



October 29, 2014

**Filed via [www.regulations.gov](http://www.regulations.gov) USTR-2014-0014**

Douglas M. Bell  
Chair, Trade Policy Staff Committee  
Office of the U.S. Trade Representative  
Washington, DC 20508

**Re: IIPA Written Submission in Response to: Request for Public Comments to Compile the 2015 National Trade Estimate Report on Foreign Trade Barriers, 79 Fed. Reg. 48292 (August 15, 2014)**

Dear Mr. Bell:

The International Intellectual Property Alliance (IIPA)<sup>1</sup> – representing significant sectors of the copyright based industries in the United States<sup>2</sup> – takes this opportunity to provide the Trade Policy Staff Committee (TPSC) with written comments to “assist it in identifying significant barriers to U.S. exports of goods, services, and U.S. foreign direct investment for inclusion in the [National Trade Estimate Report on Foreign Trade Barriers]” (NTE) to be released in 2015.

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<sup>1</sup> Formed in 1984, the IIPA is a private sector coalition of trade associations representing U.S. copyright-based industries in bilateral and multilateral efforts working to improve international protection and enforcement of copyrighted materials and open up foreign markets closed by piracy and other market access barriers. IIPA’s six member associations represent over 3,200 U.S. companies producing and distributing materials protected by copyright laws throughout the world—all types of computer and video games for video game consoles, personal computers, and the Internet; theatrical films, television programs, DVDs and home video and digital representations of audiovisual works; music, records, CDs, and audiocassettes; and fiction and non-fiction books, education instructional and assessment materials, and professional and scholarly journals, databases and software in all formats. Visit [www.iipa.com](http://www.iipa.com). Members of the IIPA include [Association of American Publishers](#), [Entertainment Software Association](#), [Independent Film & Television Alliance](#), [Motion Picture Association of America](#), [National Music Publishers’ Association](#), and [Recording Industry Association of America](#).

<sup>2</sup> In November 2013, IIPA released the latest update of the comprehensive economic report, *Copyright Industries in the U.S. Economy: The 2013 Report*, prepared by Stephen Siwek of Economists Inc. The study tracks the economic impact and contributions of U.S. industries creating, producing, distributing, broadcasting or exhibiting copyright materials, including computer software, videogames, books, newspapers, periodicals and journals, motion pictures, music, and radio and television programming. For the first time, we reported that the “core” copyright industries added over \$1 trillion in value to the U.S. economy in a single year, accounting for almost 6.5% of the total U.S. gross domestic product (GDP). These industries employed nearly 5.4 million U.S. workers – nearly 5% of the total private employment sector – with jobs paying an average of 33% more than the rest of the workforce. They also grew at an aggregate annual rate of 4.7%, more than twice the rate of growth for the U.S. economy. The core copyright industries accounted for \$142 billion in foreign sales and exports, far more than sectors such as aerospace, agriculture, food, and pharmaceuticals and medicines.



## **IIPA's Interest in the 2015 NTE Report**

Since 1984, IIPA and its association members have worked in partnership with the U.S. government to improve the ability of the copyright industries to do business in foreign markets, resulting in better copyright protection and enforcement, and fairer and more equitable market access in many countries around the world. Unfortunately, there remain significant pockets of inadequate copyright protection, inadequate enforcement against piracy, and market access barriers or other restrictions to trade, all of which combine to harm the economic interests of U.S. copyright owners. The failure adequately to protect and enforce intellectual property rights, or to afford fair and equitable market access, poses significant barriers to copyright owners' abilities to grow U.S. jobs and revenues and export legitimate goods and services to the world.

The Trade Act's establishment of the NTE to identify "significant barriers to U.S. exports of goods, services, and U.S. foreign direct investment" benefits copyright owners and creators. In particular, the Federal Register notes:

The NTE sets out an inventory of the most important foreign barriers affecting U.S. exports of goods and services, U.S. foreign direct investment, and protection of intellectual property rights. The inventory facilitates U.S. negotiations aimed at reducing or eliminating these barriers. The report also provides a valuable tool in enforcing U.S. trade laws and strengthening the rules-based trading system.

The Federal Register Notice explains, "USTR will be guided by the existence of active private sector interest in deciding which restrictions to include in the NTE."

IIPA appreciates attention to the concerns of our industries in preparing the NTE. A key concern for the copyright industries, as enumerated in the Federal Register notice, is "Lack of intellectual property protection (e.g., inadequate patent, copyright, and trademark regimes or enforcement issues)." Additional concerns to our industries include commercial obstacles also referred to in the notice, such as:

- **Import policies** (e.g., tariffs and other import charges, quantitative restrictions, customs barriers). For example, certain countries have threatened adoption of customs valuation practices for motion pictures that would be out of line with international best practices, potentially raising the costs and certainly raising the risks for our film industry doing business in those markets.
- **Services barriers** (e.g., quotas on imports of foreign films and barriers to the provision of services by professionals). For example, the inability of right holders to establish and choose for themselves a collection agency for music royalties in the United Arab Emirates is an unnecessary and unwarranted service barrier hindering the growth of that market for foreign music right holders. The quota on the number of foreign films allowed into China on a revenue-sharing basis is another longstanding example of a service barrier. The quota stands at 34 foreign films, with 14 films entering China in "enhanced" formats. The easing of the quota (from 20 films to 34 films) in 2012 was welcomed by the industry, although more needs to be done to ensure a level playing field



and competition with respect to both revenue-sharing and non-revenue sharing theatrical distribution in China and elsewhere. Also in China, a recent Chinese administrative notice threatens to place a quota on broadcast of foreign content online, which we understand may effectively set a damagingly low 30% cap on foreign films and TV shows broadcasted online. Countries like Australia and Malaysia continue to impose restrictions on foreign content in prime-time TV slots.

- **Investment barriers** (e.g., limitations on foreign equity participation, and local content performance requirements). For example, the government of Vietnam has long imposed severe investment restrictions or outright bans on what it considers “cultural products” or services, hindering the growth of core copyright businesses in the country. China continues to maintain investment restrictions on many of our industries; while a WTO Panel and Appellate Body decision confirmed China may not maintain such restrictions, some areas (e.g., publishing and certain activities related to film) remain mostly out of reach for foreign businesses. Finally, Indonesia retains a negative investment list which imposes restrictions on investment in the audiovisual sector, unduly harming those in that sector wishing to provide motion pictures and audiovisual content in the country.
- **Government-tolerated conduct of state-owned or private firms that restrict the sale or purchase of U.S. goods or services in the foreign country’s markets.** An excellent example of such a restriction affecting the copyright industries was the ban on the importation or sale of game consoles in China. In 2014, we appear to be witnessing a breakthrough in China, as distribution of the first foreign consoles has commenced.
- **Trade restrictions affecting electronic commerce** (e.g., tariff and non-tariff measures, burdensome and discriminatory regulations and standards, and discriminatory taxation). Until recently, foreign music intended for online distribution in the Chinese market was subject to discriminatory content review; Chinese companies did not face the same hurdle. While the discriminatory treatment appears to have been halted, the longstanding problem stunted the development of foreign online music distribution in China for many years. Similarly, the requirement that foreign music companies name an exclusive licensee in China hindered their commercial operations for years. While the Chinese government has informed industry that this requirement has been lifted, the government should confirm this in writing.

The notice also asks commenters to “place particular emphasis on any practices that they believe may violate U.S. trade agreements.” IIPA’s 2014 Special 301 submission contains, in Section 10, passages on “Implementation of IPR Provisions in Trade Agreements,” which note implementation issues identified in various country reports in the appendix to that report. Our submission also refers to several additional countries for issues related to their bilateral, regional, or multilateral obligations in the area of intellectual property rights.

Addressing foreign trade barriers identified by IIPA in its various filings listed or detailed in this submission would permit the copyright industries to enjoy greater economic growth including in the area of foreign sales and exports. The *Copyright Industries in the U.S. Economy: The 2013 Report* reports that foreign sales and exports of certain copyright sectors totaled \$142



billion for 2012. This number can be enhanced by addressing the foreign trade barriers underscored in this written submission and IIPA's various filings throughout the year.

### **IIPA Public Filings Relevant to the 2015 NTE**

In the filings listed below and attached to our submission, many issues and concerns relevant to the copyright industries are discussed.<sup>3</sup> Most notably, IIPA made a submission in the February 2014 annual Special 301 process, including an extensive country-by-country appendix, which is attached to this filing.<sup>4</sup> This broad submission identifies many countries that deny adequate and effective protection of intellectual property rights or that deny fair and equitable market access to U.S. persons who rely on intellectual property, as required by the Special 301 statute (19 U.S.C. §2242). The IIPA 2014 submission has been made available to the TPSC and to many U.S. government officials who work on the countries' issues and who contribute to preparing the NTE.

IIPA also provides to the public a summary of key challenges and initiatives that define the IIPA copyright industry sectors' agenda. As an easy reference, attached please find IIPA's updated one-page summary of the "Copyright Industries' Key Challenges for 2014."<sup>5</sup>

The following are the public IIPA filings relevant to the 2015 NTE:

- IIPA testimony before House Foreign Affairs Committee on Trans-Pacific Partnership (2013).<sup>6</sup>
- IIPA written comments before the Section 301 Committee on the Section 301 investigation on Ukraine (2013).<sup>7</sup>
- IIPA request to testify and written testimony regarding Russia's implementation of its WTO obligations (2013).<sup>8</sup>

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<sup>3</sup> For IIPA public filings prior to August 2013, please refer to IIPA's website, [www.iipa.com](http://www.iipa.com).

<sup>4</sup> IIPA's 2014 Special 301 Report is available to the public via [www.regulations.gov](http://www.regulations.gov) as well as our website, at [www.iipa.com/2013\\_SPEC301\\_TOC.htm](http://www.iipa.com/2013_SPEC301_TOC.htm). We note that as of July 1, BSA | The Software Alliance is no longer a member of IIPA; therefore, the Committee should contact BSA with respect to any business software-related issues discussed in filings made prior to July 1, 2014. IIPA plans to participate in the 2015 Special 301 process, and as in prior years, IIPA will provide the TPSC with a courtesy copy of our 2015 Special 301 submission for its consideration in this NTE docket. In years past, the NTE report published in March often has incorporated the most current IIPA information and statistics, even though our Special 301 submission arrives later in the NTE production process. IIPA appreciates the Committee's efforts in that regard.

<sup>5</sup> This Copyright Industries' Initiatives and Challenges paper is also posted on the IIPA website at [www.iipa.com/pdf/2014KeyInitiatives.pdf](http://www.iipa.com/pdf/2014KeyInitiatives.pdf).

<sup>6</sup> See IIPA, *Written Testimony Before the House Committee on Foreign Affairs Subcommittee on Terrorism, Non-proliferation and Trade, August 1, 2013, Hearing on "The Trans-Pacific Partnership: Outlook and Opportunities,"* August 1, 2013, at [http://www.iipa.com/pdf/2013\\_Aug01\\_HFAC\\_Testimony\\_on\\_TPP.PDF](http://www.iipa.com/pdf/2013_Aug01_HFAC_Testimony_on_TPP.PDF).

<sup>7</sup> See IIPA, *Pre-Hearing Written Comments of the International Intellectual Property Alliance Before the Section 301 Committee, Docket: USTR-2013-0023 Ukraine – Section 301, Identification of Ukraine as a Priority Foreign Country and Initiation of Section 301 Investigation, 78 Fed. Reg. 33886 (June 5, 2013),* September 9, 2013, at [http://www.iipa.com/pdf/2013\\_Sep09\\_Ukraine\\_Section301.PDF](http://www.iipa.com/pdf/2013_Sep09_Ukraine_Section301.PDF).

<sup>8</sup> See IIPA, *Russia – Implementation of its WTO Obligations, regarding Request for Comments and Notice of Public Hearing Concerning Russia's Implementation of Its WTO Obligation, 78 Fed. Reg. 49789 (Aug. 15, 2013),* September 12, 2013, at [http://www.iipa.com/pdf/2013\\_Sep12\\_Russia\\_Implementation\\_WTO\\_Obligations.PDF](http://www.iipa.com/pdf/2013_Sep12_Russia_Implementation_WTO_Obligations.PDF).



- IIPA request to testify and written testimony regarding China's compliance with its WTO commitments (2013).<sup>9</sup>
- IIPA comments on the 2013 annual review of country eligibility for benefits under the African Growth and Opportunity Act (AGOA).<sup>10</sup>
- IIPA comments regarding the 2013 Special 301 Out-Of-Cycle Review of Notorious Markets.<sup>11</sup>
- IIPA testimony to USITC on *Trade, Investment, and Industrial Policies in India: Effects on the U.S. Economy* investigation (2014).<sup>12</sup>
- IIPA written submission on USITC *Digital Trade in the U.S. Economy* investigation: Part 2 (2014) (omitting most appendices).<sup>13</sup>
- IIPA request to testify and written testimony regarding China's compliance with its WTO commitments (2014).<sup>14</sup>
- IIPA files comments with USTR on 2014 Special 301 Out-Of-Cycle Review of Kuwait.<sup>15</sup>
- IIPA comments on the 2014 annual review of country eligibility for benefits under the African Growth and Opportunity Act (AGOA).<sup>16</sup>
- IIPA comments regarding the 2014 Special 301 Out-Of-Cycle Review of Notorious Markets.<sup>17</sup>

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<sup>9</sup> See IIPA, *China's WTO Compliance - Notification of Intent to Testify and Testimony Re: "Request for Comments and Notice of Public Hearing Concerning China's Compliance With WTO Commitments,"* 78 Fed. Reg. 49787 (August 15, 2013), September 20, 2013, at [http://www.iipa.com/pdf/2013\\_Sep20\\_China\\_WTO\\_Compliance.PDF](http://www.iipa.com/pdf/2013_Sep20_China_WTO_Compliance.PDF).

<sup>10</sup> See IIPA, *Public Comments on Annual Review of Country Eligibility for Benefits Under the African Growth and Opportunity Act in 2014*, 78 Fed. Reg. 60367 (October 1, 2013), October 25, 2013, at [http://www.iipa.com/pdf/2013\\_Oct25\\_AGOA\\_Annual\\_Report.PDF](http://www.iipa.com/pdf/2013_Oct25_AGOA_Annual_Report.PDF).

<sup>11</sup> See IIPA, *IIPA Written Submission Re: 2013 Special 301 Out-of-Cycle Review of Notorious Markets: Request for Public Comments*, 78 Fed. Reg. 57924 (September 20, 2013), 78 Fed. Reg. 60367 (October 1, 2013) (*Extending Deadline*), October 25, 2013, at [http://www.iipa.com/pdf/2013\\_Oct25\\_Notorious\\_Markets.pdf](http://www.iipa.com/pdf/2013_Oct25_Notorious_Markets.pdf).

<sup>12</sup> See IIPA, *IIPA Pre-Hearing Brief and Statement Related to: United States International Trade Commission, Trade, Investment, and Industrial Policies in India: Effects on the U.S. Economy*, 78 Fed. Reg. 54677, September 5, 2013, January 30, 2014, at [http://www.iipa.com/pdf/2014\\_Jan30\\_USITC\\_Testimony.pdf](http://www.iipa.com/pdf/2014_Jan30_USITC_Testimony.pdf).

<sup>13</sup> See IIPA, *IIPA Written Submission Related to: International Trade Commission, Digital Trade in the U.S. and Global Economies, Part 2*, 78 Fed. Reg. 12787, February 25, 2013, March 21, 2014, at [http://www.iipa.com/pdf/2014\\_Mar21\\_IIPA\\_USITC\\_Digital\\_Trade\\_Part2.PDF](http://www.iipa.com/pdf/2014_Mar21_IIPA_USITC_Digital_Trade_Part2.PDF).

<sup>14</sup> See IIPA, *China's WTO Compliance - Notification of Intent to Testify and Testimony Re: "Request for Comments and Notice of Public Hearing Concerning China's Compliance With WTO Commitments"* (79 Fed. Reg. 48291, August 15, 2014), September 17, 2013, at [http://www.iipa.com/pdf/2014\\_Sep17\\_ChinaWTO.PDF](http://www.iipa.com/pdf/2014_Sep17_ChinaWTO.PDF).

<sup>15</sup> See IIPA, *2014 Special 301 Out-of-Cycle Review of Kuwait*, 79 Fed. Reg. 60229 (Oct. 6, 2014), October 15, 2014, at [http://www.iipa.com/pdf/2014\\_Oct15\\_KuwaitOCR.PDF](http://www.iipa.com/pdf/2014_Oct15_KuwaitOCR.PDF).

<sup>16</sup> See IIPA, *Public Comments on Annual Review of Country Eligibility for Benefits Under the African Growth and Opportunity Act in 2014*, 79 Fed. Reg. 59342 (October 1, 2014), October 23, 2014, at [http://www.iipa.com/pdf/2014\\_Oct23\\_IIPA\\_AGOASubmission.PDF](http://www.iipa.com/pdf/2014_Oct23_IIPA_AGOASubmission.PDF).

<sup>17</sup> See IIPA, *IIPA Written Submission Re: 2014 Special 301 Out-of-Cycle Review of Notorious Markets: Request for Public Comments*, 79 Fed. Reg. 58026 (September 26, 2014), October 24, 2014, at [http://www.iipa.com/pdf/2014\\_Oct24\\_IIPA\\_NotoriousMarkets.PDF](http://www.iipa.com/pdf/2014_Oct24_IIPA_NotoriousMarkets.PDF).



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IIPA and its members appreciate the opportunity to provide the Committee with information pertaining to the development of the 2015 NTE Report. We invite the TPSC to review these various filings and to contact us with any questions or requests to provide further information.

Sincerely,

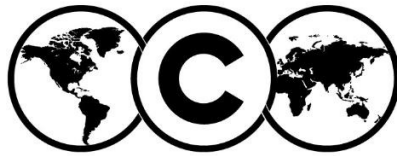
Michael Schlesinger  
International Intellectual Property Alliance

Attachments

IIPA Written Submission in Response to: Request for Public  
Comments to Compile the National Trade Estimate Report on  
Foreign Trade Barriers  
October 29, 2014  
APPENDICES

IIPA submission in the February 2014 annual Special 301  
review





February 7, 2014

*Submitted via regulations.gov Docket No. USTR-2013-0040*

Susan F. Wilson  
Director for Intellectual Property and Innovation  
Office of the U.S. Trade Representative  
600 17th Street, N.W.  
Washington, D.C. 20508

**Re: IIPA Written Submission Regarding 2014 Special 301 Review: Identification of Countries Under Section 182 of the Trade Act of 1974: Request for Public Comment and Announcement of Public Hearing, 79 Fed. Reg. 420 (Jan. 3, 2014)**

Dear Ms. Wilson:

The International Intellectual Property Alliance (IIPA) provides this response to the above-captioned Federal Register Notice that invites “written submissions from the public concerning foreign 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.”

Under Section 182 of the Trade Act of 1974 (Trade Act) as amended (19 U.S.C. 2242), the United States Trade Representative (USTR) is required annually to identify such countries and to “determine which, if any, of these countries to identify as Priority Foreign Countries,” i.e., whether “[a]cts, policies, or practices that are the basis of a country’s identification as a Priority Foreign Country can be subject to the procedures set out in sections 301–305 of the Trade Act.” USTR has also created two additional lists, the Priority Watch List and the Watch List, and places a trading partner on one of those lists if “particular problems exist in that country with respect to IPR protection, enforcement, or market access for persons that rely on intellectual property protection.” The entire process is commonly referred to as the Special 301 review.

IIPA has participated in every Special 301 review 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 and territories. In this year’s filing, including this Submission Letter and appendices, IIPA reports on 42 countries/territories noted in the chart in Section C of this Submission Letter, and mentions 4 additional countries in this letter for issues related to bilateral, regional, or multilateral IPR obligations worthy of discussion.

IIPA requests that Ukraine be maintained as a Priority Foreign Country. IIPA also requests that 9 countries appear on the Special 301 Priority Watch List and that 19 countries appear on the Special 301 Watch List. IIPA has also recommended that USTR conduct an Out-of-Cycle Review (OCR) later in 2014 on Italy and Spain. IIPA will also file under separate cover a Notice of Intent to Testify at the February 24, 2014 public hearing on Special 301.



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

The IIPA is a private sector coalition, formed in 1984, of trade associations representing U.S. copyright-based industries working to improve international protection and enforcement of copyrighted materials and to open foreign markets closed by piracy and other market access barriers. IIPA's seven member associations represent over 3,200 U.S. companies producing and distributing materials protected by copyright laws throughout the world. These include all types of computer software, including operating systems, systems software such as databases and security packages, business applications, and consumer applications such as games, personal finance, and reference software, free software, open source software, and software as a service; entertainment software including interactive games for videogame consoles, handheld devices, personal computers and the Internet, and educational software; motion pictures, television programming, DVDs and home video and digital representations of audiovisual works; music, records, CDs, and audiocassettes; and fiction and non-fiction books, education instructional and assessment materials, and professional and scholarly journals, databases and software in all formats. Members of the IIPA include [Association of American Publishers](#), [BSA | The Software Alliance](#), [Entertainment Software Association](#), [Independent Film & Television Alliance](#), [Motion Picture Association of America](#), [National Music Publishers' Association](#), and [Recording Industry Association of America](#).

In November 2013, IIPA released the latest update of the comprehensive economic report, *Copyright Industries in the U.S. Economy: The 2013 Report*, prepared by Stephen Siwek of Economists Inc. The study tracks the economic impact and contributions of U.S. industries creating, producing, distributing, broadcasting or exhibiting copyright materials, including computer software, videogames, books, newspapers, periodicals and journals, motion pictures, music, and radio and television programming. For the first time, we reported that the "core" copyright industries added over \$1 trillion in value to the U.S. economy in a single year, accounting for almost 6.5% of the total U.S. gross domestic product (GDP). These industries employed nearly 5.4 million U.S. workers – nearly 5% of the total private employment sector – with jobs paying an average of 33% more than the rest of the workforce. They also grew at an aggregate annual rate of 4.7%, more than twice the rate of growth for the U.S. economy. The core copyright industries accounted for \$142 billion in foreign sales and exports, far more than sectors such as aerospace, agriculture, food, and pharmaceuticals and medicines.<sup>1</sup> The link between copyright protection and economic growth is documented by the World Intellectual Property Organization (WIPO) in its report, *WIPO Studies on the Economic Contribution of Copyright: Overview* (2013), compiling studies employing virtually the same agreed-upon methodology in 40 countries.<sup>2</sup> Other studies have measured the contribution of certain sectors to national economies,<sup>3</sup> or the multiplier effects of reducing piracy on contribution to national GDP, job growth, and tax revenues.<sup>4</sup>

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<sup>1</sup>See Stephen E. Siwek, *Copyright Industries in the U.S. Economy: The 2013 Report*, November 19, 2013. The report and summary can be accessed at [http://www.iipa.com/copyright\\_us\\_economy.html](http://www.iipa.com/copyright_us_economy.html). Core copyright industries are those whose primary purpose is to create, produce, distribute, or exhibit copyright materials.

<sup>2</sup>WIPO *Studies on the Economic Contribution of Copyright: Overview* (2013), available at [http://www.wipo.int/export/sites/www/copyright/en/performance/pdf/economic\\_contribution\\_analysis\\_2012.pdf](http://www.wipo.int/export/sites/www/copyright/en/performance/pdf/economic_contribution_analysis_2012.pdf), last accessed December 17, 2013. In 2003, 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/export/sites/www/freepublications/en/copyright/893/wipo\\_pub\\_893.pdf](http://www.wipo.int/export/sites/www/freepublications/en/copyright/893/wipo_pub_893.pdf). The Guide, developed by an experts' group, describes methodologies for measuring the role of copyright industries in domestic economies. These national studies provide the economic underpinnings for efforts to reform copyright law and enforcement and to lower rates of copyright piracy.

<sup>3</sup>For example, the Motion Picture Association Asia Pacific has issued a series of "Economic Contribution of the Film and Television Industry" studies for India (2010), Indonesia (2012), Japan (2012), South Korea (2012), Thailand (2012), New Zealand (2009, 2012), Australia (2011), and Hong Kong (2009). See Motion Picture Association Asia-Pacific, *Research and Statistics*, at [http://mpa-i.org/index.php/research\\_statistics](http://mpa-i.org/index.php/research_statistics).

<sup>4</sup>See, e.g., BSA (now BSA | The 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), and numerous other country studies linked from <http://portal.bsa.org/piracyimpact2010/index.html>.



While these studies amply demonstrate the contribution of copyright-based industries to the economy, they do not reveal the massive costs imposed by overseas piracy and market access barriers to U.S. copyrighted products and services. Content industries are forced to face unfair competition from those who engage in piracy as a high-profit, low risk enterprise. Today, legitimate businesses built on copyright are facing increased threats, as they must compete with the massive proliferation of illegal services unencumbered by costs associated with either producing copyrighted works or obtaining rights to use them. An independent study released by BASCAP (Frontier Economics), *Estimating the Global Economic and Social Impacts of Counterfeiting and Piracy* (February 2011),<sup>5</sup> estimated the value of digitally pirated music, movies and software (not losses) at \$30-75 billion in 2010, and growing to \$80-240 billion by 2015. Others have issued reports on the economic consequences of piracy for specific industry sectors.<sup>6</sup> On January 14, 2014, the United Nations Office on Drugs and Crime (UNODC) launched a new global campaign to raise awareness among consumers of the harm being caused by the estimated \$250 billion a year illicit trafficking of counterfeit goods.<sup>7</sup> Rampant piracy not only damages existing authorized distribution channels, but also impedes the evolution of legitimate new channels for distribution.

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## B. SUMMARY OF THE IIPA 2014 SPECIAL 301 SUBMISSION

The IIPA 2014 Special 301 Submission provides information intended to assist the U.S. Government in defining plans of action for the year ahead to reduce global piracy levels and to open markets to U.S. materials protected by copyright in the identified countries/territories. Section C of this Submission Letter provides the IIPA recommendations for the 2014 Special 301 lists. Section D summarizes 12 major cross-cutting initiatives and challenges involved in improving copyright law and enforcement and lowering market access barriers to U.S. copyrighted materials. Appendix A to the Submission includes all the country surveys.<sup>8</sup> Appendix B describes IIPA members' methodologies for estimating the scope of piracy in various countries. Appendix C provides a chart of countries/territories' placement on Special 301 lists by USTR since 1989.<sup>9</sup>

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<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 (on file with IIPA).

<sup>6</sup>The Motion Picture Association has commissioned studies from IPSOS and Oxford Economics on *Economic Consequences of Movie Piracy: Japan* (2011) and *Economic Consequences of Movie Piracy: Australia* (2011). BSA's most recent study estimating the software piracy rate and commercial value of unlicensed software in more than 100 markets is at [www.bsa.org/globalstudy](http://www.bsa.org/globalstudy). BSA plans to release an updated study in the second quarter of 2014.

<sup>7</sup>See 'Counterfeit: Don't buy into organized crime' - UNODC launches new outreach campaign on \$250 billion a year counterfeit business, UNODC website, January 14, 2014, at <http://www.unodc.org/counterfeit/>, accessed January 24, 2014. The campaign, *Counterfeit: Don't Buy Into Organized Crime*, informs consumers that buying counterfeit goods could be funding organized criminal groups, puts consumer health and safety at risk, and contributes to other ethical and environmental concerns. See also International Intellectual Property Alliance (IIPA), *Statement of IIPA Hailing United Nations New Campaign "Counterfeits: Don't Buy Into Organized Crime"*, January 14, 2014, at [http://www.iipa.com/pressreleases/2014\\_Jan14\\_IIPA\\_Statement\\_UN\\_Anti\\_Counterfeit\\_Program.PDF](http://www.iipa.com/pressreleases/2014_Jan14_IIPA_Statement_UN_Anti_Counterfeit_Program.PDF).

<sup>8</sup>Country surveys were prepared by counsel to the IIPA, Michael Schlesinger, Amanda Wilson Denton, Eric Schwartz, and Steven Metalitz, and are based on information furnished by IIPA's seven member associations. We thank Pamela Burchette for her contribution in preparing, producing and distributing this submission. The country reports contain information which should not be construed as providing legal advice.

<sup>9</sup>Many 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 countries/territories named by IIPA are particularly vulnerable.



### C. IIPA RECOMMENDATIONS FOR THE 2014 SPECIAL 301 LISTS

This year IIPA has recommended 42 countries/territories: for designation as a Priority Foreign Country, or for placement on the Priority Watch List or Watch List; or noted as Special Mention or Additional Countries for copyright, enforcement, and/or market access-related concerns.

PRIORITY FOREIGN COUNTRY	PRIORITY WATCH LIST	WATCH LIST	OUT-OF-CYCLE REVIEWS	SPECIAL MENTION
Ukraine	Argentina Chile China (306) <sup>10</sup> Costa Rica India Indonesia Russian Federation Thailand Vietnam	Belarus Brazil Bulgaria Canada Ecuador Greece Israel Kazakhstan Kuwait Mexico Romania Saudi Arabia Switzerland Taiwan Tajikistan Turkey Turkmenistan United Arab Emirates Uzbekistan	Italy Spain	Hong Kong Malaysia Philippines
				<b>ADDITIONAL COUNTRIES</b>
				Albania Bosnia and Herzegovina Estonia Georgia Macedonia Malta Moldova Montenegro
<b>1</b>	<b>9</b>	<b>19</b>	<b>2</b>	<b>11</b>

### D. INITIATIVES OR CHALLENGES FOR 2014: REDUCE COPYRIGHT PIRACY, REMOVE MARKET ACCESS BARRIERS, AND STRENGTHEN LAWS

This submission and its appendices aim to define and seek implementation of solutions to significant commercial hurdles faced by the copyright industries of the U.S. The following list of cross-cutting initiatives and challenges summarizes actions governments must execute to reduce copyright piracy, open markets to legitimate U.S. copyright exports, and ensure that adequate legal structures are in place to lower piracy levels.

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

Copyright piracy increasingly occurs in ways more sophisticated than the mere duplication and sale of content on physical media. Piracy also includes:

- the illegal copying, uploading, downloading, making available, communicating, and streaming of copyright materials on the Internet or mobile networks, or contributing to, benefitting from, promoting, or otherwise inducing the same, including, for example, websites or services that often cloak themselves under the

<sup>10</sup>The notation "306" refers to monitoring of a country's compliance with trade agreements with the U.S. under Section 306 of the Trade Act.



guise of legitimacy with advertising and payment methods, giving consumers the impression they are authentic;

- the unauthorized use of software or other copyright materials by enterprises or governments;
- the illegal camcording of movies from theaters;
- the illegal photocopying or pirate offset printing of books;
- the illegal public performance, broadcast, or dissemination via cable of audiovisual works or sound recordings; and
- hard-disk loading of software or other copyright materials onto computers, laptops, smart phones, tablets, or other mobile devices without authorization or license.

Related to piracy are activities such as:

- the development, manufacture, distribution, or deployment of (and services related thereto) circumvention technologies, software, devices, or components, including game copiers, mod chips, key codes and cracks, used to access, copy, or otherwise use copyright materials protected by technological protection measures (TPMs);
- the development, manufacture, or distribution of “media boxes” including “HD players,” in which gigabytes or terabytes of storage space can accommodate hundreds of high definition movies and other content, and boxes that can directly link to websites providing illegal downloading or streaming, and to televisions and smart TVs for displaying the unauthorized content;
- the trafficking in counterfeit software packaging, labels, holograms, certificates of authenticity, or documentation; and
- the development, manufacture, or distribution of pay TV decryption technologies, devices, or components; or the unauthorized decryption of, or line-tapping to illegally obtain access to, pay TV signals.

Too often, whether due to lack of political will or inadequate rule of law, countries fail to address piracy effectively. The overarching objectives for the copyright industries therefore remain: 1) to secure globally effective legal frameworks capable of providing deterrent enforcement against copyright piracy; and 2) to ensure that enforcement authorities robustly use these legal frameworks to combat copyright infringement. To do so, countries should:

- dedicate enforcement resources commensurate with the scale of the piracy problem, to provide for “effective action” and “remedies that constitute a deterrent”<sup>11</sup> to infringement as the minimum required by the World Trade Organization’s TRIPS Agreement,<sup>12</sup> through civil, administrative, and criminal action, and effective adjudication in the courts;<sup>13</sup>
- train, build capacity, and empower enforcement authorities to investigate and prosecute copyright offenses;
- update laws and enforcement tools to meet the current piracy challenges, including organized crime and cybercrime syndicates;<sup>14</sup>

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<sup>11</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. Recidivism is endemic in many countries. Deterrence requires substantial prison sentences in these cases.

<sup>12</sup>*Agreement on Trade-Related Aspects of Intellectual Property Rights*, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, THE LEGAL TEXTS: THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 320 (1999), 1869 U.N.T.S. 299, 33 I.L.M. 1197 (1994), Art. 41.

<sup>13</sup>In many countries, specialized IP courts have been established, in addition to special IP or cybercrime investigative units with police and prosecutors. In the most successful examples, such specialized courts or units are making a difference in reducing piracy.

<sup>14</sup>Piracy (both online and offline) has been taken over in many countries by organized crime syndicates linked across national boundaries, that control large amounts of capital, and exploit complex distribution networks. The private sector does not possess the tools, nor usually the legal authority, to investigate and fight organized



- direct government agencies, state-owned enterprises, contractors, and educational institutions, to use only legal software, legal copies of textbooks, educational materials, professional and scholarly publications, and other copyright materials, and to ensure their networks or computers are not used for infringing purposes;
- ratify and fully implement the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT) and enforce resulting prohibitions as a means of reducing piracy;
- encourage cooperation by Internet service providers (ISPs) with all content owners, including notice and takedown systems for the hosted environment, and effective and fair mechanisms to deal with repeat infringers, non-hosted infringements, and infringements on foreign websites; and
- enact and enforce measures to make it illegal to use or attempt to use an audiovisual recording device in an exhibition facility to copy or transmit a motion picture, in whole or in part.

## 2. Internet Piracy

Transformative developments on the Internet and mobile (WAP, 3G, Wi-Fi) networks have created opportunities for faster, more efficient and more cost-effective distribution of information, products and services across the globe. Estimates suggest almost 2.8 billion individuals use the Internet as of 2013, according to the International Telecommunications Union (ITU). ITU estimates almost the same number of mobile and fixed broadband users, due to a surge in mobile broadband connectivity which has almost doubled in the past two years. This connectivity has had a positive transformative effect on many economies, and provides significant opportunities to copyright-intensive industries to build legitimate businesses based on their products and services. Unfortunately, the opportunities are compromised by the challenges of Internet and mobile piracy. According to NetNames, an astonishing 23.8% of all Internet bandwidth in North America, Europe, and the Asia-Pacific was devoted to copyright infringement.<sup>15</sup> A similar 2011 study concluded that nearly half of all infringing activity occurred using BitTorrent, with the rest divided among cyberlockers, peer-to-peer (P2P) downloading and uploading, forums or bulletin boards, and streaming.<sup>16</sup> Research also indicates there is a correlation between shutting down a major suspected piracy service, or improving enforcement legislation, and increases in legitimate distribution of copyright materials.<sup>17</sup>

The harm from Internet (and mobile) piracy cannot be overstated. Unauthorized downloading or streaming of a motion picture, for example, often sourced to a single illegal camcording incident, can decimate box office sales and harm subsequent release windows.<sup>18</sup> Online and mobile piracy threatens the viability of licensed platforms, and erodes the capacity of artists, musicians, filmmakers, performers and songwriters to earn a living from their craft. Online piracy of entertainment software continues to be overwhelmingly

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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; this has prevented enforcement activity by the private sector in many instances. Governments can step up to this challenge, including by applying their organized crime laws, like Hong Kong's Organized and Serious Crimes Ordinance and the United Kingdom's Serious Crimes Act 2007, to bring enhanced remedies (such as seizure or freezing of assets) to bear against syndicate operations involved in piracy. Since 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>15</sup>David Price, *Sizing the Piracy Universe*, NetNames, September 2013 (available to registered users).

<sup>16</sup>Envisional, *Technical Report: An Estimate of Infringing Use of the Internet*, January 2011 (on file with IIPA).

<sup>17</sup>See, e.g., Brett Danaher, Michael D. Smith, Rahul Telang, Siwen Chen, *The Effect of Graduated Response Anti-Piracy Laws on Music Sales: Evidence from an Event Study in France*, January 21, 2012, available at SSRN: <http://ssrn.com/abstract=1989240> or <http://dx.doi.org/10.2139/ssrn.1989240> (increased consumer awareness of HADOPI caused iTunes song and album sales to increase by 22.5% and 25% respectively relative to changes in the control group); Dianna Dilworth, *How to Stop Piracy: Carnegie Mellon Professor Michael Smith at DBW*, January 16, 2013, at [http://www.mediabistro.com/appnewser/how-to-stop-piracy-carnegie-mellon-professor-michael-smith-at-dbw\\_b31162](http://www.mediabistro.com/appnewser/how-to-stop-piracy-carnegie-mellon-professor-michael-smith-at-dbw_b31162) (Carnegie-Mellon Economist Michael D. Smith indicates his research demonstrates that every 1% reduction in Megaupload usage translated into a 2.6-4.1% increase in legitimate digital sales).

<sup>18</sup>The motion picture industry's distribution patterns (including theatrical, on-demand, pay-TV, home video, and legitimate online services) have been undermined by the availability of Internet downloads or streaming of their films.



international, as reflected in ESA vendor monitoring of P2P and direct download activity.<sup>19</sup> Book and journal publishers are plagued by sites that provide and deliver unauthorized digital copies of medical and scientific journal articles on an illegal subscription basis, as well as sites that traffic in illegally obtained subscription login credentials, and increasingly face online piracy of trade books (fiction and non-fiction) and academic textbooks. Counterfeit software products remain prevalent on certain auction and e-commerce sites, as well as on professional-looking sites that deceive consumers, selling well-packaged but poor quality counterfeit copies of software.

As one mechanism to bring to light concerns over businesses built on Internet and mobile piracy, the U.S. Government has launched, as part of the “Special 301” process, an “Out-of-Cycle Review of Notorious Markets.” Through this process, the U.S. Government has successfully identified key online and physical marketplaces that are involved in intellectual property rights infringements. IIPA has participated in each Notorious Markets OCR, most recently in October 2013, in which IIPA identified almost 80 notorious online marketplaces, some of the most accessed sites in the world.<sup>20</sup> The Notorious Market process has led to positive developments, including: closure of some Internet websites whose businesses were built on illegal conduct; greater cooperation from some previously identified “notorious” and other suspect sites; and the facilitation of licensing agreements for legitimate distribution of creative materials.

To effectively address Internet and mobile piracy, governments must attack both supply and demand. Education and criminal and administrative actions all have a role to play. A sound framework for civil actions, and legislation that creates incentives for network service providers to curb the use of their networks and services for infringing purposes, are also essential. Some of the solutions are quite straightforward. Governments must provide adequate legal frameworks for the protection of copyright online, including provisions that: implement the WCT and WPPT (discussed below); recognize online piracy as a form of cybercrime;<sup>21</sup> and foster cooperation among stakeholders (including ISPs) in the online supply chain to combat online infringements.<sup>22</sup> It is notable that online piracy rates in many of our FTA partners are quite high, including countries like Australia and Singapore which have unacceptably high rates of online piracy—at least for films and music. For free trade agreements to fulfill their promise of fostering legitimate commerce, it is critical that each our trading partners adopt measures to effectively address their serious online piracy problems.

Increasingly, the role of advertising and ad networks in sustaining piracy has come under scrutiny. Some companies have decided to take affirmative steps to terminate such practices.<sup>23</sup> In some cases, advertisers may be unaware that their advertisements appear on sites that facilitate access to infringing content. It is imperative that the ad networks that contract with site operators to feed ads on their sites make

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<sup>19</sup>For 2013, ESA vendors identified Russia, Brazil, Italy, Ukraine, Spain, and India as the top countries in overall numbers of detected connections to select ESA member titles on public P2P networks.

<sup>20</sup>IIPA, *IIPA Written Submission Re: 2013 Special 301 Out-of-Cycle Review of Notorious Markets: Request for Public Comments*, 78 Fed. Reg. 57924 (September 20, 2013), 78 Fed. Reg. 60367 (October 1, 2013) (Extending Deadline), October 25, 2013, at [http://www.iipa.com/pdf/2013\\_Oct25\\_Notorious\\_Markets.pdf](http://www.iipa.com/pdf/2013_Oct25_Notorious_Markets.pdf).

<sup>21</sup>Governments should join and implement the Budapest Convention, 23.XI.2001, which contains, in Articles 10 and 11, obligations 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 to outlaw intentional aiding and abetting of such crimes.

<sup>22</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 and to address infringements 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>23</sup>See, e.g., Chris Brummitt, *APNewsBreak: Coke, Samsung Pull Vietnam Site Ads*, Associated Press, October 3, 2012, at <http://bigstory.ap.org/article/ coke-samsung-pull-ads-vietnam-website-citing-concerns-over-unlicensed-music-downloads> (reporting decisions by Coca-Cola and Samsung to divest from *zing.com* over piracy concerns).



ethical business decisions. We applaud those who have already done so, and urge all the responsible participants in the online advertising ecosystem to act to ensure that such infringing websites do not benefit from their advertising activities.<sup>24</sup> Similar choices are being made by payment processors (online services as well as more traditional credit card companies) to halt services to pirate or counterfeit operations.<sup>25</sup> Finally, the role of search engines in the copyright value chain needs further scrutiny. As an indication that more needs to be done to establish the right framework for legitimate commerce in copyright materials, the music industry just noted its 100 millionth notice to a major search engine,<sup>26</sup> and a study conducted for the motion picture industry suggests that users searching for legal content are more often than not being directed to pirated content online.<sup>27</sup>

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

The unauthorized use of software within enterprises, also referred to as “enterprise end-user software piracy,” remains a highly damaging form of infringement to the software industry. In the most typical examples, a corporate (or governmental) entity either uses pirated software exclusively, or else purchases one or a small number of licensed copies of software and installs the program on multiple computers well beyond the terms of the license. Client-server overuse, another common example of end-user piracy, occurs when more than the licensed number of 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. In whatever way this piracy is carried out, it gives the enterprises involved the productivity benefits that the software provides, while foregoing most or all of the expense of licensed copies of the software, thus giving them an unfair commercial advantage over their competitors who pay for their software. On a macroeconomic level, countries with high piracy rates compete unfairly with countries that have lower rates.<sup>28</sup> Sometimes enterprise end-user software piracy is attributable to negligence and poor software asset management (SAM) practices. In many cases, this piracy is undertaken willfully, with management fully aware and supportive of the conduct. Adequate laws prohibiting the unauthorized use of software in a business setting must be enacted and enforced, including, in appropriate cases, through criminal prosecutions,<sup>29</sup> in order to reduce software piracy. The adoption of pre-established (statutory) damages for copyright infringement is also needed in many countries to provide predictability, encourage settlements, and provide “remedies which constitute a deterrent to further infringements,” as required by TRIPS Article 41.<sup>30</sup>

The use of unlicensed software by government agencies remains a serious and widespread problem. Since the government is often a major, and in some cases the largest, buyer of software in many countries, this has a tremendous impact on sales of legitimate software. It also undermines the credibility of government enforcement efforts against software piracy and sets a bad example for private enterprises to follow.

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<sup>24</sup>Interactive Advertising Bureau (IAB), *Standards, Guidelines & Best Practices*, at <http://www.iab.net/guidelines/508676>.

<sup>25</sup> For example, the “CD Cheap” case, involving a criminal counterfeiting ring that employed 10,000 slave computers to sell counterfeit software, was shut down when financial institutions closed the merchant accounts of the sites involved, for violations of terms of service prohibiting fraudulent activities.

<sup>26</sup>Cary Sherman, *Google's 100 Million Notices*, The Hill, January 13, 2014, at <http://thehill.com/blogs/ballot-box/195107-googles-100-million-notices> (noting the music industry had sent its 100 millionth copyright takedown notice to Google in January 2014, without a “demonstrable demotion of sites that receive a high volume of piracy notices”).

<sup>27</sup>MilwardBrown Digital, *Understanding the Role of Search in Online Piracy*, 2013, at <http://www.mpa.org/resources/38bc8dba-fe31-4a93-a867-97955ab8a357.pdf>. The study found, “[t]he majority of search queries that lead to consumers viewing infringing film or TV content do not contain keywords that indicate specific intent to view this content illegally,” and “58% of queries that consumers use prior to viewing infringing content contain generic or title-specific keywords only, indicating that consumers who may not explicitly intend to watch the content illegally ultimately do so online.”

<sup>28</sup>For example, China’s 77% PC software piracy 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 (the US has a 19% PC software piracy rate) pay on average for more than four out of five copies.

<sup>29</sup>TRIPS Art. 61 requires that this remedy be available against corporate end-user piracy.

<sup>30</sup>The U.S. has the lowest software piracy rate in the world, due in large part to the deterrent impact of infringers knowing that right holders can avail themselves of statutory damages.





Moreover, the use of unlicensed software creates security vulnerabilities and risks for government agencies. Government software legalization problems arise in many countries, including China, Ukraine, and Korea.

- **China:** The Chinese Government has made numerous bilateral commitments to the U.S. and issued directives to ensure legal software use in government agencies at all levels (central, provincial, municipal, county) and in state-owned enterprises (SOEs). While the Chinese Government has implemented some efforts to legalize software use, it has not been comprehensive and significant problems remain. Fewer efforts have been implemented for the more commercially meaningful SOE sector. We urge the Chinese Government to implement comprehensive legalization programs for government agencies and SOEs that encompasses all types of software, have audit and verification systems, and utilize SAM best practices.
- **Ukraine:** The Ukrainian Government has also made bilateral commitments to the U.S. and issued directives to combat unlicensed software use by the government, but to date has taken woefully inadequate steps toward this result. Ukraine was designated a Priority Foreign Country in 2013 by the U.S. Government for several serious problems, including the “widespread use of infringing software by Ukrainian Government agencies.”
- **Korea:** The Korean Government agreed to obligations on government software legalization in the Korea-U.S. Free Trade Agreement (KORUS); yet there remains a significant problem with several ministries not taking steps to resolve the issue of substantial unlicensed software use.

Comprehensive government software legalization programs that utilize SAM best practices are the best way to address enterprise end-user piracy, both within government agencies, in SOEs (e.g., in China), and in the private sector. Governments should also take steps to ensure that businesses that provide goods and services under government contracts do not use unlicensed software.

End-user piracy is not limited to software but affects other copyright sectors as well. For example, in some government, school and university facilities, photocopy machines are routinely used for commercial-scale book piracy. Use of networks, computers, or other equipment owned by a government or public institution to carry out infringement is particularly objectionable. 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.

#### 4. **Hard-Disk Loading, Mobile Device Piracy, and “Media Boxes”**

Not all retail piracy involves the sale of illegal copies directly. One example is “hard-disk loading,” performed by unscrupulous computer manufacturers and dealers who install copies of software without authorization from the copyright holder onto the internal hard drive of the personal computers they sell. Similarly, pirates operate stalls or kiosks, or “repair” shops, offering to load unauthorized copyright material onto any device, cell phone, smart phone, tablet, mp3 player, external hard disk, pen, thumb, flash, or USB drive. Others provide an illegal “app” for a smart phone or tablet to illegally download content, especially in countries with significant mobile penetration and mobile broadband. Another relatively recent phenomenon involves the manufacture, distribution, and use of “media boxes” which facilitate massive infringement. These media boxes are generally manufactured in China and exported to overseas markets, particularly throughout Asia. They can be pre-loaded with hundreds of high definition (HD) motion pictures prior to shipment; loaded with content upon delivery; or plugged directly into Internet-enabled TVs, facilitating easy access to remote



online sources of unauthorized entertainment content including music, music videos, karaoke, movies, and TV dramas. Enforcement authorities must take effective action against these forms of piracy, or losses will mount.

## **5. Circumvention of Technological Protection Measures (TPMs)**

Today, more consumers enjoy authorized access to more copyright works in more diverse ways and at more affordable price points than ever before. A major reason for this progress is the widespread use of TPMs to control and manage access to copyright works. Myriad innovative products and services are currently made available in connection with works protected by TPMs, and new business models that depend on such controls are emerging and being extended to new markets constantly. TPMs also ensure that works made available in hard goods, or in the online or mobile environment, are not easily stolen. For example, game consoles contain TPMs so that infringing copies of games cannot be played. DVDs are protected by “content scramble system” (CSS) 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. Many software packages are licensed with some type of technological protection measure (encryption, passwords, registration numbers). E-Books employ access and copy controls as well.

Unfortunately, just as content owners depend on TPMs to enable new means to disseminate creative content, there are those who build their entire business models around manufacturing and distributing technologies, software, devices, components, or tools (and services related thereto) to fill the demand for gaining unlawful access to the content or copying it. The “mod chip,”<sup>31</sup> “game copier,”<sup>32</sup> and software and technologies used for “soft modding” facilitate piracy on game console platforms, and require strong legal measures and enforcement to make space for the sale of legitimate games. While TPM legal protection, where properly implemented, enables effective enforcement actions against distributors of unlawful circumvention technologies, these efforts are critically undermined by countries that have yet to implement such protections adequately or at all. Countries that lack TPM provisions not only fail to afford domestic protections for legitimate online business models, but also serve as a regional or global source of circumvention devices for those who live in countries where such devices and technologies are prohibited.

## **6. Illegal Camcording of Theatrical Motion Pictures**

One of the greatest concerns to the motion picture industry involves illegal recordings of movies from theaters, especially immediately after a title’s theatrical exhibition window opens. Approximately 90% of newly released movies that are pirated can be traced to use of a digital recording device in a movie theater to record the audiovisual work (whether image or sound or both) from the theater screen and/or sound system. The increase in the severity of this problem in recent years tracks the development of camcorder technology that makes detection difficult and copies nearly 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 markets just after a film’s theatrical release, and well before it becomes available for legal home entertainment rental or purchase from legitimate suppliers.

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<sup>31</sup>There is a global market for modification chips (mod chips) sold on the Internet and in videogame outlets which, when easily installed into a console (by the user or by the pirate retailer) will bypass access controls and allow the play of pirated games.

<sup>32</sup>“Game copier” devices also bypass TPMs to allow for uploading, copying, and downloading of games for handheld platforms.



A multifaceted approach is needed including: 1) educating the public about the problems posed to businesses and the consumer by unauthorized camcording; 2) working with the private sector to identify and prevent unauthorized camcording in cinemas; and 3) developing and implementing legal measures to effectively deter unauthorized camcording. In 2013, MPAA identified 819 total illegal recordings of its member company titles from cinemas around the world, including 286 video captures and 533 audio captures. This number does not include the numerous independent or local country films illegally camcorded; producers of these films also suffer gravely from illegal camcording. Anti-camcording legislation – outlawing the possession of an audiovisual recording device in a theater with the intent to copy or transmit all or part of a motion picture – is critical to stopping the rapid increase in camcording. Effective anti-camcording laws have now been adopted in many countries, leading to dramatic drops in the number of pirate titles sourced to those countries' cinemas.<sup>33</sup> The international community is also speaking with one voice on this issue.<sup>34</sup>

## 7. Piracy of Books and Journals

The book publishing industry continues to be plagued by large scale unauthorized photocopying of academic, scientific, technical and medical books, principally on and around university campuses; sophisticated infringing offset print versions of books (essentially akin to counterfeiting); and unauthorized translations of popular books. Unauthorized commercial copying of entire textbooks by copy shops on and around university campuses is common, often undertaken on a “copy-on-demand” or “print-to-order” basis (from electronically stored digital files) to avoid stockpiling. Commercial print piracy is prevalent in many developing countries, where unauthorized operations obtain masters or copies of books and run unauthorized editions off a printing press, in English or in unauthorized translations. While many pirated copies are rife with errors or obviously of inferior quality, in some cases sophisticated scanning and printing technologies result in extremely high-quality pirate editions of books, making it difficult for users to distinguish between legitimate and pirate products.

Book and journal piracy calls for aggressive action by law enforcement authorities. Universities and educational institutions (especially those which are state-funded or operated) should do more to promote and adopt 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.

## 8. Optical Disc Piracy

Hard goods piracy, including optical disc (OD) products,<sup>35</sup> continues to inflict losses, especially in markets with low Internet penetration. As large-scale factory production of optical discs has waned, smaller, more agile operations that “burn” music, books and reference publications, video games, movies, and software onto recordable media, has increased. CD-R or DVD-R “stack” bays (of ten or twenty discs when “daisy-chained”) are lightweight and can produce multiple discs in minutes. Producers/vendors set up production or distribution operations in a wide variety of locations, including old factories, warehouses, or “burn to order” shops, often blurring any distinction between retail piracy and pirate production. In response,

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<sup>33</sup>Examples include Canada and Japan.

<sup>34</sup>The 21 members of the Asia-Pacific Economic Cooperation (APEC) committed, in November 2011, to “developing and implementing legal measures to effectively deter unauthorized camcording,” as well as working with the private sector and educating the public. *Effective Practices for Addressing Unauthorized Camcording*, 2011/AMM/014app05, adopted at 23rd APEC Ministerial Meeting, Hawaii, United States, November 11, 2011.

<sup>35</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.



programs such as surprise OD production plant or shop inspections and exemplar (sample) disc collection should continue. Where unlicensed or illegal activity is detected, copyright laws or specialized OD laws or regulations should be enforced. As an example of the harm caused, high-quality counterfeit software, DVDs, Blu-ray discs, and box sets of music or audiovisual materials continue to be manufactured in China and find markets throughout Asia, the Middle East, and Africa. Without sustained enforcement actions against these factories or production or distribution hubs, and without prosecution of their owners and financiers, there will be little progress in curtailing this problem.

## **9. Pay TV Piracy and Signal Theft**

The unauthorized broadcast, cablecast or satellite delivery of motion pictures, television content, and music and sound recordings, including the unauthorized retransmission of broadcast signals over the Internet, costs right holders dearly. Other problems include: unauthorized tapping into the lines of legitimate cable TV companies; operators who take broadcast signals by unauthorized means (hacked set-top boxes or “overspill” boxes from neighboring countries), replicating the signal and selling it to consumers without paying for any of the content, a problem of growing severity in several countries in the Caribbean region, as well as Guatemala and Honduras; and rogue pirate TV channels that create their own broadcasts by playing a DVD and airing the signal on their system, a problem re-emerging in Egypt and the broader Middle East and North Africa (MENA) region. In most of these cases, the signals are encrypted, and pirates must circumvent or hack in order to access the content. Regulations and enforcement must therefore focus on prohibiting the trafficking in pay TV or signal theft devices or technologies, the unlawful decryption of encrypted cable or satellite signals, as well as the onward use of the signals already decrypted (whether lawfully or not), without the authorization of the right holder of the content or of the signal. Licensing of broadcasters and cablecasters, and weeding out unlicensed television distributors, can also be helpful in addressing signal theft.

## **10. Implementation of IPR Provisions in Trade Agreements**

The negotiation of multilateral trade agreements (such as the WTO TRIPS Agreement), as well as regional and bilateral free trade agreements (FTAs) or Trade Promotion Agreements (TPAs) over the past two decades, has proven to be of great value to the U.S. economy. These agreements feature enforceable obligations for our trading partners to modernize their copyright law regimes and improve enforcement procedures. These agreements have helped U.S. copyright industries to compete fairly in foreign markets, and have helped our trading partners develop their domestic copyright industries, a true win-win for all parties. In addition to TRIPS implementation, U.S. FTAs or TPAs with 20 countries have entered into force, most recently with Korea, Colombia and Panama in 2012.

The pending negotiations for a Trans-Pacific Partnership (TPP) FTA present an opportunity to expand the benefits of existing FTAs to a broader range of markets around the Pacific Rim. The Government of Japan officially joined the TPP negotiations in 2013, bringing the total number of countries negotiating the agreement to twelve.<sup>36</sup> Through TPP, enhanced copyright and enforcement standards, building upon those agreed to by TPP negotiating parties that are also current FTA partners, Australia, Singapore, Chile, and Peru, and found in KORUS, should be extended to other countries in the region. Such an outcome will contribute to U.S. job growth, increase exports, and facilitate continued economic stabilization in line with the Administration’s goals. IIPA also urges USTR to seek through the TPP negotiations opportunities to address the range of market

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<sup>36</sup>TPP negotiating countries now include Australia, Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, the United States, and Vietnam.



access impediments identified in various TPP negotiating countries.<sup>37</sup> The TPP E-Commerce chapter and market access provisions for services and investment should require TPP negotiating countries not only to eliminate discriminatory taxes and policies, but also to open markets to foreign competition, including in the creative and cultural sectors. We remain hopeful that the TPP negotiations will aid in the elimination of discriminatory barriers as well as bring copyright laws and enforcement regimes into line with evolving global norms.

In addition to implementation issues identified in various country reports in Appendix A, IIPA takes notice of the following countries for issues related to their bilateral, regional, or multilateral obligations in the area of intellectual property rights.

- **Antigua and Barbuda:** In January 2013, the Government of Antigua and Barbuda sought and obtained from the WTO approval to cross-retaliate against U.S. intellectual property rights worth \$21 million a year as a remedy in an unrelated trade dispute. At the opening of the 2014 session of the country's parliament, Governor General Dame Louise Lake-Tack, in her Speech from the Throne, reportedly confirmed that the Government of Antigua and Barbuda was making the "necessary amendments" to revise the country's intellectual property laws "to invoke the WTO-approved sanctions by removing any protection which U.S. intellectual property may have in Antigua and Barbuda."<sup>38</sup> IIPA's firm view has not changed, that suspending intellectual property rights is not the right solution, and that state-sanctioned theft is an affront to any society. Should the Government of Antigua and Barbuda determine to move forward in this manner, it would be in violation of its obligations under international instruments not administered by the WTO (e.g., the Berne Convention), and would – by definition – fail to provide adequate and effective IPR protection as required under U.S. trade laws governing unilaterally-granted trade benefits such as those offered under the Caribbean Basin Initiative. In that event, we believe that the U.S. should take appropriate, immediate and robust action to uphold U.S. trade laws.
- **Colombia:** Colombia should be encouraged to take effective steps in 2014 to implement its TPA obligations and to increase the focus of law enforcement officials on needed anti-piracy actions on the streets of Colombia and online. With the January 23, 2013, decision of the Constitutional Court declaring the 2012 amendments to the Copyright Law unenforceable, Colombia is now nearly two years overdue in bringing its copyright law into compliance with the obligations that went into effect with the signing of the TPA in April 2012. We urge Colombia to take the necessary steps to finalize the implementation of the TPA, and in particular to pass copyright amendments restoring the provisions of the 2012 law, and also to address ISP responsibility consistent with the FTA. We look forward to Colombia taking prompt actions that reflect its commitment to building and maintaining a robust and modern intellectual property protection and enforcement regime for Colombian and U.S. creators alike.
- **Korea:** One important aspect of the IP chapter of the KORUS FTA was the commitment Korea made to ensure that its central Government agencies would utilize legitimate software. Software industry representatives have raised concerns about significant under-licensing of software within the Korean Government. Although the Ministry of National Defense has taken steps in the right direction, other Korean Government agencies have to date not taken sufficient action in response to these concerns. For example, auditing appears not to follow best practices in many circumstances and to be nonexistent in others. Korea also fails to provide adequate funding for at least some Korean Government agencies to

<sup>37</sup>As an example, IIPA notes that Vietnam has some of the most restrictive market access barriers in the world for copyright materials.

<sup>38</sup>The full text of Governor General Dame Lake-Tack's reported speech is available at [http://ab.gov.ag/article\\_details.php?id=4640&category=38](http://ab.gov.ag/article_details.php?id=4640&category=38).



purchase the software they actually use. IIPA will be closely monitoring this issue in Korea and will consult closely with the U.S. Government on means to address it.

- **Morocco:** The Moroccan Government agreed to specific government software legalization commitments under the U.S.-Morocco Free Trade Agreement. However, concerns have been raised on behalf of U.S. industry about the failure of the Government to effectively ensure the compliance of certain ministries with these commitments.

## 11. Implementation of the WCT and WPPT

The WCT and WPPT, in force since 2002, provide a basic legal framework for the protection of online copyright. The WCT now has 91 adherents, while the WPPT has 92. 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. Implementing the WCT and WPPT includes express protection for 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 fall within the exclusive reproduction right). This is important since businesses and consumers can fully exploit copyright materials they receive over a network without ever making a permanent copy. Implementation also includes a treaties-compatible definition of “communication to the public,” including an interactive “making available” right. Finally, implementation includes prohibiting, through civil and criminal remedies the circumvention of TPMs (access and copy controls) and trafficking in circumvention technologies, software, devices, components, and services. A number of key trading partners, including New Zealand and Israel among developed countries, and Thailand among developing countries, have not yet either ratified or fully implemented these treaties. The United States, which was one of the first countries to implement these changes in its laws 15 years ago, should continue to make it a priority to encourage other countries to follow this path.<sup>39</sup> In the more than 17 years since the adoption of the WCT and WPPT at WIPO in Geneva, WIPO has taken some steps to encourage its members to join and implement the treaties, but more should be done.

## 12. Market Access Barriers

The U.S. copyright industries suffer from myriad market access barriers, investment barriers, and discriminatory treatment that make it difficult to compete in some foreign markets on a level playing field. All efforts to crack down on piracy will be unavailing if legitimate products and services cannot be brought into a market to meet consumer demand. Thus, the reduction of market access impediments is a key component of ongoing efforts to combat piracy. Among other forms, the market access barriers include:

- ownership and investment restrictions on copyright-related businesses;
- discriminatory or onerous content review/censorship systems;<sup>40</sup>
- discriminatory restrictions on the ability to fully engage in the business of development, creation, production, distribution, promotion, and publication of copyright materials;

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<sup>39</sup>The United States 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>40</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.



- the maintenance of quotas including screen time and broadcast quotas or complete bans on broadcast of foreign programming or advertising;
- periods during which governments prevent U.S. producers from opening their films, or onerous restrictions on the window for theatrical distribution (including unfairly shortening the run of a theatrical motion picture);
- local print requirements;
- onerous import duties or the improper assessment of duties on an *ad valorem* basis;<sup>41</sup>
- government procurement preferences for domestic products or those with locally-owned or locally-developed IP; and
- 1) restrictions on cross-border data flows, or 2) requirements that companies locate servers, data centers or other computing facilities in a country as a condition for market access; both of which impede the development of businesses involving software distributed via cloud computing and other digital services.

Whatever form they take, whenever such market access restrictions impede the entry of legitimate products, they make it easier for pirate operations to fill the void, become *de facto* “exclusive” distributors of the products, and cement strong loyalties with their consumer base that make them even harder to dislodge. U.S. officials should continue to strive to open markets and to eliminate or phase out market access barriers including those identified in this year’s IIPA submission.

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## E. CONCLUSION

The health and competitiveness of the U.S. economy depends on a thriving copyright sector that creates revenues, 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. Our country should remain committed to a flexible and innovative response to the constantly evolving threats to copyright worldwide. Special 301 remains one cornerstone of the U.S. response. We urge USTR and the Administration to use the Special 301 review and other trade tools to encourage the countries and territories 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,

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Counsel for  
International Intellectual Property Alliance

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<sup>41</sup>*Ad valorem* duties are 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).

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# UKRAINE

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2014 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** IIPA recommends that Ukraine be retained as a Priority Foreign Country in 2014.<sup>1</sup>

**Executive Summary:** On May 1, 2013, the U.S. Government designated Ukraine as a Priority Foreign Country (PFC), and on May 30th initiated an investigation under section 301 of the Trade Act of 1974. Under the Trade Act, countries are designated a PFC if “acts, policies and practices” are deemed “unreasonable and burden or restrict U.S. commerce” including “the denial of adequate and effective protection of intellectual property rights.” The 2013 designation of Ukraine as a PFC was based specifically on three critical shortcomings in Ukraine’s intellectual property rights (IPR) regime: (1) the failure to implement “an effective and systemic means to combat widespread online infringement of copyright and related rights;” (2) “the unfair, nontransparent administration of the system for collecting societies;” and (3) the “widespread use of infringing software by Ukrainian government agencies.”

The U.S. Government’s PFC investigation is now focused on rectifying these three serious problems, and determining the amount of economic harm to U.S. rights holders that they are causing; the investigation ends on February 28, 2014. These IPR shortcomings have caused, and continue to cause severe economic harm to (i.e., are a “burden” on) copyright rights holders in Ukraine, as well as to Ukrainian and other foreign rights holders, and have resulted in unfair and inequitable discrimination of market access opportunities for rights holders. While recognizing the present political circumstances in Ukraine, IIPA urges the U.S. Government to continue its efforts to correct these identified IPR deficiencies, and if the Government of Ukraine does not do so, to use all available remedies under U.S. trade laws to compensate for the economic losses incurred. In addition, Ukraine should remain a Priority Foreign Country until these matters are satisfactorily corrected.

Each of the identified problems are long-standing ones in Ukraine, for which solutions exist through administrative and executive actions, as well as legislative reforms. The ultimate goal of IIPA and its members is not to harm trade relations between the U.S. and Ukraine, but to enhance the economic climate and conditions in Ukraine for copyright creators and producers (U.S. and Ukrainian). In our view, undertaking the recommended actions on each of the three PFC-identified problems, as set out in detail below, would best accomplish this goal.

Weak copyright protection has been a problem in Ukraine for many years, but in the past few years the situation has substantially worsened, and piracy rates remain exceedingly high. Ukraine is a key country in the region for effective enforcement of IPR because it exports piracy, especially digital piracy, into both European Union markets and other countries in the Commonwealth of Independent States (CIS). For example, there are several notorious websites hosted in Ukraine by Ukrainian Internet Service Providers (ISPs) that, while identified to Ukrainian enforcement officials, continue to act with impunity. In 2010, the Government of Ukraine developed an IPR “Action Plan” in cooperation with the U.S. Government, to combat and target the digital piracy problem; but, the plan was never implemented.

One key to correcting the deficiencies in Ukraine is improved and effective criminal enforcement. Ukraine is obligated to have effective enforcement, including criminal enforcement, in place under its treaty (including WTO/TRIPS) and bilateral commitments. Instead, Ukraine has established itself as a “safe haven” for criminal syndicates involved in copyright piracy, in particular, for piracy of software, recorded music, films and books. Neither

<sup>1</sup>For more details on Ukraine’s Special 301 history, see previous years’ reports at <http://www.iipa.com/countryreports.html>. For the history of Ukraine’s Special 301 placement, see <http://www.iipa.com/pdf/2014SPEC301HISTORICALCHART.pdf>. For a discussion of IIPA’s 2014 Key Initiatives and Challenges, see IIPA, *2014 Special 301 Submission*, at <http://www.iipa.com/pdf/2014SPEC301COVERLETTER.pdf>.



the proper resources and on-the-ground actions, nor the proper legal framework is in place for effective criminal enforcement. Ukraine (along with Russia) is a major source for free and pay-for-download piracy of music and film, and for some of the world's top BitTorrent systems. Ukraine also remains a global hot spot for high-quality illegal camcords of films that are uploaded to top sites and distributed across the Internet. In addition to digital piracy, Ukraine's many open air markets and street stalls remain replete with illegal copies of recorded music, films, and software. Irregular and insufficient border enforcement is another reason that pirate physical material is flowing freely into and out of Ukraine. These problems need to be addressed.

The withdrawal of benefits to Ukraine under the Generalized System of Preferences (GSP) program is one of the remedies available to the U.S. Government at the conclusion of the PFC investigation as a way to compensate for U.S. rights holder losses due to Ukraine's IPR problems. IIPA filed a petition in 2011 to have Ukraine's GSP benefits suspended or withdrawn. Given the current IPR circumstances (and assuming the GSP program is re-authorized in 2014), IIPA recommends that the U.S. Government accept the IIPA petition and suspend or withdraw Ukraine's benefits completely until the Government of Ukraine properly and completely addresses the three identified problems in its IPR regime.

## **PRIORITY ACTIONS REQUESTED IN 2014**

IIPA recommends the following priority enforcement actions and legal reforms to the Government of Ukraine in 2014. These would address the three PFC-identified problems – Internet piracy, unfair collective administration, and the use of illegal software by government agencies – as well as the other serious deficiencies in the Ukraine IPR regime.

### **Criminal Enforcement**

Criminal enforcement, including prosecutions and deterrent sentencing, focused on:

- Owners of the numerous free and pay-per-download and streaming film and music sites, as well as BitTorrent sites. Criminal enforcement authorities should be using existing laws to prosecute operators of sites dedicated to pirated music, film, business and entertainment software and/or printed materials (and including sites relying, in bad faith, on rogue collecting society licenses).
- Principals of the rogue collecting societies that claim to offer "licenses" to both online and physical businesses that they do not have the authority from rights holders to grant.
- Organized crime syndicates – applying criminal prosecutions and deterrent sentences instead of, as has been done to date, relying on non-deterrent administrative penalties. Targets should include the syndicates operating websites and peer-to-peer operations, hard-copy distribution centers, camcording operations, and optical disc media production facilities (including CD-burning operations).
- Owners and operators of open air and street market piracy, especially the piracy occurring at large outdoor markets and in the streets at or around underground stations, and near local shops and supermarkets.
- Owners and managers of commercial entities who ignore and/or fail to act against unlicensed software use taking place in their businesses.

To be effective, criminal enforcement requires: (1) coordination by key agencies – including the Ministry of Internal Affairs and General Prosecutors Office; (2) a significant increase in the number of investigations (criminal searches) and prosecutions; (3) additional resources, especially for IPR police enforcement personnel (bringing the force up to at least 250 officers); and (4) coordination of enforcement practices and investigations of IP-related crimes, including the issuance of guidelines for police officers.

## Administrative and Customs Enforcement, End-User Piracy, and Software Legalization

Administrative and customs enforcement, focused on:

- Actions against enterprise end-user software piracy targeting large-scale infringers, in lieu of the current targets which are small companies and individuals.
- Moving aggressively against copyright-infringing cable transmissions and retransmissions, public performances, and TV and radio broadcasting with administrative (and where, applicable, criminal) actions.
- Using *ex officio* authority to improve border controls, especially along the Russian border, focused on railroad traffic.

The government should allocate funds, on an ongoing basis, to achieve comprehensive software legalization in each ministry (in 2014), and the creation of an effective software asset management policy and practice (including audits) – as set out in the Action Plan. Further, we recommend: (1) developing and publicly promoting the plan for software legalization; (2) identifying the steps to be taken to implement the resolution of the Cabinet of Ministers (designating the individuals responsible in the process); and (3) placing the plan's implementation under the Prime Minister's supervision.

## Legal Reforms

Legal reforms focused on:

- Amendments to the Copyright Law, Law on Telecommunications and Code on Administrative Offences, to promote a fair and effective response to online piracy, including: (1) legal incentives for ISPs to cooperate with rights holders to effectively deal with Internet piracy; (2) rules that clarify the illegality of providing services that are intended to promote the infringement of copyright and related rights or that facilitate such infringement (including knowingly and intentionally providing links to infringing content); and (3) injunctive relief and a duty on Internet service providers (ISPs) to provide information to law enforcement agencies and rights holders. Amendments proposed by the State Intellectual Property Service of Ukraine (SIPSU) in 2013, intended to address at least some of these issues, would in fact weaken, not strengthen, the IPR enforcement regime.
- Copyright Law amendments to ensure that an unauthorized online distribution, communication or making available is considered an act of infringement, regardless of whether it is undertaken for profit-making purposes or other commercial benefit or advantage.
- Criminal Code amendments to Article 176 to ensure the availability of criminal remedies against online piracy of all works and sound recordings, as well as remedies against repeat infringers (even if each separate infringement is below the criminal infringement threshold); and to establish in the Criminal Procedure Code clear rules for prosecuting infringers.
- Amendments to the Copyright Law and Criminal Code to make camcording in movie theaters illegal by excluding such camcording from any "private use" exception, and criminalizing this activity. Additionally, amendments to the Law on Cinematography to repeal the requirements of the local production of film prints.
- Implementation of the 2003 and 2004 resolutions of the Cabinet of Ministers regarding legalization of software in state agencies – as required in the Action Plan.
- Amendments to the Copyright Law, the Civil Code, and regulations, to ensure that all relevant rights holders are entitled (in law and practice) to operate effectively through the collecting bodies of their choice (based on a criteria of "volume of rights" in active use) in the licensing of broadcasting, public performance and other communications to the public.

- Abolishing the hologram stickering system (or, at the very least, fixing it so that it cannot be used by infringers to make pirate product appear legitimate) – as required in the Action Plan. One draft proposal circulated in 2012 would have revised the hologram stickering system for videogames and software.
- Fully implementing the WIPO digital treaties – in the Copyright Law and Criminal Procedural Code. Ukraine acceded to the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT) in 2002.

## **COPYRIGHT ENFORCEMENT IN UKRAINE**

**Internet Enforcement:** The failure by the Government of Ukraine to implement an effective and systemic means to combat widespread online infringement is one of the three PFC-identified problems in Ukraine. Coupled with very weak Internet enforcement, there has been an exponential increase in the number of illegal peer-to-peer hosting and website-based Internet piracy sites, including BitTorrent sites (some of the world’s largest), located in Ukraine, which target audiences throughout Europe and the United States. The growth of the online piracy problem in Ukraine continues to accelerate. In 2013, Ukraine was fourth in the world in terms of the number of connections by peers participating in the unauthorized file sharing of select Entertainment Software Association (ESA) member titles on public P2P networks, up from fifth in 2012 and 20th in 2011.

In December 2012, *ex.ua* was listed by the U.S. Government as one of thirty “Notorious Markets” as a part of the Special 301 Out-of-Cycle review, because of the site’s ongoing illegal activity and what the U.S. Government described as its “full range of infringing content.” *Ex.ua* is probably the most popular unlicensed download and streaming site in Ukraine, allowing free streaming and downloading of unauthorized copyrighted content. There are hundreds of other pirate sites including torrent sites (which comprise about half of the total illegal sites), hyperlinks, cyberlockers, and streaming sites, such as: *extratorrent.cc* and *sumotorrent*, which offer large quantities of unauthorized downloaded content from the BitTorrent network; futubox, which is managed in Ukraine and offers films and TV programming; and many other sites which offer unauthorized pre-release and recently released music and film materials via storage locker links posted by the administrator and users of the site. The recording industry reports that free and paid download sites (like *newalbumreleases.com*, *topalbums.ru*, *clubiza.ru*, *cerber.org*, *avaxhom.cc*, *frurap.ru*, *jams.to* – all sites hosted in Ukraine) remain a major source of piracy in Ukraine (some selling whole albums for US\$1). Some of these websites offer incentives such as free giveaways in return for users making monetary “deposits” onto the sites. Few of these sites have suffered any meaningful stoppages of their activities. In fact, in the *ex.ua* case, the site was back in operation after a few days stoppage in 2012, and the criminal case was closed. In 2013, there were two reported criminal cases against torrent sites (*megahsara.org* and *ost.cv.ua*); the first resulting in a fine and the latter in a sentence of one years probation. There were 14 pirate sites, targeted by anti-piracy organizations, including *www.my-hit.ru* and *fs.tu.ua*, which were closed by the police in 2013 (both of those sites were operational within a month). There were 22 sites that changed their hosting locations (that is, were taken down, but resurfaced) as the result of enforcement actions.

A roadmap for improved enforcement against digital (and hard copy) piracy was agreed to in the U.S.-Ukraine Action Plan of 2010 – with very specific steps set out to effectively combat Internet piracy. The “plan” was actually a formal summary of commitments made by the Government of Ukraine (to the U.S. Government) over the past several years, but which have never been implemented.

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). In 2013, UAPA reported that the

police did commence some investigations, and eight LANs were taken down, and a few criminal prosecution cases were commenced against LAN operators.

In addition to infringing hosted content available for download, other common types of Internet piracy are: mail order – with orders placed online and products delivered by mail; sales of fake certificates of authenticity; and, the distribution of “cracked” product keys through locally hosted web-sites.

Legal reforms to address two issues are critically needed to effectively enforce against Internet piracy: (1) the current absence of any third party (ISP) liability in existing law; and (2) the inability of rights holders or enforcement authorities to collect information about suspected infringing website owners. As the U.S. Government noted in its 2013 designation of Ukraine as a PFC, the Ukraine IPR regime has failed “to institute transparent and predictable provisions on intermediary liability and liability for third parties that facilitate piracy; to introduce limitations on such liability for Internet Service Providers (ISPs); and to enforce takedown notices for infringing online content.” In fact, not only is there no clear third party liability that could incentivize cooperation between rights holders and ISPs, but the current Law on Telecommunications (Article 40, paragraph 4 on the “responsibility of operators”) bluntly states that ISPs “do not bear responsibility for the content of the information transmitted through their networks.” Article 38 states that ISPs can only disable end-users from the Internet, or block access to (i.e., take-down) infringing websites, with a court order. In the past, the ISP association (IAU) – citing this statutory language – has taken the position that rights holders need to go after illegal websites directly, without ISP assistance or cooperation. Reportedly amendments were proposed in December 2013 to the Law on Telecommunications, but it is unclear whether these would make any effective changes. Many of the websites offering pirated copyright materials are thriving in part because of the support of local ISPs (there are over 400 ISPs in Ukraine and over 150 sites offering pirated content). The copyright industries have, for years, been seeking private agreements (with governmental assistance) with ISPs to establish effective mechanisms to takedown illegal websites and slow illegal peer-to-peer traffic, and some ISPs will delete links upon request. The anti-piracy organization UAPA and the Motion Picture Association of America (MPAA) report about a 20% response rate to notice and takedown requests (there are no laws mandating compliance).

Currently, the Criminal Procedure Code does not grant police with *ex officio* authority (although some government officials claimed otherwise); so the police 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. Amendments to the Law on Telecommunications have been proposed in recent years, but not enacted, which would have assisted the police in conducting Internet crime investigations by providing subscriber information. Legislative deficiencies and lack of cooperation with ISPs thwart any attempts to focus on enforcement against Internet piracy. The copyright industries report that the lack of clear prosecutorial and judicial procedures for Internet-related cases is a bar to effective enforcement, with existing procedures too complicated to be used effectively. IIPA continues to recommend the adoption of guidelines and more effective procedures for police, prosecutors and judges for these crimes. In 2012, a special police cyber crime unit was created (with IP officers from the Economic Police) for the purpose of combating Internet crimes. This was a positive development but many more steps, including effective criminal enforcement, need to be undertaken.

**Collecting Societies:** The second of two identified PFC-problems in Ukraine is the unfair, nontransparent administration of the system for the collective administration of rights. Collecting societies in the music sector, specifically in connection with broadcasting, public performances and other communications to the public, can provide an effective and indispensable means for licensing. Currently, the accreditation process in Ukraine for collecting societies is in chaos. After years of mismanagement by the Government of Ukraine, a 2013 court order invalidated the entire existing accreditation procedure. The court rescinded an executive order that had vested authority to implement the accreditation of collecting societies in the State Department of Intellectual Property (SDIP) – now re-named the State Intellectual Property Service of Ukraine (SIPSU). SIPSU was housed within the Ministry of Education and Science, the ministry with authority over IPR matters, but in a re-organization, the IPR portfolio last

year was moved to the Ministry of Economic Development and Trade. The 2013 court decision put SIPSU's authority to accredit authorized collecting societies on hold. The current situation effectively denies rights holders their fundamental right to make fair and open (transparent) decisions about whether to be represented by any particular society, and has prevented the development of the marketplace for legal music services, resulting in the loss of millions of dollars in legitimate business for music rights holders in Ukraine.

The main criteria for accreditation should be to accredit the organization based on a majority of national and international repertoire represented. The accreditation process should reflect commercial realities and be based on the society that represents the "majority of commercially relevant rights holders," as IIPA and other organizations have long suggested. Under IIPA's proposed solution, the current accreditation system would be re-constituted and societies granted operational licenses based on their representation of a majority of commercially relevant rights holders – whether they be Ukrainian, American, Russian, or otherwise, and which undertake their operations in a transparent matter. That would avoid the old system of providing favorable treatment to the undemocratic (non-representative), non-transparent collecting societies that also have internal government influences, and which have unfortunately been allowed to operate.

Two legitimate organizations – the Ukrainian Music Alliance (UMA) (broadcasting), and the Ukrainian Music Rights League (UMRL) (public performances) – represent over 80% of the domestic and international repertoire for music. They were both registered by SDIP (SIPSU), under the prior regulations, although their status as the only accredited organizations in their respective areas (broadcasting and public performance) was revoked by SIPSU in 2012 despite their fair and transparent operations, as well as support from local and international rights holders. A new accreditation process was announced, and then overturned by an administrative court decision in January 2014 – leaving everything at a standstill. And worse, in the vacuum, rogue collecting societies continue to operate and prosper in the chaotic market.

In 2013, the Government of Ukraine proposed a "solution" to establish the state-owned UACRR as the only collecting society for composers, music publishers, producers and performers. This proposal came from the prior management of UACRR, and was not supported by rights holders. Under new management, UACRR changed its status and became a non-profit governmental organization, and the only Ukrainian member of CISAC (the international organization for collecting societies). Reconfirming UMA and UMRL as accredited registered rights management organizations (in their respective areas) would greatly improve the situation for producers and performers; the organizations need to be able to operate fully (and, if it would improve the efficiency of their operations and other societies to do so jointly in some areas, that should be a voluntary, contractual arrangement).

While the law in Ukraine provides for remuneration rights for the broadcasting or other public performances of musical works and sound recordings, it is estimated that over 90% of the broadcast and public performance market places are unlicensed. This problem has been significantly worsened because the Government of Ukraine has not undertaken proper actions against organizations which purport to grant "licenses" for which they do not have rights.

In 2013, the General Prosecutors Office (GPO) and SIPSU undertook investigations into the activities of the collecting societies (both those supported by rights holders, and the rogue societies). The Government of Ukraine should complete its thorough investigations, and take actions against societies based on any of their improper activities including violations of laws and regulations, and should cancel their registrations. Urgent action is needed to bring order to the licensing environment to ensure that rights holders and their licensed societies are not undermined by these unscrupulous organizations operating under false mandates.

Last, the procedure for authorizing a collecting society for private copying levies should be amended. The current regulation (order #503 from 2003) did not specify that there should be a single organization for this type of activity. As in the other areas, this has led to non-representative collecting societies (like VAAP) to seek authorization and collect this type of revenues alongside UMA, a rights holder supported organization.

**Software Legalization:** The third ground for the PFC investigation is the use of unlicensed software by various ministries within the Government of Ukraine (especially the Ministry of Interior, the offices of State Tax Inspection, and the Prosecutor's Office) and the lack of any systemic means to deal with this situation. Industry reports indicate the personal computer (PC) software piracy rate in Ukraine was 84% in 2011, with a commercial value of unlicensed software installed that year of \$647 million.<sup>2</sup> The use of unlicensed software by government agencies is a significant part of this problem. SIPSU, Ukraine's agency dedicated to IPR protection, estimates the software piracy rate in Ukrainian state agencies to be 40%; industry sources believe the rate to be significantly higher in part because many older computers are not even part of the government's assessment.

Regulations were passed in 2003 and 2004 to ensure the use of licensed software in government agencies but the Government of Ukraine failed to properly finance or implement these measures. The 2003 regulation provided for government institutions to use properly licensed software, and prohibited public servants from installing, using, or copying software without prior consultation with the 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 (now SIPSU), in order to try to eliminate the use of pirated software products in the public sector.

The continued use of illegal software by state agencies sets a poor example for the business sector, where illegal software use (i.e., enterprise end-user piracy) is practically the norm. IIPA has long recommended that the Government of Ukraine allocate to each ministry on an ongoing basis dedicated funds for software legalization, that it perform software audits, and, that it expeditiously develop and make public an action plan for ongoing software legalization including an organized procurement program that can be properly administered.

In April 2013, the Government of Ukraine re-iterated the need for licensed software in state agencies and pledged to allocate 100 million UAH (US\$12.02 million) for software licensing in state institutions. But, those monies were never disbursed, even though tenders were twice announced during the year only to later be cancelled by the Government of Ukraine. Notably, the 100 million UAH would have addressed only a small fraction (perhaps 10%) of the widespread unlicensed software use within many ministries and state institutions. This follows a pattern: in 2005, the Government agreed to a tender, but only 6% of the monies were ever allocated and spent. In 2011, the Ministry of Education's request for centralized funds to purchase legal software in government ministries for the 2012 budget year was denied by the Cabinet of Ministers. The 2014 state budget has no funds allocated for software legalization.

For a proper legalization program to be implemented, the Council of Ministers has to make this matter a priority and instruct the Ministry of Finance to allocate the proper monies – and do so over multiple years of budgeting and procurement. IIPA understands that multi-year budget expenditures are not provided for under present funding structures, but believes that the Ukraine authorities and the Verkhovna Rada (the legislative body) can find a workable solution to ensure this problem is addressed on an ongoing basis. This issue has always been susceptible to quick, inadequate and marginal fixes in lieu of commitments to long-term solutions that address – in a meaningful way – a problem that is both harmful to businesses and detrimental to the effective functioning of the government. SIPSU needs to be empowered to implement and enforce an ongoing legalization program with appropriate checks and balances, accountable directly to the Council of Ministers, for example, so that software legalization receives more than sporadic attention, and there is a systemic plan in place.

**Criminal Enforcement:** One significant shortcoming in the Ukraine enforcement regime that cuts across all the copyright industries, and impacts digital and hard-copy piracy has been the absence of effective criminal prosecutions and deterrent sentencing.

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<sup>2</sup>Data on software piracy rates and commercial values are taken from the 2011 BSA Global Software Piracy Study at [www.bsa.org/globalstudy](http://www.bsa.org/globalstudy). This study assesses piracy rates and the commercial value of unlicensed software installed on personal computers during 2011 in more than 100 markets. The study includes a detailed discussion of the methodology used. BSA plans to release an updated study in the second quarter of 2014.



Some of the impediments preventing effective enforcement are statutory or procedural. Amendments made in 2005 to the Criminal Code (Article 176) significantly lowered the excessively high threshold for criminal prosecution. However, the current threshold, 12,180 UAH or US\$1,450 (as of January 2014) remains too high and continues to serve as a bar to effective criminal enforcement, resulting in rights holders using less effective administrative actions instead. 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 and prevents the initiation of criminal investigations and prosecutions. Additionally, enforcement officials have applied the threshold on a per-rights holder basis, which means that when illegal material is seized, if the material for each rights holder does not exceed the threshold, the criminal case does not proceed. There are other procedural problems as well, including: (1) the use of expert evidence (denying the use of rights holder experts); (2) non-deterrent sentences for repeat offenders; (3) needed changes in the Criminal Code or Criminal Procedure Code to avoid delays and case dismissals; and (4) the lack of guidelines for judges on sentencing and developing expertise in IPR cases (IIPA recommends that the highest specialized court in civil and criminal cases issue guidelines for judges in this regard). Provisions do exist in the Ukrainian Criminal Code (e.g., Article 28) for prosecuting organized groups or criminal organizations, including for IPR offenses, but these provisions have been under-utilized by prosecutors. One lingering enforcement problem (in criminal and civil cases) is the required proof of ownership (including a complete chain of title), and the denial of standing to licensees (especially of foreign record companies) in court.

