbook/>) and other public sources.

## 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**

## **CHART OF COUNTRIES' SPECIAL 301 PLACEMENT (1989 – 2010) & IIPA'S 2011 SPECIAL 301 RECOMMENDATIONS**

**APPENDIX C: CHART OF COUNTRIES' SPECIAL 301 PLACEMENT (1989-2010)  
AND IIPA 2011 SPECIAL 301 RECOMMENDATIONS**

COUNTRY	IIPA Recommendation February 2011	USTR 301 PLACEMENT (as of April/May of each year)																					
		2010	2009	2008	2007	2006	2005	2004	2003	2002	2001	2000	1999	1998	1997	1996	1995	1994	1993	1992	1991	1990	1989
Albania	SM																						
Algeria		PWL	PWL	WL																			
Argentina	PWL	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											
Australia													WL	WL	WL	WL		WL	PWL	PWL	PWL		
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	WL	OO									
Belize					WL	PWL	WL	WL															
Bolivia		WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	OO	WL	OO							
Bosnia and Herzegovina																							
Brazil	WL	WL	WL	WL	WL + OCR	PWL	PWL	PWL	PWL	PWL	WL	WL	WL		WL	WL	PWL	OO	PFC	PWL	PWL	PWL	PWL
Brunei	WL	WL	WL																				
Bulgaria	SM					WL	WL	WL						PWL	WL	OO	OO						
Burma (Myanmar)																							
Cambodia																							
Canada	PWL	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	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	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	WL + OCR	PWL	WL	WL	WL	WL	WL	WL						
Croatia	SM					WL	WL	WL	WL														
Cyprus															OO	OO	OO	WL	WL	WL	WL		
Czech Republic		WL	WL	WL	OCR							WL	WL	WL	OO								
Denmark												WL	WL	WL	WL								
Dominican Republic		WL	WL	WL	WL	WL	WL	WL	WL	PWL	PWL	PWL	PWL	PWL	WL	OO							
Ecuador		WL	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	WL																				
Georgia											OCR												
Germany														OO	OO	OO	OO	OO		WL	WL		
Greece	WL	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	WL	PWL	PWL	WL	WL	WL	WL	WL	WL	WL			
Honduras														WL	WL	OO	OO	OO					
Hong Kong													OCR	WL	WL	OO							

# APPENDIX C: CHART OF COUNTRIES' SPECIAL 301 PLACEMENT (1989-2010) AND IIPA 2011 SPECIAL 301 RECOMMENDATIONS

COUNTRY	IIPA Recommendation February 2011	USTR 301 PLACEMENT (as of April/May of each year)																					
		2010	2009	2008	2007	2006	2005	2004	2003	2002	2001	2000	1999	1998	1997	1996	1995	1994	1993	1992	1991	1990	1989
Hungary			WL	WL	WL	WL	WL	WL	WL	PWL	PWL	WL	WL	OO	OO				PWL	PWL	WL		
Iceland																							
India	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PFC	PFC	PFC	PWL	PWL
Indonesia	PWL	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	WL	WL	WL	OO							
Israel	WL	Pending	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	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	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	WL	PWL	PWL	WL	WL	WL	WL	PWL	PWL	WL	WL	OO						
Kyrgyz Republic											OCR												
Laos																							
Latvia	SM					WL + OCR	WL	WL	WL	WL	WL	WL											
Lebanon (GSP)	WL	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	WL + OCR	WL	WL	PWL	PWL	OCR									WL	WL
Mexico	WL	WL	WL	WL	WL	WL	WL	WL	WL	OCR			WL	OO	OO	OO							PWL
Moldova	SM											WL											
Morocco																							
Netherlands														OO									
New Zealand										WL	WL		WL							WL	WL		
Nicaragua														OO	OO								
Nigeria																							
Norway		WL	WL	WL																			
Oman												WL	WL	WL	WL	WL	OO						
Pakistan	SM	PWL	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	306	PFC	PWL	WL	OO	OO		WL			
People's Republic of China	PWL	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	WL	WL	WL
Philippines	PWL	WL + 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 C: CHART OF COUNTRIES' SPECIAL 301 PLACEMENT (1989-2010) AND IIPA 2011 SPECIAL 301 RECOMMENDATIONS