Enforcement efforts are further hampered by a lack of resources. The Government of Ukraine established a specialized unit for intellectual property rights crimes within the Economic Crime Division in the Ministry of the Interior, but there are only about 100 officers serving in that division for the entire country, too few to conduct effective and actions sufficient to deter piracy. A Cyber Crime Unit was also created within the Ministry of the Interior; in 2011, it commenced its work on IPR (including copyright) enforcement; in 2012, a new unit (taken from the Economic Police) was formed to focus on cyber crimes. There needs to be more and better resources dedicated exclusively to copyright and related rights violations, and officers should be provided with effective training (including IT skills), equipment, and high-speed broadband connections (IIPA members have in the past, and continue to be willing to help train these officials). The current number of state IP inspectors in SIPSU empowered to combat various IPR infringements throughout the 25 regions of Ukraine is inadequate and should increase to 25 at a minimum, so that each region has at least one dedicated inspector.

**Other Key Enforcement Issues:** As detailed in prior IIPA filings, the widespread availability of illegal material in open-air markets persists, in such places as: Petrovka (in Kiev), Mayak (in Donetsk), the “7-Kilometer” open market (in Odessa), and Barabashovo (in Kharkov), and, in other locations and cities (in December 2012, the Petrovka market in Kiev was listed by the U.S. Government as one of thirty Notorious Markets as a part of the Special 301 Out-of-Cycle review).

The camcording of motion pictures and the quick transference of these illegal copies on the Internet is still a problem for the motion picture industry; it is mostly undertaken by criminal syndicates operating in Ukraine and Russia. As a consequence, illicit camcording shifts quickly between the two countries resulting in hard copy and Internet piracy. Illicit camcords sourced from Ukraine are quickly uploaded to the Internet and burned to optical discs for distribution. In 2013, 11 illicit video recordings were sourced from Ukrainian theaters, up from two in 2012. The number of audio recordings sourced from Ukrainian theaters increased from 17 in 2012, to 31 in 2013. Amendments to the Copyright Law (Bill #6523, now #0902) and the Criminal Code are necessary to effectively enforce against illicit camcording.

All of these copyright industries – music, film, and software companies – continue to report persistent problems with the administration of the current hologram stickering system which was adopted in 2000. Some legal plants producing CDs and DVDs have been able to obtain unauthorized holograms which are then sold, without authorization, in Ukraine. In addition, optical disc piracy (especially of CD-Rs and DVDs), still persists, as one large raid on an optical disc plant in November 2013 revealed. Broadcast television piracy continues to be a major problem

for the motion picture, music publishing and recording industries – both with regard to regional and nationwide broadcasts. Details of all of these issues have been provided in prior IIPA filings.

According to the Government of Ukraine, in 2013 (through November), a total of 1,100 criminal investigations were initiated (compared with 960 in 2010), and about 1,600 administrative cases were conducted (down from 4,700 in 2010). The administrative actions were mostly undertaken against stores, kiosks and other forms of street-level piracy. Unfortunately, these actions were not coupled with severe enough penalties to deter these crimes (most fines were from US\$40 to a maximum of US\$400).

The software industry (BSA) reported in 2013 that there were 189 police actions – 42 relating to resellers, 117 to enterprise end-users, 30 to hard disc loaders. These actions resulted in the commencement of 116 criminal cases (a significant decrease from 2012); of these, 46 cases were sent to the courts for their consideration (a decrease from 2012). Notwithstanding the requirements of the new Criminal Procedure Code, many complaints of right holders against suspected targets were denied by law enforcement agencies, and criminal proceedings were never completed. Most investigations targeted small businesses, and most large companies continue to enjoy immunity from investigation or prosecution (mostly attributable to a lack of political will to make software piracy enforcement a priority). BSA reports that only 25% to 30% of opened criminal cases end up in court and of those, only 30% result in convictions of any kind. In the majority of cases, courts terminate cases without imposing any sentence, and the remaining cases result in low fines or suspended sentences.

Customs officials were granted *ex officio* authority to properly conduct enforcement investigations (in the 2012 Customs Code). Using this *ex officio* authority customs officials can seize illegal material at the border without a court order. Unfortunately, customs authorities within the new Ministry of Revenue and Duties are not sufficiently engaged in enforcement measures, and thus are under-utilizing their authority with the exception of some minor seizures by customs authorities of illegally produced CDs and other pirated materials; cooperation with right holders could be improved as well.

## **LEGAL REFORMS**

**Copyright Law:** Various proposals to amend the Copyright Law have been introduced in recent years. Bill #6523 (later, Bill #0902) was introduced in the Verkhovna Rada in June 2010 and passed its first reading in February 2011, but was rejected in April 2013. In January 2013, SIPSU proposed a further revised set of copyright amendments, focusing on the collective administration of rights. If enacted, it would have denied rights holders control over the management of their basic rights by collecting societies, unfairly usurped their rights of public performance, broadcasting and monies from private copying and violated basic international practices and principles of collective administration, and Ukraine's international obligations. It too was rejected in 2013.

Separately, amendments intended to improve digital piracy enforcement were proposed in May 2013 (and revised in June, September, and December) to the Copyright Law, the Law on Telecommunications, and the Code on Administrative Offences. Unfortunately, the proposal, even in its latest iteration, has attempted to address only one piece of the complete architecture required for Internet enforcement, namely a notice and takedown regime. In its current form, the notice and takedown proposal will not be effective in reducing infringement or deterring commercial operators from engaging in practices designed to provide access to infringing materials. Instead, if enacted, the draft law(s) would create a highly bureaucratic set of procedures that would render efforts to take down infringing materials time-consuming, costly, and ultimately unworkable. It is our view that this legislation would create new impediments rather than result in progress in the fight against Internet piracy, and that the draft bill, even with the further amendments in December meant to tighten the timetables for compliance, should be withdrawn from consideration. The December 2013 draft would still establish an overly burdensome notice and takedown system (with a daisy chain of notices to ISPs and websites, and huge evidentiary burdens on rights holders), using unreasonable timetables and providing very broad exclusions from liability; some of its definitions are also in need of clarification. Other deficiencies in the Copyright Law, included for revision in the 2010 package, include the need to

more clearly define temporary copies, impose damages, and exclude camcording from the scope of the private copy exception. Unfortunately, many of the copyright industries have not been afforded appropriate opportunities to provide input into the copyright law drafting process over the past few years.

There are three other important recommended amendments to the Copyright Law (which were contained in the old Bill #0902): (1) revising Article 52 to provide licensees of foreign music companies equal treatment as local right holders; (2) making either the non-payment of music rights royalties or of private copying levies an infringement of copyright and/or related rights; and (3) adding statutory damages and/or a system of enhanced damages in order to adequately compensate right holders and deter further infringement (Article 52 – to double actual damages).

**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 to the Copyright Law is needed. The Copyright Law reform proposals (Bill #6523, now #0902) included an anti-camcording amendment that would have specifically excluded camcording in movie theaters from the scope of the Copyright Law's private copy exception. The law, if enacted, would have prohibited the reproduction of audiovisual works during their exhibition in theatres and at other premises intended for public consumption; it should be enacted.

**Criminal Code and Criminal Procedure Code:** The threshold for criminal responsibility under Article 176 remains too high. IIPA additionally recommends amending 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. Any amendment to the Criminal Code should also ensure that repeat copyright infringements (within twelve months) would automatically lead to a criminal, and not solely an administrative, prosecution. Last, relevant criminal sanctions should be included in the code for intentional infringements related to the obligation to pay music rights royalties.

Ukrainian criminal procedures require rights holders to file complaints to initiate actions, which acts as a bottleneck to successful enforcement; the 2012 amendments made it a requirement also for the initiation of police actions against optical disc producers, lab operators, disc distributors and sellers. Police should be granted (and use) the authority to initiate intellectual property criminal cases and investigations for submission to the court; it should also be clear that the police (as they sometimes do in software cases) have the authority to hold seized products and equipment for use at trial.

**WIPO Digital Treaties:** In 2001, Ukraine acceded to the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonogram Treaty (WPPT), which entered into 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 of the treaty obligations, especially with regard to technological protection measures by requiring proof of "intentional" circumvention, which is a major impediment to protection. Recent attempts to reverse one (proper) implementation measure (Resolution No. 71 – January 18, 2003), which ensures the proper enforcement of cable retransmission rights, is a serious concern.

**Administrative Remedies:** Administrative remedies (as required by the 2010 Action Plan) do 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 continues to recommend. Administrative courts should be able to hear infringement cases even in the absence of the infringer, and procedures that introduce unnecessary delays and impose unreasonable deadlines, leading to unnecessary case dismissals, should be corrected. One major enforcement hurdle in the Administrative Code of Ukraine (Article 51.2) is the requirement to prove intent of the infringer; intent, while relevant in criminal proceedings, has no relevance in administrative sanctions, and should be deleted from the code (this amendment is part of Bill #6523, now #0902).

**Customs Code:** The Customs Code of Ukraine provides clear *ex officio* authority (Article 257) to customs officials. The Customs Code was further revised in 2012. While some administrative improvements were made in

recent years, IIPA recommends the abolishment of the customs registration system altogether because it is an unnecessary maze of regulations which interferes with effective border enforcement for some industries.

**Market Access:** There are two serious barriers to market access confronting IIPA members, and in particular, the motion picture industry. These barriers are: (1) an obligation to manufacture film prints and digital encryption keys in Ukraine; and (2) customs valuation rules that assess valuation on projected royalties, rather than on the underlying carrier medium. In more detail, these market barriers are as follows:

Compulsory Manufacturing of Film Prints: Ukrainian law (Law of Cinematography, amended in 2010) requires the production of film prints locally for the issuance of a state distribution certificate. The required local production rule was reiterated by the State Film Agency, and entered into force in 2012.

Customs Valuation: In 2009, Ukrainian customs authorities declared new customs valuation rules. Rather than assessing duties on the underlying carrier medium, the new rules assess valuations based on projected royalties. To further complicate matters, Ukrainian customs officials stated that the new ruling would be retroactive (three years), and would be enforced with serious penalties for valuations based on the carrier medium rather than royalties. Contrary to rumors that these rules might be reversed, in May 2012 a new Customs Code was adopted which affirmed the duties on royalties for both theatrical and home entertainment imports. These valuation procedures are governed by CMU Resolution No. 446.

# ARGENTINA

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

### 2014 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** IIPA recommends that Argentina remain on the Priority Watch List in 2014.

**Executive Summary<sup>1</sup>:** The people of Argentina take pride in their rich cultural heritage and their history as one of the early countries to adopt strong laws to protect authors' rights, yet the Government of Argentina is oblivious to its current status as one of the world's least hospitable environments for producers of copyrighted works. Leaders have turned a blind eye to the piracy that pervades their highly promoted "La Salada" public market near Buenos Aires, while digital piracy continues to climb. Some of the weaknesses in Argentina's copyright enforcement regime can be attributed to a lack of resources, but many rest on failings in procedures and laws that should be addressed immediately. Market organizers should restrict licenses to vendors selling legitimate products. Criminal and Civil courts should move copyright cases through the system more rapidly. Copyright infringers should face deterrent penalties and be subject to statutory damages in cases involving infringing physical goods and digital piracy. The government should encourage ISPs to cooperate in anti-piracy efforts by bringing them together with rights holders in round table discussions to establish voluntary best practices or codes of conduct to deal with copyright piracy over Internet services, and by ensuring that the law establishes sufficient liability for known infringements and permits courts access to incriminating data regarding online piracy. IIPA urges the U.S. Government to increase its dialogue with Argentina about the severity of copyright piracy in Argentina's streets, businesses, and online communities.

#### PRIORITY ACTIONS REQUESTED IN 2014

- 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.
- Develop processes that enhance cooperation between rights holders and online intermediaries in ways that are likely to contribute to a decline in online piracy.
- Require that the federal, provincial, and city governments take appropriate measures to:
  - Prioritize cleaning up the "La Salada" fair and similar markets to demonstrate political will against the distribution of pirate and counterfeit merchandise.
  - Identify distributors of pirate products in public markets and revoke licenses to those points of sale.
- Issue an executive decree mandating legal software use in government agencies and implementing processes to achieve this based on software asset management best practices.
- 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.
- Provide more resources and high-level support for police Internet crime units to address illegal file-sharing.

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<sup>1</sup>For more details on Argentina's Special 301 history, see previous years' reports at <http://www.iipa.com/countryreports.html>. For the history of Argentina's Special 301 placement, see <http://www.iipa.com/pdf/2014SPEC301HISTORICALCHART.pdf>. For a discussion of IIPA's 2014 Key Initiatives and Challenges, see IIPA, *2014 Special 301 Submission*, at <http://www.iipa.com/pdf/2014SPEC301COVERLETTER.pdf>.



## **COPYRIGHT PIRACY IN ARGENTINA**

The piracy culture is firmly rooted among the population of Argentina. With unrelenting online piracy of music, films, videogames, and software; hard goods piracy widely available in open markets; and the legitimate market for copyrighted works facing a steady challenge from the ready availability of pirate works, the state of piracy in Argentina has not changed in the past year. Music piracy rates remain steady at 99% of the digital market. Widespread use of unlicensed software by businesses remains a damaging form of infringement for the software industry. 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 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. It is clearly the most important center of manufacturing, distribution and selling of illegal products in Argentina. But as a result of its profitability, it has also been the most imitated business model in the last year. Thus, a number of “Saladitas,” or smaller versions of the Salada Fair market, have appeared across Argentina, including in the City of Buenos Aires and every town of the province of Buenos Aires. Although the Buenos Aires Autonomous City government has been making significant efforts, including recent actions resulting in the expulsion of over a thousand illegal street vendors from their habitual sites of sale, according to the Argentina Chamber of Commerce, there are 1,879 illegal markets in the city of Buenos Aires alone, contributing to an annual increase of hard goods piracy and counterfeiting of more than ten percent.<sup>2</sup> Other cities with high levels of piracy are Cordoba, Santa Fe, Mendoza, and Tucuman. Hard goods piracy accounts for 60% of the market for the recording industry.

As for La Salada Fair itself, the physical area continues to grow. It is made up of four markets – *Punta Mogotes*, *Urkupiña*, *Ocean* (indoor fairs) and *La Ribera* (open-air fair) – built up on the Riachuelo shore. It is a sprawling area with over 30,000 stands selling everything from music to bags, and it provides pirate and counterfeit merchandise to retailers and re-sellers from Argentina and neighboring countries. This market opens twice a week – on Tuesdays and Sundays – and is visited by approximately one million people each day. Although La Salada is mainly a physical market, it has its own websites where customers can check out information about the market hours and directions (official sites: <http://www.puntamogote.com.ar/>; <http://www.mercadolasalada.com>). Pirate and counterfeit merchandise is openly advertised and sold on such websites, though no CDs or movies are offered online. Police are well aware of the illegal activities taking place at the fair. 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.

**Internet piracy:** As in the past, online piracy in Argentina occurs predominantly via direct download, for example from cyberlockers that host infringing content. Users locate infringing files via Argentina-based web sites, such as *Cuevana.tv*, which provide well-organized links to hundreds of U.S.-produced sound recordings, movies, and TV shows stored on notorious cyberlockers. Peer-to-peer (P2P) file sharing services (including BitTorrent and eDonkey) are also increasingly popular among Argentina’s growing base of broadband-connected Internet users, particularly for the download of pirate software programs and video games.

There are multiple legal web sites offering digital music in Argentina, including most recently Spotify and Rdio, along with existing services Personal Música, Ideas Musik, Tienda de Música Movistar, Sonora, BajaMúsica.com, Faro Latino, iTunes, and Deezer. Still, online piracy overwhelms legitimate content providers, leaving the legal digital market at only 12% of total legitimate music sales. Of that 12%, mobile downloads account for 96%.

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<sup>2</sup>See [http://www.cac.com.ar/noticia/AUMENTO\\_UN\\_3.13\\_LA\\_VENTA\\_ILEGAL\\_CALLEJERA\\_EN\\_LA\\_CIUADAD\\_DE\\_BUENOS\\_AIRES\\_4699](http://www.cac.com.ar/noticia/AUMENTO_UN_3.13_LA_VENTA_ILEGAL_CALLEJERA_EN_LA_CIUADAD_DE_BUENOS_AIRES_4699).

The year 2013 witnessed the continued growth of piracy rates in Argentina, which ranked eighth in terms of the number of connections by peers participating in the unauthorized file sharing of select Entertainment Software Association (ESA) member titles on public P2P networks, up significantly from its 12th place ranking in 2012 and 21st place ranking in 2011.

**Piracy of software programs:** BSA | The Software Alliance (BSA) reports that the software piracy rate in Argentina was 69% in 2011, representing a commercial value of unlicensed software of \$657 million.<sup>3</sup> Since that time, local representatives see no change in the overall situation for commercial software in Argentina. This piracy includes widespread unlicensed software use by business enterprises, especially in small- and medium-sized organizations, and government agencies. Increasingly, users are downloading pirate copies of business software from the Internet as the distribution of physical copies of pirate software becomes less popular. Such widespread piracy has caused the legitimate market for software, including from local vendors, to shrink. Often, unauthorized versions of newly released software reach the local pirate market before a localized version of the software is available from legitimate Argentinian distributors.

## **COPYRIGHT ENFORCEMENT IN ARGENTINA**

Copyright enforcement in Argentina is, as a practical matter, limited to communicating with a cooperative segment of the country's ISPs, and seeking preliminary remedies in civil proceedings. According to local industry representatives, criminal enforcement measures for copyright infringement are virtually nonexistent. With the exception of a string of raids against a major book piracy organization in December 2013,<sup>4</sup> *ex officio* police actions are unheard of in the initiation of cases regarding copyright crimes, prosecutions do not move forward, and infringers are never issued deterrent sentences. Civil remedies in the form of preliminary injunctions or other urgent initial procedural remedies are available, particularly in relation to software infringement, but judicial proceedings in any of Argentina's 24 provincial court systems or in the Federal court system are far too time consuming. Information about customs actions is no longer available since the customs authorities discontinued the Anti Piracy Custom Forum, though rights holders report good cooperation with customs officials generally.

**Inter-industry Cooperation on Internet Piracy Cases:** Local ISPs in Argentina have gradually begun to collaborate in certain limited circumstances, such as taking down infringing sites in very specific instances. Some ISPs have established special procedures to process infringement claims from rights holders, but others require a judicial order before taking down infringing material. Successes in take-down requests are limited to e-commerce sites, hosted content, or links found on major search engines or forums. ISPs refuse to cooperate with rights holders on any copyright actions within P2P networks, claiming to have no responsibility for the activities of users on their networks. However, under Argentinian law, ISPs may be held liable for infringements committed through their services. The difficulty lies in the need to establish joint and several responsibility of both the ISP and the user, which requires evidence of user infringement. Unfortunately, Argentina's privacy laws restrict access to the user data (critical to establishing that evidence against the ISP) in cases involving intellectual property crimes. New technologies, such as piracy via variable "magnetic" links (identified by the .Torrent extension), make locating infringing activity even more difficult. Government assistance is sorely needed to facilitate cooperation across the spectrum of the Internet community.

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<sup>3</sup>Data on software piracy rates and commercial values are taken from the 2011 BSA Global Software Piracy Study at [www.bsa.org/globalstudy](http://www.bsa.org/globalstudy). This study assesses piracy rates and the commercial value of unlicensed software installed on personal computers during 2011 in more than 100 markets. The study includes a detailed discussion of the methodology used. BSA plans to release an updated study in the second quarter of 2014.

<sup>4</sup>See the local news coverage at <http://www.infojusnoticias.gov.ar/nacionales/decomisaron-100-mil-libros-truchos-y-detuvieron-al-jefe-de-la-organizacion-2708.html>.

**Criminal Enforcement – Slow Prosecutions and Non-deterrent Judgments:** The Argentine judicial system is formal and heavy on written submissions, which means that the process of administering justice is time-consuming. Very few criminal cases reach final sentencing, and most copyright infringement cases close with a suspension of judgment. While the lack of human resources and poor infrastructure in the courts contribute to the problem, clearly prosecutors and judges lack the will to push these cases through. Criminal sanctions are mere formalities; copyright crimes in Argentina do not carry a threat of jail sentences on any practical level.

**Civil Enforcement – Delays and Weak Damages:** Rights holders report positive responses from the National and Provincial Civil Courts, but the shortages in resources and capacity create delays and additional costs in civil cases. The software industry continues to rely on civil enforcement in Argentina, but there are significant procedural delays in some provincial jurisdictions in obtaining and conducting civil searches in software piracy cases. Civil actions are also weakened by the lack of deterrent civil damages; this important problem could be corrected if Argentina were to introduce an effective statutory damages system.

**Border Enforcement:** The Argentina Customs Code currently provides for *ex officio* actions. Customs authorities have a good understanding of 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. Since the customs authorities discontinued the Anti Piracy Custom Forum, rights holders have less information about customs seizures that have taken place.

**Industry trainings and public awareness efforts:** In 2013, BSA organized a panel session on software use and licenses during a conference of government lawyers, with 1,500 participants in attendance.

## **COPYRIGHT LAW REFORM IN ARGENTINA**

**Proposed Internet Legislation:** Rights holders are monitoring two separate initiatives currently being reviewed by Argentina’s lawmakers.

First, during 2013, six different bills were introduced in Argentina’s legislature to regulate Internet neutrality. These bills were consolidated by the Senate Committee on Communications Systems, Media and Freedom of Expression, and a new draft is now being discussed in the House of Representatives. The proposed legislation seeks to ensure that communications operators and ISPs do not restrict the free use of the Internet by third parties. The present drafting of the consolidated bill could limit the ability of rights holders and ISPs to take measures, without a judicial order, to remove or restrict access to infringing content online. The definitions and implementation of such legislation could significantly impede cooperative anti-piracy efforts among rights holders and ISPs.

Second, Bill No. 1508-D-2013 was introduced in 2013 regarding ISP Liability. Under this legislation, an ISP would be considered to have effective knowledge for purposes of liability for the violation of laws or the rights of third parties only after the issuance of a final (i.e., not subject to appeal) judicial order. This definition could severely restrict the incentives for any ISP to cooperate with rights holders to remove infringing material or links, and thus would make responses to quickly developing Internet piracy a lengthy and resource-intensive process.

In IIPA’s 2013 Special 301 submission we reported on Bill No. 2995-D-2012, introduced in Argentina’s legislature in 2012. Fortunately, this bill, proposing to eliminate any criminal or civil liability for unauthorized downloading or accessing of copyright material over the Internet, is no longer active.

**Copyright Law Reform:** 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 Internet Treaties, to give legal support for the digital businesses of 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 only one month imprisonment under Article 72bis of Act 11.723 of the Copyright Act) up to at least two years to apply deterrent sanctions;
- Establish effective statutory damages provisions in civil infringement cases;
- Explicitly provide for the seizures of equipment used in the manufacture of infringing goods;
- Provide clear guidelines regarding liability for ISPs, and include effective notice and takedown provisions; and
- Provide equitable and balanced treatment for all rights holders, treating juridical entities no less favorably than natural persons.

**Government Software Legalization:** Unfortunately, no progress was made on this important issue last year. With respect to government legalization efforts, the 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 mandate legal software use in government agencies and implement processes to achieve this based on software asset management best practices. While several “standards” have been issued by the Subsecretaría, the Argentine Government has not taken meaningful action toward legalizing its software inventories.

## **MARKET ACCESS ISSUES**

**Tax Exemptions for the Local Culture Industry:** During 2011, two important and positive tax exemptions were passed for the local culture industry. The first was adopted by the Government of the Province of Buenos Aires, establishing an exemption from payment of gross receipts taxes for revenue from CD/DVD publishing and sales in the territory of the province of Buenos Aires. The second was adopted by the Government of the City of Buenos Aires, establishing an exemption from payment of gross receipts taxes for revenue from DVD publishing and sales in the territory of the City of Buenos Aires. The recording industry supports such tax exemptions as an important benefit for the proliferation of cultural products. Exemptions of this kind should be extended to other provinces, and all formats and devices.

**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. The Motion Picture Association (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 2013.

**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.

**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.” In 2011, AFIP’s position was upheld by the Argentinian National Supreme Court of Justice, resulting in a considerable increase in the international license cost for end users. 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. There is also a clear need for the U.S. and Argentina to reach agreement on a treaty to avoid double taxation.

# CHILE

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

### 2014 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** IIPA recommends that Chile remain on the Special 301 Priority Watch List in 2014.<sup>1</sup>

**Executive Summary:** Since the U.S.-Chile Free Trade Agreement (FTA) went into force in 2004 allowing Chile to gain heightened access to the U.S. market, the country has failed to meet the bulk of its copyright-related obligations under the agreement. With no FTA-compliant legal protections in place for the technological protection measures (TPMs) that copyright owners use to prevent piracy, Chile remains a world leader in the sale of circumvention devices such as game copier devices made available through online auction sites. While maximum criminal penalties for repeat offenders were increased to deterrent levels, minimal levels are still available and continue to be favored by Chilean judges. Chile's 2010 Copyright Law amendments established a number of exceptions and limitations to copyright that could undermine important copyright protections, and failed to resolve gaps in copyright protection and enforcement in areas including *ex parte* searches and statutory damages. The 2010 amendments set forth significant first steps toward a robust Internet enforcement regime, but they fall short of the type of online anti-piracy mechanisms that are contemplated in the FTA. Meanwhile, stubbornly high levels of enterprise end-user piracy of business software applications persist.

As talks for a Trans-Pacific Partnership (TPP) with Chile and many other nations near completion, it is crucial that the United States press Chile to demonstrate that it is a trustworthy negotiating partner, by honoring the commitments it made in our bilateral agreement more than ten years ago.

#### **PRIORITY ACTIONS REQUESTED IN 2014**

- Satisfy FTA and WIPO Internet Treaties obligations to adopt TPMs legislation and enforce anti-circumvention provisions (both criminal and civil).
- 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.
- Fulfill obligations included in the FTA regarding Government Software Legalization, and issue appropriate regulations and administrative decrees to normalize the acquisition and management of software by all government agencies.
- Place greater priority on anti-piracy actions among administrative and enforcement authorities and improve the speed of civil copyright infringement litigation through increased resources and coordination.
- Enact legislation to provide for deterrent criminal penalties for unauthorized camcording of films in theaters, without requiring any proof of commercial intent.

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<sup>1</sup>For more details on Chile's Special 301 history, see previous years' reports at <http://www.iipa.com/countryreports.html>. For the history of Chile's Special 301 placement, see <http://www.iipa.com/pdf/2014SPEC301HISTORICALCHART.pdf>. For a discussion of IIPA's 2014 Key Initiatives and Challenges, see IIPA, *2014 Special 301 Submission*, at <http://www.iipa.com/pdf/2014SPEC301COVERLETTER.pdf>.



## **COPYRIGHT PIRACY IN CHILE**

The copyright industries report that what was once an epidemic of widespread “street piracy” in Chile largely has now migrated online. Legitimate online distributors of copyrighted materials continue to face enormous challenges through Internet piracy that occurs most significantly via peer-to-peer (P2P) file sharing of infringing content, but also occurs through hosted sites, illegal use of cyberlockers, hyperlinks to infringing materials and, increasingly, illegal mobile and smart phone downloads. The sites h2zone.cl and NeoGames.cl, which are both hosted and operated in Chile, continue to be leading purveyors of circumvention devices against which there are no means of enforcement.

The most popular piracy sources in Chile are P2P networks such as ARES and BitTorrent, and links to cyberlockers containing infringing content posted on social sites such as Chilecomparte. In 2013, Chile placed 12<sup>th</sup> in the world in terms of the number of connections by peers participating in the unauthorized file sharing of select members of the Entertainment Software Association (ESA) member titles on public P2P networks. Notably, Chile ranked seventh in the world in P2P infringement of console-based games. The recording industry saw an increase in its digital sales in 2013, but it continues to be heavily affected by piracy via P2P exchanges and links posted on blogs and social websites. In 2012, the recording industry reported detecting 4.7 million unique P2P users in Chile.

Another problem that is now well-established in Chile stems from the cyberlinks 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 unauthorized copies of music files. The Prosecutor’s Office has issued an action plan to address the issue, apparently addressing the lack of training on IPR Internet related cases. As of today, however, the Chilean authorities have taken no action to address the massive piracy taking place through *Chilecomparte*.

**Camcord piracy:** The unauthorized camcording of films in theaters has a significant negative impact on both the U.S. and Chilean filmmakers. Ninety percent of all pirated movies available during a film’s theatrical release originate as unauthorized in-theater camcords. While camcording of MPAA member titles in Chile has declined in recent years, this remains a concern for local industry and for the region. The Academy Award-nominated NO, by acclaimed Chilean filmmaker Pablo Llorain, was camcordinated and posted to an illegal website shortly after its 2012 release in Chile, but before it was legitimately available in other territories. Illegal websites, release groups, and brokers maintain a presence in Chile, creating a ready-made international online distribution network for any future camcords.

**Signal piracy:** The pay television industry in Chile also continues to experience problems with signal theft, including via “free to air” boxes.

**Enterprise end-user software piracy:** BSA | The Software Alliance (BSA) reports that the general public and government officials in Chile continue to gain a better understanding of the risks involved in using pirated software and the importance of IP to the economy. However, BSA observes that there has been very little change in the overall rate of software piracy in recent years. In 2011, the software piracy rate in Chile was 61%, representing a commercial value of unlicensed software of US\$382 million.<sup>2</sup> Widespread enterprise end-user piracy of software (the unauthorized use and copying of software by businesses and other enterprises) occurs in a variety of professional businesses, including media, architecture, design, engineering, and publicity, to name a few, and remains a high concern of the software industry. Other significant forms of software theft include unauthorized pre-installation of

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<sup>2</sup>Data on software piracy rates and commercial values are taken from the 2011 BSA Global Software Piracy Study at [www.bsa.org/globalstudy](http://www.bsa.org/globalstudy). This study assesses piracy rates and the commercial value of unlicensed software installed on personal computers during 2011 in more than 100 markets. The study includes a detailed discussion of the methodology used. BSA plans to release an updated study in the second quarter of 2014.

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 piracy that occurs within public agencies remains a significant concern. While there has been progress with government software legalization, more needs to be done. Adopting appropriate provisions to regulate the acquisition and management of software by the government is a critical solution that is required by the FTA and the adoption of effective, transparent and verifiable software asset management procedures could provide a powerful positive example to private enterprises.

## **COPYRIGHT LAW ISSUES IN CHILE**

Overall, since the U.S.-Chile FTA went into force on January 1, 2004,<sup>3</sup> Chile has failed to meet the bulk of its copyright obligations, all of which are now past due. Chile adopted amendments to its Copyright law in 2010 to address some, but far from all, of its FTA obligations. As adopted, the amendments contain significant gaps in the following areas<sup>4</sup>:

No protection for Technological Protection Measures: (This obligation is provided in FTA Articles 17.7.5.a and c, as well as the WIPO Internet Treaties.) Rights holders remain extremely disappointed that Chile continues to ignore its obligation under the FTA to provide adequate legal protection for TPMs used to control access or otherwise restrict unauthorized acts with respect to a protected work. Due to the lack of protection under current law, the sale of circumvention devices continues unabated online, in specialty markets, and in formal shopping malls, such as Galeria Las Palmas, where sales occur alongside legitimate video game products.

No notice and take down mechanism: (See FTA Article 17.11.23.) Chile's Copyright Law as amended creates a "notice plus notice" architecture for ISPs to engage with users regarding instances of infringement, but lacks the threat of any real consequences for typical online piracy, and fails to provide any consequences for an ISP that fails to act after gaining knowledge of infringement outside of a court order.<sup>5</sup> While the new ISP liability provisions fall short of establishing an effective notice and takedown procedure as required by the U.S.-Chile FTA, they do take an important first step in developing voluntary notice systems between rights holders, ISPs, and users. The recording industry reports good cooperation in 2013 with the major ISPs in Chile with the voluntary system of notifications of infringing behavior, and that digital market revenues in 2013 improved over 2012. Unfortunately, since the time of the 2010 amendments establishing ISP liability and deterrent criminal penalties in Chile, the government has failed to come back to the table to develop an FTA-compliant notice and takedown system.

No civil *ex parte* remedy or statutory damages: (See FTA Articles 17.11.12 and Article 17.11.9.) No provisions are included to strengthen the civil *ex parte* search remedy, nor are there any provisions establishing statutory damages. Chile is also required to provide for civil remedies, including seizures, actual damages, court costs and fees, and destruction of devices and products.

Overbroad exceptions to protection: (See FTA Article 17.7(3).) The Law as adopted contains certain exceptions that appear to be incompatible with the FTA, including: a reverse engineering exception that is not restricted to achieve interoperability, exceptions that could allow libraries to reproduce entire works in digital form

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<sup>3</sup>The U.S.-Chile FTA is posted on USTR's website at [http://www.ustr.gov/Trade\\_Agreements/Bilateral/Chile\\_FTA/Final\\_Texts/Section\\_Index.html](http://www.ustr.gov/Trade_Agreements/Bilateral/Chile_FTA/Final_Texts/Section_Index.html).

<sup>4</sup>These legal requirements and the 2010 Copyright Law amendments, including Chile's notice and notice infrastructure, have been examined in greater detail in IIPA's previous filings. See, e.g., <http://www.iipa.com/rbc/2013/2013SPEC301CHILE.PDF>.

<sup>5</sup>The ISP liability provisions of the 2010 legislation provide a means by which rights holders may seek a court order for the removal of infringing material by an ISP (Article 85Q of the Copyright Act), which can result in the removal of infringing material, but only after a lengthy court process. This provision falls far short of FTA compliance. Meanwhile, the mechanism for a voluntary notice system by which ISPs are to forward notices of infringement to users within five working days of their receipt (Article 85U) has had some positive impacts, as discussed in the text, but lacks incentives for compliance, and thus, standing alone, is simply an inadequate response to widespread Internet piracy.

without restriction, and the lack of overarching language consistent with the three-step test set forth in the FTA, ensuring that exceptions and limitations are not overbroad.

Several other FTA obligations also remain outstanding, including: To provide for a full right of communication to the public for producers of phonograms (Article 17.6.5); to provide adequate protection for temporary copies (Articles 17.5.1 and 17.6.1); to provide for legal remedies for rights management information (Article 17.7.6); and to provide for various border measures (Articles 17.11.17 through 17.11.21).

We also urge Chile to enact specific legislation that would criminalize illicit camcording, with penalties sufficient to deter this activity. Such a measure should not include any requirement of proof of the camcorder's intent to profit, which would significantly hamper enforcement and prosecution of camcording activity.

## **COPYRIGHT ENFORCEMENT IN CHILE**

Much of what IIPA has reported in recent years regarding copyright enforcement in Chile remains unchanged. The copyright industries report good cooperation with Chilean criminal and civil enforcement authorities (within the confines of an inadequate legal regime), and with Chile's intellectual property agency (INAPI) and the Director of the Tax Agency. However, additional resources and increased judicial attention are needed to follow through on the positive efforts of the Carabineros and Civil Police. Police and customs officials take *ex officio* actions on a regular basis and involve rights holders in legal procedures, but 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. Rights holders repeatedly must educate civil court officials regarding intellectual property law, including in enterprise end user piracy cases regarding the unauthorized use of software.

**Inadequate civil *ex parte* actions and slow civil cases:** Civil *ex parte* actions remain a critical remedy for the software industry; however, 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 is inconsistent with TRIPS Article 50, and it undercuts the effectiveness of the remedy.

**Criminal enforcement obstacles:** There are three overwhelming problems in getting effective criminal enforcement in Chile. First, 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. Second, the National Police (Carabineros), the Prosecutor's Office and the Judicial Police suffer from a lack of sufficient human resources. Finally, even with higher penalties available under the 2010 amendments, judges continue to impose the minimum available penalties, which are not deterrent, and 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.

**Market access:** The Chilean Congress is currently considering screen quota legislation that would require exhibitors to show one Chilean or Latin American film for every three "foreign" films shown on all screens nationwide during the previous six months, and to oblige theaters to run these films so long as a certain number of spectators come to see them. Such legislation may run afoul not only of Chile's Constitution but of its international obligations.

Chile is currently considering digital television legislation that includes an amendment that would ban all advertising from Pay TV channels. This legislation is currently being considered by the Transportation and Telecommunications, and Education and Culture joint committee. In addition to this straight ad ban, there are multiple other amendments that would limit advertising and restrict the content of advertisements.

# CHINA (PRC)

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

### 2014 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** IIPA recommends that USTR maintain China on the Priority Watch List and that China be monitored under Section 306 of the Trade Act.<sup>1</sup>

**Executive Summary:** The market in China for music, software, publications, films, and video games remains stunted by a combination of piracy and stifling market access and discriminatory barriers. At the same time, there were once again some gradual signs of progress in China during 2013. The U.S. Government has long recognized the significant harm caused by IP infringement in China,<sup>2</sup> and remains deeply engaged with the Chinese Government on intellectual property issues in various fora, including the U.S.-China Joint Commission on Commerce and Trade (JCCT) and the U.S.-China Strategic and Economic Dialogue (S&ED). These engagements have yielded progress in some areas. Recent positive developments include the 2012 U.S.-China Film Agreement, the decision to test self content-review of music in 2014 by licensed online music distributors, and the December 2013 decision to partially open the market in the Shanghai Free Trade Zone to foreign investment, which will hopefully allow the introduction of game consoles and ease restrictions on foreign online music distribution in China.

Yet many commitments made by China in the JCCT, S&ED, and the U.S.-China Film Agreement remain unfulfilled and full market opening remains elusive. For example, the Chinese commitments to promote reform in the distribution of imported films, and to actively encourage more private Chinese enterprises to be licensed by the Chinese Government to engage in the distribution of these films, have not been met. National distribution of imported films remains completely dominated by two state-owned enterprises (SOEs). The theatrical film “Master Contract,” which reportedly is under discussion between some right holders and China Film Group, remains non-transparent, unfair, and inconsistent with international best practices. Investment in music production, publication, and distribution remains limited, stunting the growth of that industry. Progress to “significantly reduce piracy” and tackle unlicensed software use, including in government agencies and SOEs, remains limited. One measure of under-performance of legitimate copyright industries is per capita spending, and the evidence is telling. Software spending per PC in China ranks among the lowest in the world, while the value of unlicensed software is estimated to be over US\$8.9 billion. The size of the legitimate music market is a fraction of what it would be in the absence of piracy and market barriers. Publishers remain hindered in their efforts to engage in core publishing activities in China, and while cooperation has been forthcoming against the piracy of online journals of scientific, technical, and medical (STM) materials, new online “sharing” services threaten the professional publishing market yet again. Other problems worsened in 2013, including unauthorized camcording; sales of hard goods pirated product, or passwords and product activation keys on online trading sites; and websites employing third parties’ peer-to-peer (P2P) and streaming client services to enable infringement by their users.

## **PRIORITY ACTIONS REQUESTED IN 2014**

### **Enforcement**

- Ensure implementation of the 2012 *Network Rules* to hold liable services encouraging or facilitating infringement.
- Halt sales of physical pirate product, passwords, and product activation keys on online trading sites and other e-commerce platforms.

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<sup>1</sup>For more details on China’s Special 301 and Section 306 monitoring history, see previous years’ reports at <http://www.iipa.com/countryreports.html>. For the history of China’s Special 301 placement, see <http://www.iipa.com/pdf/2014SPEC301HISTORICALCHART.pdf>. For a discussion of IIPA’s 2014 Key Initiatives and Challenges, see IIPA, *2014 Special 301 Submission*, at <http://www.iipa.com/pdf/2014SPEC301COVERLETTER.pdf>.

<sup>2</sup>A May 2011 United States International Trade Commission (USITC) report found that overall IP infringement (of which copyright infringement was found to be the largest part) in China costs the U.S. economy as much as \$107 billion and upwards of 2.1 million jobs. USITC, *China: Effects of Intellectual Property Infringement and Indigenous Innovation Policies on the U.S. Economy*, Investigation No. 332-519, USITC Publication 4226, May 2011, available at [www.usitc.gov/publications/332/pub4226.pdf](http://www.usitc.gov/publications/332/pub4226.pdf).



- Take effective action against websites offering infringing content, as well as those deploying non-hosted platforms such as *Xunlei* and *QVOD*.
- Have the State Administration of Press, Publication, Radio, Film and Television (SAPPRFT), the Ministry of Culture (MOC), and the Ministry of Industry and Information Technology (MIIT) revoke business licenses and halt online services of enterprises providing access to infringing materials.
- Bring targeted and deterrent actions, with transparency, against unauthorized use of software by enterprises, hard disk loading, camcording, pay TV piracy, and media box piracy.
- Allow right holders as victims to file collateral civil claims for compensation during criminal IPR trials.
- Follow through on JCCT commitments for transparent, comprehensive, and verifiable progress on government and SOE software legalization, and for strengthening IP protection in university (including library) settings.
- Ensure that SAPPRFT, theater owners, and others associated with the chain of theatrical distribution of films, make efforts to prohibit (including criminal penalties) and deter unauthorized camcording.
- Establish a central authority to compile statistics of civil, administrative, or criminal cases involving copyright; and fully implement new rules on disclosure of administrative penalties.
- Enhance “pre-release” administrative enforcement for motion pictures, sound recordings, and other works, e.g., by establishing a voluntary government-backed online copyright bulletin board.
- Expand resources at National Copyright Administration of China (NCAC), local Copyright Administrations (CAs), and Law and Cultural Enforcement Administrations (LCEAs), commensurate with the scale of piracy problems.
- Allow foreign right holder associations to increase staff and conduct anti-piracy investigations.
- Meet TRIPS obligation to fairly compensate copyright owners for public performance (including broadcast) of musical compositions.

### **Legislation and Related Matters**

- Include intellectual property provisions in the Criminal Law reform consistent with this filing.
- Consider and enact comprehensive copyright law reform as “first tier” legislation, incorporating changes recommended by IIPA and member associations in various past filings.
- Ensure criminalization of: 1) unauthorized use of software by enterprises; 2) hard disk loading; 3) Internet piracy; and 4) circumvention of TPMs and trafficking in circumvention technologies, software, devices, components, and services, including the sale of passwords and product activation keys.
- Specify and lower proof requirements for evidence preservation orders and civil injunctions.
- Make it a violation of law to use, or attempt to use, an audiovisual recording device to make or transmit a copy, in whole or in part, of a cinematographic/audiovisual work, from a performance in an exhibition facility.
- Lower the threshold for criminal enforcement actions to be taken against infringers, including Internet infringers, and including infringements undertaken for purposes other than commercial gain.
- Clarify that administrative transfers of cases for criminal prosecution are required upon “reasonable suspicion” that the criminal thresholds are met.

### **Market Access**

- Ensure full implementation of the U.S.-China Film Agreement:
  - Ensure the promotion and licensing of private Chinese enterprise to engage in national distribution in competition with China Film Group and Huaxia.
  - For “Revenue Sharing Films,” ensure that all terms of the Master Contract for theatrical film distribution comply with the U.S.-China Film Agreement.
  - For “Other Than Revenue-Sharing Films,” ensure that the terms of Chinese SOE contracts comply with the Agreement and are transparent to the industry at large, including private Chinese Enterprises which may act as intermediaries in the importation and national distribution chain.
- Meaningfully implement the WTO cases to further open the market for publishing, online music distribution, and theatrical film distribution.
- Formally revoke the requirement to appoint an exclusive licensee for online music distribution, consistent with verbal assurances of the same.



- Ensure market access is not conditioned on local ownership or local development of the IP of a service or product, and does not compel the transfer of foreign IP and R&D to China, including information security software and cloud products.
- Revise new software procurement rules that impose price controls and licensing terms that discriminate against the procurement of foreign software brands.

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

Prior IIPA submissions in the Special 301 docket, as well as IIPA filings in WTO compliance reviews and other fora, have provided detailed accounts of the many piracy and enforcement challenges and issues in China. This year's filing serves as a supplement to those, and is not meant as an exhaustive review of all issues.<sup>3</sup>

**The Continuing Challenge of Addressing Online/Mobile Piracy in China:** Online piracy remains a major challenge in China.<sup>4</sup> Prior filings document the rapid growth of online access, broadband, and mobile penetration in China. With this, China is fast becoming the largest potential market in the world, and while some progress has been made to license services in China, the challenge of online infringement and illegal web and mobile services harming right holders in (and outside of) China has grown faster than the legitimate market.<sup>5</sup> Some services previously noted, like *Xunlei's GouGou* service, have ceased to operate; however, *Xunlei* remains a concern, and was nominated by IIPA as a "notorious market" in IIPA's October 2013 filing,<sup>6</sup> for its hosted *Xunlei Kuaichuan* service and its proprietary, high speed non-hosted P2P file sharing system that facilitates the distribution of unauthorized copies of motion picture and television content. *QVOD* is also noted in that October 2013 filing as a P2P protocol software used by Chinese linking sites to distribute infringing copies of copyright materials. *Xunlei* and *QVOD* are deployed on third-party websites but are responsible for massive amounts of infringement. Stakeholders from both the foreign and domestic film and television industries have identified such piracy sites/services as the biggest threat to the development of the legitimate online video industry in China.

Another major Internet piracy problem involves the unauthorized sale of physical pirate and counterfeit product on e-commerce sites. *Taobao* has demonstrated major improvements in cooperation and coordination with some right holders in recent years (mainly through MOUs), and the Motion Picture Association of America reports exemplary cooperation. Unfortunately, the software, music, and publishing industries all report continuing problems on *Taobao* and other e-commerce sites. The software industry is deeply concerned about tremendous losses resulting from the sale of unlicensed software and software product activation codes and keys via *Taobao* and other auction sites, where these materials are available for very nominal fees. The music industry similarly notes that, notwithstanding greater cooperation with *Taobao*, infringing music remains widely available on the site, as well as on other e-commerce sites. The publishing industry, while noting *Taobao's* willingness to cooperate, continues to have concerns over entities that traffic in login credentials through the *Taobao* platform.

The music industry notes the rampant rise of mobile piracy and the rapid proliferation and worsening of pirate mobile apps. Publishers have noted continuing concerns with unauthorized online distribution of copies of STM

<sup>3</sup>See, e.g., IIPA, *China*, 2013 Special 301 Report, February 8, 2013, at <http://www.iipa.com/rbc/2013/2013SPEC301CHINA.PDF>; IIPA, *China's WTO Compliance - Notification of Intent to Testify and Testimony Re: "Request for Comments and Notice of Public Hearing Concerning China's Compliance With WTO Commitments"* (78 Fed. Reg. 49787, August 15, 2013), September 20, 2013, at [http://www.iipa.com/pdf/2013\\_Sep20\\_China\\_WTO\\_Compliance.PDF](http://www.iipa.com/pdf/2013_Sep20_China_WTO_Compliance.PDF).

<sup>4</sup>The record industry reports, for example, that the total number of cease and desist notices sent to infringing websites increased from 8,692 (2012) to 11,671 (2013).

<sup>5</sup>Some music sites in China have been licensed (for example *kugou*, *baidu*, *kuwo*, *duomi*, and *xiami*), although many smaller websites remain unlicensed, those that are licensed may not cover all rights (for example, some licenses only extend to streaming), and the licenses are restricted to the territory of China. Unfortunately, *kuwo.cn* is accessible from Hong Kong, Singapore, and Taiwan; *xiami.com* is accessible from Singapore, Malaysia, and Taiwan; and *yinyuetai.com* is accessible from Hong Kong, Singapore, Malaysia, and Taiwan). The Chinese Government should apply pressure to rectify these problems. The licensed site *baidu* also remains problematic for the music industry as it operates a cyberlocker *pan.baidu.com* which hosts infringing content. The music industry sent over 2,000 notices to *pan.baidu.com* with a takedown rate of only 42%.

<sup>6</sup>IIPA, *IIPA Written Submission Re: 2013 Special 301 Out-of-Cycle Review of Notorious Markets: Request for Public Comments*, 78 Fed. Reg. 57924 (September 20, 2013), 78 Fed. Reg. 60367 (October 1, 2013) (Extending Deadline), October 25, 2013, available at [http://www.iipa.com/pdf/2013\\_Oct25\\_Notorious\\_Markets.pdf](http://www.iipa.com/pdf/2013_Oct25_Notorious_Markets.pdf). Chinese-based sites noted in that filing include: *QVOD*, *xunlei*, *xiami.com*, *sina.com.cn*, *wenku.baidu.com*, *docin.com*, *yyets.com*, *eachnet.com*, and *taobao*.

journal articles,<sup>7</sup> as well as the rise of new “sharing services,” which are open online platforms where users can upload and share documents. These services, such as *Baidu Wenku*, *Sina*, and *Docin*, employ “digital coin” systems, whereby coins earned through uploading documents may be used to “purchase” English language and Chinese translations of trade books, textbooks, and journals for download. These sharing services have ineffective notice and takedown processes for reporting and addressing infringements. Other online services provide unauthorized access to proprietary databases through the sale of login credentials or information from the databases.

Enforcement against online piracy in China over the past year has been mixed. The Chinese Government has brought several criminal actions. The continuation of the special campaign “Operation Sword Net” organized by NCAC, MPS and MIIT also demonstrates positive government commitment. IIPA members report continued cooperation with authorities and some ISPs to engage in self-help to defeat or remove piracy from rogue or notorious sites. For example, the music industry reported 437 websites to NCAC and MOC in 2013. Of these, 96 websites removed alleged infringing links, 109 were closed by the copyright bureaus and cultural enforcement agencies, and 5 no longer contain music. The other websites apparently still remain operational. The motion picture industry reports cooperation directly with many ISPs and services, with some notable exceptions (e.g., *Xunlei*).

Court cases and administrative enforcement seem to be making an impact. In November 2013, pursuant to a complaint filed by the recording industry, the founder of the *Zyin* service was convicted and sentenced to 15 months imprisonment, fined RMB50,000 (roughly US\$6,000), and subject to confiscation of illegal income of RMB100,000 (roughly US\$12,000), and the operator/owner of the website was sentenced to one year imprisonment, fined RMB40,000 (roughly US\$5,000), and subject to confiscation of the hard disks involved. In addition, in November 2013, the major Chinese site *Sohu* and several other websites sued *Baidu Player* (*v.baidu.com*) and *QVOD* for hosting P2P networks with widespread infringing content. On December 30, 2013, NCAC, together with State Internet Information Office, MIIT, and MPS, jointly held a press conference to announce the results of the “2013 Special Campaign for the Crackdown on Internet Piracy.” *Baidu* and *QVOD* were ordered to immediately cease facilitation of copyright infringement and penalties of RMB250,000 (US\$41,000), the maximum administrative fine under the law, were assessed to each service. In December 2013, IIPA further welcomed the decisions of the Beijing No. 1 Intermediate People’s Court holding liable P2P streaming video network and video on demand (VOD) company Beijing Funshion Online Technology Co., Ltd., owners of the website *Funshion.com*. This site has caused significant harm throughout Greater China, including Taiwan, as well as Hong Kong and Singapore. The total award was RMB470,875 (US\$77,647) in respect of nine civil actions filed, although the site appears to remain operational with a server location in Inner Mongolia.

Combating copyright infringement on the Internet must remain a top priority for the Chinese Government.<sup>8</sup> Full and proper implementation of the 2012 *Network Rules* is critical to hold liable websites and online and mobile services that encourage infringement. Unfortunately, rights holders indicate that promulgation of the *Network Rules* has yet to have a meaningful impact. Full implementation of the *Network Rules* is necessary for ensuring that service providers are: 1) subject to clear secondary liability rules, including in cases of wilful blindness; 2) obligated to respond in a timely manner to takedown notices; and 3) incentivized to take action against repeat infringers. While NCAC has been cooperative on the administrative side, the Supreme People’s Procuratorate remains reluctant to prosecute due to concerns about adequacy of evidence to meet the thresholds for criminal liability (i.e., they cite the lack of hard evidence on ISP servers related to P2P streaming). Thus, there remains a need to address thresholds so that non-hosted online services such as P2P streaming services can no longer escape liability. One step IIPA has noted would be helpful is the establishment of a voluntary government-backed online copyright bulletin board to enhance “pre-release” administrative enforcement for motion pictures, sound recordings, and other works.

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<sup>7</sup>Problems remain with online journal piracy in China, including a service that offers for purchase, and delivery by e-mail, articles from a massive database of journals. The site is currently down and under investigation, but unless and until there is a final conviction and the service is permanently dismantled, other potential similar services will not be deterred. While there has certainly been progress, it has come slowly, since it is now more than two and a half years since the original complaint was filed.

<sup>8</sup>Industry notes the growth of the Internet and mobile piracy problem in particular in Zhejiang, Guangdong, and Shanghai.

**Camcording Worsened in 2013 and Must Be Addressed Forthwith:** Unauthorized camcording of movies – a key source for online audiovisual infringements – has reemerged, particularly in southern China, with a number of illegal camcording incidents detected in Guangzhou city in 2013. The motion picture industry has raised this issue with relevant Chinese Government agencies, e.g., NCAC, NAPP, and SAPPRFT, and with the China Film Distribution and Exhibition Association. The Chinese Government must swiftly enact reforms to make it a violation of law to use, or attempt to use, an audiovisual recording device to make or transmit a copy, in whole or in part, of a cinematographic/audiovisual work, from a performance in an exhibition facility. While awaiting this legislative change, the Chinese Government, theater owners, and others associated with the chain of theatrical distribution of films should take stronger efforts to deter unauthorized camcording.

**Software Piracy Updates:** Chinese private enterprises, state-owned enterprises and government agencies continue to use high levels of unlicensed software. The commercial value of unlicensed software in China was \$8.9 billion in 2011 – an amount that has more than doubled since 2005. This figure represents nearly half the value of all unlicensed software in the Asia-Pacific region. The piracy rate in 2011 was 77%, well above the global average of 42% and the Asia-Pacific average of 60%.<sup>9</sup> Piracy of U.S. software in China diminishes sales and exports for U.S. software companies. It also provides an unfair competitive advantage to Chinese firms that use this unlicensed software. Namely, Chinese firms get a free ride on their software and produce products coming into the U.S. market, which then compete against U.S.-made goods produced by firms that legitimately pay for their software.

As detailed in prior filings, there are significant hurdles to effectively dealing with enterprise end-user piracy in China. These include: 1) the lack of criminal remedies against this form of software piracy; 2) ineffective civil enforcement procedures; and 3) inadequate administrative enforcement. With regard to civil cases, several critical improvements are needed. The courts must relax excessively high burdens for granting evidence preservation orders and need to increase the amount of damages awarded against end-user pirates. In 2013, more local judges granted evidence preservation orders, but this process remains unpredictable, with some judges rejecting applications or causing undue delays. While some courts have increased the amount of damages, others, when facing similar infringement situations, grant much smaller “statutory damages” in lieu of a proper compensatory award. This problem highlights the need to significantly increase statutory damages beyond those currently laid out in the third draft Copyright Law revision. Finally, in cases in which a civil order is issued, right holders and authorities often face on-site resistance against evidence preservation and have only a limited amount of time to conduct software infringement inspections.

Another major issue is the lack of progress on software legalization in Chinese Government agencies and SOEs despite numerous specific commitments by the Chinese Government to tackle this problem in the JCCT and S&ED. Reports by U.S. software companies of little to no progress on these issues clearly indicate that software legalization programs are not being implemented in a comprehensive manner. To follow through on its software legalization commitments, the Chinese Government needs to implement comprehensive legalization programs for the Chinese Government and SOEs that include: 1) audits, certification and other credible processes to verify software license compliance; 2) software asset management (SAM) best practices; 3) sufficient budgets to purchase legal software; 4) performance indicators to hold government and SOE officials accountable for ensuring measurable progress on software legalization; and 5) a prohibition on mandates or preferences for the purchase of domestic software brands as part of the legalization process.

**Physical Piracy Abates, But Hard Disk Loading, High-Quality Counterfeits, Exports, and Manufacture of Circumvention Devices, Remain Problematic:** While many companies report an overall reduction in the impact of physical piracy, hard disk loading of software and other copyright materials remains an acute problem in China,

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<sup>9</sup>Data on software piracy rates and commercial values are taken from the 2011 BSA Global Software Piracy Study at [www.bsa.org/globalstudy/](http://www.bsa.org/globalstudy/). This study assesses piracy rates and the commercial value of unlicensed software installed on personal computers during 2011 in more than 100 markets. The study includes a detailed discussion of the methodology used. BSA plans to release an updated study in the second quarter of 2014.

including at *BuyNow PC Malls* as indicated in IIPA's October 2013 "Notorious Markets" filing to USTR.<sup>10</sup> High-quality counterfeit discs continue to be manufactured in China and sold in domestic markets or exported (including to the U.S., Australia, and Europe). *Hua Qiang Bei Market* (华强北) in Shenzhen, also mentioned in IIPA's October 2013 filing, is a central point from which counterfeit software is distributed to other regions in China and exported. Several criminal counterfeit software cases in China have involved distributors operating out of this market, and while the market has been subject to several sweeps during special enforcement campaigns, the situation has not improved in any meaningful way. Publishers continue to note physical piracy, for example, in the form of English language textbooks, but this is not as substantial a problem as print piracy of trade books. Reports indicate pirate books printed in and exported from China are showing up in parts of Africa. While university-sanctioned piracy has declined over the years, the Ministry of Education should be more involved in fighting piracy on campuses and educating librarians and students. The Ministry of Science & Technology (MOST) should also become more proactive to address pirate document delivery services, and the Chinese Academy of Sciences (CAS) should do more to educate information officers/librarians of the 100 research institutes in China.

Media box piracy, as documented in prior IIPA reports, remains a serious issue and since China is the main source of this problem spreading across Asia, the Chinese Government should take immediate actions against manufacturers and key distribution points for this illegal business model.<sup>11</sup> Finally, as documented in prior IIPA reports, China remains a hub for manufacture and distribution of technologies and devices used around the world to circumvent access controls employed by copyright owners to manage access to their works and services. The reluctance of the Chinese Government to bring criminal actions against manufacturers and distributors of these circumvention technologies and devices remains deeply troubling.

**Next-Generation Pay TV Signal Theft:** IIPA has documented in prior reports not only the increasing incidence of pay TV piracy in China but China's role as the manufacturing and export/distribution hub for pay TV circumvention devices and services. It is believed that pay TV piracy has widened in China's second and third tier markets in recent years. In addition, concerns have been raised about the deployment of services providing unauthorized retransmission (including over the Internet) of digital pay TV services. The film and TV industries are still learning about the size and scope of the problem, but the emergence of this next-generation digital pay TV is certainly a cause for concern.

**Continued Need for Enhanced Chinese Government Resources to Tackle Piracy:** IIPA has long argued that the disproportionately small amount of resources devoted to fighting piracy in China, when compared, for example, with those deployed to stop counterfeiting, creates a recipe for failure. For example, the software industry continues to report that the only avenues they have for seeking redress for unauthorized use of software by enterprises are the administrative and civil systems, which are under-funded and under-resourced, and which generally result in non-deterrent penalties. The same story plays out for other industries, which report that civil enforcement efforts are plagued by non-deterrent remedies (e.g., low damages and limited injunctive relief) and overly burdensome procedures (e.g., extensive documentation and legalization requirements). As such, IIPA continues to urge the Chinese Government to expand resources at NCAC, local CAs, and LCEAs, commensurate with the scale of the piracy problem. Given the ongoing prohibition on foreign right holder investigations into piracy, it becomes even more incumbent upon the Chinese Government to enhance its own resources.

## **COPYRIGHT AND RELATED LAWS AND REGULATIONS UPDATE**

Prior IIPA filings have documented in detail developments in the Chinese legal system for the protection of copyright, including Copyright and Criminal Law reform efforts. Last year's major development was the entry into

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<sup>10</sup>Buynow (百脑汇) PC Mall (China, various locations) is a very large personal computer mall chain in China, operating 22 stores across the country, leasing space to sellers of electronics equipment, software, games and accessories. Many of these sellers offer pirated operating systems and software, which they will install directly onto their customers' hard disks.

<sup>11</sup>"Media box" piracy consists of hardware sold that facilitates remote access to music videos, karaoke, audiovisual, and other creative materials. These boxes are being manufactured in China and exported to overseas markets throughout Asia. This next generation piracy threatens not only the Chinese market for content but is exported from China, harming other markets.

force on January 1, 2013 of a 2012 set of *Network Rules* to address online infringements.<sup>12</sup> These revision processes provide important opportunities to update the legal regime in China for more effective copyright protection and enforcement. IIPA also notes the commencement of official operations of the National Leading Group (NLG) in July 2013. While the key work plan of the NLG remains unclear, one important item on its agenda should be to ensure the Copyright and Criminal Law reform processes move forward and result in updated laws that adopt copyright protection and enforcement best practices, as IIPA and many IIPA member associations have recommended in numerous submissions to the Chinese Government. In 2013, *Regulations for the Implementation of the Copyright Law of the People's Republic of China* were issued (January 30); the *Regulations* confirm increased maximum administrative penalties.<sup>13</sup> Meanwhile, several other draft measures were released for comment, including: *NCAC Measures on the Supervision and Administration of the Copyright of Film and Television Works Disseminated via Internet* (March 2013);<sup>14</sup> *Rules of Administration of Network Publication Services* (January 2013);<sup>15</sup> and *Draft Measures for Online Trading and Related Services* (September 2013).<sup>16</sup> None of these measures seems to have fully recognized the seriousness and scope of online piracy and counterfeiting. For example, the *Draft Measures for Online Trading and Related Services* simply defers the IP infringement issues to the existing Tort Law without imposing any meaningful duty over online trading platforms. If the *Draft Measures* are issued as is, China will have missed an opportunity to reform its regime of online enforcement to the benefit of creators.

**Copyright Law Reform Not Fast-Tracked:** IIPA has provided several sets of comments on the draft amendments to the Copyright Law, and IIPA's specific comments and remaining issues have been communicated to the Chinese Government. Beyond those already discussed, additional issues raised with the Chinese Government by industry most recently include:

- the proposal by the Chinese Government of possibly overly restrictive collective management provisions;
- problematic default presumptions of ownership in the draft as to audiovisual works and works for hire;
- the re-introduction of an over-broad statutory license for broadcast of certain "published works";
- concerns over the way the draft attempts to address protection and use of "orphan works"; and
- the need to ensure that: 1) evidence preservation orders would issue within 48 hours of receipt of the application; 2) written decisions on applications for such orders are provided; 3) an opportunity to appeal denials of such orders is afforded; and 4) evidence preservation provisions otherwise conform to China's TRIPS obligations.

The third NCAC draft now sits with the State Council Legislative Affairs Office, where it is reportedly not considered "first tier" legislation, meaning it may not be considered by the National People's Congress in 2014 with priority. This is unfortunate. Given the proliferation of copyright piracy in China, including illegal online services, there is an urgent need for China to update and modernize its copyright law. This includes adequate remedies in the online environment and for ISP cooperation to tackle online piracy. In the absence of Copyright Law reform, the 2012 *Network Rules* on liability (i.e., the "necessary measures" to be taken by ISPs to avoid liability) will continue to govern.

**Criminal Code Reform Should Include Intellectual Property:** Unlike Copyright Law reform which appears stalled, Criminal Law reform appears to be fast-tracked. While to IIPA's knowledge no set of comprehensive amendments has emerged, the latest information suggests changes to the intellectual property provisions of the

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<sup>12</sup>*Judicial Rules on Several Issues concerning the application of Law in Hearing Civil Dispute Cases Involving Infringement of the Right to Network Dissemination of Information*, Approved at No. 1561 Meeting of the Supreme People's Court Adjudication Commission held on November 26, 2012. These *Rules* replaced the 2006 *Regulations on the Protection of the Right of Communication through Information Networks*.

<sup>13</sup>For example, the maximum compensation for infringing related rights of sound recording producers will be increased to RMB250,000 (US\$41,000).

<sup>14</sup>The music industry suggested that cinematographic works and works created in a way similar to cinematography as well as music videos should be covered in these measures.

<sup>15</sup>The music industry recommended that: 1) the draft rules should clarify that foreign invested entities may participate in network distribution service for music; 2) online music should be subject to only one content examination procedure; 3) copyright infringement should be expressly indicated as a "prohibited" action; and 4) consequences should be clearly stated if an ISP does not strictly observe its obligations under the Rules.

<sup>16</sup>The music industry suggested that: 1) copyright and rights related to copyright should be covered; 2) a "Publication Business Permit" should be obtained and shown in order to sell audio and video products; and 3) third party trading platform service providers and related service providers should have obligations to protect copyright and rights related to copyright.

Criminal Law (e.g., Articles 217 and 218 and accompanying JIs) and other related provisions may not be considered. This would be a major missed opportunity, and we urge the Chinese Government to reconsider this decision. As IIPA has noted above and in many prior filings and in informal consultations, a credible criminal remedy in China is needed to effectively curtail piracy and related violations in all their forms. Remaining gaps include:

- Thresholds that are too high (in the case of illegal income) or unclear (e.g., in the case of the copy threshold).
- Leaving some critical commercial scale infringements without a criminal remedy because of the requirement to show that the infringement is carried out “for the purpose of making profits,” an undefined phrase. It is often difficult for law enforcement authorities or right holders to prove that the infringer is operating for the purpose of making profits in cases of Internet piracy, enterprise end-user software piracy, or hard disk loading piracy cases.
- Failure to cover all acts of piracy on a commercial scale as required by TRIPS Article 61. For example, acts that Chinese law fails to expressly criminalize include: infringement of the communication to the public or the making available right of any work/related right; satellite, cable and broadcast piracy; trafficking in bootleg recordings; and other acts of infringement even when they are “on a commercial scale.”
- Failure to separately define criminal violations related to the WCT and WPPT, for example, circumvention of technological protection measures, trafficking in circumvention technologies, software, devices, components, and services, including in particular the unauthorized sales of passwords or product activation codes or keys over the Internet.
- Limited criminal accomplice liability with respect to imports and exports (with lower penalties available).
- Uncertainties with respect to increased penalties against repeat offenders.

In addition to expanding the scope of IP criminal liability, the law should also be amended to lift the jurisdictional bar limiting foreign right holders from commencing a private “civil claim” against those being prosecuted for copyright crimes in local district courts.

**Possible New Levels of Transparency in Case Law and Administrative Enforcement:** The SPC issued a Decision, *Supreme People’s Court Decision on Publishing Written Judgment of People’s Court on the Internet*,<sup>17</sup> effective January 1, 2014, requiring all judicial opinions to be published on the Internet within seven days. The increased transparency directly corresponds to what is called for by the Resolution of Third Plenum, demanding consistency and uniformity in the court adjudication process, including those adjudicated in the IP system. On November 21, 2013 the State Council issued its *Opinion on Disclosure of Information on Administrative Sanctions against IP Piracy*. The *Opinion* indicates that, except for business confidential and private information, administrative sanctions against IP piracy shall be disclosed to the public. These are generally considered positive developments.<sup>18</sup> We hope that full implementation of these measures, as well as the establishment of a central authority to provide information on and compile statistics for civil, administrative, or criminal cases involving copyright, will usher in a new era of transparency in the Chinese enforcement system.

**TRIPS/Berne Obligation to Pay Fairly for Public Performances (Including Broadcasts) of Musical Compositions:** IIPA continues to maintain that China violates its TRIPS/Berne Convention obligation to compensate copyright owners for the broadcast of musical compositions, both for failure to pay retroactively to China’s entry into the WTO, and for an ongoing violation of establishing a payment scheme that is clearly tens of millions of dollars below what would be a fair rate. The Chinese Government has never followed through on the agreement to “hold government/industry roundtables in China to discuss online copyright protection and enforcement, including library copyright protection.” This issue should remain a top priority in bilateral discussions.

**Administrative Criminal Transfer Regulations Need Significant Improvements:** The amended *Criminal Transfer Regulations* are well intentioned but do not adequately address existing challenges to the effective transfer

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<sup>17</sup>*Supreme People’s Court Decision on Publishing Written Judgment of People’s Court on the Internet* (最高人民法院关于人民法院在互联网公布裁判文书的规定), effective January 1, 2014.

<sup>18</sup>There are genuine concerns, however, based on some recent decisions, that the arbitrary deadline may short-circuit some judges’ processes in achieving full, reasoned decisions.

of administrative cases to criminal investigation and prosecution. The *Regulations* leave unclear whether transfers are required upon “reasonable suspicion” that the criminal thresholds have been met, and thus, some enforcement authorities believe “reasonable suspicion” is insufficient to result in a transfer, requiring proof of illegal proceeds. However, administrative authorities do not employ investigative powers to ascertain such proof. The “reasonable suspicion” rule should be expressly included in amended transfer regulations. There is apparently also some reluctance about transferring cases due to administrative authorities’ wish to retain the potential financial reward for successful enforcement actions, although questions also remain about who bears the costs for storage of contraband and other expenses associated with the handling of cases.<sup>19</sup>

## **MARKET ACCESS UPDATES AND RELATED ISSUES**

IIPA has consistently stressed the direct relationship between the fight against piracy in China and the need for liberalized market access to supply legitimate product, both foreign and domestic, to Chinese consumers. Many past IIPA submissions on China have detailed key market access barriers, such as:

- investment prohibitions or restrictions on core copyright businesses, such as production (including signing musicians and recording them), publication, duplication/replication, and distribution of audiovisual (music and film/TV) and published materials;
- restrictions on “exclusive licenses” of online music services;
- the lack of competition with incumbent SOEs for national distribution of imported films, and the lack of encouragement of other private Chinese entities to participate in national distribution of imported films without interference;
- the to-date non-transparent and non-negotiable Master Contract for theatrical distribution;
- import and export restrictions;
- discriminatory, arbitrary, and opaque censorship and release processes and timelines;
- the ban on importation or distribution of videogame consoles (which may be partially lifted due to market opening in the Shanghai Free Trade Zone); and
- measures that have the effect of discriminating against foreign software and other technology products, or compelling transfers of technology and intellectual property to China in order to access the market.

While many of these restrictions remain, some of the copyright sectors have seen limited progress in the past two years toward expanded market access. For example, the December 2011 amendment to the *Catalog of Foreign Investment Guidelines* promised to open the market for several creative product categories, creating new opportunities for foreign right holders. We are also encouraged by recent high-level political pronouncements which seem to indicate a policy shift toward viewing IP overall as an important Chinese interest. In November 2013, the Chinese Communist Party issued a decision on major issues concerning comprehensive major reforms, which stated that “China will strengthen protection of intellectual property rights, improve the mechanism to encourage innovation, and explore ways of setting up an IPR court.” The reform document also mentions improving the cultural management system and developing a modern cultural market. This would include improving entry and exit mechanisms into the cultural market and the development of non-state owned cultural enterprises. The document also mentions promoting Chinese culture to the world while actively absorbing all outstanding cultural achievements from abroad. These high-level policy directives to guide the Chinese Government over the next decade seem to represent a positive policy shift, although given the industry’s experience with, e.g., indigenous innovation and concerns over strategic emerging industries (SEIs) and possible discriminatory or protectionist effect, we must urge the U.S. Government to continue to monitor this trend carefully.

**Self-Censorship of Foreign Entity Music Introduced:** On August 12, 2013, the *Administrative Measures on Content Self-Censorship of Internet Cultural Operating Units of MOC* were issued (entering into force December

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<sup>19</sup>The bottom line is that the structures in place should encourage administrative authorities and police to cooperate in seeking positive outcomes in piracy cases.

2013).<sup>20</sup> Under the *Administrative Measures*, the Ministry of Culture will not need to censor or examine either the imported or domestic music repertoire of foreign entities after self-censorship by the Internet cultural operating units. This self-censorship is considered as a pilot project until November 2014, after which time MOC will decide whether or not to extend or expand it. IIPA and members have been pressing for years for a change to the current discriminatory system, and we hope to see it implemented in a way which will provide equal treatment to both imported and domestic music. In addition, the Chinese Government has verbally indicated that it is no longer necessary to appoint an exclusive licensee for online music distribution. However, to avoid any uncertainty, it is recommended that the Chinese Government formally revoke this requirement.

**Shanghai Free Trade Zone Opens Online Music Sector (and Perhaps Consoles) to Foreign Investment, But Leaves Others Out:** In September 2013, China officially launched the pilot free trade zone in Shanghai (“Shanghai FTZ”). Foreign investment in all sectors is allowed in the Shanghai FTZ unless listed under a published *Negative List*. The *List* does not prohibit investment in internet services for “music,” so foreign record companies should be able to start online music businesses in the Shanghai FTZ. Unfortunately, the *List* expressly prohibits investment in “online audio and video programs,” as well as so-called “Internet cultural business.” In addition, I64, category 4, indicates, “Foreign investors are forbidden to be engaged or involved in operation of online games directly or indirectly.” Further, even for music, it is unclear whether music videos can be included, and whether such a foreign company established in the Shanghai FTZ could make music available throughout China. One potential breakthrough includes the ban on importing or distributing consoles in China. Since there is no express prohibition on consoles in the *List*, presumably, that market is now apparently permitted for foreign investment in the Shanghai FTZ.

**Review of the “Master Contract”:** The Master Contract governs the relationship between China Film Group and foreign producers who secure a quota slot, which are primarily major motion picture studios. This Contract, which unfairly restricts terms such as revenue-sharing percentage, is reportedly being re-negotiated. This is an extremely important development. IIPA requests that the U.S. Government make this review a priority issue, as we can expect that China Film Group may try to negotiate as few changes as possible. To the extent the Master Contract becomes the subject of bilateral discussions between U.S. Government and its counterparts at the Chinese Ministry of Commerce (MOFCOM), all industry stakeholders are prepared to work with the U.S. Government to get the most they can out of this discussion and negotiation. The financial and standard terms of the Master Contract must be transparent with the effect of the Chinese Government signaling to the marketplace that reforms to comply with the U.S.-China Film Agreement are well underway. Other private Chinese enterprises will then understand the terms on which China Film Group imports and distributes quota films so that they can finally engage in the national distribution of imported films.

**U.S.-China Film Agreement Implementation – Next Stages:** The February 2012 U.S.-China Film Agreement has had the positive result in increasing revenue sharing participation to 25% of box office revenue for up to 34 films (14 of which enter the Chinese market in enhanced formats). This change has already resulted in increased revenues for films that are able to secure the increased quota slots and share in box office revenue. This progress is tempered by the fact that so few imported films are able to secure quota slots, and films that do not share in the box office revenue still meet insurmountable boundaries and lack of distribution options due to the dominant incumbent SOEs in the market, China Film Group and Huaxia. Until the U.S.-China Film Agreement is robustly and fully implemented, and national distribution can be conducted by private Chinese enterprises in competition with the dominant incumbents, the majority of film producers will have very limited export opportunities in China.<sup>21</sup> Access

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<sup>20</sup>Before this occurred, IIPA and its members had been concerned about the 2012 draft *Network Publishing Service Management Regulations (Opinion-Seeking Revision Draft)*, but the new *Administrative Measures* appear, at least for the moment, to have overtaken those concerns.

<sup>21</sup>The independent film industry which produces the majority of U.S. films continues to experience limited access to the Chinese marketplace and is only able to secure a very limited number of revenue sharing quota slots. Most independent films are still imported and theatrically distributed in China on a non-revenue share basis and suffer from lack of distribution options and below-market commercial terms. Both the financial return and the license fees for the underlying films are massively eroded by the lack of qualified theatrical distributors who can adequately support a nationwide theatrical release, and by a relatively non-competitive and non-transparent marketplace. The lack of legitimate distribution opportunities for independent films make these films particularly vulnerable to piracy as Chinese consumers struggle or are unable to find the content they want through legitimate channels.



they do have will be through intermediaries that must navigate a non-transparent marketplace. In order to promote a level the playing field for all imported films seeking distribution opportunities in China, the PRC should immediately:

- begin to actively promote and approve Chinese companies to engage in national distribution of theatrical films. This includes promulgating transparent business practices in which the incumbents would work transparently with private Chinese enterprise to coordinate importation of films (both revenue sharing and non-revenue sharing films) so that those private companies could engage unfettered in the national distribution of imported films as envisioned in Paragraphs 4 through 8 of the Agreement;
- provide for transparency in the censorship process for films;<sup>22</sup>
- eliminate arbitrarily declared special periods of protection for domestic films that interfere with the marketing and distribution of imported and local films alike, so as to permit imported films to be released and scheduled according to commercial contracts and without Government interference (permitting both the Chinese distributor and the producer to achieve maximum commercial benefits);<sup>23</sup> and
- cease other actions taken by the Government and SOEs (formal or otherwise) which have a discriminatory impact on foreign film and television producers.

A newly proposed centralized ticketing system may create more transparency, but also may be a new cause of concern for the strengthening of the Chinese Government's influence on the theatrical marketplace. Developments must be closely monitored to ensure the Chinese Government's full compliance with the U.S.-China Film Agreement.

**Addressing Indigenous Innovation, Procurement Preferences, and Local IP Ownership Requirements for Information Security Products Including Software:** The Chinese Government must continue to address other market access barriers and industrial policies, including indigenous innovation policies, that impose discriminatory requirements on foreign right holders and/or deny them the exercise of their IP rights.<sup>24</sup>

**Indigenous Innovation:** Over the past several years, China has rolled out a series of policies aimed at promoting "indigenous innovation." The apparent goal of many of these policies is to develop national champions, but raising some concerns that the implementation of such policies may discriminate against foreign companies and compel transfers of technology. Of particular concern are policies that condition market access on local ownership or development of a service's or product's intellectual property, or that aim to compel transfers of foreign intellectual property and research and development to China.

For example, in 2012, the Chinese Government announced they would be investing US\$1.7 trillion over the next five years in designated Strategic Emerging Industries (SEIs). This initiative, in addition to a SPC Opinion on IP released in mid-December 2011 which seemed to instruct lower courts to make decisions that assist domestic "cultural" industries, could effectively promote the implementation of discriminatory policies. In 2011, China committed to eliminate catalogues or other measures by provincial and municipal governments and autonomous regions linking innovation policies to government procurement preferences. This followed previous Chinese commitments to "delink" innovation policies from government procurement. At the 2012 S&ED, China made a broader commitment to treat IPR owned or developed in other countries on the same basis as IPR owned or developed in China. These commitments must be fully satisfied to give software developers and other copyright industries fair access to China's vast procurement market.

**Software Preferences:** The software industry remains concerned that the Chinese Government is adopting mandates or preferences for domestic software brands as part of its legalization programs for government agencies

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<sup>22</sup>The lack of certainty in China's censorship process for films causes unstable commercial transactions and poses a market access barrier to independent film producers. For example, local distributors report they cannot obtain official written responses from the censorship authorities, and some continue to use a film's censorship rejection as a way to avoid payment of license fees.

<sup>23</sup>Uncertainty regarding the release of foreign and domestic films in China negatively impacts all independent film producers and their local Chinese distribution partners.

<sup>24</sup>For more market access related concerns for the software industry, please see the China section (pages 3-5) of the BSA submission for the National Trade Estimate (NTE) to USTR, at <http://www.bsa.org/~media/Files/Policy/Trade/BSASubmissionfor2013NTEFINAL10152012.ashx>.

and SOEs. This is inconsistent both with China's efforts to join the WTO's Government Procurement Agreement, and with China's commitment in its WTO Working Party Report that the Government "would not influence, directly or indirectly, commercial decisions on the part of state-owned or state-invested enterprises, including the quantity, value or country of origin of any goods purchased or sold ... ."

In May 2013, China's Ministry of Finance (MOF) issued new rules on software procurement, the *Notice on Generic Software Assets Allocation Standards in Government Agencies* (MOF Decree). The MOF Decree imposes price controls and preferred licensing terms (e.g., site-licenses) on procurement of software that favor local brands and significantly restrict market access for foreign brands. Moreover, the MOF Decree focuses on the procurement of only certain types of software – operating systems, office productivity software, and anti-virus software – suggesting that procurement may not be authorized or, at a minimum, that budgets will not be made available for other types of software. This directive does not comport with best practices for software procurement, does not adequately take into account the speed with which software products and services are developing, and puts in place *de facto* preferences for procuring domestic software products and services that are not in keeping with China's JCCT and S&ED commitments to avoid discrimination against products with foreign-owned or foreign-developed IP in its government procurement and its WTO accession obligations to refrain from imposing price controls.

Additionally, China has provided similar MOF guidance to the SOEs. This guidance has been provided directly, as well as on State-owned Assets Supervision and Administration Commission (SASAC) hosted SOE product legalization websites. This guidance: 1) creates a preference to purchase domestic-brand software; 2) erects artificial barriers that impede market access by suggesting that products are comparable when they are not (e.g., business productivity software versus basic word processing software); and 3) presses entities to support, encourage, and ensure the fast growth of the domestic software industry.

To address this situation, the Chinese Government should:

- withdraw the MOF Decree and address its discriminatory elements, including by removing the price controls and site-license preference, and refrain from adopting or implementing any other measure that would have the effect of excluding foreign software or favoring domestic software in government procurement;
- consistent with its WTO obligations and its JCCT and S&ED commitments, affirmatively declare: 1) that it will not influence, either formally or informally, the software purchasing decisions of SOEs in any way (whether through the MOF Decree or otherwise); and 2) that it will take affirmative steps to clarify to all SOEs that they remain free to make software purchasing decisions based on commercial considerations irrespective of the origin of the software or the nationality of the supplier.

In keeping with these commitments, China should remove all instances of such discriminatory guidance from all government websites directed at SOEs.

**Local IP Ownership Requirements for Information Security Products Including Software:** China's "Multi Level Protection Scheme" (MLPS) imposes significant restrictions on procurement of information security products for an overly broad range of information systems the government considers sensitive. Among other requirements, procurements of such products are limited to those with IP rights owned in China. This applies to procurements by the Chinese Government and increasingly to procurements by SOEs and others in the private sector. This results in an undue and discriminatory market access restriction for foreign information security products and will in many cases prevent information systems in China from procuring the most effective security tools to meet their needs. We welcome the commitment made by China in the 2012 JCCT that it will review and revise the MLPS rules through a process that will seek the views of all parties, including through dialogue with U.S. parties, and urge that China use this process to remove requirements that discriminate against products that are foreign-owned or have foreign-owned IP.

**Patent Law Reform:** The Chinese Government is currently undertaking a process to amend the Patent Law, led by the State Intellectual Property Office (SIPO). Among other things, the proposed amendments would give expanded enforcement powers to SIPO, who may be able to conduct *ex officio* raids and enforcement actions

against ill-defined “market-disruptive” patent infringement activities, and award fines as well as compensatory and punitive damages. This creates enormous risks for foreign patent holders in China. The Chinese judicial system is the proper forum to adjudicate patent infringement and damages, and it does not make sense to vest that same authority in administrative agencies as well. The proposed empowerment of SIPO and hundreds of local intellectual property offices (IPOs) in enforcing patents will dramatically change the current enforcement landscape, creating the potential for substantial confusion and duplication of the role that courts now play. The envisioned role for SIPO and IPOs as patent enforcement authorities is, based on our research, without analogue in any other national law.

# COSTA RICA

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

### 2014 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** IIPA recommends that Costa Rica be elevated to the Priority Watch List.<sup>1</sup>

**Executive Summary:** Enforcement efforts are lacking and copyright piracy remains at unacceptable levels in Costa Rica, particularly for a country that has now been an FTA partner of the United States for five years. In addition to the resources and coordination that are badly needed among Costa Rica's enforcement authorities, two areas of acute difficulty in Costa Rica for IIPA's members are particularly frustrating given the simplicity of the needed reforms. First, contrary to commitments that the Government of Costa Rica has made in past years to sound recording producers and artists that the full range of rights provided under international treaties would be available, President Laura Chinchilla issued decrees that foreclose important sources of revenue to the industry, forcing many to make detrimental decisions about their investments in the country. The resulting halt of payments pinches producers and artists already battered by high piracy rates and limited digital sales in the market. Now that the underlying legislative initiative for the decrees has been withdrawn from the legislature, all that is needed to resolve this outstanding concern is political will. Second, local software developers in Costa Rica are growing, selling, and exporting their goods, a fact that makes all the more disappointing the country's failure to tackle enterprise end-user software piracy by, for example, forging concrete alliances with the industry to raise awareness, and by implementing a government-wide software legalization program with adequate budgetary appropriations. These steps toward legal government software use would allow Costa Rica to fully comply with its FTA obligations.

Pirated music accounts for more than half of the records sold or downloaded in Costa Rica. Meanwhile performers and record labels remain unable to collect payments from broadcasters for the performance of their works as provided in the copyright law. Government efforts to coordinate IPR enforcement policy slowed to a halt in 2012, as a unit specialized in IP within the local Prosecutor's Office expected to be launched officially in 2012 failed to materialize. Attention is needed to resume those plans and to eliminate major obstacles that still remain for rights holders taking action in Costa Rica's courts.

#### **PRIORITY ACTIONS REQUESTED IN 2014**

- Repeal Executive Decree No. 36.014-MP-COMEX-J (May 2010), which executes now-withdrawn legislation to implement reservations to international obligations that would result in denying compensation to U.S. performers and record labels; and require performance rights payments from commercial broadcasters to performing artists and record producers to resume immediately.
- Revise past government initiatives and push forward a decree to properly implement Costa Rica's remaining CAFTA-DR obligation to adopt Internet Service Provider (ISP) liability provisions, with speedier deadlines by which ISPs must forward notices to users for the unauthorized exchange of protected content over the Internet.
- Officially launch and support a new specialized IP Prosecutor's Office under the Attorney General.
- Fully comply with commitments in the CAFTA-DR in practice by effectively implementing Decree 37549 JP (2013), including by institutionalizing concrete software asset management practices in government agencies and providing adequate budgetary appropriations.

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<sup>1</sup>For more details on Costa Rica's Special 301 history, see previous years' reports at <http://www.iipa.com/countryreports.html>. For the history of Costa Rica's Special 301 placement, see <http://www.iipa.com/pdf/2014SPEC301HISTORICALCHART.pdf>. For a discussion of IIPA's 2014 Key Initiatives and Challenges, see IIPA, *2014 Special 301 Submission*, at <http://www.iipa.com/pdf/2014SPEC301COVERLETTER.pdf>.