COUNTRY	IIPA Recommendation February 2011	USTR 301 PLACEMENT (as of April/May of each year)																					
		2010	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	WL	OO	OO	OO	WL						
Russian Federation (GSP)	PWL	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	WL		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	PWL	WL	WL	WL								WL	WL	OO				WL	WL	WL	WL	WL	WL
Sri Lanka																							
Sweden													WL	WL	WL								
Switzerland	SM																						
Taiwan				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	WL											
Thailand	PWL	PWL + 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	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	WL											
UAE											WL	OCR	WL	WL	WL	WL	WL	WL	WL	WL	WL		
Ukraine	PWL	WL	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	WL											
Venezuela		PWL	PWL	PWL	PWL	PWL	PWL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	
Vietnam	PWL	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 continued until the GSP program expired on December 31, 2010.  
 DS: Dispute Settlement.  
 \*: Due to recent events in Egypt, IIPA has recommended that USTR defer any Special 301 decision for Egypt in 2011.

# **APPENDIX D**

## **HISTORICAL SUMMARY OF SELECTED COUNTRIES' SPECIAL 301 PLACEMENT**

# APPENDIX D: HISTORICAL SUMMARY OF SELECTED COUNTRIES' PLACEMENT FOR COPYRIGHT-RELATED MATTERS ON THE SPECIAL 301 LISTS

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2011 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

### ALBANIA

In 2011, IIPA made a Special Mention filing on Albania. Albania does not appear on any USTR lists.

### ALGERIA

USTR placed Algeria on the Priority Watch List in 2009 and 2010. Algeria first appeared on USTR's Watch List in 2008.

### ARGENTINA

IIPA recommends that Argentina remain on the Priority Watch List in 2011. See IIPA's 2011 report on Argentina at <http://www.iipa.com/rbc/2011/2011SPEC301ARGENTINA.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. 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, 2009 and 2010.

### ARMENIA

Armenia does not currently appear on any of the USTR lists. IIPA did not make a submission on Armenia in 2011, 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. Armenia acceded to the WTO on February 5, 2003. On September 3, 2003, USTR announced that it had terminated Armenia's GSP review.

## AUSTRALIA

Australia does not currently appear on any of the USTR lists. 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 2011, but has in years prior. See IIPA's 2009 report on Azerbaijan at <http://www.iipa.com/rbc/2009/2009SPEC301AZERBAIJAN.pdf>.

In 1995 and 1997, IIPA requested that USTR add the nations of the Commonwealth of Independent States (CIS) collectively, excluding the Russian Federation, to the Special 301 Watch List because nearly all of the CIS countries had failed to meet their bilateral IPR obligations, piracy was rampant, enforcement inadequate, and copyright law reform urgently needed. In 2000, IIPA recommended that ten of the CIS countries be placed on the Special 301 Watch List (Armenia, Azerbaijan, Belarus, Georgia, Kazakhstan, Kyrgyz Republic, Moldova, Tajikistan, Turkmenistan, and Uzbekistan). In its May 30, 2000 Special 301 Announcement, USTR placed seven CIS countries on the Special 301 Watch List for the first time: Armenia, Azerbaijan, Kazakhstan, Moldova, Tajikistan, Turkmenistan, and Uzbekistan. In 2001, IIPA recommended and USTR agreed to place Azerbaijan on the Watch List. In the 2001 Special 301 submission, IIPA suggested again that 10 of the 12 CIS countries individually (excluding Russia and Ukraine, for much more serious piracy problems) be listed, and for filing purposes only, grouped them together due to the similarity of copyright concerns each country faces. These deficiencies include the lack of legislative implementation of the bilateral trade agreements, failure to comply with the WTO TRIPS Agreement, and the failure to adopt optical media production and distribution controls. In its April 30, 2001 Special 301 Announcement, USTR noted that "Azerbaijan has yet to fulfill its intellectual property commitments under the 1995 U.S.-Azerbaijan Trade Agreement," citing failure to adhere to the Geneva Phonograms Convention as well as weak criminal provisions for IP violations. In 2002, IIPA recommended that Azerbaijan remain on the Watch List, and USTR agreed, noting that the country "has several remaining steps to take before fulfilling its intellectual property rights commitments under the 1995 U.S.-Azerbaijan Trade Agreement." In particular, USTR pointed to Azerbaijan's



lack of protection for U.S. and other foreign sound recordings and lack of a clear provision of retroactive protection for works or sound recordings. USTR's 2003 announcement, which again kept Azerbaijan on the Watch List, cited similar problems, noting "provisions under the Azerbaijani Criminal Code are minimal and contain a high threshold for the imposition of criminal penalties." Moreover, they are limited to copyright and patent violations, completely excluding neighboring rights violations, and do not provide *ex officio* authority. In 2004, IIPA recommended, and USTR agreed, that Azerbaijan remain on the Watch List. USTR stated that then that Azerbaijan had "yet to fully implement the 1995 US-Azerbaijan Trade Agreement and address deficiencies in its IPR law," and as "a result of these inadequacies, IPR enforcement in Azerbaijan remains weak and ineffective." USTR kept Azerbaijan on the Watch List in 2005 for many of the aforementioned reasons. In 2006, Azerbaijan joined the two WIPO Treaties (WPPT and WCT). Citing progress made in IPR enforcement, USTR removed Azerbaijan from the Watch List in April 2006.