## **COPYRIGHT PIRACY IN COSTA RICA**

The copyright industries report no change whatsoever in the levels of piracy present in Costa Rica. Both physical and online piracy in Costa Rica have caused such major losses that many in the content industries have been forced to leave the market.

**Hard goods piracy:** The sale of pirate CDs on the streets is still a significant problem for the recording industry in Costa Rica. Street vendors placed on strategic squares in downtown San Jose can offer these and pirate DVDs without the risk of police intervention. The level of physical piracy in Costa Rica increased to approximately 95% by early 2013. Much of this optical disk (OD) piracy involves local CD-R burning. Several groups are involved in the importation of blank media and equipment, but customs authorities have not been able to disclose information about the individuals and companies involved in the massive importation of blank media destined to piracy. Local experts estimate that approximately 22 million units of CD-Rs and DVD-Rs enter Costa Rica annually.

**Internet piracy:** Internet piracy, as everywhere else in the region, is a growing problem in Costa Rica, particularly via links to music files stored on cyberlockers, and peer-to-peer (P2P) piracy via BitTorrent networks such as ARES. Internet piracy is particularly damaging because of its harm to the development of legitimate online distribution services. Currently there are no discussions between the content community and ISPs regarding Internet piracy on their networks, and this growing problem is completely ignored by authorities and ISPs in the country.

**End-user software piracy and lack of effective CAFTA implementation:** The software market in Costa Rica continues to expand, fueled by growth among local developers, but the overall software piracy rate remains steady in Costa Rica, at 58% in 2011, and, as a result, the losses for the software sector have also increased.<sup>2</sup> The software industry remains particularly concerned about the high level of unlicensed software use by legitimate businesses and government agencies. BSA | The Software Alliance (BSA) reports that it has not seen pirated software products on the streets, but hard disk loading is becoming common, primarily in the “Gran Area Metropolitana” region in the central valley of Costa Rica, which comprises the capital and surrounding provinces.

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. Notably, Costa Rica produces and exports at least \$400 million worth of software per year, and there has recently been greater awareness by the government regarding protecting the IP industry for its overall economic health.

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

**Recent reservations to two treaties and withdrawn legislation affecting the recording industry:** The main source of concern for the music industry in Costa Rica is an Executive Decree, No. 36,014-MP-COMEX-J published in the official Gazette in 2010, that implements reservations to the two international treaties protecting neighboring rights (Article 12 of the Rome Convention and Article 15.1 of the WIPO Performances and Phonograms Treaty (WPPT)). Those reservations effectively exempt broadcasters from performance rights payments to performing artists and record producers. The Decree has the odd distinction of implementing legislation that was introduced in 2009 but was never adopted; in fact, during 2013 Bill No. 17,719 received a negative vote at the Legal Affairs Committee in Congress, and was withdrawn from the legislative queue. Still, the Decree remains in force and performance rights payments to performing artists and record producers have been halted since its issuance in 2010. The government could simply repeal the Decree to allow these payments to resume immediately.

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<sup>2</sup>Data on software piracy rates and commercial values are taken from the 2011 BSA Global Software Piracy Study at [www.bsa.org/globalstudy](http://www.bsa.org/globalstudy). This study assesses piracy rates and the commercial value of unlicensed software installed on personal computers during 2011 in more than 100 markets. The study includes a detailed discussion of the methodology used. BSA plans to release an updated study in the second quarter of 2014.

In 2009, the four major recording companies brought actions against two important commercial FM stations in San Jose for broadcasting sound recordings without the required performance rights license, in the case of *Fonotica vs. Radio Columbia/Radio Omega*. As a result of the actions, the court granted injunctions prohibiting the stations from further performing copyrighted sound recordings without the proper licenses, but the broadcasters ignored the injunctions and Costa Rica's courts failed to enforce them. In the second half of 2012, a court of first instance reaffirmed the right of the record producers to collect payments for the commercial broadcast of their recordings, pending the calculation of damages by an expert appointed by the court. The decision was appealed by the broadcasters and, as a result, rights holders have been unable to finalize the calculation of damages, let alone receive payments for what is now years of unpaid performances. The defendants in the case continue broadcasting international sound recordings without proper licenses. The case is a clear example of the failures within the judiciary in Costa Rica to enforce the copyright law, the *Ley de Observancia* (Enforcement of IPR Law) and the most basic civil law rules in the country. The music industry's business model is transitioning from sale of hard goods to the licensing of transmissions, making the removal of existing performance rights particularly detrimental to prospects for investments made in the country in reliance on those rights. 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.

**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 Copyright Treaty and WPPT (collectively, the WIPO Internet treaties).

**Internet piracy measures:** Rights holders continue to face significant impediments in their efforts to address Internet piracy in Costa Rica due to the lack of an effective legal framework for the removal of infringing content. In 2011, Costa Rica implemented CAFTA-DR provisions establishing limitations of liability for ISPs that take certain actions in response to copyright infringement committed by users on their networks and services. Decree 36,880-COMEX-JP, published in the official gazette on December 16, 2011, fulfills most of the requirements of such provisions. Nevertheless, the decree sets forth overly long time periods by which ISPs are to forward notifications sent by rights holders, and in practical terms creates a serious obstacle for the enforcement of rights in the online environment. As an example, the decree allows an ISP up to 45 days just to forward a single notification to its subscriber. In the modern market peak consumer demand for copyrighted works typically occurs within a matter of weeks after release, making this a crucial period of time for rights holders to generate revenue in an effort to recoup their considerable investment in creating, producing and distributing their works. If copyright owners must compete with free unauthorized copies that can remain online for over a month, that opportunity is lost.

**Government software asset management not completed yet:** Government legalization of software is a CAFTA-DR obligation that was due upon the agreement's entry into force. The Costa Rican Government commenced efforts on this issue in 2013 with a Government Software Legalization Decree. We welcome the enactment of Decree 37549 –JP, published on March 1, 2013 which has established that software legalization in government agencies should be an important public policy goal, for its own sake and to set a good example for the private sector. However, in order to fully comply with its commitments in the CAFTA-DR, Costa Rica must accelerate the implementation of the decree and take concrete steps to ensure the use of authorized software by government agencies, including by forging concrete alliances with the industry to raise awareness and promote enforcement, initiating effective software asset management practices, and providing sufficient budgetary allocations. The only government agency to demonstrate progress in implementing the Decree has been the National Registry, whose Copyright Office has been receiving data for several years from other government agencies about their software inventories, and which in general has complied with its software licenses. The Government of Costa Rica could improve the overall rate of software legalization by requiring private contractors to submit proof of their software license compliance, a step that could achieve noticeable results without legislative hurdles.

**Poor Enforcement Results Under The Law on Enforcement (*Ley de Observancia*):** Key elements of enforcement under the *Ley de Observancia* have fallen short of deterring criminal copyright infringement in Costa

Rica. The jail terms for criminal copyright piracy are currently so low (in some cases as little as two months) as to pose negligible deterrence against infringement. It has become common practice for judges to use the discretion to choose fines rather than jail terms. Where low sentences are imposed, judges commonly use their discretion under the law to suspend them. Deterrent-level sentences at a minimum of three years should be imposed in practice. Meanwhile, fines are not consistently imposed under the *Ley de Observancia*, whose 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.

## **COPYRIGHT ENFORCEMENT IN COSTA RICA**

Many of the enforcement concerns that copyright holders have cited in years past remain a problem today. While some IIPA members report positive relationships with Costa Rica's enforcement authorities, key authorities have not dedicated adequate resources to the piracy problem, leaving a number of copyright enforcement deficiencies in the Costa Rican legal and enforcement system. In late 2011, sources indicated that the Attorney General had plans to launch a specialized IP unit within the Prosecutor's Office in early 2012, but those plans never materialized. Instead, resources dedicated to tackling piracy in Costa Rica are minimal, and the copyright industries continue to report a lack of focus or cooperation that has been a major obstacle at the prosecutorial level. The national police and prosecutors are responsible for the anti-piracy actions in Costa Rica, but street operations against points of sale for illegally burned CDs are rare. There are no major operations against digital jukeboxes that contain illegal music files despite complaints filed on a regular basis by industry representatives in San Jose.

The following actions are needed to improve the effectiveness of Costa Rica's enforcement regime:

- *Establish regular meetings of the Interministerial Committee on IPR Enforcement (established in 2009), and set coordinated objectives for participating government bodies – including the Ministry of Justice, and also includes the Ministry of Foreign Trade (COMEX), the Investigations Police, the Copyright Registry, and the Attorney General's Office. In practice, the Committee has met rarely since its creation, and nothing has come from those meetings.*
- *Officially launch and support a new specialized IP Prosecutor's Office under the Attorney General. Given the significant delays and observed lack of proficiency of prosecutors and judges, the creation of this special office remains a pressing priority. While there were reports in 2012 that such an Office would begin to work in an official capacity that year, that initiative has been all but forgotten.*
- *Continue to follow through with increased attention to IPR enforcement, additional resources for border enforcement, and prosecution of copyright violations as organized crime as initiated by Attorney General Jorge Echavarría in 2011. The Attorney General's resolution resulted in an initial increase in prosecutorial attention to copyright crimes, which needs to be reinvigorated, and the initiative has yet to penetrate the lack of coordination between the investigation police and the judiciary, leaving, for now, Costa Rica's growing piracy problems unaffected.*
- *Provide needed training programs for police, prosecutors, and civil and criminal judges on proper enforcement of the copyright and criminal laws.*
- *Provide needed resources and ex officio authority for police forces to address intellectual property infringement. The police efforts that take place in municipalities to raid and confiscate pirate optical disks from street vendors do not pursue investigations of the supply chain for the pirated and counterfeit merchandise, and lack authority in the law for ex officio actions for copyright infringement.*

# INDIA

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2014 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** IIPA recommends that India remain on the Priority Watch List in 2014.<sup>1</sup>

**Executive Summary:** Piracy and market access barriers are the chief reasons for the under-performance of both domestic and foreign copyright industries in India.<sup>2</sup> Problems include: massive and growing online, mobile (smart phone and tablet) piracy; unauthorized camcording of movies in the theaters; unauthorized use of software and published materials; lack of priority assigned to copyright piracy cases; lack of uniform enforcement procedures among different states' law enforcement authorities; and market access barriers such as high taxes, "must provide" requirements in the pay TV sector, and discriminatory procurement practices. The Copyright Act was amended in 2012 with some positive features. However, some aspects of that reform remain problematic, such as: inadequate protection for access control technological protection measures and against trafficking in circumvention technologies, devices, and services; ownership and assignment restrictions which threaten the fabric of longstanding business models; and TRIPS- and Berne-incompatible compulsory and statutory licenses. Copyright holders generally have positive relationships with Indian authorities, including the Ministry of Human Resources and Development (MHRD). Several effective court mechanisms remain viable, including Anton Piller (*ex parte* search), John Doe, and Mareva (asset freezing) orders, and police will often take enforcement action on their own recognition (so-called *suo moto* cognizance). Actions against "release" groups engaged in the unauthorized camcording of movies in cinemas, and court orders disabling access to dedicated piracy websites in India, have had a temporary ameliorative effect.

### PRIORITY ACTIONS REQUESTED IN 2014

#### Enforcement

- Immediately implement or revise the laws to deal nationwide with online and mobile piracy, including expeditious remedies against services built on copyright infringement.
- Strengthen state-based enforcement efforts, increasing the number and scope of *suo moto* raids to address all forms of piracy, and increasing the speed and efficacy of enforcement efforts in cities where piracy has migrated.
- Exert greater Indian Government resources to drive unauthorized camcording from the market.
- Amend state laws against organized crimes (Control of Goonda Acts) to include software and book piracy.
- Encourage establishment of special IP panels with expert judges and IP-devoted prosecutors to accelerate effective and deterrent adjudication processes in both civil and criminal cases; hold judicial trainings.
- Establish standard operating procedures for enforcement agencies, particularly police departments across the country, in relation to: 1) pre-raid documentation requirements for lodging complaints; and 2) evidence gathering during raids, adhering to safeguards and post-raid recordals to ensure predictability in enforcement processes.
- Have Indian Customs effectuate *ex officio* seizures, followed by destruction, of illegal exports as well as imports.

#### Legislation

- Include and adopt in India's Cinematograph Bill a measure making it an offense to use (or attempt to use) an audiovisual recording device in a cinema to make or transmit a copy of an audiovisual work in whole or in part.

<sup>1</sup>For more details on India's Special 301 history, see previous years' reports at <http://www.iipa.com/countryreports.html>. For the history of India's Special 301 placement, see <http://www.iipa.com/pdf/2014SPEC301HISTORICALCHART.pdf>. For a discussion of IIPA's 2014 Key Initiatives and Challenges, see IIPA, 2014 Special 301 Submission, at <http://www.iipa.com/pdf/2014SPEC301COVERLETTER.pdf>.

<sup>2</sup>For example, India produces the greatest number of films in the world, but ranks only sixth in terms of box office. India also boasts a creative and diverse Indian and international music market and retains a prolific publishing industry. The Government of India should conduct a study, in line with the methodology devised by the World Intellectual Property Organization to ascertain the contribution of its copyright industries to the Indian economy. Such a study would help form a sound policy basis for strengthening India's copyright laws and enforcement response to piracy. WIPO has conducted over 40 contribution studies in other countries. See *WIPO Studies on the Economic Contribution of Copyright: Overview* (2013), available at [http://www.wipo.int/export/sites/www/copyright/en/performance/pdf/economic\\_contribution\\_analysis\\_2012.pdf](http://www.wipo.int/export/sites/www/copyright/en/performance/pdf/economic_contribution_analysis_2012.pdf), last accessed December 17, 2013.





- Further amend the Copyright Law to, among other things:
  - clarify prohibitions against circumvention of access control technological protection measures (TPMs), and of trafficking in circumvention technologies, devices, components or services.
  - remove burdensome restrictions on freedom of contract at odds with industry practices and the expectations of the creative parties.
  - remove or restrict the scope of statutory license provisions for broadcasters.
  - introduce a clear basis for fair and effective measures to address access to websites built on hosted or non-hosted infringements.
  - adopt statutory damages in civil cases and allow restitution to be awarded in criminal cases.
  - establish enhanced penalties for “pre-release” piracy, with provisions comparable to those adopted in the U.S.
- 1) Amend the tax laws to make software piracy a form of tax evasion; 2) enhance corporate audit and disclosure requirements; and 3) adopt software asset management (SAM) policies to ensure legal software use in private enterprises and Indian Government agencies.
- Provide tax benefits for associations involved in anti-piracy and capacity building.
- Reduce patent pendency on software and technology patents.

### **Market Access**

- Eliminate significant market access barriers imposed on the motion picture industry as described in this submission, including the TRAI ban on exclusivity and imposition of “must provide” in the pay TV sector.
- Eliminate high tariffs on entertainment software products.
- Eliminate cascading effect of direct and indirect taxes, resulting in extremely high taxation rates for the motion picture and television industries.
- Eliminate double taxation of software.
- Refrain from imposing technology or procurement preferences or mandates for products using technology or IP owned and developed in India.

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

Prior IIPA reports on India contain detailed discussion of piracy and enforcement issues.<sup>3</sup> This report serves only as an update and is not to be considered an exhaustive review of the issues.

**More Effective Enforcement Needed Against Internet and Mobile Piracy:** Within the next two years, India will be the second largest Internet market in the world, and the world’s leading English language market, with an estimated 330-370 million Internet users. Mobile penetration stands at around 70% with an increasing number of mobile (smart phone and tablet) users (estimated at around 22 million) having 3G Internet access.<sup>4</sup> The Indian Government continues investing in infrastructure to support this growth under its National Broadband Policy, and opportunities for expansion of India’s online marketplace for copyright content theoretically abound. However, without adequate legal protection and enforcement against illegal BitTorrent, cyberlocker, web-based file hosting, wireless access protocol (WAP), blogs, and online radio sites or services (catering to Indian demand for music, movies and television programming, software, games, and books), India’s legitimate online marketplace will remain stunted.<sup>5</sup>

A recent reported study tracking downloading IP-addresses on peer-to-peer (P2P) networks for films and television content found India to be in the top ten Internet piracy countries in the world.<sup>6</sup> In 2013, the Entertainment Software Association (ESA) reports that India once again placed sixth in the world in terms of the number of

<sup>3</sup>See, e.g., IIPA, *India*, 2013 Special 301 Report, February 8, 2013, at <http://www.iipa.com/rbc/2013/2013SPEC301INDIA.PDF>.

<sup>4</sup>See generally International Telecommunications Union, *Facts and Figures*, <http://www.itu.int/en/ITU-D/Statistics/Pages/facts/default.aspx>.

<sup>5</sup>Indian consumers have legitimate choices today, including BigFlix, Eros On Demand, Box TV, Rajshri, iTunes India, Yahoo India, YouTube India, Ditto TV, BSNL Hungama, Spuul, NFDC Cinemas of India, Biscoot Talkies. On top of these legitimate online platforms, retail chains such as Landmark, Crossword and Planet M now sell legitimate copies of films in DVD and VCD format.

<sup>6</sup>Utpal Borpujari, *India Major Online Film Piracy Hub*, Deccan Herald, January 30, 2014, at <http://www.deccanherald.com/content/41541/india-major-online-film-piracy.html>.

connections by peers participating in the unauthorized file sharing of select ESA member titles on public P2P networks. Pirated versions of movies often appear on the Internet in India within hours of their release in the movie theater, available through BitTorrent, cyberlocker, or web-based file hosting sites or services. The Internet piracy situation in India is fluid, as sites subject to enforcement or court orders merely migrate to avoid enforcement or further detection. Hundreds of sites target international and Indian movies and music, as well as other copyright materials.<sup>7</sup> The prevalence of these readily accessible sites indicates that local Indian creators are being harmed significantly by online piracy, a factor that the Indian Government should take into account.

A more centralized enforcement response to the proliferating online piracy problem is needed. In 2012 and again in 2013, the music industry association obtained civil court orders to take down more than 250 dedicated piracy sites. These orders are a helpful indicator of a nascent Indian Government willingness to address online infringement, but much more will be required to drive down online music piracy and create the space needed for the operation of legitimate music services. The motion picture industry notes some cooperation for takedowns of hosted content on traditional sites (e.g., user-generated content sites) but inadequate support from ISPs and law enforcement for taking down dedicated piracy sites. Since piracy sites and those offering the sale of pirated materials for mobile devices generally operate openly in India without fear of legal action, a much stronger enforcement response is needed on the part of all relevant agencies of the Government. If necessary, as discussed below, laws and regulations should be fine-tuned to permit effective action against online piracy services, beyond the basic structure established under the Copyright Act.<sup>8</sup> In addition, it is suggested that the Indian Government convene regularized communications between right holders and the major ISPs, or at least ensure that such meetings occur, to foster voluntary and mutual cooperative efforts.

Where investigations reveal that piracy websites have a nexus to or contact details in India, the music industry is bringing criminal complaints. Twenty-two such criminal complaints were lodged in 2012 by the music industry, including ongoing cases against *songsdl.com* and *mp3don.com*. One court case, *Super Cassettes Industries Ltd. v. Myspace Inc. & Another* (2011),<sup>9</sup> may be helpful in defining the contours of liability for intermediaries in the online space and fostering greater cooperation among ISPs and other intermediaries. In that case, the plaintiff was granted an interim injunction against the defendant whose social network was found to be secondarily infringing through allowing its “webspaces” or “places” to be used for sharing infringing materials.

**Despite Some Improvement, Unauthorized Camcording Situation Remains Severe:** IIPA’s 2013 Special 301 report noted an alarming proliferation of unauthorized camcording which drove not only online piracy but also harmed markets outside India. In 2012, there were 69 incidents of major U.S. motion pictures for which audio, video, or audio/video captures were detected as being sourced from Indian movie theaters.<sup>10</sup> That number dropped to 43 incidents in 2013. This is a slightly positive trend, but does not include unauthorized camcording of local Indian, foreign, or independent films. The local film industry and cinema owners are quickly coming to understand there is a need for urgent action. In the second quarter of 2013, joint efforts by the Motion Picture Distributors Association, MPAA, and the Andhra Pradesh Film Chamber of Commerce (APFCC) resulted in the arrest of members of two major criminal camcording syndicates operating in previously reported piracy hotbeds of Surat (Gujarat) and Indore (Madhya Pradesh).<sup>11</sup> As a consequence of these successful enforcement operations, there were no camcording incidents reported in these areas during the remainder of the year. IIPA also views as a positive development the

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<sup>7</sup>Many notorious sites (i.e., those recommended to USTR by IIPA as “notorious markets” for piracy in October 2013) are among the top 100 sites accessed in India, and many websites, such as *exdesi.com*, *netload.in*, *bollyrulez.net*, *bollyzone.ch*, *cramit.in*, *gorillavid.in*, *daclips.in*, *djluv.in*, *ictorrents.com*, *moviespack.com*, *movpod.in*, and *mediafiremoviez.com*, have a nexus to and/or particularly target Indian audiovisual materials. Hundreds of additional sites such as *songspk3.in* target both international and Indian music repertoire.

<sup>8</sup>The Copyright Act provision on notice and takedown will not alone be adequate to address online piracy, since it only provides takedown for a period of 21 days, and failure of the right owner to furnish a court order within 21 days of the takedown notice allows the ISP to reinstate the content.

<sup>9</sup>*Super Cassettes Industries Ltd. v. Myspace Inc. & Another* (High Court of Delhi, July 29, 2011, IA No.15781/2008 & IA No. 3085/2009 in CS (OS) No. 2682/2008.

<sup>10</sup>In IIPA’s 2013 Special 301 report, we noted that 53% of all pirated versions of major U.S. releases detected in Asia were sourced to an Indian cinema.

<sup>11</sup>The first operation targeted a major camcording syndicate nicknamed ‘Yamraaj’ located in Indore during the release of ‘Ironman 3.’ The second operation, based on evidence linked to the first operation was against a major release group operating out of Surat in India nicknamed ‘NICKkkDon.’ The second camcording syndicate owned 33 websites and comprised 6000 members. Extensive seizures were made in both cases. These actions in 2013 followed four operations in 2012 in Bangalore, Hyderabad, and Vijayawada with links in Delhi, leading to the closure of eight dedicated piracy websites.

creation, with the assistance of the motion picture industry, of a mobile “app” launched in Andhra Pradesh to detect and report piracy and camcording incidents. Unfortunately, camcording incidents are now being reported in some of India’s smaller cities and towns and are exacerbated by the growth of multiplexes in these cities. Increased camcording incidents were observed in Bhopal (Madhya Pradesh), Lucknow, Noida, and Muzaffarnagar (Uttar Pradesh), and Aurangabad (Maharashtra). Amending the Cinematograph Act, 1952 to include a prohibition on unauthorized camcording will be critical to a more centralized and effective enforcement effort. Continued efforts by cinema owners (e.g., showing slides and placing messages on tickets and within theaters conveying that illegal camcording is not allowed), as well as industry initiatives like the “Make a Difference” campaign working directly with cinema owners, have raised awareness of this problem and hopefully provide some level of deterrence.

**More Coordinated Effort Among States Needed to Reduce Piracy:** The Indian Government has established various state enforcement cells in the state police headquarters, and the states have appointed nodal officers to handle IPR related offenses. In addition, the non-bailable nature of copyright offenses has traditionally been helpful, meaning the state cells can run raids on *suo moto* cognizance. This has proven over time to be a very effective and efficient means of enforcement, and IIPA encourages the Indian Government at the federal and state level to continue seeking such enforcement action. Many of the states also have laws against organized or immoral crimes (so-called ‘Control of Goonda Acts’), which have been helpful in addressing piracy, since the time frames for action are accelerated and the authority well spelled out in the various states. Use of the Goonda Acts should be expanded to address software and book piracy.<sup>12</sup>

At the same time, right holders continue to report some difficulties, including the lack of standard operating procedures among the states, leading to some delays and inefficiencies. First, there is often no clear delineation of the proper office to approach with respect to online piracy (i.e., cybercrimes) versus hard goods piracy. Second, time frames from registration of a “First Information Report” or criminal complaint, to the execution of a raid, are too slow to maintain enforcement momentum (sometimes taking three to four days), particularly against covert networks when speed of response, confidentiality, and adaptability are key factors. Law enforcement in smaller cities and towns, where piracy and pirate networks now percolate, must move in a more agile manner and without reluctance to address piracy as it emerges. Third, reports also indicate the concern over the high risk that information about the raid is being leaked. Publishers report that district police departments have differing procedures regarding pre-raid documentation requirements for lodging complaints, evidence gathering details during raids, safeguards during raids, and post-raid recordation. These differing procedures invariably lead to differing enforcement attitudes, inclinations, and awareness; duplication of efforts; and low conviction rates.

**Court Reform Needed to Address Piracy Issues in India:** Use of the courts in India remains a mixed experience, depending on the state and issue. Generally, the High Courts in Delhi, Mumbai, Chennai, and Kolkata (which also retain jurisdiction as “courts of first instance”) do a creditable job in civil cases, and most positive civil relief and court orders emanate from these areas of the country. The experience in other regions, where District Courts are the courts of first instance for piracy issues, is spottier, with endemic factors which prevent effective judicial enforcement of copyright including: clogged dockets; delays due to archaic procedural laws, such as the failure to accept electronic documents and multiple opportunities for parties to delay proceedings; problems with retaining evidence (and lack of familiarity with the evidentiary requirements in relation to electronic evidence in online piracy cases); onerous requests to produce evidence of ownership and/or witnesses; failing to grant seizure orders to copyright owners as a matter of right in civil cases;<sup>13</sup> and difficulty enforcing civil court orders.<sup>14</sup> IIPA continues to urge the Indian Government to establish special IP courts throughout the country. Industry stands ready to develop appropriate briefings for judges on copyright piracy developments, stressing the serious commercial harm caused by various forms of piracy and the need for deterrence.

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<sup>12</sup>IIPA understands that several states like Madras and Karnataka have begun the process of seeking inclusion of “software piracy” under their state Goonda Acts. Book publishers would also be helped in this regard since they usually only get raids after lodging formal complaints under Section 200 of the Code of Criminal Procedure.

<sup>13</sup>IIPA recognizes that seizure orders in civil cases are discretionary, but believes that in clear-cut civil infringement cases seizure orders should be granted as a matter of right.

<sup>14</sup>Difficulties arise at times when defendants refuse entry to the Local Commissioner or police refuse to take action, citing lack of available personnel. Irregularities are also reported between police and infringers.

With fewer civil cases settling, judges increasingly must award adequate damages to compensate the right holder, and thus, adopting statutory damages in civil cases is critical. A recent report indicates the Delhi High Court has proposed higher court costs (up to 300% of current costs) for cases valued at Rs.20 million (US\$333,000). This would severely hamper anti-piracy efforts in India, since the Delhi High Court is one of the few to have IP specialist judges, and is often used by right holders in civil copyright cases. The Court should refrain from making this change.

Criminal cases are a different matter and unfortunately, most of the time, have not yielded effective and deterrent results. While copyright piracy is a non-bailable offence, in practice, bail is often secured on the first day after arrest. There are no provisions for forfeiture of pirate product, although equipment used to manufacture such goods may be subject to seizure. Criminal prosecutions often take years, by which time relevant witnesses and officers are untraceable and in many cases evidence secured is also compromised, leading to acquittals. In plea bargains (the recording industry reports 80 plea bargains in 2013) or even convictions, fines remain low and non-deterrent, with most falling under US\$1,000. IIPA recommends allowing restitution to be awarded in all criminal cases for greater deterrent effect. Experiences of the industries with criminal cases differ by region, but overall, further training of prosecutors (there are no dedicated or IP expert prosecutors) and police officers on the seriousness of IP offenses, linkages to organized crime, and the importance of investigating up the chain, would be helpful.

**Incremental Progress Noted Against Unauthorized Use of Software by Enterprises:** The software industry reports that the rate of PC software piracy has continued to decline gradually in India, though it remains high at a rate of 63% in 2011, representing a commercial value of unlicensed software used in India of nearly US\$3 billion.<sup>15</sup> The number of actions taken against enterprises using unlicensed software in India increased from 12 (in 2012) to 24 (in 2013). The courts effectively employ Anton Piller orders to preserve evidence and retain the element of surprise, which is critical for such enforcement actions. Still, the software industry would like to see *suo moto* cognizance raids which would have an even more deterrent effect (since it would obviate the need for a complaint or application for an order, as well as broaden the scope of the search). Unfortunately, many states and localities do not view unauthorized use of software by enterprises as a serious infringement, much less a crime. As a result, enterprise end-user software piracy has become acute in some parts of the country, e.g., commercial/ industrial hubs such as New Delhi, Mumbai, Bangalore, Coimbatore, Chennai, and Baroda. In addition, in certain cities in India, it is extremely difficult to get police support in civil end-user actions despite court orders. In such cases, instructions from the highest officers should be issued to provide unstinting support.

**Unauthorized Use of Books Continues to Plague Publishers; Export Monitoring Needed:** Unauthorized commercial-scale photocopying and unauthorized reprints of academic textbooks and professional books remain the predominant piracy problems facing the publishing industry in India. There has also been an increase in the availability of pirated trade (or consumer) books, which are often sold by itinerant (street) vendors to motorists in the middle of intersections. In efforts to combat rampant piracy, publishers long ago established the practice of creating market-specific low-priced textbooks editions to meet domestic demand – a significant benefit to Indian students and academics.

Two significant developments over the past year may portend major problems for U.S. and Indian publishers and distributors going forward. First, the export of India-only, low-priced editions has long been a significant problem for U.S. publishers. In 2013, India-only reprints were shipped to, and detected in, the Middle East, Africa, Europe (including the United Kingdom), and the United States. This threatens to adversely affect the longstanding system of providing less expensive reprints exclusively for the Indian market. IIPA strongly urges the Indian Government to take immediate action to protect continued access by its students to textbooks by empowering Customs to take *ex officio* actions with respect to illegal exports as well as imports at the border. Doing so will send a positive signal to all publishers, including those printers and distributors who rely on copyright in the India-only editions for their livelihoods.

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<sup>15</sup>Data on software piracy rates and commercial values are taken from the 2011 BSA Global Software Piracy Study at [www.bsa.org/globalstudy](http://www.bsa.org/globalstudy). This study assesses piracy rates and the commercial value of unlicensed software installed on personal computers during 2011 in more than 100 markets. The study includes a detailed discussion of the methodology used. BSA plans to release an updated study in the second quarter of 2014.

Second, in August 2012, a group of university presses and academic publishers brought suit against Delhi University and a photocopy shop operating on the premises of the university. The suit seeks to draw the line between an exception for face-to-face teaching, in which teachers might be able to avail themselves of appropriate narrowly tailored exceptions to provide materials to students, and the activity concerned in this case – the commercial production of course packs which Delhi University has outsourced to a commercial, for-profit, copy shop. There is a major difference between the two activities, with the former falling within the scope of what may be permissible under global norms, and the latter falling squarely outside those strictures. Nonetheless, the highly charged case has caused much debate among Delhi University faculty and students. The suitable middle ground appears to be what publishers have requested of the courts, namely, to enjoin the copy shop and the University from commercial acts of unauthorized photocopying, reproduction, and distribution of course packs without appropriate licenses from publishers. The courts can grant the injunction, preserving authors' rights against commercial reprography and requiring that licenses be granted with appropriate payments for course packs, while still preserving appropriate fair dealing. Doing so will also reaffirm the well-established three-step test which India must adhere to under the TRIPS Agreement and Berne Convention.

**Retail Piracy, Including Mobile Device Piracy, Must be Addressed:** Retail hard goods piracy continues to harm right holders, including: burned, factory, and imported optical discs containing all kinds of content;<sup>16</sup> mobile device piracy in which shops as an after-service offer to upload content to mobile device customers or sell flash or pen drives filled with pirated content; hard-disk loading of pirated software and content onto computers at the point of sale; pirate rental of motion pictures; and pirate sales of video games supported by sales of circumvention devices (in the market or online) and modification services for consoles. Both USTR and IIPA members have noted various physical marketplaces in India as “notorious” for the availability of pirated/illegal materials. IIPA’s latest notorious markets filing in November included the following markets: Richie Street, Censor Plaza, and Burma Bazaar (Chennai); BaraBazaar (Kolkata); Chandini Chowk, Palika Bazaar, Gaffar Market, and Sarojini Nagar Market (Delhi); Navyuk Market Ambedkar Road and Nehru Nagar Market (Ghaziabad); Kallapur Market and Laldarwajah (Ahmedabad); Jail Road and Rajwada (Indore); Manish Market, Lamington Road, Dadar Train Station, Andheri Station Market, Borivili Train Station and Thane Station Market (Mumbai). Since much pirate material is “pre-release” (for example, Indian and international music records available on the streets before they are released legitimately to the public), the Government of India should establish enhanced penalties for dealing in pre-release piracy.

The most effective enforcement against these markets continues to be police raids taken on the basis of *suo moto* cognizance. Overall, the authorities continue to run thousands of raids on an annual basis. In a positive sign, legitimate resellers in Nehru Place in New Delhi have taken the initiative and complained to the responsible police unit, but reports of irregularities among the local police and leaks of raids hinder or even prevent enforcement activities. Even when raids take place and sellers of pirated material are arrested, the situation reverts within a few days, as the sources of the material may be based elsewhere (e.g., China, Pakistan, or Nepal) and are out of the reach of the authorities.

## **COPYRIGHT LAW AND RELATED ISSUES**

**Confirm That Camcording of a Motion Picture is Illegal:** With the increase in unauthorized camcording of movies in theaters in India, the Indian Government should adopt national legislation making it unlawful to possess an audiovisual recording device (such as a video camera or other device) with the intent to make or transmit (or attempt to make or transmit) a copy, in whole or in part, of a motion picture while inside a theater. We understand the Ministry of Information & Broadcasting (MIB) is considering inclusion of an anti-camcording provision in the Cinematograph Bill to be considered by India’s Parliament. The emerging international trend is to provide explicit protection against unauthorized camcording. The U.S. and many other countries have addressed the problem successfully through legislation; instances of camcording have been reduced in several markets with relatively minimal enforcement. We

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<sup>16</sup>In addition to Hollywood, Hindi, Tollywood, and South Indian movie titles, the hard goods market also caters to titles in other regional languages.

hope this activity will be fully covered in the Cinematograph Bill, and that passage and implementation of anti-camcording in India will mark the beginning of the end for this extremely damaging activity in the country.

**Copyright Rules, 2013 In Force; Act Remains Deficient in Certain Key Areas:** Copyright protection in India is governed by the Copyright Act, 1957 as amended last by the Copyright (Amendment) Act, 2012, and implemented in The Copyright Rules, 2013 (in force March 14, 2013). IIPA and several IIPA members have commented extensively on both the Act and the Rules while they were under consideration and after the Act was in force (previous Special 301 reports on India document in great detail the substance of IIPA positions). The Act (as amended) and Rules contain some improvements, while largely leaving in place the enforcement structure of the Copyright Act and related laws and regulations.

The Act and Rules (which, under the Constitution, as “delegated legislation” are limited in scope to supporting and prescribing the processes and formalities to implement the Act but never going beyond the Act) unfortunately also leave some important concerns unresolved and raise new concerns. Some of the issues with the Law and Rules may call into question India’s compliance with international obligations under the TRIPS Agreement and Berne Convention, and its conformity with the standards set out in the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT). In summary terms, further changes to the Act should be contemplated to:

- Amend ownership and assignment provisions that are harming and altering existing commercial arrangements in India.<sup>17</sup>
- Ensure coverage in the law of access control TPMs, and ensure prohibition against both the act of circumvention of TPMs as well as the trafficking in circumvention technologies, devices, components, and services, and other changes, in full accord with the WCT and the WPPT.<sup>18</sup>
- Ensure that any compulsory or statutory license provision fully meets the provisions of the Berne Convention and TRIPS Agreement.<sup>19</sup>
- Strengthen the statutory provisions regarding online infringements, so they permit for expeditious takedowns without automatic put-back, and address both hosted and non-hosted infringing activities and services.<sup>20</sup>

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<sup>17</sup>The Act now contains independent rights for authors of ‘underlying works’ incorporated in cinematograph films including granting ‘non-waivable’ & ‘non-assignable’ royalty rights in favor of authors (Sections 17, 18-3, 19). The Act also barred assignment of future rights in respect of modes and mediums of exploitation which have not been invented or are not in commercial use (Section 18-2). As IIPA has previously indicated, the new provisions limit the ability of right holders to freely engage in contractual relationships with the authors of literary or musical works and set exact percentages or amounts ascribed to be paid to such authors, undermining the flexibility of parties to negotiate agreements on royalties’ distribution which could be more beneficial or appropriate under the circumstances. To our knowledge, the Rules: 1) do not confirm only the prospective (i.e., non-retroactive) application of Articles 17-19; 2) retain the Section 18 proviso that assignments are deemed invalid as to “any medium or mode of exploitation of the work which did not exist or was not in commercial use” at the time the assignment was made unless that medium or mode was “specifically” mentioned in the assignment, which could wreak havoc with existing distribution arrangements, in particular with respect to digital distribution; 3) do not clarify that the Act governs the relationship of creative parties with respect to the production of works in India, and not contracting parties outside of India.

<sup>18</sup>The Act now contains a criminal (but not civil) prohibition, in Section 65A, of the act of circumvention of a technological protection measure (TPM) “with the intention of infringing” an exclusive right. The provision falls short of full WCT and WPPT compliance, as described in previous IIPA submissions. The exception on the act of circumvention remains too broad. For example, the Rules do not adequately require, in the case of an exception to circumvent, reporting of 1) information about the tools used to circumvent; 2) the provision under which the exception to the prohibition is based; 3) the underlying work and subject matter being accessed by virtue of the circumvention; and 4) a declaration that under no circumstances will the underlying work be subject to onward distribution, transmission, making available, public performance, or communication to the public. It is helpful that the reporting does include under Section 80(2)(c) the reason for the circumvention, but Section 80(2)(d) is not as helpful. While it requires the person circumventing to sign an undertaking to accept responsibility for infringement as a result of the circumvention, it imposes no liability on the party enabling the circumvention. Finally, civil as well as criminal relief should be available. As India is witnessing the roll out of the National Broadband Policy, and cable TV digitization is due for completion by December 2014, and the Internet subscriber base in India grows year on year, TPMs become very relevant both to curb online piracy levels and make space for new legitimate distribution models.

<sup>19</sup>The Rules unfortunately do not alter the fact that two existing compulsory licenses, which were applicable only to Indian-origin works, now include all foreign works. The extension of these compulsory licenses to foreign works appears to run counter to India’s Berne Convention and TRIPS obligations.

<sup>20</sup>The Act now includes a safe harbor provision for ISPs engaged in the ‘transient or incidental storage of ‘works’ with requirements mandating takedown notices, disabling of access, and liability of such persons providing “access, links or integration” (Section 51 (1) (c)). The Rules provide for takedown within 36 hours of a notice, but are otherwise problematic. While Rule 75(3) provides that the person responsible for the storage of the copy shall take measures to refrain from facilitating such access within 36 hours, this rule shifts the responsibility to right holders that have to comply with burdensome rules and requirements that may not be possible to meet in practice. For instance, according to Rule 75(2)(c) right holders must provide evidence that the copy of the work in question is not covered under a Section 52 or other exception, inappropriately shifting the burden of proof to the right holder. The exception for certain acts of transient and incidental storage of works should be narrowed to those that do not have an independent economic significance and the sole purpose for which is to enable transmission in a network between third parties by an intermediary for a lawful use. Further, while the Information Technology (Intermediaries Guidelines) Rules 2011 imposed due diligence requirements on ISPs, they do not effectively provide incentives for ISPs to assist in curbing online piracy, and carved out from their

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- Ensure any exceptions and limitations pass muster under the well-established Berne three-step test (e.g., the “private or personal use” exception in Section 52(1)(a); and the software exceptions in Sections 52(1)(aa) and (ad)).
- Provide statutory damages, upon the election of the right holder, on a per-copy basis, adequate to compensate right holders in cases in which proof of infringing numbers of copies or distributions cannot be determined.
- Adopt provisions (such as those provided in the U.S. Family Entertainment and Copyright Act of 2005) that provide for increased civil and criminal penalties in cases involving defendants who make available to the public pre-release works or other subject matter.

**Software Legalization Steps: 1) Amend Tax Laws to Make Software Piracy a Form of Tax Evasion; 2) Enhance Corporate Audit and Disclosure Requirements; and 3) Adopt SAM Policies to Ensure Legal Software Use in Private Enterprises and Government Agencies:** There are several steps the Indian Government should take to enhance software protection in India. First, the Government should amend Indian tax laws to classify software piracy as a form of tax evasion and define corresponding tax violation rules in line with international best practices. Tax inspectors and external and internal auditors should then be empowered to check and account for genuine software licenses inside public and private companies. It is estimated that by taking these steps, the Indian Government can recover hundreds of millions of dollars in lost direct and indirect taxes.<sup>21</sup> Second, the Indian Government should amend the Companies Act, 1956 to require software compliance audits by duly qualified and appointed auditors. Such requirements might be targeted by reference to a minimum threshold (for example, revenue, total assets, etc.) to determine the set of companies to which such an audit requirement would apply. Corporate disclosure rules should also be revised to require more specific disclosure of genuine software licenses. Third, the Indian Government should issue a directive or strict policy guidelines mandating that all Government departments across the country use legal software at all times and follow due diligence while procuring software assets. The Government can ensure this by adopting established software asset management (SAM) best practices and extending this requirement along its supply chain. BSA and the Department of IT established a roadmap for promoting SAM best practices in government and private enterprises in a joint report in November 2011. Additionally, BSA has worked with the software industry and other experts to develop educational and SAM management tools under the Verafirm umbrella.<sup>22</sup> These Verafirm programs are designed to help both governments and enterprises understand, manage, and certify their SAM practices.

**Provide Tax Benefits for Associations Involved in Anti-Piracy and Capacity Building:** IIPA recommends that the Indian Government amend the tax code to provide exemptions for copyright associations involved in anti-piracy and capacity building activities. Providing this support will help create a win-win situation, since right holder groups will have the wherewithal to provide greater levels of support and capacity building. Such cooperative efforts will both raise awareness of the issues surrounding copyright protection in India as well as promote greater cooperation and more effective enforcement, to the benefit of local Indian as well as foreign creators and right holders.

**Patent Pendency:** The software industry faces a significant and long-standing backlog of patent applications in India. Over the past five years, only 37% of the patent applications filed in India (and available for examination) have been examined by the Intellectual Property Office. The current backlog stands at approximately 100,000 applications across all industries. We urge the Indian Government to address this backlog as a priority, to promote R&D investment, ICT innovation, and national competitiveness in India.

**Patent Reform:** India recently issued draft *Guidelines for Examination of Computer Related Inventions*. The strict regime of patentability implemented by the draft *Guidelines* would disallow patent protection for innovations,

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due diligence requirements is whether the transaction taking place (in which the transient reproduction occurs) is an authorized one. In addition to gaps in the Copyright Act, the Department of Telecom (DOT) should enforce the conditions of its licenses with ISPs, and the current Information Technology (IT) Act and relevant Implementing Rules should be utilized to full effect to address online copyright infringements and infringing websites.

<sup>21</sup>A study by IDC estimates the Indian Exchequer lost US\$866 million in 2009 due to failure to capitalize on direct and indirect taxes which would have been owed in the absence of software piracy in India.

<sup>22</sup>See [www.verafirm.org](http://www.verafirm.org) for more details on the program.

including those having inventive technical character, in a vast segment of the computer-technology field. Thus, the *Guidelines* do not appear to be consistent with Article 27.1 of TRIPS, which states that patents shall be available for inventions in all fields of technology, assuming they satisfy the other criteria for patentability such as novelty, inventive step and industrial application. The regime implemented under the *Guidelines* would have a deleterious effect on the emerging software sector in India as well as on investment in India by multinational software companies.

## **MARKET ACCESS ISSUES**

IIPA has commented in previous submissions and in significant detail on market access barriers imposed on the motion picture, software, and publishing industries. Removing such barriers not only levels the playing field for all right holders, who otherwise have to compete with pirates who unfairly benefit since they do not pay taxes or follow rules, but is critical to reducing piracy, since their removal permits the advancement of legitimate business models bringing greater content to market on more diverse terms. Market access barriers previously addressed by IIPA, and remaining of concern, include:

- A ban on exclusivity including “must provide” requirement in the pay TV sector.
- Restrictions in the Direct-to-Home (DTH) market (the reception of satellite programs with a personal dish in an individual home).
- Price controls imposed in the pay TV sector.
- Inordinately high and discriminatory entertainment taxes on theatrical admissions, including unconstitutional taxes based on the language of the film, other taxes such as value-added tax (VAT) and service taxes levied by the Indian Government; subsuming all taxes into a unified tax such as the Goods and Services Tax (GST) will be preferred.
- Price fixing on tickets in South India as well as quotas on the number of screenings per title per day.
- Onerous regulations on uplink and downlink of satellite signals beaming into India.
- High tariffs on entertainment software and hardware products, including PC game products, console game products, game console hardware, and game activation cards.
- An array of software goods and services taxes, including transfer pricing rules based on global profit split attributions to outsourced R&D activity in India and double taxation of software as both a good and service.
- Government procurement preferences and product testing and certification requirements that favor domestic technology products.

One measure which the Indian Parliament is still rolling out is the GST. The rollout of GST and its impending implementation could help resolve issues related to entertainment taxes, high tariffs on entertainment software, and software double taxation issues.

## **TRAINING AND PUBLIC AWARENESS**

IIPA member associations continued to participate in training initiatives as well as public awareness and outreach with various constituencies in 2013. For example, the motion picture industry: 1) conducted more “Make a Difference” campaign events for movie theater employees at high-risk theaters, discussing investigative and enforcement techniques in cases of unauthorized camcording (around 1,200 staff in all participated in trainings); 2) conducted two successful training programs for multiplexes operators in Ahmedabad and Delhi in association with the United States Patent and Trademark Office and the Federation of Indian Chambers of Commerce and Industry (FICCI); 3) participated in awareness-raising activities on the need for specific laws to combat piracy in the film and entertainment industries in India at local film festivals such as the Mumbai International Film Festival and the National Film Development Corporation’s Film Bazaar (with FICCI, the Confederation of Indian Industry (CII), the Film and Television Producers Guild of India (FTPGI) and the U.S.-India Business Council (USIBC)); 4) conducted training programs for prosecutors in Mumbai and Thane attended by about 60 officers each; 5) conducted programs for police in West Bengal attended by around 200 officers; 6) participated in a roundtable discussion attended by Indian Government officials and representatives of the Multiplex Association of India to discuss the alarming growth of illegal



camcording in India; and 7) made a presentation on the effects of piracy and the growing threat of online piracy to approximately 80 representatives of law enforcement at a conference jointly organized by the Central Bureau of Investigation (CBI) and Interpol.

As in previous years, the local music industry and the International Federation of Phonographic Industries (IFPI) conducted several training programs for police and public prosecutors in Andhra Pradesh, Punjab, Mumbai, Delhi, West Bengal, Kerala, Tamil Nadu, Maharashtra, and also organized meetings with law enforcement and members of Parliament to discuss better implementation of IPR protections. In 2013, MHRD in association with FICCI launched a subcommittee entitled the 'Copyright Enforcement Advisory Council' to deal with issues relating to enforcement of copyright in India. Industry has already weighed in with the CEAC on its specific concerns.

# INDONESIA

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2014 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** IIPA recommends that Indonesia remain on the Priority Watch List in 2014. IIPA also supports the continuation of the Generalized System of Preferences (GSP) investigation into Indonesia's intellectual property system and related market access concerns once that program is renewed.<sup>1</sup>

**Executive Summary:** To create a healthy copyright market in Indonesia, its Copyright Law should be reformed; serious enforcement deficiencies addressed; and market access barriers lowered. IIPA is appreciative of the Indonesian Government's increased level of transparency in the legislative drafting process of proposed amendments to the Copyright Law, and has made several rounds of comments to the Government, most recently in December 2013. We understand the latest draft currently sits with the Parliament, but there is some indication that the bill will not be considered with priority before the April 2014 parliamentary and July 2014 presidential elections. While the legislation requires further amendments, we urge Parliament to accord it priority. Unfortunately, the enforcement situation in Indonesia remains very difficult. Right holders are often asked by enforcement officials to pay for raids; and criminal raids and prosecutions, even against well-identified and recognized notorious markets, are almost non-existent. USTR should seek to implement a meaningful action plan addressing key areas of copyright reform, enforcement benchmarks, and the easing of market access barriers.

### PRIORITY ACTIONS REQUESTED IN 2014

#### Enforcement

- Institute comprehensive enforcement reforms (under the oversight of the Anti Corruption Commission) such as:
  - Establishing a separate Indonesian National Police unit dedicated to IP crimes with adequate funding;
  - Expanding the budget of the Penyidik Pegawai Negeri Sipil (PPNS) team, and increasing the number of copyright piracy raids annually;
  - Ensuring the Directorate of Special Crimes (Ditreskrimsus) and "Type A" Police Commands run sustained IPR police investigations with deterrent results; and
  - Establishing a team of IP prosecutors to bring more cases, including high-profile anti-piracy cases.
- Establish a National IP Task Force website tracking piracy prosecutions as part of an effort to increase transparency.
- Ensure legal use of software by the Indonesian Government and promote the adoption of software asset management best practices by enterprises.
- Commit to judicial reforms in the Jakarta Commercial Courts; expand such courts in Medan, Semarang, Surabaya, and Makassar to adjudicate copyright cases; and establish special IP courts for criminal cases.
- Combat illegal photocopying, print piracy, and unauthorized translations, and work with rights holder groups to legitimize the use of published materials at schools and universities.
- Ensure that courts properly apply statutory presumptions of copyright ownership.

#### Legislation

- Enact amendments to the Copyright Law with changes noted in IIPA comments and this submission, ensuring compliance with Indonesia's international obligations.
- Ensure that copyright infringement is considered a predicate offense under anti-organized crime laws that permit broader criminal investigations and enhanced remedies.

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<sup>1</sup>For more details on Indonesia's Special 301 history, previous years' reports at <http://www.iipa.com/countryreports.html>. For the history of Indonesia's Special 301 placement, see <http://www.iipa.com/pdf/2014SPEC301HISTORICALCHART.pdf>. For a discussion of IIPA's 2014 Key Initiatives and Challenges, see IIPA, *2014 Special 301 Submission*, at <http://www.iipa.com/pdf/2014SPEC301COVERLETTER.pdf>.



- Make optical disc regulations more effective by: 1) routinely conducting off-hours unannounced inspections; 2) enforcing against source identification (SID) code violations; 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

- Amend the Negative Investment List (NIL) to allow direct foreign investment in the audio-visual sector.
- Now that Decree (BRTI) No. 177/2011 has been repealed, immediately initiate investigations into identifying parties involved in illegal ring tone and ring-back tone operations to restore the market to legitimate operators.
- Reduce import tariff rate on films to pre-2010 levels.
- Permanently remove the requirement to replicate locally all theatrical prints and home video titles released in Indonesia.
- Eliminate provisions from the Film Law that would, if implemented, impose local screen quotas, pre-production content review requirements, a prohibition on dubbing imported films, and other restrictions on the film industry.
- Ensure electronic commerce regulations do not require companies to locate data centers in Indonesia as a condition for market access.

## PIRACY AND ENFORCEMENT UPDATES IN INDONESIA

Prior IIPA reports on Indonesia contain detailed discussion of piracy and enforcement issues. This report serves only as an update to those and is not to be considered an exhaustive review of issues.<sup>2</sup>

**Retail Piracy, Mall Piracy, Including Physical and Mobile Device Piracy Remain Rampant:** Retail piracy in Indonesia's notorious markets, kiosks and malls<sup>3</sup> remains extremely high (estimated around 90% for most industries). Unauthorized CDs, VCDs, DVDs, and CD-ROMs occupy an estimated 90% of the market for most industries, including music, movies (including pirate movies in or claiming to be in Blu-ray format), software, and video games. Unauthorized photocopying of published materials continues to be a significant problem, particularly around university campuses. Retail pirates also offer to load illegal copyrighted files onto various mobile devices or carriers. Absent landlord liability provisions in the copyright law, retail piracy continues largely unabated. While the Governor of Jakarta issued a Decree that malls not allow the sale of counterfeit and pirated materials on their premises (which was sent to the Mayors of five cities in Jakarta), anecdotal evidence suggests the Decree is not being enforced strictly (and there are no consequences for not following the Decree).

**Internet Piracy and Wireless Mobile Piracy:** According to the Indonesia Internet Service Providers Association, by the end of 2013, there were 62 million Internet users in Indonesia (up from 55 million in 2012), or almost 25% of Indonesia's population.<sup>4</sup> Mobile penetration is well over 100%, with 282 million mobile subscribers,<sup>5</sup> There are nearly 3 million fixed broadband subscriptions (up from 2.7 million in 2012).<sup>6</sup> These numbers indicate that significant opportunities exist for the launch of legitimate services for the distribution of copyright materials in Indonesia. Unfortunately, with the absence of an adequate legal or enforcement framework, online and mobile piracy services have proliferated, including direct download sites (mainly from servers located outside Indonesia), and illicit peer-to-peer (P2P) file sharing. Some of the most notorious piracy websites in the world are servicing the Indonesian

<sup>2</sup>See, e.g., IIPA, *Indonesia*, 2013 Special 301 Report, February 8, 2013, at <http://www.iipa.com/rbc/2013/2013SPEC301INDONESIA.PDF>.

<sup>3</sup>Major cities including Jakarta, Padang, Java Island, Semarang, Medan, Makassar, Bandung, and Surabaya have hotspots replete with pirate materials. Notorious markets recommended by IIPA in 2013 included Mangga Dua Mall, Ambassador Mall/ITC, and Ratu Plaza. See International Intellectual Property Alliance (IIPA), *IIPA Written Submission Re: 2013 Special 301 Out-of-Cycle Review of Notorious Markets: Request for Public Comments*, 78 Fed. Reg. 57924 (September 20, 2013), 78 Fed. Reg. 60367 (October 1, 2013) (Extending Deadline), October 25, 2013, at [http://www.iipa.com/pdf/2013\\_Oct25\\_Notorious\\_Markets.pdf](http://www.iipa.com/pdf/2013_Oct25_Notorious_Markets.pdf). Other notorious spots in the Jakarta area include Glodok Penampungan, Jalan Pinangia, and Glodok Jakarta.

<sup>4</sup>*Pengguna Jasa Internet di Indonesia 82 Juta Orang*, December 10, 2013, at <http://koran-jakarta.com/?785-pengguna>.

<sup>5</sup>International Telecommunication Union, *Mobile-cellular Telephone Subscriptions per 100 Inhabitants 2000-2012*, at <http://www.itu.int/en/ITU-D/Statistics/Pages/default.aspx>, accessed on December 23, 2013.

<sup>6</sup>International Telecommunication Union, *Fixed Broadband Subscriptions 2000-2012*, at <http://www.itu.int/en/ITU-D/Statistics/Pages/default.aspx>, accessed on December 23, 2013.

market.<sup>7</sup> The evasive behavior of online pirate services 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.

There remains no comprehensive enforcement infrastructure in Indonesia to deal with online or mobile piracy. Initial efforts through the Ministry of Information and Communication Technology (Kominfo) to demand that some of the most flagrant violators (like *4shared.com*) cease accepting, uploading, storing, or transferring pirated content have been unsuccessful. The Minister of Kominfo supported the “Hail Our Music” initiative by which the music industry and ISPs were to cooperate in 2012 to seek closure of the most notorious sites (most of which are local services).<sup>8</sup> Following extensive consultations with the Indonesian Government, on April 30 2013, local film associations and film producers together submitted a request letter to the Directorate General of Intellectual Property Rights (DGIPR) to block seven rogue websites. The letter, which was then referred to Kominfo, has unfortunately not resulted in any action. In the absence of Government action and lacking requirements in the current Copyright Law, ISPs have chosen to largely ignore piracy occurring within their reach. New legal measures are clearly needed which will help halt online infringements, and steps should be taken to encourage more active and voluntary cooperation of ISPs with right holders to prevent the use of their networks for infringement, including but not limited to establishing fair and effective processes for dealing with non-hosted infringements and repeat infringers.

**Unauthorized Use of Software by Enterprises Causes Significant Losses:** The software piracy rate in Indonesia, including widespread unlicensed use of software by enterprises, remains among the highest in the world. In 2011, the software piracy rate in Indonesia was 86%, representing a commercial value of unlicensed software of US\$1.47 billion.<sup>9</sup> Lowering software piracy would bring significant benefits to the Indonesian economy.<sup>10</sup> Indonesian law contains a provision criminalizing end-user software piracy (Article 72(3)), and the draft copyright law has a similar provision. Unfortunately, enforcement has significantly waned in recent years in Indonesia. Despite a positive ruling in one enterprise end-user software piracy case,<sup>11</sup> the number of civil and criminal software cases remains far too low to deter unauthorized use of software by enterprises.

**Hard Disk Loading of Software and Other Copyright Materials Growing More Severe:** Hard disk loading, in which computers are loaded with the latest software or other copyright materials, all of it unauthorized, at the point of sale of the hardware, has grown severe in recent years in Indonesia. The Indonesian Government should combat this massive problem by engaging in continuous raiding against computer dealers and outlets that offer hard disk loading as a service. The Indonesian Government should also engage IT mall management, PC dealers, and local representatives of computer manufacturers to address the challenge. Sellers of new laptops without any software should be scrutinized, since such sales encourage piracy by companies and consumers.

**Book Piracy:** Piracy of published materials in Indonesia, especially academic books and journals, continues to be a major concern. Publishers undertook enforcement actions against some 76 photocopy shops on and around university campuses in the Jakarta area. The enforcement campaign was relatively successful, with some 46 shops agreeing to cease their unauthorized copying and distribution activities, while 18 others voluntarily changed their business models or shut down. There remain a number of shops that refuse to

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<sup>7</sup>*4Shared.com* is a popular “one-click hosting” site or cyberlocker site, which provides access to large libraries of infringing files for download (hence it is also considered a download hub) and currently ranks as the 21st most visited site in Indonesia (<http://www.alexa.com/siteinfo/4shared.com#>, accessed on December 23, 2013).

<sup>8</sup>See Tomi Tresnady, *Hari Ini, Kemenkominfo Tutup 20 Situs Musik Illegal*, Okazone, July 27, 2011, at <http://music.okezone.com/read/2011/07/26/386/484624/hari-ini-kemenkominfo-tutup-20-situs-musik-illegal> (citing 20 websites noted at a meeting between the Ministry of Communication and Informatics and the music industry).

<sup>9</sup>Data on software piracy rates and commercial values are taken from the 2011 BSA Global Software Piracy Study, at [www.bsa.org/globalstudy](http://www.bsa.org/globalstudy). This study assesses piracy rates and the commercial value of unlicensed software installed on personal computers during 2011 in more than 100 markets. The study includes a detailed discussion of the methodology used. BSA plans to release an updated study in the second quarter of 2014.

<sup>10</sup>A 2010 study done by IDC for BSA found that decreasing Indonesia’s software piracy rate by ten points over a four-year period would add US\$2.43 billion to gross domestic product (GDP), generate US\$124 million in additional tax revenues and create 1,884 new IT jobs. The benefits would be even greater if the ten point reduction was achieved in two years, yielding US\$3.18 billion in added GDP and US\$162 million in new tax revenues.

<sup>11</sup>The Indonesian police conducted 70 enterprise end-user raids in 2012, but far fewer in 2013. In a recent case (*Multisari vs. BSA*) in which a raided company countersued BSA, alleging, among other things, that the raid was unauthorized, the Central Jakarta District Court on January 15, 2013 dismissed the countersuit. There was no appeal to this decision and the case is now closed.

cooperate, and further action will be undertaken against such shops. The Department of Education and Commission on Higher Education could do more to help right holder groups better address the problem of unauthorized photocopying. Universities should be encouraged to adopt appropriate use and copyright policies, and to better promote the use of legitimate published materials in schools and universities. Publishers note that some university professors have been encouraging students to buy only legitimate books, but this message would better serve students, professors and all university personnel, and be better received, coming from the universities' governing bodies.

**Comprehensive Enforcement Reform:** A significant, multi-faceted enforcement reform process must be instituted in order to make significant progress against piracy in Indonesia. The National IP Task Force has launched a “campaign” against piracy, but the actual efforts have been minimal. Under the direction of the Task Force, and with the oversight of the Anti Corruption Commission, the following steps should be undertaken:

- First, a separate police team for IPR crimes should be established, perhaps as a pilot program in Jakarta, with proper funding and salary levels.
- Second, the IPO PPNS team budget should be expanded in order to increase the number of copyright piracy raids each year.
- Third, Ditreskrimsus and “Type A” Police Commands should announce in early 2014 a plan for sustained IPR police investigations with deterrent results.
- Fourth, a select group of IP prosecutors should be established, with a mandate to handle more IPR cases.
- Fifth, the National IP Task Force should create a website to track prosecutions, including identifying parties to the cases; legal bases for prosecutions; penalties assessed; and evidence found during raids.

Enforcement officials have reportedly been reluctant to conduct regular enforcement actions because of the involvement of organized crime in piracy activities. It is critical that copyright piracy constitute a predicate offense for organized crime statutes, such that Indonesian officials will feel more secure in targeting such criminal groups.

**Comprehensive Judicial Reform:** The courts in Indonesia remain largely ineffective in both the civil and criminal areas. First, it is critical to improve the quality and consistency of civil Commercial Court rulings. To this end, the Anti-Corruption Commission should work with the Supreme Court Ethics Committee. Publishing court decisions is also necessary to improve transparency and reduce irregularities. Second, with the exception of Jakarta, very few civil Commercial Court judges are familiar enough with basic aspects of how IPR cases are conducted, including damages calculations; issuing provisional orders; implementing injunctions; or conducting IPR border seizures. As a result, they award: only rudimentary judicial remedies with extremely low, non-compensatory (and non-deterrent) damages; no orders to detain, remove or destroy pirate goods; and unenforceable verdicts. Once a pilot program of judicial reform has been firmly established in Jakarta, IIPA recommends that it be extended to Commercial Courts outside Jakarta, especially in Medan, Semarang, Surabaya, and Makassar, along with extensive practical training.

The criminal courts face similar hurdles. Despite the 2009 Attorney General letter categorizing IP cases as “Important Cases” “in order to accelerate case prosecutions,”<sup>12</sup> in the few cases that proceed to a conviction, most result in extremely low and non-deterrent criminal fines. In one case, a Public Prosecutor in Lubuk Sikaping, Padang eventually (after a complaint to the National Public Prosecutor) brought a case against a suspect selling unlicensed music, seeking three years imprisonment. It was only due to the persistence of the industry that this case was

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<sup>12</sup>Attorney General Letter No. SE-003/A/JA/02/2009, 26 February 2009. The Attorney General has stipulated the following, as examples: 1) for IP infringement where the evidence of pirated CDs is less than 5,000, the cases are directly handled by the District Attorney; 2) for IP infringement where the evidence of pirated CDs is in the range of 5,000 to 10,000, the cases are directly handled by the High Attorney; and 3) for IP infringement where the evidence of pirated CDs is more than 10,000 (bulk production), the cases are directly handled by the Attorney General. Reports are to be submitted directly to the Attorney General. See Ministry of Trade of the Republic of Indonesia (Dr. Mari Pangestu), *Intellectual Property Rights System of Indonesia: Progress and Achievements in 2010*, February 2011, at <http://www.regulations.gov/contentStreamer?objectId=0900006480e01d5d&disposition=attachment&contentType=pdf>.

brought, and only after significant delay. IIPA continues to recommend establishing a National IP Task Force website to track case results.<sup>13</sup>

**Berne and TRIPS-Compatible Presumptions Not Being Afforded:** Industry has reported that court processes are sometimes hampered by defendants simply placing in issue the copyright ownership of the infringed work or sound recording, and reversing the statutory presumption of ownership without any proof to the contrary. Indonesia's Berne Convention (and TRIPS) obligations require it to provide a presumption of copyright ownership, and that presumption cannot be rebutted unless the defendant shows proof to the contrary. Defendants should be asked to rebut the presumption, for example, by showing that they have a requisite license to conduct the relevant activities. The new draft copyright law would provide a Berne-compatible presumption of ownership, and it is hoped that this would halt the overly burdensome and costly cases in which ownership is wrongly placed in issue. A presumption of subsistence of copyright should also be provided.

## **COPYRIGHT LAW AND RELATED ISSUES**

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>14</sup> In 2012 and 2013, the Indonesian Government engaged in a drafting exercise toward modernizing the statute and fully implementing Indonesia's many treaty obligations. The process has been relatively transparent, and stakeholders have been invited to express their views which have been duly considered.

While some prior concerns raised by IIPA were addressed in the latest draft (October 2013, which to our knowledge currently sits with the Parliament), many were not. In some respects the draft still does not create an efficient IPR enforcement system that effectively combats copyright infringements from raid to trial. The draft also contains provisions that do not comply with Indonesia's international obligations under the TRIPS Agreement, the Berne Convention, and the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT).<sup>15</sup> In further revisions, the drafters should make changes to avoid unintended consequences which could cause commercial harm to local and foreign right holders in Indonesia, and/or call into question Indonesia's commitments to its international obligations with respect to copyright protection and enforcement. The following are some key remaining issues of concern.

**Internet Exception:** Draft Article 44(d) provides an exception which appears to allow, without permission or payment, the "making and dissemination of the content of Copyright through information and communication technology media that is non-commercial and/or non-profit to the Author or related parties, or the Author has no objection to such making or dissemination." This provision, if adopted as drafted, would set a terrible precedent and could devastate legitimate business models in the Internet environment which are built precisely on the rights of authors, right holders, and related right owners to control the manner and means in which they authorize the making and disseminating of content through information and communication technologies. As drafted, this provision collides with Indonesia's international obligations under TRIPS, Berne, the WCT, and the WPPT. It must be deleted.

**Technological Protection Measures (TPMs):** Draft Article 53, like previous drafts, provides a rudimentary approach to protection against unlawful circumvention of TPMs (called "Technological control measures" in our translation) used by copyright owners to protect their works or objects of related rights. However, the following additional changes must be made to ensure Indonesia fully complies with the requirements of the WCT and WPPT:

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<sup>13</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 to the public that copyright infringement is a serious violation of the law with serious legal consequences.

<sup>14</sup>*Undang-Undang RI No. 19 Thn 2002 Tentang Hak Cipta*. In addition, the Indonesian Government also points to a *Fatwa* indicating that infringement is forbidden by Islamic law. The Indonesian Ulema Council (*Majelis Ulama Indonesia/MUI*) has released a religious decree (*fatwa*) emphasizing that any kind of IPR infringement, including but not limited to, using, disclosing, producing, utilizing, selling, importing, exporting, distributing, giving out, providing, publishing, reproducing, copying, counterfeiting, and hijacking others' IPR illegally is *haram*, or legally forbidden by Islamic law. (MUI Decree No. 1/MUNAS VII/MUI/15/2005 concerning IP Protection).

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

1) “Technological control measure” should be defined in Article 1 as “any technology, device, or component that controls access to Works or Related Rights, or protects exercise of any right in Works or Related Rights as provided by this Law”; 2) trafficking in circumvention devices, technologies, components, or services should be expressly covered;<sup>16</sup> 3) exceptions should be limited to a finite enumerated list of cases in which the act of circumvention of a TPM is permitted (the phrase “other causes permitted by the prevailing laws and regulations” should be deleted); and 4) the draft should include criminal penalties for violations.

**Chapter VIII (Draft Articles 55-57) on Internet Infringements:** As Indonesia is quickly developing its IT infrastructure and its citizens are increasingly accessing the Internet, online piracy is becoming a more important and complex issue for the Government to address. The latest draft provides a notification system to the Minister of Information regarding Internet infringements which can lead to the takedown of infringing material or disabling access to sites in appropriate circumstances.<sup>17</sup> However, the voluntary “notice and takedown” provisions of the previous draft should be restored, along with preservation of injunctive relief against non-compliant ISPs, constructive knowledge as a trigger for takedown, a repeat infringer policy, and the sufficiency of email notices, to provide the necessary incentives for ISPs and right holders to cooperate to prevent acts of infringement over the Internet. The final law should also include provisions that make clear the circumstances under which an ISP (including a mobile operator) will be liable for its users’ acts of infringement.

**Communication to the Public:** There is differential treatment of “communication to the public” among works, performances, and phonograms. Such treatment should be unified, and as to performances and phonograms, at least along the lines of WPPT Articles 14 and 15. Exclusive rights over digital related rights should be afforded, with any flexibilities applying only to analog or non-interactive communications to the public.

**Criminal Penalties:** The criminal provisions in the latest draft unfortunately take steps backward from the current law. They no longer provide minimum mandatory statutory criminal penalties. Without a minimum fine, deterrent sentences will not be forthcoming. Also, ambiguities in the treatment of infringement of software should be clarified, and the possibility to impose both a fine and imprisonment, especially for repeat offenders, should be maintained.

**Prohibition on Purchase of Infringing Materials Should Include Software and Video Games:** Draft Articles 10(1) and 114(1) are welcome, but software and video games must be included to effectively address the manufacture, distribution and sale of illegal optical discs (e.g., CDs, DVDs, CD-ROMs, etc.).

**Landlord Liability Should be Broadened:** Draft Articles 10(2) and 114(2) are also positive proposals to impose landlord liability, but these provisions should be broadened to include all premises, rather than just “shopping centers,” which may be difficult to define. Additionally, aiding and abetting liability in conformance with Indonesia’s Criminal Code should be available in criminal copyright infringement cases generally, not just landlord liability cases.

**Ex Parte Civil Searches:** The TRIPS Agreement requires Indonesia to have available the possibility of *ex parte* relief (“Anton Pillar” orders). Draft Articles 106 through 109 provide for so-called “temporary injunctions” but it must be clarified that these can be obtained *ex parte* in appropriate circumstances, and the onerous procedures set out in Article 108 and 109 must be liberalized in order to meet TRIPS requirements.

**Compensatory Damages and Statutory Damages:** Draft Articles 99 through 105 deal with claims for compensatory damages arising out of copyright infringement cases. Unfortunately, as is well known from the experience of the industry, the costs of bringing civil cases usually far outweigh any damages recovery.<sup>18</sup> Indonesia

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<sup>16</sup>Draft Article 53 should make it illegal for anyone to “manufacture, import, export, distribute, offer to the public, otherwise traffic in circumvention technologies, products, or components.”

<sup>17</sup>The wording in draft Articles 56(3) and 57(1) leave it unclear as to whether the Minister’s order can be made to disable access to an entire site or whether it can only apply to links to infringing contents on the site. This should be clarified to allow disabling access with appropriate fair process.

<sup>18</sup>We further note that draft Article 99(2) only covers some right holders’ monetary remedies (i.e., to only “income earned from the organization of speeches, scientific meetings, performances or exhibition of the work which constitute a copyright infringement, or as to products of related rights”). It must be confirmed (...continued)

must ensure the law meets its international obligations to provide for “damages adequate to compensate for the injury the right holder has suffered because of an infringement” and “expenses, which may include appropriate attorney's fees” and should also consider the imposition of pre-set statutory damages in order to achieve the goals of deterrence and full compensation.

**Seizure and Destruction of Infringing Articles:** Draft Articles 99 *et seq.* make no mention of the remedies of seizure and destruction of infringing articles in civil proceedings, and the express remedy of “destruction” of infringing goods in criminal cases has been removed from draft Article 122. These provisions should be revised in order to meet the standards of TRIPS Articles 46 and 61.

**Coverage of End-User Piracy of Software and Hard-Disk Loading:** Coverage of commercial reproduction of computer programs in draft Article 9(3) is welcome and appears to cover most forms of end-user piracy and hard disk loading, but should be clarified to include under “commercial purposes” an unfair commercial advantage such as that enjoyed by an enterprise that uses software without paying for it.

**Duration:** It is very positive that under draft Article 59 of the latest draft, authors of many categories of works receive protection for their life plus seventy years. This term should be matched for other works and subject matter, both to ensure that those other works and subject matter do not have conflicting terms, and to make sure Indonesia can avoid discrimination against its own authors and right holders.

**Collective Management:** Right holders should be permitted to organize the management of their own performance rights freely, fairly, and transparently, in the most cost-effective manner and in accordance with international best practices. In consideration of these basic principles, the latest draft law is much improved over previous drafts with respect to the establishment of collective management organizations (CMOs). It appears the CMO establishment is now voluntary under draft Article 88(3) and that different types of CMOs will be permitted, but that if there is more than one CMO for any field, royalties shall be administered by one central CMO (CCMO). Care should be taken in this regard, for example, music videos owned by record companies should be administered by a different CMO than the CMO for “cinematographic works.” Furthermore, as noted in previous comments, there should be a mechanism in place to enable right holders on their own initiative to request the revocation of the operation permit of a CMO, which should not be limited to the conditions under draft law (i.e., in the discretion of the Minister).

Two other key problems appear from the latest draft. First, rate setting should be done in a way that approximates a hands-off free market negotiated rate. Article 81(4) provides that “the amount of royalty as described in paragraph (3) and the procedure of granting thereof shall be pursuant to the grant of a royalty license between the copyright holder or the owner of rights related to copyright and the licensee.” This is consistent with free market principles. However, Article 81(5) states that “the Minister may, at the request of the parties, give consideration in making the royalty determination whether the prevalent practice in force does not meet the elements of justice.” It is unclear whether either party can make a request to the Minister, or whether it must be requested by all parties. If the former is true, the determined rate will surely not approximate a voluntarily negotiated rate, which is likely to stifle free negotiations between right owners and licensees in future. For this key reason, Article 81(5) should be deleted. Second, the 30% cap on costs under draft Article 92 is disfavored by industry and inappropriate as drafted. In the least, the provisions need to be rewritten to provide that cost deductions are based on actual expenses subject to this 30% cap and that a CMO is obligated to progressively reduce its costs significantly downward from this 30% cap. In addition, to the extent there is a central CMO, the cap for the CCMO must be significantly below 30% (otherwise, it would amount to double-dipping, to the detriment of right holders). Both CMOs and CCMOs should also have an express legal obligation to operate efficiently.

**Over-Broad Exceptions/Compulsory Licenses:** Several of the draft provisions for exceptions to copyright protection must be re-examined and revised to ensure compliance with international treaties to which Indonesia is a

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that all right holders have a general right to damages. Furthermore, the unfair commercial advantage enjoyed by an entity that uses software without paying for it should be a factor in considering compensatory damages.



party, or to other relevant international norms, e.g., in the case of exceptions for “computer program development,” to the stricter standards of Article 6 of the European Directive on the legal protection of computer programs, Directive 2009/24/EC of 23 April 2009. Similarly, compulsory license provisions incompatible with Berne/TRIPS standards should be eliminated from the draft.

**Registration and Invalidity:** IIPA understands from local right holders that there is considerable concern about abuse of the voluntary copyright registration process in Indonesia. While a voluntary registration system is Berne-compatible, we understand that in Indonesia, many invalid copyrights get registered, including by IP infringers. Given these abusive practices, DGIPR should be authorized to review and invalidate false applications or registrations. In addition, we suggest creating a more forceful deterrent, including fines and penalties, against anyone who knowingly files a false application. Also, nothing with respect to the registration system may create prohibited formalities. According to draft Article 77, there is an obligation to record transfers and other changes. To the extent failure to record transfers or other changes would deny copyright protection to the registrant, this could constitute a prohibited formality under the Berne Convention and should be deleted.

**Omission of Anti-Camcording Piracy Provisions:** The latest draft does not, but should, define the act of using (or attempting to use) an audiovisual recording device in cinemas to camcord, record, or transmit a film, in whole or in part, as a *strict liability* criminal offense. The Asia Pacific Economic Cooperation (APEC) Ministers and Leaders, including from Indonesia, recently agreed on “Effective Practices for Addressing Unauthorized Camcording,” and the steps recommended therein should also be taken.<sup>19</sup>

Other needed legal reforms that are related to the Copyright Law include:

**Strengthening the Organized Crime Statute:** Since 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, copyright infringement should be 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.

**Strengthening the Optical Disc Regulations and Making them GATT/WTO-Consistent:** The Optical Disc Regulation (2005), a Ministry of Trade Regulation on the importation of machines and raw materials, and another Regulation on reporting by registered producers, were enacted and issued to address rampant optical disc piracy. The Regulations need to be updated to: 1) prohibit the unlawful use of or manipulation of 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 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 entry for an inspection in case a suspect target refuses entry (and penalties for such refusal); 7) require the Government to keep records of “permits” and raids run; 8) permit only those industries directly related to the optical disc industry to import polycarbonate; and 9) expressly impose corporate liability on individuals.. In addition, a fatal flaw of the regulatory framework is that it does not provide clear enforcement authority or grounds for routine inspections on manufacturers’ or importers’ premises.

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<sup>19</sup>Effective Practices for Addressing Unauthorized Camcording, 2011/AMM/014app05, 23<sup>rd</sup> APEC Ministerial Meeting, Hawaii, United States, 11 November 2011. The document notes,

Steps that affected economies may take to address the challenges of unauthorized camcording in cinemas include: (1) educating the public about the problems posed to businesses and the consumer by unauthorized camcording; (2) working with the private sector to identify and prevent unauthorized camcording in cinemas; and (3) developing and implementing legal measures to effectively deter unauthorized camcording.

## **MARKET ACCESS AND RELATED ISSUES**

**Lift Prohibitions and Restrictions on Foreign Company Participation or Investment in Importation, Direct Distribution, Exhibition, or Retailing in Copyright Products in Indonesia:** Presidential Decree 118 of 2000 stipulates that all importation and distribution of films and video products is restricted to wholly-owned Indonesian companies.<sup>20</sup> The specific sectors of the media business that the Indonesian Government has excluded from foreign investment in its Negative Investment List (NIL) include: radio and television broadcasting service providers; radio and television broadcasting subscription service providers; print media information service providers; filmmaking businesses; film technical service providers; film export and import businesses; film distributors; and movie house operators and services. The motion picture and music sectors are particularly hard hit by this ban. IIPA notes the longstanding promise made by the Indonesian Government 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). Broader investment in the distribution structure would benefit local and foreign-based producers alike in creating more legitimate channels over which to distribute films, music, and other copyright materials. In June 2013, IIPA submitted comments to Indonesia's Minister of Trade, Gita Wirjawan, setting out the reasons Indonesia's NIL should be revised and restrictions on copyright businesses eased.<sup>21</sup> While IIPA had understood that certain changes would be made to the NIL in 2013, reportedly no changes have been finalized to date.

**Immediately Initiate Investigations Into Identifying Parties Involved in Illegal Ring Tone and Ring-Back Tone Operations:** While the October 2011 Kominfo Decree (BRTI) No. 177/2011 making pay SMS messages illegal was repealed in 2012,<sup>22</sup> it is now incumbent upon the Indonesian Government to crack down on parties involved in illegal ring tone and ring-back tone operations. Until this occurs, legitimate operators remain effectively barred from full participation in this market.

**Customs Valuation:** In 2010, the Indonesian Government sought to impose a methodology for determining the customs duty on theatrical prints imported into Indonesia that would have sought to capture the royalties paid on the films. Not only was this formulation inconsistent with the WTO Customs Valuation Agreement, but U.S. industry believes that the regime which replaced this proposal is as well. A new specific tariff that is based on the running time of the film has since been imposed, resulting in a new barrier to the Indonesian market in the form of a significant increase in the amount of customs duties paid for the importation of foreign films. The Indonesian Government should properly apply the computed methodology, in which the valuation of film imports is made on a per-meter basis against the physical carrier medium, as is the norm in virtually every market in the world.

**Permanently Remove the Requirement to Locally Replicate All Theatrical Prints and Home Video Titles Released in Indonesia:** In November 2013, the Indonesian Government once again suspended application of the 2008 Decree requiring the local replication of all theatrical prints and home video titles (e.g., DVDs).<sup>23</sup> While this renewed suspension is appreciated, it is past time to formally and permanently eliminate this requirement, which is opposed by local Indonesian filmmakers as well as by international producers and distributors. The specter of the Decree threatens to have serious negative consequences on the long-term viability of Indonesia's film industry, threatens the continued development of local cinemas, and jeopardizes arrangements for local filmmakers to carry out post-production work overseas. If the Decree was ever implemented, it would negatively affect foreign motion picture companies' release and distribution schedule for the country, and would raise concerns over existing local facilities' ability to handle its volume and quality output requirements, as well as lab and duplication facility security issues.

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<sup>20</sup>The Broadcast Law allows foreign ownership up to a 20% cap, and IIPA understands that the Broadcast Law overrides the Presidential Decree

<sup>21</sup>These comments were later communicated to Indonesia's Vice Minister of Trade, Dr. Bayu Krisnamurthi, upon his visit to the United States, and to Indonesia's Ambassador to Singapore.

<sup>22</sup>In the 2011 Decree, the Indonesian Telecommunications Regulatory Agency, BRTI, instructed telecommunications companies to: 1) stop offering content through SMS broadcast/pop-screen/voice broadcast until a time to be later determined; 2) deactivate/unregister as of the date of issuance (October 18, 2011) each "Premium Message Service," including but not limited to SMS/MMS premium subscriptions, ring tones, games, or wallpaper services.

<sup>23</sup>Ministry of Culture and Tourism (MOCT) *Ministerial Decree No. 55, PM No. 55/PW.204/MKP/2008 on Utilisation of Domestic Film Technical Services in Making and Duplicating Activities of Local Film and Duplication of Imported Film* (2008). The Decree was once again (for the fifth time) suspended, for one year, until January 1, 2015.

**Eliminate Problematic Provisions from the Film Law:** The 2009 Film Law, which also has not yet been implemented, contains provisions that would limit foreign participation in various aspects of the film businesses and as such would be inconsistent with the U.S.-Indonesia Letter Agreement on Market Access for Films and Videos. The local filmmaking industry opposes the Law. The Law includes a 60% local content (screen) quota for local exhibitors, and a ban on the dubbing of imported films. Other restrictions include: 1) Articles 10 and 20, that require the maximization of Indonesian resources (potentially including a local print replication requirement); 2) Article 17, which establishes a pre-production content review requirement that obliges filmmakers to notify the Government of the title, story content, and production plan (this would be especially burdensome for co-productions); 3) Articles 26-28, under which distributors are required to provide “fair and right” treatment to exhibitors and could be interpreted to mandate provision of prints to theaters on demand (a potential “must supply” obligation); and 4) Article 40, restricting foreign entities from engaging in film distribution, exhibition, export, and import businesses.

**Avoid Data Localization Requirements:** Indonesia is in the process of implementing electronic commerce regulations that could require companies to locate data centers in the country as a condition for market access. This type of data localization requirement impedes the ability of foreign companies to provide software and other digital services in Indonesia and limits the ability of enterprises and consumers in the country to take advantage of these innovative technologies.

## **GENERALIZED SYSTEM OF PREFERENCES (GSP)**

On August 1, 2013, the GSP program expired, thus placing on hold the investigation into the country practices in Indonesia regarding intellectual property rights (which had commenced in July 2012). Once the program is renewed, it is expected that the investigation will continue into whether Indonesia qualifies for GSP beneficiary status. Under the now expired statute the President of the United States had to consider for GSP beneficiary status “the extent to which such country is providing adequate and effective protection of intellectual property rights,” and “the extent to which such country has assured the United States that it will provide equitable and reasonable access to the markets ... of such country.” 19 U.S.C. § 2462(c)(4) and (5). Countries like Indonesia should not expect to continue to receive trade preferences if they do not live up to their end of the bargain by providing adequate and effective protection for the intellectual property rights of U.S. creators, and/or if they fail to afford equitable and reasonable market access to U.S. creative products and services.

## **INDUSTRY ENGAGEMENT AND OUTREACH**

In addition to engagement in the Special 301 process and the GSP petition, IIPA and copyright associations engaged in significant outreach in Indonesia and with the Indonesian Government to address the problems contained in this submission. Upon the invitation of DGIPR, IIPA visited Indonesia in April 2013 to speak at the “Improving Indonesia’s Competitiveness Through IP Compliance and the Implementation of the Unfair Competition Act (UCA),” and met with DGIPR, the Ministry of Trade, and others. The motion picture industry engaged in educational outreach in 2013 consisting of film workshops and other industry initiatives. The Motion Picture Association of America’s local association (MPA) worked closely with the local screen community to stage a number of events in celebration of World IP Day. On April 27, 2013, in partnership with @America and the U.S. Embassy, and with support from Layar TV, MPA hosted the first “green screen” workshop for young people, and on April 29, they partnered with Blitz Megaplex, Margate House Films and the U.S. Embassy for a special screening of a new Indonesian feature film, Java Heat. In October 2013, MPA supported the 2013 “Balinale” held in Bali and in November 2013, MPA supported the first Indonesian Filmmakers Gathering at the Jakarta International Film Festival (JiFFest).

# RUSSIAN FEDERATION

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

### 2014 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** IIPA recommends that the Russian Federation be retained on the Priority Watch List in 2014.<sup>1</sup>

**Executive Summary:** In 2013, there was little concrete progress made on IPR enforcement in Russia, especially on the priority problem there – digital piracy. The Russian Duma did enact a package of important legislative changes (Federal Law No. 187 – in force August 1, 2013) with provisions pertaining to online service provider liability, including website and hosting activities. But, the new laws are limited in scope – key provisions apply only to movies and television programs – and so far, have had limited effectiveness. In two post-enactment cases in 2013 aimed at the social networking site vKontakte (whose posted music and film site has been identified by the U.S. Government as a “Notorious Market”), the infringing website evaded any sanctions.

In sum, one year after Russia completed its accession to the World Trade Organization, and agreed to a detailed IPR Action Plan with the U.S. Government, little has improved in the Russian enforcement scheme and where it has improved, it has not done so for all types of content. The U.S. Government acknowledged these enforcement shortcomings in its first annual report to Congress on Russia’s WTO compliance (December 2013), noting that “the current IPR enforcement environment in Russia remains weak” in areas such as end-user software piracy, online piracy, and the persistent collective administration problems.

The number of criminal raids, and police activity in general, declined significantly for the second straight year. Following legislation passed in 2011, there was a major reorganization of the police force and a drop in resources; there are about half the number of IPR economic crime police as there were a few years ago. Not coincidentally, in 2013, the initiation of criminal IPR cases is one-third the level from five years ago. Most tellingly (according to the information available to us), there were only three Internet piracy criminal cases commenced in Russia in 2013. Additionally, there were too few administrative actions against commercial enterprises that use or operate as distribution hubs for infringing content. Effective enforcement in Russia would require the Government of Russia to pursue more, and more effective criminal and administrative actions, and to strengthen administrative penalties particularly against large-scale enterprises.