## THE BAHAMAS

IIPA did not file on The Bahamas in 2011, 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 its bilateral agreement with the U.S.. In its April 30, 2001 Special 301 announcement, USTR stated 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 had 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. On November 1, 2009, the Bahamas implemented this new law which drew praise from USTR.

## BAHRAIN

IIPA did not make a submission on Bahrain in 2011, 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 contained some FTA-incompatible elements that needed to be fixed or it would 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. By mid-2008, following negotiations with USTR, Bahrain came into substantial compliance with most FTA deficiencies that IIPA had noted.



## BANGLADESH

IIPA did not make a submission on Bangladesh in 2011, 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 participated in the Generalized System of Preferences (GSP) program which included, as one of its criteria of eligibility, that a country provides "adequate and effective" copyright protection, until it expired on December 31, 2010.

## BELARUS

IIPA recommends that Belarus remain on the Watch List in 2011. See IIPA's 2011 report on Belarus at <http://www.iipa.com/rbc/2011/2011SPEC301CIS.pdf>. USTR placed Belarus on the Watch List 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 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. The GSP program expired on December 31, 2010.



## BELIZE

IIPA did not make a submission on Belize in 2011, 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 participated in the Generalized System of Preferences (GSP) program, a U.S. trade program that offered 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." The GSP program expired on December 31, 2010.

## BOLIVIA

IIPA did not make a submission on Bolivia in 2011, 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 2007-2010.

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. The GSP program expired on December 31, 2010.

## BOSNIA AND HERZEGOVINA

IIPA did not make a submission on Bosnia and Herzegovina in 2011, 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 2011. See IIPA's 2011 Brazil country report at <http://www.iipa.com/rbc/2011/2011SPEC301BRAZIL.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 has kept Brazil on the Watch List from 2008 to 2010.



In addition to 301 activities, the copyright industries over the years have invoked additional trade leverage, specifically, that of the GSP trade program. 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 was a beneficiary country under the GSP trade program until it expired on December 31, 2010.

## BRUNEI

IIPA recommended that Brunei be retained on the Watch List in 2011. See Brunei's country report at <http://www.iipa.com/rbc/2011/2011SPEC301BRUNEI.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. IIPA did not make a recommendation for Brunei in 2010, but USTR retained Brunei on the Watch List in 2010.

## BULGARIA

IIPA filed a Special Mention report on Bulgaria in 2011. USTR did not place Bulgaria on any list in 2010. See Bulgaria's country report at <http://www.iipa.com/rbc/2011/2011SPEC301BULGARIA.pdf>.

Bulgaria had a long history in the Special 301 process. To recap, by 1995, Bulgaria had 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, 200, and in any event, the GSP program expired on December 31, 2010. [need date for Bulgaria joining the EU]

## 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 participated in the Generalized System of Preferences (GSP) program which included as one of its criteria of eligibility that a country provides "adequate and effective" copyright protection, until the GSP program expired on December 31, 2010.

## CANADA

In 2011, IIPA again recommends that Canada remain on the Priority Watch List. See <http://www.iipa.com/rbc/2011/2011SPEC301CANADA.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 where it remained in April 2010.

## CHILE

In 2011, IIPA recommends that Chile remain on the Priority Watch List. See IIPA's 2011 Chile country report at <http://www.iipa.com/rbc/2011/2011SPEC301CHILE.pdf>. USTR placed Chile on the Priority Watch List in 2010.

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 2008-2010.

## COLOMBIA

IIPA did not make a 2011 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 from 2007 to 2010.

Colombia participated 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.” The GSP program expired on December 31, 2010.

## COSTA RICA

In 2011, IIPA recommends that Costa Rica be elevated to the Priority Watch List. See IIPA’s 2011 Costa Rica country report at <http://www.iipa.com/rbc/2011/2011SPEC301COSTARICA.pdf>. In 2010 IIPA also recommended that Costa Rica be elevated to Priority Watch List; however, USTR kept Costa Rica on the Watch List in 2010.