For the past several years, the business software industry has been the only copyright industry that has seen a positive trend in piracy rates in Russia. Software industry piracy rates declined significantly in the past several years from 87% in 2004 to 63% in 2011.<sup>2</sup> This has been due to criminal and civil enforcement efforts directed against end-user software piracy and progress made on legalization of software purchased by the government. However, this progress has stalled because of a significant decline in Russian enforcement activity. The Government of Russia needs to recommit to ensuring legal software use in government institutions and state owned enterprises.

Russia has been a beneficiary of the Generalized System of Preferences (GSP) program (which is currently awaiting re-authorization) exceeding US\$500 million in 2012. One key factor in determining eligibility for GSP benefits is whether a country is providing “adequate and effective” protection of intellectual property rights. When the

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<sup>1</sup>For more details on Russia’s Special 301 history, see previous years’ reports at <http://www.iipa.com/countryreports.html>. For the history of Russia’s Special 301 placement, see <http://www.iipa.com/pdf/2014SPEC301HISTORICALCHART.pdf>. For a discussion of IIPA’s 2014 Key Initiatives and Challenges, see IIPA, *2014 Special 301 Submission*, at <http://www.iipa.com/pdf/2014SPEC301COVERLETTER.pdf>.

<sup>2</sup>Data on software piracy rates and commercial values are taken from the 2011 BSA Global Software Piracy Study at [www.bsa.org/globalstudy](http://www.bsa.org/globalstudy). This study assesses piracy rates and the commercial value of unlicensed software installed on personal computers during 2011 in more than 100 markets. The study includes a detailed discussion of the methodology used. BSA plans to release an updated study in the second quarter of 2014.



GSP program is reauthorized, the U.S. Government should consider suspending Russia's participation in the program until it provides significantly improved IPR enforcement.

## **PRIORITY ACTIONS REQUESTED IN 2014**

IIPA recommends the following priority enforcement actions and legal reforms to the Government of Russia for 2014:

- Undertake effective actions against Internet piracy – including unlicensed streaming services, pay-per-download websites, videogame hacking or cheating sites, cyberlockers, BitTorrent sites, private servers bypassing official videogame servers, and other commercial enterprises that provide services with the clear intent to promote or induce infringement, whether or not the servers are located in Russia.
- Properly staff and resource the Internet enforcement units in the Ministry of Internal Affairs (MVD) – such as Department K – and add copyright infringement work to their list of priorities.
- Increase the overall number of criminal IPR cases to previous levels, and bring deterrent criminal actions against retail chains that sell pirated entertainment software, movies and music, businesses using unlicensed software, and organized criminal syndicates involved in piracy.
- 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) better define the basis for liability for providers of online services that induce or encourage the infringement of copyright and related rights, or that facilitate infringement and do not take reasonable steps to prevent such activities (and, develop a clear definition of the types of intermediaries entitled to the safe harbors, to prevent knowing facilitators from enjoying the safe harbor benefits);
  - (c) implement injunctive relief and efficient and scalable notice and takedown procedures – applicable to all copyrightable works and recordings (not just motion pictures and television programs);
  - (d) provide legal norms that create incentives for Internet Service Providers (ISPs) to cooperate with right holders in fighting infringement taking place over their networks or platforms; and
  - (e) introduce a duty on ISPs to provide information to law enforcement agencies and rights holders.
- Strengthen copyright liability under the Administrative Code by eliminating the for-profit requirement in Article 7.12 of the Code of Administrative Offences, and raising administrative penalties to deterrent levels, for example, by implementing: (i) higher fixed fines for violations by legal entities and individuals; (ii) fines proportionate to corporate revenues (e.g., as is done for anti-monopoly violations); and/or (iii) penalties to disqualify from their managerial responsibilities, for one to three years, managers of legal entities.
- Ensure fairness and transparency in collective administration of certain rights, while preserving the exclusive rights of copyright owners in Internet distribution.
- Amend the Criminal Code and undertake effective enforcement against illegal camcording of motion pictures.
- Ensure government agencies and state owned enterprises procure and use only legal software.
- Establish an official uniform methodology for the investigation and prosecution of copyright and related rights infringements (particularly, for Internet and software enterprise end-user cases).
- Amend the Criminal Code to establish criminal liability against legal entities, including for IPR crimes.

## **COPYRIGHT PIRACY AND ENFORCEMENT IN RUSSIA**

**Internet Piracy Enforcement:** Russia has one of the largest and most active online communities in Europe. Internet and wireless access by Russian citizens is growing rapidly; according to the International Telecommunications Union (ITU), as of June 2013, over 53% of the Russian population now has Internet access, up 10% from two years ago (and compared to 33.7% in Ukraine). Yet, basic copyright enforcement of Internet piracy has lagged far behind the rapid growth of Internet and wireless access in Russia.

There are many linking sites and cyberlockers that offer access to pirated music. *vKontakte*, the most popular online social network in Russia (with over 46 million visits per day) is the largest single distributor of infringing music in Russia, and also is a hotbed for online piracy of movies and television programming, which is why it is on the U.S. Government's "Notorious Markets" list for 2012. It is ranked 26 in Alexa's global top 500 most visited websites worldwide and is the second most visited website in Russia. *vKontakte* has a functionality specifically designed to enable members to upload music and video files, which includes hundreds of thousands of unlicensed copyright works. It is available in many languages, including English, and has a dedicated content search engine that enables other members to search and instantly stream infringing content. In addition, some third-party software developers have distributed "apps" to enable non-members to search, stream and download the content available on the site. *vKontakte* will generally take down specific content when notified, but that is not an adequate enforcement mechanism for a problem that *vKontakte* created. Russia's second largest social network site, *odnoklassniki.ru*, also operates an unlicensed music service similar to *vKontakte*'s service. According to the recording industry, paid download sites are still an important source of piracy in Russia along with the peer-to-peer services and cyberlockers. There are over thirty *allofmp3.com* copycat sites which offer entire albums for as little as US\$1, and use up to thirty different domain names for the same user interface.

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*, launched in response to the takedown of *torrent.ru*. Another particularly problematic site is *Torrent-Games.net*, a Russian BitTorrent tracker. Neither ISPs nor website owners respond to takedown requests for this site. For the second consecutive year, Russia was first in the world in the number of connections by peers participating in the unauthorized file sharing of select Entertainment Software Association (ESA) member titles on public peer-to-peer networks. In 2013, users with Russian IP addresses accounted for more than 36% of the global volume of detected infringements occurring on public peer-to-peer networks. ESA also reports that Russian service providers either host or provide proxy services to a number of the world's largest and most popular linking sites, including *final4ever.com*.

Russia is also home to the world's two most prolific criminal release groups of motion pictures. The source materials for the infringing copies come from camcording films at local theaters and then uploading these illegal camcords onto the Internet (and selling illegal hard copies as well). Pre-release DVDs of major film titles often appear on the Internet (and then in pirate hard copies sold online or in markets), within a few days after the authorized theatrical release. The illicit camcords sourced from Russia are of exceptional quality and remain in high demand by international criminal syndicates for Internet uploading. We urge the Government of Russia to amend Article 146 of the Criminal Code (which was considered in the Duma, but stalled, in 2013), as well as to undertake effective enforcement against illegal camcording of motion pictures.

Book publishers are concerned by the prevalence of online piracy in Russia, particularly on hosted-content sites, and note very low compliance rates in response to rights holder requests to takedown links to infringing content. Peer-to-peer piracy providing free unauthorized access to e-books continues to be an issue as well.

The independent segment of the film and television 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 films and television programming. High quality pirated hard copies (DVDs) are routinely offered for free online,

destroying the legitimate market for these works. As a result, legitimate distributors cannot commit to distribution agreements, or alternatively, offer drastically reduced license fees which are inadequate to support the financing of independent productions. Revenue from legitimate distribution services, which is licensed country-by-country, is critical to financing the development of new creative works worldwide. Since Internet piracy in one territory affects other markets instantly, this type of infringement not only undercuts anticipated revenue from the distribution of a particular asset, it also harms the ability of independent producers to secure financing for future productions. The independent production sector cannot easily shift to new business practices that might otherwise limit piracy, such as worldwide same day release (referred to as “day-and-date” releases), since national distributors release films on their own schedules.

In three separate bilateral and multilateral agreements over the past several years, the Government of Russia made commitments to take effective action against Internet piracy. In the 2006 U.S.-Russia IPR Agreement, Russia agreed 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 registered in Russia’s .ru domain name, or whose servers are situated in Russia) and “to investigate and prosecute companies that illegally distribute objects of copyright or related rights on the Internet.” As part of its WTO accession, in the Working Party Report (paragraph 1339), the Government of Russia pledged that it would “continue to take actions against the operation of websites with servers located in the Russian Federation that promote illegal distribution of content protected by copyright or related rights, such as phonograms (sound recordings) and investigate and prosecute companies that illegally distribute objects of copyright or related rights on the Internet.” In December 2012, in the U.S.-Russia Action Plan on IPR, the Government of Russia agreed it would take “enforcement actions targeting piracy over the Internet” and more specifically it would, inter alia: “Take measures in order to disrupt the functioning of websites that facilitate criminal copyright infringement, and provide for takedown of infringing content...Take actions against the creators and administrators of websites through which intellectual property crimes are committed...Conduct meaningful consultations with rights holders to target and to take action against high-priority infringing websites.” The Government of Russia, has to date, taken few of these steps.

To significantly improve Internet enforcement, in addition to increasing the number of IPR cases and conducting expeditious investigations, much better law enforcement coordination is needed. Relevant administrative agencies (e.g., the Federal Anti-Monopoly Control) need to target large-scale illegal distribution enterprises, such as those unlicensed services now responsible for most of the illegal distribution of music in Russia (e.g., *vKontakte*).

In addition, all the agencies that can initiate criminal cases, including the Investigative Committee of Russia, the Investigative Department of MVD, the Federal Security Service of the Russian Federation (FSB), and Customs, should coordinate their efforts with police. Since the General Prosecutor’s Office has supervisory authority over investigations and prosecutions, it should work with the Investigative Committee of Russia and the Investigative Department of MVD to develop an updated and detailed methodology for investigations of copyright infringements. This would help to increase the quality, effectiveness and consistency of IPR enforcement activities (work on a draft methodology was suspended a few years ago).

One fundamental enforcement shortcoming is the lack of clear authority and jurisdiction to act against copyright infringement crimes occurring on the Internet, whether through administrative or criminal means. 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 MVD, even though they have occasionally taken action. Department K’s authority and responsibility to act in cases of online infringement should be further clarified and strengthened. Although Department K has equipment and expertise, there is not a single person in the department assigned to the sole task of combating IP crime. Proper staffing, equipping and resourcing of a sub-unit within Department K is essential, along with the formation of other such units within the MVD to deal exclusively with IPR Internet cases, and to train officers in how to combat these copyright crimes, including the maintenance of evidence. It also should be

clarified that actions can be brought under the Code of Administrative Offenses against commercial actors involved in the massive distribution of infringing material, where there is no direct fee charged by the enterprise.

An intensification of criminal investigations and criminal convictions against principals of organized commercial pirates is sorely needed, especially directed at Internet operations. Changes to criminal procedure 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 against owners and operators of piratical operations. However, deterrent criminal penalties have rarely, if ever, been 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, so few such cases are ever brought and even fewer tried to a conclusion. The 2011 increase in the criminal threshold, without special consideration of its application to Internet offenses, has exacerbated this problem; this further underscores the importance of also using administrative authority in digital piracy cases.

The August 2013 package of laws had two key features: (1) amendments to the Civil Code, Part IV – to provide for third party liability, as well as safe harbors from such liability for “information brokers” (ISPs) that comply with all the requirements for those safe harbors; and (2) amendments to the Civil Procedure Code (and corresponding amendments to the Arbitration Procedure Code and the Federal Law on Information and Information Technologies (2006)) that provide injunctions after notice and takedown (and by court order only) to block infringing materials or limit access to infringing websites. However, as noted, the provisions are limited to movies and television programs, and have yet to be fully implemented even for these works. As a result, little has changed in 2013 for works other than motion pictures and television programs: some ISPs cooperate and take down pirate materials once identified, but many ISPs are not willing to cooperate absent a court order, even with clear evidence of piracy. This is why further amendments to broaden the scope of the August law to all works, and to include stronger ISP cooperation and clear third party liability provisions, are essential. The motion picture industry reports that in 2013, most of the ISPs often did voluntarily cooperate and respond to the Russian-Anti Piracy Organization (RAPO) cease and desist letters. However, efforts between the Ministry of Economic Development to develop formal notice and takedown procedures between rights holders and ISPs were not successful. In December 2013, film and television producers and some Internet services (including mail.ru – one of the most popular Russian Internet services) signed a Memorandum of Understanding to improve voluntary notice and takedown and other cooperative procedures.

As noted, there were only a few Internet criminal cases commenced in Russia in 2013. One, against a telecommunications employee using malware software; the case is still pending. In October 2013, a district court in Moscow convicted the two administrators of the *interfilm.ru* site; they received four years probation (this was a case that commenced in 2009). It was the first criminal conviction in Russia for online copyright infringement. IIPA recommends that Russian authorities step up their efforts to investigate Internet piracy of software, books, music, and film material, by a variety of technical means, and increase the number and disposition of effective criminal investigators.

BSA | The Software Alliance (BSA) reported only two raids against Internet users or services in 2013 (compared with 25 in 2008 and 22 in 2011), and three criminal cases initiated in 2013, with one conviction. This compares, for example, to 6 cases initiated and 3 verdicts in 2011, and 15 cases and 7 verdicts in 2008.

**Criminal Enforcement in General:** For both online and hard copy piracy, criminal enforcement in Russia remains a priority for IIPA and its members. For hard goods piracy, Russia’s laws are generally adequate for addressing this problem (although some gaps remain). As in years past, most criminal enforcement by the government in 2013 was aimed at physical piracy.

In 2013, the Russian police continued to take actions against copyright infringers, including against street vendor piracy and companies involved in the installation and use of pirated software. However, all of the copyright industries reported substantial declines in the number of raids in 2013 from previous years, in part due to the severe



cuts in police resources. In addition, the copyright industries are concerned that the proportion of raids to the initiation of cases, and to criminal verdicts, remains disproportionately low. The Government of Russia (MVD) usually provides comprehensive annual statistics on intellectual property cases, and investigations commenced; however, the full 2013 report was not available before the Special 301 filing deadline. From preliminary data, however, it is clear that criminal enforcement is down significantly, from prior years. According to the MVD statistics (through November), the number of criminal investigations in 2013 was 2,535, down from 3,580 in 2012 and less than half the (full year) statistics for 2007, when 7,874 investigations were commenced (there were 5,033 in 2011 and 6,118 in 2010). The number of convictions under Article 146 of the Criminal Code in 2013 (through June) was 580, compared with 1,325 in all of 2012, and 2,676 in 2010.

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 copyright industries, such as the motion picture industry, have seen a decline of 5% to 10% in hard goods piracy in the past two years, in major cities, including Moscow, St. Petersburg, Rostov-on-Don, and Novosibirsk (and an overall decline in the size of the hard goods market by about 50% since 2010). They also report continued cooperation by enforcement authorities with the RAPO in 2012.

There were also a considerable number of administrative and criminal penalties imposed against illegal DVD vendors. The motion picture industry noted several markets, including Gorbushka, Savelovskiy, Sherbakovsky, Luzniki, and Radio that no longer contain pirate DVDs, and only sell legitimate DVDs. Further, the local motion picture industry (Motion Picture Association, MPA) reported very good cooperation with law enforcement authorities in organizing raids against problematic kiosks. 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 have been convicted).

BSA reported the overall number of raids decreased substantially in 2013, which has been a trend the past several years. In 2013, the number of *ex officio* raids declined even in major cities including Moscow, Rostov-on-Don, and Novosibirsk (among others), and there was inconsistent enforcement in other cities and regions. As in prior years, the majority of raids are “channel” raids against CD sellers and pre-installed hard disk loaders. There were 333 end-user raids in 2013 (down from 506 in 2012, and 554 in 2011); there were 1000 “channel” case raids, up from 931 in 2012, but down from 1161 in 2011. The number of criminal cases initiated (as a result of these raids) declined from 97 in 2012 to 66 in 2013 against end-users, and from 609 “channel” cases in 2012 to 556 in 2013. The total number of court verdicts was up substantially for “channel” cases with 260 in 2013, but was substantially down for end-user cases, falling from 24 verdicts in 2012 (and 83 in 2007), to only 11 in 2013.

BSA continues to report good cooperation with enforcement officials, but inconsistency in the number and quality of raids stemming from the lack of a uniform methodology promulgated by the Investigative Department of MVD, the Investigative Committee of Russia, and the General Prosecutor’s Office in relation to implementation of Article 146 of the Criminal Code. Investigators and prosecutors often 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.

MPA reports that enforcement activity in 2013 was about the same as in 2012, with most of it concentrated in Moscow and St. Petersburg, but like other industries, was down overall from only a few years ago, as a result of the reorganization of the police and severe reductions in enforcement personnel. RAPO reported one major raid on a DVD plant in 2013 in Tver, in cooperation with the FSB and economic crime police (seizing 12 DVD and 2 CD lines). The police (with cooperation from RAPO) seized a total of 3.2 million discs in 2013. The motion picture industry reported box office receipts in Russia in 2013 of US\$1.37 billion (a 10.6% increase from 2012).

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 IPR 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. ESA continues to report delays in examination reports from government experts, due to a lack of technical expertise. Enforcement is also hampered, and trials delayed, by the requirement that exemplars be collected only with the participation of state officials, 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. Worse, some local authorities refuse to share any information on cases with rights holders at the investigative stage, making effective cooperation extremely difficult. The problems are further exacerbated by ongoing reforms of the investigative bodies. These arcane and outdated rules and practices create unnecessary delays and costs in litigation. The rules should be modernized so that industry experts can be more effectively integrated into the judicial process. One way to accomplish this would be for the Supreme Court to issue new guidelines on the admissibility of the testimony of private experts.

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 (court of general jurisdiction) – which unnecessarily lengthens the process and makes enforcement even more difficult.

Another recommended measure to increase the efficiency of IPR criminal investigations is the appointment of IPR special prosecutions, investigators, and police officers at both the federal and regional levels throughout Russia. 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 Investigative Department of MVD and the Investigative Committee of Russia should continue to work with IIPA members on future training programs, and that the General Prosecutor's Office (along with the MVD-IC) appoint a government liaison with IP rights holders to more effectively bring criminal investigations and trials to successful conclusions. The approval in 2011 of a specialized IP court in Skolkovo (the innovation center) which opened in 2013 (with thirty trained judges) was a positive step; these courts should be created in other cities and regions across Russia to handle copyright, as well as patent cases.

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 or against a business using unlicensed software), 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.

Several copyright industries continue to report that raids against retail outlets, 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. Amendments to the Criminal Code to allow corporate entities to be held criminally liable would help to correct this problem. As one example, CDs and DVDs with illegal software are readily available in markets and in kiosks, but the police only take action against the vendors, not the organized illegal businesses that make those materials available. There were three reported raids against large pirate warehouses in 2013 (one resulting in the seizure of over a million illegal discs and the other two over 700,000 discs).

**Civil Enforcement:** The commercial-scale piracy harming all of the copyright industries can and should be addressed through enhanced administrative actions (and penalties), and criminal remedies. Civil measures are not capable of providing the requisite level of deterrence against that type of piracy; but, if, properly applied, civil enforcement can be a useful tool for some industries. However, in Russia, there are many civil enforcement inadequacies, including: remedies limited to the seizure of specific copies of works that are the object of a lawsuit; the failure to award preliminary injunctions (although some changes were made in 2013), 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. The August 2013 package of laws resulted in 77 applications for preliminary injunctions in the Moscow city court; 40 lawsuits were filed and several blocking orders were issued by the court. But, the law needs more effective provisions against rogue websites, instead of its current focus on individual works on the sites (in addition to its application to all works and recordings, not just motion pictures and television programs).

While criminal enforcement (by the police) remains the primary IPR enforcement tool in Russia against commercial piracy, in the past few years the business software industry has been able to expand its civil search practices against enterprises using unlicensed software as a secondary enforcement method. While the number of searches is low (12 in 2013, 11 in 2012), this activity has contributed to public awareness for businesses especially about legal versus illegal activities, as well as helping to legalize software in commercial entities. One additional recommendation is the adoption of judicial guidelines on civil search practices, including provisional measures (consistent with the WTO TRIPS requirements).

**Administrative Enforcement:** 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 (for natural persons and juridical entities) and arbitration courts (for legal entities). Imposing significant administrative fines on legal entities, for example, for the distribution or making available of infringing content or the use of unlicensed software, would have a deterrent effect (and could be imposed in instances when criminal cases are terminated for failing to meet the high evidentiary burdens). Unfortunately, current administrative procedures are inadequate because of the very low level of fines imposed and the inability to reach commercial enterprises that distribute infringing content (especially when there is no direct payment for such infringing content, but only, for example, advertising revenue, such as at *vKontakte*). BSA reported only 27 administrative court decisions against enterprises using unlicensed software, and only 2 against “channel” pirates in 2013 (compared to 18 end-user and 24 “channel” cases in 2012). During 2013, the average administrative fine imposed on legal entities was about 30,000 rubles (approximately, US\$1,000) per case, which is too low to be a deterrent. In total, the number of administrative cases has, like the number of criminal cases, fallen significantly: there were 3,310 cases in 2013 through June, compared with 7,482 cases in all of 2012, and 13,268 administrative cases in 2010. BSA reported two prosecutorial raids in 2013 that did commence administrative cases in each instance.

In addition to the piracy problems, the music industry is also concerned with the lack of transparency and governance issues in connection with the state accredited collecting societies for authors, record labels and performers, including VOIS, the sole state accredited collecting body for record labels and performers. We urge the Government of Russia to use its oversight authority to ensure that rights holders are being fairly represented and treated, in accordance with commitments that it made to the U.S. Government and other trading partners who had expressed concern with the accreditation process. Fair representation in these societies includes direct representation of rights holders on the board in a manner that is proportionate to relevant market share (and that reflects commercial realities). During WTO accession (in the Working Party Report, paragraph 1218), Russia assured its trading partners it would “review its system of collective management of rights in order to eliminate non-contractual management of rights within five years after Part IV of the Civil Code entered into effect,” to bring the management societies in line with international standards on governance, transparency and accountability. That commitment came due in 2013 but no such action was taken. To develop legal music markets and protect legitimate licensed services, the Government of Russia must fulfill this obligation and resolve the issue of the state accreditation of collecting societies in a matter that ensures that rights holders are able to control and manage their own societies.

In October 2013 (to be implemented in 2014), a new Federal Service for Copyright will replace the existing Federal Service for Intellectual Property (Rospatent), including the governance of collective management organizations.

## **DEFICIENCIES IN THE RUSSIAN LEGAL REGIME**

Although Russia did make some progress on legal reforms as part of its WTO accession, many key elements of an effective legal regime remain absent or incomplete, especially with regard to effective Internet enforcement. 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 (unclear ISP liability, no formal notice and takedown procedure, and the other list of deficiencies noted in previous IIPA filings). While the 2013 package of laws is a step forward, key improvements, detailed above, are still needed.

In the Civil Code, IIPA and its members have in the past commented on three major overarching concerns: (a) a lack of clarity on numerous provisions, especially exceptions; (b) administrative law principles throughout the Civil Code that likely cannot be enforced by civil or criminal procedures; and (c) the absence of clear liability rules for online websites and services that induce or encourage infringement. The 2013 package of laws was intended, in part, to address this latter issue. But the law does not clearly define ISPs (and the various services they provide) nor does it link liability (and safe harbors) in a manner that will encourage cooperation with rights holders to effectively deal with Internet piracy – in civil and criminal law; last, it does not clearly define secondary liability. If Russia is to foster legitimate electronic commerce and if the rule of law is to apply to the online world, Russia needs to develop a balanced system of liability provisions that incentivizes ISPs to cooperate in addressing Internet piracy, and one that does not provide cover for services that induce or promote infringement. Further, it is critical that Russia amend its regime to allow for injunctive relief – quickly and effectively, applicable to all works, and especially for Internet matters. One additional tool would be to introduce a duty on ISPs to provide information to law enforcement agencies and rights holders to assist with criminal enforcement.

Other existing hurdles to effective civil and criminal enforcement are: (a) the failure of courts and police to apply statutory presumptions of copyright ownership; (b) overly burdensome evidentiary requirements to prove title; and (c) the lack of criminal liability for corporate enterprises. To require a “full” chain of title for each recording in every investigation is especially problematic for foreign rights holders with translation, notarization and other costs and delays. Similarly, the procedures for obtaining injunctions tied to notice and takedown (and proposals for further changes), have been criticized as being overly burdensome in requiring “proof” of ownership.

For a detailed list of IIPA’s comments on the Civil Code, and the other relevant laws, 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 continue to apply in light of the adoption of the 2008 Civil Code and the repeal of the copyright law. Last, we recommend 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”). Unfortunately, the resolution did not resolve a number of legal issues that remain unclear, and as a result are problematic for judges trying to enforce IPR infringements. These issues include: the treatment of unlicensed stored copies in an electronic medium (IIPA recommends they be treated as illegal without the need to prove use of the software in the user’s business activities); the failure to craft explicit liability rules for the pre-installation of unlicensed software on PCs; the failure to establish rules to determine damages (i.e., the value of works), including for “making available”; failure to provide explicit guidelines pertaining to infringement for PCs (with illegally installed software) used in businesses, regardless of the

ownership of the PCs; and, the failure of courts to apply provisional measures (and to clarify evidentiary rules in civil searches or civil suits based on materials acquired in criminal raids).

# THAILAND

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

### 2014 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** IIPA acknowledges that the political climate in Thailand at present makes it difficult to predict with certainty near-term developments in Thailand. This said, IIPA members urge USTR to maintain Thailand on the Priority Watch List in 2014.<sup>1</sup> The list of Priority Actions below is presented as guidance once stability has been reestablished in Thailand.

**Executive Summary:** The market for creative content in Thailand has deteriorated in recent years due mainly to piracy, exacerbated by the lack of needed legal reforms. Online and mobile device (smart phone, tablet) piracy (estimated to have captured 80% of the Thai market) has largely replaced physical piracy, although there remain pockets of hard goods piracy (e.g., hard disk loading at IT malls). The establishment in 2012 by the Royal Thai Government (RTG) of the National Intellectual Property Committee chaired by the Prime Minister and the National IPR Center for Enforcement (NICE) under the Department of Intellectual Property (DIP) was to usher in an era of enhanced enforcement. Unfortunately, this has not happened. Reports indicate that irregularities in the Thai enforcement system remain prevalent. Courts do not view IP infringements as serious enough to warrant significant judgments, fines, or sentences. Royal Thai authorities do not investigate piracy up the chain to reveal its highly organized and criminal nature. In the online space, right holders rely largely on the voluntary cooperation of ISPs, and in the absence of legal requirements to take down or disable access to infringements, are developing Memoranda of Understanding (MOUs) with willing ISPs.

The draft copyright amendments add difficulties with respect to addressing Internet piracy through ISP liability and accountability, and the proposed protections against the circumvention of technological protection measures (TPMs) fail to address trafficking in circumvention technologies and introduce over-broad exceptions. The inclusion of piracy as a predicate offense under the Money Laundering Prevention and Suppression Act (MLPSA) went into force February 2013, but has not yet been used effectively against piracy, and the draft Computer Crimes Act would not address IP crimes. While recognizing that political instability has made it impossible to predict the way forward, the RTG's 2013 "Year of IP Protection" was a missed opportunity.

## **PRIORITY ACTIONS REQUESTED IN 2014**

### **Enforcement**

- Through DIP, coordinate negotiations between right holders and ISPs to foster greater immediate cooperation against both hosted and non-hosted piracy sites and services.
- Take targeted enforcement against notorious online piracy sites, including those mentioned in this filing; establish Internet piracy taskforce with dedicated expert IP officers to address Internet and mobile device piracy.
- Close notorious piracy markets ("Red Zones" and "Yellow Zones") and prosecute uncooperative mall owners.
- Continue RTG support and collaboration on campaigns focused on reducing unauthorized use of software by enterprises and Government entities, including implementing software asset management, and fully implementing the Cabinet Resolution on legal software use, procurement, and installation in the public sector.
- Use MLPSA in key cases of intellectual property infringement as a predicate money-laundering offense, enabling enhanced remedies.
- Issue and implement sentencing guidelines in criminal copyright cases to provide deterrence.

<sup>1</sup>For more details on Thailand's Special 301 history, see previous years' reports at <http://www.iipa.com/countryreports.html>. For the history of Thailand's Special 301 placement, see <http://www.iipa.com/pdf/2014SPEC301HISTORICALCHART.pdf>. For a discussion of IIPA's 2014 Key Initiatives and Challenges, see IIPA, *2014 Special 301 Submission*, at <http://www.iipa.com/pdf/2014SPEC301COVERLETTER.pdf>.



## Legislative

- Adopt legislation making it an offense to possess an audiovisual recording device in a movie theater with the intent to make or transmit an audiovisual work in whole or in part.
- Enact copyright amendments to effectively: 1) address Internet piracy and promote ISP responsibility; and 2) protect against acts of circumvention of TPMs and trafficking in circumvention technologies, devices, components, and services.
- Enact landlord liability provision, such that there will be adequate civil, administrative, and criminal remedies against those who lend their premises to people engaging in commercial infringement of copyright.
- Add IP crimes to the draft Computer Crimes Act to create a more effective remedy against online infringement.
- Amend the Evidence Law to allow the admission of digital evidence in copyright cases before the court.
- Issue clarification that exceptions in the Copyright Law do not allow the whole copying of books without permission and payment.

## Market Access and Related Issues

- Fix (or withdraw) the problematic Film Act, which potentially imposes a screen quota and uncertain censorship and ratings requirements, and relax investment/ownership and advertising restrictions that impede legitimate distribution channels for audiovisual content.

## PIRACY AND ENFORCEMENT UPDATES IN THAILAND

Prior IIPA reports on Thailand contain detailed discussion of piracy and enforcement issues. This report serves only as an update to those and is not to be considered an exhaustive review of issues.<sup>2</sup>

**Internet and Mobile Piracy Problems Worsen in Thailand:** As broadband and mobile 3G and 4G services become more widely available, with faster speeds, growing infrastructure, and lower Internet subscription fees, there are opportunities for growth of a legitimate online and mobile marketplace for copyright works in Thailand. One indicator suggests that 52 million people in Thailand are using the Internet as of early 2014.<sup>3</sup> Fixed line broadband penetration alone exceeded 5.4 million as of December 2012, according to the International Telecommunications Union.<sup>4</sup> Legal services for music and audiovisual materials are launching in Thailand, like GTH Movie Store, AIS Movie Store, and 15 legal music services including iTunes, Deezer, KKBox and AIS. Unfortunately, most Thai users are wedded to Internet piracy, including BitTorrent index and tracker sites, streaming sites, social media sites (used to locate infringing files), cyberlockers, and BBS/forums.<sup>5</sup> These piracy services are being accessed both via wired and wireless broadband services on PCs, as well as on mobile devices such as smart phones and tablets, especially in cases of 3G and 4G Internet. In June 2013, 12 local sites with business models based on providing access to infringing content, were referred to NICE. However, action against these sites has not been as forthcoming as hoped.

The RTG has missed opportunities over the past couple of years to establish a suitable framework to address what is now rampant and growing online and mobile piracy in Thailand. Right holders have therefore been left seeking self-help and the good faith cooperation of ISPs. All things considered, these efforts have already borne

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<sup>2</sup>See, e.g., IIPA, *Thailand*, 2013 Special 301 Report, February 8, 2013, at <http://www.iipa.com/rbc/2013/2013SPEC301THAILAND.PDF>.

<sup>3</sup>*Thailand's Internet Users to Double*, Bangkok Post, July 4, 2013, at <http://www.bangkokpost.com/breakingnews/358289/thailand-internet-users-to-double-to-52-million-in-2013>.

<sup>4</sup>International Telecommunication Union, *Fixed Broadband Subscriptions 2000-2012*, at [http://www.itu.int/en/ITU-D/Statistics/Pages/stat/default.aspx?utm\\_source=twitterfeed&utm\\_medium=twitter](http://www.itu.int/en/ITU-D/Statistics/Pages/stat/default.aspx?utm_source=twitterfeed&utm_medium=twitter), accessed on January 21, 2014.

<sup>5</sup>Several sites either have a nexus to Thailand, such as *siamzone.com* (the 74th most accessed site in Thailand), and *tvjaa.com* (109th), which apparently have their server located in Bangkok, or are directed at Thai users specifically, such as *thailandtorrent.com* (159th) and *siambit.org* (287th). Other sites popular in Thailand are among the most accessed sites in the world and are identified by IIPA as "Notorious Markets" in filings with the U.S. Government (including the latest filing in October 2013). In addition, in 2013, Thailand ranked 15th in the world in terms of the number of connections by peers participating in the unauthorized file sharing of select Entertainment Software Association (ESA) member titles on public P2P networks.

some fruit. Takedown rates for hosted content are relatively high (the music industry reports over 90% takedown rates with the 20 or so ISPs they work with, involving hundreds of notices). However, more should be done. The Electronic Transactions Development Agency (ETDA) (under the administration of the Information and Communication Technology Ministry) has drawn up an MOU which would put into place voluntary mechanisms to address hosted as well as non-hosted piracy situations (and other illegal activities). While some ISPs have been willing to voluntarily address such piracy challenges, no progress has been made in relation to cooperation with other ISPs, and there have been no signatories. DIP and NICE should bring together stakeholders on a more regularized basis to discuss better ways to cooperate. Without such efforts, and in the absence of strong legal reform or a dedicated government enforcement taskforce against Internet and mobile piracy,<sup>6</sup> it will be much more difficult to target Internet piracy.

In the absence of a coordinated Government approach including a dedicated taskforce, IIPA members find that today, most enforcement authorities lack Internet and technological knowledge, there are no standards for computer forensics and/or electronic evidence gathering, and RTG authorities wait for court orders in respect of digital forensics involving third parties like ISPs or payment processors, rather than taking the initiative to launch their own investigations.

**Addressing Retail Piracy Including “Red Zones” and “Yellow Zones”:** The continued blight of blatant and open piracy in the malls and on the streets in Thailand is difficult to justify and should no longer be tolerated. In its 2013 “notorious markets” submission, IIPA singled out Panthip Plaza, Klong Thom, Saphan Lek, Baan Mor Shopping Area, Patpong and Silom Shopping Areas, Mah Boon Krong (MBK) Center, and Sukhumvit Road,<sup>7</sup> and the RTG has itself listed “Red Zones” and “Yellow Zones” which it views as vulnerable to piracy activities.<sup>8</sup> Pirated films, music, software, video games, and published materials remain available (although on a somewhat lesser scale due to the rising popularity of online content), while the IT malls conduct hard disk loading of content onto computers and the loading of pirate materials onto mobile devices, smart phones, and tablets. IIPA has also reported the growth of so-called “media box” piracy, in which digital drives are filled with hundreds of movies and other content or enabled to illegally download or stream content to users’ TVs or computer monitors. These boxes sell at low prices at the malls, and while the boxes themselves may be advertised for legitimate purposes, often they are used or modified for use to infringe copyright, calling into question the responsibility of those who traffic in or provide services related to them. Enforcement authorities are not taking the steps needed to shut down piracy in the malls. Industry reports that RTG authorities conducted some raids during 2013, but unfortunately, seizures were very small and are not followed by upstream investigations. To the extent mall owners are uncooperative, the RTG has indicated that, even in the absence of the planned landlord liability law, criminal action can be brought; however, we are unaware of action to date.

**RTG Authorities Continue to Make Dent in Unauthorized Use of Software by Enterprises:** The software industry reports good cooperation from the RTG authorities including the Economic Crime Division, in addressing software piracy in Thailand, with an increase from 187 enterprise end-user raids in 2012 to 280 raids (a 30% increase) in 2013. For the most part, the software industry has found civil and criminal penalties awarded in end-user cases to be sufficient. The latest figures, however, still indicate a 72% rate of unauthorized software usage by enterprises in 2011, with a commercial value of this unlicensed software reaching \$852 million.<sup>9</sup> The software piracy rate in Thailand is well above the Asia regional average of 60% indicating that there is still much progress to be made. Beyond enterprise software piracy, the failure to fully implement the existing Cabinet Resolution on legal

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<sup>6</sup>By contrast, we note the Korean Anti-Piracy Task Force boasts more than 30 expert officers undertaking *ex-officio* monitoring activities related to Internet piracy on a 24/7 basis, with the power to request takedowns.

<sup>7</sup>See IIPA Written Submission Re: 2013 Special 301 Out-of-Cycle Review of Notorious Markets: Request for Public Comments, October 25, 2013, at [http://www.iipa.com/pdf/2013\\_Oct25\\_Notorious\\_Markets.pdf](http://www.iipa.com/pdf/2013_Oct25_Notorious_Markets.pdf).

<sup>8</sup>Industry notes that physical piracy is also problematic in big cities in all over Thailand such as Hua Hin, Phuket, Samui, Pattaya, and Chiangmai.

<sup>9</sup>Data on software piracy rates and commercial values are taken from the 2011 BSA Global Software Piracy Study at [www.bsa.org/globalstudy](http://www.bsa.org/globalstudy). This study assesses piracy rates and the commercial value of unlicensed software installed on personal computers during 2011 in more than 100 markets. The study includes a detailed discussion of the methodology used. BSA plans to release an updated study in the second quarter of 2014.



software use, procurement, and installation in the public sector remains an irritant. BSA has proposed software asset management (SAM) policy initiatives to DIP and the Software Industry Promotion Agency, and is willing to assist with the training of SAM certified personnel and the implementation of SAM procedures to reduce software piracy in the public sector.

**Camcorder Piracy Traced to Thailand Continues to Harm Film Market:** The problem of camcording of films in movie theaters in Thailand remains a concern of the industry in 2013. The rise in audio forensic matches in 2013 suggests that camcording remains prevalent in the country, primarily driven by domestic demand for films dubbed in Thai (there were no full-length video camcords detected in 2013). Local Thai films are camcordered within days of their release in the movie theater. Increasing broadband Internet and 3G connections in Thailand mean faster uploads to the Internet of movies illegally camcordered there. These titles are then made available to the world through various Internet piracy rings, becoming pirated hard goods within a matter of days. While the RTG has indicated it may take action against unauthorized camcording under existing laws, nothing has been done to curtail this damaging activity. In the meantime, anti-camcording legislation remains pending.

**Book Piracy Problems Abound:** The book and journal publishing industry continues to face print piracy, illegal photocopying, unauthorized translations, and online piracy in Thailand. Copy shops continue to photocopy books for students, primarily on a “print or copy to order” basis to avoid keeping infringing stock on site. Other pirated materials include novels, travel guides, history books and foreign language newspapers. Furthermore, RTG efforts to address the production and export of counterfeit books have not yielded any actionable results.

**Pay-TV Piracy (Cable and Satellite), Public Performance Piracy:** 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. While the National Broadcasting and Telecommunications Commission (NBTC) was established in September 2011, and established a Broadcasting Committee to handle regulation of the broadcasting industry, there is not yet effective government supervision of pay TV content. In recent years, unlicensed new operators of satellite channels (showing DVDs of recent films not yet released in Thailand) have entered the industry with business models based on stolen content, and have achieved substantial business success without any interference by RTG authorities. These channels make stolen content available not only in Thailand but to other countries covered by satellite transponder signals as well. With support from legitimate pay TV providers and the Thai Film Federation, the motion picture industry gathered evidence and submitted a complaint to NBTC in December 2013 requesting that enforcement action be taken. Pay TV content also continues to be freely stolen and re-sold by many provincial cable operators.<sup>10</sup> Public performance piracy continues to be a problem, with many hotels outside Bangkok retransmitting unauthorized videos over in-house movie systems, and with bars in tourist areas openly exhibiting films without authorization. A growing number of bars and restaurants have also added “private” rooms to screen motion pictures illegally.

**Lack of Overall Effective Civil Remedies or Criminal Penalties in the Courts:** While the establishment of the Thai IP&IT Court in 1998 encouraged great hope for a sustained workable judicial system to protect copyright, in recent years, both civil judgments and criminal convictions have failed to meaningfully deter further infringements for most of the copyright industries. Civil judicial remedies have ceased being effective for most industries because civil damage awards are far lower than costs and attorney’s fees associated with bringing the case. Further, neither additional damages, punitive damages, nor pre-established (statutory) damages are available. Civil procedures are extremely lengthy with an average pendency of three years from filing to judgment. Plaintiffs also bear all the burdens of proof, from copyright ownership to losses and damages, which becomes burdensome but critical since profits awarded in civil cases are so low in Thailand.

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<sup>10</sup>The industry association CASBAA has attempted to ensure that in broadcast regulations, an explicit condition for a broadcast license includes that “the operator must not commit, permit or suffer any conduct which is an infringement of any intellectual property right,” but thus far, no such conditionality has been accepted.

Although some right holders, such as those in the software industry, have generally been satisfied with the efficacy of criminal enforcement and the support given by the IP&IT Court, either through mediation or decisions in civil cases, in general the criminal system has not provided adequate relief to many copyright sectors. In order to more effectively address the endemic piracy problem in Thailand, a credible, deterrent criminal remedy must be available. Very few raids achieve meaningful results which would, when publicized, have a deterrent effect on piracy activities in the country. Low numbers of criminal convictions leading to suspended sentences are the norm in Thailand. RTG statistics have traditionally failed to break down cases by IP type, and do not show whether investigations are being taken up the organized crime chain or result in deterrent outcomes. In fact, most cases are taken against low-level pirate distributors who are often poor and at the lower end of the organized criminal enterprise. It is no wonder that judges in such cases are reluctant to come down hard with maximum penalties. Yet, judges' attitudes toward IP in recent years have been telling, with some of them expressing to industry that they view copyright infringement as nothing more than petty theft. The MLPSA was amended in 2012 to add IP crimes as a predicate for up-the-chain money laundering investigations leading to significant criminal fines, imprisonments, and asset seizure. It is time for prosecutors and judges to recognize this, and to build key cases involving copyright infringement to test this new tool. In addition, sentencing guidelines should be issued, adopting minimum sentences that provide a real deterrent to infringement.

## **COPYRIGHT LAW AND RELATED ISSUE UPDATES**

Recognizing that the Parliament was dissolved in December 2013, IIPA nonetheless addresses the latest status of various pieces of relevant legislation as of that time, in the hopes that, once the political situation stabilizes, the RTG can move forward swiftly with needed reforms.

**Camcording Bill Should be Revamped Prior to Passage:** IIPA appreciates that the RTG drafted a bill intended to address the issue of unauthorized camcording of motion pictures in Thailand. The legislation that was put forward unfortunately fell well short of the goals set out in model approaches provided to the RTG. An effective law would prohibit the possession of an audiovisual recording device in an exhibition facility with the intent to copy or transmit a whole or part of an audiovisual work (including the video, the soundtrack, or both). Those engaging in the act proscribed would be subject to interdiction by cinema employees and the police, immediate seizure and forfeiture of the equipment used in violating the law and any unlawful copies made, as well as civil and criminal remedies. Unfortunately, the latest draft IIPA has reviewed would fail to provide adequate protection in several respects:

- The draft only outlaws the actual “reproduction,” not the preparatory steps of possession or use of recording equipment, which in practice would be the basis for enforcement in many cases.
- The draft fails to authorize specific enforcement steps and spell out the conditions under which they could be taken, including: 1) entering and searching exhibition facilities; 2) searching suspects on site (and detaining them if necessary to carry out the search); and 3) seizing any audiovisual recording device or other evidence of an offense.
- The draft should create appropriate presumptions of subsistence and ownership of copyright. In case either is placed into issue by a defendant, an affidavit by the right holder should create *prima facie* proof rebuttable only by evidence to the contrary.
- The draft should empower courts to seize, forfeit, deliver up or destroy any unauthorized copy of audiovisual material and any audiovisual recording devices or other equipment in the possession of the alleged offender.
- The draft should remove the proposed exception for the visually impaired. It appears this was intended as an addition to the copyright law, but was appended to the camcording bill.

**Copyright Draft Approved by Council of State, Needs Significant Rewrite Prior to Passage:** IIPA is pleased that the RTG has drafted legislation attempting to modernize the Copyright Act, B.E. 2537 (1994) by addressing online piracy through ISP liability provisions, and by taking on key obligations of the WIPO Copyright Treaty (WCT) and WIPO Performances and Phonograms Treaty (WPPT) regarding technological protection

measures (TPMs) and rights management information. In October 2012, the Cabinet provisionally approved a set of proposed amendments. Unfortunately, the draft falls short of providing effective solutions in the following areas:

- **Service Provider Liability Provisions:** Draft Section 32/3 provides a rudimentary and ultimately unsatisfactory approach to online infringements and to fostering greater responsibility and cooperation among ISPs. Rather than a direct notice and takedown approach for the hosted environment, draft Section 32/3 simply authorizes courts to issue takedown orders. Even an ISP which knows or has “red flag” (constructive) knowledge of infringing activity occurring through the use of its services, can, under the draft’s formulation, take no action to remove it and simply wait for a court order to do so. IIPA is deeply concerned that virtually all cooperation right holders currently receive from Thai ISPs will cease if this draft becomes law. Instead, a true “notice and takedown” process is needed in the hosted environment, as well as fair and effective procedures to deal with repeat infringers and with infringements that do not involve hosting, so long as there is a nexus to infringement occurring in Thailand. In addition, the drafters would be wise to heed the advice of DIP officials who have espoused a much more effective and commonsense approach through a simple amendment to the Computer Crime Law, as discussed below.
- **Technological Protection Measures Provision May Need More Detailed Treatment:** TPMs are key enablers of new legitimate business models for content distribution in the digital and online environments. Therefore, their proper protection is necessary to shape a healthy digital marketplace for Thailand. The draft unfortunately falls short of providing adequate protection and also of meeting the requirements of the WCT and WPPT (thus paving the way for Thailand to join those treaties) in critical ways.
  - **Access Controls:** First, Section 53/4 of the draft outlaws circumvention of a TPM only when carried out by someone “knowing that such act may induce or cause the infringement of copyright or performer’s rights.” The phrase “or may result in unauthorized access to a work or object of related rights” should be added. Otherwise the intention of the drafters to cover access controls in the definition in draft Section 3 will have been for naught.
  - **Copy Controls:** Second, by only mentioning “technology designed to prevent the reproduction” in the definition of a TPM, the draft fails to cover other important exclusive rights, beyond reproduction. Also, while the term “technology” may cover all devices and components, there may be concerns about the word “designed” since the TPM should be defined based on its performance (i.e., whether it controls access or whether it protects copyright or related rights), not how it was designed. We suggest altering the wording to “technology, device, or component that protects any copyright or related right designed to prevent the reproduction, or to controls an access.”
  - **Trafficking:** Third, while it is commendable that the draft contains a broad definition of “avoidance of TPMs” and that it covers circumvention services, it needs also to explicitly outlaw trafficking in circumvention devices, based on an objective definition that is consistent with global norms.<sup>11</sup>
  - **Exceptions:** While some of the enumerated exceptions in draft Section 53/5 may be acceptably narrow, others need to be deleted or reworked in order to preserve the adequacy and effectiveness of protection. For example, draft Section 53/5(1), allowing circumvention for any exception to copyright under the law, is overly broad and would undermine needed protections, especially for access controls. The exception in draft Section 53/5(7) should also undergo further scrutiny, since it seems to provide blanket immunity for circumvention by educational, archival, library or public broadcasting entities.

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<sup>11</sup>Preferably, the draft Section would outlaw anyone who “manufactures, imports, exports, distributes, offers to the public, provides, or otherwise traffics in devices, products, or components which 1) are promoted, advertised or marketed for the purpose of circumvention, or 2) have only a limited commercially significant purpose or use other than to circumvent, or 3) are primarily designed, produced, adapted, or performed for the purpose of enabling or facilitating the circumvention of a TPM.”

**Absence of Landlord Liability Provision:** It is highly unfortunate that the RTG did not take the opportunity to enact a landlord liability provision, to provide adequate civil, administrative, and criminal remedies against property owners who lend their premises to those who engage in commercial infringement of copyright. While a previous draft of copyright law amendments included a landlord liability provision imposing criminal liability on one who “provides physical or digital spaces for infringing activities,” in 2011, DIP was apparently informed by the Thai Trade Representative that the provision was “redundant with the existing contributory offense of the Criminal Code.” DIP has commissioned a research team to conduct an in-depth study on this issue. In the meantime, the authorities may opt for existing provisions under the Penal Code to prosecute landlords who facilitate infringement activities if there is enough evidence of the landlords supporting the wrongdoing.<sup>12</sup> Such a test case would be extremely helpful, but should not ultimately substitute for a strong landlord liability provision, since in order to crack down on pervasive privacy at shopping malls, RTG authorities must have the full range of legal remedies at their disposal to combat those who benefit from, control, or contribute to the infringement of others.

**Computer Crime Law:** The ETDA has reportedly drafted amendments to the Computer Crime Act B.E. 2550 (2007) that do not include IP crimes. This would be most unfortunate. Intellectual property infringement should be included as an offense under the law.<sup>13</sup> One change still being contemplated by MICT, in the response to a request from fellow RTG enforcement agencies, would be to draft and insert notice and takedown for computer crimes (which would include IP) into the Computer Crime Act. However, to our knowledge, to date, IP has not been included in the drafts.

**Customs Law:** Draft amendments to the Customs Act have been prepared to empower Royal Thai Customs to seize transshipments containing pirated goods. This would be very helpful. As of January 2014, the draft had been reworked but had not yet been re-submitted to the Cabinet for approval.

**Evidence Law:** IIPA recommends that the RTG amend the Evidence Law to allow the hearing and testimony of digital evidence. Conforming changes should be made to any procedural rules of evidence in the various enforcement authorities so that they too will have clarity with respect to digital evidence.

**Section 32 and Fair Use Guidelines:** IIPA also continues to call for a narrowing or clarification of Article 32(6) and (7) of the Copyright Act, 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 sets of 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 RTG 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 helpful 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.

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<sup>12</sup>The RTG, in its February 2012 submission to USTR, indicated that the Office of the Attorney General had concluded that “criminal prosecution is possible if there is enough evidence of the landlords supporting the wrongdoing.” See *Thailand’s Implementation on Intellectual Property Rights (February 2011-2012)*, para. 3.2.2. The report indicated DIP would be working alongside the Royal Thai Police and DSI to bring an appropriate test case in a place where “tenants are large-scale infringers, and offences are committed repeatedly to prove negligence and illicit facilitation on the part of the landlords.”

<sup>13</sup>DIP has indicated that an amendment to Article 14(3) of the Computer Crime Act to include all online IP crimes would “enable blocking or shutting down websites selling IP infringing goods, publicizing copyright infringement content or facilitating copying and sharing of copyrighted works.” Further, DIP notes, “[t]he ISPs will also be able to block Internet access to the domains of infringing websites.” See *id.*, para. 3.2.3.

## **MARKET ACCESS ISSUE UPDATES IN THAILAND**

**Problematic Film Act Potentially Imposes Screen Quota and Uncertain Censorship and Ratings System:** The Motion Pictures and Video Act B.E. 2550 (2008) (effective July 1, 2008, but not yet implemented) potentially imposes quotas and potentially onerous censorship and ratings provisions. Section 9(5) allows the Film Board to establish a ratio between the number of local and foreign films, and film/screen time quotas. The number of screens in Thailand (nearing 1,000 as of the end of 2013) is more than enough to have a free market for theatrical releases. At a time when most other countries are removing quotas, not putting them into place, these restrictions could, if imposed, have a significant negative effect on foreign film distribution in Thailand.

The Act also imposes onerous ratings requirements on films, music videos and live performances, and censorship requirements on films, audiovisual products, music used for karaoke, and videogames. 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 (including criminal liability) for failure to comply with the ratings and censorship system; and 4) the requirement 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 Royal Thai Government should reevaluate this ill-conceived and outmoded legislation.

One positive aspect of the Film Act places responsibility on Internet cafés, distributors (shops or stalls) of films and audiovisual products, theaters, and Karaoke operators to acquire a "license to operate the business" in advance, with violators subject to criminal liability of up to BHT1 million (US\$30,000) or up to two years in jail. Industry has noted optimistically that the new law could be used to curb piracy in street stalls, shopping malls and complexes and even in Internet cafés in parallel with Copyright Law.

**Ban on Investment/Ownership in Terrestrial Broadcast Networks:** Foreign ownership/investment in terrestrial broadcast networks is severely limited, to 25%. This includes free to air, pay TV and channel content provider operators. Such restrictions impede the development of legitimate content in Thailand, and should be relaxed.

**The Royal Thai Government Should Reduce The Film Import Tax from 5 Baht to 0 Baht.**

**The 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 minutes in any single hour. This restriction should be lifted.

# VIETNAM

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2014 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** Vietnam should be elevated to the Priority Watch List in 2014.<sup>1</sup>

**Executive Summary:** IIPA's recommendation to elevate Vietnam this year to the Priority Watch List recognizes: the increasing importance of this potential market; unacceptably high piracy levels which are increasingly harming the emerging online and mobile marketplaces; the continued unwillingness on the part of the Vietnamese Government to mete out deterrent administrative fines, or to launch any criminal prosecutions against piracy; and onerous market access barriers. The Vietnamese Government has 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> but its actions have not been commensurate with that acknowledgement. The Government has taken the first administrative enforcement actions against a couple of Internet piracy sites under a Ministry of Information and Communications (MIC) and Ministry of Culture, Sports, and Tourism (MCST) Joint Circular, and the software industry reports a greater number of raids against unauthorized use of software in enterprises. These are positive signs, but a more intensive approach to copyright enforcement will be needed to reduce piracy levels and make space for legitimate businesses. The Vietnamese Government should further signal its intention to ease market access restrictions and remove film quota language causing uncertainty in the market for right holders.

### PRIORITY ACTIONS REQUESTED IN 2014

#### **Enforcement**

- Enforce with greater vigor the Joint Circular, taking effective measures against notorious infringing sites whose business models are based on providing access to infringing content, including sites identified in this report.
- Devote greater MCST Inspectorate, Economic Police, and High Tech Police manpower to running administrative and criminal raids, meting out maximum fines and bringing criminal prosecutions where appropriate.
- Reduce piratical imports from China.
- Develop and finalize the IP Manual for Judges, including reference to civil, administrative, and criminal remedies.

#### **Legislation**

- Issue implementing guidance for the revised Criminal Code, confirming: 1) its application to online distributions and other violations of the IP Code; and 2) that "commercial scale" includes significant infringements without profit motive.
- Make necessary changes to its laws and implementing decrees to ensure Vietnam is in full compliance with its Bilateral Trade Agreement (BTA) with the U.S., and with other international obligations, and otherwise facilitate the free exercise of rights by copyright owners.
- Join the WIPO Copyright Treaty (WCT) and WIPO Performances and Phonograms Treaty (WPPT).
- Clarify that Decree No. 85 measures imposing onerous collective management do not apply to foreign collective management organizations (CMOs) or to the administration of foreign rights.
- Adopt legislation making it an offense to use (or attempt to use) an audiovisual recording device in a movie theater to make or transmit a copy of an audiovisual work, in whole or in part.

<sup>1</sup>For more details on Vietnam's Special 301 history, see previous years' reports at <http://www.iipa.com/countryreports.html>. For the history of Vietnam's Special 301 placement, see <http://www.iipa.com/pdf/2014SPEC301HISTORICALCHART.pdf>. For a discussion of IIPA's 2014 Key Initiatives and Challenges, see IIPA, 2014 Special 301 Submission, at <http://www.iipa.com/pdf/2014SPEC301COVERLETTER.pdf>.

<sup>2</sup>Copyright Office of Vietnam, *Overview of Copyright in 2008*, January 19, 2009 (on file with IIPA).



## Market Access

- Eliminate 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.

## PIRACY AND ENFORCEMENT UPDATES IN VIETNAM

Prior IIPA reports on Vietnam contain detailed discussion of piracy and enforcement issues. This report serves only as an update to those and is not to be considered an exhaustive review of issues.<sup>3</sup>

**The Vietnamese Government Should More Vigorously Attack Internet and Mobile Piracy:** Increased Internet and mobile penetration and more widely available broadband capacity have led to a severe increase in the trade of illegal copyright files online. As of the end of 2012, the International Telecommunications Union (ITU) estimated 39.5% of Vietnamese use the Internet – 35 million users (including more than 4.5 million fixed broadband subscriptions). Mobile subscriptions have exploded, with Vietnam well surpassing the 100% penetration mark and boasting 134 million mobile subscriptions as of the end of 2012 (according to ITU). 3G mobile Internet users are now well above the 16 million reported in late 2012 (18% of the country's population).<sup>4</sup> These developments present enormous opportunities for copyright owners seeking to launch legitimate services in Vietnam. These opportunities are evidenced by more Internet content providers being licensed as of the end of 2013, e.g., 24H (*nhac.vui.vn*), NCT (*nhaccuatui.com*), and Viettel Media (*keeng.vn* and *imuzik.com.vn*).

In an attempt to help effect a transition to legitimate services, some music labels have licensed notorious market *Zing* for certain parts of their service. However, *Zing* has continued to operate as a distribution hub for infringing music to our great disappointment, and continues to be a major contributor to an environment that prevents the Vietnamese legitimate music online marketplace from fully developing. Indeed, major independent Vietnamese record company Lang Van filed an action in a U.S. court against *Zing's* parent company, VNG, as well as a U.S. investment group, IDG, just weeks ago, highlighting the scope of injury that *Zing* inflicts on the Vietnamese market.

Unfortunately, the vast majority of remaining websites dealing in copyright content are unlicensed, including streaming and download sites, blogs/forums, video streaming sites, search engines, deeplinking sites, cyberlockers, and social networks. All these channels are employed to deliver unlicensed copyright content, including music, movies, video games, software, and published materials. Many Vietnam-based or Vietnam-directed sites offer unauthorized copyright materials, and the Vietnamese Government has been notified of some of these sites.<sup>5</sup> Most of these sites generate revenue through advertisements or paid premium subscriptions. Only a few sites are reported to have relationships with media companies that have rights over Vietnamese, Chinese, Korean, or other movies, although no sites have rights from U.S. major motion picture companies.

Right holders are looking to Vietnamese Government agencies (e.g., MIC and its Vietnam Internet Network Information Center, VNNIC) to take a much stronger approach in dealing with online piracy. IIPA is pleased that MCST took successful administrative actions against three notorious piracy services.<sup>6</sup> The MCST actions mark a milestone in combating online piracy in Vietnam. IIPA would like to see Vietnamese authorities take more effective

<sup>3</sup>See, e.g., IIPA, *Vietnam, 2013 Special 301 Report*, February 8, 2013, at <http://www.iipa.com/rbc/2013/2013SPEC301VIETNAM.PDF>.

<sup>4</sup>*Vietnam Ranks World's 18th for Most Internet Users*, Global Times, December 4, 2012, at <http://www.globaltimes.cn/content/748146.shtml>.

<sup>5</sup>The motion picture industry has filed administrative referrals with MCST in respect of the following sites: *phim47.com*; *v1vn.com*; *pub.vn*; *phimvong.com*; *phimvong.org*; *coiphim.vn*; *maxphim.net*; *rapphim.vn*; *hayghe.com*; *phimphim.com*; *vtube.com*; and *xemphim.tv*. Other suspect sites (some of which have been previously reported by IIPA) include *tamtay.vn* (331st); *socbay.com* (3,125th); *vietvideos.vn* (152nd, having a tag line of "Vietvideos.vn - the largest video sharing networks Vietnam"); *viettorrent.vn* (325th); *hdviet.com* (103rd, having the tag line "HD Videos, HD TV Free, high quality, stable, With the amount of Content Rich, On Mobile has many applications"); *hayhaytv.vn* (108th, having the tag line "View movies or online, HD, constantly updated full category, load super fast, super watch FREE!"; unauthorized audio files have been detected on the site); *vnsharing.net* (135th); and cyberlockers like *fshare.vn* (90th); and *4share.vn* (225th).

<sup>6</sup>The three sites subject to administrative sanctions (essentially, a sanction order in the form of a warning and instruction to cease infringing) were the above-mentioned *phim47.com*; *v1vn.com*; and *pub.vn*. While the three sites went clean for a while, we understand they are back now engaging in suspect activities via social networking or under different names.

measures in 2014 against notorious infringing sites whose business models are based on providing access to infringing content, employing many of the actions set out in *Joint Circular No. 07/2012/TTLT-BTTTT-BVHTTDL on Stipulations on the Responsibilities for Intermediary Service Providers in the Protection of Copyright and Related Rights on the Internet and Telecommunications Networks* (which went into force August 2012) (JC).<sup>7</sup> The Inspector of MIC should use the authority granted under the JC to enforce against these types of violations more effectively, particularly against those websites which are under MIC licenses.

In the absence of JC implementation or administrative or criminal enforcement, right holders have largely been left with self-help measures including requests for voluntary cooperation by service providers and websites to respond to notices and take down infringing content. In the past, this has been a disappointing route since service providers largely ignored right holder requests (e.g., the music industry reported a 2% takedown rate in 2012). In 2013, there seemed to be more awareness of the issue and the need to positively respond to right holders (e.g., the takedown rate for music went up to 31%). Some sites, like *chiasenhac.com*, *mp3.rolo.vn*, and *rappervn.net* started to respond positively to takedown requests, another encouraging sign. However, right holders are often increasingly frustrated by measures adopted by infringing sites and online (or mobile) infringers to hide accurate contact information. Many such websites are becoming more sophisticated, providing user-friendly interfaces and access to infringing content without requiring users to register or log in.

With rapid increases in the number of mobile phone subscribers in Vietnam, there has also been an increase in mobile piracy over the past year. Right holders now face two major challenges in the mobile space: 1) mobile device vendors loading illegal copyright content onto devices at the point of sale; and 2) illegal music channels or “apps” set up to be accessed on mobile platforms. 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. These phenomena must be addressed with swift and deterrent enforcement. To our knowledge, Vietnamese authorities have done nothing to counter such activities.

**Continue Actions Against Unauthorized Use of Software by Enterprises:** The software industry reports positive support from MCST and the High Tech Crimes Department of the Public Security Ministry (High Tech Police) in addressing the unauthorized use of software by enterprises in Vietnam. The number of actions targeting unlicensed software use by corporate end-users increased from 14 in 2012 to 42 in 2013. Nonetheless, the software piracy rate is extremely high in Vietnam, far exceeding the global (42%) and regional (60%) averages. In 2011, the software piracy rate in Vietnam was 81%, representing a commercial value of unlicensed software of US\$395 million.<sup>8</sup> BSA relies on administrative enforcement, although fines remain too low to constitute a deterrent. To our knowledge, no software piracy case has ever been brought to civil or criminal court, although BSA members are considering some test cases in the near future. Other problems in Vietnam for software publishers include retail piracy (e.g., counterfeits imported from China) and hard disk loading of unlicensed software onto computers at the point of sale. The industry also notes the need for legalization of software use within Vietnamese Government

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<sup>7</sup>The Joint Circular (JC) imposes high standards of performance on “providers of intermediary services” to: 1) take affirmative steps to “[e]stablish a system to examine, supervise and process the information that is uploaded, stored and transmitted on internet and telecommunications networks in order to prevent violations of copyrights and related rights”; 2) “[u]nilaterally refuse to provide a service that runs counter to the laws on copyright and related rights”; and 3) “[r]emove and erase the digital content that violates the copyright and related rights; terminate, stop and temporarily suspend the internet and telecommunications services upon receiving a written request of the MIC Inspectorate, MCST Inspectorate, or of other Government authorities in accordance with the law.” Additional requirements are imposed upon social network operators to “send a warning of a responsibility to compensate for civil damages and a possibility of being subject to administrative sanctions and criminal prosecution to a social media user who commits an act that violates copyright and related rights.” The JC requires providers of intermediary services to be “[s]ubject to the inspection and examination conducted by state management authorities in compliance with the regulations on copyright and related rights.” Finally, liability is possible when copyright is violated or technological protection measures (TPMs) are removed, including liability for “[h]aving operations like a secondary distributor of the digital content generated from violations of the copyright and related rights.”

<sup>8</sup>Data on software piracy rates and commercial values are taken from the 2011 BSA Global Software Piracy Study at [www.bsa.org/globalstudy](http://www.bsa.org/globalstudy). This study assesses piracy rates and the commercial value of unlicensed software installed on personal computers during 2011 in more than 100 markets. The study includes a detailed discussion of the methodology used. BSA plans to release an updated study in the second quarter of 2014.



agencies. To this end, the Vietnamese Government should take effective measures to ensure the purchase and use of authorized software by the public sector. Some initial discussions on government legalization occurred between BSA and MIC, with a focus on legalization procedures and the need for the Government to avoid any mandates or preferences for the purchase of specific types of software as part of its legalization program.

**Ex Officio Enforcement Against Hard Goods Piracy Needed:** Prior IIPA reports have documented in detail the hard goods piracy problems in Vietnam, including traditional CD/DVD piracy (e.g., high-quality counterfeits from China as well as home-made pirated optical discs), and “media box” piracy.<sup>9</sup> Though MCST has indicated its recognition of the hard goods piracy problem, it has devoted few resources, and has not undertaken *ex officio* actions to date. Vietnamese Customs authorities should take *ex officio* actions to intercept infringing imports, especially high-quality counterfeits from China.

**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 unauthorized copies of bestselling trade books, travel books and academic textbooks, and unlicensed print overruns continue to harm foreign publishers. Unauthorized translations produced by university lecturers or professors have been detected, in which the lecturers or professors append their name to the translated textbook. The English language teaching market continues to be hard hit. Much of the market (private-sector education and universities) is supplied by unauthorized reprints and adaptations. State-sector publishers (such as the Ministry of Youth and the General Publishing House of Ho Chi Minh City) also have an interest in making sure their licenses are not misused. Concerns about piracy have been raised at many levels (national, provincial and district), and local provincial authorities will conduct the occasional raid when prompted by a right holder, generally resulting in nothing more than the confiscation of goods and the imposition of a small, non-deterrent fine. Moreover, there are currently no university or government efforts to address the endemic piracy on university campuses. Universities should implement appropriate use and copyright policies that promote respect for copyright and raise awareness among personnel, faculty, and students in order to discourage infringing behavior.

**Unauthorized Use of Music Videos in Vietnamese TV Content:** A unique problem has emerged in Vietnam, in which some companies producing legitimate TV programs sold to pay TV channels are utilizing infringing music videos. We urge the Vietnamese Government to assist right holders in the music and audiovisual materials in halting such practices without authorization (or payment) to right holders.

**Court Reform Efforts Remain Lacking:** The general inactivity of the courts in dealing with copyright infringement issues remains a major disappointment in Vietnam. To IIPA’s knowledge, no criminal copyright infringement case has ever been brought to the courts in Vietnam. While inter-governmental discussions have been held on judicial reform, there seems to be reluctance in Vietnam to apply criminal remedies to even the most egregious cases involving copyright infringement. There have to date been relatively few civil court actions involving copyright infringement in Vietnam. The main reasons for this are 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, as they play a very important role in bringing a criminal offense case to the courts. Industry and the U.S. Government were working with the Supreme Court in drafting an “IP Manual for Vietnamese Judges,” but we understand that effort has stalled. The Manual should be concluded as soon as possible, including sentencing guidelines to create a level of deterrence in copyright cases. IIPA also recommends frequent outreach with judges (and prosecutors and police) as part of the judicial reform effort, to sensitize these officials to the enormous commercial harm being caused by piracy and seek a mutual path forward toward successful resolution of right holder claims involving infringement.

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<sup>9</sup>“Media box” (set-top device) piracy is a fast-growing phenomenon by which people purchase devices directly connected to foreign websites to access pirated materials, or those with a hard disk to store pre-loaded or subsequently downloaded content.

## **COPYRIGHT LAW AND RELATED ISSUES**

Copyright protection and enforcement in Vietnam is governed by the Intellectual Property Code (as last amended 2009), the Criminal Code (as amended in 2009), and the Administrative Violations Decree which took effect December 15, 2013.<sup>10</sup> The Civil Code remains as a vestigial parallel law, implemented by Decree No. 100, and as amended in late 2011 by Decree No. 85. The laws, while not entirely in compliance with Vietnam's international or bilateral obligations, include a basic structure which could if fully implemented address online/mobile and hard goods piracy in the country, although further improvements should be sought. They also include measures that implement the WCT and WPPT. Vietnam should now be encouraged, as an immediate next step, to join those treaties.

**Criminal Code Should Cover All IP Code Violations, Not Just Reproduction and Distribution, and Comply With BTA:** The Criminal Code as amended criminalizes “commercial scale” acts of “[c]opying of works, audio recordings and visual recordings” or “[d]istributing the copies of work, audio or video recording.” While amended Article 170a improved Vietnam’s statutory framework in some respects,<sup>11</sup> it is now weaker than the provision in force up until its adoption, the February 2008 Criminal Circular.<sup>12</sup> Vietnam also appears by virtue of the changes to be out of compliance with its BTA commitments to the United States, in which it agreed to provide criminal remedies for all “infringement of copyright or neighboring rights on a commercial scale,” as well as for satellite signal piracy.<sup>13</sup> The Vietnamese Government should immediately issue implementing guidance for the Criminal Code to confirm that all infringement and signal theft can attract criminal liability, and to confirm that “commercial scale” infringements are not limited to those undertaken with a profit motive. Otherwise, the U.S. should commence consultations in accordance with Chapter VII, Article 5 of the BTA, to resolve these trade agreement violations.

**New Administrative Enforcement Decree Must Be Implemented in Practice:** The new Administrative Violations Decree seems to be an attempt to fine-tune the administrative enforcement mechanisms, but it may send the wrong signal since it reduces the maximum administrative fine for an individual to VND250 million (US\$11,800), while the maximum fine for an organization is VND500 million (US\$23,600). The following fines are also set forth: 1) VND400 to 500 million against an organization that imports an unauthorized copy; 2) VND70 to 100 million against an individual that engages in unauthorized broadcasting or re-broadcasting; and 3) VND15 to 35 million against an individual that reproduces unauthorized copies of phonograms or video recordings. In addition to these fines, infringers may face remedial measures, such as confiscation of infringing goods and any (false) registration certificates, as well as the forced suspension of business, consultancy, or service activities. Since the previous maximum fines were rarely, if ever, imposed, time will tell if the administrative measures under the new Decree will be carried out in practice with greater frequency and maximum deterrence, which is needed to make an impact on piracy.

**Decree No. 85 Questions Remain:** IIPA previously reported on Decree No. 85 (2011), which amended certain provisions of the Civil Code.<sup>14</sup> While Decree No. 85 contains some helpful clarifications, it also contains provisions that are problematic in terms of Vietnam’s compliance with international norms and best practices. Most notably, Decree No. 85 makes certain changes to Article 41 of Implementing Decree No. 100 governing collective management which, if applied to foreign right holders, would be onerous and would conflict with the ability for

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<sup>10</sup>Decree No. 131/2013/ND-CP on Sanctioning Administrative Violations of Copyright and Related Rights, entry into force December 15, 2013 (replacing Ordinances No. 47 and 109).

<sup>11</sup>For example: 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 technically aligned with the TRIPS minimum standard; and 2) fines are increased to a range from US\$2,350 minimum to US\$23,500 maximum, and for crimes committed in “an organized manner” or for recidivism, fines are increased to a range from US\$18,800 minimum to US\$47,000 maximum.

<sup>12</sup>The 2008 Circular criminalized all acts of “infringement” by referring to Articles 28 and 35 of the IP Code, including all acts of infringement defined therein, as well as violations involving circumvention of TPMs, decryption of encrypted satellite signals, and other acts. Please refer to IIPA’s previous submission on Vietnam for more detailed discussion.

<sup>13</sup>See *Agreement Between The United States of America and The Socialist Republic of Vietnam on Trade Relations*, July 13, 2000 (BTA), chapter II, Art.14.

<sup>14</sup>Civil Code, (No. 33/2005/QH11), entry into force July 1, 2006.

collective management organizations to operate freely and determine on what terms their rights will be administered.<sup>15</sup> It should also be clarified that the “Principles and methods of payment of royalty, remuneration and material benefits” which the Decree adds in a new Article 45a of Implementing Decree No. 100 are not compulsory.

### **IP Code as Amended Remains Incompatible with the BTA and Vietnam’s International Obligations:**

The IP Code and amendments have made a number of improvements in the overall protection of copyright in Vietnam. Yet, they leave questions with respect to Vietnam’s compliance with the BTA and other international obligations/standards. Among issues that should be resolved in the current Code are the following:

- The IP Code does not provide a term of protection of 75 years from publication (or 100 years from fixation) for sound recordings (BTA Article 4.4).
- The IP Code does not expressly afford producers of sound recordings with a WPPT-compatible right of “making available.”<sup>16</sup>
- An apparent inadvertent gap was created in the 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.
- Articles 7(2), 7(3), and 8 of the IP Code appear to give the State power to remove copyright protection in ways similar to provisions in China’s Copyright Law, found by a WTO panel to violate China’s WTO obligations.<sup>17</sup>
- Article 17(4) creates an unacceptable hierarchy of the rights of authors over related rights owners.
- Certain exceptions in the IP Code may be overly broad and call into question Vietnam’s compliance with its international obligations.<sup>18</sup>
- Articles 202(5) and 214(3) of the IP Code permit seized infringing goods and the means of producing them to be distributed or used for “non-commercial purposes,” rather than destroyed. These provisions fall short of Vietnam’s BTA (Article 12.4) and TRIPS Agreement obligations.

In addition to addressing these issues in the IP Code, IIPA also recommends: 1) introducing pre-established (statutory) damages upon the election of the right holder, which can be very important in civil cases when the amount of reproduction or distribution having occurred is difficult to calculate; 2) adopting a measure outlawing the use of (or the attempt to use) an audiovisual recording device in a movie theater to make or transmit an audiovisual work, in whole or part; and 3) adopting a long-awaited optical disc regulation to address production over-capacity in Vietnam.

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<sup>15</sup>For example, Article 41(4) of Decree No. 100 as amended now requires the following particulars to be reported by the collective management organization to MCST, as well as the Ministry of Home Affairs and the Ministry of Finance:

“amendments or supplementations to the operation charters or regulations; changes in the leadership; participation in international organizations; other external activities; rates and modes of payment of royalty, remuneration and material benefits; long-term and annual programs and plans; operations, conclusion of authorization contracts and use licensing contracts; collection, levels, modes and methods of dividing royalty, remuneration and material benefits; and other related activities.”

Such onerous provisions should be stricken from the law in order to allow right holders to freely exercise their rights in Vietnam. In the absence of immediate changes, it should be clarified that these provisions do not apply to administration of foreign rights.

<sup>16</sup>At the least, 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.

<sup>17</sup>Article 7(2) potentially gives the State unchecked power to decide when a right holder may exercise rights and under what circumstances. Article 7(3) permits the State to take away copyright altogether or restrict the ability of a right holder to exercise lawful rights. Article 8 establishes impermissible content-based restrictions of protection under copyright.

<sup>18</sup>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 problematic. Article 25(2) of the Implementing Decree also allows 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, the breadth of which cannot be remedied by the simple addition of three-step test language. As drafted, it creates a Berne- and TRIPS-incompatible compulsory remuneration scheme. Similarly, the Article 33 compulsory license for use of audio-visual recordings for commercial “broadcasting” violates international standards at least as to the works involved and cannot be remedied by the addition of three-step test language.

## **MARKET ACCESS BARRIERS IN VIETNAM**

Vietnam restricts foreign companies from setting up subsidiaries to produce or distribute “cultural products.” 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>19</sup> Unfortunately, their restrictions on foreign investment in cultural production undermine this objective, impoverishing the content marketplace and discouraging investment in the creation of new Vietnamese cultural materials. The restrictions also fuel demand for pirate product, instigating a vicious circle in which less legitimate product is produced. 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.

IIPA has included extensive discussions of various market access barriers in previous submissions. The following provides updates only and is not meant to be an exhaustive list of the issues.

**Laws Leave Potential Quotas In Place:** The amended Cinematography Law creates the potential for a film quota, with numerical benchmarks set at 20% for Vietnamese feature films shown in theaters. On November 11, 2013, the Prime Minister issued a *Decision of Approval of “Development Strategy for Movie Industry to 2020 and Vision to 2030.”* The *Decision* sets an even more restrictive aspiration of 45% Vietnamese (40% Vietnamese major films) by 2030. While the Law’s stated quota and *Decision* appear to be hortatory in nature, the Vietnamese Government should confirm that it will not impose these quotas which would amount to a serious market access barrier. Such quotas are highly disfavored, and it is clear that, as Vietnam produces only about 20 films per year, the imposition of the quota, combined with the local industry’s inability to meet demand, would have a devastating effect on the distribution infrastructure and foreign filmmakers’ and distributors’ abilities to do business in Vietnam. IIPA also notes the hortatory preference to show “valuable” foreign films. Rather than instituting unworkable quotas or developing preferences for films based on arbitrary or subjective criteria, the Vietnamese Government should take steps to provide more openness and flexibility in the marketplace, thereby fostering greater development and more avenues for distribution of motion picture content, whether foreign or domestic, in Vietnam.

Certain articles of the Cinematography Law also endanger the 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>20</sup> This quota should be lifted or eased significantly.

**New Decree Risks Exacerbating Already Onerous Market Access Restrictions for Software and Video Game Right Holders:** On September 1, 2013, *Decree No. 72 72/2013/NĐ-CP on the Management, Provision, and Use of Internet Services and Online Information* went into force. The new Decree, and other measures on IT services reportedly being considered by the Vietnamese Government, may undermine the ability of companies, particularly in the areas of software and video games, to provide various digital or online services in Vietnam.

With respect to entertainment software and video games, overall, compared with the draft Decree IIPA reviewed in late 2012, the final Decree appears to create some room for foreign video game companies to operate in Vietnam. However, foreign companies still seem to be held at arm’s length, and there is a strong risk of discriminatory treatment against foreign companies in the provision of online games in Vietnam. The new Decree appears to lift the 2010 ban on issuance of new licenses for online games and the ban on advertising of online

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<sup>19</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).

<sup>20</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.

games, and omits other restrictions that appeared in earlier drafts of the Decree. However, IIPA remains concerned that the Decree will limit the ability of foreign companies to offer online games in Vietnam. Article 31(4) provides, “[f]oreign organizations and individuals that provide online game services for Vietnamese users must establish enterprises in accordance with Vietnam’s law in accordance with this Decree and the laws on foreign investment.” The decree establishes four categories of games. In category G1 (multiplayer games in an interactive online environment) the enterprise must obtain a license and approval of the contents of the game from MIC. Other restrictions are imposed, including many involving censorship of the content of games in order for them to be approved; content within games that is outright prohibited (*see, e.g.*, Article 32(3)(b) on content restrictions for multiplayer online games in category G1); restrictions on data collection; restrictions related to the age of users; license duration limits; and other restrictions. IIPA will be monitoring very carefully the implementation of this Decree to ensure it does not create structures which unduly impede the ability of foreign right holders to avail themselves of the Vietnamese market or which discriminate against them.

With respect to software, the Decree and other measures reportedly being considered on IT services appear to impose onerous requirements on server localization and cross-border data flows that will undermine the ability of companies to provide digital services in Vietnam. This would include software through cloud computing, which offers many potential economic benefits, especially to small- and medium-sized enterprises. The Decree specifically requires that at least one server be located in Vietnam in order to: 1) establish an online social network; 2) establish a general information website; 3) supply content services on a mobile telecommunications network; or 4) provide online gaming services. In addition, there are also licensing and registration requirements in the Decree that could significantly restrict the ability to conduct cross-border data business. A separate IT Services Decree under consideration by the Vietnamese Government could include similar problematic provisions. IIPA recommends that Vietnam reconsider and revise or rescind these policies to avoid discouraging investment in Vietnam and to avoid imposing market access restrictions that may be inconsistent with Vietnam’s commitments in the WTO and BTA.

**Onerous Market Access Restrictions on the Music Sector:** Onerous and discriminatory Vietnamese restrictions prevent U.S. record companies from engaging in production, publishing, distribution and marketing of sound recordings in Vietnam. The lack of a meaningful commercial presence of U.S. record companies in Vietnam, coupled with restrictions on the ability of the industries to conduct investigations in Vietnam, also inhibit anti-piracy efforts. This leaves it incumbent upon the Vietnamese Government to enforce intellectual property rights of U.S. content largely on its own, a task at which it has not succeeded thus far. 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,<sup>21</sup> and to establish music publishing houses and websites to publish and distribute legitimate music products in Vietnam.

## **TRANS-PACIFIC PARTNERSHIP (TPP)**

Negotiations continue toward a high-standard, broad-based Trans-Pacific Partnership trade agreement, including Vietnam. Enhancement of copyright protection and enforcement standards, building upon those agreed to by current U.S. FTA partners, Australia, Singapore, Chile, and Peru, and found in the more recent in-force agreement with Korea, should be extended to other countries in the region through the TPP. Such an outcome will contribute to U.S. job growth, increase exports, and facilitate continued economic stabilization in line with the Administration’s goals. Vietnam has taken strides in its substantive laws which will make meeting the legal and enforcement

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<sup>21</sup>The importation of cultural products like music is governed by Decree No. 103/2009/ND-CP on Promulgating the Regulation on Cultural Activities and Commercial Provision of Public Cultural Services and the Regulation on Cultural Activities and Commercial Provision of Public Cultural (promulgated together with the Government’s Decree No. 10.V200/ND-CP of November 6, 2009). Decree No. 103 provides that circulation permits for tapes and discs produced or imported by central organizations are granted by MCST, while circulation permits for tapes and discs produced or imported by local organizations and individuals are granted by provincial-level CST Departments. The Decree provides for application procedures. However, limitations on foreign companies’ setting up subsidiaries to produce or distribute “cultural products” in Vietnam also thereby limit foreign companies’ abilities to apply for circulation permits. The application must be done by a local company. Vietnam should consider encouraging foreign investment by allowing foreign investors to apply for permits.

obligations of previous U.S. free trade agreement IPR chapters less challenging. At the same time, many gaps remain, and some recent changes threaten to move Vietnam further from those standards. In addition, Vietnam has some of the most restrictive market access barriers in the world. IIPA urges USTR to seek through the TPP negotiations opportunities to address the range of market access impediments identified herein and in prior IIPA submissions. The TPP E-Commerce chapter and market access provisions for services and investment should require Vietnam not only to eliminate discriminatory taxes and policies, but also to open Vietnam's market to foreign competition including in the creative and cultural sectors. We remain hopeful that Vietnam's participation in TPP negotiations will aid in eliminating discriminatory barriers, as well as bringing its copyright law and enforcement regime into alignment with evolving global norms.

# BRAZIL

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2014 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** IIPA recommends that Brazil remain on the Watch List in 2014.<sup>1</sup>

**Executive Summary:** The explosive growth of broadband access in Brazil has accelerated the migration to the Internet of pervasive piracy of all kinds of copyright works. Many notorious sites targeting the Brazilian market provide links to offshore pirate repositories; illicit peer-to-peer (P2P) services continue to thrive; and Internet-based sales of unlicensed software are increasing. Criminal enforcement against online piracy has stalled, and the informal cooperation of other players in the Internet ecosystem, which is currently limited, may be further threatened by pending “Marco Civil” legislation. In this environment, it is difficult for services that legitimately deliver copyright works online to gain traction. Hard-goods piracy remains a serious problem, and progress against it was mixed last year. São Paulo’s abandonment of the successful “City Free of Piracy” initiative partly overshadowed steady progress in some other regions. Systemic bottlenecks persist in investigation, prosecution and the criminal courts, although the picture is brighter for civil enforcement against enterprises using unlicensed business software.

Legislatively, the Marco Civil da Internet, or “law of the Internet” bill, took center stage after the President invoked expedited “constitutional urgency” procedures. Although the measure still ignores the role of copyright protection in delivering a healthy and viable Internet marketplace, recent proposed amendments at least preserve the possibility of establishing an effective online copyright regime, including efficient notice and takedown procedures. It is critical that these amendments be included in any enacted version of this landmark legislation. Progress continues on important but modest legislative reforms to streamline criminal copyright prosecutions; some aspects of criminal code reform, however, could weaken penalties and otherwise impede enforcement. Brazil’s copyright law still needs modernization, but draft amendments remain in limbo. Besides dealing effectively with online infringement and resisting excessively broad exceptions and limitations to copyright protection, copyright reform must fix the deficient laws against circumvention of technological measures used by copyright owners to restrict access and copying. This inadequacy, coupled with exorbitant taxes and escalating duties on legitimate imported games and consoles, has stunted the development of a legitimate market for videogames in Brazil. Meanwhile, new market access barriers threatened the copyright industries in 2013, including a “VOD tax” on films and TV programs delivered on demand; procurement policies that discriminate against foreign software and service providers; and a government-backed threat on patenting of software-related inventions.

### PRIORITY ACTIONS REQUESTED IN 2014

#### Enforcement

- Ensure that the National Council to Combat Piracy and Intellectual Property Crimes (CNCP) has the resources and political backing to ramp up its efforts against hard-goods piracy, including continued expansion of the “City Free of Piracy” initiative, and to revive that program’s coordinated attacks on retail piracy and distribution chains in the nation’s largest city, São Paulo.
- Bring CNCP resources to bear on encouraging cross-industry efforts to combat Internet piracy.
- Launch criminal prosecutions against those engaged in major online piracy activities or knowingly providing the means for doing so.
- Effectively enforce the current Penal Code to address illicit camcording in theaters.

<sup>1</sup>For more details on Brazil’s Special 301 history, see previous years’ reports at <http://www.iipa.com/countryreports.html>. For the history of Brazil’s Special 301 placement, see <http://www.iipa.com/pdf/2014SPEC301HISTORICALCHART.pdf>. For a discussion of IIPA’s 2014 Key Initiatives and Challenges, see IIPA, 2014 Special 301 Submission, at <http://www.iipa.com/pdf/2014SPEC301COVERLETTER.pdf>.



- As steps toward a deterrent enforcement system, prioritize a national program to train judges, prosecutors, and police officers on IPR law and enforcement measures; implement judicial policies that expedite criminal copyright investigations; and reform sentencing practices to achieve deterrent impact.