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 Costa Rica would begin 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. Since the FTA entered into force in Costa Rica on January 1, 2009, it has ceased to benefit from a variety of other 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 filed a Special Mention on Croatia in 2011, but has in various years prior. See IIPA’s report at <http://www.iipa.com/rbc/2011/2011SPEC301CROATIA.pdf>.

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.” USTR has not placed Croatia on any lists since 2006.

Croatia participated in the Generalized System of Preferences (GSP) program, a U.S. trade program that offered 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.” The GSP program expired on December 31, 2010.

## CYPRUS

Cyprus does not currently appear on any of the USTR lists. IIPA did not make a submission on Cyprus in 2011, 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 2011, 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; again in 2010 IIPA did not file on the Czech Republic, but USTR again included the Czech Republic on the Watch List.

## DOMINICAN REPUBLIC

IIPA did not file on the Dominican Republic in 2011, 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 and 2010.

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 2011, 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. In 2010 IIPA did not file a recommendation on Ecuador, but USTR placed Ecuador on the Watch List.

Ecuador participated 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." The GSP program expired on December 31, 2010.

## EGYPT

Due to recent events in Egypt, IIPA has recommended that USTR defer any Special 301 decision for Egypt in 2011. IIPA has filed on Egypt in years prior. See past reports at <http://www.iipa.com/countryreports.html>.

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. IIPA recommended that Egypt remain on the Watch List in 2010; USTR agreed with IIPA placing Egypt in the Watch List in April 2010.



Egypt participated in the Generalized System of Preferences (GSP) program, a U.S. trade program that offers preferential trade benefits to eligible beneficiary countries. One of the discretionary criteria of this program is that the country provides "adequate and effective" copyright protection. The GSP program expired on December 31, 2010.

## EL SALVADOR

El Salvador does not currently appear on any of the USTR lists. IIPA did not make a submission on El Salvador in 2011, 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 2011, 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.

## FINLAND

IIPA has not made any submissions on Finland, but in April 2009 and 2010, USTR placed Finland on the Watch List.

## GEORGIA

Georgia does not currently appear on any of the USTR lists. IIPA did not make a submission on Georgia in 2011, 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. The GSP program expired on December 31, 2010.

## GERMANY

In 2011, 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. 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 2009-2010.

## GREECE

IIPA recommends that Greece remain on the Watch List in 2011. See <http://www.iipa.com/rbc/2011/2011SPEC301GREECE.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 through 2010, IIPA recommended that Greece be placed on the Watch List, and USTR did so, and kept Greece on this list in from 2008 through 2010..

## GUATEMALA

IIPA did not make a submission on Guatemala in 2011, but has in various years prior. See IIPA’s country reports page at <http://www.iipa.com/countryreports.html>. Guatemala has been on USTR’s 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, 2009 and 2010.

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. The FTA entered into force in Guatemala on March 1, 2007 and, the country ceased to benefit from a variety of U.S. trade programs (such as GSP and CBI).

## HONG KONG

In 2011, IIPA did not file on Hong Kong, but has in year's prior. See IIPA's country reports page at <http://www.iipa.com/countryreports.html>.

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 to 2010, IIPA included Hong Kong in its Special Mention section.





## HUNGARY

In 2011, IIPA did not make a recommendation for Hungary, but has in various years prior. See IIPA's country reports page at <http://www.iipa.com/countryreports.html>.

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. Again, in 2010, IIPA recommended that Hungary be placed on the Watch List; however, Hungary did not appear on any USTR lists in 2010.

## ICELAND

IIPA did not make a submission on Iceland in 2011, 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 2011, IIPA again recommends that India remain on the Priority Watch List. See IIPA's 2011 India country report at <http://www.iipa.com/rbc/2011/2011SPEC301INDIA.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- 2010, IIPA recommended that India remain the Priority Watch List, and USTR agreed.

India participated in the Generalized System of Preferences (GSP) program, a U.S. trade program that offers preferential trade benefits to eligible beneficiary countries. One of the discretionary criteria of this program is that the country provide "adequate and effective" copyright protection. The GSP program expired on December 31, 2010.

## INDONESIA

In 2011, IIPA recommends that Indonesia remain on the Priority Watch List. See IIPA's 2011 Indonesia country report at <http://www.iipa.com/rbc/2011/2011SPEC301INDONESIA.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 noted 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 and 2010 recommendation was Priority Watch List, which was USTR’s April decision both years as well.

Indonesia participated in the Generalized System of Preferences (GSP) program, a U.S. trade program that offers preferential trade benefits to eligible beneficiary countries. One of the discretionary criteria of this program is that the country provides “adequate and effective protection for intellectual property rights.” The GSP program expired on December 31, 2010.

## IRELAND

Ireland does not currently appear on any of the USTR lists. IIPA did not file a 2011 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 2011. See IIPA's 2010 Israel country report at <http://www.iipa.com/rbc/2011/2011SPEC301ISRAEL.pdf> and the out-of-cycle review submission at <http://www.iipa.com/pdf/IIPAIrelandOCRsubmissionFINAL110909.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 an out-of-cycle review. In 2010, IIPA recommended Watch List with an out-of-cycle review. USTR determined as a result of the previous OCR that Israel would be lowered to the Watch List upon introduction of patent-related legislation, and removed from the 301 list upon implementation of such legislation. Therefore, Israel's status remains pending.

## ITALY

IIPA recommends that Italy remain on the Watch List in 2011. Italy has appeared on the Watch List since 2001 when it was removed from the Priority Watch List. See IIPA's 2011 Italy country report at <http://www.iipa.com/rbc/2011/2011SPEC301ITALY.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 and 2010 IIPA recommended that Italy be maintained on the Watch List; USTR kept it on the Watch List in both years.

## 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." Since 1998 has Jamaica remained on the Watch List 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 2011, but has in years prior. See IIPA's country reports page at <http://www.iipa.com/countryreports.html>.

Japan does not currently appear on any of the USTR lists. 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 2009, IIPA highlighted copyright concerns and included Japan in its Special Mention section.

## JORDAN

IIPA did not file on Jordan in 2011, but has in years prior. See IIPA's country reports page at <http://www.iipa.com/countryreports.html>.

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 continued 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." The GSP program expired on December 31, 2010.

## KAZAKHSTAN

IIPA recommends that Kazakhstan be placed back on the Watch List in 2011, from which it has been off since April 2006. See IIPA's 2011 Kazakhstan country report at <http://www.iipa.com/rbc/2011/2011SPEC301CIS.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 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 and 2010, USTR did not include it on any 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. The GSP program expired on December 31, 2010.

## KENYA

IIPA did not make a submission on Kenya in 2011, 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 participated 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. The GSP program expired on December 31, 2010.

## KUWAIT

IIPA recommends that Kuwait remain on the Watch List in 2011. See IIPA's 2011 Kuwait country report at <http://www.iipa.com/rbc/2011/2011SPEC301KUWAIT.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, strengthen an existing interagency process, and improve 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 2010, 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 2011, 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 included Latvia in its Special Mention section in 2011. See IIPA's 2011 Latvia country report at <http://www.iipa.com/rbc/2011/2011SPEC301LATVIA.pdf>.

IIPA first filed a Special 301 report on Latvia in 2000, when we recommended that Latvia be added to the Watch List for serious deficiencies in the copyright law, criminal code and implementation of the new customs code. USTR accepted our recommendation, and placed Latvia on the Watch List for the first time in 2000. Latvia remained on the Watch List in 2001. In its April 30, 2001 Special 301 Announcement, USTR noted that "[l]arge volumes of pirated products are transshipped through Latvia from Russia and Ukraine." Local enforcement is poor and "[l]egislation is needed to improve the ability of law enforcement and judicial authorities to combat this piracy, such as providing for adequate civil *ex parte* search remedies." Again citing Latvia as a major transshipment point for large volumes of pirated products, USTR kept the country on the Watch List in 2002. The USTR 2003 Special 301 Announcement noted that there was some positive movement in 2002, including raids on sellers of pirated optical media. Latvia stayed on the Watch List, however, because of the continuing transshipments and the fact that "police, customs officials, prosecutors and judicial authorities have not placed sufficient emphasis on combating piracy." In 2004, IIPA recommended that Latvia be maintained on the Watch List, noting that the anti-piracy efforts in the country were "inadequate, if not virtually non-existent." USTR agreed, citing a variety of copyright concerns in its 2004 Special 301 Announcement, including Latvia's continued status as a "consumer of and transshipment point for pirated goods, especially from Russia." USTR also identified high piracy levels for the motion picture, recorded music, and entertainment software industries, and raised concerns over the growth of Internet piracy in Latvia. Finally, though some progress had been made on end-user piracy in the business software industry, USTR stressed that "unlicensed use of business software by government ministries remains a serious concern." USTR retained Latvia on the Watch List in its Special 301 2005 Announcement. USTR acknowledged that progress was made in the form of legislative actions but also called attention to the problems of IPR enforcement and piracy levels. Again in 2006, USTR concurred with IIPA's recommendation and retained Latvia on the Watch List, noting that: "...some key IPR issues remain in need of attention, including copyright piracy, especially on the Internet, and the lack of effective border enforcement. The United States encourages Latvian customs officials to take increased action to inspect and seize transshipped pirated and counterfeit goods coming into Latvia from Russia and exported to Lithuania, Poland, and other EU countries." USTR also said it would conduct an out-of-cycle-review (OCR) in 2006 to monitor further progress. 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. The GSP program expired on December 31, 2010.