## Legislation and Regulation

- Ensure that the “Marco Civil” Internet bill reflects the critical role of copyright protection in promoting the healthy growth of e-commerce, and that its provisions do not undermine voluntary notice and takedown efforts or other constructive and cooperative agreements to combat online piracy.
- Enact pending legislation to streamline copyright prosecutions and to clarify criminal remedies.
- Ensure that amendments to the Criminal Code preserve the ability to enforce against criminal copyright infringement, and provide criminal penalties for unauthorized camcording of films in theaters without a requirement of proof of an intent to profit.
- Reduce high tariffs and taxes placed on videogame products, and mitigate imposition of the “VOD tax” on movies and TV programming delivered on demand.
- Avoid data localization requirements, and government procurement policies that discriminate against foreign software producers.
- Ensure continued eligibility for patentability of software-implemented solutions.

## 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 music, movies, TV programming and videogames, but also devices that circumvent access controls on videogame consoles – continues to be a key concern for most copyright sectors. The software industry continues to combat high rates of end-user piracy by corporations and other enterprises. The book publishing industry still confronts widespread unauthorized photocopying of educational materials.

IIPA’s 2013 Special 301 report on Brazil<sup>2</sup> summarized extensive studies that quantified, as of 2011, the economic impact of piracy in Brazil on the audiovisual sector,<sup>3</sup> and the piracy rate and commercial value of unlicensed software on personal computers (PCs).<sup>4</sup> The audiovisual study estimated that this illegal activity cost R\$1 billion (US\$570 million) in foregone tax revenues, and accounted for 92,000 jobs lost or not created. The software study estimated the commercial value of unlicensed software installed on PCs in 2011 at more than US\$2.8 billion. A May 2013 study from the international business school INSEAD estimated that each increase of 1% in the use of licensed software in Brazil would contribute about US\$1.4 billion to national production, twice as much as would be gained by the same increase in the use of unlicensed software.<sup>5</sup> These studies show that piracy of all kinds of copyrighted materials continues to inflict significant damage on Brazil’s economy and to suppress job growth in its creative industries.

**Internet Piracy:** Internet access continues its explosive growth in Brazil. A survey by the Brazilian Telecommunications Association (Telebrasil) counted 126.6 million broadband connections across the country, an astonishing 46% increase from the previous year.<sup>6</sup> Brazil has the fastest broadband growth rate in Latin America,

<sup>2</sup> See <http://www.iipa.com/rbc/2013/2013SPEC301BRAZIL.PDF> (hereafter cited as IIPA 2013).

<sup>3</sup> “Economic Consequences of Movie Piracy: Brazil,” January 2011 (on file with IIPA). See IIPA 2013 at 106.

<sup>4</sup> Data for software piracy rates and commercial values are taken from the 2011 BSA Global Software Piracy Study at [www.bsa.org/globalstudy](http://www.bsa.org/globalstudy). This study assessed piracy rates and the commercial value of unlicensed software installed on personal computers in 2011 in more than 100 markets. The study includes a detailed discussion on the methodology used. BSA plans to release an updated study in the second quarter of 2014.

<sup>5</sup> See [http://portal.bsa.org/insead/assets/studies/2013softwarevaluestudy\\_en.pdf](http://portal.bsa.org/insead/assets/studies/2013softwarevaluestudy_en.pdf). An earlier IDC study found that decreasing Brazil’s software piracy rate by ten points over a two-year period would yield over US\$5.2 billion in added GDP and nearly US\$1.2 billion in new tax revenues. See IIPA 2013 at 106.

<sup>6</sup> See <http://www.telecompaper.com/news/brazil-ends-november-with-1266-mln-broadband-connections--988303>.



and ranks in the top ten worldwide for the size of its broadband base.<sup>7</sup> Especially notable is the 51% annual growth in mobile broadband access.<sup>8</sup> But the development of a robust legitimate online marketplace in delivering copyrighted materials to these users continues to be stunted by the prevalence of online piracy. IIPA reported last year on a study conducted for the Brazilian Government that 81% of Brazilians who download music or films from the Internet, including individuals from all economic classes, regions, age brackets, and levels of education, do so exclusively from illegal sources.<sup>9</sup> The Internet certainly remains Brazil's fastest-growing forum for copyright piracy, and the primary piracy challenge for most industry sectors.

Internet piracy problems in Brazil feature two main distribution channels. The first involves sites that link to infringing distribution hubs (sometimes called “cyberlocker” services), nearly all of which are located outside Brazil. (Brazilian websites that directly host pirate content remain relatively rare.) Link sites to infringement hubs account for over 60% of online music piracy, and at least that proportion of the Internet piracy cases involving audiovisual works like movies and TV programs. Sites such as *baixedetudo.net* (which translates to “download everything”) attract high volumes of visitors by aggregating links to pirate movies (including via streaming) and music, with this site also engaged in distributing hacked or cracked software codes or programs. One very popular site in this category, *degracaemaisgostoso.org* (“free is much better”), reaches 1.5 million unique users each month, while *MusicaParaBaixar.org* (“music for download”) has 900,000 unique users monthly. The files to which such sites link are generally stored on offshore hosting sites such as 4Shared and Bitshare. But the sites themselves are available only in the Portuguese language and clearly target the Brazilian market almost exclusively. Other linking sites to infringement hubs that specifically cater to the Brazilian market include *teleona.org* (which features camcorderd first run motion pictures, with Portuguese audio captured from a local theatre or with Portuguese subtitles added); *Megafilmeshd.net*, which provides links to streams of thousands of films, TV series, and concerts, much of it in Portuguese; and *Filmesonlinegratis.net*. The latter two sites attract nearly seven million unique visitors per month. Such links also continue to be propagated massively through social networking communities. Some Brazilian linking sites, such as *Clubedownload.info* and *Baixandolegal.org*, and some unlicensed online streaming sites, like *Some13.com.br*, specialize in infringing music. Many Brazilian sites also employ unique methods for undermining anti-piracy efforts, such as the use of local encryption and “captcha” technology to prevent rights holders from detecting links to infringing files through automated monitoring.

The second channel for Internet piracy is file sharing via illicit P2P networks, which stands out as a growing threat for the entertainment software industry in particular, making pirated games widely available. In 2013, for the third straight year, Brazil ranked second in the world in the number of connections by peers participating in unauthorized file sharing of select Entertainment Software Association (ESA) member titles on public P2P networks. Brazilian IP addresses accounted for more than 12% of the global volume of detected infringements occurring on such networks. Notably, Brazil ranked first in the world in P2P-based infringement of console-based games.

Another form of networked dissemination of pirate product in Brazil is sales of unlicensed software over the Internet. BSA reports that this form of piracy, marked by online advertising for illegal copies, is increasing rapidly in Brazil. Online auction sites are also used to sell circumvention devices, such as game copiers, as well as copies of pirate games. Compliance with requests for the removal of such auctions remains inconsistent.

Taken together, these forms of online piracy are a significant obstacle to efforts to develop legitimate online distribution channels for copyrighted works in Brazil. For example, legitimate online audiovisual services have increased in recent years, but still suffer from the pervasive availability of illicit, advertising-supported services that are free to the consumer.<sup>10</sup> Similarly, while online music industry revenues topped 30% of total sales in Brazil in

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<sup>7</sup>See <http://www.nearshoreamericas.com/broadband-connections-brazils-surpasses-110-million/>.

<sup>8</sup>See <http://www.telecompaper.com/news/brazil-ends-november-with-1266-mln-broadband-connections--988303>.

<sup>9</sup>See Comunicado do Ipea - 2012 - Maio - nº 147, “Download de músicas e filmes no Brasil: Um perfil dos piratas online”, at [http://www.ipea.gov.br/portal/index.php?option=com\\_content&view=article&id=14071](http://www.ipea.gov.br/portal/index.php?option=com_content&view=article&id=14071) (unofficial translation on file with IIPA), summarized in IIPA 2013 at 106.

<sup>10</sup>The uncertainties regarding the new video on demand tax, and other market access barriers discussed in this submission, also play a role in retarding the growth of the legitimate online audiovisual market.

2012 for the first time, demonstrating robust growth of the legitimate market for online music, the fact remains that this marketplace is dominated by illegal sources, with only a small minority of Brazilian online consumers patronizing authorized services.

**Hard Goods Piracy:** Even as more of the piracy problem shifts to the Internet, pirate hard goods remain an enormous problem in Brazil. Large-scale distribution networks involve thousands of street vendors, established facilities (such as gas stations) which blanket the major highways, and stalls in camelodromos (street markets). Hundreds of millions of 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, and are used to burn pirate musical recordings, movies, and software.

Brazil's largest city, São Paulo, is also a key hub of these national piracy networks. Not only are pirate products widely sold in the city, but distributors based there supply many similar retail operations in other parts of the country. Thus, the pressure applied against the pirate market in São Paulo in recent years, especially since the initiation of the "City Free of Piracy" project in 2011, had a positive ripple effect. Frequent raids in São Paulo diminished the supply of pirate videogames and circumvention devices in markets such as Feira dos Importados (also known as Feira do Paraguai) in Brasilia. Conversely, the retrenchment of enforcement efforts in São Paulo under the new municipal administration, described below, has had negative impacts in other cities as well. In 2014, not only are piracy-friendly shopping complexes such as Galeria Page thriving in São Paulo, with levels of pirate product not seen for several years, but street vendors are also returning to high-profile areas in that city, such as the Avenida Paulista and Faria Lima. In other major cities, big outdoor markets such as the Camelodromo Uruguaiana in Rio de Janeiro, and the Feira dos Importados in Brasilia, are epicenters for the trade in pirate videogames and audiovisual products. Minas Gerais and Pernambuco are other cities with serious hard goods piracy problems.

These piracy problems are particularly acute for the audiovisual and entertainment software industries. Even though Internet piracy is clearly growing faster than physical piracy for films, TV programming and videogames, these products demand high bandwidth, and access to reliable broadband connections remains spotty in certain regions of the country and, where available, too expensive to supplant the attractiveness of disc-based products, although pirate discs may well be sourced from downloaded copies of films or games. In the case of videogames, pirate titles even for platforms like the Nintendo DS and DSi are often sold in disc format. Piracy of entertainment software through the sale of pen drives loaded with huge quantities of pirate games is also becoming more common, especially in the specialized pirate videogame markets such as Santa Ifigenia Street in São Paulo. Much of this pirate product enters the Brazilian market through the nation's relatively porous borders, not only with Paraguay (around Ciudad del Este and Foz de Iguacu) but also through ports of entry such as Guaira, Ponta Porã and Corumbá. Blank media are imported via the same routes, and are loaded with pirate games in small, decentralized burner facilities, often located in private homes.

Finally, a major feature of the piracy landscape for videogames in Brazil is the prevalence of so-called game copiers and other circumvention devices aimed at nullifying access control technologies used by copyright owners, thus enabling the play of pirate games on modified consoles (the great majority of videogame consoles in the country have been so modified). Santa Ifigenia Street is a leading venue for sales of these circumvention devices, targeting consoles such as PS2, Wii, 3DS and Xbox, and R4 devices and other game copiers, at prices as low as US\$39-59. Typically, sellers of the game copiers also include a memory card with 50-150 game titles that were illegally downloaded from the Internet. These circumvention devices are significant multipliers that exacerbate levels of online piracy by enabling the use of unauthorized copies of game software. Most game copiers and mod chips are produced in Asia and flown into Brazil or delivered through the same channel as for modified game consoles.

**Software Piracy:** BSA reports that while the overall software piracy situation has improved somewhat, high levels of software piracy persist. In 2011, the software piracy rate stood at 53%.<sup>11</sup> Along with unlicensed software use

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<sup>11</sup>See footnote 4.

by enterprises, the Brazilian market is characterized by 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.

**Camcord Piracy:** Ninety percent of all pirated movies available during a film's theatrical release originate as unauthorized in-theater camcords. In Brazil, the problem typically takes the form of in-theater audio captures, after which the dubbed Portuguese soundtrack is married with high-quality video captures sourced elsewhere. The resulting copies are made available online to Portuguese speakers worldwide, as well being burned onto DVD-Rs and then distributed to Brazil's many black markets. The Motion Picture Association of America (MPAA) identified 47 member company films stolen in this way from Brazilian theaters in 2013, a 7% increase from 2012. While one enforcement action was brought in 2010, MPAA is not aware of any such actions since then. The Independent Film & Television Alliance (IFTA) reports that camcording in Brazil fuels rampant online piracy, negatively impacting worldwide distribution and preventing the establishment of legitimate online distribution platforms.

## **COPYRIGHT ENFORCEMENT IN BRAZIL**

### **Enforcement Overview**

The challenges of enforcement against piracy in Brazil have been extensively detailed in past IIPA filings.<sup>12</sup> For 2013, a mixed picture emerges. In the struggle against hard goods piracy, our past submissions have applauded the successes of the "City Free of Piracy" initiative, launched in São Paulo in 2011, and since extended to a number of other Brazilian cities. While this expansion continued in 2013, and other signs of progress are noted below, the flagship "City Free of Piracy" initiative suffered a disappointing and problematic reversal last year in its city of origin. Moreover, little progress was made on systematic obstacles to effective copyright enforcement, including the lack of law enforcement resources; staggering court backlogs; and the failure to impose more deterrent penalties. Moreover, the lack of effective enforcement against the pervasive menace of online piracy continues to cloud the future prospects for robust e-commerce marketplaces in Brazil for copyright materials of all kinds.

The CNCP, the main governmental entity responsible for the central coordination and implementation of Brazil's national anti-piracy campaign, is led by a committed and energetic team. While its reorganization in 2012 sparked concerns about whether the CNCP would maintain the high level of participation and cooperation with industry groups that has been its hallmark, its track record in 2013 helped to put many of those doubts to rest. It remains critical for the Ministry of Justice to take the necessary steps to ensure that the reorganized CNCP continues to work closely with industry, that it is adequately resourced, and that it follows up vigorously on its initial steps to expand its work beyond its traditional focus on physical piracy.

### **Enforcement Against Hard Goods Piracy: Signs of Progress, but Many Challenges Remain**

Throughout 2011 and 2012, the "City Free of Piracy" initiative, fostered by the CNCP, had pirates in Brazil's largest city on the defensive. Through the coordinated efforts of municipal, state and federal law enforcement, huge seizures of pirate product were made, pirate vendors largely vanished from São Paulo's streets, and shopping centers that had turned a blind eye to rampant retail piracy among their tenants came under severe pressure to clean up their marketplaces. All of this came to a sudden halt in early 2013, when a new municipal administration took power. Raids on shopping centers ended abruptly, and the inter-agency task forces were disbanded. The practical impacts of this policy reversal were quickly evident: not only within the shopping centers, but also back on the streets from which it had been largely cleansed, retail hard goods piracy re-emerged. Because illicit distribution channels based in São Paulo were also able to regain their footing, the adverse effects were felt also in markets in other cities across the country, whose pirate vendors depend on supply chains originating in São Paulo. Thanks to unflagging

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<sup>12</sup>See, e.g., IIPA 2013 at 109-112.

efforts of local business groups, the São Paulo municipal government began to reassert its enforcement efforts late in 2013; but considerable damage was done during the enforcement hiatus.

News from other fronts in the struggle against hard goods piracy was more positive. The “City Free of Piracy” model proliferated to more Brazilian cities, now 11 in all, with Porto Alegre the most recent addition. It is critical that these coordinated campaigns be sustained and expanded, and that the active participation of city authorities in improved enforcement be encouraged. Some enforcement agencies, such as the Federal Highway Patrol, stepped up their enforcement efforts for the first time. Customs increased its activities against piratical imports at several ports. Special IP enforcement units of Civil Police were established at the state level, such as in Pernambuco and the Distrito Federal, and these have already made a difference (ESA reports, for example, that the number of booths selling counterfeit games in the markets of Brasilia has sharply decreased). On the municipal level, civil police in Manaus, Cuiaba, and Salvador also increased their effectiveness. On the other hand, the Special IP unit in Rio de Janeiro has reportedly become less proactive in recent months.

However, even though the copyright industries in general enjoy good (in some cases, excellent) working relationships with enforcement agencies, and even though there have been a number of instances of constructive cooperation (with the notable recent exception of São Paulo), little has been done to tackle the larger, systemic problems that render Brazil’s copyright enforcement system far less effective than it needs to be. The main deficiencies have been described in detail in past IIPA reports. They include:

- Prolonged and inefficient police investigations, sometimes taking years, during which right holders must push the process every step of the way. Among other detrimental impacts, the requirement to store all seized goods throughout the long pendency of the case drains away resources that could be better applied to running more enforcement operations.
- Criminal case experts can only be appointed by a judge, there are too few experts in the country, and there are no standard criteria for expert analysis of and reporting on seized materials. To expedite preliminary investigations conducted by the police, Brazilian law should be amended to permit the private sector to appoint experts and specialized IPR experts should be appointed at the “*Instituto de Criminalística*” (CSI Institute of Brazil).
- Prosecutors and judges lack specialized training in IPR cases, and, although some training has been provided to municipalities participating with CNCP in “Cities Free of Piracy,” there is no effective national program.<sup>13</sup> Although currently most training for judges, prosecutors and police officers is organized and financially supported by the affected industries, CNCP has actively stimulated, promoted and participated in such events at the national, regional, and state levels; but these efforts must be expanded considerably.
- Creating a specialized court for copyright matters, at least in a few major jurisdictions such as Rio de Janeiro and São Paulo, would improve judicial expertise and help expedite case processing. The 1997 Industrial Property Law authorized the judiciary to create specialized IPR courts, and such courts exist for patent and trademark matters, but this authority has never been exercised with respect to copyright.
- Finally, criminal penalties imposed on pirates are too frequently suspended. 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 other prosecutions is complete; and a suspended sentence for a first offender is treated as almost an inalienable right in the Brazilian legal system, sometimes conditioned on the defendant agreeing to provide minimal monetary compensation to the victim. All this contributes to a culture of impunity for copyright violations.

In sum, from initiation of the case through its conclusion, Brazil’s criminal justice system still does not adequately deter copyright piracy. There have been, however, some improvements in the civil judicial system, on which BSA relies extensively to combat unlicensed use of software by enterprises. BSA sent 1700 cease and desist

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<sup>13</sup>In a positive development, 200 judges attended a seminar in December 2013 on copyright enforcement in the digital environment at the State of São Paulo school for judges, with industry sponsorship.

letters and filed 455 civil lawsuits against enterprise end-users in 2013. BSA reports that 30 civil court experts received industry-sponsored training on software licensing issues. While civil cases continue to encounter court backlogs, judges in several major jurisdictions are responding well to requests for trials. Notably, the Superior Court of Justice has reaffirmed earlier rulings that it is not sufficient simply to 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. Instead, fines of multiple times the market value of the unlicensed software are increasingly being imposed. This provides greater deterrence in those cases that proceed to final judgment, but also sends a message to companies that they should not wait to be sued before legalizing their software use. While these are positive trends, more needs to be done to overcome long docket backlogs, and to ensure that more judges are adequately trained.

### **Internet Enforcement: Cooperation and Government Action Needed**

Effective enforcement against the growing problem of Internet piracy in Brazil will require positive and active cooperation among rights holders and ISPs. This cooperation is forthcoming in some areas. Purely on an informal basis, a number of ISPs are responsive in a reasonably prompt fashion to requests from rights holders to remove individual links to pirate sites; to take down individual unauthorized files they may be hosting;<sup>14</sup> to delete advertisements for infringing copies; and even to shut down blogs, forums and social networking communities that are dedicated to disseminating pirate product. But clearly this piecemeal and passive response is not by itself sufficient to cope with the rapid growth in online piracy of all sorts of copyrighted materials. Furthermore, this cooperation does not extend to working together to fight the pervasive piracy 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 effectively deal with repeat infringers. Consequently, many ISPs do nothing, and this channel for piracy proliferates unchecked.

Clearly, active government involvement could help to bring ISPs and rights holders together to find effective means to deal with the most serious forms of online piracy, and to prevent its further growth. As long ago as 2008-09, the CNCP identified as a priority for its future activities the area of “Partnerships and Cooperation with Internet Service Providers,” and has made intermittent efforts since then to bring ISPs to the table for discussions, but without any success (in part, because of past opposition from other government agencies). Reports that CNCP is developing a project to engage with payment processors to discourage use of their services by sites dedicated to piracy provides some hope that the needed government encouragement for inter-industry cooperation might finally be forthcoming. IIPA urges the Brazilian Government to advance such initiatives, in order to 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.

The situation is different with regard to criminal enforcement against serious online copyright crimes. Existing legislation provides a framework for this, and some Brazilian enforcement authorities have considerable experience in investigating other types of cybercrimes. But, in contrast with the progress being made on enforcement against offline piracy, Brazilian authorities continue to take virtually no enforcement actions in Brazil’s fastest growing marketplace for copyright piracy – the Internet. In view of the significant damage that pirates inflict on Brazil’s economy and culture, authorities must accord a much higher priority to criminal investigations of online piracy.

## **LEGISLATION AND REGULATION IN BRAZIL**

**“Marco Civil da Internet” Internet Legal Framework:** This proposal, to “establish principles, guarantees, rights and obligations on the use of the Internet in Brazil,” was the focus of considerable attention in Brazil’s Congress over the past year, following its designation by President Rousseff in October 2013 as a matter of

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<sup>14</sup>For instance, MPAA reports that notices to ISPs about hosted infringing material lead to takedowns about 90% of the time. However, as noted above, hosting sites based in Brazil are not the major sources of the online piracy problem there, and cooperation is much less frequent with regard to links to off-shore hosted material and other forms of online infringement.

“constitutional urgency,” giving it priority over all other legislation. IIPA remains concerned, as it has since the inception of the “Marco Civil” project in 2010, that the proposal seems to lack any recognition of the importance of protecting copyright in the online environment as an essential ingredient for the healthy growth of electronic commerce. The concrete concern, which has been the subject of legislative debate, is whether Article 15 of the introduced bill, which provides blanket immunity to all “providers of Internet applications” unless they disobey a specific takedown order issued by a court, would eliminate voluntary notice and takedown activities, such as those engaged in by many ISPs with regard to hosted infringing content today. Such an interpretation could render moot all efforts to promote the inter-industry cooperation against online infringement that is so essential to tackling pervasive online piracy. It is encouraging that the most recently released draft of the bill, in which the notice and takedown provisions are found in Article 20, makes such an interpretation much less likely. In this draft, Article 20 now provides that the blanket immunity applies “except as otherwise established by law”; and, more specifically, a new paragraph 2 authorizes “specific statutory regulation” dealing with notice and takedown procedures for violations of copyright or related rights. This would be the first recognition in the Marco Civil bill of the importance of copyright protection, and would at least provide space for specific notice and takedown provisions in copyright legislation that could supersede the general requirement for a court order. This amendment would be a significant improvement to the legislation, preserving Brazil’s ability to design an effective and flexible legal regime for dealing with online copyright theft. While IIPA remains concerned about a number of other aspects of Marco Civil,<sup>15</sup> it is essential that the exemption reflected in the proposed amendment to Article 20 be preserved as the legislation moves through the expedited consideration demanded by the President. Especially in view of Brazil’s increasingly prominent role in global discussions about Internet governance,<sup>16</sup> its handling of this critical issue in its national law will be viewed widely as a litmus test of its appreciation of the importance of copyright protection to a sound and robust e-commerce marketplace.

Other aspects of the Marco Civil bill raise significant concerns for the software industry. Specifically, Articles 11 and 12 include provisions that impose restrictions on cross-border data flows and could impose requirements to locate servers in Brazil. This represents a significant threat to the development and introduction of innovative software services, including cloud computing, in Brazil. If adopted, these proposals will harm consumers and businesses in Brazil by reducing the availability and increasing the costs of such services.

**Proposed Legislation Related to Enforcement:** A plethora of bills to improve copyright enforcement in Brazil have been presented to the legislature, but few have progressed. One important exception is Bill 2729/03, which is a product of cooperative efforts between the copyright industries and the CNCP. It includes a few vital reforms that would address some of the systemic enforcement impediments identified above. For instance, the bill would allow expert reports in infringement cases to be based on a sampling of the goods seized, and would authorize the destruction of all pirate product seized in a criminal case. Bill 2729/03 was approved by the House of Deputies in 2012, and was sent to the Senate (now labeled Bill 63/2012), where it recently received committee approval and now awaits action by the full Senate. Once enacted, this bill will streamline criminal prosecutions and reduce the significant costs entailed in storing vast quantities of seized materials until the final resolution of a criminal case. IIPA commends legislators for advancing this legislation, and urges its passage as soon as possible. We would then encourage Brazilian legislators, with the leadership of the large, multi-party Parliamentary Front against Piracy (also known as the Congressional Anti-Piracy Caucus), to turn to other long-overdue and critical enforcement reforms, including some that had to be jettisoned from Bill 2729/03 to expedite its passage.<sup>17</sup>

In December 2013, a committee of the Senate approved amendments to the Criminal Code that would have significant impacts on criminal copyright enforcement. Many of these impacts could be negative, including repeal of

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<sup>15</sup>For instance, the blanket immunity from all liability remains in the legislation (Art. 19 of the current draft) for “providers of Internet connections services,” even if a court order requires them to block access to specified content. The bill could benefit from other improvements to reflect a more balanced legal framework for the Internet and e-commerce that includes an appreciation of the importance of copyright protection as a critical framework element.

<sup>16</sup>See, e.g., the Global Multistakeholder Meeting on the Future of the Internet Governance, which the Brazilian Government is hosting (<http://netmundial.br>).

<sup>17</sup>Among other improvements, various pending bills would allow criminal judges to appoint private sector experts; increase government resources allocated to fighting software piracy; criminalize the advertisement of pirated products, the distribution of instructions on how to manufacture counterfeit goods, and the purchase of pirated goods intended for resale; and facilitate removal of infringing material from Internet sites.

the catch-all provision in the chapeau of Article 184, providing a penalty for criminal copyright violations that are not otherwise specified; elimination of *ex officio* criminal actions; and reducing penalties for some basic copyright violations, including unauthorized reproduction for profit and infringement on the Internet. The latter changes would send precisely the wrong message to a Brazilian society that already deprecates the significance of copyright infringement, and to a legal system that in practice provides impunity from criminal penalties in most cases. The Criminal Code reform bill (PLS 236/12) still must be considered by another Senate committee, but this debate bears close watching so that the negative impacts can be minimized or avoided. We urge lawmakers instead to seek ways to support Brazil's creative economy by strengthening effective copyright enforcement, such as the inclusion of specific measures providing criminal penalties for camcording without a requirement of proof of an intent to profit.<sup>18</sup>

**Copyright Law Reform:** Brazil's 1998 copyright law needs updating to reflect today's copyright protection and enforcement challenges. The most recent official draft amendments were released by the Ministry of Culture in March 2011. IIPA submitted detailed comments on the draft, which are summarized in previous IIPA submissions.<sup>19</sup> However, although a bill largely embodying the 2011 draft remains pending before Brazil's House of Deputies,<sup>20</sup> the draft itself, after undergoing further changes, was returned for review by the new Minister of Culture in mid-2012, and no subsequent drafts have been publicly released.

The 2011 draft contained a number of positive features, including the establishment of a liability regime applicable to the online hosting of infringing content, which would increase the incentives for providers of such services to cooperate with right holders, such as through a notice and takedown system. The need for a meaningful and effective notice and takedown provision in the copyright law will take on added importance if and when the Marco Civil bill is enacted. A comprehensive update of Brazilian copyright law will also need to address a number of other issues. The complete lack of effective legal prohibitions against trafficking in devices and services aimed at circumventing technological protection measures (TPMs) used by copyright owners to control access to their works has acted as an insurmountable obstacle to the healthy growth of a legitimate videogame marketplace in Brazil. This big gap in Brazilian law must be filled by legislation that brings the law into alignment with global norms under the WIPO Copyright Treaty (WCT) and WIPO Performances and Phonograms Treaty (WPPT), and which promotes legitimate digital commerce by protecting TPMs. Additionally, any copyright law reform must avoid the addition of broad or vaguely worded exceptions to copyright protection (a pitfall to which the 2011 draft succumbed). IIPA urges the U.S. Government to continue to engage with Brazilian authorities to encourage copyright reform 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 rights holders to enforce their rights.

## **MARKET ACCESS AND RELATED ISSUES**

**High Tariffs and Barriers on Entertainment Software:** Brazil's high tariffs and taxes on videogame products, which have long plagued the entertainment software industry by serving as a significant barrier to legitimate market entry and as a spur to the pirate market, became worse in 2013. Under a new interpretation of the customs law, tariffs and taxes began to be calculated based on the imputed "copyright value" of a videogame title itself (i.e., the distribution and marketing fees paid to the copyright holder), rather than on the much lower value of the import medium. By adding 75% to the cost to the Brazilian consumer, this new interpretation further marginalized the legitimate market (since, of course, pirate copies, whether smuggled across the border or burned within the country, do not pay these fees). It also runs contrary to well-established international rules favoring the use of the value of the medium as the basis for tariffs and taxes. We urge that this new interpretation be reconsidered. In addition, taxation

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<sup>18</sup>Among other legislative developments, the music industry commends the Senate's approval in September 2013 of a constitutional amendment to ease tax burdens on the sale of recordings that include Brazilian artists, and calls for careful monitoring of implementation of Law 12.853, enacted in August 2013, that imposes a new supervision regime on collecting societies (including ECAD, which administers performance rights in sound recordings), to ensure that the goal of improving transparency and accountability is not overwhelmed by onerous new requirements and cumbersome procedures.

<sup>19</sup>See, e.g., IIPA 2013, at 112-13.

<sup>20</sup>See PL 3133/2012, introduced by Rep. Fonteles.

on imported videogame consoles, totaling nearly 90%, makes it almost impossible to bring them into the market legitimately.

**Foreign Ownership Restrictions and Content Quotas on the Audiovisual Sector (Law 12.485):** This law imposes local content quotas for pay television to be enforced by ANCINE, the national film agency, and it delegates to ANCINE unprecedented powers to limit advertising and to direct business activities. MPAA is concerned that local content quotas will limit what consumers experience and push consumers towards illegitimate sources of content. Under the implementing regulations, only works in which local producers own the majority share of intellectual property rights are included as Brazilian works; co-productions between Brazilian and foreign producers are excluded if they fail to meet this criterion. This exacerbates the harm inflicted on the Brazilian pay television market. Lawsuits challenging the constitutionality of the quotas and powers granted to ANCINE remain pending before Brazil's Supreme Court.

**Video on Demand (VOD) Tax:** Another feature of Law 12.485 has been interpreted by ANCINE to require tax payments of US\$1500 per feature film, and US\$375 per TV series episode, released in Brazil through on demand services. The VOD tax, part of a broader tax regime on film and television content called CONDECINE, is a unique and serious threat to the growth of the VOD market there. The tax is assessed per title, is payable every five years that a title remains in the VOD window, and if a title is licensed to multiple VOD outlets, each of them must pay the tax. CONDECINE is burdensome, amounting to as much as \$25 million in charges in the case of large collections of VOD titles, and will limit the choices available to Brazilian consumers in the nascent online content market and through other VOD services. We understand that ANCINE has acknowledged the threat this tax poses to the VOD market and is engaging in discussions with industry stakeholders on possible changes to its approach. We encourage ANCINE to continue these efforts and to seek a reasonable solution that promotes, rather than impedes, the growth and development of Brazil's VOD market and robust content choices for consumers.

**Software Procurement Preferences:** As flagged in last year's submission, the Brazilian Government's new CERTICs program (the Certification of National Technology Software and Related Services) carries a significant risk of discriminating against foreign providers of software and other IT goods in Brazil's US\$9 billion market for government procurement of software. On January 17, 2014, the government published, with immediate effect, a decree (8.168/2014) which set a price preference of 18 percent for software that is certified as domestically produced, based on the lowest price offered by a foreign service provider. In the government's revised framework for implementation, issued in June 2013, the methodology for assessing whether a company satisfies the domestic development requirement to be eligible for the preference is burdensome, containing more than 150 technical items that all businesses seeking certification must submit. The methodology's criteria are unclear, and it lacks checks for conflicts of interest and adequate safeguards for trade secrets. At this point it is not clear whether companies will subject their software products to this certification process. Careful monitoring of the implementation of this program is essential.

A new procurement issue demanding attention arises from a Presidential Decree (8.135/2013) issued in November 2013. Asserting national security interests, Article 2 of the Decree immediately waives the requirement for public sector bidding for data communications and IT services. Article 1, slated to enter into force in March 2014, instructs Federal agencies to conduct all data communications (other than personal mobile and fixed telephone services) through government controlled networks, including email services. It also subjects all equipment and software used by federal agencies for these services to audit requirements, purportedly to ensure the availability, integrity, confidentiality and authenticity of information. The audit requirement threatens to expose proprietary source code to a large number of Brazilian Government auditors, and also risks the creation of back doors or other means for unauthorized access. Implementation of this requirement must be monitored carefully to assess its impact on U.S. equipment and software providers, and to consider whether the audit function could more fairly be carried out by an independent, qualified auditor with global recognition and offering security guarantees.



**Software-Related Patents:** On October 10, 2013, Brazil's Congress released a study that questions the value of software patents and calls for suspending the issuance of new ones pending a further study by Brazil's patent office, INPI. Government representatives supported the study's conclusions and characterized the current patent law as a violation of national sovereignty and an obstruction to innovation. Legislation embodying many of the report's recommendations (PL 5402/2013) was introduced in the Congress. Although the bill does not single out patents for software implemented solutions, there is a real risk that the government will not wait for the result of the INPI study, but instead move unilaterally to issue binding guidelines to INPI that will complicate or even prevent the issuance of any further computer-implemented patents. It is important to continue to encourage Brazil to avoid unwarranted changes to its patent system that could be inconsistent with its current patent law and international commitments.

**Patent Pendency:** Brazil's patent pendency problem undermines IP protection and market access for both foreign and Brazilian software and other innovations in the Brazilian market. There is at least a ten-year backlog for computer implemented patent applications, partly because there are so few patent examiners (only 12 examiners in INPI's ICT division, and up to half of them are scheduled to retire within a year). Besides adequate staffing, INPI needs greater regulatory flexibility to implement novel solutions to reduce the patent backlog without additional funding, such as queue swapping, techniques to encourage abandonments, or using positive patent examinations from other jurisdictions to permit work sharing in Brazil. The Brazilian Government's initiative to support a significant increase in the number of examiners for INPI is a positive step on which it should be encouraged to build.

# BULGARIA

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2014 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** IIPA recommends that Bulgaria remain on the Watch List in 2014.<sup>1</sup>

**Executive Summary:** The year 2013 for Bulgaria was marked with disruptive political upheaval and prolonged reorganization that prevented any meaningful signs of improvement in Bulgaria's intellectual property (IP) regime. Enforcement difficulties that IIPA's members faced in 2012 persisted and, in some cases, worsened. Cases brought against the notorious torrent trackers *arenabg.com* and *zamunda.net* still have not been fully resolved, and in the meantime the number and reach of Bulgaria's hosted pirate sites, infringing peer-to-peer (P2P) services and networks, and even services hosting open and notorious pirate sites and uploaders continues to expand. Bulgaria's Cyber Crime Unit at the General Directorate was once an important ally for the initiation of investigations into Bulgaria's copyright criminals, but the Unit has been inactive since it was transferred to a new independent agency and pending cases under its review were transferred to regional police forces. An important casualty of this reorganization was the work begun in late 2012 by the Cyber Crime Unit against uploaders at the popular video streaming service *VBox7.com*, which provides hosting services to hundreds of thousands of sound and video recordings without authorization. The case now appears stalled. The Cyber Crime Unit was also an important ally in cases against enterprise end-user software piracy, an effort that is now severely hindered for rights holders, mainly due to the structural changes that were ongoing in 2013. Obstacles in collective management continue to chip away at an important source of income for the beleaguered music industry. The overall picture for copyright owners in Bulgaria at the end of 2013 is extremely grim.

### PRIORITY ACTIONS REQUESTED IN 2014

- Revisit proposals to adopt new provisions to combat online piracy through administrative measures and clarifications regarding intermediary liability.
- Reinstate the Cyber and IPR Crimes Unit to ensure effective criminal IPR enforcement.
- Take the necessary and appropriate steps to address notorious torrent trackers that knowingly provide access to infringing materials, setting a strong example for other infringers.
- Increase public-private cooperation within prosecutors' offices and improve timely prosecutorial attention to copyright crimes.
- Complete an updated Manual for Uniform Prosecutors' Practices in Investigating and Prosecuting IPR Crimes for circulation by the Attorney General as mandatory instructions to district and regional prosecutors.
- Modify the 2011 amendments to the copyright law to resume the now inoperable collective management of simulcasting, webcasting, private copy, and performance remuneration rights in Bulgaria.
- Build public-private cooperation within the process of drafting of the new Penal Code of Bulgaria in order to secure strong and adequate criminal protection of IPRs in the country.

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<sup>1</sup>For more details on Bulgaria's Special 301 history, see previous years' reports at <http://www.iipa.com/countryreports.html>. For the history of Bulgaria's Special 301 placement, see <http://www.iipa.com/pdf/2014SPEC301HISTORICALCHART.pdf>. For a discussion of IIPA's 2014 Key Initiatives and Challenges, see IIPA, *2014 Special 301 Submission*, at <http://www.iipa.com/pdf/2014SPEC301COVERLETTER.pdf>.



## **THE NATURE OF PIRACY IN BULGARIA**

Internet piracy, predominantly via peer-to-peer (P2P) services including bitTorrent file sharing, is a severe threat to legitimate sales of copyright works of all kinds in Bulgaria. Numerous download sites, BitTorrent sites, Rapidshare sites, online storage servers, streaming sites and widespread P2P piracy provide ready access to illegal music, making it very difficult for a legitimate online music market to develop. The legitimate online music services in Bulgaria struggle to survive in a marketplace with an extremely high online piracy rate, and cannot contend with multiple different pirate services. Among the most notorious pirate sites are *zamunda.net* and *arenabg.com*, along with the user-generated video exchange platform, *VBox7*.<sup>2</sup> Hosting services based in Bulgaria, such as *superhosting.bg*, provide services to illegal sites that operate internationally, such as Yify-Torrents, Primewire, Viooz and Rarbg, all of which are ranked in Alexa's top 2,000 most popular sites. Dozens of sites and services offer unauthorized material to the Bulgarian audience.<sup>3</sup> The Internet piracy rate for music is suffocating. The music and film piracy situation persists notwithstanding some laudable efforts of the Cyber Crime Unit that were initiated in the first half of 2013, detailed below. Court cases continue against some of the largest pirate sites, including *zamunda.net*. Unfortunately, while the cases continue, *zamunda.net* has seen a spike in its popularity, reportedly generating enormous revenues from advertising.

The software industry reports that enterprise end-user software piracy, particularly among small- to medium-sized enterprises, is a prevalent practice in Bulgaria that poses a major threat to the local software industry. Local systems builders commonly offer assembled PCs with pre-installed copies of unlicensed business software (a practice known as Hard Disk Loading). In some cases, this involves the central system drives managed by an organization's network system builders. In an even more alarming trend, BSA | The Software Alliance (BSA) reports that where system builders have in the past installed unauthorized software, they are now encouraging their customers to use "Internet resources" to satisfy their software needs, essentially directing customers to download and self-install pirated software at work, and demonstrating relative comfort that there is little risk in such illegal activity.

The collective management market for music copyright holders in Bulgaria faces serious problems. Organizations blatantly purport to license the use of music without proper authorization from the relevant rights holders. One such operation, EAZIPA, has functioned with the tacit support of the previous Minister of Culture to crowd out legitimate rights holders from collecting for public performances, and could be spreading its activity to licensing of other uses.

Public awareness efforts are sorely needed to demonstrate the importance of intellectual property protection for the development of creativity and innovation, and for economic growth. There is a dire need for the Government of Bulgaria to provide high-level political support for long-term public sector programs, emphasizing the social and economic importance of intellectual property rights and countering populist messages in favor of piracy.

## **COPYRIGHT ENFORCEMENT IN BULGARIA**

IP enforcement efforts by Bulgarian authorities deteriorated across the board in 2013, exacerbating an already difficult environment for anti-piracy efforts.

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<sup>2</sup>VBox7, Bulgaria's largest user-generated streaming video platform, operates without licenses from the respective record companies. It is part of the largest online media group Net Info. Recently the majority share of this company was acquired by one of the biggest TV groups in Bulgaria – Nova Broadcasting Group, owned by the Swedish company MTG. While the new owners have expressed interest in negotiating a license agreement with rights holders and discussions have commenced, whether an agreement can be reached is not yet known.

<sup>3</sup>BAMP has compiled lists of the most popular music pirate sites, illegal services other than P2P, and torrent trackers for illegal music in Bulgaria, which are available from IIPA on request.

**Political setbacks in 2013:** In the summer of 2013, Bulgaria's new government transferred resources from the Ministry of Interior's General Directorate to Combat Organized Crime (GDCOC), which at the time housed the Cyber Crime Unit, to the independent State Agency for National Security (SANS), leading to a long-term freeze of operations in criminal IP enforcement. The Cyber Crime Unit was once an important ally to rights holders, assisting with criminal actions and even conducting *ex officio* criminal actions. Unfortunately, the activities of the Unit were suspended in 2013, and it is unclear whether IPR enforcement will figure as a priority when the Unit resumes activities, expected in early 2014.

In a positive development during the first two months of 2013, the Ministry of Culture and Ministry of Interior conducted a Government Led Mass Software Compliance Campaign, building on a year of preparations. Approximately 20,000 local businesses received a joint letter from both Ministries, informing them of the risks involved in software piracy and encouraging auditing and compliance programs. BSA accompanied the program with a public awareness initiative to educate users and promote Software Assets Management tools. However, due to political instability, the planned intensive follow-up by authorities with enforcement capacity never occurred, thus undermining the value of the initiative.

The Ministry of Culture's Copyright and Neighboring Rights Inspectorate also suffered from setbacks during the political crisis in early 2013, resulting in a reduced staff of just three inspectors for all copyright claims. The Ministry's capacity to handle collective management matters also was severely reduced. During the second half of 2013, the software industry reports that the Inspectorate resumed activities and successfully cooperated with rights holders in actions against local system builders distributing illegal copies of pre-installed business software. As of late 2013, rights holders report that the Inspectorate conducted five *ex officio* enterprise software end-user administrative inspections for the year. However, other actions continued to be severely hindered.

In past years, the Council for IPR Protection coordinated administrative anti-piracy activities including by mediating negotiations between rights holders and ISPs. However, the Council's working sessions have been greatly reduced over the last few years, and none took place in 2013. The Council should resume its activities to encourage greater attention to online infringement.

**Criminal enforcement:** For all the copyright sectors, the criminal prosecution of IPR crimes remains severely burdened in Bulgaria's judicial system, and suffered from additional setbacks during the political difficulties in 2013. The Attorney General appointed in late 2012 brought in a new management team at the Supreme Cassation Prosecutor's Office (SCPO). Throughout 2013, the SCPO was engulfed in administrative reforms and internal reviews, while needed reforms in the field of IPR prosecution were left unaddressed. Some progress in late 2012 was made against ten of the major uploaders of pirated music on the VBox7 platform, who were the subject of criminal investigations before the Cyber Crime Unit. One of these uploaders was brought to court and admitted the crime by plea bargain. The other cases, however, are still at preliminary investigation phases, while experts' reports and interrogations are prepared in various regional jurisdictions. This criminal campaign received media coverage in Bulgaria's online publications, but further progress is still pending.

As a general matter, criminal cases regarding online piracy are very difficult to pursue. Besides weaknesses in Bulgaria's judicial system regarding public prosecution, rights holders confirm that a problem that IIPA reported in 2009<sup>4</sup>, created when the Bulgarian Supreme Administrative Court revoked a law permitting the identification of online copyright infringers, has yet to be resolved. Amendments to the Law on Electronic Communications (LEC) adopted in 2010 addressed the problem in relation to serious crimes as defined by Article 93 of the Penal Code (or crimes punishable by more than five years imprisonment), but IPR crimes that do not amount to the level of serious crimes are excluded from that definition. While for these cases public authorities may rely on the disclosure provisions in the Criminal Procedure Code, it is often not possible to obtain additional data that ISPs are required to store under the LEC.

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<sup>4</sup><http://www.iipa.com/rbc/2009/2009SPEC301BULGARIA.pdf>.

While the activities of the Cyber Crime Unit were put on hold, many of the criminal cases it was investigating were transferred to regional police offices, where the capacity to handle IPR cases is extremely limited. As a result, any forward progress came to a full halt. Even if the Cyber Crime Unit is fully reinstated under the SANS, expectations for successful operations are low, due to difficulties the private sector faces in communicating with SANS.

As in the past, the prosecution of IPR crimes is slow and largely ineffectual. Prosecutors at the district court level understand the fundamentals of copyright but need further knowledge and incentives to focus on IPR crimes. Many often terminate or suspend criminal IPR investigations that reach their desks before cases can reach the court phase. Often the rights holders are not even informed of these developments. Burdensome evidentiary requirements for experts' reports mean that the compilation of data for trial can take months or even years. Of course, far fewer cases were initiated in 2013 than in previous years due to the restructuring of the Cyber Crimes Unit.

A long-term supervision program is needed to monitor and analyze the work of particular prosecutors, observe the grounds for their motions to terminate or suspend criminal proceedings and provide institutional guidelines and methodological support on how to investigate and prosecute IPR crimes. Cooperation between the private sector and the SCPO should be encouraged to address the chronic problem of prosecutors wrongfully terminating or refusing to initiate criminal proceedings for IPR offenses. The Attorney General's Office should be encouraged to maintain a sustained dialogue with the private sector, with ongoing high-level support of the SCPO, in keeping with the public-private cooperation it has exhibited in the past. The competent bodies should promptly complete an updated Manual for Uniform Prosecutors' Practices in Investigating and Prosecuting IPR Crimes and circulate the Manual as an Attorney General's mandatory instruction to district and regional prosecutors' offices.

**Civil enforcement:** Two hurdles in identifying online infringers make civil enforcement nearly impossible. First, the data retention regime under the LEC, as described under "Criminal enforcement" above (available for the criminal enforcement authorities only for serious crimes and computer crimes), is entirely unavailable to private parties such as rights holders in the aftermath of the 2009 Supreme Administrative Court ruling. There is also a contradiction between the applicable Civil Procedure rules and Bulgaria's Law on Copyright and Neighboring Rights, which together require a pending civil proceeding to be initiated before identification of infringers may be requested, yet do not allow the court to open the civil case without the identification of the defendant by at least his name. This means that while the right of information provided by Article 8(1) of the EU Enforcement Directive is implemented, its exercise is hindered by civil procedure rules. This catch-22 prevents rights holders from turning to civil proceedings to combat online infringement. Further burdening civil enforcement, court officials are inexperienced in copyright law, and judges rarely permit *ex parte* provisional measures or the preservation of evidence. Thus, litigation is a lengthy and expensive last resort.

**Administrative enforcement:** Despite a general lack of administrative capacity within the Ministry of Culture and the resulting deficit of effective administrative enforcement, the new Minister and his team have demonstrated the will to overcome some of the Ministry's most serious problems related to the collective management market. The Ministry of Culture finally rejected the registration of EAZIPA as collective management society in the field of music rights by an ordinance that is currently subject of appeal before the Administrative Court in Sofia. In another positive development in 2013, the Council of Electronic Media (CEM) increased its role in regulating the media market. As a result, most of the major radio and TV operators in Bulgaria started the year in 2014 under legitimate license with the music industry. Still, positive developments related to administrative enforcement are sporadic and lack sustainability.

## **COPYRIGHT LAW REFORM AND RELATED ISSUES**

**Pending Copyright Law reform:** Lawmakers in Bulgaria are contemplating new amendments to the Law on Copyright and Neighboring Rights to transpose the terms of protection for phonogram producers and performers

as required by EU Directive, which came into force on November 1, 2013 and requires EU member states to implement the provisions as soon as possible to ensure that all accompanying measures provided in the Directive are put in place. The amendments are an important opportunity to address other shortcomings in Bulgaria's copyright law, including by adopting provisions on administrative measures for online piracy. This could also be an opportunity to address, through tandem amendments to the Law on Electronic Commerce, the need for Bulgaria to fully implement provisions of the EU E-Commerce Directive regarding ISP liability, and the EU Enforcement Directive 2004/48/EC. Such amendments should specify that (a) ISPs are required to terminate or prevent infringements upon an order by a court or administrative body (Article 12.3 of the E-Commerce Directive); and (b) ISPs should provide information to authorities regarding known infringements that occur over their services (Article 15.2 of the E-Commerce Directive). Currently, intermediaries such as the hosting service *superhosting.bg* are not cooperating with rights holder efforts to close websites dedicated to piracy. Notices of infringement are ignored, and after repeated communications the service *superhosting.bg* insisted that it was not obligated to take action without court or police action. Legal incentives are needed to bring all parties to the table in cases of persistent infringement.

On March 25, 2011 the National Assembly of Bulgaria adopted amendments to the Bulgarian Law on Copyright and Neighboring Rights (LCNR). Disappointingly, much-needed provisions on compulsory administrative measures for combating online piracy were removed from the draft prior to passage. This negative legislative development deepened the problem of the general administrative inefficiency of the Ministry of Culture to cope with law enforcement efforts, especially dealing with online copyright and related rights infringements. Instead, the amendments codified a number of flaws, chipping away at the ability for recording artists and producers to be remunerated for the use of their music – a vital element of revenue for the Bulgarian music industry, which relies on collective management for about 40% of its yearly income.<sup>5</sup> The range of problems created by these amendments, and reported by IIPA in the past,<sup>6</sup> continue to exist and have ultimately led to such a drop in resources for the umbrella collective management organization, Copy BG, that it was forced to close operations during 2013.

The recording industry remains especially concerned that the LCNR amendments failed to eliminate the very problematic law limiting the freedom to enter into licensing contracts for more than a set number of years (a ten-year limitation for licenses with authors under Article 37(2), and a five-year limitation for licenses with artists, under Article 76(3)). The need to renegotiate contracts every ten or five years, respectively, is inconsistent with industry best practices across the EU and prevents producers from exercising their neighboring rights in full.

**Proposed new Criminal Code:** Rights holders expect that Bulgaria's lawmakers will revisit amendments to the Criminal Code in 2014 that were contemplated in 2013. The new draft should address the new challenges posed by evolving forms of Internet piracy, and resolve enforcement difficulties faced in IPR cases. It is crucial that the contemplated changes to the Criminal Code provide deterrent sanctions for copyright crimes, and that they provide the necessary resources to the Cyber Crime Unit in SANS so that it may continue its important efforts to police online criminal activity. It is also crucial that new texts on IPR crimes be both comprehensive and clearly drafted, so as to avoid any future misinterpretations that will jeopardize successful criminal prosecution. IIPA encourages the Bulgarian Ministry of Justice to consult with IPR experts and representatives as any such draft moves forward.

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<sup>5</sup>These new provisions are described in detail in IIPA's 2013 Special 301 filing on Bulgaria, available at <http://www.iipa.com/rbc/2013/2013SPEC301BULGARIA.PDF>.

<sup>6</sup>See <http://www.iipa.com/rbc/2013/2013SPEC301BULGARIA.PDF>.

# CANADA

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2014 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** IIPA recommends that Canada remain on the Special 301 Watch List in 2014.<sup>1</sup>

**Executive Summary:** Most of Canada's Copyright Modernization Act has now been in force for more than a year, but the concrete results are far from clear. In particular, Canada's intent to change the country's reputation as a haven for technologically sophisticated international piracy operations has not been fully realized. Although one of Canada's most notorious pirate websites was closed down as a result of U.S. litigation, a number of similarly destructive sites with Canadian connections remain in full operation. Progress toward ratification and accession to the WIPO Internet Treaties has been slow, and until this happens, many of the benefits of the new law, especially for the recording industry, won't be realized. Expanded copyright fair dealing exceptions in the new law, combined with problematic legal interpretations of the previous law, have nearly decimated the market for licensing educational uses of copyright materials, inflicting significant damage on the publishing sector in particular. Canadian authorities urgently need to communicate to educational institutions the need for a balanced approach on fair dealing. Tabling of legislation to fix several long-standing shortfalls in Canada's copyright enforcement regime, especially at its borders, is an important positive step; Bill C-8 should be improved and then enacted as quickly as possible. But to make significant progress against piracy in Canada will require not only new laws but also new priorities among enforcement agencies, prosecutors and courts, and additional resources for all these institutions. It will also require stronger incentives for service providers to cooperate with right holders to combat infringement, incentives that the Modernization Act simply may not be able to provide. IIPA urges that the U.S. Government remain extensively engaged with Canada on these and other issues in 2014, with the aim of making clearer progress toward the goal of achieving a healthy marketplace for copyright works in our neighbor and largest trading partner.

### PRIORITY ACTIONS REQUESTED IN 2014

#### Legislative and Regulatory Reform

- Ratify and accede to the WIPO Copyright Treaty (WCT) and WIPO Performances and Phonograms Treaty (WPPT) as promptly as possible.
- Improve (e.g., by extending to in-transit goods) and adopt legislation to empower customs officials to make *ex officio* seizures of counterfeit and pirate product at the border without a court order, and make other legal changes to the enforcement regime called for by parliamentary committees.
- Adopt strong legal incentives for Internet Service Providers (ISPs) to cooperate with copyright owners in combating online piracy, in accordance with international best practices.

#### Enforcement

- Take steps to limit the decimation of the educational collective licensing market arising from legislative changes and judicial precedents on fair dealing.
- 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.

<sup>1</sup>For more details on Canada's Special 301 history, see previous years' reports at <http://www.iipa.com/countryreports.html>. For the history of Canada's Special 301 placement, see <http://www.iipa.com/pdf/2014SPEC301HISTORICALCHART.pdf>. For a discussion of IIPA's 2014 Key Initiatives and Challenges, see IIPA, *2014 Special 301 Submission*, at <http://www.iipa.com/pdf/2014SPEC301COVERLETTER.pdf>.



- Increase resources devoted to anti-piracy enforcement both at the border and within Canada (including online).
- Vigorously enforce new provisions of the Copyright Modernization Act aimed at suppressing the trafficking in illicit devices or services to circumvent technological protection measures.

## **COPYRIGHT PIRACY AND ENFORCEMENT**

### **The Piracy Situation in Canada – Online**

Developments in 2013 clearly demonstrated that enactment of the Copyright Modernization Act the preceding year, with its prohibition of online services “designed primarily to enable copyright infringement,” was not by itself enough for Canada to shed its reputation as a safe haven for Internet pirates. There was certainly positive news, when the notorious Canadian site isohunt.com shut down in October, after more than a decade spent flagrantly promoting and facilitating piracy on a massive and global scale. But the proximate cause of this important victory was not any action taken by Canadian authorities, but rather the March 2013 affirmation by a U.S. appellate court of an earlier decision finding Isohunt and its operator guilty of inducing infringement in violation of U.S. law, and entering a permanent injunction against its operations.<sup>2</sup> Even after the shuttering of Isohunt, Canada is still the home to some of the world’s most popular Internet sites dedicated to piracy, including *torrentz.eu* and *kickass.to*, which garnered rankings of third and second place, respectively, on one of the most widely accessed listings of the world’s most popular illicit BitTorrent sites.<sup>3</sup> Both *torrentz* and *kat.ph*, which morphed into *kickass* after its domain name registrations in the Philippines (*kat.ph*) and Trinidad (*ka.tt*) were cancelled, appeared on the most recent (December 2012) USTR list of “notorious markets ... reportedly engaged in substantial piracy.”<sup>4</sup> A number of other sites whose business models are based on piracy still have Canadian connections, including the torrent sites *fenopy.se* and *monova.org*, and the linking sites *cuevana.tv*, *free-tv-video-online.me*, and *solarmovie.so*.

It is hard to avoid the conclusion that Canada remains 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, recorded music, entertainment software, and other copyright materials. The largest of these Canadian-hosted sites attract scores of millions of unique visitors every month,<sup>5</sup> and their corrosive effects on legitimate markets are felt worldwide (for instance, *cuevana* targets Spanish-speaking markets across Latin America). The same is true of sites dedicated to technologies to circumvent tools used by copyright owners to control access to or copying of their works. Despite the enactment of anti-circumvention prohibitions as part of the 2012 copyright reform, many Canadian sites (such as *R4cardsmontreal.com*, *gamersection.ca*, *r4ds.ca*, *ncardcanada.com*, and *r4itoronto.com*) continue to offer circumvention devices; and computer software that effects a “soft modification” of the security technology of game consoles, and thereby facilitates the play of pirated games, remains available on sites hosted in Canada.

In this environment, it is not surprising that Canadians continue to demonstrate a formidable propensity to patronize illegal online sources of copyright material, thus stunting the availability and growth of legal alternatives. A report released in September 2012 found that, on a per-capita basis, Canadians download more unauthorized music than residents of any other country, and two-and-one-half times as much as Americans.<sup>6</sup> High levels of Internet music piracy in Canada continue to inflict serious harm on the legitimate market for online delivery of music. For example, according to IFPI Recording Industry in Numbers, for the year 2012 the online and mobile share of total music sales in Canada was 43%, compared with 58% in the U.S. Per capita online sales of music in Canada ran well

<sup>2</sup>*Columbia Pictures Industries, Inc. v. Fung*, 710 F.3d 1020 (9th Cir. 2013), affirming *Columbia Pictures Industries, Inc. v. Fung*, CV 06-5578 SVW (JCx), 2009 U.S. Dist. LEXIS 122661, at \*39-53 (C.D. Cal. Dec. 21, 2009).

<sup>3</sup>See <http://torrentfreak.com/top-10-popular-torrent-sites-2014-140104/>.

<sup>4</sup>See Out of Cycle Review of Notorious Markets (Dec. 2012), at <http://www.ustr.gov/sites/default/files/121312%20Notorious%20Markets%20List.pdf>.

<sup>5</sup>Kickass.to, the 120th most popular web site of any kind in the world as calculated by alexa.com, counted more than 48 million unique visitors in August 2013, according to comScore World Wide data.

<sup>6</sup>[http://www.huffingtonpost.ca/2012/09/20/music-piracy-canada-top-countries\\_n\\_1899752.html](http://www.huffingtonpost.ca/2012/09/20/music-piracy-canada-top-countries_n_1899752.html).



behind those in the United States. Fewer digital music providers have introduced new online or mobile digital service models in Canada than in the U.S., Europe and Japan, where there is a proliferation of new digital consumer choices.

The growing availability of copyrighted audio-visual material online from legitimate, licensed sources is worth noting. Entertainment studios are working with new technologies and a multitude of partners, including retailers, cable providers, social networking sites, gaming consoles and websites, to provide an expanding range of legitimate services that enable Canadian consumers to enjoy movies and TV on a variety of platforms. Among the most recent services to launch are Cinema Now, Bell Mobile TV, and Fandor. However, the continued availability of the “free” illicit services hampers the development of the legitimate marketplace and makes it more difficult for it to realize its full potential.

### **The Piracy and Infringement Situation in Canada – Offline**

U.S. publishers serving the educational market with textbooks, journals and other materials are currently facing a comprehensive collapse of an important element of their Canadian market: licensing revenue for permission to copy works for educational uses. Well-established collective licensing mechanisms for administering such permissions are reeling under the combined impact of adverse judicial decisions and drastic legislative changes. The Copyright Modernization Act added “education” to the list of purposes (such as research and private study) that qualify for the fair dealing exception. Because “education” is not defined, the amendment creates an obvious risk of unpredictable impacts extending far beyond teaching in bona fide educational institutions (and far beyond materials created specifically for use by such institutions). Even before the fair dealing amendment came into force, some of the decisions in the “pentology” of copyright decisions issued by Canada’s Supreme Court in July 2012 posed a direct threat to the educational licensing market.<sup>7</sup> These decisions underscored, among other things, that Canadian courts are to treat fair dealing, not as an exception, but as a “user’s right,” subject to a “large and liberal interpretation”;<sup>8</sup> that the purposes of the putative user, not those of a commercial or non-commercial intermediary that actually makes the copy and supplies it to the user, are of primary relevance in determining whether a dealing is fair; and, that factors such as the availability of a license to make the use, and even the overall impact of widespread unlicensed use on the actual or potential markets for the work, carry much less weight in Canadian law than they do in U.S. fair use jurisprudence.

Although the *Alberta Education v. Access Copyright* case in the Supreme Court’s pentology directly affected only a marginal aspect of the educational copying collective licenses — reprographic copying of a few pages per student per year of short excerpts of already purchased supplemental texts by K-12 teachers for use in class instruction — its ultimate impact has been much more destructive. Lawyers for primary and secondary school systems across Canada, giving both the precedents and the new fair dealing amendment the “large and liberal” reading that the pentology decisions encouraged, concluded that fair dealing now eliminates the need for them to obtain any license from a collecting society such as Access Copyright, including for uses such as copying of primary textbooks or of newspaper articles, course packs, digital copying (including digital storage and distribution through learning management systems), and copying for uses outside the classroom. Consequently, as soon as the new Act came into force, virtually all K-12 school boards across Canada cancelled their licenses with Access Copyright. Anticipated 2013 annual licensing revenue of at least C\$12 million to right holders and authors — much of it destined for U.S. publishers, which enjoy a large market share in the educational sector — evaporated. Similar legal advice was provided to post-secondary institutions, and many of them have declined to renew their Access Copyright licenses as they expire. Access Copyright negotiations with two of Canada’s largest universities — the University of

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<sup>7</sup>Of the five copyright decisions announced on July 12, 2012, the main rulings addressing the issues discussed in this submission were *Alberta (Education) v. Canadian Copyright Licensing Agency (Access Copyright)*, 2012 SCC 37, available at <http://scc.lexum.org/decisia-scc-csc/scc-csc/scc-csc/en/item/9997/index.do?r=AAAAAQALQmVsbCBDYW5hZGEAAAAAAB>, and *Society of Composers, Authors and Music Publishers of Canada v. Bell Canada*, 2012 SCC 36, available at <http://scc.lexum.org/decisia-scc-csc/scc-csc/scc-csc/en/item/9996/index.do?r=AAAAAQALQmVsbCBDYW5hZGEAAAAAAB>.

<sup>8</sup>For instance, the Supreme Court ruled that that listening to a sample of a popular recording to decide whether or not to buy it qualifies as “research,” and that classroom discussion of a work qualifies as “private study.” This helps explain the trepidation about how broadly Canadian courts will define “education.”

Toronto and Western University – collapsed in recent weeks over this issue. The licensing revenue stream from higher education – historically larger than the K-12 revenue – is thus in immediate jeopardy.

Access Copyright was just beginning the process of implementing new licenses for digital copying in Canadian schools when the “double whammy” of the 2012 Supreme Court decisions and the copyright modernization legislation hit them. The prospects for achieving any licensing revenue for digital copying, which is already becoming more pervasive than photocopying throughout Canadian educational institutions, now appear extremely bleak, because of the widespread belief in the education community that Canada’s copyright law gives educators carte blanche for all uses of copyright works<sup>9</sup>. The damage does not stop there. Publishers are not seeing any ‘up-tick’ in privately agreed direct licenses and, in fact, are experiencing attrition of overall revenues from the sale of their educational works — this in spite of the education community’s repeated assurances to Parliament during the copyright revision process that the expansion of fair dealing would not cause a diminution in publishers’ business. Publishers are already re-assessing their planned investments in new materials for this core market.

We urge the U.S. government to engage with Canadian authorities to ameliorate this threat to the entire educational publishing market in Canada, which is already having deleterious impacts on publishing revenue, investments and jobs on both sides of the border. Canadian authorities should be encouraged to communicate directly to the educational institutions and their representatives to reinforce the government’s stated objectives for the fair dealing exception. Even if some expanded uses are permitted, the appropriate balance must still be struck so that educational publishers are duly compensated for their works, thus ensuring a viable domestic marketplace for commercially-published educational materials.

Serious piracy problems persist in Canada’s offline marketplace as well. The RCMP, reviewing statistics from 2005 through 2011, reported “a noticeable yearly increase in the number of reported occurrence involving counterfeit and pirated products,” with copyrighted works presenting the second largest category of seizures in 2011.<sup>10</sup> Flea markets in the Peel Region, neighboring the Greater Toronto Area (GTA), are the most prominent locus for significant sales of counterfeit DVDs, according to the Motion Picture Association of America (MPAA). This illicit trade is conducted on a massive scale and is characterized by ties to organized crime. Infringing audiovisual products are also sold on third-party Internet marketplace sites such as *kijiji.ca* and *ebay.ca*.

BSA | The Software Alliance (BSA) reports that unlicensed use of software by enterprise end users – especially small and medium-sized enterprises – remains a concern, particularly in the province of Québec. In 2011, the software piracy rate in Canada was 27%, representing a commercial value of unlicensed software of US\$1.14 billion.<sup>11</sup>

## The Canadian Enforcement Response

These realities point to serious deficiencies in enforcement against piracy. Historically, much of the problem has been attributable to Canada’s inability to advance copyright law reform. The enactment of the Copyright Modernization Act should contribute to the solution. For example, now that Canada’s copyright law is modernized to include clear criminal prohibitions against trade in circumvention devices, Canadian law enforcement at least has the legal authority to enforce against local mod chip distributors, retailers, and exporters. Effective enforcement of these

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<sup>9</sup>The fair dealing amendment of the Copyright Modernization Act is not the only provision of the legislation that may be contributing to this belief. For instance, the broad new exception in section 30.04 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 technological protection measure. The Act’s extremely low C\$5000 cap on statutory damages for all infringements carried out by any defendant for “non-commercial purposes” – an undefined phrase sure to be interpreted expansively by advocates for educational institutions – renders that remedy virtually insignificant in any copyright dispute with a school, further discouraging enforcement of rights.

<sup>10</sup>RCMP, “2011 Intellectual Property (IP) Crime Statistics,” at <http://www.rcmp-grc.gc.ca/fep-pelf/ipr-dpi/report-rapport-eng.htm>.

<sup>11</sup>Data on software piracy rates and commercial values are taken from the 2011 BSA Global Software Piracy Study at [www.bsa.org/globalstudy](http://www.bsa.org/globalstudy). This study assesses piracy rates and the commercial value of unlicensed software installed on personal computers during 2011 in more than 100 markets. The study includes a detailed discussion of the methodology used. BSA plans to release an updated study in the second quarter of 2014.

new legal provisions is critical, though it will of course entail a learning curve. IIPA therefore recommends that the Canadian government allocate adequate resources to train and educate enforcement personnel (including customs authorities, the RCMP, and prosecutors) about the underlying technologies that will be implicated in enforcement of the new prohibitions.

Similarly, while enactment in the Modernization Act of prohibitions on online services “designed primarily to enable copyright infringement” may provide an effective mechanism for enforcement against some of the most egregious online piracy sites that have found safe haven in Canada until now, it is questionable whether Canadian law overall provides legal incentives sufficiently powerful to motivate the inter-industry cooperation that is essential to effectively combat pervasive copyright infringement online. It remains to be seen whether the new law’s “notice and notice” provisions, which have not yet come into force, will be enacted within a framework that gives copyright owners the tools they need to combat online content theft.

Entirely apart from the issues addressed in the copyright modernization legislation, Canadian government inaction has effectively handcuffed its law enforcement agencies at the border, a key anti-piracy battlefield. 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>12</sup> only the RCMP can carry out an *ex officio* seizure, and coordination between the two agencies is generally not effective. As a result, virtually no seizures at the border have occurred, and Canada’s borders are effectively wide open to imports of infringing materials. Thus, enactment of the pending legislation (Bill C-8) to give CBSA independent authority to act against any suspected pirate or counterfeit imports, as well as to make other long-overdue improvements in Canada’s enforcement regime, is a matter of urgency.<sup>13</sup>

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 lack 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>14</sup>

While in general, police agencies have responded well to anti-piracy training programs offered by industry, they too often lack the human and financial resources, and the strategic mandate, to properly investigate IP crimes or to prepare the cases for prosecution. Only a handful of criminal investigations against audio-visual piracy were conducted by the RCMP in 2013, and only a small number of investigations were conducted by Toronto police in the GTA. The Halton Regional Police Service (Ontario) arrested five individuals and dismantled an online counterfeit DVD operation targeting consumers in several countries,<sup>15</sup> but otherwise Internet piracy was not addressed by criminal authorities in 2013. On the whole, the Canadian law enforcement commitment to act against copyright piracy, remains under-resourced, and too few agencies consider it a strategic or organizational priority.<sup>16</sup>

Similar problems extend to prosecutors and courts in Canada. Few resources are dedicated to prosecutions of piracy cases; prosecutors generally lack specialized training in prosecuting such offenses, and too often fail to

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<sup>12</sup>Court orders, however, can only be obtained upon the filing of an application by the right holder, supported by affidavit evidence, including information regarding the identity of the importer, exporter or vendor; country of origin or export; quantity and value of the infringing goods; estimated date of arrival in Canada; mode of importation; identity of the ship, train or truck used to transport the infringing goods; and (if available) the serial number of the container in which these goods may be found. In many instances, a right holder will not have access to this information and the necessity of obtaining the court order is itself unduly burdensome and not designed to prevent pirated and counterfeit imports from entering the country.

<sup>13</sup>Two parliamentary committees that studied this topic in 2007 called explicitly for such amendments to be enacted. See reports from the Standing Committee on Public Safety and National Security, <http://cmte.parl.gc.ca/Content/HOC/committee/391/secur/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>14</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>15</sup> See <http://toronto.ctvnews.ca/2-more-arrested-in-online-counterfeit-dvd-operation-1.1312838#ixzz2VXwU5mZd>.

<sup>16</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.

advocate fervently for imposition of deterrent penalties. The result is that those few pirates who are criminally prosecuted generally escape any meaningful punishment.<sup>17</sup> The weak penalties obtained also discourage prosecutors from bringing cases, and encourage recidivism. In a notable exception to this trend, in December 2013 a court in Winnipeg sentenced the operator of Audiomaxxx, which generated nearly C\$2 million in online sales of infringing compilation CDs, to two years' house arrest, and fines and restitution totaling C\$550,000.<sup>18</sup> Though the case took five years from arrest to verdict, it represents a rare instance of a responsive prosecutor's office taking piracy seriously and working with rights holders to build a case and obtain a solid outcome. IIPA hopes that this case will be harbinger of further cooperation in the future.

Above and beyond supporting the needed legal changes to the enforcement regime discussed below, the U.S. Government should press the Canadian Government to initiate and adequately fund a coordinated federal law enforcement effort against copyright piracy, including a program to crack down on the importation of pirate goods at all major Canadian points of entry. 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.<sup>19</sup>

Canada's serious problems of Internet piracy, where law enforcement has up to now played very little role, cannot effectively be tackled without greatly enhanced cooperation between right holders and service providers. A number of major Internet Service Providers participate in a voluntary "notice and notice" system growing out of an industry Code of Conduct. There is no empirical evidence that this program has been effective in changing infringing consumer behavior, which is not surprising, considering its glaring weaknesses. Although more and more notices of infringement are sent by right holders and forwarded by service providers to their customers each year, the providers do not even correlate the notices with individual subscribers to know which are repeat infringers. Consequently, the same notice can be sent an unlimited number of times to a single subscriber, without any apparent consequences for infringing behavior, even those consequences that the customer service agreements in question would authorize. To treat the first-time violator identically with the serial offender jeopardizes any deterrent effect the notices might otherwise achieve.

Canadian authorities had the opportunity, in the context of copyright modernization, to create a much more robust framework of incentives for effective cooperation against online infringement, including a version of the notice and takedown systems that most developed countries have adopted as one tool to deal efficiently with the problem of infringing content hosted by service providers. Unfortunately, Canada spurned that opportunity, opting instead to codify a version of the current voluntary system; and even that has never been brought into force, although the relevant ministries are currently seeking the views of stakeholders. USG should encourage Canadian authorities to do what they can to give service providers greater incentives to come together with right holders to make meaningful progress against online copyright infringement; but further legislative change is likely to be needed.

## **LEGISLATIVE ISSUES**

On June 29, 2012, Canada marked an important step forward in its years-long effort to modernize its copyright law when it enacted Bill C-11, the Copyright Modernization Act. A major stated goal of the copyright reform process in Canada was to enable the country to accede to the WIPO Copyright Treaty (WCT) and WIPO Performances and Phonograms Treaty (WPPT). Unfortunately, the formal process of ratification of these crucial

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<sup>17</sup>While calling for increased statutory penalties for piracy, and for new remedies such as forfeiture of the proceeds of piracy, the Industry, Science and Technology Committee of the House of Commons also opined that "the justice system should be imposing stiffer penalties for such offences within the limits of current legislation," and recommended that the government "immediately encourage prosecutors" to do so.

<sup>18</sup> See <http://www.winnipeg.sun.com/2013/12/19/counterfeit-music-scheme-nets-550k-penalty>.

<sup>19</sup>Numerous recommendations of the parliamentary committees echo these concerns.

treaties did not even begin until almost a year after copyright reform legislation was enacted; and best estimates of the time needed to carry out the remaining procedural steps indicate that accession is unlikely to occur before mid-2014. This delay is particularly concerning to the recording industry, since the provisions of Bill C-11 recognizing an exclusive making available right in sound recordings will not be proclaimed in force until accession to the WPPT occurs. U.S. sound recording producers thus face the prospect of at least two full years of discriminatory denial of the full scope of their exclusive rights over digital dissemination of their products in Canada, even though U.S. law accords full rights to Canadian producers without discrimination. WPPT provides the needed minimum standards and the legal points of attachment to set the music industry on the path to a robust legitimate online market in Canada. The U.S. Government should encourage Canada to correct this injustice by completing the ratification and accession process as expeditiously as possible.

The modernized Canadian copyright law features a number of critical legal tools needed to protect copyright in the digital networked environment and to promote the healthy growth of electronic commerce in creative works; but it also contains a number of seriously problematic provisions. Some, such as elements of Canada's online copyright liability regime, fall well short of evolving international best practices. Changes made to Canada's statutory damages regime could reduce the effectiveness of that remedy in the online environment, where it is compellingly needed. Serious questions also remain unanswered about whether many of numerous new or expanded exceptions to copyright protection in the Modernization Act comply with Canada's obligations under the Berne Convention, TRIPS, and the WCT/WPPT to confine exceptions to those that meet the "3-step test."<sup>20</sup> IIPA urges USG to monitor closely the implementation of all these exceptions, as well as developments in Canada's service provider liability and statutory damages regimes, as the real impact of the modernized Canadian law becomes clearer in the year ahead.<sup>21</sup>

Of course, some important copyright law issues were not even considered in the context of copyright modernization, notably the disparity of term of protection of copyright between the U.S. and its largest trading partner. This divergence will make trade tensions almost inevitable in the future, with respect to a growing body of works that remain protected in one country but not in the other, so Canada should join the growing international consensus in support of term extension.

Having completed its copyright modernization exercise, Canada's government finally turned in 2013 to long-overdue reform of its enforcement regime for copyright (and trademark). Bill C-56 (now superseded by the identical Bill C-8 in the current parliamentary session) will plug a critical gap repeatedly stressed by USTR in its Special 301 reports on Canada (as well as by IIPA), by empowering Customs officers to act *ex officio* against suspected pirate or counterfeit imports or exports, as well as to share information about suspect shipments with rightholders upon request. The failure of the bill to provide similar authority regarding goods in-transit through Canada is puzzling, however, and should be corrected in order to reduce the risk that pirate products will enter the U.S. market via Canada. It is also of potential concern that the full costs of the border enforcement enhancements (including storing, handling and destroying detained goods) are to be borne by right holders. Bill C-8 contains other important improvements, including creating new offenses for export of infringing copies, and for possession of such copies for sale, rental, or distribution of public exhibition "by way of trade." It would also empower law enforcement to seek communication interception orders in criminal copyright investigations. The legislation commendably seeks to implement a number of the enforcement reforms that have been called for by parliamentary committee reports dating back to 2007. However, many other parliamentary recommendations are not taken up in this legislation, such as

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<sup>20</sup>See Art. 9(2) of the Berne Convention; Art. 13 of the WTO TRIPS Agreement; Art. 10 of the WIPO Copyright Treaty; and Art. 16(2) of the WIPO Performances and Phonograms Treaty.

<sup>21</sup>For IIPA's more detailed analysis of the Copyright Modernization Act, see our 2013 Special 301 submission on Canada at <http://www.iipa.com/rbc/2013/2013SPEC301CANADA.PDF>, at pp. 127-131, and other sources referenced therein.

increasing maximum penalties for piracy. Bill C-8 also does nothing to address the numerous parliamentary non-legislative recommendations directed to enforcement policy and resources.<sup>22</sup>

Bill C-8 is an important step toward addressing the long-neglected shortfalls in Canada's enforcement regime against piracy and counterfeiting, but more ambitious and comprehensive steps are called for. Prompt parliamentary approval of the legislation should be encouraged, but accompanied by needed improvements that would further narrow the gap between Canadian enforcement standards and global best practices. Canada's government should also be encouraged to commit the resources and to set the enforcement priorities that are needed to respond effectively to piracy and counterfeiting.

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<sup>22</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/secup10/secup10-e.pdf>, and from the Standing Committee on Industry, Science and Technology, see <http://cmte.parl.gc.ca/cmte/CommitteePublication.aspx?COM=10476&Lang=1&SourceId=213200>.

# COMMONWEALTH OF INDEPENDENT STATES

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

### 2014 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 – be placed on the Watch List for 2014. Belarus, Tajikistan, Turkmenistan and Uzbekistan were on the Watch List in 2013; Kazakhstan was not listed in 2013. IIPA recommends that Kazakhstan should be elevated to the Watch List for 2014.

All five countries are failing to comply with existing copyright treaty or bilateral and/or multilateral trade agreement obligations to provide adequate and effective protection and enforcement. In each country report we specify the details of the deficiencies, and recommend legal reforms and enforcement steps to improve the IPR regimes of each country.

Each of the five countries, of course, has its own copyright laws, treaty accessions and ratifications, and bilateral trade agreement obligations with the United States, and its own variances in other issues. IIPA, however, combines the reports of these five countries into a single report because the overwhelming majority of issues in each country are based upon similar bilateral trade agreements (negotiated and signed separately) with the United States in the mid-1990s, and because of very similar recommended legal reforms and enforcement shortcomings. The mid-1990 U.S. trade agreements with each country 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 fully 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** – are set out below in the individual country reports.



# BELARUS

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2014 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** IIPA recommends that Belarus remain on the Watch List in 2014.

**Priority actions requested to be taken in Belarus in 2014 – Key Legal Reforms:** In 2011, Belarus completely revised its Copyright Law, and (according to an unofficial translation of the law) significantly improved several key provisions, including those pertaining to anti-circumvention and copyright management information. Still, there are a number of serious legal deficiencies that are preventing effective enforcement in Belarus.

Although it made many improvements, there are several serious concerns with the 2011 Copyright Law. First, Belarus (perhaps inadvertently), subjected the producers' and performers' rights of communication to a compulsory license – that is, a right of remuneration rather than an exclusive right. While rights of remuneration are acceptable for certain limited communications, such as traditional over-the-air broadcasting or performances of music in establishments, this is not the case for transmissions that are broad distributions of music to the public. The Copyright Law of Belarus incorporated a making available right within the right of communication to the public. But, as enacted, the right of remuneration operates as a compulsory license for all distributions of music to the public in violation of Belarus' obligations under the WIPO Performances and Phonograms Treaty (WPPT), as well as the right of reproduction under the WTO TRIPS Agreement. There are two additional serious concerns with the 2011 Copyright Law: (1) none of the limitations and exceptions in the law are subject to the three-step test of the Berne Convention or the WTO TRIPS Agreement, making them potentially very broad; and (2) the scope of rights for which the collective management organizations can receive state accreditations is extremely broad, and far outside of international norms. Rights holders, in particular the software industry, have provided significant resources for the training of local enforcement authorities in recent years (including in 2013), but report little noticeable improvement in either public awareness for IPR protection or enforcement activity by the authorities. There are also ongoing reports of significant procedural and administrative hurdles, including delays in government approval of right holder specific enforcement methodologies, which have impeded effective IPR enforcement operations.

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 to IPR violations after there has been an administrative violation and an exhaustion of administrative remedies.
- 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 to commence liability (in Article 158), which is now BR12.1 million (US\$1,260).
- 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 rights 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 (2011) to: (a) provide an exclusive right of making available to the public for performers and producers of sound recordings (currently a right of remuneration) by amending Article 41(1); (b) subject all of the exceptions and limitations to the three-step test of Berne Article 9(2); (c) limit the scope of rights to the public performance right for state accredited collective management organizations, by amending Article 48(2); (d) clarify the protection for pre-existing works and sound recordings. Belarusian officials have insisted that this latter protection already exists. According to Article 3 of the Copyright Law, international treaties supersede the copyright and neighboring rights law, and Articles 21 (works) and 31 (neighboring rights) specify the treatment of the “public domain,” but these articles do not specify how (or what) pre-existing works and recordings are protected. Statutory clarification on this point by amendment (or decree) would avoid 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. Over 20 years later, Belarus still has not fully implemented the IPR obligations in that agreement.

On May 1, 2013, the U.S. Trade Representative (USTR) – while retaining Belarus on the Watch List – noted that the U.S. remained “concerned about Belarus’ implementation of the IPR commitments made under the United States-Belarus Trade Relations Agreement of 1993. Piracy and counterfeiting remain widespread in Belarus, and IPR enforcement efforts continue to be weak and ineffective.” In addition, the USTR urged Belarus to “enact all regulations necessary to implement the amendments to the Belarussian Criminal and Administrative Codes related to IPR that have been pending since 2011, and to implement fully the WIPO Internet Treaties.” Those regulations would finally and fully implement the 2011 amendments to the Copyright Law. The statement further urged customs officials to implement and exercise *ex officio* authority to investigate cases, seize infringing goods and prosecute IPR violations.

Belarus is a member of all of the relevant IPR treaties, including the Berne Convention (1997), the WIPO Copyright Treaty (WCT) (2002), the WPPT (2002), and the Geneva Phonograms Convention (2003). As noted, Belarus has not adopted basic Internet piracy enforcement steps, such as “notice and takedown” procedures.

IIPA continues to urge the Government of Belarus to improve its border enforcement – to prevent any optical disc plant production 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 legal optical disc plant (opened in 2004) in Belarus (the Vigmoplast optical disc replication plant, near Minsk).

**Legal Reform Deficiencies:** The Copyright Law of Belarus was first adopted in 1996, with amendments in 1998 (for WIPO “Internet treaties” implementation, at least in part), and amended again in 2011. The 2011 Copyright Law repealed and replaced the 1996 law and 1998 amendments. It also revised the Civil Code, including those provisions pertaining to intellectual property (copyright). The 2011 Copyright Law also included Internet treaty implementation measures, prohibiting anti-circumvention devices and services, and protected against the removal or alteration of rights management information (Article 55.2). The remedies for anti-circumvention and rights

management information protection included injunctive relief, monetary damages, and seizure of devices. Related Criminal Code provisions (adopted in 2000) apply; these provisions (Article 201) include sanctions of up to five years imprisonment for repeat offenders of copyright and neighboring rights violations. Article 55.2 (in an unofficial translation) prohibits 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 (“any action”), and it protects the “removal or alteration” of rights management information.

**Enforcement:** With the exception of some civil remedies in the Copyright Law itself, most of the IPR enforcement provisions in Belarus are found in the penal, administrative and civil codes (and other laws, such as the customs laws). Under Article 56 of the Copyright Law (2011), 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. These remedies also apply, according to Article 56.2 to anti-circumvention and rights management information violations. Belarusian officials point to the Civil Code (1998, amended in 2011) as providing additional remedies for IPR violations.

In general, levels of piracy remain extremely high, and enforcement remains virtually nonexistent in Belarus. For example, BSA | The Software Alliance (BSA) reports that in 2011, the software piracy rate in Belarus was 87%, representing a commercial value of unlicensed software of US\$87 million.<sup>1</sup> IIPA continues to recommend a focus on legal reforms, as well as on enforcement, including steps against online 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 Agreement obligations by adopting the revisions noted above and by improving on-the-ground enforcement.

There are no comprehensive enforcement statistics for 2013. In recent years, the industries reported some successful raids by the enforcement agencies, but that 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.

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<sup>1</sup>Data on software piracy rates and commercial values are taken from the BSA 2011 Global Software Piracy Study at: [www.bsa.org/globalstudy](http://www.bsa.org/globalstudy). This study assesses piracy rates and the commercial value of unlicensed software installed on personal computers during 2011 in more than 100 markets. The study includes a detailed discussion of the methodology used. BSA plans to release an updated study in the second quarter of 2014.

# KAZAKHSTAN

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2014 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** IIPA recommends that Kazakhstan be placed on the Watch List in 2014.

**Priority actions requested to be taken in Kazakhstan in 2014 – Key Legal Reforms:** There are several legal reforms in Kazakhstan – all tied to improving enforcement – that IIPA recommends to the Government of Kazakhstan:

- **In the Civil Code:** adopt proper *ex parte* search provisions for effective enforcement against end-user pirates and clarify the rules for computing damages in civil infringement 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 violations as well.
- **In the Copyright Law:** adopt the necessary amendments to fully implement the WIPO Internet treaties (the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT)). IIPA has, in the past, provided extensive comments to the Government of Kazakhstan on treaty compatible amendments – especially focused on improving enforcement against Internet piracy. As one example: “online piracy” (in contrast to physical goods piracy, which includes digital copies such as CDs, DVDs etc.) is not defined in any of the IPR laws, which, according to some local counsel, makes IPR enforcement very difficult.
- Adopt a proper regulatory scheme, including criminal penalties, for the unauthorized 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 international treaty commitments and its bilateral commitments under the 1992 U.S.-Kazakhstan Trade Agreement (in force, February 18, 1993). Article 440 of the Customs Code now provides *ex officio* authority for customs officials to seize illegal material and to commence their own investigations.

However, as a result of a “moratorium” on government anti-piracy activity, at least one copyright industry reports a continuing decline over the past several years in the number of enforcement actions – such as raids by the financial police, the regular police forces, and the Ministry of Justice. In general, copyright enforcement is a low priority of prosecutors and law enforcement officials, in addition to being impeded by excessive procedural and bureaucratic delays. Several deficiencies, noted above, remain in the Kazakh legal regime, including a high burden of proof in criminal cases, and an absence of sufficient resources – which have contributed to weak criminal enforcement.

Enforcement activity needs to target 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, in the software industry, the common phenomena of unlicensed software use among enterprises and the prevalent sale of pre-installed pirated software on computers. Another form of counterfeiting has emerged in the past two years: the sale of fake stickers (“certificates of authenticity”) that rights holders place on some software

products. The Government of Kazakhstan should address these varying forms of piracy and counterfeiting. 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.