## LEBANON

IIPA again recommends that Lebanon remain on the Watch List in 2011. The IIPA Petition regarding Lebanon's IPR practices remains ongoing. See IIPA's 2011 Lebanon country report at <http://www.iipa.com/rbc/2011/2011SPEC301LEBANON.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. 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 GSP 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 and 2010; USTR again agreed and placed Lebanon on the Watch List both years. The GSP program expired on December 31, 2010.

## LITHUANIA

IIPA did not make a submission on Lithuania in 2011, 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 to 2010.

## MACAU

Macau does not currently appear on any of the USTR lists. IIPA did not file a report on this country in 2011 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 participated in the GSP program which expired on December 31, 2010.

## MALAYSIA

In 2011, 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 2011 Malaysia country report at <http://www.iipa.com/rbc/2011/2011SPEC301MALAYSIA.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. In 2010, USTR maintained Malaysia on the Watch List.

## MEXICO

IIPA recommends that Mexico remain on the Special 301 Watch List in 2011. See IIPA's 2011 Mexico country report at <http://www.iipa.com/rbc/2011/2011SPEC301MEXICO.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 through 2010, IIPA again recommended that Mexico be elevated to the Special 301 Priority Watch List; however, USTR retained Mexico on the Watch List.

## MOLDOVA

Moldova does not currently appear on any of the USTR lists. IIPA made a Special Mention filing on Moldova in 2011. 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. The GSP program expired on December 31, 2010.

## MOROCCO

IIPA did not make a submission on Morocco in 2011, 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 2011, 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 2011 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 or 2011, but in 2009, IIPA included 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.

## NORWAY

For the first time, in 2008, USTR placed Norway on the Watch List where it has remained through 2010.

## OMAN

IIPA did not make a submission on Oman in 2011, 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. On January 1, 2009, the U.S.-Oman FTA entered into force.

## PAKISTAN

IIPA included Pakistan in its Special Mention section in 2011. See IIPA's 2011 Pakistan Special Mention report at <http://www.iipa.com/rbc/2011/SPEC301PAKISTAN.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. IIPA recommended that Pakistan be lowered to the Watch List in 2010, USTR placed Pakistan on the Priority Watch List in 2010.

Pakistan participated 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. The GSP program expired on December 31, 2010.

#### 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 participated in the Generalized System of Preferences (GSP) program, a U.S. trade program that offers preferential trade benefits to eligible beneficiary countries. One of the discretionary criteria of this program is that the country/territory provides “adequate and effective protection of intellectual property rights.” The GSP program expired on December 31, 2010.

#### PANAMA

Panama does not currently appear on any of the USTR lists. IIPA did not file on this country in 2011. 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 2011, IIPA recommends that Paraguay remain under Section 306 monitoring; see IIPA’s 2011 Paraguay country report at <http://www.iipa.com/rbc/2011/2011SPEC301PARAGUAY.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, 2009 and 2010, IIPA recommended that Paraguay remain under Section 306 monitoring; USTR again placed Paraguay under Section 306 monitoring.

Paraguay participated in the Generalized System of Preferences (GSP) program, a U.S. trade program that offers preferential trade benefits to eligible beneficiary countries. One of the discretionary criteria of this program is that the country provide "adequate and effective protection of intellectual property rights." The GSP program expired on December 31, 2010.

## PEOPLE'S REPUBLIC OF CHINA

In 2011, IIPA recommends that USTR maintain China on the Priority Watch List. See IIPA's 2011 People's Republic of China country report at <http://www.iipa.com/rbc/2011/SPEC301PRC.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 continued 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. These cases were concluded in 2009 with finding on most US. claims that China was in violation of its WTO commitments. In 2008, IIPA recommended that USTR maintain China on the Priority Watch List in 2008, 2009, and 2010; USTR kept China on the Priority Watch List.