**Legal reforms:** Kazakhstan joined the Berne Convention (1999); the Geneva Phonograms Convention (2001); and the two WIPO Internet treaties, the WCT and the WPPT, effective in 2004. Also in 2004, the Copyright Law of 1996 was amended to provide the long-sought explicit protection for pre-existing foreign works and sound recordings. In 2005, Kazakhstan made significant improvements in its IPR enforcement regime with the adoption of a package of IPR reforms, including amendments to the Copyright Law, 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 – a major improvement. Other positive steps 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.

Additional amendments to the IPR laws were made in 2011 (effective January 12, 2012), to implement the WIPO Internet treaties. One such key addition in 2012 was the adoption (Article 48) of protection for technological protection measures (TPMs), including a bar on the making, distribution or sale of devices or components that circumvent TPMs. Proposed amendments would not fully implement the Internet treaties.

**Legal Reform Deficiencies:** In the Civil Code, one significant deficiency is the lack of clarity about the calculation of damages in civil copyright infringement cases; this results in very low non-deterrent penalties being available for copyright infringements.

The Copyright Law (as amended in 2004) provides a flat 50-year window of pre-existing protection for foreign works and sound recordings. Thus, pre-1964 works and sound recordings remain in the public domain.

The 2003 amendments to the Customs Code added a complicated registration system for copyright rights holders seeking enforcement at the border, which further weakens the system. IIPA continues to recommend that this registration system be repealed. Kazakhstan, Russia and Belarus joined a Customs Union (in force July 2010). As part of that Customs Union, a complicated duty valuation system based (unfairly) on royalties rather than, as in most countries, on the value of the underlying carrier media (e.g., the optical discs) went into force. IIPA recommends that Kazakhstan (and the Russia/Belarus Customs Union) repeal 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 the above noted legislative reforms. However, for the past several years, the copyright industries have experienced a decline in the number of police raids and seizures, and in prosecutorial activity as well. Thus, very few criminal cases have been initiated for IPR offenses.

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. Article 184(2) of the Criminal Code has had limited impact 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. IIPA knows of no criminal convictions in 2013 in the music, film or entertainment software industries. The last such notable conviction was in 2008, in a criminal case 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, the low priority given to IPR offenses, and an overall ineffective judicial system.

Enforcement is undertaken by a variety of agencies, including the Copyright Agency within the Ministry of Justice (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. A few years ago, some of the copyright industries signed a Memorandum of Understanding with the Government of Kazakhstan on enforcement and agreed to continue training programs throughout the country. IIPA continues to encourage the government to act, especially against criminal operations, and to improve its overall enforcement with deterrent penalties.

BSA | The Software Alliance (BSA) reports that there have been, in recent years, reductions in the types of open and notorious piracy that existed a few 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. However, the most prevalent forms of software piracy in Kazakhstan are now enterprise end-user and Internet piracy. In 2013, there was also a sharp rise in the volume of high quality counterfeit software in the market. In addition, via the government tender process, numerous government agencies, lured by low prices, have become the victims of software piracy. This migration of piracy and counterfeiting combined with decreased levels of criminal enforcement (especially a decline in police and prosecutorial activity in the past few years) contribute to the high software piracy rate. BSA reports that in 2011 (as in 2010), the software piracy rate in Kazakhstan was 76%, representing a commercial value of unlicensed software of US\$123 million.<sup>1</sup> In 2013, the rate of online piracy of entertainment software exploded in Kazakhstan. According to the Entertainment Software Association (ESA), Kazakhstan ranked tenth in the world in terms of the number of connections by peers participating in the unauthorized file sharing of select ESA member titles on public peer-to-peer networks, a sizeable increase from its 28th place ranking in 2012.

Kazakhstan has, in the past, been a beneficiary of the Generalized System of Preferences (GSP) program. IIPA recommends that the U.S. Government (once the GSP program is re-authorized) carefully review Kazakhstan's eligibility for GSP benefits, since a beneficiary is required to provide "adequate and effective" protection and enforcement of IPR and there continue to be many serious shortcomings in the Kazakh IPR regime.

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<sup>1</sup>Data on software piracy rates and commercial values are taken from the BSA 2011 Global Software Piracy Study at: [www.bsa.org/globalstudy](http://www.bsa.org/globalstudy). This study assesses piracy rates and the commercial value of unlicensed software installed on personal computers during 2011 in more than 100 markets. The study includes a detailed discussion of the methodology used. BSA plans to release an updated study in the second quarter of 2014.

# TAJIKISTAN

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

### 2014 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** IIPA recommends that Tajikistan remain on the Watch List in 2014.

**Priority actions requested to be taken in Tajikistan in 2014 – 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 need for full implementation of the WIPO Internet treaties. Recent positive steps have included accession to the WIPO Copyright Treaty (WCT) in 2009, the WIPO Performances and Phonograms Treaty (WPPT) in 2011, the Geneva Phonograms Convention in 2013, and most notably, the World Trade Organization (WTO), effective March 2, 2013.

IIPA recommends the following legal reforms to improve the IPR regime in Tajikistan, and to comply with these treaty obligations:

- Amending the Copyright Law to: (a) comply with the 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 clear 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 right holder.
- 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 criminal copyright 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.

On May 1, 2013, the U.S. Trade Representative – in retaining Tajikistan on the Watch List – noted the positive step of accession to the WTO and as part of its accession, committing to “an amendment to the Customs Code to provide *ex officio* authority for border and criminal enforcement officials.” But, as the statement further noted: “Tajikistan has yet to fully implement its commitments under the 1993 United States-Tajikistan Trade Agreement. In particular, Tajikistan needs to increase prosecutions of criminal IPR infringement.”

One remaining issue, even after WTO/TRIPS, WCT and WPPT treaty accessions, is that Tajikistan has not clearly indicated its intention to provide protection for pre-existing works and sound recordings, as those agreements and treaties, as well the Berne Convention and the Bilateral Trade Agreement, require. It is hoped that the Government of Tajikistan will either clearly identify this protection (in existing law), or quickly amend its law to provide such protection for works and sound recordings.

**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, now including the WTO TRIPS Agreement. The Tajik Government has indicated it would reform its copyright law to fully comply with Berne, but it has not, to our knowledge, done so. 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 rights 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.

# TURKMENISTAN

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

### 2014 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** IIPA recommends that Turkmenistan remain on the Watch List in 2014.

**Priority actions requested to be taken in Turkmenistan in 2014 – Key Legal Reforms:** In January 2012, in a positive step, Turkmenistan enacted its first-ever Copyright Law (in force, January 20, 2012). The enactment of the copyright law providing basic comprehensive protections for works and neighboring rights, was part of the complete revision of the Turkmenistan Civil Code, Part IV outlining basic provisions for copyright (and patent and trademarks). However, still missing from the IPR legal regime are enforcement provisions, and basic treaty accessions – to provide protections for American (and other foreign) works and recordings. 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 Internet treaties – the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT).
- Amendments to the law to fully comply with Berne, the WTO TRIPS Agreement and the WIPO Internet treaties (WCT/WPPT), including basic provisions to 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 clearly protect pre-existing works and sound recordings for a minimum of 50 years (and preferably, 70 years).
- 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 the 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. – 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. Over twenty years later, Turkmenistan has not adequately implemented the IPR obligations in that agreement.



On May 1, 2013, the U.S. Trade Representative – in retaining Turkmenistan on the Watch List – noted its progress in adopting a Copyright Law and by amending “its Civil Code to enhance IPR protection.” But, the statement noted: “Turkmenistan should also provide for administrative and civil procedures for IPR enforcement, as well as criminal penalties against IPR infringement, and should provide *ex officio* authority to its customs officials.” Further, the USTR noted the 1993 Trade Agreement obligations to join the Berne Convention and the Geneva Phonograms Convention.

**Legal Reform Deficiencies:** Until 2012, Turkmenistan did not have a comprehensive basic copyright and neighboring rights law, instead relying on the Soviet-era Civil Code (Chapter IV). The 2012 revision of that Civil Code (Chapter IV), and of a separate Copyright Law remedied this major IPR legal regime deficiency, but other key reforms, as noted, are still especially necessary for a basic digital-era IPR regime for effective enforcement.

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.

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) 2014 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** IIPA recommends that Uzbekistan remain on the Watch List in 2014.

**Priority actions requested to be taken in Uzbekistan in 2014 – 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:

- Adherence to the Geneva Phonograms Convention.
- Adherence to the WIPO Internet 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:
  - Providing protection for pre-existing works and sound recordings for a minimum of 50 years (and preferably, 70 years).
  - 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).
  - Clarifying the scope and application of the rental right for audiovisual works and computer programs (Article 21).
  - Complying with the WIPO Internet 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).
  - Deleting the onerous provisions (found in Articles 38 through 42) that over-regulate the terms and conditions of authors' 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 the 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. – 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, twenty years after the 1994 Trade Agreement, some of the most basic protections continue to be denied rights holders in Uzbekistan. For example, since Uzbekistan is still not a member of the Geneva Phonograms Convention or the WPPT, it does not provide any protection or rights for U.S. or other foreign sound recordings.

One important positive development this year: effective January 8, 2014, Uzbekistan finally withdrew its reservation to Article 18 of the Berne Convention and agreed to protect pre-existing foreign works prior to 2005.

On May 1, 2013, the U.S. Trade Representative, in announcing Uzbekistan’s retention on the Watch List, noted ongoing concerns and the need to immediately “address longstanding deficiencies” including by: joining the Geneva Phonograms Convention; removing the Article 18 Berne reservation (both obligations of the 1994 United States-Uzbekistan Trade Agreement); joining the WIPO Internet treaties; and taking “legislative action to provide adequate copyright protection for foreign sound recordings.” Further, USTR said Uzbekistan should also “increase penalties for IPR violations and ensure that its law enforcement authorities have *ex officio* authority to initiate investigations and enforcement actions” and to “allocate more resources to IPR enforcement,” including at the border.

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 (once that program is re-authorized), because Uzbekistan is not providing “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 Agreement, which the government hopes to accede to at some future date. The 2006 law added: a making available right; a right of communication to the public; provisions pertaining to technical protection measures and copyright management information; regulations pertaining to private copying and public performance royalties; and extensive provisions and regulations involving collective administration (Chapter Four of the law). The Copyright Law could have benefited from more input by copyright rights holders, 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, at that time, Uzbekistan made a reservation to its accession regarding Article 18 that denied 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, was in contravention to the Article 18 obligations of Berne (and the 1994 Agreement).

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<sup>1</sup>Note, IIPA bases this filing on an unofficial English translation of the 2006 Copyright Law. In 2006, Uzbekistan also adopted conforming amendments to its Civil Code on copyright and neighboring rights, as well as a decree on royalties for public performances and private copying (IIPA does not have official English translations of these laws/regulations).

By a formal notification to the WIPO on January 8, 2014, Uzbekistan finally withdrew its reservation — applicable to works (but, not sound recordings).

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. IIPA testified again in 2007, 2009, and 2013 at GSP hearings. Now, more than eight years later, and after four rounds of hearings, the Government of Uzbekistan has failed to adopt six of the eight recommendations (which, for the most part, track the 1994 Trade Agreement obligations). The 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 – would be 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 draft bill several years ago 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.

**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.

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 the Uzbek Government should 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 accurate, are a positive step.

The IIPA recommends that the U.S. Government should remove Uzbekistan from eligibility to receive GSP benefits (once the GSP program is re-authorized) because Uzbekistan is not complying with the IPR eligibility requirements for GSP benefits; namely, it is not providing "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.

# ECUADOR

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2014 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** IIPA recommends that USTR retain Ecuador on the Watch List in 2014.<sup>1</sup>

**Executive Summary:** In December 2013, the National Assembly of Ecuador adopted amendments to the criminal code that decriminalize all intellectual property rights (IPR) violations, by eliminating Chapter III, “Offenses and Penalties” (Sections 319 to 331), of the Intellectual Property Law. With this drastic change, criminal enforcement will come to a stop, leaving only administrative enforcement and fines for the public enforcement of copyright. On the backdrop of a long history of piracy of copyrighted works, the development leaves little optimism that a reasonable legitimate market can reopen in the near future for the works of IIPA’s members. The United States Government should press the Government of Ecuador to repeal these amendments, which will cripple the country’s ability to tackle widespread street piracy and growing online piracy, and will bring Ecuador out of compliance with its important obligation as a member of the World Trade Organization (WTO) to provide adequate criminal procedures, including deterrent penalties, for the enforcement of IPR under Article 61 of the TRIPs Agreement.

### PRIORITY ACTIONS REQUESTED IN 2014

- Re-establish criminal enforcement and penalties for IPR violations in the Intellectual Property Law.
- Provide the Ecuadorian Intellectual Property Institute (IEPI) with the necessary budget and support to conduct administrative actions in an organized and effective fashion.
- Immediately upon reinstating criminal enforcement in the law, step up enforcement actions by police and customs officials in shopping malls, where pirate points of sale are established (for example in *El Bosque*, *Espiral*, and *Naciones Unidas* in Quito), including against landlords who turn a blind eye to illegal activity.
- Support an amendment to the Intellectual Property Law to provide enforcement tools to combat Internet piracy.

**Piracy:** The level of piracy in Ecuador worsened in 2013, and pirate music products are being massively sold in shopping malls without any control from police or local authorities. Rights holders have reported that the expansive Bahia Market in Guayaquil, Ecuador sells a wide selection of pirated DVDs, CDs, and software. The piracy problem in certain regions is so expansive that it has raised concerns of ties to organized criminal groups. The film industry also reports growing online piracy as Internet access expands across Ecuador, threatening legitimate theatrical and home entertainment markets. This situation will only worsen in 2014 in the absence of police enforcement.

BSA | The Software Alliance (BSA) reports that the software piracy rate in Ecuador was 68% in 2011, representing a commercial value of unlicensed software of US\$92 million.<sup>2</sup> In an online survey of 411 computer users in Ecuador conducted between February and March 2012, nearly three-fourths of those surveyed admitted to acquiring pirated software or software that is not fully licensed to some degree, and 44% admitted to committing these forms of software piracy at least “occasionally.”<sup>3</sup>

<sup>1</sup>For more details on Ecuador’s Special 301 history, see previous years’ reports at <http://www.iipa.com/countryreports.html>. For the history of Ecuador’s Special 301 placement, see <http://www.iipa.com/pdf/2014SPEC301HISTORICALCHART.pdf>. For a discussion of IIPA’s 2014 Key Initiatives and Challenges, see IIPA, *2014 Special 301 Submission*, at <http://www.iipa.com/pdf/2014SPEC301COVERLETTER.pdf>.

<sup>2</sup>Data on software piracy rates and commercial values are taken from the 2011 BSA Global Software Piracy Study at [www.bsa.org/globalstudy](http://www.bsa.org/globalstudy). This study assesses piracy rates and the commercial value of unlicensed software installed on personal computers during 2011 in more than 100 markets. The study includes a detailed discussion of the methodology used. BSA plans to release an updated study in the second quarter of 2014.

<sup>3</sup>See [http://portal.bsa.org/globalpiracy2011/downloads/opinionsurvey/survey\\_ecuador.pdf](http://portal.bsa.org/globalpiracy2011/downloads/opinionsurvey/survey_ecuador.pdf).



The dramatic changes in Ecuador's Intellectual Property Law could not come at a worse time for the U.S. movie industry, which continues to confront blatant piracy in the streets and online. Rights holders report that some pirate vendors are even using social media channels to advertise promotions such as three DVDs for US\$1. The absence of basic criminal provisions in the law will surely make it more difficult to address any public perception that the unauthorized distribution of copyrighted films is acceptable and will go unpunished.

The recording industry reports that the level of piracy in Ecuador has been steady in recent years, at approximately 90% of the physical and online market in 2012. In Quito and Guayaquil the availability on the streets of music CD-Rs was reduced considerably because many illegal points of sale have been fined and removed by tax authorities. However, many of those vendors simply moved their businesses to permanent locations inside shopping malls where they now are openly competing with the legal offer. Examples of this situation are found at the shopping malls *El Bosque*, *Naciones Unidas* and *Espiral* in the capital city area.

**IPR Law and Enforcement in Ecuador:** On December 17, 2013, the National Assembly of Ecuador approved a new criminal code, making sweeping changes to Ecuador's criminal laws and, importantly, eliminating all criminal enforcement and sanctions for IPR violations. The new code will enter into force after its publication in 2014. Specifically, the enacted law decriminalized all IPR violations by eliminating Chapter III, "Offenses and Penalties" (Sections 319 to 331) of the Ecuador Intellectual Property Law (as published Dec. 28, 2006). The change, unless amended, brings Ecuador in violation of its TRIPs Article 61 obligation to provide criminal copyright enforcement and deterrent remedies. It could also have detrimental effects on public awareness of the importance of copyright protection, and sets a terrible example in the region.

Upon entry into force, only administrative actions and fines will be available to deter piracy of copyrighted works. However, Ecuadorian President Correa's government published a decree (#1,322 dated Oct. 5th, 2012) that reduced the Ecuadorian Intellectual Property Institute (IEPI) to a small department inside the Secretary of Education, Science, Technology and Innovation (SENESCYT). Due to the high costs involved, as well as the lack of resources in the form of personnel, infrastructure and adequate technology, the IEPI cannot take adequate measures to combat piracy effectively in Ecuador. The action effectively eliminated administrative enforcement actions on copyright infringement cases, along with the resources to train officers and needed attention to the collective management of rights. Local record producers report that following the decree, the IEPI completely stopped its anti-piracy actions due to lack of resources, and no longer has the ability to organize raids in Quito and Guayaquil.

# GREECE

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2014 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** IIPA recommends that Greece remain on the Watch List in 2014.<sup>1</sup>

**Executive Summary:** While it is not surprising that Greece's IPR enforcement regime suffers from resource challenges that result in court delays, postponements of hearings, and a lack of deterrent sentences, a more strategic approach could ameliorate these problems, and there are some positive developments in this regard. Rights holders report excellent cooperation with the Tax Police (SDOE) in addressing enterprise end-user software piracy, though there are concerns that a major restructuring of SDOE now underway could jeopardize these efforts. Greek police forces are a bright spot in efforts to enforce against infringement, but these authorities lack needed resources in difficult economic times. Prosecutors should place greater priority on copyright crimes, courts need to facilitate speedier cases and issue deterrent sentences, and government leaders need to establish the tools for ISPs and rights holders to cooperate against Internet piracy. Furthermore, many attempts to combat illegal file-sharing continue to be frustrated by data protection laws that impede investigations and enforcement actions. IIPA urges the U.S. Government to engage with the Government of Greece to encourage that it resume and strengthen the efforts of the Coordination Committee for Monitoring and Coordinating IPR and reinstate and implement a Greek national IPR enforcement strategy, efforts that have been abandoned since 2009.

### PRIORITY ACTIONS REQUESTED IN 2014

- Greece should coordinate at the highest levels a national enforcement campaign with clearly-defined goals to:
  - (1) Involve rights holders and online intermediaries in the introduction of clear incentives for cooperation in anti-piracy measures, for both hosted and non-hosted content,
  - (2) Address widespread end-user software piracy both within government ministries and in Greek enterprises, through support for continued actions of the SDOE, which should also include training expert personnel, conducting compliance audits, and issuing monthly public communications that disclose infringement,
  - (3) Recommend updated legal standards within the data protection laws, consistent with the 2008 European Court of Justice (ECJ) *Telefonica* decision, to allow disclosure of information necessary for rights holders to protect their rights against infringement in court, and
  - (4) Set targets for speedier criminal cases and instruct judges to issue deterrent, non-suspended sentences.

### COPYRIGHT PIRACY IN GREECE

Piracy rates in Greece have not worsened over the past year, but they also have not improved. Hard goods piracy, online piracy, and enterprise end-user software piracy remain at steady but unacceptably high levels.

**Online piracy:** Each of the copyright sectors – books, film, music, software, and videogames – faces the challenge of Internet piracy in Greece that severely damages their legitimate markets. The number of Greek web sites offering pirate works has remained between 70 and 75 for the last five years. Social networking and blogspot

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<sup>1</sup>For more details on Greece's Special 301 history, see previous years' reports at <http://www.iipa.com/countryreports.html>. For the history of Greece's Special 301 placement, see <http://www.iipa.com/pdf/2014SPEC301HISTORICALCHART.pdf>. For a discussion of IIPA's 2014 Key Initiatives and Challenges, see IIPA, *2014 Special 301 Submission*, at <http://www.iipa.com/pdf/2014SPEC301COVERLETTER.pdf>.



sites have emerged in the place of other illegal web sites offering links to infringing content via streaming. Peer-to-peer (P2P) file-sharing of infringing content and cyber-lockers containing pirated material (with relevant links offered through various online forums) continue to be very popular, though. In 2013, Greece ranked 25<sup>th</sup> in the world in terms of the number of connections by peers participating in the unauthorized file sharing of select Entertainment Software Association (ESA) member titles on public P2P networks. As a result of all of the foregoing, the legitimate Greek markets for music, movies, and videogames are stymied.

For the recording industry, piracy has almost entirely migrated to the Internet. Piracy of sound recordings and music in Greece is still very high for both international and local repertoire. Of particularly serious concern is the site Music Bazaar, which offers music for download under targeted categories such as Greek, Latin, Italian, and Turkish. The site is hosted from Russia, but the majority of the visitors to the site are from Greece, Lithuania and Germany. The site escaped a May 2012 court order for Greek ISPs to block the site, by moving to a new IP address.

Rights holders in the film industry are aware of 15 web sites that engage in illegal subtitling, allowing Greek Internet users to look to foreign online sources for pirated movies. Even theatrical exhibition and video on demand suffer in Greece. Internet piracy has particularly damaged the independent film sector, which has less flexibility to shift to technology-enabled new business practices that might limit piracy such as worldwide same day releases. For independents, whose national distributors release on their own schedule, this technique is impossible.

**Street piracy:** Hard goods piracy is visible on the streets of all of Greece's large cities and tourist areas, by vendors selling mostly DVDs of recently released films and occasionally circumvention devices for use with videogame consoles.

**Enterprise end-user software piracy:** BSA | The Software Alliance (BSA) reports that the software piracy rate in Greece is now above 60% and has risen over the past few years.<sup>2</sup> The high commercial value of software piracy in Greece (estimated at US\$343 million in 2011) translates to fewer job opportunities and decreased revenues for local IT businesses, which have faced huge financial problems in recent years. In areas of Greece where Internet access is improving, such as Athens and Thessaloniki, hard goods piracy of software products is giving way to Internet downloads of illegal products. In other areas, unlicensed software continues to be distributed on low-quality pirated CDs.

## **COPYRIGHT ENFORCEMENT IN GREECE**

Improved enforcement conditions are within Greece's means if it generates a national IPR enforcement plan and redirects key resources toward targeted goals. The "Coordination Committee for Monitoring and Coordinating IPR," which has not been active since it last issued a national IPR plan in early 2009, must be reconvened to establish new objectives in the key areas of: incentives for online cooperation in anti-piracy measures; efforts to reduce widespread enterprise end-user software piracy; improved legal standards to allow disclosure of information crucial to copyright infringement cases; and faster and more effective criminal copyright cases in Greece's courts. The software industry reports very positive outcomes from the actions of the Authority for the Prosecution of Financial Crimes (SDOE, or Tax Police) in addressing end-user piracy of commercial software. Unfortunately, in the absence of a comprehensive mechanism for cooperation among rights holders and ISPs to combat online piracy, copyright holders can only work through the courts to seek remedies against known infringing websites in Greece. The enforcement tools available to rights holders are arduous and often inefficient – and therefore insufficient to effectively address the piracy problem.

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<sup>2</sup>Data on software piracy rates and commercial values are taken from the 2011 BSA Global Software Piracy Study at [www.bsa.org/globalstudy](http://www.bsa.org/globalstudy). This study assesses piracy rates and the commercial value of unlicensed software installed on personal computers during 2011 in more than 100 markets. The study includes a detailed discussion of the methodology used. BSA plans to release an updated study in the second quarter of 2014.



**Cooperation against Internet piracy:** As file-sharing of pirated works becomes increasingly common in Greece, the difficulties rights holders face in working with ISPs to identify infringing users in the file-sharing environment have created a major obstacle to online enforcement, despite the efforts of copyright holders and the Hellenic Copyright Organization (OPI). Greek ISPs do cooperate with rights holders in the rare cases involving websites within the .gr domain that host infringing material. In the more prevalent contexts of P2P file-sharing and material hosted in cyber-lockers and forums outside the .gr domain (but operated by local nationals with local IP addresses), ISPs refuse to take action against infringing activity. Instead, they cite to provisions of the data protection law regarding disclosure of personal data (Law 2225/1994), which is limited to a specific range of crimes that do not include even felony copyright infringement. As a result, Internet investigations in Greece can identify an infringing IP address but cannot uncover an infringer's name or physical address without a court or prosecutorial order, which is a rather lengthy procedure.

Negotiations between rights holders and ISPs started more than three years ago under the auspices of OPI, whose aim is for ISPs to adopt voluntary measures to decrease Internet piracy. In March 2013, through work with OPI, two major ISPs and several copyright protection societies signed a Memorandum of Understanding regarding public awareness efforts. Unfortunately, in the absence of the government signaling the political will to bring about legislative change, no further progress has resulted. In addition, there has been no change to data protection provisions that prevent the disclosure of digital piracy information for use in court, notwithstanding the fact that the Ministry of Justice had promised to support the inclusion of felony copyright infringement as grounds for disclosure of personal data in the data protection law.

**Civil enforcement actions:** Even for cases that do not need to overcome the evidentiary hurdles that rights holders face in bringing online infringers to court, in the past copyright plaintiffs have faced court delays and the postponements of hearings due to the extremely high number of pending cases. Encouragingly, the software industry reports that amendments to the Code of Civil Procedure appear to have ameliorated the time needed for cases to be brought before the court and for the issuance of court decisions. Greek law 4055/2012 provides that a hearing on any interim measure must occur within 30 days starting from the filing date, and the court decision is to be issued 60 days after the trial. Further, rights holders report that *ex parte* search orders and preliminary injunctions in software piracy cases are normally granted without major difficulties and parties typically settle the cases out of court. The Special IP departments within the Civil Courts of First Instance of Athens, Thessaloniki, Piraeus, and within the Court of Appeals of Athens are valuable tools for efficient and quality final judgments, and rights holders hope to see this program extended to other Greek cities. Amendments have also extended county courts' jurisdiction over copyright cases by increasing the limits on the amounts in dispute. None of these positive developments, however, have changed the fate of Internet piracy cases in Greece, which rarely reach trial due to the lack of access to data identifying infringers.

**Criminal enforcement:** Criminal copyright enforcement actions in Greece are generally initiated by either the Greek police or, as is typically the case in enterprise end-user software piracy cases, by the SDOE. Rights holders report good relationships with both of these enforcement bodies, but court delays, postponements of hearings, and a failure by the courts to issue deterrent sentences as provided by the law, prevent effective enforcement in many cases.

**Anti-piracy raids and audits.** In February 2011, in accordance with Article 4© of Presidential Decree 9/2011, a new IPR Department was established within the Cybercrime Unit of the Greek Financial Police (part of the Greek Police and independent from the Ministry of Finance), authorized to conduct raids against Internet software piracy. Some of the copyright sectors report the need to present their own evidence or investigation results before the IPR Department of the Greek Police will initiate raids, but the audiovisual sector reports some progress with this division, including cases regarding pay TV signal theft and three cases against the administrators of bogspot sites charged with offering links to infringing streaming content. The software sector notes that this Police division works cooperatively with their representatives. In 2013, the number of *ex officio* raids conducted in relation to software piracy cases significantly increased, including cases involving website operators dealing in a variety of pirate material. Still, trained personnel and increased raids are needed. Rights holders report that although administrative

finances are available, the Greek Police do not impose them. What cases the police have initiated have not been brought to effective prosecution.

The software industry reports positive outcomes from the work of the SDOE against enterprise end-user software piracy. The SDOE Directorate of Planning and Coordination of Audits initiated a legalization campaign in September 2012, sending 1,400 audit letters to Greek companies requesting: a) a software inventory list, b) a copy of software invoices and c) software licenses. The letters resulted in a wave of legalizations in 2013 valued at more than US\$1 million. Companies that did not reply to audit letters become possible suspects for raids. In 2013, SDOE raids resulted in collections of fines in 90% of the cases and an increase in fines collected from €60,000 (US\$81,000) in 2012 to €70,000 (US\$95,000) over the past year. Of the raids that were conducted in 2013, only two cases came to prosecution in criminal court, for nonpayment of fines. The SDOE should continue to issue follow-up warnings and conduct raids, when appropriate, on non-responsive companies, publishing reports of administrative fines imposed. Building on this good work, the SDOE should conduct more raids, and more importantly, expand the scope of enterprises targeted in such raids. Unfortunately, the SDOE generally avoid targets involving more than 50 illegal software products (*i.e.*, larger enterprises), apparently to avoid triggering the threshold for criminal liability that would require initiating complicated and time consuming criminal investigations and prosecutions. In January 2014, SDOE began to undertake administrative enforcement with respect to establishments such as cafés and restaurants where there may be illegal reproduction of phonograms for public performance, and it is hoped that these actions will continue and expand.

The SDOE and its offices across Greece are currently undergoing a major restructuring that could result in the reformation of some IPR programs. It is critical that the SDOE IP Departments continue to operate across the country, as it is currently the only competent authority with any success in reducing software piracy in the country. These departments must be given the resources and training to build on their existing work, and to continue monthly reports with regular targets for software legalization. A new wave of audit letters was planned for 2013, but is currently suspended due to SDOE's reorganization, and should be resumed as soon as possible. Lastly, it is crucial that SDOE is manned with trained officers. Otherwise stakeholders will continue to bear the costs of providing IT experts in order for SDOE to conduct administrative raids.

**Challenges in the criminal courts:** As in the past, court delays, postponements of hearings, and lack of deterrent sentences are the main obstacles to effective enforcement against hard goods piracy in Greece. Internet cases are very difficult to litigate even in criminal cases, despite opinions issued on behalf of the Attorney General that data needed to determine the identity of online copyright infringers may be disclosed. The specialized IP courts in Athens and Piraeus only deal with civil and not criminal cases, and therefore are ineffectual against criminal commercial-scale piracy. Greek prosecutors, especially at the local level, have largely ignored Supreme Court circulars directing them to prioritize IPR cases. Although this slowly appears 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. Judges vary in practice from region to region, and often lack adequate knowledge for sophisticated IPR issues. Short hearing dates need to be set, and non-suspended prison sentences as well as monetary penalties must be imposed, to preserve the deterrent effect of sentences.

**Government software legalization:** BSA reports no new developments or progress in 2013 on ensuring that government agencies use only legal software. Governments 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 Greek Government could raise significant awareness of the problem and help bring down the unacceptably high software piracy rate.

## **COPYRIGHT LAW REFORM AND RELATED ISSUES**

IIPA members have identified a priority area of the Greek Copyright Act that requires updating to bring Greece into full compliance with its international obligations and to provide modern copyright enforcement tools:

***Establish the legal foundations needed to facilitate ISP coordination on copyright infringement matters regarding both hosted and non-hosted content, and provide for an enforceable right of information.***

The lack of ISP cooperation remains an issue for rights holders, and no progress has been obtained in the course of 2013. While the courts have issued orders under the implementation of Article 8.3 of the EU Copyright Directive, these court orders were ultimately ineffective because they did not cover subsequent IP addresses. Therefore, the illegal downloading site *music-bazaar* remains a concern in spite of an order to ISPs to block the site. It is crucial for the government to assist rights holders in coming to agreement with ISPs on meaningful cooperation, particularly with respect to: (1) injunctive relief under Article 8.3 of the EU Copyright Directive to address hosted and non-hosted content, (2) notice and take down for hosted content; and (3) measures in respect of repeat infringers. In addition, there has been no progress in the past year to amend Article 4 of the Data Protection Law (Law 2225/1994) to require ISPs to disclose the identity of users suspected of copyright infringement. The Attorney General has issued circulars that, at a minimum, would permit law enforcement to work with ISPs to obtain identification information for criminal enforcement, but ISPs have not complied. A legal structure by which ISPs may reveal the identities of copyright infringers, consistent with the 2008 ECJ *Promusicae vs. Telefonica* decision, is a critical component of an effective mechanism to address Internet piracy regarding hosted and non-hosted content. Such a provision should include appropriate steps to facilitate the ability of rights holders to obtain the necessary information to take civil actions to protect their rights.

# ISRAEL

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2014 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** Israel should remain on the Watch List in 2014.<sup>1</sup>

**Executive Summary:** Copyright owners have long struggled to enjoy the full exercise of their rights in Israel. Israeli lawmakers have lagged behind in affording appropriate Internet rights for copyright materials and protecting technological protection measures (TPMs), including access and copy controls. Online and mobile infringements in Israel abound, and the Israeli Government needs to establish an overall approach to these problems, including effective and fair procedures to halt hosted and non-hosted infringements and encourage responsibility of ISPs and others in the copyright value chain (e.g., advertisers who support businesses built on infringement). A recently-introduced bill which would reportedly impose a surcharge on search engines (with proceeds going into a fund for creators with web presence) is not responsive to the problem. Other piracy problems, like unauthorized use of software by enterprises, cost right holders hundreds of millions of dollars per year, robbing Israel of good IT jobs, tax revenues, and contributions to economic growth.

### PRIORITY ACTIONS REQUESTED IN 2014

#### **Enforcement**

- Tackle burgeoning Internet piracy through proactive Israeli Police pursuance of Internet piracy cases.
- Fortify Special Police IPR Units by adding staff and funding and providing them with *ex officio* raiding authority; establish a national prosecutors unit and give piracy cases priority attention.

#### **Legislation**

- Enact law to protect against unlawful circumvention of TPMs as well as trafficking in circumvention technologies, devices, components, or services.
- Support swift passage of bill endorsed by the Israeli Government that would extend the term of protection for sound recordings.
- Enact legislation to address online infringement, including the establishment of criminal liability for the unauthorized making available of copyright works, an effective and fair procedure to halt non-hosted piracy, injunctive relief, and a duty on ISPs to provide information to law enforcement agencies and right holders.
- Amend the Copyright Act to, *inter alia*, confirm criminal liability for enterprise end-user software piracy.
- Amend law to provide for minimum statutory damages.

### PIRACY AND ENFORCEMENT UPDATES IN ISRAEL

Prior IIPA reports on Israel contain detailed discussions of piracy and enforcement issues (including physical piracy and the development of IP courts). This report serves only as an update to those and is not to be considered an exhaustive review of issues.<sup>2</sup>

**Enterprise End-User Piracy Causes Harm to U.S. Software Companies:** The level of software piracy in Israel has remained relatively low in recent years, at 31%, although the commercial value of unlicensed software

<sup>1</sup>For more details on Israel's Special 301 history, see previous years' reports at <http://www.iipa.com/countryreports.html>. For the history of Israel's Special 301 placement, see <http://www.iipa.com/pdf/2014SPEC301HISTORICALCHART.pdf>. For a discussion of IIPA's 2014 Key Initiatives and Challenges, see IIPA, 2014 Special 301 Submission, at <http://www.iipa.com/pdf/2014SPEC301COVERLETTER.pdf>.

<sup>2</sup>See, e.g., IIPA, *Israel*, 2013 Special 301 Report, February 8, 2013, at <http://www.iipa.com/rbc/2013/2013SPEC301ISRAEL.PDF>.



remains significant at US\$192 million.<sup>3</sup> In Israel, many small companies that purchase legal software engage in under-licensing by deploying software on more computers than the license allows, and engaging in related breaches of end-user license agreements (EULAs), such as the use by commercial organizations of “original equipment manufacturer” (OEM) products or educational versions of software products. The software industry relies on self-help and civil remedies to address software piracy in Israel. Even in successful civil cases, no court has ever awarded the maximum statutory damages of NIS100,000 (US\$28,500); thus the increased maximum in the 2007 Copyright Law has not been helpful. Instead, the minimum statutory damages must be increased in order to make the civil system more effective. Awarding realistic legal expenses (including attorney’s fees) in addition to damage awards would also be a major improvement. During 2013, BSA conducted a media campaign to help businesses comply with software licenses, offering them a grace period to come forward and negotiate software licenses without risk of suit. The program was successful in getting companies to come forward, but right holders still need adequate remedies at their disposal to achieve greater reductions in piracy. Unfortunately, the Israeli Government does not consider unauthorized use of software by enterprises to be a crime, which remains a major deficiency in the law.

**Internet Piracy:** Israel offers exciting opportunities for legitimate services delivering copyright material via online and mobile networks. As of the end of 2012, an estimated 5.8 million Israelis use the Internet, with 1.9 million fixed broadband subscribers; Israel also had 9.2 million mobile subscriptions (114% penetration), with more than 4 million of those being broadband mobile, according to the International Telecommunications Union. Despite the availability of legitimate services iTunes and Rdio, these services face huge challenges with online and mobile (smart phone, tablet) infringing activities.<sup>4</sup> The recording industry reports that online music piracy remains a major concern. In 2013, Israel, despite its small population, ranked 20th in the world in terms of the number of connections by peers participating in the unauthorized file sharing of select Entertainment Software Association (ESA) member titles on public peer-to-peer (P2P) networks.<sup>5</sup> The Israeli Government has recognized the importance of Internet piracy issues at a political level, but its enforcement authorities (police, tax authorities, customs) have been relatively uninvolved in online enforcement. Civil action has been one of the only routes available to deal with infringement, but a March 2010 decision of the Supreme Court impeded that route. The decision held that Israeli courts are not empowered to issue disclosure orders against ISPs (i.e., right holders cannot obtain the details of anonymous infringers for the purpose of establishing the existence of a direct infringement to support a secondary liability claim against operators of infringing online services). The Knesset is reportedly working on data legislation which would make this possible, but until that time, right holders depend entirely on voluntary cooperation from ISPs to deal with online piracy.

Recent court decisions have set out standards on secondary liability which can be helpful in both the physical and online piracy contexts. In one case, the Supreme Court held in 2011 that a defendant can be held liable for contributory infringement if the following are proved: 1) the existence of a direct infringement; 2) actual awareness of the infringement; and 3) actual and significant contribution. In a second case, involving Internet infringement, the Israeli court held that the owners of a forum website could be held liable for providing infringing links: 1) if the forum operator actively encouraged its users to post links to infringing websites or marketed its website as a platform for doing so; or 2) if the forum was predominantly infringing and therefore was “improper,” based on evidence showing that the majority of links posted on the forum are to infringing sites/content, and that the forum operator has knowledge of the infringement.<sup>6</sup>

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<sup>3</sup>Data on software piracy rates and commercial values are taken from the 2011 BSA Global Software Piracy Study at [www.bsa.org/globalstudy](http://www.bsa.org/globalstudy). This study assesses piracy rates and the commercial value of unlicensed software installed on personal computers during 2011 in more than 100 markets. The study includes a detailed discussion of the methodology used. BSA plans to release an updated study in the second quarter of 2014.

<sup>4</sup>Several notorious sites (i.e., those recommended to USTR by IIPA as “notorious markets” for piracy in October 2013) are among the top sites accessed in Israel.

<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.

<sup>6</sup>*Appeal to the Supreme Court 5977/07 by the Hebrew University of Jerusalem vs. Yaakov Cohen, the Labour Party and Schocken Publishing House against the ruling by Y Shapira in T.A. 6306/04 from 17 May 2007*, June 20, 2011 (heard on November 15, 2010 by Deputy President Rivlin, and Justices Jubran and Danziger); *ALIS – Association for the Protection of Cinematic Works v. Rotter.net Ltd.*, CA 567-08-09, August 8, 2011.

## **COPYRIGHT LAW UPDATES AND RELATED ISSUES**

Prior IIPA submissions have discussed in great detail previous Israeli bills (such as the Copyright Bill, 5771-2011 – Amendment-Protection of Technological Means and of Means for Management of Rights) and remaining issues in the Copyright Law, 2007 (as amended).<sup>7</sup> IIPA is hopeful that the drafters of the 2011 bill are reconsidering their approach in line with IIPA's prior comments, and will take into account IIPA's comments on the Copyright Law.

**IIPA Supports Enactment of Bill to Extend Term of Protection for Sound Recordings:** IIPA understands from reports that on December 25, 2013, the Government Committee of Legislation endorsed a proposal to lengthen copyright protection in sound recordings in Israel to 70 years.<sup>8</sup> The Knesset Economic Affairs Committee is now to prepare a final version for consideration and hopefully passage into law. IIPA supports the immediate passage of the Bill which will put Israel in line with the clear international trend.

**Addressing Internet Piracy:** Israel's Knesset is reportedly beginning to consider approaches to address growing online and mobile infringements in Israel. The Israeli Government should establish an overall approach to these problems, including criminal liability for the unauthorized making available of copyright works; expeditious notice and takedown (immediately in the case of pre-release material); preservation of injunctive relief; appropriate disclosure of data to law enforcement about infringing users; liability for those whose business models are clearly built on infringement; effective and fair policies to address non-hosted infringements and repeat infringers; and measures to discourage web advertising services and payment processors from assisting infringing sites. Unfortunately, proposals considered thus far would not put into place such a system. Instead, a Knesset member has put forward a proposal to impose a seven percent (7%) royalty on "Google and other search engine companies that link to locally produced Internet content," with proceeds going into a fund for creators with web presence.<sup>9</sup> This proposal is not responsive to the problem; nor is another reported proposed change to the private copy levy.<sup>10</sup> Rather than trying to mitigate the prejudice due to unauthorized activities, the Government of Israel should focus on establishing the conditions (such as those described above) that will permit the operation of a healthy marketplace for online content.

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<sup>7</sup>See, e.g., IIPA, *Israel*, 2013 Special 301 Report, February 8, 2013, at <http://www.iipa.com/rbc/2013/2013SPEC301ISRAEL.PDF>.

<sup>8</sup>See Jenny David, *Israeli Parliament Extends Copyright Protection on Recordings to 70 Years*, Bureau of National Affairs, Patent, Trademark & Copyright Law, January 16, 2014 (subscription only). Under the current Law as amended, Israel protects sound recordings and performances for only 50 years "from the date of its making."

<sup>9</sup>See Jenny David, *Israel Considers "Google Tax" on Search Engines for Copyrighted Web Content*, Bureau of National Affairs, Patent, Trademark & Copyright Law, January 8, 2014 (subscription only).

<sup>10</sup>Any provision that could legalize online piracy or file-sharing and immunize activities of third parties that may induce or support illegal downloading, e.g., through the provision of links to illegal infringing materials, should be rejected.

# KUWAIT

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2014 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** IIPA recommends that Kuwait remain on the Watch List in 2014.<sup>1</sup>

**Executive Summary:** There is an urgent need to address copyright protection and enforcement in Kuwait which has been lagging for several years. Without effective protection in Kuwait including against pirate resellers and enterprises that engage in end-user software piracy, and in the face of severe market barriers for the music industry, legitimate commerce in copyright materials cannot flourish and piracy cannot effectively be countered. IIPA calls upon the Government of Kuwait to eliminate burdensome restrictions on the ability to engage in the music business, and in particular to modify the operation of its onerous content review processes that effectively prevent the development of a legitimate music market. Legitimate streaming service Deezer is operating in Kuwait, but faces many obstacles in trying to expand its operations. The service currently offers only a limited catalog due to content review uncertainties. Content review in Kuwait affects only legitimate actors and does not in any way affect the availability of the same content uncensored via pirate services. The Kuwaiti Government is considering a new draft Copyright Law to replace the current law from 1999. This new draft will hopefully bring the law into compliance with the WTO TRIPS Agreement, create a more deterrent criminal penalties structure, and implement the WIPO Copyright Treaty (WCT) and WIPO Performances and Phonograms Treaty (WPPT). IIPA recommends immediate passage of the draft Law, with changes to ensure full TRIPS compliance and compatibility with the WCT and WPPT, and thus create a legal framework that is more conducive to reducing piracy in all its forms.

IIPA recommends that the U.S. Government should, at the next meeting under the U.S.-Kuwait Trade and Investment Framework Agreement, firmly encourage the Government of Kuwait to take stronger measures in enforcement and to bring its IPR legal framework up to date and into compliance with its international obligations.

### **PRIORITY ACTIONS REQUESTED IN 2014**

#### **Enforcement**

- Have Kuwaiti authorities re-commence raiding activity which ceased since January 2012.
- Investigate and prosecute cases of unauthorized use of software in enterprises, pirate software resellers, and hard disk loading of software onto computers being sold in the market.
- Impose maximum penalties in criminal cases to drive piracy levels down and defeat recidivism.
- Enforce against pirate vendors who sell or advertise illegal products on websites or e-commerce platforms.
- Eliminate marketing restriction prohibitions (such as religious requirements), or at least implement them in an even-handed manner so that pirates do not enjoy a state-enforced monopoly to sell illegal materials.
- Create specialized IP courts.

#### **Legislative**

- Enact Copyright Law amendments to significantly increase minimum and maximum criminal penalties and mandate both fines and prison sentences.
- Further modernize the Copyright Law to meet the requirements of the TRIPS Agreement, implement the WCT and the WPPT, and update the law to more effectively address online piracy.
- Issue an Emiri decree to address enforcement pending the enactment of the new Copyright Law.

<sup>1</sup>For more details on Kuwait's Special 301 history, see previous years' reports at <http://www.iipa.com/countryreports.html>. For the history of Kuwait's Special 301 placement, see <http://www.iipa.com/pdf/2014SPEC301HISTORICALCHART.pdf>. For a discussion of IIPA's 2014 Key Initiatives and Challenges, see IIPA, 2014 Special 301 Submission, at <http://www.iipa.com/pdf/2014SPEC301COVERLETTER.pdf>.



- Eliminate burdensome and inefficient barriers to the distribution of legitimate music, in particular by addressing the operation of the current outdated content review regime.

## **PIRACY, ENFORCEMENT, AND MARKET ACCESS UPDATES IN KUWAIT**

Piracy and some market-related issues remain difficult problems in Kuwait, hindering legitimate businesses from taking hold and driving others out of the market.<sup>2</sup> Piracy in Kuwait today consists of: 1) software piracy, including unauthorized use of software by enterprises (in 2011, the software piracy rate in Kuwait was 59%, representing a commercial value of unlicensed software of US\$72 million), and hard disk loading;<sup>3</sup> 2) pirate sales in the retail markets;<sup>4</sup> and 3) Internet and mobile (smart phone, tablet, etc.) piracy. Websites apparently targeting Kuwait for infringement include *myegy.com* (the 35th most accessed site in Kuwait, with a tagline “Download the latest and the most beautiful films of Arab and foreign Sweeter games, programs and songs and more services”); *subscene.com* (36th, with the tagline “Passionate about good subtitles this community-driven site aims to disperse and produce quality subtitles for media content including Films, TV-Series, Music Videos, and Online Video”).<sup>5</sup>

The Copyright Department is no longer accepting any new complaints for Copyright cases. The Kuwaiti Emir has signed the agreement to transfer the Copyright Department of the Ministry of Commerce and Industry to the National Council for Culture, Arts and Letters (NCCAL). Unfortunately it is not clear when copyright raids will start happening under this agency. Right holders report no enforcement actions since January 2012. Court results arising from prior raids have been non-deterrent, largely because so few cases were prosecuted, and even in those brought forward, extremely low criminal penalties were imposed (given the low maximum penalties in the Copyright Law). The Kuwaiti Government should immediately re-commence raiding, and investigate and prosecute cases of unauthorized use of software in enterprises, pirate software resellers, and hard disk loading of software onto computers being sold in the market. With legitimate digital services having launched in Kuwait, it is also incumbent upon the Kuwaiti Government to ensure an adequate legal and enforcement framework to deal with piracy, including much higher and deterrent minimum mandatory sentences and maximum penalties. Included in such enforcement should be the imposition of Internet takedowns against pirate vendors who sell or advertise illegal products. ISPs have a good understanding of the issues, but the laws have not kept up to provide proper incentives to encourage cooperation between ISPs and right holders.

Censorship practices, which result in banning and on occasion confiscating legitimate product from legitimate stores, continue to inhibit effective access to the Kuwaiti market. Such burdensome and inefficient barriers to the distribution of legitimate music embodied in the current outdated content review regime should be eliminated. If marketing prohibitions (such as those based on religious requirements) are retained, they should be implemented in an even-handed manner so that pirates do not enjoy a state-enforced monopoly to sell illegal materials on the streets or over the Internet, while leaving legitimate right holders with no outlet for distribution of legal materials. Problems with existing censorship processes threaten to undermine the very ability of legal music platforms to operate in Kuwait.

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<sup>2</sup>For example, in previous filings, we noted that the Virgin Megastore in Kuwait City was closed for three months due to restrictive marketing requirements and censorship. Meanwhile, the same products which the Virgin Megastore would have sold (books as well as recorded music) were openly available on the streets in pirated copies, as well as over the Internet through pirate sites.

<sup>3</sup>Data on software piracy rates and commercial values are taken from the 2011 BSA Global Software Piracy Study at [www.bsa.org/globalstudy](http://www.bsa.org/globalstudy). This study assesses piracy rates and the commercial value of unlicensed software installed on personal computers during 2011 in more than 100 markets. The study includes a detailed discussion of the methodology used. BSA plans to release an updated study in the second quarter of 2014.

<sup>4</sup>Much of this activity takes place in Hawalli, Bin Khalidoun street, and the Al Fahahil area.

<sup>5</sup>Several notorious sites (i.e., those recommended to USTR by IIPA as “notorious markets” for piracy in October 2013) are among the top 100 sites accessed in Kuwait.



## **COPYRIGHT LAW AND RELATED ISSUES**

**Copyright Law in Need of Reform:** Copyright protection in Kuwait is governed by the Copyright Law, Decree No. 64/1999 (effective February 9, 2000). Implementing regulations have never been issued. The law fails to comply with the TRIPS Agreement in certain respects and contains other problems and ambiguities, all of which have been recounted in previous IIPA filings.<sup>6</sup> Kuwait, an original member of the WTO, has not joined the Berne Convention (although Berne is incorporated by reference into the TRIPS Agreement), the Phonograms Convention, the WCT or WPPT. IIPA has reviewed several drafts, all of which apparently intend to bring Kuwait closer into compliance with the TRIPS Agreement and make other changes, such as strengthening the penalty structure, providing rudimentary protections of technological protection measures (TPMs), making other changes to implement the WCT and WPPT, and fixing point of attachment issues in the current Decree. IIPA supports passage of a strong law taking into consideration the following, among other things:

- **TPMs:** The law should confirm full coverage under the WCT and WPPT by: 1) ensuring TPMs are defined to include access controls and controls on the exercise of exclusive rights; 2) ensuring trafficking in circumvention technologies, software devices, components, and services is prohibited; and 3) providing civil, administrative, and criminal relief.
- **Communication to the Public Right:** The law should ensure that the definition of “communication to the public” includes “the making available of the work or object of related rights in such a way that members of the public may access it from a place and at a time individually chosen by them” and ensure this interactive right applies to related rights. In addition, it is critical for the traditional broadcast and public performance of sound recordings to require compensation to performers and record companies as contemplated in Article 15 of the WPPT.
- **Internet Service Provider (ISP) Cooperation:** The law should include: principles of liability to hold accountable those who facilitate infringement on the Internet; specific provisions related to ISPs, including notice and takedown, and incentives for ISPs to cooperate with right holders against online piracy, including effective and fair policies to deal with repeat infringers and access to non-hosted infringements.
- **Enumeration of Exclusive Rights in Works:** The law should enumerate exclusive rights, as is the international best practice.
- **Presumptions of Ownership and Subsistence of Copyright:** The law should confirm a presumption of ownership, including for related rights, and a presumption of subsistence of copyright.
- **Availability of *Ex Parte* Civil Searches as Required by TRIPS:** The law should confirm expressly that civil *ex parte* searches are available in line with TRIPS.
- **Effective Civil Remedies:** The current Law contains rudimentary discussion of compensatory damages, but should also provide for the possibility of statutory damages, to be elected by the right holder, and recovery of lost profits, attorneys’ fees, and costs.
- **TRIPS-Compatible Remedy for “Materials and Implements”:** Article 42 of the current Law authorizes the Court of Urgent Matters to confiscate all materials used for illegal publications on “condition that these materials be fit only for republishing said work, performance, phonogram or broadcast program.” This narrow authority does not satisfy the clear language of TRIPS.
- **Government Legalization of Software and Other Copyright Works and Sound Recordings:** The Kuwaiti Government should clearly mandate that all Government agencies use legitimate software and other copyright materials, and adopt software asset management best practices.
- **Protection for Encrypted Programs:** The law should be amended to provide a remedy against trafficking in a device or system used to decode encrypted program-carrying signals without authorization of the right holder.
- **Term of Protection:** The Kuwaitis should take the opportunity presented by the draft law and follow the modern trend (more than 80 countries have greater than TRIPS minimum terms) to protect works for life plus 70 years for works of natural authors, and 95 years from publication for audiovisual works and sound recordings.

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<sup>6</sup>See, e.g., International Intellectual Property Alliance, *Kuwait*, IIPA 2009 Special 301 Report, at <http://www.iipa.com/rbc/2009/2009SPEC301KUWAIT.pdf>.

- **Narrow Exceptions:** Any exceptions adopted in Kuwait must meet international standards and the three-step test of the Berne Convention (incorporated into TRIPS). The prior draft law limited personal copying, which was positive, but the law must not in any case permit reprographic copies of entire books or musical works. The proposal should also require that a backup copy of software must be destroyed if there is no longer lawful ownership or license of the original.
- **Moral Rights Provisions Should be Narrowed:** The moral rights provisions should: 1) ensure that any moral right to “publish” amounts to a right of first divulcation only; 2) ensure that protection against modification does not collide with the exclusive adaptation right of an author and ensure that any translation undertaken may only be done “with authorization”; and 3) restrict the author from withdrawing a work from circulation, or allowing the author to make substantial changes after the economic rights have been transferred, since this would collide with Berne/TRIPS economic rights.
- **Rights Management Information (RMI):** To ensure full implementation of the WCT and WPPT, the law should cover rights management information, defining it properly, and prohibiting the unlawful tampering with or trafficking in RMI or works or objects of related rights which voluntarily employ RMI.

# MEXICO

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2014 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** IIPA recommends that Mexico be retained on the Watch List in 2014.<sup>1</sup>

**Executive Summary:** In 2013, the Mexican federal authorities continued to engage in copyright enforcement efforts in good cooperation with rights holders, but with mixed results. 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. Most of the government's enforcement activities remain focused on hard copy piracy, and not on the priority for the copyright industries, namely, Internet piracy, where much more needs to be done to address a serious and growing problem.

The Government of Mexico has been very slow to promote cooperation between rights holders and Internet Service Providers (ISPs) to combat online copyright infringement, and has instead recommended very weak "notice and notice" provisions. Revision of the Copyright Law is necessary for effective enforcement against digital piracy, including the full implementation of the WIPO Internet treaties, with proper protection for technological protection measures (an imperative for many copyright industries). Internet-related legislative reforms (such as clarifying the making available right), as well as efforts to raise penalties to deterrent levels and to create a warning system for online users, all stalled again in 2013. However, the Copyright Law was amended to allow rights holders to collect damages even absent a final infringement judgment, which is a positive change.

Hard copy piracy in Mexico persists and takes many forms, including CD-R and DVD-R burning of music, audiovisual and videogame discs (widely available in numerous street markets); unauthorized camcording of films in theaters; unlicensed use of software by enterprises, and unauthorized photocopying of books at universities.

The copyright industries recommend several enforcement measures (criminal, administrative and prosecutorial) as well as several legal reforms for the Government of Mexico in order to improve its IPR regime, led by the development and enactment of a high-level national anti-piracy plan to adopt a broad strategy against major targets, and to coordinate federal, state and municipal enforcement activities.

### **PRIORITY ACTIONS REQUESTED IN 2014**

The copyright industries recommend that the Government of Mexico take the following priority enforcement and legal reform measures:

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

- Implement a national *ex officio* anti-piracy campaign with a consistent year-round focus on major targets (e.g., suppliers and distribution chains), a stress on coordination of the available police and prosecutorial resources, and a strategic approach (with a prominent role by the Specialized Unit on Investigation of Crimes Committed Against Industrial Property and Copyright, UEIDDAPI) within the Attorney General's Office (PGR)).

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<sup>1</sup>For more details on Mexico's Special 301 history, see previous years' reports at <http://www.iipa.com/countryreports.html>. For the history of Mexico's Special 301 placement, see <http://www.iipa.com/pdf/2014SPEC301HISTORICALCHART.pdf>. For a discussion of IIPA's 2014 Key Initiatives and Challenges, see IIPA, *2014 Special 301 Submission*, at <http://www.iipa.com/pdf/2014SPEC301COVERLETTER.pdf>.



- Set national goals and augment the tax authorities' (the Mexican Tax Administration, SAT's) anti-piracy actions, including inspecting enterprises for software license compliance.
- Provide Customs with adequate resources and *ex officio* authority to independently make seizures of infringing goods and components.
- Ensure timely destruction of goods seized in criminal and administrative actions to prevent their reentry into the market.

### **Administrative Enforcement**

- Provide the Institute of Industrial Property (IMPI) with additional resources, encourage it to issue decisions more expeditiously, and allow IMPI regional officers to conduct local raids.
- Provide INDAUTOR (the author's rights institute) with more resources and facilities to increase and strengthen its mediation capabilities.

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

- Encourage prosecutors to take *ex officio* actions against piracy (especially online piracy), to focus on prosecuting individuals arrested in such actions, and to seek deterrent sentences, including jail time; in addition increase IPR case training for prosecutors.
- Adopt mandatory sentencing regulations or guidelines to promote deterrent sentencing in piracy cases, and increase IPR judicial training, with an emphasis on technology.
- Implement *ex parte* remedies, especially injunctive relief, for civil IPR infringement cases in order to fulfill Mexico's WTO TRIPS Agreement obligations.

### **Legal Reforms**

- Fully implement the WIPO Internet treaties – in the Copyright, Industrial Property, Criminal and Criminal Procedure Codes.
- Enact legislation to create incentives for ISPs to cooperate with right holders to combat infringement taking place over their networks or platforms (following the Coalition for the Legal Access to Culture (CALC) initiative).
- Enact legislation to impose criminal penalties for large-scale infringements without requiring proof of a profit motive, and for unauthorized camcording of films in theaters.
- Amend the Criminal Code and the Copyright Law to authorize criminal sanctions for the distribution and importation of devices used for the unauthorized circumvention of technological protection measures (TPMs).
- Amend the Civil Code to allow civil damages to be an additional award to plaintiffs in administrative and criminal cases, without awaiting a *res judicata* ruling in the other proceedings.

## **COPYRIGHT PIRACY IN MEXICO**

**Internet piracy:** As of June 2013, there were an estimated 46 million Internet users in Mexico, representing 36.5% of the population, up from 2.7% in 2000 (according to [www.internetworldstats.com](http://www.internetworldstats.com)). As Internet use grows rapidly in Mexico, so does Internet piracy. For unauthorized downloads, the most prevalent digital platforms are P2P file sharing services, as well as sites dedicated to providing links to infringing hosted content, illegal distribution hubs (also known as cyberlockers), forums and social networks, BitTorrent index sites and blogs. Many sites are hosted in

the U.S. and Europe, but administered in Mexico. In 2012, the Government of Mexico took down one such site (the BitTorrent tracker demonoid.me); during its operation, it was a major source of pirated material worldwide. The criminal investigation of the operators of that system is a work in progress.

The most widespread source of music piracy is peer-to-peer (P2P) activity with ARES, Gnutella and BitTorrent dominating, as well as “linked” piracy on blogs and forum sites. Blogspot, a Google service, has been widely used to provide these links. Studies in 2011 and 2012 of illegal downloading activity in Mexico by the Coalition for Legal Access to Culture (CLAC), conducted by IPSOS, found that Internet piracy rates for audiovisual content were very high, and rising. Independent film producers (IFTA members) are especially concerned about Internet piracy because of its harm to legitimate online distribution platforms and services that provide the revenue for financing the development of new creative works worldwide. BSA | The Software Alliance (BSA) reports that downloading software via illegal websites, P2P platforms and online auction sites is growing, with a rise in the market for illegal passwords, codes and key generators. The Entertainment Software Association (ESA) reports that in 2013, Mexico ranked 14th in the world for a second consecutive year in terms of the number of connections by peers participating in unauthorized file-sharing of select ESA-member titles on public P2P networks. Notably, Mexico ranked 28<sup>th</sup> in 2011.

**Hard goods piracy:** Although there has been a significant decline in the sale of legitimate hard goods in recent years, hard goods piracy persists both in the manufacturing and distribution networks, and on the street and at markets. The U.S. Government named three Mexican markets to its 2012 “Notorious Markets” list: (1) Pulga Rio (Las Pulgas) in Monterrey, calling it a “major hub for counterfeit and pirated goods” in the state of Nuevo Leon, operating despite law enforcement activities to decrease the number of vendors; (2) San Juan de Dios in Guadalajara, describing it as an “indoor flea market” with over 300 vendors selling pirated first-run movies, music, videogames, software and other items; and (3) Tepito in Mexico City, “reportedly the main warehousing and distribution center for pirated and counterfeit products” sold throughout Mexico. Other major distribution centers for optical disc piracy (CDs and DVDs) of music, film, entertainment and business software include: Lomas Verdes, Pericoapa, Salto del Agua, Plaza Meave, and (to a growing extent) Plaza de la Computación in Mexico City; La Cuchilla and La Fayuca in Puebla; and El Parián in Guadalajara. The street markets have discrete distribution chains and often involve organized criminal syndicates. It is also troubling that many of these markets reside on public land, increasing the need for attention and awareness by municipal and state authorities. IIPA continues to recommend focusing enforcement on these locales, with a more systematic approach to identifying and prosecuting the criminal organizations operating in these markets. Such efforts should make use of the new forfeiture law, under which landlords aware of criminal activity on property they own must either stop the activity, notify the authorities, or face liability. Even though it was raided at least once by the PGR enforcement officials, piracy levels at Tepito remained “unchanged” in 2013; other key markets in Guadalajara, Puebla and Monterrey were also raided by the PGR authorities.

The Association for the Protection of Film and Music (APCM) reports that hard goods piracy for 2013 in the film industry remained at the same rate as in 2012 (so, at about 85%, and at about 75% for music). There remain at least 80 large, very well-known, “black markets” in Mexico, many of which are well organized and continue to be politically protected (and some are on state or local government property). In some street locations, consumers can exchange previously purchased pirated product. Vendors also make available infringing copies of any catalog product or TV series, often with a 24-hour turnaround time. APCM reported the following PGR statistics on raids and seizures in 2013: there were 180 arrests; 26 charges were filed with seven convictions. There were over 2.2 million CDs seized, and over 3.8 million DVDs seized, plus over 84,000 blank CDs and 17,000 blank DVDs seized. There were 547 street raids, 27 factory or lab raids, and 277 warehouse raids.

Almost all of the pirated disc 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 and China; the main ports of entrance are Manzanillo, Lazaro Cardenas, Matamoros, Reynosa, and Laredo.

Hard goods piracy remains very damaging for the entertainment software industry, as evidenced by the enormous quantities of burned optical discs and counterfeit cartridges (and memory sticks) found in the major markets (cited above), particularly Tepito, Pericoapa and San Juan de Dios. Industry enforcement efforts have uncovered multiple burning labs in Tepito capable of producing hundreds of thousands of pirated games. The widespread availability of circumvention devices and technologies in many markets, and, increasingly, from online auction and e-commerce sites, underpins and facilitates the growing problem of online piracy of entertainment software in Mexico. 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 by modifying the game platform’s operating system to facilitate the play of pirated games (so-called “soft modding”). Circumvention devices are typically manufactured overseas and shipped in component pieces which are then assembled in Mexico. Vendors sell circumvention devices for approximately 350 to 500 Pesos (US\$26 to \$38), often with memory cards containing up to 400 unauthorized copies of games as part of the sale. Enforcement against distributors of circumvention devices is unavailable, because Mexican criminal law prohibits only the domestic manufacture of such devices, but not their distribution or sale.

**Enterprise end-user software piracy:** The primary concern for the business software industry remains the unlicensed use of software by enterprises (end-user piracy). BSA’s most recent software piracy study found that the PC software piracy rate in Mexico was 57% in 2011 with an estimated commercial value of unlicensed software of US\$1.25 billion.<sup>2</sup> As noted in last year’s report, one commendable step forward was the certification in November 2012 of the Mexican Ministry of Economy and several affiliated agencies as meeting software asset management best practices under BSA’s certification program for standards-based software asset management (SAM), the Verafirm program.<sup>3</sup> It is hoped that other government ministries and the private sector will follow this example. Illegal software is also commonly available at street markets (from “carpeteros”), and by downloads from online 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.

**Camcord piracy:** While incidents of illegal recording of films in Mexican theaters have decreased in recent years, camcord piracy continues to threaten both the U.S. and Mexican motion picture industries and the high burden for enforcement of such cases continues to pose challenges. In 2013, only two films were detected as stolen from Mexican theaters, but one of these was the highly successful Mexican film “Nostros Los Nobles.” This is down from 38 incidents in both 2010 and 2011, likely due to convictions in several highly-publicized cases where prosecutors were able to prove not only camcording, but an array of other crimes. In Mexico, successful enforcement against camcord piracy requires evidence of intent to distribute, that is, proof of a profit motive, which is very difficult to obtain. In order to do this, investigators have to watch the thieves actually camcord the movie, walk out of the theater, hand a copy to the people who hired them, and then wait for the film to be widely distributed; by that time, grievous harm has resulted. By comparison, in the U.S. or Canada, the laws recognize the act of unauthorized camcording in a cinema as a crime by itself. Even though there has been a decrease in camcording incidents in the last two years, Mexico’s anti-camcording law needs to be strengthened to allow for enforcement without proof of a profit motive, to prevent further harm to the Mexican box office, as well to the other distribution channels for films in Mexico.

**Book piracy:** For book publishers, the unauthorized photocopying of academic materials remains a concern. Universities should promote respect for copyright with the adoption of appropriate use and copyright policies, and by encouraging professors and teaching staff to promote the use of legitimate textbooks and materials to address this infringing behavior.

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<sup>2</sup>Data on software piracy rates and commercial values are taken from the BSA 2011 Global Software Piracy Study at: [www.bsa.org/globalstudy](http://www.bsa.org/globalstudy). This study assesses piracy rates and the commercial value of unlicensed software installed on personal computers during 2011 in more than 100 markets. The study includes a detailed discussion of the methodology used. BSA’s data is planned for release in the second quarter of 2014.

<sup>3</sup>For more information about the Verafirm program, see [www.verafirm.org](http://www.verafirm.org).

## **COPYRIGHT ENFORCEMENT IN MEXICO**

Three federal agencies take the lead in copyright enforcement in Mexico. The Attorney General's Office (the PGR) is responsible for federal criminal enforcement. The Mexican Institute of Industrial Property (IMPI) takes administrative actions under the Industrial Property and Copyright Law. INDAUTOR (the author's rights institute) is responsible for registering copyrights, as well as enforcement. The Scientific Police of the Secretaria de Seguridad Publica have also assisted rights holders by providing information on illegal software websites, although following recent changes in leadership, the quantity of collaboration has somewhat declined.

### **Criminal Enforcement**

While cooperation between rights holders and the PGR is very solid, IPR prosecution is being hampered by a lack of proper resources, training to new agents (despite many programs), and the lack of deterrent sentences. The number of cases is still far below what is needed to have any significant effect on the marketplace. Additionally, several copyright industries reported excellent cooperation with IMPI against hard goods piracy in inspection visits and *ex officio* raids in 2013. IMPI conducted 1059 software related *ex officio* raids, 450 inspection visits and administrative proceedings, and imposed eight closures of businesses in 2013. BSA reported that there were no criminal convictions in 2013 for software piracy (there were two convictions in 2011, and 20 criminal cases commenced). Lack of coordination between the government agencies (PGR, the specialized IP unit, and local police forces) has continued to stymie enforcement against the distributors of infringing entertainment software. On many occasions in 2013, the Specialized IP Unit obtained search warrants to raid premises known to harbor commercial-scale piratical operations but warrants were not executed (or were delayed) because police officers were not assigned to assist with raids. The entertainment software industry, along with the other copyright industries, recommends that prosecutors continue to focus their efforts on major sellers, rather than on street vendors (further recommending that street vendor raids be used to investigate supply chains to target large-scale distributors, with follow-up criminal prosecutions).

**Structural reforms and jurisdictional issues:** IIPA continues to recommend several "structural" reforms or agency actions to improve criminal enforcement. An overarching recommendation is to implement a national *ex officio* anti-piracy campaign. Such an effort would seek to coordinate the various police agencies (including the Federal Police (PF), the Ministry of the Interior (Gobernación), and the Mexican Tax Administration (SAT), as well as state and local police) that need to be involved in identifying and targeting individuals responsible for large-scale distribution and importation of pirated goods, including the major organized crime syndicates engaged in these operations. The campaign could also focus on: (1) well-known street markets, labs and distribution centers responsible for the sale of large quantities of pirated goods; and (2) enterprise end-users of unlicensed software and other materials. In 2013, a national IPR enforcement plan was publicly released but never implemented; it is a step in the right direction even if it does not have all of the recommended components for an effective plan. That said, joint implementation and monitoring of an IPR enforcement plan between PGR, SAT, IMPI, PROFECO and the Federal Police is required. In a related positive development, during 2013, SAT engaged with PGR to support enforcement actions related to audiovisual piracy, especially in cases where money laundering or tax evasion is suspected; these actions were focused in Mexico City and are a positive step that should continue and be expanded to other states.

A second and related recommendation is to coordinate municipal, state, and federal government criminal enforcement actions. In Mexico's 32 states there are 2,400 municipal governments, 190 of which have populations of over 100,000. Each one of these municipalities has regulations related to commercial establishments, markets and street vendors; but even so, few local anti-piracy actions have been taken. Only four of Mexico's 32 state governments currently cooperate on IPR enforcement – the State of Mexico, the Federal District, Jalisco and Puebla. Besides improving cooperation in these states, coordinating federal-local efforts in Nuevo Leon, Morelos, Baja California Norte, Veracruz and Michoacán should be priorities.

A third recommendation is to significantly improve the PGR's criminal enforcement actions, especially outside of the main cities. Since 2010, the PGR has had the authority to take *ex officio* actions against copyright infringement. In 2013, a change in administration also brought a change in the PGR's strategy that prioritized raids at laboratories and warehouses instead of street raids, resulting in a decrease in the overall number of actions. To improve its success rate, PGR often asks rights holders to file complaints, build their own cases, and take evidence to the authorities, concurrently with PGR's *ex officio* commencement of enforcement activities. The PGR anti-piracy coordinating committees have proven effective in several states, including Nuevo Leon, Morelos and Puebla.

Organized crime syndicates continue to predominate in hard goods piracy, and increasingly, digital piracy in Mexico. The PGR has a special piracy unit, the "Subprocuraduría" Specialized in Investigation of Federal Crimes (SEIDF), which has worked effectively with industries and achieved significant results in some key markets (including in digital piracy cases). However, this unit is under-resourced to effectively dismantle 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. IIPA members recommend better coordination between PGR-SIEDO and PGR-SEIDF, as well as additional resources and training.

Fourth, the Mexican Tax Administration (SAT) should use its inspection power to investigate and audit enterprises for unlicensed software use, since such use can constitute a tax violation. Using this authority would serve as a powerful deterrent to unlicensed software use by business enterprises. SAT should also use its authority to require companies to audit and declare software assets. In 2012, IMPI referred 150 cases to SAT for investigation and auditing; during 2013 SAT analyzed this information and acted accordingly where it found possible tax evasion; IIPA recommends continuous action on these cases in 2014.

Fifth, enforcement agencies should adopt clear and consistent policies for the expeditious destruction of seized infringing goods. The copyright industries have successfully applied the "Ley Federal de Extinción de Dominio" (Federal Law for Property Forfeiture) in piracy cases; but materials seized in the PGR enforcement raids continue to find their way back into the black market. Some rights holders continue to report problems, although there were several instances where rights holders were notified, and did cooperate in the destruction of confiscated goods – including in December 2013 when over 6.4 million illegal products were destroyed at once, the largest such effort in this administration. Article 75 of the Federal Law for the Administration and Alienation of Public Sector Goods requires a final court order to destroy goods, unless they are abandoned, and prosecutors need to wait 90 days to declare goods "abandoned" in order to destroy them. IIPA recommends both clarity in the law, and more cooperation with rights holders to ensure that illegal materials are not returned into the stream of commerce.

Sixth, the Federal Bureau of Consumer Interests (PROFECO) should 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 ongoing training programs with different agencies undertaken by industry (BSA, in particular), but PROFECO still needs to be properly resourced to undertake action against street markets. Multiple changes in the leadership in PROFECO has complicated efforts to develop sustained and effective enforcement improvements.

A continuing weak spot in Mexican IPR enforcement is the judiciary – the need for training to improve IPR expertise by judges (especially training on technology, including circumvention devices, digital distribution, and online piracy); the lack of specialized IP judges and courts; the non-deterrent sentencing in many or most cases (criminal sentences are rare, given the number of raids and cases commenced); and persistent problems with civil litigation. 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 and the award of damages (*reparación del daño*). That court should also issue an advisory to criminal judges nationwide to act expeditiously on applications for search warrants. Judges should also be encouraged to treat copyright treaty obligations as self-executing (in accordance with 2010 constitutional



amendments and Supreme Court decisions). Finally, Mexico should provide sufficient resources for the IP magistrates within the Tax Court, and consider creating specialized IP administrative circuit courts.

### **Civil Enforcement**

Mexico's three-tiered civil procedure system makes civil litigation too complicated, time consuming, and costly for rights holders. There have been some recent improvements: for example, the Copyright Law was amended in 2013 to allow rights holders to seek damages in civil courts even before an administrative infringement decision is issued or becomes final. Mexican law now grants full validity to electronic documents and discovery, although some judges are still not familiar with these rules. In 2011, Mexico amended the Civil Code to provide *ex parte* measures to avoid the destruction of evidence; however, those provisions have not yet been implemented. IMPI's business closures for those opposing inspection visits has had positive results. BSA reported that in 2013, provisional measures to preserve evidence (i.e., the seizure of computers with allegedly infringing software) were used effectively by IMPI in administrative cases. However, this can be an eight to ten year process of litigation in IMPI, the Tax Court and the circuit courts, with a parallel process of approximately two years seeking damages, in civil court.

### **Administrative Enforcement**

**IMPI:** Statutory changes that took effect in 2012 increased the penalties IMPI could impose, and established a presumption of infringement in cases where enterprises refuse entry to IMPI inspectors (so-called "door closures"). These changes bore fruit in 2013, when IMPI undertook 1,509 actions against enterprises infringing software licenses (1,059 *ex officio* actions and 450 *ex parte* raids and proceedings, also known as "full raids") – an increase from 2012 – and imposed higher fines, including immediate fines in door closure cases, and closed 8 businesses who opposed to inspection visits. Other rights holder groups also continued to report significant cooperation and coordination with IMPI on enforcement actions, resulting in more and higher fines. Many of the copyright industries continue to recommend that investigations be conducted more rapidly (including faster issuance of decisions), and that evidence be 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). Several copyright industries reported that IMPI inspectors in 2013 did gather more detailed evidence than in prior years, and that this resulted in better outcomes for infringement cases (including higher fines). IMPI needs more resources to carry out its enforcement mission, including recording equipment, personnel and training. IMPI should also be encouraged to waive or lower rights holder's deposit fees in instances of "obvious" piracy. Last, it is recommended that IMPI empower its regional offices to conduct raids and seizures.

The long-standing agreement between AMPROFON (the association of phonogram and motion picture producers) and IMPI for 100 administrative procedures every month against illegal downloading in cyber cafés, mainly in the capital city area, remained in effect in 2013. BSA and IMPI signed collaboration agreements last year, further strengthening cooperation and leading to an increase in *ex officio* actions and raids.

### **INDAUTOR:**

IIPA members continue to recommend additional training for INDAUTOR 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 should be allocated more resources and facilities to increase and strengthen its mediation capabilities, particularly by providing more mediators and mediation rooms, and requiring more expeditious notices to rights holders. 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.

## Online Enforcement

Several legal deficiencies hamper effective online enforcement. First, there is no specific Mexican legislation establishing liability principles for ISPs in piracy cases. It is assumed that ISPs are subject only to the general liability principles contained in the Civil and Criminal Codes. Without clear legal standards, ISPs claim uncertainty 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 takedowns, but more broadly, there is little cooperation. Google Mexico has been blocking links in Blogspot in response to takedown notices sent by rights holders, but their takedown procedure has proven to be very time consuming, and thus not a very effective remedy.

Second, specific provisions in the Telecommunications Law prohibit ISPs from disclosing a customer's personal information to rights holders seeking civil recourse against 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 Mexican 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 (the film and music association) reports very few Internet piracy cases filed last year (and none pertaining to P2P piracy) mainly due to the lack of adequate criminal provisions. For 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, which is why legal reforms to address these issues are strongly recommended. IMPI has also been working with ISPs and rights holders to develop "cooperative models" for fast and efficient disabling of infringing websites, and at least one proposal to do that and to institute a (weak) notification system to infringers, was introduced in December 2013.

## 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, or detain it for more than a few hours, 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. IIPA recommends greater cooperation between these two agencies to improve border enforcement, and to expedite the procedures by which Customs may make independent seizures of clearly infringing products. Additionally, the Customs Code needs to be amended to grant customs officers *ex officio* powers.

In 2006, 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. Unfortunately, in 2011, PGR halted its seizure of in-transit containers, claiming a lack of authority, and it never implemented a new "protocol" between the PGR and Customs officials. Imported raw materials – blank CD-Rs, blank DVD-Rs, jewel boxes and burners – are still widely used to produce pirate material in Mexico. These importations are not considered a crime, but coordinated administrative actions by the PGR, SAT and APCM have resulted in the seizure of illegal imported raw material.

IIPA continues to recommend cooperative efforts between U.S. and Mexican customs authorities, not only to prevent Mexican exports of pirate movies to the U.S. and Latin markets, but also to control blank media exports from Southeast Asia that pass through the U.S. to Mexico (to avoid Mexican taxes). Mexico should also implement the recently enacted legislation to create a centralized customs registration database to assist with identification of infringing shipments. Other needed improvements include: adopting procedures to address changes in the size and frequency of shipments, and to deal with falsified documents; re-launching Customs' inspection program and its program for seizing goods arriving at local ports, destined for other countries; adopting a maximum quota on blank

media importations used for the pirate market; and developing a strategy to identify infringers who import their goods using falsified information.

The Customs authorities have continued their anti-piracy initiatives with the support of the local American Chamber of Commerce participating in regular training programs in conjunction with IMPI for Mexican officials at various ports on intellectual property enforcement issues and the identification of various types of pirated product, and with regular meetings with industry members. ESA continues to report positive results from ongoing training efforts with Mexican Customs officials (and it participated in five more training programs with customs officials in 2013 throughout Mexico), including detention notifications and seizures of pirated game product from diverse ports, in particular, Guadalajara and Monterrey. ESA notes that importers are now reducing the size of their shipments to avoid detection, making border enforcement even more critical, but more difficult. ESA did report an improvement in the level of support from Customs in dealing with shipments of circumvention devices.

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

**Federal Law on Copyright (1996, as amended):** The 1996 Copyright Law was last amended effective in 2003 (with implementing regulations in 2005). Mexico acceded to both the WIPO Internet Treaties (the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT)) in 2002 (but never fully implemented the treaties, and did not publish the ratification of the treaties with the Agreed Statements). Draft laws to implement the digital treaties have circulated for years, but have never been enacted. The 2013 drafts that circulated publicly would fall far short of proper implementation on issues relating to technological protection measures, for example. One other component of digital treaty implementation that has been proposed in recent years, but never enacted, would enforce a rights holder's authorization for "making available" (i.e., for the distribution or commercialization of copyright material on websites). There are many remaining deficiencies in the Copyright Law (including long-standing NAFTA and WTO TRIPS obligations), as well as those relating to full digital treaty implementation. For details see <http://www.iipa.com/rbc/2010/2010SPEC301MEXICO.pdf>.

As noted above, the Mexican legal regime for dealing with online infringement remains deeply deficient. The draft amendments circulated in 2013 failed to address third party (ISP) liability at all, and provided very weak notice and notice (instead of notice and takedown) provisions. A much more effective approach is available. Over five years ago, 37 civil organizations representing copyright industries, other rights holders and collecting societies formally established the CALC to promote and defend copyrights and related rights threatened by physical and online piracy, working with different government entities and federal authorities. The CALC also focused on legislative reforms, including addressing private copy issues and promoting cooperation between rights holders and ISPs to address piracy in the online environment. The CALC initiative provides a sound framework for needed improvements, including *inter alia*: (1) effective notice and takedown procedures; (2) rules that clarify the illegality of providing services intended to promote the infringement of copyright and related rights; and (3) injunctive relief and a duty on ISPs to provide information to law enforcement agencies.

In August 2013, a new broadcasting and theatrical exhibition regulation was announced (but is not yet in force), that will be burdensome to implement for motion picture and television program producers. The regulation restricts the advertising of "junk food" and sugary beverages on television and in theaters, specifically during programming intended for children.

**Legislative Recommendations:** A few additional legislative reforms needed for effective enforcement (in addition to Copyright Law amendments) include:

- Amendments to the Criminal Code to punish – with a prison term (three to ten years) and fines – the unauthorized camcording of films in theaters. The legislation needs to eliminate any required proof of commercial intent.

- Amendments to the Criminal Code to eliminate proof of a profit motive as a prerequisite to criminal liability for large-scale copyright infringements.
- Amendments to the Copyright Law or Criminal Code to establish criminal sanctions for the distribution or trafficking of devices used for the circumvention of TPMs. This should include “acts” as well as devices, components and services. Mexico’s existing criminal law concerning TPM protection (Penal Code, Article 42) has proven ineffective because it only applies to the domestic manufacture of circumvention devices. Since such devices are made abroad and imported into Mexico, there is no criminal enforcement against retailers of these devices.
- Amendments to the Customs Code to grant customs inspectors *ex officio* powers to detain and seize infringing imports.
- Amendments to strengthen administrative enforcement by: (1) providing tax crime prosecution of copyright infringement (when it implicates tax liability); and (2) increasing administrative sanctions.
- Ensure that all relevant rights holders are entitled in law and practice to operate effectively through the collecting bodies of their choice in the licensing of broadcasting, public performance and other communications to the public.
- Enact and enforce decrees to ensure the procurement and use of legal computer software in governmental agencies at all levels (especially all state and municipal agencies).

Enhancement of copyright and enforcement standards, building upon those agreed to by current FTA partners, Australia, Singapore, Chile, and Peru, and found in the more recent in-force agreement with Korea, should be extended to other countries in the region through the Trans-Pacific Partnership (TPP) Agreement, including in Mexico. Such an outcome will contribute to U.S. job growth, increase exports, and facilitate continued economic stabilization in line with the U.S. Administration’s goals.

# ROMANIA

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2014 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:**<sup>1</sup> IIPA recommends that Romania remain on the Watch List in 2014.

**Executive Summary:** In the midst of steady and significant piracy rates in Romania, enforcement conditions have only deteriorated. High-level Romanian authorities support the private sector in promoting anti-piracy messages, but their efforts have not translated into concrete steps to bring copyright criminals to justice, and enforcement actions in the past year have dropped. As a result, piracy remains widespread in Romania for all forms of copyright works, especially in the online space, where international pirates seek safe haven from better-enforced terrain elsewhere in Europe. Making matters worse, in 2013 the Court of Appeal held that the making available right in Romania is subject to mandatory collective administration, contradicting Romania's obligations under the WIPO Treaties to provide an exclusive making available right and the means to enforce it. We encourage the Romanian Government to address this troubling development, adapt the country's laws to the modern environment, encourage a national policy of cooperation against online infringement, ensure police officials are competent and well-equipped to conduct raids and investigations efficiently, and give targeted prosecutors and courts the authority and training to bring piracy cases to speedy conclusion, with deterrent sentences and penalties. The support and assistance of the U.S. Embassy in Bucharest continues to be an invaluable part of the continued effort to address these crucial issues.

### PRIORITY ACTIONS REQUESTED IN 2014

- Senior levels of the Romanian Government must express a coordinated commitment to fighting copyright piracy, providing the necessary resources and authority to all enforcement authorities to take sustained and concrete actions to support that commitment, and monitoring progress over an extended period of time.
- Provide adequate resources, high-priority support, and instructions to prioritize IPR cases for all specialized police as well as local law enforcement for investigations and actions involving piracy on the Internet.
- Ensure that specialized IPR prosecutors are tenured in IPR expertise, communicate with rights holders' representatives, and provide results by swiftly initiating and indicting criminal infringement cases.
- Impose swift, deterrent, non-suspended sentences and fines for criminal copyright convictions, and avoid dismissing cases, especially those involving high-level damages or repeat offenders.
- Amend the law to resolve obstacles to search warrants in enterprise end-user software piracy cases.
- Permit rights holders' organizations to serve as court experts in copyright infringement cases.
- Amend the law to clarify that the making available right is not subject to mandatory collective administration.
- Amend the Copyright Law to reauthorize IPR-trained Tribunal-level prosecutors in criminal copyright cases, and instruct public prosecutors' offices and courts to prioritize IPR cases, including Internet piracy cases.
- With respect to the Romanian Copyright Office (ORDA), (1) abolish the statutory stickering (hologram) system; (2) make ORDA's track recordation system for sound recordings voluntary and free of charge; (3) substantially reduce ORDA's tariffs; and (4) simplify intricate and bureaucratic procedures.
- Include rights holders in any legislative consultation process to amend the copyright law or other laws.

<sup>1</sup>For more details on Romania's Special 301 history, see previous years' reports at <http://www.iipa.com/countryreports.html>. For the history of Romania's Special 301 placement, see <http://www.iipa.com/pdf/2014SPEC301HISTORICALCHART.pdf>. For a discussion of IIPA's 2014 Key Initiatives and Challenges, see IIPA, *2014 Special 301 Submission*, at <http://www.iipa.com/pdf/2014SPEC301COVERLETTER.pdf>.



## **COPYRIGHT PIRACY IN ROMANIA**

**Online Piracy:** For several years now, Romania has developed into a significant European haven for Internet piracy. A number of well-known illegal websites choose Romanian ISPs for hosting services with little risk, such as the linking sites *hdmusic.me* and *downloadbox.me*, and the cyberlocker *share-byte.net*. Romanian users increasingly access illegal content at home and download and burn copyrighted materials — music, videogames, films and software. Legitimate distributors of these products struggle in the face of the unfair competition that such widely available pirated content represents. The problem has so pervaded Romania's webspace that pirate services there are now serving users both in and out of Romania.

Each industry can attest to the damaging levels of online piracy in Romania. In 2013, Romania ranked 13th in the world in the number of connections by peers participating in the unauthorized file-sharing of select Entertainment Software Association (ESA) member titles on public peer-to-peer (P2P) networks. The software industry reports a growing presence of pirate software on file-sharing networks including BitTorrent networks. This illegal downloading of software typically occurs from users on home computers, who then distribute the pirated works further online or bring the illegal software to work for use in enterprise settings. Unauthorized credentials used to access cloud software services are also becoming more prevalent.

Local film distributors report a significant increase of online piracy in the country in 2013, including via BitTorrent networks and other P2P formats, as well as websites that offer streamed pirate audiovisual works. The most prominent of these sites is *vplay.ro*, which offers Romanian users access to streaming television series for free or even for subscription payment. These illegal services based in Romania are the source of audio and video camcords that have a direct impact on the legitimate online market in Romania and in other countries, and serve as the foundation of a still-present illegal DVD market worldwide. There are reports of the appearance of illegal digital content with Romanian subtitles in Moldova, both online and on broadcast networks, creating a substantial problem for film distributors there. There are also reports of unauthorized retransmission of television programs in the countryside of Romania.

The music industry faces high levels of Internet piracy in the form of P2P file-sharing, yet the growing use of cyberlocker sites to distribute infringing music files is close behind.

**Enterprise End-user Software Piracy:** BSA | The Software Alliance (BSA) reports that the software piracy rate in Romania was 63% in 2011, representing a commercial value of unlicensed software of US\$207 million.<sup>2</sup> This includes continued widespread use of unlicensed software among small businesses.

**Hard Goods Piracy:** The levels of optical disk piracy in Romania have declined somewhat in recent years, a trend attributable to both the increase in Internet piracy and enforcement actions against places of sale. Hard-disk loading, an activity that involves resellers installing pirated or unlicensed software onto PCs that are then sold on to consumers, was for a short time on the decline as a result of private sector efforts combined with deterrent sanctions issued by law enforcement. However, in the aftermath of some dismissed hard-disk loading cases, a new wave of this type of illegal software distribution has crept back on the scene.

## **COPYRIGHT ENFORCEMENT IN ROMANIA**

Romania's copyright enforcement suffered from a significant decline in 2013, reflecting a de-prioritization of copyright crimes among police, prosecutors, and judges. Despite positive interactions with higher level officials within the Romanian Police, the General Public Prosecutor's Office, and the Romanian Copyright Office in 2013, the law

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<sup>2</sup>Data on software piracy rates and commercial values are taken from the 2011 BSA Global Software Piracy Study at [www.bsa.org/globalstudy](http://www.bsa.org/globalstudy). This study assesses piracy rates and the commercial value of unlicensed software installed on personal computers during 2011 in more than 100 markets. The study includes a detailed discussion of the methodology used. BSA plans to release an updated study in the second quarter of 2014.

enforcement officials in the field continue to look past many piracy cases and have poor results in the cases they do address. Difficulties in civil and criminal litigation include obstacles to gathering evidence in raids and investigations, and prosecutorial dismissal of cases.

Meanwhile, the Intellectual Property (IP) Working Group is an important but under-utilized part of Romania's IPR public-private cooperation and enforcement regime. It was formed in 2006 as a form of public-private partnership for the organization of training programs and intra-governmental cooperation, led by the IP Department of the Public Ministry within the General Public Prosecutor's Office. The IP Working Group includes all the public authorities having IPR enforcement jurisdiction along with representatives from the private sector, and should increase its efforts to communicate among enforcement bodies the importance of reducing piracy in the year to come.

**Cooperation for the Removal of Infringing Material Online:** The government has taken no action to encourage service providers that host or direct traffic to infringing materials to cooperate in taking down infringing content, and there are no mandatory or voluntary established procedures for takedown notices to service providers. With no negotiations underway to develop an understanding among these parties for the handling of infringement notices, ISPs in Romania typically decline to take voluntary measures even in response to rights holder requests.

The music industry reports very low levels of cooperation with Romanian hosting providers even with respect to the most rudimentary form of cooperation (notice & takedown). The film industry reports that notices sent in 2013 to Voxility, the main hosting provider for copyright infringing websites, have gone without response, and direct communications with the service's management confirms their unwillingness to cooperate with rights holders in anti-piracy measures. Instead, rights holders have been forced to take the matter to litigation in what could be a lengthy process if preliminary injunction proceedings are unsuccessful. The local music industry also initiated a civil action against a hosting provider for the refusal to remove/take down infringing links or block access to the infringing materials. The court recently granted damages against the provider. However, given the general inaction of the Government of Romania to enforce the law, this decision does little to affect the perception that Romania is a favorable climate for hosting providers to supply services to those who infringe copyright. Government leadership is needed to bring the relevant parties together for an agreed solution.

**Police Enforcement:** The Romanian Police is a cooperative partner with the private sector. For example, BSA and the police renewed the cooperation Protocol in September 2013, and continued conducting joint awareness campaigns, both to the public generally as well as specific efforts to inform enterprises of the various risks associated with the use of unauthorized software. Unfortunately, the police suffers from insufficient resources and in 2013 the number of actions taken and resulting convictions declined sharply. Some local police forces are organized efficiently and manage to proceed with cases despite these limitations, according to the music industry. The police have specially appointed officers for IPR matters, and conduct *ex officio* raids, particularly in enterprise end-user software piracy cases. However, the superiors of the General Inspectorate of Police should retain specialized officers and ensure resources are adequate for their dedication to IPR cases. Since 2009, copyright enforcement actions by the Romanian Police have dwindled. For example, in 2013, BSA reports that the police conducted 238 enterprise end-user piracy raids, a significant drop from 430 conducted in 2009. Internet piracy raids numbered 25 during 2013, a decline from 38 in 2012.

A major obstacle in enterprise end-user software piracy enforcement is the need to have both a physical location warrant and a computer search warrant with strict identification of the computers and of the digital data media that are to be searched for unlicensed software. In practice this causes the police to conduct twice as many actions: first obtaining the physical location search warrant to visit the site, and second, having retrieved the computer identification information, they can request the search warrant for the PCs themselves. This process is time- and resource-consuming and it can also lead to unsuccessful raids if a company shows misleading licensing information or is tipped-off before the initial search. This issue dates back to 2005 and still remains unsolved. It has been the subject of discussion for amendments to the copyright law currently under consideration.

Gathering evidence in Internet piracy cases is significantly more challenging since the Constitutional Court brought down the legal framework on data retention in 2009, as explained below. Moreover, under legislation still in force, traffic data may be obtained by order as part of a criminal investigation, but such a case may not be opened without existing evidence sufficient to prove infringement – a self-defeating limitation that prevents the collection of necessary evidence to initiate the case.

**Judicial Enforcement:** As reported in IIPA's past submissions,<sup>3</sup> Romania's courts remain a bottleneck for copyright enforcement. Prosecutors continue to view IP offenses as trivial and lacking "social harm," leading to dismissals that are generally upheld on appeal. Romania's courts lack specialized IPR judges or panels, making it difficult to provide targeted training for judges. Non-deterrent sentences, after an average of three years at trial, are a common result. Prioritization of IP crimes in general needs to be instilled in the judiciary from the highest levels.

Romania's local public prosecutor's offices each include one public prosecutor appointed for IP cases, among other responsibilities. However, the requirement to hand over IP cases to specialized prosecutors is not strictly followed, and inexperienced prosecutors may be called upon to handle these highly technical cases. The problem is compounded under the 2010 reorganization of court jurisdiction of copyright cases, by which all initial criminal copyright cases would be heard by First Instance Courts, courts of lower instance than the Tribunal courts that had this jurisdiction in the past. The reorganization dispersed IP competence from 42 Tribunal courts to as many as 188 Courts of First Instance, making training and capacity building in copyright crimes extremely difficult. Recent informal surveys of IP prosecutors revealed that the vast majority have only a few months of experience handling these matters, and are likely to rotate to other fields. Historical IP cases that were still queued before the Tribunals were finally resolved by 2013, and the inability of the lower courts to bring new cases to conviction is starkly evident. Only four cases involving enterprise software piracy have resulted in convictions in 2013, a drop from 15 in 2012 and 24 in 2009.

Local industry now reports that the General Prosecutor's Office is considering abolishing its IP department in 2014. Further, the section of the Bucharest Court of Appeal handling IP cases is expected to be dissolved in March 2014, with no published plan indicating whether the judges to be handed redirected IP cases will have any specialization in the field. These developments clearly demonstrate that Romania's judicial system is taking a step in the wrong direction and indicate a general lack of appreciation for the importance of IP crime enforcement.

**Anti-Piracy Activities of the Romanian Copyright Office (ORDA):** 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. In addition to its administrative duties, ORDA conducts forensic examination of seized goods in software piracy cases and issues a technical report certifying which goods are pirated. However, the verification process is not transparent and there are no independent experts in the copyright domain. Further, ORDA has been less than transparent in its interactions with the IP Working Group. Romania should (1) abolish the statutory hologram system; (2) make the track registration system voluntary and free of charge; and (3) allow rights holders' organizations to conduct forensic examination and act as court experts in copyright infringement and piracy cases.<sup>4</sup>

The software industry notes that ORDA does supervise the activity of professionals involved in the software business, such as importers, producers, distributors, and resellers. ORDA applies administrative sanctions in cases where registrations, administrative measures and obligations are not observed. ORDA served as an important partner to BSA in 2013, promoting the use of licensed software among public authorities and publicly financed entities, and emphasizing the security and other risks associated with software piracy. An ORDA-BSA cooperation protocol was signed in 2012. In 2013, BSA and the police also organized a high school piracy awareness project with ORDA support.

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<sup>3</sup>See last year's IIPA Special 301 submission on Romania at <http://www.iipa.com/rbc/2013/2013SPEC301ROMANIA.PDF>.

<sup>4</sup>For further details on these long-standing problems, see IIPA's 2010 submission on Romania at <http://www.iipa.com/rbc/2010/2010SPEC301ROMANIA.pdf>.



**IPR Trainings and Public Awareness:** In 2013, BSA participated in three programs organized by Romanian authorities to increase awareness and technical support for enforcement officers. These included events with the Supreme Council of Magistrates for a variety of law enforcement officials, with the Romanian Police for internal training, and with the General Public Prosecutor's Office and the Romanian Police for a variety of law enforcement officials. MPA also participated in the third listed event. The U.S. Embassy provided valuable support as well. In late 2013, BSA organized three training sessions for police officers, public prosecutors, and technical experts of ORDA. One hundred twenty-five participants received a day and a half of technical and legal training.

## **COPYRIGHT LAW AND RELATED ISSUES**

There are a variety of Romanian laws that affect the abilities of rights holders to protect their content and of the authorities (both criminal and administrative) to enforce the law.

**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>5</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), the WIPO Performances and Phonograms Treaty (WPPT), or the EU Copyright and Enforcement Directives, and may not fully implement the WTO Trade Related Aspects of Intellectual Property Rights (TRIPS) Agreement. For example, Article 143, which provides protection for technological protection measures (TPMs), 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.

Following a recent and troubling decision of the Court of Appeals, amendments to the copyright law are now needed to clarify that the making available right is an exclusive right not subject to mandatory collective management. The 2013 decision was made in a case regarding the on-demand streaming of sound recordings over the Internet, and held that the activity was subject to collective management with a mere right of equitable remuneration. This holding is a misinterpretation of the right of communication, as set forth under Article 8 of the WCT and the making available right, as set forth under Articles 10 and 14 of the WPPT, which in both cases are exclusive rights.

A set of draft amendments to the Copyright Law is being considered for adoption possibly by the first half of 2014. If adopted, the draft would finally implement the EU Directive 2011/77, regarding the term of protection of copyright and certain related rights, an obligation that was due to be completed by November 1, 2013. The draft is also expected to resolve the issue of computer search warrants that has created a long-standing problem for the software industry to conduct raids regarding enterprise end-user software piracy. Unfortunately, the draft includes decreases of penalties for some copyright crimes and could reduce the scope of cases in which police and law enforcement may engage in *ex officio* actions. The draft also fails to correct the detrimental allocation of competence of copyright crimes to the Courts of First Instance. Another needed revision would implement Article 8.3 of the EU Copyright Directive to allow rights holders to seek injunctions before civil courts against intermediaries whose services are used by a third party to infringe copyright.

**No Legal Framework for Online Anti-piracy Investigations:** A Constitutional Court decision from October 2009, finding that the now-defunct Data Retention Law (no. 298 of 2008) was unconstitutional, has continued to hinder the ability of Romanian police authorities to seek the identities of online infringers. Law no. 298 was enacted to implement the EU Data Retention Directive (2006/24/EC), and required Romanian ISPs to retain their subscriber and network data for six months and to communicate it to the authorities, upon court order, in cases of crimes committed on the Internet or through other communication systems.

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<sup>5</sup>For a detailed history of these amendments, see the IIPA's 2010 Report at <http://www.iipa.com/rbc/2010/2010SPEC301ROMANIA.pdf>.

In June 2012, Romania adopted Law no. 82 of 2012 to replace Law no. 298/2008 and to implement the EU Data Retention Directive. The new law grants to the authorities the ability to require ISPs to implement data retention policies, so that such data may be disclosed to authorities in cases of severe criminal offenses – but copyright crimes are not clearly within the scope of the new provision. Unfortunately, because the data retention obligations and the requirements to make such data available to the competent authorities only apply to limited cases and under limited conditions, ISPs in Romania have remained uncooperative and it remains difficult for the authorities to obtain the necessary user information for effective enforcement. Further amendments are needed to allow the collection and use of needed evidence (data retained under Law no. 82/2012) in anti-piracy investigations.

**Intermediary Liability for Online Piracy:** The Romanian Copyright Law addresses the unauthorized uploading and downloading of copyrighted works from the Internet, but is not clear as to the responsibility of ISPs specifically.<sup>6</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. 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, ANRCTI cannot act in response to infringements of the copyright law, but only in cases of infringement of the E-Commerce Law, leaving copyright violations out of the purview of this ISP liability mechanism. Further, the E-Commerce Law 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, such illegal/infringing nature must be confirmed by a competent public authority. However, 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 support this provision in principle; however, it requires clarification to make it workable and enforceable.

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<sup>6</sup>See Article 1432 of the Copyright Law (a crime punishable with imprisonment from six months to three 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.)

# SAUDI ARABIA

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2014 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** IIPA recommends that Saudi Arabia be placed on the Watch List in 2014.<sup>1</sup>

**Executive Summary:** The Kingdom of Saudi Arabia (KSA) stands as one of the largest potential markets for copyright owners in the Middle East. The market's consistent under-performance is attributable to piracy; to insufficient KSA Government resource allocation; and to market barriers (such as import restrictions on many copyright products and onerous and unduly complicated content review processes). KSA retains the highest piracy rates in the Gulf region, in the 90% range for movies and music, unacceptably high for entertainment software and publishing, and persistently high software piracy rates (51% in 2011, with little to no improvement over the last five years). High-quality counterfeits enter into the channels of commerce in Saudi Arabia from UAE (duty-free zone) and China. The KSA Government has made little progress in legalizing its software use, and street vendor and signal piracy continue to be major irritants. Positive developments include the Board of Grievances (BOG) issuance of its first deterrent penalty against a recidivist video pirate; the Violation Review Committee (VRC) consistently increasing penalties and improving the efficiency of handling cases; increased and sustained raiding; some successful enforcement against Internet piracy websites and services; and increased transparency with right holders. However, these developments are insufficient to make a permanent dent in piracy. The United States has a Trade and Investment Framework Agreement (TIFA) with the KSA Government, and will hold talks in February 2014. IIPA recommends that the U.S. Government use the TIFA process to obtain commitments from the KSA Government to take necessary steps to address the particular issues discussed below, in the near term, in order to make space for legitimate commerce in copyright works.

### PRIORITY ACTIONS REQUESTED IN 2014

#### Enforcement

- Implement Ministry of Culture and Information (MOCI) plan to add 300 employees, including 150 inspectors, and put in place an appropriate and carefully managed reward and recognition program.
- Issue a mandate to legalize software usage within KSA Government ministries and grant authority to MOCI to audit and enforce legalization.
- Establish a special cybercrime unit within the Police and an Internet piracy unit at MOCI; work closely with the Communication and Information Technology Commission (CITC) to take more actions against Internet piracy.
- Ensure that cases involving major seizures or repeat offenders are systematically adjudicated through the VRC and the BOG, resulting in deterrent sentencing.
- Legalize pay TV usage throughout the KSA, especially on compounds.

#### Legislation

- Ensure penalties structure is adequate to deter piracy.
- Amend Copyright Act to fully implement (and join) the WIPO Copyright Treaty (WCT) and WIPO Performances and Phonograms Treaty (WPPT), including ensuring that the law provides incentives for Internet Service Providers (ISPs) to cooperate with right holders against online and mobile piracy.
- Adopt changes to content review regulations and/or practices for music that currently limit the operations of legitimate platforms while having no impact on pirate services.

<sup>1</sup>For more details on Saudi Arabia's Special 301 history, see previous years' reports at <http://www.iipa.com/countryreports.html>. For the history of Saudi Arabia's Special 301 placement, see <http://www.iipa.com/pdf/2014SPEC301HISTORICALCHART.pdf>. For a discussion of IIPA's 2014 Key Initiatives and Challenges, see IIPA, 2014 Special 301 Submission, at <http://www.iipa.com/pdf/2014SPEC301COVERLETTER.pdf>.



## **PIRACY AND ENFORCEMENT UPDATES IN SAUDI ARABIA**

Prior IIPA reports on the Kingdom of Saudi Arabia contain detailed discussions of piracy and enforcement issues. This report serves only as an update to those and is not to be considered an exhaustive review of issues.<sup>2</sup>

**Enterprise End-User Software Piracy Hinders Development of Software Industry:** High levels of unauthorized use of software in enterprises cause mounting losses to the software industry in Saudi Arabia. The enterprise software piracy rate in Saudi Arabia was 51% in 2011, above the global average of 42%, and representing a commercial value of unlicensed software of \$449 million.<sup>3</sup> In an effort to increase the frequency and effectiveness of inspections on enterprises to detect unauthorized use or under-licensing, MOCI has agreed with a plan to increase the number of employees by 300, adding 150 additional inspectors; now the plan must be implemented. This is critical, as is an appropriately tailored reward and recognition program, to ensure that such efforts are effective in reducing piracy throughout the Kingdom. The Minister of Culture & Information sent his request (and two reminders) to the King, but has not received the required support and approval yet. Implementation thus awaits the King's order to the Ministry of Finance (MOF) to provide the manpower and required budget. The current (and very low) number of MOCI inspectors (reported to be 12-15 overall) is inadequate to address the enormity of the enforcement challenges. Without the reward and recognition program, existing inspectors will have little incentive to do their job. We appreciate the support of MOCI Vice Minister Dr. Abdullah Al-Jasser in helping guarantee higher levels of support and resources. It should be noted that the 12-15 copyright inspectors pales by comparison with the 600-800 Inspectors at the Ministry of Commerce tasked with enforcing against trademark-related issues.

Where inspections are run and fines are meted out, the fines are usually so low that they do not even amount to the software license fee. Fines therefore provide no incentive for companies to legalize. In some cases, end-users have refused access to inspectors, emphasizing the need for Police cooperation with MOCI inspectors. Further, industry reports over 150 enforcement activities related to software piracy took place in 2013, including against resellers, maintenance workshops, and street vendors. However, such activities are minimal compared to the amount of piracy in the marketplace and compared to requests (rejected due to lack of capacity). One positive development involves case handling by the VRC. When cases are brought to the VRC, that body has improved its execution dramatically over the past year. They have very few outstanding cases, and there has been an improvement in the penalties issued and damages awarded. Unfortunately, the overall effect of this improvement has not led to greater deterrence. One reason for this is the bottleneck at the BOG. Cases handled by the VRC are invariably appealed to the BOG (the infringer has 60 days to appeal a judgment by the VRC), and cases appealed to the BOG can take years to complete.

**Little Progress on Government Legalization:** MOCI has committed to upgrade and legalize the KSA Government's software usage, undertaking an inventory and reporting out to industry. However, the inventory and reporting has not yet occurred.<sup>4</sup> In 2013, MOCI's Department of Copyright conducted a summit for KSA Government agencies, and strong messages were sent by the Vice Minister for all KSA agencies to legalize. However, the reality is that very few accounts have actually legalized, and the bulk of Ministries still will not respond to requests to discuss the matter with industry. IIPA understands that a Decree from the King has previously been issued, directing all KSA Government entities to use legal software, but the refusal of the MOF to grant them adequate budgets has been raised as a reason for the lack of progress. The Saudi leadership should once again issue a mandate to KSA Government ministries, requiring them to procure and use only licensed software, and granting authority to MOCI to audit and enforce compliance. The Government should also issue decrees directed at the MOF to ensure proper budgeting for the same. The KSA Government should publicize quarterly reports detailing progress in this initiative.

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<sup>2</sup>See, e.g., IIPA, *Saudi Arabia*, 2013 Special 301 Report, February 8, 2013, at <http://www.iipa.com/rbc/2013/2013SPEC301SAUDIARABIA.PDF>.

<sup>3</sup>Data on software piracy rates and commercial values are taken from the 2011 BSA Global Software Piracy Study at [www.bsa.org/globalstudy](http://www.bsa.org/globalstudy). This study assesses piracy rates and the commercial value of unlicensed software installed on personal computers during 2011 in more than 100 markets. The study includes a detailed discussion of the methodology used. BSA plans to release an updated study in the second quarter of 2014.

<sup>4</sup>In 2009, industry reported sharp increases in high-quality counterfeit software being sold to KSA Government Ministries as part of hardware purchases. While the computers purchased were returned to the vendor, industry requested immediate enforcement action against such vendors, but although five years have passed, MOCI has not taken action.

BSA members have offered support for third-party software asset management to identify current deficiencies in government legalization and on-going mechanisms to ensure continued compliance.

**Internet Piracy Proliferating Despite Good Enforcement by MOCI:** By the end of 2012, there were a reported 1.9 million fixed broadband subscriptions, well over 100% mobile penetration (53 million mobile subscriptions for a population of just over 28 million), and over 15 million total Internet users in Saudi Arabia (representing 54% of the population), according to the International Telecommunications Union (ITU).<sup>5</sup> With legitimate digital services such as iTunes, Deezer, and Nokia Music launching in Saudi Arabia, it is incumbent upon the KSA Government to ensure an adequate legal and enforcement framework exists to make space for legitimate e-commerce in copyright materials. Unfortunately, thus far, right holders have witnessed a proliferation of online and mobile piracy services that hinder the development of legitimate business models.<sup>6</sup> While MOCI has cooperated well with industry on addressing some infringing websites and services brought to its attention, and is to be commended for these efforts, it is critical that MOCI take a new more proactive position. The next stage should involve establishing a special cybercrime unit within the Police Committees and an Internet piracy unit at MOCI that would work closely with the CITC to take further actions against Internet piracy. In addition, the computer cybercrime unit at the Ministry of Interior (MOI) should incorporate itself into this process. MOCI has sent a letter to CITC requesting that CITC send a directive to all ISPs to deal effectively with online infringements. This is a positive step.

**Hard Disk Loading and Street Vendor Sales:** Right holders continue to report harmful hard disk loading of software and hard goods street piracy by resellers in the eastern (Dammam, Khobar, and Dhahran), central (mostly Riyadh) and western (Jeddah, Makkah, and Madinah) parts of the Kingdom. The KSA Government ran a “zero tolerance” policy in the past toward street vendor piracy with positive effect. The Copyright Department executed some raids in 2013 against street vendors selling pirate goods and confiscated their vehicles, and the VRC issued the first judgment on a fine against a street vendor. This is a commendable step, and more should be done, including re-commencing the zero tolerance policy until street piracy becomes a *de minimis* problem. The Police Committees in Riyadh and in other major cities should be assigned to run street vendor investigations, raids, and prosecutions as appropriate against large producers and distributors of pirate product. Marketing (and content) restrictions greatly hinder legitimate right holders and should be eased, but in the absence of steps to do so, at least they should be imposed against pirate sellers who sell uncensored pirate materials without regard to the restrictions. In addition, as many products are coming into the Kingdom from the UAE free trade zone as well as from Asia (mainly China), Saudi Customs must reinvigorate its efforts, including on an *ex officio* basis, to seize and detain pirated and counterfeit products, and to impose deterrent fines on importers of seized product. Prosecutions should once again ensue, so that the first conviction achieved in the *Video Mesfir* case does not prove to be an isolated case. Cases involving major seizures or repeat offenders must systematically be adjudicated through the VRC and the BOG, resulting in deterrent sentencing.

**Pay TV Piracy:** Piracy of pay TV content in Saudi Arabia remains serious, notwithstanding that we are aware Saudi Customs has seized some decryption equipment.<sup>7</sup> Premium channels and services are targeted, and the problem is particularly severe in the compounds. Each compound has thousands of homes under central management controlling and operating cable services. The compounds utilize smart cards, installing them in their centralized “head end” and then redistributing pay TV channels without authorization or payment to right holders. The management of these compounds are very influential and can clearly afford to pay for premium channels but choose not to do so. MOCI, the KSA Police, and right holders should cooperate to develop a plan to convert compounds to legitimacy, bringing pay TV piracy in the compounds to an end.

**Enforcement Against Book Piracy Should Continue, and Should Commence Against Music Piracy:** Publishers have received good cooperation from MOCI and raids have been run upon request. Raiding needs to be

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<sup>5</sup>See International Telecommunications Union, *Statistics*, at <http://www.itu.int/en/ITU-D/Statistics/Pages/default.aspx>.

<sup>6</sup>Many notorious sites (i.e., those recommended to USTR by IIPA as “notorious markets” for piracy in October 2013) are among the top 100 sites accessed in KSA, and some websites, such as *3asq.com* (the 73rd most accessed site in KSA), and *myegy.com* (54th) have an apparent nexus to, and/or are peculiarly popular in the Kingdom, like *subscene.com* (28th).

<sup>7</sup>A major issue affecting pay TV stakeholders is the illegal importation, distribution and sale of decoder boxes that circumvent encryption technologies.

extended to the music and recording industry which suffers very high rates of piracy in the Saudi market, both physical and online. In 2013, the MOCI, in collaboration with the Ministry of Education, completed an awareness campaign directed at all universities about the importance of adhering to the copyright law and not using pirated textbooks or photocopies.

## **COPYRIGHT LAW AND RELATED ISSUES**

**Remaining Deficiencies in Saudi Law Related to Deterrence:** Most of the deficiencies in the Saudi Copyright Law previously identified by IIPA in previous filings were remedied in the Copyright Law implementing regulations adopted in 2005. A few deficiencies remain, however. The law does not appear to mandate destruction of infringing goods, and does not include the award of costs and attorney's fees as provided for in the TRIPS Agreement. Furthermore, statutory prison sentences remain very low. It is very important to ensure that the penalties structure for the VRC and BOG remain high enough to deter piracy.

**Amendments to Implement WCT and WPPT:** The KSA Government is apparently consulting with stakeholders and the World Intellectual Property Organization (WIPO) about plans to develop an adequate legal infrastructure to deal with Internet infringements by fully implementing, and then joining, the WCT and WPPT. It is clear that the key to implementation will be protecting technological protection measures (TPMs) against unlawful circumvention. This should include: 1) covering TPMs that control access to, as well as the exercise of exclusive rights in, works, sound recordings, and other subject matter; 2) prohibiting trafficking in circumvention technologies, software, devices, components, and services; 3) ensuring exceptions are narrow enough to preserve the adequacy and effectiveness of protection; and 4) providing deterrent civil and criminal remedies against violations involving TPMs. In addition, the KSA Government should ensure that adequate rights are afforded as to communications to the public, including the interactive "making available" right as to works, sound recordings, and other subject matter, and that broadcasts or public performances of sound recordings provide adequate compensation to record companies and performers. Furthermore, the KSA Government should take steps to ensure that content review regulations and limitations on the operation of foreign invested enterprises do not create impediments to the efficient functioning of legitimate enterprises. While a number of well-known online music platforms are operational in KSA, they have limited catalog due to content review uncertainties (which of course are not followed by pirate sites).

# SWITZERLAND

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2014 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** IIPA recommends that USTR place Switzerland on the Watch List in 2014 and urges that USTR increase its bilateral engagement with Switzerland in the coming year.<sup>1</sup>

**Executive Summary:** More than three years have passed since the Swiss Federal Supreme Court issued its decision in the Logistep case, which prompted Swiss prosecutors to halt all investigations on online copyright crimes. Enforcement authorities have too broadly interpreted the decision as precluding private parties from collecting the IP addresses of Internet users sharing pirate material over publicly available networks, the first and necessary step in identifying illegal online activities for purposes of enforcement, whether for civil or criminal cases. In the immediate aftermath of the decision, experts came together in an IPR Round Table to resolve this legal gap, but the activities of the Round Table disappointingly came to a stop in December 2013 without any concrete results. Meanwhile, the Swiss music industry is attempting to break this deadlock with a test case: The alleged infringer is a heavy uploader of pirated material via the "Gnutella" peer-to-peer (P2P) file-sharing protocol. Once again, the prosecutor has refused to accept this case on grounds of the Logistep decision and the appeal is currently pending with the Zurich Supreme Court. It is unclear whether the case will result in a conviction or if it can eventually set the needed precedent to permit prosecutors to move forward as needed.

In the meantime, piracy in Switzerland continues to damage many rights holders, and much of what IIPA reported in 2013 remains unchanged. The country remains a haven for existing and new services heavily engaged in infringing activity that have opened or moved headquarters or servers to Switzerland. From there, they provide a global service to export pirated content. This long-lasting and ongoing activity can be directly attributed to the reality that Swiss law enforcement still provides no effective consequences for online copyright infringement on any scale. The Swiss Government should respond to the unanimous report of the *Arbeitsgruppe Urheberrecht 2012*, or Working Group on Copyright 2012 (AGUR12) as published in December 2013, by incorporating the full package of compromise recommendations, including measures to fairly and effectively address websites providing access to both hosted and non-hosted infringing content and repeat infringers, as well as a civil liability limited to certain service providers hosting structurally infringing sites.

### **PRIORITY ACTIONS REQUESTED IN 2014**

- To permit law enforcement authorities to resume online copyright enforcement, prioritize the full implementation of the recommendations of the AGUR12, as published in Section 9.3 of the final AGUR12 report dated December 6, 2013, and introduce a corresponding bill to the legislative branch in 2014.
- Continue to address copyright reform and the importance of effective copyright enforcement in the online environment both through U.S.-Swiss trade dialogues and within the Government of Switzerland itself.
- Clarify Switzerland's exceptions to copyright to ensure that single copies for private use are permissible only as long as they derive from a legal source.

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<sup>1</sup>For more details on Switzerland's Special 301 history, see previous years' reports at <http://www.iipa.com/countryreports.html>. For the history of Switzerland's Special 301 placement, see <http://www.iipa.com/pdf/2014SPEC301HISTORICALCHART.pdf>. For a discussion of IIPA's 2014 Key Initiatives and Challenges, see IIPA, *2014 Special 301 Submission*, at <http://www.iipa.com/pdf/2014SPEC301COVERLETTER.pdf>.



## **THE NATURE OF PIRACY IN SWITZERLAND**

Switzerland suffers not only from increasing domestic piracy rates for music, film, videogames, and entertainment software, but also from a growing reputation as a safe haven for certain Internet service providers (ISPs) to base operations dedicated to piracy on a global scale. While BSA | The Software Alliance (BSA) reports a positive experience, generally speaking, in that Switzerland has among the lowest PC software piracy rates in the world, other industries face great difficulty in the current Swiss market. The percentage of all active Internet users in Switzerland using unlicensed services is still higher than the piracy rate in countries that actively engage in anti-piracy measures, such as France and Germany.<sup>2</sup> Swiss Internet users utilize a broad range of mechanisms to access pirated content online. P2P activity for the purposes of sharing infringing material remains popular, both through P2P client networks and BitTorrent networks. Cyberlocker services for storage and sharing of illegal files are also still available, though with some decline in favor of BitTorrent networks since the closure of Megaupload in 2012. Illegal streaming and the use of stream ripping sites and applications, which permit a user to create a local copy of unauthorized streamed content, are still high in usage. Downloading and streaming for private use are widely viewed as legal, as long as there is no uploading.

Some of the world's most popular Internet services for the unauthorized sharing of copyrighted works have opened or moved headquarters or services to Switzerland, including the file storage services Uploaded and Rapidshare, along with *couldzer.net*, another file storage service which fuels piracy by incentive programs, which are just the latest name on this dubious list. The hosting provider Private Layer, which hosts a large number of illegal websites including *darkwarez.pl*, is also running dedicated servers in Switzerland, while the company is domiciled in Panama. These services have a worldwide clientele affecting Russia, Poland, the United States, the EU, and beyond, and are accountable for significant traffic of pirated content.

## **ONLINE COPYRIGHT ENFORCEMENT IN SWITZERLAND**

Criminal and civil actions against online infringement under Swiss law have almost entirely ceased in the aftermath of the 2010 decision of the Swiss Federal Supreme Court in the Logistep case, which prosecutors have interpreted broadly as barring the collection and use of any IP address data identifying defendants in criminal copyright cases. This is despite a clarification from the Swiss Data Protection Authority (FDPIC) stating that under Swiss privacy laws, the decision only barred the specific data harvesting that was used in that case, and only from use in civil actions. In fact, the Data Protection Commissioner has opined that the anti-piracy activities of the type carried out by IIPA members, including the music and film industry, are compliant with the Data Protection Act, and is supportive of rights holders' Best Practices.<sup>3</sup>

Based on the broader misreading of Logistep, public prosecutors have abandoned actions, declaring as inadmissible evidence any IP addresses used to identify defendants. Appellate judges agreed, dismissing the subsequent appeals against these determinations. Rights holders are thus currently proscribed from analyzing the IP addresses of suspected infringers for purposes of establishing the existence of an underlying direct infringement as part of a secondary liability claim, notwithstanding the fact that such information is made publicly available by users who participate in P2P file sharing on public networks. Consequently, because rights holders are unable to bring actions for online copyright infringement, Switzerland appears to be in violation of its obligation to "ensure that enforcement procedures ... are available under [its] law so as to permit effective action against any act of infringement of intellectual property rights" under the World Trade Organization Agreement on Trade-Related Aspects of Intellectual Property Rights, Article 41.

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<sup>2</sup>Source: IFPI trend analysis based on data by comScore, Inc. (October 2013).

<sup>3</sup>More details about the Logistep decision and its political aftermath in Switzerland are provided in IIPA's 2013 Special 301 filing, available at <http://www.iipa.com/rbc/2013/2013SPEC301SWITZERLAND.PDF>.



In early 2012, the Swiss State Secretariat for Economic Affairs (SECO) initiated a Round Table of experts and stakeholders to seek a way forward. However, the activities of this Round Table did not include any concrete outcomes, and in any case were paused in December 2013 without any promising resolutions. Of particular disappointment, the Round Table took no initiative to improve the legal framework was taken. The only measurable result of the Round Table was that the Swiss music industry took the initiative to launch a test case against a heavy P2P uploader to clarify the practical meaning of the Logistep case. Unfortunately, the Zurich state prosecutor refused to accept the case. That decision has been appealed to the Zurich Supreme Court where it is still pending. It remains unclear whether the case will result in a conviction and if it can eventually set the needed precedent to permit prosecutors to move forward as needed. It is believed that the Round Table will resume after a decision in the test case has been issued by the Zurich Supreme Court. If the lower court's dismissal is affirmed and the members of the Round Table do not find a resolution, the only remaining recourse would be legislative amendments, a process that is sure to be lengthy and to leave Internet piracy virtually unhindered for some time to come.

On a separate track, in August 2012, the Federal Council for Justice agreed to set up a stakeholder working group (known as "AGUR12"), and invited fifteen participants from the private sector, including artists, producers/distributors, collecting societies, copyright user organizations, and consumer organizations. Representatives from various ministries also participated as well as ISP representatives who were invited to a number of meetings as experts. On December 6, 2013, the AGUR12 published its unanimous recommendations for a reform – the significance of which cannot be overstated given the variety of viewpoints that were represented in the working group. The full list of recommendations was presented as a package that, altogether, reflects a compromise among the four represented stakeholder groups, and includes:

- Introduction of a fair and effective mechanism to address websites providing access to both hosted and non-hosted infringing content via a governmental body;
- Introduction of a simplified mechanism to deter repeat infringers, which ultimately leads to civil liability for the holder of an infringing IP address;
- Introduction of liability for certain hosting providers, similar to the form of liability known in German courts as "Störerhaftung," leading to a take-down/stay-down obligation for certain providers;
- Limitation of liability for ISPs meeting certain criteria, along the lines of Article 14 EU E-Commerce Directive; and
- A right of information for the collection and use of data (including IP addresses) for copyright enforcement purposes.

The practical feasibility of this package of recommendations, and the fact that all stakeholder groups agreed on them, clearly introduce a unique opportunity for the Swiss government to demonstrate its commitment to copyright protection and to combating online piracy vigorously. Unfortunately, the government has given no response so far and has declined to announce a date by which it intends to comment on the AGUR12 report. For this reason, the Swiss rights holders have serious concerns about their government's will to accept and prioritize the implementation of this AGUR12 package of recommendations, and are afraid that their call for legal protection remains once more unheard. Instead, the Swiss government should now prioritize the full legal implementation of this package of unanimous recommendations by the end of this year.

## **THE SWISS COPYRIGHT ACT AND RELATED LAWS**

In addition to the urgent developments regarding Internet piracy enforcement in Switzerland, IIPA continues to have other long-standing concerns with certain aspects of the copyright and related laws in Switzerland. These were explained in detail in IIPA's 2013 Special 301 submission on Switzerland.<sup>4</sup> In summary:

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.

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. As a consequence, devices and circumvention software are widely available in Switzerland.

Third, the new Articles 22(a) to 22(c) regarding mandatory collective administration provide overbroad benefits to state-licensed broadcasting organizations, at the expense of record producers and artists.

Fourth, 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 collecting society "Swissperform" initiated arbitration proceedings against this cap, and after the case was dismissed in 2010 by the Swiss Arbitration Commission, subsequently appealed before the Swiss Federal Administrative Court. That Court dismissed the case, and now, more than three years later, the case is pending with the Swiss Federal Supreme Court.

Fifth, 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.

Sixth, although Article 12 Section 1*bis* of the Swiss Copyright Act states that copies of audiovisual works may not be distributed or rented if this prejudices the right holder's public performance right – e.g., if the audiovisual work is still in the theaters – an explicit criminal sanction for the violation of this principle is needed, in order to deal effectively with an influx of French language DVDs imported from Canada and freely distributed while the motion pictures are still playing in Swiss cinemas.

Finally, the Swiss Federal Institute for Intellectual Property is focused on issues in the areas of patents and trademarks, where Switzerland has a strong export industry, and provides little support to strengthening copyright law and its enforcement.

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<sup>4</sup>See <http://www.iipa.com/rbc/2013/2013SPEC301SWITZERLAND.PDF>.

# TAIWAN

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2014 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** IIPA recommends that Taiwan be placed on the Special 301 Watch List.<sup>1</sup>

**Executive Summary:** Internet piracy remains the most urgent problem in Taiwan. Taiwan remains without an effective mechanism to address websites, mostly foreign, whose business models are built on piracy. There is concern over the decision to reorganize the IPR Police (IPRP) into a new Criminal Investigation Brigade (CIBr) under the Second Police Special Headquarters (SPSH) of the National Police Agency (NPA), Ministry of the Interior (MOI). Equally concerning is the dismantling of the bonus systems for fighting piracy, which may also signal a weakening of the Taiwan Government's commitment to enforcement against copyright piracy. IIPA further remains concerned that ISPs are not effectively encouraged to cooperate with right holders trying to protect their rights on the Internet or at the borders. Judges appear to view copyright piracy as a minor offense, and most recent criminal cases have resulted in suspended sentences. Foreign-based websites targeting Taiwan users have eroded the legitimate market for local and foreign right holders. Other piracy problems include the unauthorized use of software and other copyright materials by enterprises and government agencies, and rampant commercial photocopying of textbooks on or around university campuses. We urge the Taiwan Government to reinvigorate its commitment to address copyright industry concerns appropriately.

### PRIORITY ACTIONS REQUESTED IN 2014

#### Enforcement Issues

- Ensure that the reorganization of the IPRP into the CIBr does not diminish enforcement, i.e., ensure manpower, resources, and equipment are not decreased, and that case targets are maintained and met.
- Maintain award budget for major anti-piracy cases.
- Improve IP courts to reduce numbers of “suspension of indictment” cases, and increase convictions resulting in deterrent penalties.
- Increase trainings for judges and prosecutors on specific issues related to IPR infringement for the software, music, film, and publishing industries, including understanding the nature and seriousness of online piracy.
- Ease the process of obtaining search warrants by relaxing evidence collection procedures and burdens of proof.
- Bring and conclude “media box” piracy cases under Articles 87(7) or 91 of the Copyright Law, as aiding or abetting cases under the criminal law, or through other measures.

#### Legislative Issues

- Establish effective administrative and/or judicial remedies to address access to infringing websites in Taiwan.
- Implement the ISP law to provide appropriate incentives for expeditious removal of infringing materials, including forwarding notices to infringers and informing and implementing repeat infringer policies.
- Ensure copyright law amendments: 1) do not relax or reduce criminal liability standards; 2) make Internet piracy a “public crime”; 3) include provisions addressing non-hosted infringements; 4) fix copyright collective management provisions to allow the use of agents, and remove the authority of the Taiwan Intellectual Property Office (TIPO) to set a “joint royalty rate” and appoint a “single window” for collection; 5) make it an offense to use/attempt to use an audiovisual recording device in a movie theater to make or transmit a copy of an audiovisual work, in whole or in part; and 6) extend copyright term in line with the international trend.

<sup>1</sup>For more details on Taiwan's Special 301 history, see previous years' reports at <http://www.iipa.com/countryreports.html>. For the history of Taiwan's Special 301 placement, see <http://www.iipa.com/pdf/2014SPEC301HISTORICALCHART.pdf>. For a discussion of IIPA's 2014 Key Initiatives and Challenges, see IIPA, *2014 Special 301 Submission*, at <http://www.iipa.com/pdf/2014SPEC301COVERLETTER.pdf>.



## Market Access Issue

- Cease setting a price ceiling on pay TV subscriptions.

## PIRACY AND ENFORCEMENT UPDATES IN TAIWAN

Prior IIPA reports on Taiwan contain detailed discussions of piracy and enforcement issues. This report serves only as an update to those and is not to be considered an exhaustive review of issues.<sup>2</sup>

**Concerns Exist Over IPRP Reorganization Into CI Br, and Removal of Award Structure:** The IPRP has been one of the more effective units in Taiwan in the fight against copyright piracy. Its reorganization, effective January 1, 2014, into the new CI Br is fraught with challenges. First, CI Br must keep IPR protection as the most important mission and must assign a Commander and supervisors who understand IP and have the know-how to take effective action against physical and Internet piracy in the future. Second, the manpower for the new CI Br must be maintained. IPRP was comprised of only 166 policemen as of late 2013, far less than the fully authorized force of 218. Before the reorganization, the IPRP had seven squadrons located in seven major cities. The CI Br only has three investigation teams located in Taipei, Taichung and Kaohsiung.<sup>3</sup> The reduction in manpower and locations may already be impacting negatively the effectiveness of the force. Reports that the force will be decreased further to only 100 officers, and that fewer than half of the current IPRP team will be retained, raise deep concerns. Third, other resources, including an adequate budget, must be sufficient to effectively enforce against copyright infringement. Fourth, benchmarks must be maintained for copyright cases, both in terms of the numbers of cases heard, as well as reasonable targets for successful convictions. It is important that such targets are broken out by the type of piracy, e.g., Internet, software,<sup>4</sup> book piracy,<sup>5</sup> camcording, media box,<sup>6</sup> signal theft, and border seizures.<sup>7</sup> Fifth, TIPO should continue in its advisory role.

**Award Budgets Must Be Maintained:** It is critical to maintain an award budget so that the CI Br officers feel that fighting copyright piracy is an important endeavor and that successful efforts will be rewarded. Unfortunately, the proposed budget of NT\$4.5 million for awards for physical and Internet cases in 2013 was cut to NT\$3.5 million by the Legislative Yuan (LY). Worse, IIPA understands there is no budget for awards in 2014 because the Ministry of Economic Affairs (MOEA), responding to pressure from the LY, eliminated TIPO's budget for such the awards. IIPA recommends the reinstatement of reasonable awards. It is unfortunate that TIPO's role will be relegated to a training budget for IPR enforcement officers, and will no longer play an important role in the IPR police force as in the past.

**Response Needed to Worsening Internet Piracy:** Over the past several years, several copyright industry sectors have noted an increase in the severity of Internet piracy that has accompanied increased Internet, broadband,

<sup>2</sup>See, e.g., IIPA, *Taiwan*, 2013 Special 301 Report, February 8, 2013, at <http://www.iipa.com/rbc/2013/2013SPEC301TAIWAN.PDF>.

<sup>3</sup>Squadrons in Taoyuan and Chiayi were abolished in 2013.

<sup>4</sup>The use of unlicensed software in the workplace by businesses (and to some extent, government) causes the greatest revenue losses to the software industry in Taiwan, thereby stunting the growth of the IT sector. The software piracy rate remains below the regional average (37% in 2011 compared with an Asia regional average of 60%). The commercial value of unlicensed software in Taiwan in 2011 was US\$293 million. Data on software piracy rates are taken from the 2011 BSA Global Software Piracy Study at [www.bsa.org/globalstudy](http://www.bsa.org/globalstudy). This study assesses piracy rates and the commercial value of unlicensed software installed on personal computers during 2011 in more than 100 markets. The study includes a detailed discussion of the methodology used. BSA plans to release an updated study in the second quarter of 2014.

<sup>5</sup>Illegal photocopying of books and journals on or near university campuses causes great harm to the U.S. publishing industry. Publishers find numerous instances of unauthorized photocopying by campus photocopy centers and the majority of students using illegally photocopied texts in the classroom. Unauthorized photocopying (particularly of higher education and English language textbooks (ELT)) remains the most damaging problem for U.S. and Taiwanese publishers. There have been instances where the photocopy shop delivers cases of illegal copied textbooks to the campus mail room, and being unable to locate the intended recipients, the mail room actually delivered the pirated copies to the publishers (apparently relying on the publisher logos on the covers). Online piracy, particularly of textbooks and password-protected material, is on the rise in Taiwan, being made available mainly from servers/sites in China.

<sup>6</sup>"Media box" (set-top device) piracy is the fastest growing Internet-based piracy in Taiwan. Various kinds of boxes originating in China are available throughout Taiwan, including at so-called "3D" shops that sell computers, software, and peripherals. The three main types of devices are: 1) those that directly connect to foreign sites (usually in mainland China); 2) those with a hard disk to store downloaded contents; and 3) those with an SD card which helps novices connect with the foreign site. TIPO reports that media box piracy can be addressed through current provisions of the law and that one case was commenced in 2013. These boxes are publicly sold in stores and it is common knowledge and practice for consumers to make modifications on the box to allow users to access illegal content, apps, illegal transmissions, etc. which can be accessed on a smart TV.

<sup>7</sup>Taiwan Customs is responsible for inspection of optical discs which contain infringing materials, and after confirming this, cases are to be transferred to the Aviation Police Bureau (APB) for investigation and then transferred to a prosecutor for criminal referral. Unfortunately, the system is not working as intended. Customs agents have no judicial authority to conduct searches or seizure, but direct APB and prosecutor involvement has led to non-cooperation between Customs and the APB and lack of criminal transferrals. In some cases, transferring a clear-cut case of infringement at the border has taken upwards of two years.

and mobile penetration. Particularly noted are the use of streaming, forum and blog,<sup>8</sup> deeplinking, P2P, BitTorrent, and “one-click hosting” sites to infringe copyright in movies, music, software, and books and journals.<sup>9</sup> Mobile apps are a new platform for disseminating illegal content. In addition to online piracy, sales of hard goods through Internet auction and e-commerce sites remain a problem. For example, pirate Blu-ray and DVD discs are being sold on e-commerce websites. Most of these hard goods websites are operated out of mainland China, which send the pirate discs into Taiwan in small packages. IIPA encourages the Taiwan Government to work with industry to engage courier services which have not only refused cooperation but reportedly inform infringers about monitoring.

While the takedown rate remains high for hosted content in Taiwan (over 90% for industries reporting), Internet users in Taiwan increasingly obtain unauthorized content from websites located overseas, particularly websites located in mainland China.<sup>10</sup> While right holders worked with two ISPs in Taiwan, Chunghwa and HiNet, to try a six-month test to see how implementation of the ISP graduated response would work in practice, this process revealed flaws since a very low percentage of the already-low number of warning messages were forwarded to the ISP’s subscriber. The trial shows that further regulation or legislation is necessary to provide an appropriate response to Internet piracy. In addition, while graduated response, put into place several years ago, remains an important element of an overall strategy in Taiwan to effectively encourage ISP cooperation with IP right holders and penalize repeat infringers, a measure is needed which addresses non-hosted websites at the source, i.e., the source services which are built on, foster, or encourage piracy. Without such a measure, ISPs will remain reluctant to cooperate in such cases.<sup>11</sup>

**Improvements Needed for IP Courts:** Many reports from copyright and other IP right holders indicate that the Taiwan specialized IP Courts may not adequately be addressing IP matters, including with respect to the adjudication of copyright disputes, from inspection/raid to conviction. “Suspension of indictment” in digital piracy cases are up to 86% in 2013. In the criminal context, difficulties continue in obtaining search warrants due to evidence collection and burden of proof hurdles. In addition to challenges for moving criminal IP cases forward from investigation to prosecution, right holders report that existing civil procedures for provisional measures/injunctions remain ineffective. Regular training schedules should be established for judges and prosecutors on specific issues related to IP infringements for the software, music, film, and publishing industries, focusing on the particularities of Internet-based copyright piracy cases as well as aspects of the civil and criminal system that are not operating smoothly for right holders.

**Process of Obtaining Search Warrants Needs Improvement:** Certain industries report difficulties in obtaining criminal search warrants due to burdens imposed upon their right holders by courts regarding evidence collection and onerous burdens of proof. The software industry reports that some courts, when reviewing the application for a search warrant against enterprise end-user targets, find informant testimony insufficient, and ask for additional evidence such as screen shots to prove the target is using illegal software. This additional proof requirement is imposed notwithstanding that the testimony affirms the informant has direct knowledge of the unauthorized use of software by the target company. Publishers also note a lack of consistency with respect to the evidence prosecutors consider sufficient to proceed with a criminal case. In addition to the actual pirated copy, copyright holders are often asked to produce, for instance, detailed receipts with book titles and ISBNs, audiovisual recordings of the crime in progress, names of witnesses, etc. Where the pirated copy is only a portion of a book rather than the entire book, it is also often dismissed as inconsequential and the prosecutor will refuse to use the information to apply for a search warrant. Finally, while the TRIPS Agreement requires a presumption of ownership of the copyright matter if the name of the right holder appears in the usual manner, the software industry reports that in

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<sup>8</sup>Forums are a serious problem, including sites like *ck101.com* (the 10th most accessed site in Taiwan), and *eyny.com* (11th), as just two examples. The flow of content through these forums is large. Both sites appear to mask the identity of the registrant as well as the server location.

<sup>9</sup>The estimated losses caused by Internet piracy for music industry were around US\$286.87 million in 2013.

<sup>10</sup>In December 2013, IIPA welcomed the decisions of the Beijing No. 1 Intermediate People’s Court holding P2P streaming video network and video on demand (VOD) company Beijing Funshion Online Technology Co., Ltd., owners of the website *Funshion.com*. This site has caused significant harm throughout Greater China, including Taiwan, as well as Hong Kong and Singapore. Unfortunately, the damages awarded by the court were too low by any account to deter piracy, and the site appears to remain operational with a server location in Inner Mongolia.

<sup>11</sup>In addition to Chunghwa Telecom and HiNet, Taiwan Mobile Co., Ltd., and Far EasTone Telecommunications (FET) make up the major ISPs in Taiwan.

some cases courts are requiring a copyright certificate to prove ownership, which would be inconsistent with this standard.

## **COPYRIGHT LAW AND RELATED ISSUES**

**Concerns Over Continued Lack of Administrative or Judicial Remedies Against Non-Hosted Infringements:** IIPA is grateful to TIPO for its continuing expressions of mutual concern over non-hosted infringements in Taiwan. As TIPO has indicated, addressing hosted content in Taiwan has not posed as great a difficulty, with takedown rates remaining relatively high. When it comes to non-hosted infringements, however, a problem emerges. While the infringing activity is occurring in Taiwan, the services built on this infringing activity, and/or fostering or encouraging it, are often located outside of Taiwan. The infringement within Taiwan creates the nexus for action, and Taiwan and other jurisdictions are working toward approaches to halt the services from being accessed at the border. We believe that all organs of the Taiwan Government (TIPO, the Ministry of Justice, and the LY) should remain steadfast in seeking an appropriate remedy that is narrowly tailored and with appropriate due process to halt services which are built on, facilitate, and/or encourage infringement. However, during recent meetings with industry, we understand an administrative or judicial remedy against non-hosted infringement remains a sensitive issue and may not be included in amendments to be proposed in 2014. This would be highly unfortunate.

**Full Implementation of ISP-related Provisions Needed:** The Taiwan authorities have recognized that significant online copyright infringement occurs in Taiwan, including through services that are often offshore. To address this problem, it is necessary that a combination of approaches be implemented, whereby a new administrative or judicial remedy can address online services, while the proper implementation of the graduated response already enacted in Taiwan's Article 90*quinquies* can be applied to large-scale file-sharing of unauthorized content. In particular, further amending legislation should clearly implement the current ISP liability provisions to provide an effective and fair mechanism to address Internet infringement, including by clarifying that ISPs lose the "safe harbors" under the new ISP Law if they fail either: to forward notices to alleged infringing users; or to have and implement a termination policy for repeat infringers.

**Copyright Review Should Modernize the Statute and Address Non-Hosted Infringement But Avoid Weakening Criminal Liability or Creating Overly Broad Exceptions; Should Include Fixes to Collective Management Statute:** TIPO is in the final year of its three-year plan of Copyright Act reform (2011 to 2013) and has held 46 internal meetings for proposals of draft amendments through December 2013. TIPO has indicated its intention to introduce proposed amendments sometime after February 2014, following which time it will convene a series of public hearings. IIPA understands that there are several changes being considered, including some positive features (e.g., providing an Internet re-transmission right, which should also be afforded to all right holders). However, care should be taken in this process to ensure changes: 1) do not relax or reduce criminal liability standards; 2) make Internet piracy (e.g., mass file-sharing of unauthorized content, or providing online services built on infringement) a "public crime"; 3) include provisions addressing non-hosted infringements; 4) correct problematic provisions regarding copyright collective management to: allow the use of agents; allow the setting of fair market based rates for collectively managed rights (instead of tariffs determined by TIPO); establish judicial dispute resolution mechanisms in lieu of the requirement to have CMOs tariffs approved by TIPO; and eliminate TIPO's authority for setting a "joint royalty rate" and appointing a "single window" for collection;<sup>12</sup> 5) make it an offense to use/attempt to use an audiovisual recording device in a movie theater to make or transmit a copy of an audiovisual work, in whole or in part; and 6) extend copyright term in line with the international trend. We understand the drafters are looking at a distance learning exception, and IIPA recommends the TEACH Act in the U.S. as a reference to provide guidance on the properly narrow scope of permissible distance learning activities.

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<sup>12</sup>The 2010 amendments to the Copyright Collective Management Organization Act leaves in place overbroad authority with TIPO to fix royalty rates for both the broadcast and performance of music and sound recordings and allows for delays in fixing the rate, thus interfering with the ability of right holders to collect royalties. The Act establishes a four-month time limit on TIPO approval of these rates and requires TIPO to reconstitute a special rate setting committee to include right holders as well as users and experts. The Act should be modified to favor a market-based approach, allowing for the establishment of fairer tariff rates, and eliminating the single licensing window. Detailed discussion of the shortcomings of the Act appear in previous IIPA filings.

## **MARKET ACCESS ISSUE**

**Price Ceiling on Pay-TV Subscriptions:** The Taiwanese Government currently supports a price ceiling policy for pay TV subscriptions which provides a disincentive for content providers to enter the market. While this situation should be changed with oncoming digitization (it should be easier for the government to support a “pay what you see” policy within a digitized environment), the Taiwanese Government should ease any current price controls in this market.

# TURKEY

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2014 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

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

**Executive Summary:** For many years, a relatively cooperative Turkish Government has made incremental but uneven progress in addressing piracy. The shift to online and mobile media presents enormous opportunities for the emergence of legitimate distribution models, but also presents significant piracy challenges. Piracy of published materials remains serious. The software piracy rate remains 20 points higher than the global average, and the Turkish Government has yet to fully legalize its own software usage. While the Government has remained proactive against online piracy, they have been less helpful against book counterfeits and photocopying of textbooks near university campuses. Judges and prosecutors are becoming attuned to the challenges of online and mobile piracy, but the judicial system as a whole still remains non-deterrent, due to the perception that copyright infringement is not a significant criminal offense, and due to low-level and frequently postponed penalties, backlogs of cases, and recidivism. The Turkish Grand National Assembly (GNA) is considering legislation that would strengthen the Government's hand against Internet and mobile piracy and make other reforms, but has not completed its legislative work, and must ensure that the law finally enacted comports with Turkey's international obligations and global best practices.

### PRIORITY ACTIONS REQUESTED IN 2014

#### Enforcement

- Take continued steps to reduce the use of unlicensed software in enterprises, and ensure that Turkish Government agencies, employees, contractors, and grantees use only licensed software.
- Continue taking effective means against online and mobile piracy, and encourage greater Internet service provider (ISP) cooperation.
- Reduce illegal commercial photocopying, especially near universities, and shut down known book counterfeiters.

#### Legislation

- Pass legislation to amend the Turkish Copyright Law (Law No. 5846 on Intellectual and Artistic Works), including provisions enhancing ISP cooperation, and outlawing circumvention of technological protection measures (TPMs) and trafficking in circumvention technologies, software, devices, components, and services.
- Ensure amended Copyright Law does not run afoul of Turkey's international obligations, and, e.g., adheres to fair and transparent best practices with respect to collective management of rights.

### PIRACY AND ENFORCEMENT UPDATES IN TURKEY

Prior IIPA reports on Turkey contain detailed discussions of piracy and enforcement issues. This report serves only as an update to those and is not to be considered an exhaustive review of issues.<sup>2</sup>

**Progress Seen Against Enterprise Software Piracy; More to be Done on Government Legalization:** A key concern in Turkey remains the widespread use of unlicensed software by enterprise end-users. The software piracy rate in Turkey was 62% in 2011 (far higher than the global and European averages), representing a

<sup>1</sup>For more details on Turkey's Special 301 history, see previous years' reports at <http://www.iipa.com/countryreports.html>. For the history of Turkey's Special 301 placement, see <http://www.iipa.com/pdf/2014SPEC301HISTORICALCHART.pdf>. For a discussion of IIPA's 2014 Key Initiatives and Challenges, see IIPA, 2014 Special 301 Submission, at <http://www.iipa.com/pdf/2014SPEC301COVERLETTER.pdf>.

<sup>2</sup>See, e.g., IIPA, Turkey, 2013 Special 301 Report, February 8, 2013, at <http://www.iipa.com/rbc/2013/2013SPEC301TURKEY.PDF>.





commercial value of unlicensed software use of \$526 million.<sup>3</sup> Piracy is particularly bad in the industrial regions and cities where economic activities are more intensive, such as Istanbul, Ankara, and Izmir, and the industry has recently observed high levels of enterprise piracy in Bursa, Kayseri, and Gaziantep.

Enforcement against unauthorized use of software by enterprises improved in 2013. The software industry brought 80 civil and criminal actions (up from 60 in 2012). As such cases become more routine, they are better accepted by judges, prosecutors, and law enforcement officers. Additionally, the courts on the Asian side of Istanbul have been consolidated, and as a result, industry is now able to obtain search warrants in any location in the city. One problem remains the lack of *ex officio* actions by Prosecutors or Customs authorities in copyright-only actions. Although *ex officio* raids are available if there is a pending trademark or patent claim, pure enterprise end-user piracy actions involving only copyright infringements require formal complaints by right holders.<sup>4</sup>

The Turkish Government issued a Circular in 2008 for its agencies to legalize their software use,<sup>5</sup> but due to low budgetary allotments and lack of transparency in the process, the Government has not implemented the Circular. The Government must allocate sufficient budgets, and each Ministry and public authority should follow the Circular by establishing its own software legalization procedures and budgets and instructing its sub-divisions, thereby setting a powerful example for businesses and consumers in Turkey.

**Internet and Mobile Piracy Threat Increases:** Turkey has tens of millions of Internet users, with approximately 7.9 million fixed Internet subscriptions (each subscription supporting multiple users), almost all of which are defined as broadband (according to the International Telecommunications Union). Turkey also boasts 67.7 million mobile subscriptions, 40 million of which reportedly have 3G wireless connections.<sup>6</sup> As a result of these developments, the opportunities for legitimate Internet and mobile business models are enormous. Unfortunately, widespread Internet and mobile piracy harm right holders and have hindered the development of licensed services.<sup>7</sup> Online piracy is carried out using cyberlockers, deeplinking sites, peer-to-peer (P2P) filesharing services, forums/blogs, and BitTorrent sites. The Entertainment Software Association (ESA) reports that in 2013, Turkey ranked eleventh in the world in terms of the number of connections by peers engaging in the unauthorized file-sharing of select ESA member titles on public P2P networks. The Radio and Television Supreme Council (RTÜK) and Telecommunication and Transmission Authority (TTA) have taken commendable steps to address online and mobile infringements, and some elements of a legislative framework for dealing with it are in place.<sup>8</sup> However, many ISPs still do not cooperate with right holders, and obtaining needed data for enforcement has been close to impossible.<sup>9</sup>

**The Prevalence of Trafficking in Circumvention Tools:** Both trafficking in pirated materials for which the technological protection measures (TPMs) have been unlawfully circumvented, and in the circumvention technologies, devices, or components themselves, have increased. For example, online links enable downloading of software which has been hacked and stripped of TPMs, or downloading the necessary technology for circumventing

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<sup>3</sup>Data on software piracy rates and commercial values are taken from the 2011 BSA Global Software Piracy Study at [www.bsa.org/globalstudy](http://www.bsa.org/globalstudy). This study assesses piracy rates and the commercial value of unlicensed software installed on personal computers during 2011 in more than 100 markets. The study includes a detailed discussion of the methodology used. BSA plans to release an updated study in the second quarter of 2014.

<sup>4</sup>There is a precedent for providing police with *ex officio* authority in the case of copyright materials sold in the market without banderoles, but the banderole requirement does not apply to software.

<sup>5</sup>*Circular on Legalization of Software Use in Public Entities*, No. 2008/17 (July 2008).

<sup>6</sup>See *Turks Are the Highest Mobile Internet Users in Europe*, Sabah, November 29, 2012, at <http://english.sabah.com.tr/economy/2012/11/29/turks-are-the-highest-mobile-internet-users-in-europe>.

<sup>7</sup>Several websites identified by IIPA as notorious for piracy in its notorious markets filing to USTR in October 2013 are among the top 100 sites accessed in Turkey, while some, like *turbobit.net* (the 89th most accessed site in Turkey), *fullhdfilmizle.org* (105th), and *divxplanet.com* (111th) seem peculiarly popular in and/or targeted toward Turkey. This list does not include numerous sites with “TV” in the title, many of which appear to provide access to live or near-simultaneous retransmission of broadcasts, with a focus on sporting events.

<sup>8</sup>For example, through the *Law on Content Published on the Internet No. 5651*, a right holder may apply to an Internet content provider (ICP) and request content to be taken down, subject to a court order if the ICP fails to do so. “Additional Article 4” of the Copyright Law has also encouraged some positive practices between right holders and ISPs when infringement occurs.

<sup>9</sup>Turkish judicial authorities assume that IP addresses of Internet users are personal data and under the protection of Section 9 of the Criminal Law. Therefore, such data cannot be shared with right holders without judicial findings even if there are clear-cut infringements of copyright. Even if right holders and/or collecting societies monitor infringements occurring on the Internet, there is no way to find out the identity of infringers without applying to judicial authorities.

a TPM (e.g., key search programs). The same is true for pay TV, with infringers trafficking in decoder programs to break passwords on encrypted channels or signals. The Copyright Law amendments as proposed would be helpful in addressing these problems.

**Book Piracy Situation Remains Serious:** As documented in detail in prior IIPA reports, unauthorized commercial photocopying and counterfeit books hamper the growth and further development of the legitimate market for publishers in Turkey. Local publishers report that illegal photocopying is “out of control” on and around university campuses. Two notorious and organized pirate book counterfeiting operations conduct an estimated 90% of all piracy of foreign language books in Turkey. The Government should take actions to close them down, and to legalize use of published materials at universities. Publishers report that universities interpret Article 34 of the Copyright Law to allow free copying of textbooks, which is also harming the academic textbook market in Turkey for local and foreign publishers. Article 34 should not be interpreted in this way or should be amended so that such an interpretation is no longer viable.

**Hard Disk Loading, Retail Piracy, Mobile Device Piracy, “Mod Chips”:** Physical piracy has decreased in Turkey, but hard disk loading of software onto computers at the point of sale, as well as other problems previously documented by IIPA (e.g., “burned” recordable discs, imported factory discs, mobile device piracy, through which music, audiovisual works, software, and published materials are loaded onto any portable device, the sale and servicing of “mod chips” installed into videogame consoles to play illegal games) remain visible in the marketplaces in major cities.

## **COPYRIGHT LAW AND RELATED ISSUES**

**Draft Amendments to Copyright Law:** The *Law on Intellectual and Artistic Works 1951, No. 5846* (last amended by Law No. 5728, 2008) provides the basis for copyright protection in Turkey. The Turkish Government has been preparing draft amendments to the Law for many years, and while IIPA reviewed an interim draft in October 2012, there may be a further draft. All indications are that the GNA plans to push the amendments forward. IIPA has commented in detail on the draft in prior filings.<sup>10</sup> In brief, IIPA recommends swift passage of modernizing amendments to the Copyright Law, noting, among other things, the following:

- Criminal penalties should include imprisonment “and” a judicial fine.<sup>11</sup>
- Copying, distributing, or unlicensed use should be criminalized regardless of whether the defendant undertook the acts with commercial purpose.
- The Law should provide: 1) a legal framework of effective and fair policies to address non-hosted infringements and repeat infringers, and to discourage web advertisers and payment processors from supporting infringing sites; 2) a clear obligation on ISPs to cooperate expeditiously<sup>12</sup> (i.e., without demanding a court or prosecutor’s order) when they know or are aware of facts and circumstances from which infringement is apparent; and 3) a means for identifying perpetrators who often use privacy services to hide their activities.<sup>13</sup>
- The Law should ensure the TPMs provisions follow the interim draft and fully meet the requirements of the WIPO Copyright Treaty (WCT) and WIPO Performances and Phonograms Treaty (WPPT), to which Turkey is a party.
- The Law should: 1) avoid restrictions on the ability of foreign music producers or their foreign collective management organizations (CMOs) to become full members of a CMO in Turkey; 2) ensure fair and proportionate voting rights, distribution of income for foreigners, and principles of good governance, fair participation, transparency, and accountability in the operation of any CMO; and 3) avoid mandatory “single-window” licensing or “joint” collective solutions.

<sup>10</sup>See, e.g., IIPA, *Turkey*, 2013 Special 301 Report, February 8, 2013, at <http://www.iipa.com/rbc/2013/2013SPEC301TURKEY.PDF>.

<sup>11</sup>Both remedies are provided for in the Trademark Decree and in the Law prior to the 2008 amendment.

<sup>12</sup>The time frames for removing content or disabling access to infringement must not be too long to address, e.g., pre-release piracy.

<sup>13</sup>An interim draft released to local stakeholders includes a number of proposals to provide a framework for protection of copyright on the Internet. IIPA understands that positive elements would include: 1) the possibility of secondary liability against an owner of a website that knows or has been given notice about infringement, had technical capabilities of stopping such an infringement, and fails to terminate the infringement, and 2) the possibility of directly applying to a Public Prosecutor for removal of infringing activity without a warning notice if the content provider’s or the hosting provider’s electronic contact addresses are not provided in the Internet medium, all of the activities of the related website are infringing, or in case of inconvenience that may result from any delay.

- Since the Government of Turkey has chosen to implement a private copy levy, it is imperative that the levies are in fact collected and distributed to relevant right holders in full, and not retained and used as public funds under the authority of the Ministry of Culture and Tourism.
- The Law should (and reportedly does) retain the banderole system for physical piracy enforcement.
- The Law should avoid overly broad exceptions and limitations or compulsory licenses.<sup>14</sup>
- The Law should avoid mandating recordal and registration of copyright materials which could amount to a prohibited formality under the Berne Convention and the TRIPS Agreement.
- The Law should ensure that the rights of authors and the rights of producers of phonograms and performers coexist independently (i.e., that there is no hierarchy of rights, thus remaining consistent with the Rome Convention and WPPT Article 1).

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<sup>14</sup>IIPA understands many new exceptions and some compulsory licenses are being considered; these must be measured against Turkey's international obligations under TRIPS, the Berne Convention, the WCT and the WPPT. In addition, IIPA encourages the Turkish Government to address the harm that is befalling academic publishers due to the overly broad language in Article 34 of the current Law.

# UNITED ARAB EMIRATES

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

### 2014 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** IIPA recommends that the United Arab Emirates be placed back on the Watch List in 2014.<sup>1</sup>

**Executive Summary:** After many years off the Special 301 lists, the situation in the United Arab Emirates is serious enough to warrant its placement back on the Watch List. For years, IIPA members experienced exemplary enforcement efforts on the part of the Dubai Police, the Telecommunications Regulatory Authority (TRA), the Ministry of Information and Culture (MOIC), the Departments of Economic Development of various Emirates, and until two years ago, the Ministry of Economy (MOE). With an emerging online and mobile marketplace, including legitimate online/mobile music services launching in the region, and sold-out concerts for many major music acts, it is critical that the Government implement the UAE Copyright Law (“Federal Law No. 7 of 2002 Concerning Copyrights and Neighboring Rights”) so that music right holders can be compensated through their established collecting society. Compensation for the commercial use of music is critical not only for U.S. companies but also as a source of revenue for investment in local cultural production and the development of a robust local industry that can develop local talent. Internet and mobile piracy has become severe, requiring a much more coordinated enforcement response. The software piracy rate in enterprises is higher than it should be for this economically developed marketplace, and other problems like hard disk loading and Customs’ re-exportation of counterfeits is now having an adverse effect on piracy in other countries in the Gulf and throughout the Middle East, Africa, and Europe.<sup>2</sup> The Economic Policy Dialogue (EPD) is addressing these issues, but concerns remain that the UAE Government will stall on collective management and that other problems will not be addressed with priority.

## PRIORITY ACTIONS REQUESTED IN 2014

- Allow collecting societies to begin collecting royalties under the Copyright Law.
- Have the MOE take proactive enforcement against Internet piracy, including properly instructing the TRA with respect to Internet sites involved in the distribution of infringing copyright materials and circumvention tools.
- Cease the practice of re-exporting seized counterfeit goods, potentially in violation of TRIPS.
- Modernize the Copyright Law to ensure adequate protection against circumvention of technological protection measures (TPMs) and trafficking in circumvention technologies, devices, components, or services.
- Ensure enforcement in malls outside of the cities and Free Zones, which are currently rife with pirated and counterfeit product.

## PIRACY AND ENFORCEMENT ISSUES IN UAE

Prior IIPA reports on UAE contain detailed discussion of piracy and enforcement issues. This report serves only as an update to those and is not to be considered an exhaustive review of issues.<sup>3</sup>

**Allow Legitimate Collection of Royalties for Uses of Phonograms:** Broadcasting and public performance (such as in hotels, restaurants, shops, discos, bars, dance schools, airlines, etc.) are increasingly

<sup>1</sup>For more details on United Arab Emirates’ Special 301 history, see previous years’ reports at <http://www.iipa.com/countryreports.html>. For the history of UAE’s Special 301 placement, see <http://www.iipa.com/pdf/2014SPEC301HISTORICALCHART.pdf>. For a discussion of IIPA’s 2014 Key Initiatives and Challenges, see IIPA, *2014 Special 301 Submission*, at <http://www.iipa.com/pdf/2014SPEC301COVERLETTER.pdf>.

<sup>2</sup>According to a European Commission study, the UAE was second after China in seizure/detention of suspect infringing goods in the EU (8.37% of all infringing goods seized in the EU were sourced from the UAE). See European Commission, *Report on EU Customs Enforcement of Intellectual Property Rights Results at the EU border 2012*, August 2013, at [http://ec.europa.eu/taxation\\_customs/resources/documents/customs/customs\\_controls/counterfeit\\_piracy/statistics/2013\\_ipr\\_statistics\\_en.pdf](http://ec.europa.eu/taxation_customs/resources/documents/customs/customs_controls/counterfeit_piracy/statistics/2013_ipr_statistics_en.pdf).

<sup>3</sup>See, e.g., IIPA, *United Arab Emirates*, 2013 Special 301 Report, February 8, 2013, at <http://www.iipa.com/rbc/2013/2013SPEC301UAE.PDF>.



important uses of recorded music, and are an essential element for the UAE's ability to develop local artists and to become a hub for the production of Arabic music. Licensing the use of recordings for these purposes has become an increasingly important part of the overall revenue stream for performers, producers of phonograms, songwriters, composers, and music publishers throughout the world. In the UAE, a conservative estimate of these revenues would be at least US\$15 million per year. Yet virtually nothing is being collected today, completely undermining the capacity of companies in the UAE to invest in promoting local artists and building artists' careers. The UAE Copyright Law provides the relevant rights.<sup>4</sup> Article 37 of the Law provides that anyone who engages in such exploitation without permission from the right holder infringes copyright and is made subject to criminal penalties and civil remedies. In addition, Section 16 of the Copyright Law enables the creation of collecting societies and provides for the undertaking of collective rights administration, and Ministerial Decision No. 133 of 2004 concerning the Collective Management of Copyrights and Neighbouring Rights established the basis on which licenses permitting collective management activities would be granted by the MOE. Based on the Law and Ministerial Decision, in 2004, the recording industry took steps to establish Emirates Music Rights Society ("EMRS") in the UAE to serve as a collecting society.

A decade later, things are at a standstill. MOE has not yet promulgated regulations that would permit the approval of a collecting society. Without such approval, there is no practical way for right holders to enforce their rights. Disappointingly, the latest reports indicate that the UAE is not planning to approve a national collecting society at all, instead waiting for the Gulf Cooperation Council to establish region-wide collective management. This is a major policy mistake, since such a trans-national society could not be established for several years, if ever. Meanwhile, the toll of uncollected royalties continues to mount. IIPA urges the U.S. Government to engage the UAE Government, through the EPD or otherwise, to address this long-festering problem by approving a collecting society as quickly as possible.

**Internet Piracy and Lack of Responsiveness from MOE:** According to the International Telecommunications Union (ITU), Internet broadband penetration in the UAE has skyrocketed, to almost 952,000 and nearly 10.3% of the population. ITU also indicates that 7.8 million people in the UAE (85%) now use the Internet, and this may be accounted for by mobile users (the mobile penetration rate far exceeds 100% at nearly 13.8 million), with well over half of those mobile users having access to the Internet through their phones or mobile devices (e.g., tablets). These numbers mean enormous opportunities for growth in legitimate copyright distribution models, as demonstrated by the launch of Digital Music Services in the Emirates.<sup>5</sup> Also, since TRA effectively owns large stakes in the key mobile operators, it would seem that a legitimate market could indeed flourish. Unfortunately, online and mobile device piracy in the UAE has also proliferated, harming all the content industries. Hundreds of websites provide illegal access to pre-release music, movies, television content, software, games, reference books, online journals, and trade books of top publishers.<sup>6</sup>

The TRA took action with respect to over 100 websites several years ago, including online piracy sites as well as sites making available circumvention devices for console-based videogames. Six criminal cases were launched against the worst of these sites. In addition, there were over 100 server addresses engaged in signal theft piracy against which TRA took action based on an MOE directive. Unfortunately, in 2012, MOE stopped issuing such directives, and enforcement ceased. Piracy and illegal circumvention activities online have increased since then. TRA appears ready to act and awaits further MOE instructions, and industry has undertaken significant preparatory activities, including test purchases of circumvention devices. MOE should now issue clear directives to TRA to take steps as they did in the past. In addition, MOE needs to resume working with TRA with respect to the sale of pirate hard goods, as well as circumvention technologies, devices, and components, over the Internet. The industry has

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<sup>4</sup>Specifically, Article 18 of the Law states that producers of phonograms enjoy rights to any exploitation (including copying, renting, broadcasting, re-broadcasting, disseminating by wire, wireless, computer or other means, or making available to the public via computer or other media) of their phonograms.

<sup>5</sup>Noelle Manalastas, *Apple Opens iTunes Store in Middle East, Unveils iPhone 5 Release Date*, Al Arabiya News, December 5, 2012, at <http://english.alarabiya.net/articles/2012/12/06/253621.html>.

<sup>6</sup>Several notorious sites (i.e., those recommended to USTR by IIPA as "notorious markets" for piracy in October 2013) are among the top sites accessed in UAE, and some websites, such as *myegy.com* (the 91st most accessed website in UAE) is targeted toward UAE users. The tagline for *myegy.com* is "Download the latest and the most beautiful films of Arab and foreign Sweeter games, programs and songs and more services." The registrant and server information are masked.

tried to fill the void with notifications to some of the sites to demand that they cease distributing pirated materials and counterfeits (and reports indicate that ISPs are more cooperative when it comes to removing listings for sale of counterfeits than they are for piracy notifications). IIPA understands MOE has sent its own notifications to ISPs to cease distributing copyrighted content without authorization. IIPA commends the Cybercrime Department of the Dubai Police for stepping in during the lapse in enforcement, conducting a raid against a website service offering for sale pirated products and making available circumvention devices for console-based videogames.

**Software Piracy in All Its Forms Harming Right Holders:** The software industry notes increasing problems, including unlicensed software usage by enterprises, hard disk loading, and, most recently, Customs' re-exportation of seized counterfeit goods. Unlicensed use of software in enterprises makes up nearly 40% of all software use, with a commercial value of over \$200 million.<sup>7</sup> The problem needs to be addressed by conducting effective enterprise end-user raids. While the courts in the UAE have usually been a bright spot for right holders, in recent years, both piracy and counterfeiting cases have resulted in insignificant fines, and courts of first instance have even been reversed by the court of appeal (in favor of infringers) with significant fine reductions. Courts have struggled with finding a sufficient number of experts to conduct raids frequently enough. Right holders also face difficulties in ensuring that court-appointed experts have the proper level of authority to carry out effective end-user raids.

**Customs' Re-Exportation of Counterfeit Goods:** A major setback to right holders took place in 2013 when UAE Customs apparently decided to start re-exporting seized counterfeit goods rather than destroying them. Exacerbating this problem is a lack of transparency on Customs actions. The re-exportation of counterfeits sets a bad example for other countries, puts other markets around the region at risk, and may be a violation of the UAE's TRIPS obligations. Authorities are encouraged to cease this policy immediately and to create public-private partnerships with right holders to ensure wrongful re-exportation of illegal goods does not occur.

**Enforcement in Malls Outside the Major Cities and in Free Zone Areas:** While enforcement authorities in Dubai have undertaken a number of fruitful efforts, including Customs initiatives and the "open complaints" initiative of the Dubai Department of Economic Development, many enforcement challenges remain in the UAE, particularly in malls outside the main cities and in Free Zone areas. In view of the high volume of goods imported to the UAE, as well as the territory being used as a regional hub for goods in transit, and given recent detections of high levels of pirates and counterfeit product in places like Dragon Mart (scheduled to significantly increase its capacity with the completion of Dragon Mart 2) and the China Mall, the UAE authorities must ramp up efforts to enforce against pirate and counterfeit traffickers in these locales (many from China seeking to infiltrate the markets in the Middle East and North Africa) with deterrent enforcement actions.

## **COPYRIGHT AND RELATED LAW UPDATES**

**Amendments to the UAE Copyright Law:** IIPA understands MOE plans to enact amendments to the UAE Copyright Law to make certain needed changes, following a study by the Abu Dhabi Technology Development Committee. The plans reportedly include tougher policing and the establishment of specialized intellectual piracy courts, but further changes are also needed.

The current Law contains only rudimentary protections against the unauthorized act of circumvention of TPMs and against the trafficking in devices, technologies, components, and services that facilitate the circumvention of TPMs. The following should be prohibited: 1) the act of circumvention of a TPM that effectively controls access to copyright materials,<sup>8</sup> or the exercise of exclusive rights; and 2) the trafficking in devices, technologies, components,

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<sup>7</sup>Data on software piracy rates and commercial values are taken from the 2011 BSA Global Software Piracy Study at [www.bsa.org/globalstudy](http://www.bsa.org/globalstudy). This study assesses piracy rates and the commercial value of unlicensed software installed on personal computers during 2011 in more than 100 markets. The study includes a detailed discussion of the methodology used. BSA plans to release an updated study in the second quarter of 2014.

<sup>8</sup>It should be confirmed that access control TPMs are covered (at present, Article 38(1) covers a TPM "for preservation of specific standard of quality of the copies," which does not seem to cover all access control TPMs).

and services that facilitate the circumvention of TPMs (independent of the existence of any infringement). It should be made clear that violations involving TPMs are subject to both civil and criminal remedies.

Other changes that should be made in any amendments going forward include: 1) removal of unreasonable restrictions on the ability to freely contract;<sup>9</sup> 2) ensuring compulsory license provisions are in conformity with the Berne Convention Appendix<sup>10</sup>; 3) addressing restrictions on the ability of joint authors to use joint works without permission of the other joint author (Article 25); 4) ensuring TRIPS-compatible enforcement procedures are included, such as *ex parte* civil searches; 5) providing for statutory (pre-established) damages; 6) adding a presumption of subsistence of copyright; 7) extending terms of protection to life plus 70 years for natural authors and 95 years for works of corporate authors and for producers/performers of sound recordings; 8) confirming that costs and attorney fees are available to the prevailing party in infringement actions; 9) providing protection against unauthorized decryption of program-carrying signals, manufacture of decryption devices, and provision of decryption services; 10) raising minimum and maximum fines for copyright infringement (Article 37); and 11) adding provisions specifically related to Internet infringements, including notice and takedown, as well as fair and effective measures to deal with repeat infringers and non-hosted infringements on services with business models based on providing access to copyright infringing material.

**Draft Commercial Fraud Law Might Allow Re-Exportation of Counterfeit Goods:** As noted above, IIPA is deeply concerned by the recent decision of UAE Customs to allow the re-exportation to the country of origin of seized counterfeit goods. The draft commercial fraud law currently under examination reportedly would authorize MOE to issue decisions allowing the re-exportation of counterfeit goods to the country of origin, thus codifying this new troubling practice. This provision should immediately be scrapped from the draft law.

**Cyber Crime Law Should Include IP:** The Cyber Crime Law was recently updated to include, among other things, a specific provision on ISP liability. However, the Law does not cover ISP liability in connection with IP infringement. It would be useful if the Law could be clarified in implementing regulations to apply in cases of IP infringement.

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<sup>9</sup>For example, Articles 11 (right of transfer or to return to court for reconsideration) and 15 (making invalid “any action” with respect to “more than five” of an author’s works) are unreasonable restrictions, and should be left in general to marketplace solutions rather than be restricted as they are here by statute.

<sup>10</sup>Article 21 of the law provides for the possibility of reproduction of translation compulsory licenses consistent with the Berne Convention Appendix. In 2004, when the UAE joined the Berne Convention, the government availed itself of the Berne Appendix. See Berne Convention Members, World Intellectual Property Organization, at <http://www.wipo.int/export/sites/www/treaties/en/documents/pdf/berne.pdf>. In implementing any such licenses, the Government of the UAE must ensure that the rules of the Appendix are strictly followed.

# ITALY

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

### 2014 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** IIPA recommends that USTR remove Italy from the Special 301 Watch List, in recognition of its adoption of Internet anti-piracy regulations that include a fast-track procedure to address large-scale piracy in 12 days or less. However, in light of the current scope of Internet piracy that still stifles the legitimate marketplace and the untested nature of the regulations, we suggest that USTR conduct an Out-of-Cycle Review of Italy to monitor for full implementation of the regulations and resolution of key enforcement challenges.<sup>1</sup>

**Executive Summary:** On December 12, 2013, the Italian Communications Regulatory Authority (AGCOM) adopted regulations that hopefully signal a radical step forward in Italy's fight against long-entrenched copyright piracy. The regulations provide notice and action procedures that incorporate due process safeguards, establish a 12-day mechanism for large-scale piracy, and allow rights holders to seek action from sites that host infringing works as well as those that provide links to infringing files. In 2013, rights holders reported a surge in anti-piracy actions by the Fiscal Police, resulting in the closure or removal of infringing material or links from sites including linking sites, torrent indexing and tracker sites (including *isohunt.com*), streaming services, and Italy-based cyberlockers. Yet overall, extremely high levels of piracy in the country persist. The situation signals a need for a handful of targeted reforms that can (a) respond quickly to constantly moving targets such as linking sites, (b) dedicate needed resources to enforcement officials, (c) enable the collection of evidence needed for civil enforcement against operators of infringing P2P services, (d) close legal loopholes that have resulted in a glut of professional workplaces that rely on illegal software, and (e) take action against theatrical camcord theft and theft of dubbed soundtracks.