## PERU

IIPA did not make a submission on Peru in 2011, but has in years prior; see IIPA’s country page at <http://www.iipa.com/countryreports.html>.

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 and 2010, 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. As a result, Peru will cease to benefit from a variety of U.S. trade programs (such as GSP, although ATPA has been extended for Peru). The GSP program expired on December 31, 2010.

## THE PHILIPPINES

IIPA recommends that the Philippines be elevated to the Priority Watch List in 2011. IIPA recommended the same ranking with an out-of-cycle review in 2010. USTR retained the Philippines on the Watch List with an out-of-cycle review which was conducted in December 2010. See IIPA’s 2011 Philippines country report at <http://www.iipa.com/rbc/2011/2011SPEC301PHILIPPINES.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.

The Philippines participated in the Generalized System of Preferences (GSP) program, a U.S. trade program that offers preferential trade benefits to eligible beneficiary countries. One of the discretionary criteria of this program is that the country provides "adequate and effective protection of intellectual property rights." The GSP program expired on December 31, 2010.

## POLAND

IIPA recommends that Poland be placed on the Watch List in 2011. See IIPA's 2011 Poland country report at <http://www.iipa.com/rbc/2011/2011SPEC301POLAND.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 but included an out-of-cycle review. Poland was removed from the Special 301 list in 2010. In 2010, IIPA recommended that Poland remain on the Watch List.

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. The GSP program expired on December 31, 2010.





## QATAR

Qatar does not currently appear on any of the USTR lists. IIPA did not file on this country in 2011. 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 after 2002..

## ROMANIA

IIPA recommends that Romania remain on the Watch List in 2011. See IIPA's 2011 Romania country report at <http://www.iipa.com/rbc/2011/2011SPEC301ROMANIA.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 made 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 remained on the Watch List in 2006, as recommended by IIPA. USTR noted some improvements that year, including designation of a national coordinator for IPR enforcement and "increased dedication of resources for IPR enforcement."

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 2008-2010, IIPA recommended that Romania remain on the Watch List, and USTR kept Romania there.

## RUSSIAN FEDERATION

In 2011, IIPA recommends that Russia remain on the Priority Watch List. See IIPA's 2011 Russia country report at <http://www.iipa.com/rbc/2011/2011SPEC301RUSSIA.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>1</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 of 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. Again in 2008 through 2010, IIPA recommended that Russia remain on the Priority Watch List, and USTR retained Russia on the Priority Watch List all three years.

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

---

<sup>1</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.

U.S. copyright owners, as required under that program. In January 2001, the Administration announced that it accepted IIPA's petition. . . That Petition is still pending; however, the GSP program expired on December 31, 2010.

## SAUDI ARABIA

IIPA recommended that Saudi Arabia be returned to the Watch List in 2011. See IIPA's 2011 Saudi Arabia country report at <http://www.iipa.com/rbc/2011/2011SPEC301SAUDIARABIA.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. In its November 2009 OCR submission, IIPA recommended that Saudi Arabia be removed from the Watch List due to immanent progress that the Saudi government promised would be made in imposing, for the first time, a deterrent prison sentence on a pirate and taking other key actions. In February 2010, IIPA filed a Special Mention report on Saudi Arabia, noting its recommendation that the Kingdom be removed from the Watch list. Soon thereafter, USTR announced its removal from the Watch List.

## 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. The GSP program expired on December 31, 2010.

## SINGAPORE

IIPA recommended that Singapore appear on the Watch List in 2011. See <http://www.iipa.com/rbc/2011/2011SPEC301SINGAPORE.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- 2010.

## SLOVAK REPUBLIC

IIPA did not file on the Slovak Republic in 2011, 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. It has not appeared on any Special 301 list since 2005.

## SOUTH AFRICA

IIPA did not make a submission on South Africa in 2011, 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 participated 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.” The GSP program expired on December 31, 2010.

## SOUTH KOREA

IIPA did not make a recommendation for South Korea in 2011, 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 KORUS FTA was signed on June 30, 2007, and still awaits Congressional approval.

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 the Watch List in April 2009 and it has remained off such list since then..

## SPAIN

In 2011, IIPA recommends that Spain be elevated to the Priority Watch List. See <http://www.iipa.com/rbc/2011/2011SPEC301SPAIN.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. In 2010, USTR placed Spain on the Watch List.

## SWEDEN

In 2011, 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. IIPA did not make a recommendation for Sweden in 2010 after it adopted copyright law amendments to deal with many of these issues. Sweden currently does not appear on any USTR list.

## SWITZERLAND

IIPA made a Special Mention filing on Switzerland in 2011. See IIPA's 2011 report at [www.iipa.com/rbc/2011/2011SPEC301SWITZERLAND.pdf](http://www.iipa.com/rbc/2011/2011SPEC301SWITZERLAND.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

IIPA did not make a recommendation for Taiwan in 2011, but has in years prior; see IIPA's country page at <http://www.iipa.com/countryreports.html>.

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. In 2010, IIPA again included Taiwan in its Special Mention section; and Taiwan remained off any list..

## TAJIKISTAN

In 2011, IIPA recommended that Tajikistan remain on the Watch List. See IIPA's 2011 country report at <http://www.iipa.com/rbc/2011/2011SPEC301CIS.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 had 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 and 2010, 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 and 2010.

## THAILAND

In 2011, IIPA recommends that Thailand remain on the Priority Watch List. See IIPA's 2011 Thailand country report at <http://www.iipa.com/rbc/2011/2011SPEC301THAILAND.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. In 2010, IIPA recommended that Thailand be lowered to the Watch List and that an out-of cycle review be conducted later that year; USTR placed Thailand on the Priority Watch List in April 2010 with an out-of-cycle review which was conducted in December 2010. The result of the OCR was still pending as of February 15, 2011.

Thailand participated in the Generalized System of Preferences (GSP) program, a U.S. trade program that offers preferential trade benefits to eligible beneficiary countries. One of the discretionary criteria of this program is that the country provides "adequate and effective protection of intellectual property rights." The GSP program expired on December 31, 2010.

## TURKEY

In 2011, IIPA recommends that Turkey remain on the Watch List. See IIPA's 2011 Turkey country report at <http://www.iipa.com/rbc/2011/2011SPEC301TURKEY.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 and 2010, IIPA recommended that Turkey remain on the Watch List, and USTR again placed them on the Watch List both years.

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 had been closed in 2001. The GSP program expired on December 31, 2010.

## TURKMENISTAN

In 2011, IIPA recommended that Turkmenistan remain on the Watch List. See IIPA's 2011 country report at <http://www.iipa.com/rbc/2011/2011SPEC301CIS.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 through 2010. USTR placed Turkmenistan on the Watch List all those years..

## UKRAINE

IIPA recommends that Ukraine be elevated to the Priority Watch List in 2011. See IIPA's 2011 Ukraine country report at <http://www.iipa.com/rbc/2011/2011SPEC301UKRAINE.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 23, 2006. The GSP program expired on December 31, 2010.

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. USTR retained Ukraine on the Watch List in 2009 and 2010.

## UNITED ARAB EMIRATES

IIPA did not make a submission on the United Arab Emirates in 2011, 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 20010, 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, but those negotiations were concluded without an agreement. The Emirates also joined both the WCT and WPPT in 2004.

## URUGUAY

Uruguay currently does not appear on any Special 301 list. IIPA did not file a 2011 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 has remained off all lists since then.

Uruguay participated in the Generalized System of Preferences (GSP) program, a U.S. trade program that offers preferential trade benefits to eligible beneficiary countries. One of the discretionary criteria of this program is that the country provide “adequate and effective” copyright protection. In 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. The GSP program expired on December 31, 2010.

## UZBEKISTAN

IIPA recommends that Uzbekistan remain on the Watch List, where it has appeared since 2000. See IIPA’s 2011 Uzbekistan country report at <http://www.iipa.com/rbc/2011/2011SPEC301CIS.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 2008-2010,





IIPA recommended that Uzbekistan remain on the Watch List, where it had appeared since 2000, and USTR maintained this country on the Watch List in those years.

## VENEZUELA

IIPA did not make a submission on Venezuela in 2011, 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 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 2008-2010; however, USTR retained Venezuela on the Priority Watch List those years. Venezuela was a beneficiary country of the Generalized System of Preferences (GSP) trade program until the program expired on December 31, 2010.

## VIETNAM

In 2011, IIPA recommends that Vietnam be elevated to the Priority Watch List. See IIPA's 2011 Vietnam country report at <http://www.iipa.com/rbc/2011/2011SPEC301VIETNAM>.

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 2008-2010, IIPA recommended that Vietnam remain on the Watch List, and USTR retained Vietnam on the Watch List in each of those years.

#####