#### **PRIORITY ACTIONS REQUESTED IN 2014**

- Upon entry into force of the AGCOM online copyright regulations, publish quarterly reports documenting:
  - (i) notifications that have resulted in removal of infringing material from hosted websites;
  - (ii) notifications that have resulted in removal of links to infringing material;
  - (iii) the number of cases resolved by expedited procedure; and
  - (iv) actions against repeat infringers.
- Coordinate government bodies at a high level, and encourage cooperation to continue important criminal actions and injunctions against illegal P2P and linking services.
- Provide the legal tools and resources for specialized judges and staff within the specialized corporate judiciary section toward more timely resolution of IP cases.
- Clarify that unincorporated professional partnerships that infringe copyright of software in the course of their business activities are criminally liable under Article 171*bis* of the Copyright Act.
- Effectively enforce the Anti-Camcording Law to curb the increasing problem of theatrical camcord theft and theft of dubbed soundtracks.
- Eliminate legal obstacles for rights holders to take appropriate civil actions for the protection of their rights in the online environment, including by gathering 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 establish underlying infringement in cases against major infringing web operators.

<sup>1</sup>For more details on Italy's Special 301 history, see previous years' reports at <http://www.iipa.com/countryreports.html>. For the history of Italy's Special 301 placement, see <http://www.iipa.com/pdf/2014SPEC301HISTORICALCHART.pdf>. For a discussion of IIPA's 2014 Key Initiatives and Challenges, see IIPA, *2014 Special 301 Submission*, at <http://www.iipa.com/pdf/2014SPEC301COVERLETTER.pdf>.





## **REFORM FOR COOPERATION ON INTERNET PIRACY**

In accordance with the responsibility assigned to it under the “*Decreto Romani*” of 2010, the Italian Communications Regulatory Authority (AGCOM) worked to develop a solution to online piracy that could be both effective and efficient, while respecting due process. IIPA supports the resulting December 12, 2013 AGCOM regulations (the Regulations), which will enter into force on March 31, 2014. These notice and action measures are crucial to encouraging speedy responses to infringement notices and to promoting more robust cooperation between various actors in the online ecosystem. Italian law already provides rights holders with the ability to obtain a preventive attachment (seizure order) against foreign sites, and rights holders have done so, for example with respect to Pirate Bay and BTJunkie. But the process through the courts is lengthy and results are isolated, making the availability of rapid administrative procedures against both domestic and foreign infringement indispensable to an effective antipiracy program in Italy. Experience suggests that any effective response to Internet piracy must take place in Internet time, and expedited processes are therefore greatly welcomed.

The Regulations establish a procedure by which rights holders may submit complaints to an authority requesting removal of infringing activity online, which are passed on to the relevant ISPs and where possible, website managers and uploaders. (A website manager is a service provider that, “in the context of an Internet site, carries out the management of a space in which there are digital works or parts of same or *Hypertext links* (links or torrent) to same, even if uploaded by third parties.”) Unless the recipients comply with the request, the authority initiates, within seven days after submission of the complaint, a review of the case, which must be concluded within 35 days. If the authority determines the request is justified, it orders the hosting ISP to remove or disable access to the infringing files (or, if the files are hosted on a server outside of Italy, it orders ISPs to disable access to the website) within three days. Parties are permitted to put the process on hold for purposes of an appeal in a court of law. We highlight that this process is intended to operate alongside present notice-and-takedown arrangements, and is primarily aimed at sites that do not generally respond to notices. Cooperation between rights holders and intermediaries remains important to ensure the prompt removal of infringing materials. Reasonable takedowns are measured in hours, not days.

An expedited procedure lasting no more than 12 days is made available in Article 9 of the Regulations in serious cases of piracy, and is vital to the objective of establishing a rapid response to instances of Internet piracy, but it will only be effective if every effort is made to provide the authority with adequate resources so that it can review complaints and turn notices around for delivery to web administrators within hours, rather than weeks. The maximum deadlines allowed for review of complaints should be the exception, rather than the rule. The granting of extensions should be minimized, as they have the potential to delay action and unfairly harm the legitimate market for copyrighted materials, diminishing the deterrent effect of more expedited procedures.

IIPA strongly supports provisions in the Regulations providing rights holders with the ability to seek action from sites that provide links to infringing files. Although the Regulations do not directly address users engaged in illegal file sharing activity over P2P networks, this provision will assist in stemming the unauthorized activity over those networks and other sources such as cyberlockers.

In recent years, some major local ISPs and international ISPs with local offices have begun to cooperate with rights holders, but only on a reactive and limited basis. In the modern market, peak consumer demand for copyrighted works typically occurs within a matter of weeks after release, making this a crucial period of time for rights holders to generate revenue in an effort to recoup their considerable investment in creating, producing and distributing their works. IIPA welcomes the promise of improved cooperation through the adoption of the AGCOM Regulations. The copyright sector in the United States encourages USTR to monitor the implementation of the Regulations throughout 2014, particularly regarding adherence to the Article 9 expedited procedure, application of the procedures to linking sites, and actions against repeat infringers.

## **COPYRIGHT PIRACY IN ITALY**

The overall level of piracy remained steady in 2013 for all of IIPA's members, seemingly unaffected by several Internet enforcement actions during the year. This may be explained by the fact that the most prevalent forms of piracy in Italy today have arisen where the current legal regime has been unable to reach them. Small web sites providing links to illegal material (hosted on major cyberlockers in other jurisdictions) can nimbly relocate and proliferate before lengthy litigation can even be initiated against them. Meanwhile, the other "big fish" of the piracy food chain, operators of peer-to-peer (P2P) platforms dedicated to infringement, cannot be prosecuted without evidence of the underlying copyright infringements occurring at the user level, but that data is out of reach due to privacy laws. The large-scale importation of circumvention devices, contributing to Italy's status as having one of the world's worst videogame piracy rates, originates from the land-locked microstate of San Marino where adequate anti-circumvention laws are not in place. Finally, much of Italy's professional class, including architects and lawyers, use illegal software without the threat of prosecution due to a carve-out on their behalf in Italy's Copyright Act.

**Online and mobile device piracy:** All of IIPA's members are dramatically affected by online piracy in Italy, and for many of the copyright sectors the problem is most severe on websites that link to illegal files available either from P2P file-sharing networks or on cyberlockers. Increasingly, cyberlockers refuse to respond to rights holder requests to remove pirate material. The most popular torrent search engines among Italian users are located abroad, although many of these were blocked in 2013 by Italy's Fiscal Police. Mobile device piracy of music, films, and videogames is also growing rapidly via applications that share links to infringing content.

Internet-based piracy has grown in particular for the software industry, which in the past saw most of the end-user piracy in the country originating from offline sources. Piracy of books and journals is particularly acute via P2P networks, and the Association of American Publishers (AAP) reports that Italy ranks among the top five problem countries for some publishers. The Entertainment Software Association (ESA) reports that Internet piracy remains a serious problem for its members in Italy, which in 2013 once again placed third in the world in terms of the number of connections by peers participating in the unauthorized file-sharing of select ESA member titles on public P2P networks. Italy has ranked among the top three countries since ESA began measuring such data in 2009.<sup>2</sup> The local recording industry associations, FIMI and FPM, report that more than six million people were using P2P networks for illegal uploading and downloading of music files in 2013.

**Enterprise end-user piracy of software:** As of 2011, the software piracy rate in Italy stood at nearly 50%, well over the average among European countries, and representing a commercial value of unlicensed software of nearly US\$2 billion.<sup>3</sup> This includes widespread use of unlicensed software by enterprises and the pre-installation of pirated software on PCs. BSA has also become aware of activities in Italian companies involved in the importation of illegal software from China, which they then sell to customers located in other European countries.

**Camcord Piracy:** The level of camcord piracy in Italy remains unacceptably high. The problem in Italy is a lack of enforcement and the fact that it takes literally years to move a criminal complaint. Much of the illicit activity involves the 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 and sold through street vendors. Video captured in Italian theaters is also increasingly appearing in illegal copies online.

**Hard goods piracy:** Organized criminal syndicates remain heavily involved in the production and distribution of infringing product, particularly in southern Italy. DVD burning labs are located in Sicily, while street

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<sup>2</sup>ESA's reporting on P2P activity does not take into account downloads of these titles that occur directly from hosted content, such as games found on "cyberlockers" or "one-click" hosting sites, which appear to account each year for progressively greater volumes of infringing downloads.

<sup>3</sup>Data on software piracy rates and commercial values are taken from the 2011 BSA Global Software Piracy Study at [www.bsa.org/globalstudy](http://www.bsa.org/globalstudy). This study assesses piracy rates and the commercial value of unlicensed software installed on personal computers during 2011 in more than 100 markets. The study includes a detailed discussion of the methodology used. BSA | The Software Alliance (BSA) plans to release an updated study in the second quarter of 2014.

piracy of DVDs is spreading in the regions of Campania, Sicily, and Puglia. Independent producers and distributors confirm that DVD sales have been particularly impacted since pirated DVDs are readily available on the street, at kiosks and in shops throughout Italy. The prevalence in Italy of circumvention devices such as videogame copiers is a severe problem for ESA members, which report that many of the devices originate from San Marino (where local law enforcement lacks the legal tools to address circumvention of technological protection measures, or TPMs) and facilitate much of the illegal videogame downloads in the country. Circumvention devices are found both in retail stores and on e-commerce sites. Because circumvention devices enable users to play pirated copies of games that are downloaded from the Internet, hard goods piracy of videogames themselves has continued to decline in 2013 in favor of online piracy.

## **COPYRIGHT LAW REFORM AND RELATED ISSUES**

In January 2013 the Senate adopted a bill that would have resulted in a decriminalization of various copyright infringement offenses. For instance, non-commercial copyright infringements (including illegal uploading of content) would no longer have been subject to criminal liability, but only to civil liability. Fortunately, copyright infringements were ultimately excluded from the draft that now has been transmitted to the Chamber of Deputies for the final parliamentary reading, with adoption expected in spring 2014. Rights holders welcome the exclusion of copyright infringements from this draft. *Legislative initiatives are needed to strengthen, rather than undermine, the ability for copyright owners to protect and enforce their rights in the following areas:*

**Evidentiary Hurdles in Internet Piracy Enforcement:** Action against Internet piracy is hampered by, among other things, limitations on monitoring and collecting Internet piracy data, based on Italy's Privacy Code and the March 2008 ruling of the Data Protection Authority, resulting in a lack of civil enforcement against file-sharing of infringing content. Despite some advances that the local film industry has made in data privacy issues in its case against Telecom Italia,<sup>4</sup> Italian jurisprudence still appears to limit the ability of rights holders to use collected data in actions against individual infringers. Civil enforcement against P2P piracy has been severely hampered by the Rome High Court's interpretation of Italy's Privacy Code in the famous Peppermint cases, and by a March 2008 ruling of the Data Protection Authority to the effect that the use of tools to gather IP addresses of infringers would violate the Privacy Code.<sup>5</sup> Unless rights holders can obtain IP addresses and thereafter the names of subscribers via a civil court order, civil enforcement in P2P piracy cases will, as a practical matter, be impossible.

**Lack of ISP liability provision:** Italy's laws do not yet firmly establish fundamental liability when an ISP fails to take action in response to a notice of infringement provided by a relevant rights holder. On January 19, 2012, the Italian Parliament Commission of EU Affairs approved an amendment to a bill for the European Community Law, referring to Articles 16 and 17 of the Italian Decree implementing the E-Commerce Directive. The draft amendment would have confirmed the existence of an ISP's duty of care when it becomes aware of an infringement based on information provided by rights holders, and of an ISP's responsibility to take actions to remove or to disable access "upon request of [i.e., notice from] the competent authorities or any interested person." While the introduction of these provisions was an important step forward, they were, unfortunately, withdrawn from consideration in early 2012, and future work still remains uncertain.

**Professionals exempted from liability for software piracy:** In December 2009, the Italian Supreme Court held that self-employed professionals are not within the scope of Article 171*bis*, which requires that, for criminal liability to attach, the infringing act had be carried out by corporate entities acting for commercial purposes. The case held that unincorporated professionals (such as architects and engineers) and their partnerships 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. An

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<sup>4</sup>The history of FAPAV's case against Telecom Italia is detailed further in IIPA's 2012 Special 301 filing, available at <http://www.iipa.com/rbc/2012/2012SPEC301ITALY.PDF>.

<sup>5</sup>The Peppermint case is detailed most recently in IIPA's 2013 Special 301 filing, available at <http://www.iipa.com/rbc/2013/2013SPEC301ITALY.PDF>.

amendment to Article 171*bis* is needed to specify that the provision also criminalizes piracy carried out with a professional purpose for a profit.

## **COPYRIGHT ENFORCEMENT IN ITALY**

The *Guardia di Finanza* (Fiscal Police) have consistently been a bright spot in rights holders' relationships with enforcement authorities for most of the copyright sectors. In 2013, the Fiscal Police carried out a significant number of operations against websites hosting or linking to infringing material, including some very popular torrent sites, a trend that IIPA hopes will continue going forward. To the extent Italian Customs authorities have competence (i.e., outside of intra-European imports), they operate with general efficiency and take on many *ex officio* actions. Rights holders are also encouraged that a criminal proceeding is moving forward before the Court of Florence addressing circumvention devices, which is expected to conclude in early 2014 and could be an important milestone in the fight against the trafficking of these devices. For the average copyright infringement case, however, difficulties arise over the course of lengthy litigation; all of the concerns with Italy's court systems that IIPA has detailed in previous years remain true today.

**Criminal enforcement:** Enforcement actions related to Internet-based piracy increased in 2013, with improved coordination among enforcement authorities and rights holders. Rights holders report very good cooperation with the Fiscal Police for cases involving infringement of film, music, software and videogames, and in particular report very good cooperation with the "GAT" department, a special division dedicated to online fraud. In 2013, the "GAT" carried out some of the most effective and large-scale operations against online copyright infringements, with actions against some of most significant international illegal portals available in Italy, as well as investigations and seizures of some well-known Italian sites. Other successful actions taken by the Fiscal Police in 2013 include actions against Italian linking sites, illegal streaming services with movies and television program and cyberlockers sites. In 2013, BSA supported the Fiscal Police in 23 criminal raids for illegal software use (with 21 more in the pipeline at the time of reporting in late 2013), 21 of which resulted in the seizure of illegal software valued in total at more than US\$ 1.7 million (1.26 million euros).

Despite the *ex officio* actions of the Fiscal Police against hard goods piracy, in the most problematic region of southern Italy, police forces do not have a systemic, effective approach to the issue. Hard goods piracy activity is fragmented in nature and conducted by numerous small operators, making effective enforcement raids difficult to organize. Additional resources are needed to permit the Fiscal Police to develop a more consistent and comprehensive program for all varieties of copyright crimes.

It is when cases are brought before the court that severe obstacles emerge. Public prosecutors do not inform injured parties of pending criminal proceedings, and prosecutors and judges continue to show a lack of interest in criminal enforcement of IPR violations. Many of the Fiscal Police's high-profile online cases mentioned above resulted in success due to preliminary remedies. In some cases, however, preliminary *ex parte* searches are undermined by judges who fail to see the risk in alerting defendants of a scheduled raid. For cases that require full proceedings, the difficulties that IIPA has detailed in past years persist in Italy's criminal courts.<sup>6</sup> "Specialized" sections handle a variety of cases in practice, and are only "specialized" to the extent that a portion of their day is allotted to IPR crimes. In reality, these sections often fail to prioritize copyright cases. Criminal sanctions vary from four months to one year, including in cases of repeat infringers, for whom the law provides a minimum term of one year. Severe delays in the judiciary ultimately undermine effective enforcement.

**Civil Enforcement:** Italy's civil courts also suffer from a lack of resources that can mean major delays in proceedings. As it stands in Italy, injunctions are among the few effective measures in the civil arena, but given the evidentiary obstacles to civil enforcement posed by Italy's privacy laws, injunctions are of no use to rights holders

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<sup>6</sup>For more details about enforcement in Italy's courts, see IIPA's 2013 Special 301 filing, available at <http://www.iipa.com/rbc/2013/2013SPEC301ITALY.PDF>.

against online piracy. It is extremely important that new competent judges are allocated to the specialized courts with jurisdiction over IP, to avoid creating further delays in civil proceedings. On a positive note, BSA | The Software Alliance (BSA) reports that many of its civil searches result in early settlements out of court, and in rare cases the actions are resolved in court. In these cases, BSA reports a positive degree of understanding among the courts of both the nature of the claim and of damages in cases of end-user software piracy.

## **TRAINING AND TECHNICAL ASSISTANCE**

During 2013, anti-piracy organizations took part in training programs planned with Fiscal Police offices in Cuneo, Alessandria, Sondrio, Imperia, and Piacenze that were attended by a total of about 200 officers. Topics concerned audiovisual, music, software, satellite TV and videogame piracy, with a primary focus on online piracy of copyrighted works.

# SPAIN

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2014 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** IIPA recommends that USTR continue its out-of-cycle review of Spain in 2014, and return Spain to the Special 301 Watch List if copyright enforcement fails to improve markedly in 2014.<sup>1</sup>

**Executive Summary:** Spanish policymakers, over the past year, have been developing a set of important reforms to the Intellectual Property Law, Criminal Code, and Civil Procedure Law. Many of these changes, if adopted and implemented effectively, could close loopholes that for years have prevented law enforcement authorities and rights holders from taking meaningful action against digital piracy and end-user software piracy. Despite these good efforts, adoption of law reform is still pending and is not likely to enter into force until the end of 2014, and necessary changes to the Law of Information Society Services and Electronic Commerce (LSSI) to eliminate the need for a court order to establish effective knowledge appear to be stalled. In the meantime, the black market for copyright works continues to expand and evolve in the online environment, with enterprise end-users, and even in the streets of Spain's major cities, while administrative and criminal copyright enforcement efforts remain at a standstill.

Most notably, the Spanish Copyright Commission, established by law in 2011 within the Intellectual Property Commission (herein, the IPC) has yet to remedy its extremely slow response times to rights holders' complaints. Of the complaints submitted by rights holders reporting their results to IIPA, only one has been the subject of a full case with effective takedown results since the IPC began operations in early 2012. While Spain's police, prosecutors and judges point to Spain's laws as the reason for their inaction against pirates and sellers of circumvention devices, the IPC already has many of the legal tools needed to take expeditious and deterrent actions against online piracy. IIPA urges the U.S. Government to stress the need for the IPC to effectively exercise its administrative authority, and for Spain's prosecutors and courts to take action wherever possible under the law, taking their cue from Spain's policymakers that the country's anti-piracy efforts must press forward without delay. We also urge that enactment of needed legal reforms be accelerated and that their subsequent implementation is comprehensive and effective.

### **PRIORITY ACTIONS REQUESTED IN 2014**

- Resolve shortcomings in existing legislative proposals and quickly adopt needed reforms to the IP Law, Criminal Code, Civil Procedure Law, and LSSI, so that criminal and civil actions may proceed against all forms of piracy and the manufacture and sale of circumvention devices.
- Provide adequate resources to the IPC and improve its operations for more effective enforcement of the Law on the Sustainable Economy, in actions against infringing web-hosting, linking, indexing, and torrent sites.
- Establish a national authority to coordinate online piracy enforcement, ensure allocation of adequate resources for investigation of Internet and computer crimes, and avoid unnecessary delays within the Ministry of Interior, the Guardia Civil, the National Police, the Criminal Courts, and the Commercial Courts handling IP cases.
- Establish clearly defined lines of communication between rights holders and authorities in the National Tax Agency devoted to tax fraud and smuggling linked to IP infringement, and work with electronic payment services such as VISA, MasterCard, and PayPal to block payments to distributors of pirate product.
- Seek agreements between rights holders and major online advertising services, similar to the 2012 efforts of the Coalition of Creators and Content Industries toward removal of ads from websites offering illegal material.

<sup>1</sup>For more details on Spain's Special 301 history, see previous years' reports at <http://www.iipa.com/countryreports.html>. For the history of Spain's Special 301 placement, see <http://www.iipa.com/pdf/2014SPEC301HISTORICALCHART.pdf>. For a discussion of IIPA's 2014 Key Initiatives and Challenges, see IIPA, *2014 Special 301 Submission*, at <http://www.iipa.com/pdf/2014SPEC301COVERLETTER.pdf>.



## **COPYRIGHT PIRACY IN SPAIN**

In stark contrast to so many of its neighbors in Western Europe, Spain suffers from unrelentingly high rates of digital piracy in every sector – music, film, videogames, software, and books. The sheer volume of content being taken without compensation to rights holders is staggering. A 2013 survey conducted by GfK and the Coalition of Creators and Content Industries (*Coalición de Creadores e Industrias de Contenido*) (the GfK study),<sup>2</sup> shows that in 2012, users in Spain accessed 170 million illicit videogames, valued at 4.38 billion Euros (US\$ 5.92 billion). The volume of pirate music products in 2012 was valued at 6.9 billion euros (US\$ 9.3 billion). More than 40% of software installed on personal computers (PCs) in Spain in 2011 was unlicensed with a commercial value of more than US\$1.2 billion.<sup>3</sup> The GfK study shows there were more than 500 million illicit audiovisual downloads in Spain during 2012, valued at 3.3 billion euros (US\$ 4.1 billion). Widespread Internet-based piracy in Spain undercuts the legitimate market for music publishers and their royalty collections. In Spain, 33% of Internet users download music content illegally, and one in two Internet users have accessed unauthorized content online at some time. In short, there isn't a sector within IIPA's membership that doesn't experience significant loss in the Spanish market due to piracy.

According to the GfK study, 17% of Spanish Internet users believe there are no legal consequences to downloading material without authorization, and twenty percent believe there is nothing legally or morally wrong in doing so. A more brazen one out of four in Spain feel it is a user's right to access unauthorized content. And perhaps most telling of all, 69% argued that they would not pay for something they could get for free. These attitudes are fueled by an environment where there are no real deterrents against online piracy.

The entire Spanish-speaking market suffers as a direct result. Once one of the top markets in the world for consumption of legitimate copyright works, the Spanish market has been decimated in recent years. Revenues for sound recordings have dropped for eleven years straight in Spain to less than a quarter of what they were in 2001. Annual income in the Spanish digital market is now surpassed by much smaller countries such as Norway, and total recording industry revenue in Spain has been overtaken recently by Sweden. The videogame industry, which saw its Spanish market value peak in 2007 and has since faced steady declines, expects to see a five percent drop in annual sales in 2013, based on preliminary estimates. At the same time, Spain is increasingly becoming a hub for illicit activity. The Entertainment Software Association (ESA) reports that in 2013 Spain ranked fifth in the world in terms of the number of connections by peers participating in the unauthorized file sharing of select ESA member titles on public peer-to-peer (P2P) networks. Spain has ranked among the top five countries since ESA began measuring such data in 2009.<sup>4</sup> Compounding the problem of unfettered digital piracy in Spain is the ripple effect it has for music, audiovisual, videogame, software, and book publishing markets across Latin America, where Spanish-language products proliferate, originating from Spanish pirates.

Piracy leads to shrinking revenues for Spain's creative sectors and its government. Piracy in 2012 caused the music industry in Spain lost profits valued at almost 580 million euros (US\$ 784 million), according to the GfK study. The same research shows that for the videogame industry, the loss of potential profits was 269.5 million euros (US\$ 364.5 million), or a 55% increase over the current market, and for the film industry, potential earnings without piracy were 209 million euros (US\$ 285 million), a 42% increase over the current market. The Spanish independent film industry has been especially hard hit – where they once could receive as much as 10% of a production budget from a minimum guarantee of a license fee, surviving Spanish distributors reportedly may only be able to guarantee a mere two to three percent of a film's budget, if any. The income loss for the music industry alone accounts for a loss in government revenue (including taxes and social security income) of 310 million euros. A study by BSA | The

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<sup>2</sup>See [http://www.mcu.es/libro/img/MC/Observatorio\\_Pirateria\\_2012.pdf](http://www.mcu.es/libro/img/MC/Observatorio_Pirateria_2012.pdf).

<sup>3</sup>Data on software piracy rates and commercial values are taken from the 2011 BSA Global Software Piracy Study at <http://www.bsa.org/globalstudy>. This study assesses the rate and commercial value of unlicensed software installed on personal computers during the year in more than 100 markets. The study includes a detailed discussion of the methodology used. BSA | The Software Alliance (BSA) plans to release an updated study in the second quarter of 2014.

<sup>4</sup>ESA's reporting on P2P activity does not take into account downloads of these titles that occur directly from hosted content, such as games found on "cyberlockers" or "one-click" hosting sites, which appear to account each year for progressively greater volumes of infringing downloads.

Software Alliance (BSA) and the business school INSEAD indicates that a one percent increase in the use of authorized software in Spain would result in nearly US\$1.5 billion more growth to Spain's economy than a one percent increase in unauthorized software.<sup>5</sup>

The decline in the Spanish market for legitimate content is directly related to the prevalence of piracy. In a study supported by the Ministry of Culture in 2011, "*Encuesta de hábitos y prácticas culturales 2010-2011*," nearly 80% of users engaged in piracy admitted that they do it to save the money they would have to pay for legal content. As a result, Spain's own creators are hard hit by the pervasive piracy problem. The GfK study demonstrates that sales of albums by Top 50-ranked national recording artists dropped by 72% between 2004 and 2012, and in the last four years only one Spanish recording artist has placed in the Top 50 albums of the year. As a result, local jobs in the music industry alone have dropped by more than 50% in recent years. Economists point to 4,000 jobs in the sector that have been lost due to piracy.

**Online Piracy Generally:** Digital piracy accounts for the lion's share of the problem in Spain. Today, Internet piracy in Spain occurs via hosted websites, linking sites that direct users to infringing content stored in "cyberlockers," BitTorrent networks, more "traditional" P2P networks (such as Edonkey), and increasingly via streaming sites. The incidence of digital piracy is generally evenly split between P2P formats and non-P2P formats. Within the P2P categories, piracy via BitTorrent networks is by far the most favored for pirated music, audiovisual, and videogame content, particularly since the closure of MegaUpload led to a notable migration from cyberlocker activity to P2P networks of all kinds. Among non-P2P formats, unauthorized files stored on cyberlockers account for the majority of music piracy, but that activity is diminishing as the growth of stream-ripping is mushrooming. Smartphone apps that facilitate piracy are increasingly worrisome in the Spanish market.

It is important to note that BitTorrent trackers and sites that index files on hosted servers are critical tools for users to locate infringing material; without them, the scale of online piracy that occurs in Spain would not be possible. These indexes and trackers are also often the only point of attachment for the jurisdiction of Spain's authorities, since they are frequently located within Spain but they direct users to files located in other jurisdictions.

**Hard goods piracy:** Across Spain, street piracy remains a highly visible and unabated problem particularly for the music and film industries. For the music industry, illegal CD sales amount to 19% of the legal market. The film industry reports that hard goods piracy in Spain has increased since 2012, through organized DVD-R labs, distribution centers, and street vendors.

Physical piracy is well entrenched in cities such as Seville, Granada, and Murcia, which have displaced Madrid and Barcelona as the main operational centers for the organized pirate networks that produce pirate CDs and DVDs for the rest of Spain. IIPA reported in 2013 a severe epidemic of street piracy in Seville's open air markets, which persists to the present day. Seville is the home of more than 20 flea markets across the city, representing almost 2,000 points of sale from which more than 300 are devoted to pirate sales of copyrighted content (music, films, software, games, etc.).

The City Council of Seville licenses its local flea markets and charges consumption taxes for their activities, but otherwise delegates all management and control over the markets to the Association of Street Selling (*Asociación Del Comercio Ambulante*, or ACA). The ACA administers the issuance of points of sale licenses and the collection of payment, and also authorizes the placement of blankets and stalls to sell pirate and counterfeit CDs and DVDs at various flea markets. There is reason to believe the ACA has connections with Seville's organized networks involved in pirate CD and DVD duplication and distribution throughout Spain. Seville local police have instructions not to patrol or act inside the grounds of flea markets, and the local police unit specializing in investigating and monitoring piracy in the city was dismantled in October of 2012.

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<sup>5</sup>Competitive Advantage: The Economic Impact of Properly Licences Software (2013) at [http://portal.bsa.org/insead/assets/studies/2013softwarevaluestudy\\_en.pdf](http://portal.bsa.org/insead/assets/studies/2013softwarevaluestudy_en.pdf).



There is strong demand for hard copies of pirate DVDs across Spain, and the result is a decimated legitimate retail market. The number of videoshops has dropped from 9,000 in 2005 to fewer than 2,000 in 2013. The most representative trade association for video distributors, UVE, had 13 members in 2006 but now counts only four. In the first half of 2013 alone, the legitimate home video market declined by 14%.

**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 services. Spanish-sourced copies routinely appear 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 of such piracy, prosecution of camcorders in Spain remains quite difficult. Independent producers are less likely to have the resources or ability to coordinate “day and date” releases amongst their national distributors, leaving them and their authorized distributors especially vulnerable to piracy stemming from illegal camcords in the markets of initial release.

**Circumvention devices:** The videogame industry also continues to suffer from the availability (primarily online) of circumvention devices for videogame consoles. Online vendors and e-commerce sites conduct sales of circumvention devices, such as mod chips and game copiers, through highly sophisticated and professional-looking online services. The widespread availability of these tools to bypass technological protection measures (TPMs) are central to the overall piracy problem for the local and international video game industry, as these devices are needed to play unauthorized copies of video game software.

**Software piracy:** BSA reports that the software piracy rate in Spain stood at 44% in 2011 (an increase from 43% in 2010), representing a commercial value of unlicensed software of \$1.2 billion.<sup>6</sup> This includes a significant level of unlicensed software use by enterprises, particularly small- to medium-sized enterprises (SMEs). Spain is a country with a large number of SMEs, among which levels of piracy are still considerably more rampant than among the larger corporations that might characterize other markets.

## **COPYRIGHT ENFORCEMENT ACTIONS IN SPAIN**

Enforcement in Spain needs improvement on all fronts: criminal, civil, and administrative. Rights holders report strong relationships with police forces, but investigations of criminal piracy networks are limited to physical piracy operations, and even those investigations have decreased significantly in 2013. Two positive decisions were issued by Criminal Courts against illegal websites in 2013. But in general, investigations handed over to prosecutors go nowhere or are extremely slow to come to conclusion. Civil actions, particularly for individual acts of Internet piracy, are unavailable as a practical matter because Spain’s data retention laws restrict authorities from accessing identifying information connected with IP addresses. Even if these types of enforcement were functioning well, a modern anti-piracy effort in Spain would not be comprehensive without an effective system for the notice and takedown of infringing online materials. Unfortunately, the IPC that began operations in early 2012 to facilitate such a system remains ineffectual.

A number of clarifications and amendments are needed in Spain’s laws to permit court actions to go forward against infringers, as well as against manufacturers and distributors of circumvention devices, and these are explained in detail below under “Copyright and Related Laws in Spain.” The following four action items are needed to ensure that Spain’s IP Commission and the country’s law enforcement authorities have the resources and coordination mechanisms necessary for effective copyright enforcement:

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<sup>6</sup>See footnote 3.

***Improve the efficiency of the Spanish IP Commission by providing adequate resources to facilitate effective enforcement of the Law on the Sustainable Economy against web-hosting of pirated content and linking, indexing, and torrent sites.***

On December 30, 2011, the Spanish Government adopted much-anticipated regulations for establishing Section 2 of the IP Commission, the Spanish Copyright Commission (herein, the IPC) for the administration of notices and removal orders regarding infringing content hosted online. Since its inception, the IPC has been plagued by delays that, in 2013, the Government of Spain promised were being addressed. Yet IIPA members continue to report great difficulty in obtaining orders that require the removal of infringing material or that impose other consequences for online infringers through the IPC. In fact, the mere initiation of a case has proven to be an agonizingly slow process.

What few successes have occurred are the exception to the rule. Rights holders report the voluntary closures of *www.listengo.com* and *www.dtpt.net* in May 2013, and *www.dijafe.com* and *www.descargadirecta.biz* in October 2013, in response to investigations under the IPC proceedings. Often, as in the case of *elitetorrent.net*, cited infringing material is removed but the website remains in operation. The IPC also set an important example in 2013 by treating a linking website owner (*www.foroxd.com*) as a “responsible party” for infringement actions, and not a mere intermediary.<sup>7</sup> IIPA looks forward to seeing more rapid actions against linking sites according to this treatment. But in other proceedings the IPC has come back to the strategy of directing its action against cyberlockers (such as *Uploaded.to* and *Letitbit.net*) instead of the linking sites. Under the procedures, the “responsible party” must respond to IPC notices within 48 hours, but many of the cyberlockers involved in Spain’s online piracy epidemic are outside of the IPC’s jurisdiction and not likely to respond. It is only after this initial period that any responsibility attaches to the “intermediaries,” and as a result, the opportunity for rapid response is lost.

IIPA members are aware of only 74 cases in which infringing material was successfully removed in response to IPC action since it began operations. This reflects a very small number of IPC removal orders in the context of Spain’s online copyright piracy epidemic, and underscores the fact that a notice and takedown system that requires notices to be sent to and reviewed by a bureaucratic body is unworkable. Indeed, according to the Spanish Coalition of Creators and Content Industries, the IPC takes on average more than 400 days to initiate an investigation into a site after receiving a rights holder complaint. To date, there have been no IPC actions taken in response to complaints of recidivist infringing sites that have been submitted by IIPA’s affiliates – including two that were filed as far back as September 2012. Of the 26 complaints filed with the IPC by the videogame association aDeSe, only one has resulted in an order from the IPC requiring the removal of infringing content. The representative group for the music industry, AGEDI, notes that in 18 months of operation, the IP Commission has initiated only 29 of the 40 complaints it has filed. AGEDI filed a complaint regarding the notorious site The Pirate Bay on November 29, 2012, and submitted new material on March 11, 2013; there has so far been no response from the IPC. Meanwhile, rights holders still must limit the number of works that can be included in a complaint, so that the number of complaints needed for comprehensive action is necessarily greater. The recording industry reports that as of November 2013, just 35 albums and 24 songs had been voluntarily or compulsorily removed and just a handful of small-scale websites have closed down in response to IP Commission decisions.

All told, very little has changed regarding the IPC since the Government of Spain submitted its optimistic report in the 2013 Special 301 Review. IIPA is hopeful that proposed amendments to the IP Law will be further improved, adopted, and ultimately provide additional tools and greater clarity; however, it is fair to assume that such reforms will take time, and likely will not come into effect in the coming months. The IPC should use its existing tools to their maximum effect. To be effective, it simply must work faster and focus on linking sites. Moving the existing complaints through the due process steps provided for and removing unnecessary procedural hurdles will not only

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<sup>7</sup>For further explanation of the importance of the “responsible party”/“intermediary” distinction under the IP Commission’s procedures, and a more detailed description of the full set of procedures as provided by the Law for the Sustainable Economy (much of which has still not yet been tested by the IP Commission), see IIPA’s 2013 Special 301 filing, available at <http://www.iipa.com/rbc/2013/2013SPEC301SPAIN.PDF>.

demonstrate the fairness of the system for addressing online infringement, but will also allow Spain to move toward meeting its key obligations under the World Intellectual Property Organization (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 WIPO Performances and Photograms Treaty (WPPT), and Article 14 of the WIPO Copyright Treaty (WCT)).

***Coordinate Internet piracy enforcement at the national level, and ensure allocation of adequate resources for investigation of Internet and computer crimes within the Ministry of Interior, the Guardia Civil, and the Cuerpo Nacional de Policía (National Police), the Criminal Courts, and Commercial Courts (Juzgados de lo Mercantil) that have jurisdiction over IP cases, to avoid unnecessary delays.***

Government-wide attention and a national action plan is needed to provide adequate personnel and training to local and regional authorities to heighten sensitivity to the piracy problem in Spain. This might include appointing a Special IP Crime Prosecutor’s Office. A previous effort, launched by Royal Decree 118/2005 in October 2005, has completely lapsed; the Cross-sectorial Commission to fight infringement that it authorized has not met since 2010.

In 2006, the Attorney General issued instructions effectively decriminalizing organized online file sharing of pirated content, and preventing the pursuit of criminal cases against enterprise end-user software piracy by establishing that such piracy is not considered to have a “commercial purpose” subject to criminal liability. Due to the 2006 Circular and various court decisions, the police, prosecutors, and the National Police—Technology and Internet Division (BIT) have all significantly reduced work on Internet piracy cases. Also, until proposed amendments to the Criminal Code are adopted, corporate criminal liability arising from software infringement will remain unavailable under amendments made to the Criminal Code in 2010.

Some rights holders report good cooperation with Spanish police forces on criminal cases, including the National Police, Regional Police, and Guardia Civil. But criminal court procedures suffer from lengthy delays, lasting on average 18 months, and appeals are unlikely to result in deterrent sentences. Industry groups report little IP awareness in the judiciary, particularly in the digital realm. For example, in 2013, a criminal software piracy case was brought against a company that not only was using pirated software internally, but also was using the pirated software to provide client services. Such activity should qualify as having “commercial purpose,” even in the context of the 2006 Attorney General instructions, but six months after the case was filed, the court has yet to grant requested raids.

Several decisions in cases of criminal Internet piracy were issued in 2013, with mixed results. There have been mixed rulings handed down by Criminal Courts involving linking websites. For example, a decision of Examining Judge no. 1 of Bilbao, in a case against *mejortorrent.com*, cited the 2006 Circular, among other issues, in exonerating the defendant.<sup>8</sup> Two cases<sup>9</sup> dismissed charges because the Public Prosecutor did not include claims of infringement by communication to the public. On the other hand, two decisions came down against illegal linking websites,<sup>10</sup> finding that the website operators did engage in a communication to the public when providing links to infringing content. These decisions illustrate the importance of providing prosecutors with adequate training to ensure that copyright cases are effectively prosecuted. Courts are mixed in response to cases involving circumvention devices, some rejecting cases due to an interpretation of the Criminal Code that the “specific” purpose of the device must be its exclusive purpose.

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<sup>8</sup>For a discussion of this case, see <http://ispliability.wordpress.com/2013/11/17/website-operator-sentenced-to-18-months-of-prison-for-linking-to-p2p/>.

<sup>9</sup>See, Decision of Juzgado de Instrucción (Examining Judge) No 1 of Mislata (Valencia) dismissed the Zonaemule case and Decision of Juzgado de Instrucción No 10 of Zaragoza dismissed the Spanishtracker case in 2013.

<sup>10</sup>See: Judgment 313/2013 Juzgado de lo Penal nº 3 Valencia, June 24, 2013 and Judgment 453/13 (Divxonline, streaming case) Juzgado de lo penal nº 4 Castellón, October 30, 2013 (bajatetodo.com case).

Police agencies and customs officials do take *ex officio* actions in criminal copyright actions, mainly in cases of physical piracy (including some cases involving circumvention devices). But, despite the fact that physical piracy has not abated in Spain, the total number of actions declined sharply from 834 actions in 2012 to just 265 in the first 11 months of 2013. Rights holders suspect that limited storage facilities and the failure to destroy seized goods could be partly to blame, as is a lack of sufficient funding for enforcement activities. As we have reported in the past, cases against street piracy defendants face a number of obstacles, including the heavy burden placed on local police, and changes to the Criminal Code in 2010 that reduced crimes to minor offenses where the profit valued is below 400 euros (US\$ 541).

In civil piracy cases, rights holders continue to encounter the obstacles IIPA has detailed in the past, including that Commercial Courts handling copyright cases are overloaded; cases suffer from lengthy delays; rights holders lack needed evidence due to data retention laws; and courts misinterpret Spain's IP laws with regard to injunctions.

**Criminal and civil actions involving end-user software piracy:** BSA has a history of good cooperation with police forces and with the Ministry of Industry, and reports that these relationships improved further in 2013. In the last year, authorities conducted *ex officio* actions in two investigations, a sign of modest progress; although Criminal Courts still resist actions on software piracy due to the instructions of the Attorney General's circular. Other than these two cases, all of BSA's judicial cases involve the civil courts and raids must be initiated by the private sector. As IIPA has reported in 2013 and previous years, Commercial Courts in general perform reasonably well, but the procedures before these courts are on some occasions burdened by high bonds, difficulty obtaining the detailed evidence required to conduct raids, court-imposed measures that frustrate raids in progress, and inappropriately low valuation of damages in some cases.

**Attack piracy at the payment level and in cooperation with tax authorities, by establishing clearly defined lines of communication between rights holders and authorities in the National Tax Agency devoted to tax fraud and smuggling linked to IP infringement, and by working with electronic payment services such as VISA, MasterCard, and PayPal to block payments to distributors of pirate product.**

Rights holders report that the Tax Agency and specifically the Customs' Department have shown some interest in the possibility of addressing IP crimes through tax fraud and smuggling charges. However, no real steps have been taken to assign investigation and coordination units specialized in this field.

**Seek agreements between rights holders and major online advertising services such as AUTOCONTROL and IAB Spain, toward the removal of advertising from websites offering illegal material.**

In 2013, an agreement was reached between the Coalition of Creators and Content Industries (*Coalición de Creadores e Industrias de Contenido*) and the Spanish Advertisers' Association (*Asociación Española de Anunciantes*). The parties anticipate that this effort will be expanded to include AUTOCONTROL and IAB Spain, along with the support of the Government of Spain.

## **COPYRIGHT AND RELATED LAWS IN SPAIN**

Following the conclusion of the 2013 Special 301 cycle, the Government of Spain began developing a number of important initiatives to correct many loopholes that have made copyright enforcement actions incredibly difficult in Spain. Below is an account of the priority legislative changes that IIPA believes are crucial in the effort to develop an effective anti-piracy program. Each of these was included in the Priority Action Items in IIPA's 2013 Special 301 submission on Spain, where very extensive background information has already been provided for each

topic.<sup>11</sup> Here, a brief summary of the issue is provided for each priority item along with any relevant progress made by Spain's lawmakers in 2013. The current bills still require important modifications before they are adopted, as they contain various shortcomings, many of which are mentioned below. Many of the amendments currently being considered are not likely to be adopted until mid-2014, and in the event they are adopted it will be important to monitor their application by Spain's prosecutors and judges upon entry into force.

**Clarify that linking sites are infringing and can be prosecuted through amendments to the Intellectual Property Law.**

The need for this clarification in Spain's laws is rooted in the many difficulties rights holders face in obtaining judgements or administrative actions against Internet sites that link to and index infringing content, which are arguably at the root of Spain's digital piracy epidemic. IIPA is aware of draft amendments to the Criminal Code that would make certain linking activities a crime where they meet a number of criteria (e.g., active behavior in maintenance and updating of links to infringing works; knowledge or control of the infringement; significant activity as measured by the size of the audience in Spain or the number of works illegally offered; and a criminal intent of commercial gain). However, these criteria are unclear and should be clarified before enactment of the proposed amendments. It is also uncertain how these amendments will be applied to linking sites hosted outside the Spanish jurisdiction. Amendments to the IP Law have been proposed that could ensure that such linking sites are included in the scope of the IPC's administrative procedure, and these updates would likely be applicable to civil liability as well, but the final text of the law and its effectiveness remains uncertain.

**Amend the Criminal Code to provide criminal remedies and allow prosecutions to resume in cases of P2P piracy and enterprise end-user software piracy.**

Draft amendments to the Criminal Code that were presented for Parliamentary consideration in September 2013 would allow Spanish law enforcement to take criminal actions in important areas of copyright piracy that currently go unprosecuted. The amendments as currently drafted address the need for criminal liability for commercial scale infringement over P2P networks, although further modifications may prove necessary. They also, as mentioned above, would provide criminal remedies for certain instances of linking to infringing material. Finally, the amendments could clarify that enterprise end-user software piracy may be subject to criminal prosecution as well. These amendments are expected to be adopted and to enter into force by the end of 2014.

The amendments are critical because instructions to prosecutors issued by the Attorney General, decriminalizing infringing distributions of content by P2P networks and denying that enterprise end-user software piracy meets the standard for criminal prosecution, have resulted in a cessation of criminal enforcement actions against illegal file sharing and have eliminated the possibility of prosecuting enterprises that are using unlicensed software, as discussed under "Criminal Enforcement Actions in Spain" above.

**Empower rights holder-submitted notices of infringement to establish ISP liability, by amending Spain's laws to clarify that these notices are effective means of providing ISPs knowledge that infringement is occurring on their services without court orders.**

Decisions issued by the Spanish Supreme Court, most recently in March 2013, confirm that Article 16 of the Law of Information Society Services and Electronic Commerce (LSSI) must be construed to provide that any effective notice to an ISP regarding infringing activity suffices for the knowledge requirement in a copyright liability action, without requiring that such notice be served by a government authority, in accordance with the EU Directive of reference. However, clarifications to the LSSI are needed to prevent lower courts from ignoring this important jurisprudence and to encourage cooperative anti-piracy communications within the private sector.

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<sup>11</sup>See <http://www.iipa.com/rbc/2013/2013SPEC301SPAIN.PDF>.

**Establish legal incentives for ISPs to cooperate in efforts to stem infringing file sharing activities.**

At present, no voluntary ISP cooperation efforts are in place because the Spanish E-commerce Law (LSSI) does not establish liability for ISPs if, absent a Court or administrative authority order, they fail to remove illicit content. Amending the law to define a broader set of circumstances in which ISP liability could attach would encourage further cooperation in combating piracy, and reduce the administrative burden placed on Spanish authorities. Draft Amendments to the IP Law and the Criminal Code could achieve this. In July 2013, a provision was added to the draft IP Law amendments that would establish voluntary codes of conduct with respect to the cooperation of the intermediary service providers, electronic payment providers and advertising providers, but without active engagement by the government, it is likely to prove difficult to encourage all providers to participate.

**Permit rights holders to obtain identifying information of infringers, in a manner that respects rights to data privacy consistent with the 2008 European Court of Justice (ECJ) decision in *Promusicae v. Telefonica*, for purposes of bringing civil and criminal copyright actions.**

The Spanish Law on Data Retention (Law 25/2007, articles 1 and 6) obligates ISPs to retain and supply data to competent authorities in case of a Court order granted in criminal proceedings involving serious crimes. According to Spanish legislation, Intellectual Property Crimes are not considered serious criminal offenses (those punished with a minimum of five years of prison), and therefore the relevant data is unavailable for criminal copyright cases. Processing retention data for the purpose of civil copyright actions is banned. Amendments to the Civil Procedure Law have been drafted that could improve this matter, and could undergo Parliamentary review by as early as summer 2014. As currently drafted, however, the amendments do not provide the right of information where infringers act in good faith and not on a commercial scale, essentially leaving such cases inactionable.

**Correct Spain's implementation of the right of information as provided in article 8 of the Enforcement Directive in the Civil Procedure Law (*Ley de Enjuiciamiento Civil*) so the "commercial scale" requirement is only applicable to intermediaries, not also to their clients as set out under the current Spanish Law.**

The "right of information" provided in Article 8 of the EU Enforcement Directive requires Member States to make available procedures for rights holders to obtain court orders to ISPs 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 ISP 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 ISP, not to the acts committed by the infringer. A remedy to this weakness was proposed in draft amendments to the Civil Procedure Law in the summer of 2013, but a later draft incorporates the requirement that the defendant's acts must be acts that "could not be considered carried out by mere end users in good faith and without the aim of obtaining economic or commercial benefits." This language, unfortunately, would solidify the current status quo in Spain, under which infringing online users are guaranteed anonymity and impunity.

**Ensure that commercial dealing in circumvention devices is a criminal offense.**

Spain has ratified the WCT and the WPPT, and these obligations entered into force on March 14, 2010. However, to fully comply with these treaties, Spain needs to address significant gaps in its legal structure for the protection of copyright works that are protected by TPMs. Spanish courts have erroneously concluded that devices primarily designed for purposes of circumvention of TPMs are lawful when capable of some ancillary non-infringing use. While these courts arguably are improperly interpreting the law, legislative amendments would ensure that the provisions function as intended to effectively prosecute the manufacture and distribution of circumvention devices. Draft amendments to the Criminal Code that would bring the definition of circumvention devices in line with the EU

Copyright Directive, if adopted, could go into force by the end of 2014 and could lead to more effective interpretation by the courts.

***Introduce changes in legislation to facilitate civil cases against software piracy, by avoiding bonds for ex parte raids, permitting anonymous evidence to initiate ex parte raids, and clarifying that compensation of damages must be valued at least at the full retail value of the infringed goods or copies.***

These legislative changes to the Civil Procedure law would address longstanding problems faced by the software industry in bringing successful civil actions against enterprise end-user software piracy. Unfortunately, no known resolution is in the works.

## **TRAININGS AND PUBLIC AWARENESS**

The content industries regularly offer training sessions and enforcement assistance in Spain. BSA and the Ministry of Industry agreed in 2011 to collaborate on a joint program, in which the Ministry would have invested 300,000 Euros towards a new training and awareness campaign. Although the program was suspended, BSA intends to work with the Ministry of Industry in 2014 to revive this important initiative. In previous years, a similar investment produced excellent results by reducing piracy levels among illegal channels of software distribution by 20%. A new campaign could further these achievements and extend the program to small- and medium-enterprises.

As a private initiative, in 2013, PROMUSICAE-AGEDI provided 18 training sessions to some 1330 attendees from different enforcement agencies (eight sessions to the National Police/Guardia Civil, eight to the Local Police, one to Customs and one to the regional police Mossos d'Esquadra). A total of 220 training certificates have been delivered.

# HONG KONG

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

### 2014 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** IIPA recommends that USTR actively monitor developments in Hong Kong during 2014 with respect to the issues discussed in this Special Mention report.<sup>1</sup>

## LEGISLATIVE ISSUES

More than seven years ago, authorities in the well-wired, tech-savvy Hong Kong Special Administrative Region (HKSAR) recognized that Hong Kong's Copyright Ordinance needed updating for the digital networked environment, and launched an extensive public consultation in December 2006 to identify what changes were needed. Further consultations, public hearings, and drafting exercises followed; but to date, the entire effort has borne no fruit. Meanwhile, the landscape of copyright piracy in Hong Kong has undergone a dramatic shift. Thanks in great part to the persistent enforcement efforts of the Hong Kong Customs & Excise Department (HKC&E), which has a good working relationship with many right holder groups, hard goods piracy in Hong Kong's shops and its local online auction sites has been reduced to low levels. But Hong Kong residents find a plethora of options online to obtain unauthorized access to creative content, ranging from well-established cyberlocker services (mainly based overseas), illegal streaming sites, peer-to-peer (P2P) services and forum sites, to a new generation of mobile apps that stream music, movies and other content without authorization to the millions of smartphone owners in the territory.<sup>2</sup> These developments have roared past Hong Kong's outdated copyright legal regime, leaving right holders and law enforcement alike with inadequate tools to combat online piracy, and providing insufficient incentives to service providers to cooperate to the extent necessary to combat the problem. Consequently, legitimate online and mobile services are handicapped in their efforts to compete against pirates. Accordingly, the top priority must be to get the copyright reform effort back on track as promptly as possible in 2014.

The Copyright (Amendment) Bill 2011 (Bill) was presented to the Legislative Council (LegCo) in June 2011. The Bill included several progressive features, such as providing criminal remedies for violations of the "making available" right for on-demand streaming in appropriate cases. It did fall short in a number of other areas,<sup>3</sup> but constructive discussions were underway to improve the Bill. However, in mid-2012, the LegCo suspended further consideration of the Bill, which had become embroiled in a controversy over whether criminal copyright liability could arise from parodies.

After legislative elections intervened in September 2012, the copyright reform project lay dormant until July 2013, when the Administration launched a public consultation exercise on the parody issue, which did not conclude until November. The process was further delayed when some groups seized on the public consultation exercise to propose a much broader and ill-defined exception to the exclusive rights of copyright owners, modeled on the user-generated content exception recently enacted in Canada. IIPA is pleased that the Administration's preliminary analysis of this proposal cast grave doubt on whether it is consistent with Hong Kong's international obligations to confine exceptions and limitations to those that satisfy the familiar "three-step test."<sup>4</sup> But the need to respond to this out-of-scope proposal risks distracting the Administration from the overriding priorities: to come to closure on an

<sup>1</sup>For more details on Hong Kong's Special 301 history, see previous years' reports at <http://www.iipa.com/countryreports.html>. For the history of Hong Kong's Special 301 placement, see <http://www.iipa.com/pdf/2014SPEC301HISTORICALCHART.pdf>. For a discussion of IIPA's 2014 Key Initiatives and Challenges, see IIPA, *2014 Special 301 Submission*, at <http://www.iipa.com/pdf/2014SPEC301COVERLETTER.pdf>.

<sup>2</sup>Over 83% of Hong Kong households have access to broadband services; but it is the mobile subscriber penetration rate (236.6% in September 2013) that is truly astonishing, especially considering that there are over 11.4 million 3G or 4G mobile customers in a territory of less than 7.2 million residents. See [http://www.ofca.gov.hk/mobile/en/media\\_focus/data\\_statistics/index.html](http://www.ofca.gov.hk/mobile/en/media_focus/data_statistics/index.html) and [http://www.ofca.gov.hk/filemanager/ofca/en/content\\_108/wireless\\_en.pdf](http://www.ofca.gov.hk/filemanager/ofca/en/content_108/wireless_en.pdf).

<sup>3</sup>Some of these shortcomings were discussed in IIPA's 2012 Special 301 filing on Hong Kong, see <http://www.iipa.com/rbc/2012/2012SPEC301HONGKONG.PDF>.

<sup>4</sup>See WTO TRIPS Agreement, Article 13.





appropriate clarification of how Hong Kong's criminal copyright provisions apply to parodies; to incorporate that clarification into the Copyright (Amendment) Bill 2011; and to enact the Bill (as modified) as promptly as possible. Until this happens, both law enforcement and right holders will continue to be significantly hampered in their efforts to use the outdated Copyright Ordinance to combat digital piracy effectively. While there are certainly other improvements that could be made to the Copyright Ordinance beyond those contained in the 2011 Bill, any proposal for an additional public consultation at this stage is a recipe for further delay for a measure whose enactment is already long overdue.<sup>5</sup>

Improved public education on IP rights is essential to pave the way for the re-introduction of the Bill. The Concern Group of IPR Education (the Concern Group), with members from different organizations in the content/copyright industry, was established in May 2012 to work for sorely needed improvements in school curricula regarding IPR. The Concern Group is working effectively with the Department of Intellectual Property on this, but the Education Bureau is being less cooperative. IIPA urges Hong Kong authorities to be more responsive on this important educational effort.

In parallel with the law reform effort, Hong Kong authorities had been engaging with stakeholders on a draft Code of Conduct for Online Service Providers (OSPs). While ultimately this Code would interlock with the legislation, with compliance with the Code creating a presumption that an OSP was entitled to a statutory safe harbor for its role in infringement involving its system or network, there is no reason why the Code discussions cannot progress even during the hiatus on the legislation. However, in fact, no progress was made on the Code during 2013. It is disappointing to report that no new draft of the Code has been issued since March 2012.<sup>6</sup> Accordingly, the critique of the draft Code set forth in IIPA's previous submissions remains fully relevant, including the Code's failure to deal with the issue of repeat infringers; its compounding of the problem of identifying online infringers, by validating counter-notifications from users whose identities are not disclosed; and other provisions that could discourage use of the notice-and-takedown process that the Code was intended to promote.<sup>7</sup> Unless these flaws are addressed, it is difficult to see how the Code would represent any significant improvement over today's informal notice and takedown practice, in which service providers generally respond reasonably promptly to most takedown requests involving infringing material that they host, but do nothing to deal effectively with repeat infringers.

Although the critical task is for the HKSAR Administration to take prompt action to bring its Copyright Ordinance into the digital networked era, some remaining (or growing) physical piracy problems are worth noting. For example, devices aimed at circumventing the technological measures used to prevent the play of pirate videogames on consoles are still widely available in Hong Kong. While trafficking in these devices is a criminal violation, recent practice changes instituted by the Department of Justice could make prosecutions much more onerous by requiring documentation regarding copyrighted material in the console itself, rather than in the game. IIPA urges Hong Kong authorities to reconsider this change, which is contrary to well-established practice in most jurisdictions.

While some pirate optical discs (CDs and DVDs), most imported from the PRC, continue to appear in the Hong Kong market, a more worrisome trend is the availability of digital devices that enable piracy, such as karaoke players pre-loaded with more than 30,000 unauthorized music videos, or devices that provide internet browsing capability, and HDMI connectivity between Internet lines and televisions, and that are pre-loaded with "entertainment" icons which, when clicked, take the user to infringing websites. The growing presence of such "black box" devices for sale or rental in Hong Kong threatens the legitimate pay TV, theatrical and home video markets, and deserves increased attention from Hong Kong enforcement authorities.

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<sup>5</sup>For example, the issues that should be addressed in the next public consultation will likely include, but not be limited to, extension of copyright term; online border control measures; specific measures combating peer-to-peer infringement; additional damages and statutory damages; and further clarification on secondary liability and action against repeat offenders. These complex issues must not be allowed to hold up prompt action on the current Copyright (Amendment) Bill.

<sup>6</sup>That draft was very similar to the January 2012 draft IIPA reviewed in its 2012 Special 301 filing. See <http://www.iipa.com/rbc/2012/2012SPEC301HONGKONG.PDF>.

<sup>7</sup>See IIPA 2013 submission on Hong Kong, at <http://www.iipa.com/rbc/2013/2013SPEC301HONGKONG.PDF>, at 306-07.

While Hong Kong courts generally impose appropriate sentences in piracy cases, IIPA urges the courts to issue additional guidelines to assist trial courts in imposing consistent, proportional and deterrent penalties for copyright offenses in Hong Kong.<sup>8</sup> Further training for prosecutors regarding copyright licensing regimes and the scope of various licenses in place in Hong Kong is also needed, along with improved communication between prosecutors and licensing bodies.

Finally, the outstanding efforts of HKC&E in enforcement against piracy continued in 2013. Publishers commend the HKC&E's consistent efforts against copy shops, conducting numerous raids and pursuing these cases of book piracy through to conviction, which has led to significant fines in a number of cases. Software copyright owners praise the HKC&E's continuing efforts in combatting enterprise software piracy in Hong Kong, and in arranging related publicity to raise the public's awareness on the legal and security risks in using unauthorized software. The music industry notes that in December 2013, HKC&E conducted the first ever raid against a one-stop service providing and updating karaoke systems loaded with infringing recordings, as well as against five pubs which were the service's customers. The agency's efforts to tackle the problem of heavy uploaders of infringing material in popular Hong Kong online fora such as discuss.com.hk and uwants.com also deserve acknowledgement. Finally, all copyright industry groups in Hong Kong continue to benefit from close cooperation with HKC&E in training and research, as well as on-the-ground enforcement actions.

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<sup>8</sup>For instance, prosecutors need to do more to draw the attention of sentencing courts to precedents such as the *Choi Sai Lok* case (1999), establishing the guideline that most criminal copyright convictions should result in custodial sentences, absent truly exceptional circumstances.

# MALAYSIA

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

### 2014 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** IIPA files this Special Mention report on Malaysia to note accomplishments and remaining challenges ahead for the Malaysian Government in the protection of copyright.<sup>1</sup>

**Executive Summary:** Malaysia's copyright system has seen enormous progress in the past several years. Once a hub for the manufacture of pirate optical discs for export, Malaysia no longer fuels global copyright piracy. However, the strong demand for pirated goods still results in harm to copyright-based businesses in Malaysia. With the migration of business models to online and mobile platforms, the Malaysian Government must keep pace through adequate devotion of resources, training, and redirection of its enforcement efforts to properly target and speed investigations and prosecutions against both online and mobile services, as well as traditional forms of piracy. Malaysia's participation in the Trans-Pacific Partnership (TPP) negotiation will help it enjoy access to many of the world's leading trading partners, while ensuring that it agrees to strong IP standards.

### PRIORITY ACTIONS REQUESTED IN 2014

#### **Enforcement**

- Continue to address Internet, mobile, smart phone, and tablet piracy in a systematic and deterrent manner.
- Urge universities to adopt policies mandating the use of legitimate copies of books and other copyright materials.
- License all legitimate dealers in malls and night markets, and close down unlicensed dealers and those who sell pirated materials, unstickered product, and media boxes, including in the night markets.
- Reduce unlicensed software use by enterprises, implement a government-led software audit initiative, implement and promote the adoption of effective software asset management (SAM) processes, train senior management of companies, and conduct public awareness campaigns to highlight the harms caused by software piracy.
- Assign more dedicated judges to the Criminal IP courts, and establish the promised 15 Sessions courts around the country to reduce backlogs and obtain convictions that are publicized in the media as a form of deterrent.

#### **Legislation**

- Implement a measure to hold landlords and mall owners liable when they are aware of (or have constructive knowledge of) piracy activities on their premises and continue to allow such illegal activities.
- Make other changes to the Copyright Act to further strengthen copyright protection, consistent with this filing.
- Amend the optical disc laws to ensure that source identification (SID) code applies to recordable discs; prohibit "gouging" of SID code; allow inspections any time or place; and make other needed changes.
- Clarify ISP provisions in the Copyright Act in respect of: 1) notice and takedown of infringing content ("red flag knowledge"); and 2) fair and effective measures to address access to infringing websites, and having in place a termination policy for repeat infringers.

#### **Market Access**

- Resolve market access barriers, including: lifting broadcast quotas; cutting cinema entertainment taxes; easing foreign ownership restrictions in cinema and television businesses; and refraining from imposing discriminatory content review fees, import fees, and additional Goods and Services Tax (GST) on top of entertainment taxes.

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<sup>1</sup>For more details on Malaysia's Special 301 history, see previous years' reports at <http://www.iipa.com/countryreports.html>. For the history of Malaysia's Special 301 placement, see <http://www.iipa.com/pdf/2014SPEC301HISTORICALCHART.pdf>. For a discussion of IIPA's 2014 Key Initiatives and Challenges, see IIPA, *2014 Special 301 Submission*, at <http://www.iipa.com/pdf/2014SPEC301COVERLETTER.pdf>.



## **PIRACY AND ENFORCEMENT UPDATES IN MALAYSIA**

Prior IIPA reports on Malaysia contain detailed discussion of piracy and enforcement issues. This report serves only as an update to those and is not to be considered an exhaustive review of issues.<sup>2</sup>

**Internet, Mobile, Smart Phone, Tablet Piracy Require Appropriate Enforcement Response:** Malaysia's Internet and broadband capacity has grown and improved significantly, now boasting an estimated 19.2 million Internet users (65.8% of the population), according to ITU, and including 3.9 million Internet "natives."<sup>3</sup> Malaysia now has 2.5 million broadband subscribers (with many more using those subscriptions). The equally impressive number is the 41.3 million mobile subscriptions, representing well over 100% mobile penetration. Faster and more readily available broadband Internet creates many opportunities for right holders to launch legitimate services for computer, mobile device, smart phone, and tablet users. Unfortunately, a largely Internet-literate population also means huge challenges for addressing Internet piracy or piracy that caters to users of these devices.<sup>4</sup>

The Ministry of Domestic Trade, Cooperatives and Consumerism (MDTCC) and the Royal Malaysian Police (RMP) have been active in 2013 in dealing with Malaysian nationals involved in online piracy. For example, in March 2013, officers from the cyber crime unit of the RMP arrested a 27-year-old man for hosting links to illegal downloads of *Skyfall*, *Life of Pi*, *Jack Reacher*, *Argo*, and more, on the popular local message board and filesharing site, *SYOK.org*. The site, which boasted hundreds of thousands of registered users (according to the website's Facebook page), went down soon after the arrest, as the arrested man was also believed to be the operator.<sup>5</sup> In June 2013, MDTCC conducted an operation dubbed "Ops Skyfall" and raided a premises in Kubang Kerian, Kelantan where they suspected *Jiawang.org* was operating. The site was notorious for massively infringing local Malay repertoire. The site was immediately taken down.<sup>6</sup> MDTCC continues monitoring more than 30 other suspect websites, and has taken action against five additional websites.

These cases and some additional actions reported against websites built on infringement demonstrate the willingness of the Malaysian authorities to take positive actions against Internet piracy. IIPA strongly urges the Malaysian Government to continue such activities, focused on websites built upon providing access to infringing content, and to actively include ISPs in the discussion to find means of mutual cooperation in eradicating online piracy in all its forms from the Malaysian market. Industry dialogues to that end are believed to have started at the end of 2013, and it is crucial that the various stakeholders find meaningful solutions, in particular in respect to notice and takedown procedures and measures to fairly and effectively halt non-hosted infringements. There are reportedly no MOUs in place with ISPs to date. IIPA is pleased that in June 2013, the MDTCC Minister reactivated the Special Anti-Piracy Task Force (SAPTF), with four sub-committees planned to address specific issues, including a digital piracy subcommittee headed by the Malaysian Communications and Multimedia Commission (MCMC).<sup>7</sup>

**More Action Required to Legalize Educational Use of Published Materials:** Previous IIPA reports have documented rampant unauthorized photocopying on and around university campuses causing harm to publishers in Malaysia. In 2013, MDTCC once again demonstrated good cooperation and responsiveness to publishers' requests

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<sup>2</sup>See, e.g., IIPA, *Malaysia*, 2013 Special 301 Report, February 8, 2013, at <http://www.iipa.com/rbc/2013/2013SPEC301MALAYSIA.PDF>.

<sup>3</sup>Malaysia's youth ranked fourth in the world in "digital natives" according to ITU's report, *Measuring the Information Society 2013*.

<sup>4</sup>Several notorious sites (i.e., those recommended to USTR by IIPA as "notorious markets" for piracy in October 2013) are among the top sites accessed in Malaysia, and some websites, such as *8share* (the 109th most accessed website in Malaysia) (which appears to be a reward system for uploading files that are then downloaded by others, similar to the *MegaUpload* model) have a direct nexus to Malaysia.

<sup>5</sup>Patrick Brzeski, *Malaysian Police Crack Down on Movie Piracy Site*, The Hollywood Reporter, March 8, 2013, at <http://www.hollywoodreporter.com/news/malaysian-police-crack-down-piracy-426841>.

<sup>6</sup>Lucas Lao, *Illegal Music Download Website www.jiawang.org Shut Down*, June 20, 2013, LowYat.net, at <http://www.lowyat.net/2013/06/illegal-music-download-website-www-jawang-org-shut-down/>.

<sup>7</sup>The SAPTF comprises high level representation from various Malaysian Government agencies and industry. Priority actions include consideration of enhanced education campaigns, closer collaboration between the Malaysian Government and industry on high profile cases, and improvements in the process for addressing websites whose business models are built on copyright infringement. This is a very promising partnership and development that should help to expand legitimate opportunities for Malaysian and U.S. creators alike.

for raids. Unfortunately, raids have not usually resulted in prosecutions, thus minimizing any possible deterrent effect. IIPA is pleased the MCMC has been helpful in locating and identifying scanned copies of textbooks saved in electronic devices seized in raids, and has produced detailed reports to be used in court as evidence. In 2014, in addition to prosecutions to create deterrence, the Malaysian Government should mandate that universities adopt policies requiring the use of legitimate copies of books and other copyright materials by all those in the university community.

**Mall and Night Market Piracy Require Anti-Piracy and Licensing Approach:** Hard goods piracy continues to harm copyright owners in Malaysia. Retail urban “hot spots” and night markets offer mostly burned-to-order recordable discs (pirate Blu-ray, DVDs, VCDs, CD-Rs, DVD-Rs); some imported factory-manufactured discs (mainly produced in China); “media boxes”;<sup>8</sup> and mobile devices, smart phones, tablets, and flash drives pre-loaded, or loaded to order with all kinds of pirate material.<sup>9</sup> Hard disk loading still occurs in many shopping malls, especially in IT malls, where vendors load hard drives with massive amounts of infringing software and other content. MDTCC is carrying out raids, including *ex officio*, to address such piracy activities. However, the shops are not deterred, simply re-opening within 24 to 48 hours after being raided. To address retail piracy, IIPA urges the Malaysian Government to adopt a measure to impose landlord liability. Pending adoption of such a measure, all legitimate dealers in malls and night markets should be licensed, and unlicensed dealers should immediately be closed down. This is a matter which the Malaysian Government should attend to with urgency.

**Continued Vigilance Needed to Legalize Use of Software in Enterprises, Government:** The software industry reports a slowly declining rate of piracy in Malaysia, although it notes higher piracy levels outside the main business regions due to lack of attention on the issue and fewer complaints lodged.<sup>10</sup> BSA ran 60 criminal end-user raids and 1 civil end-user raid in 2013, up from 53 actions in 2012. Most of the companies recently raided are under-licensed as opposed to having no licenses at all, which is a positive sign of increasing copyright awareness. It is believed that the public sector is also highly under-licensed, although lack of statistics and transparency has hampered efforts to confirm this. In 2014, IIPA recommends implementing mandatory annual software audits of enterprises and Malaysian Government agencies, with results filed with the Companies Commission of Malaysia and the Enforcement Division of MDTCC. In addition, IIPA recommends implementing software asset management (SAM) protocols to drive the use of legal software in the corporate sector; training programs targeting senior management of companies; and public awareness campaigns to highlight the damage caused by piracy to creativity and innovation and to the growth of the IT industry.

**Case Backlog Shows Desirability for More Specialized IP Courts As Promised:** Some industry sectors report continued case backlogs, while noting the situation in the courts has improved somewhat in recent years. Most of the backlog is attributable to the lack of resources for investigations and prosecutions (although there has been greater activity in taking cases since Deputy Public Prosecutors from the Attorney General Chambers became involved). Some industries report the filing or charging of cases in court occurs, if at all, only with extreme delays. In addition, fines are usually the minimum MYR2,000 (US\$600) for first offenders, with no jail term, which is hardly a deterrent. Court orders for closure of plants, retail outlets, and the like are extremely rare. Criminal procedures can sometimes be effective (see above discussion of *SYOK.org* case, which remains pending), due to the deterrent nature of arrest itself. In addition to the assignment of dedicated prosecutors as noted above, IIPA urges the

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<sup>8</sup>“Media box” (set-top device) piracy involves the sale and servicing in devices: 1) that directly connect to foreign sites to infringe copyright; 2) that include a hard disk to store illegally downloaded contents; and 3) that have an SD card which helps novices connect with foreign sites.

<sup>9</sup>In IIPA’s 2013 submission on “Notorious Markets,” IIPA singled out Petaling Street, Chinatown, and Holiday Plaza (Kuala Lumpur, Johor Bahru). See *IIPA Written Submission Re: 2013 Special 301 Out-of-Cycle Review of Notorious Markets: Request for Public Comments*, October 25, 2013, at [http://www.iipa.com/pdf/2013\\_Oct25\\_Notorious\\_Markets.pdf](http://www.iipa.com/pdf/2013_Oct25_Notorious_Markets.pdf). The motion picture industry notes the areas with the most concentrated problems as Klang Valley and in particular the areas of Petaling Jaya, Sri Hartamas, Mont Kiara, Bangsar, Cheras and Damansara. In other parts of Malaysia, Penang and Johor Bahru are reported as having the most problems with hard goods piracy.

<sup>10</sup>BSA estimates the software piracy rate in Malaysia at 55% in 2011, with the value of unlicensed software at US\$657 million. Data on software piracy rates and commercial values are taken from the 2011 BSA Global Software Piracy Study at [www.bsa.org/globalstudy](http://www.bsa.org/globalstudy). This study assesses piracy rates and the commercial value of unlicensed software installed on personal computers during 2011 in more than 100 markets. The study includes a detailed discussion of the methodology used. BSA plans to release an updated study in the second quarter of 2014.

Malaysian Government to assign more dedicated judges to the criminal IP courts, and to establish the promised 15 Sessions courts (with IP specialists) around the country to reduce backlogs and obtain convictions that will be publicized in the media as a form of deterrence. In addition, IIPA urges continuous judicial reform and training efforts to sensitize the judiciary as well as prosecutors on the serious nature of IP infringements.

## **COPYRIGHT LAW AND RELATED ISSUES**

**Further Copyright Reforms Could Be Effective to Curb Piracy:** Copyright protection in Malaysia is governed by the Copyright Act, 1987, as last amended by Copyright (Amendment) Act 2010 in December 2011 (in force March 2012). IIPA provided detailed commentary on the Act in its 2013 Special 301 report on Malaysia.<sup>11</sup> The Optical Media Act and related regulations govern the manufacture of optical discs. The Malaysian Government should further strengthen the laws by:

- making possession of pirated goods an offense;
- holding landlords and mall owners liable when they are aware of (or have constructive knowledge of) piracy activities on their premises and continue to allow such illegal activities;
- confirming legal protections for “access” control technological protection measures;
- removing the “innocent infringer” provision from the law, or at least, confirming that it applies 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;<sup>12</sup>
- ensuring that:
  - ISP provisions apply in cases of “red flag” notice (facts or circumstances from which infringing activity is apparent);
  - injunctive or other equitable relief remains available against a service provider that does not cooperate; and
  - ISPs have in place a fair and effective termination policy for repeat infringers, and service providers who fail to inform their customers and implement such a policy would not be eligible for the safe harbors provided;
  - fair and effective measures exist to address access to websites built on infringement.
- ensuring the availability of recovering right holder costs, as required by, and attorney fees, as authorized by, the TRIPS Agreement;
- providing a copyright term of “life plus 70” for authors, and 95 years from publication;
- providing mandatory minimum jail sentences for piracy and/or sentencing guidelines to ensure imposition of deterrent sentencing;
- allowing the filing of civil actions based on information gathered during criminal anti-piracy operations conducted by law enforcement agencies
- amending the optical disc laws to: 1) ensure that source identification (SID) code requirements apply to recordable discs; 2) prohibit “gouging” of SID code from discs; and 3) allow inspections at any place and time.

## **MARKET ACCESS AND RELATED ISSUES**

The Malaysian Government should ease market access restrictions that not only hinder businesses (Malaysian and foreign) from operating in Malaysia but also exacerbate the piracy problems in the country. Specifically, the Government should: 1) lift broadcast quotas, currently requiring stations in Malaysia to devote 70% to 80% of terrestrial airtime to local Malaysian programming, and banning them from broadcasting foreign programming during “prime time” hours of 8:30 to 9:30 p.m.; 2) reduce cinema entertainment taxes, currently 25% of the gross ticket price; and 3) ease or eliminate foreign ownership restrictions, since foreign investment in terrestrial

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<sup>11</sup>Unauthorized camcording of movies from theaters was outlawed in Malaysia. The motion picture industry reports two detections of unauthorized camcording in 2014, consisting of audio copies made of major motion pictures. Deterrent remedies need to be applied against those engaging in these illegal acts.

<sup>12</sup>This change is particularly important as it applies to remedies for circumventing TPMs, since statutory damages are expressly excluded as a remedy.

broadcast networks is strictly prohibited and the Malaysian Government imposes a 20% limit on foreign investment in cable and satellite operations through licensing agreements. In addition: 1) the Film Control Division that oversees the Malaysian Censorship Board should refrain from increasing censorship fees and charging them in a discriminatory manner against foreign right holders; 2) the National Film Development Corporation Malaysia (FINAS) should refrain from charging foreign motion picture distributors a FINAS fee, since films are now able to be duplicated locally (in September 2013, FINAS argued that these locally replicated and electronically transmitted materials would have to pay the FINAS fee, which we believe is impermissible under the governing statute); and 3) the Malaysian Government should refrain from imposing an additional 6% GST on top of the already unreasonable entertainment tax.

# THE PHILIPPINES

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

### 2014 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** IIPA files this Special Mention report on the Philippines to note continued positive progress in several key areas for protection of creative content warranting recognition, while noting remaining issues in the country that must be addressed in the coming year.<sup>1</sup>

**Executive Summary:** IIPA lauds the leadership of the Philippine Government, Ricardo Blancaflor, Director General of the IP Office of the Philippines (IPO), and Optical Media Board (OMB) Chairman Ronnie Ricketts, for sustained and effective anti-piracy activities around the country that have resulted in reduced physical piracy in Metro Manila and beyond, even with very little budgetary support. In 2013, the physical book piracy problem improved somewhat in Metro Manila. However, significant concerns remain, including unauthorized on-demand photocopying along with the use of social media platforms to sell unauthorized e-books, medical textbooks, reference materials, fiction books, and non-fiction titles. Increasingly, mobile device “repair” shops double as piracy portals. The number of illegal instances of camcording of major U.S. motion pictures off the movie theater screen tripled in 2013. New IPO Enforcement Rules, issued October 6, 2013, now permit physical piracy visits in plain-view cases, but the Rules do not create authority to investigate online infringements, and the current laws do not establish a mechanism to address non-hosted online piracy. IPO has engaged judges, prosecutors, and law enforcement to sustain enforcement efforts; this engagement should continue. The recently-formed National Committee on Intellectual Property Rights (NCIPR)<sup>2</sup> should be proactive in taking actions against all forms of piracy. Secretary of State Kerry’s visit in December 2013, and the commencement of technical discussions toward the Philippines potentially joining the Trans-Pacific Partnership (TPP) trade pact, can hopefully trigger progress in addressing the concerns raised herein.

## PRIORITY ACTIONS REQUESTED IN 2014

### Enforcement

- Implement the Supreme Court Rules of Procedure for IP Cases to remedy bottlenecks and provide for speedier and more effective civil/criminal pre-trials and trials, effective search warrants, and deterrent criminal convictions.
- Encourage the NCIPR to undertake targeted deterrent actions against online, camcording, software, book, “media box,” signal theft, and mobile device piracy; provide the Philippine National Police with *ex officio* authority.
- Coordinate further discussion among ISPs and e-commerce sites, copyright owners, and enforcement agencies, leading to commencement of effective enforcement against online and mobile piracy in the country.
- Increase the budget of the OMB so it can continue to conduct nationwide enforcement efforts.
- Maintain enforcement efforts, including prosecutions where necessary, under the Anti-Camcording Act of 2010.

### Legislation

- Modernize laws, e.g., the E-Commerce Act, to facilitate measures to deal effectively with non-hosted infringements (as well as traditional notice and takedown).
- Include CD-R burning, mobile device piracy, “media box” piracy, and border enforcement in OMB’s purview under the Optical Media Act.

<sup>1</sup>For more details on the Philippines’ Special 301 history, see previous years’ reports at <http://www.iipa.com/countryreports.html>. For the history of the Philippines’ Special 301 placement, see <http://www.iipa.com/pdf/2014SPEC301HISTORICALCHART.pdf>. For a discussion of IIPA’s 2014 Key Initiatives and Challenges, see IIPA, *2014 Special 301 Submission*, at <http://www.iipa.com/pdf/2014SPEC301COVERLETTER.pdf>. IIPA acknowledges the terrible devastation of Typhoon Yolanda, and expresses our condolences and sympathies to those who have been affected by the tragedy and our wishes for a speedy process of recovery and reconstruction.

<sup>2</sup>NCIPR comprises IPO, Department of Trade and Industry (DTI), Department of Justice (DOJ), Department of the Interior and Local Government (DILG), Bureau of Customs (BOC), National Telecommunications Commission (NTC), National Bureau of Investigation (NBI), Philippine National Police (PNP), OMB, National Book Development Board, and the Bureau of Food and Drugs.





- Implement Republic Act 9184 (An Act Providing for the Modernization and Regulation of the Procurement Activities of the Government and for Other Purposes), such that Government entities are forbidden to purchase illegal software, and will allow only suppliers of legitimate software to participate in government bidding.

## **PIRACY AND ENFORCEMENT UPDATES IN THE PHILIPPINES**

Prior IIPA reports on the Philippines contain detailed discussions of piracy and enforcement issues. This report serves only as an update to those and is not to be considered an exhaustive review of issues.<sup>3</sup>

**Camcording Piracy Once Again on the Increase:** The passage and implementation of the anti-camcording law (Philippines Republic Act No. 100,088) in 2010 initially led to an impressive reduction in the number of forensic matches traced back to the Philippines of illegal camcords of major motion pictures. Regrettably, however, 2013 saw a sharp increase in the number of detections of major U.S. motion pictures sourced to the Philippines, from four in 2012 to twelve in 2013. It is critical that the Philippine Government take greater steps to detect and address illegal camcording, since camcording fuels online piracy, negatively impacts worldwide distribution, and prevents the establishment of legitimate online distribution platforms. Camcording remains a lucrative path for pirates in the Philippines, since films released in theaters on the same date in the Philippines and the U.S. (“day-and-date” release) screen more than half a day earlier than a U.S. release.

**Software Piracy (Enterprise End-User, Hard Disk Loading, Internet Café) Causes Significant Losses:** The use of unlicensed software continued to cause significant revenue losses to the software industry in 2013, thereby stunting the growth of the information technology sector. The software piracy rate increased to 70% in 2011, above the Asia average of 60% and significantly above the global piracy average of 42%. The value of unlicensed software in the Philippines grew to US\$338 million in that same year.<sup>4</sup> While more must be done, the software industry notes the success of Philippine Government visits in seeking enterprise software legalization. In 2013, software companies reported more than 20 end-user visits by IPO and OMB, with 2 additional end-user raids by NBI.<sup>5</sup> Hard disk loading, the pre-installation of unlicensed software or other copyright materials on new PCs or other devices, remains a persistent problem with computer stores and computer parts stalls. Use of unlicensed software in Internet cafés remains rampant. IIPA recommends that the Philippine Government conduct audits of Internet cafés and revoke business licenses of those found to allow the unauthorized use of content.

**Commitment to Legalize Software Use by Government Agencies Still Not Fully Implemented:** It remains important that the Philippine Government work to fully legalize government software use and have procurement practices in place to pay for software. Republic Act 9184 must be implemented to ensure Philippine Government agencies refrain from purchasing illegal software and allow only suppliers of legitimate software to participate in government bidding.

**Mobile Device Piracy Becoming a More Serious Concern:** IIPA has noted in previous reports the significant increase in mobile penetration, and there are now increasing reports of infringing wireless application protocol (WAP) systems, which provide pirate content directly through wireless communications onto mobile phones/devices. In addition, vendors that sell and supposedly “repair” mobile devices actually offer, either at the time of sale or afterwards, to download onto devices (including cell phones, tablets, mp3 players, hard disks, thumb/flash/USB drives) all kinds of infringing content. Unfortunately, OMB does not have jurisdiction over mobile device piracy. In the meantime, the recently formed NCIPR should take proactive steps to remove this form of piracy from the market in the Philippines.

<sup>3</sup>See, e.g., IIPA, *Philippines*, 2013 Special 301 Report, February 8, 2013, at <http://www.iipa.com/rbc/2013/2013SPEC301PHILIPPINES.PDF>.

<sup>4</sup>Data on software piracy rates and commercial values are taken from the 2011 BSA Global Software Piracy Study at [www.bsa.org/globalstudy](http://www.bsa.org/globalstudy). This study assesses piracy rates and the commercial value of unlicensed software installed on personal computers during 2011 in more than 100 markets. The study includes a detailed discussion of the methodology used. BSA plans to release an updated study in the second quarter of 2014.

<sup>5</sup>This compares with more than 30 end-user visits by IPO and OMB in 2012, with 3 additional end-user raids by NBI.

**Emerging Internet Piracy Requires Law Reform, Enforcement Response:** While access to the Internet in the areas outside Metro Manila is still not that well established, Internet penetration in the cities is growing. Internet piracy is growing along with it, through P2P file-sharing services, BitTorrent file-sharing, deep linking, blogs providing links to pirate materials, and cyberlockers used to store infringing material, to which pirates then sell passwords for illegal access. The Entertainment Software Association (ESA) reports that in 2013, the Philippines placed 18th in the world in terms of the number of connections by peers participating in the unauthorized file-sharing of select ESA member titles on public P2P networks. In some cases, websites fostering piracy are located outside of the Philippines, as in the case of *kat.ph*. While that case remains ongoing, IPO seized the domain *kat.ph* in June 2013, and the service then migrated to *kickass.to* in mid-2013. Users in the Philippines remain targets for the piracy activities of the site. We commend the IPO and the Philippine Government for taking aggressive action to the extent possible under current law.

ISPs have at least indicated a willingness to cooperate, and may be amenable to an approach to address access to non-hosted content upon a legal order from the Government and according to the laws. Pending needed legal reform, we recommend further engagement, with the helpful assistance of the Philippine Government in arranging such consultations among the ISPs, copyright owners, and enforcement agencies.

**Decrease in Availability and Openness of Hard-Goods Piracy:** Due in large part to the efforts of the OMB and cooperation of IPO, the number of stalls in Metro Manila and availability of pirated DVDs and CDs has decreased, while street vendors who used to travel on foot with giant backpacks full of pirated products now carry very few discs at a time. Most pirate product in Metro Manila is sold underground or in concealed stalls. IIPA notes positively the issuance of new IPO Enforcement Rules in October 2013 to allow the IPO to investigate, upon complaint, physical piracy occurring in plain view (but the Rules do not create authority to investigate online infringements which should be remedied). This approach is quick and cost-efficient, and in many cases, IPO visits are translating into positive results, without the need for a further administrative complaint.

**Court Processes Should be Further Streamlined for Efficiency and Consistency:** IIPA continues to be made aware of some difficulties in the court system, with mixed reviews over the speed and efficacy of the criminal inquest and “preliminary investigation” process by prosecutors. While the search warrant quashal issue has largely abated,<sup>6</sup> there are still some complaints about law enforcement and DOJ misapplying “probable cause” in preliminary investigations in criminal cases.<sup>7</sup> Even when prosecutors have applied the standards correctly and acted expeditiously, court cases can drag on for years. Two long-running criminal cases against the Marquez defendants’ photocopy piracy operation (this time against Mr. Marquez) finally came to successful conclusions in late 2013 and early 2014. In both cases, defendant Mr. Marquez was convicted of criminal copyright infringement and sentenced to at least 18 months imprisonment in addition to being assessed over \$20,000 in fines. Still, the defendant was granted “provisional liberty” while the cases are on appeal, and there is concern the defendant will abscond. In general, the police have shown little interest in looking for defendants who disappear after the criminal raid process has been completed. In other cases, it appears that the threat of criminal prosecution has exerted some pressure on infringers, as industry reports some defendants are willing to settle in order to avoid criminal prosecution. IPO is engaging directly with prosecutors and judges, which IIPA supports. In addition to this engagement, full implementation of the Supreme Court Rules of Procedure for Intellectual Property Cases should hopefully provide for more expeditious and effective civil and criminal pre-trials and trials, effective search warrants, and deterrent criminal convictions.

**OMB Still Requires Adequate Funding:** For many years, IIPA has indicated that OMB remains hampered by the lack of an adequate appropriated budget. This should be remedied, so that OMB can procure the proper equipment and resources needed to tackle piracy in all its forms, including software inspections in cooperation with IPO visits.

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<sup>6</sup>See IIPA, *Philippines*, 2013 Special 301 Report, for more detailed history of the issue of search warrant quashal.

<sup>7</sup>“Preliminary investigation” is an inquiry or proceeding to determine whether there is sufficient ground to engender a well-founded belief that a crime has been committed and the respondent is probably guilty thereof, and should be held for trial. It is not required in cases of warrantless arrest.

## **COPYRIGHT LAW AND RELATED ISSUES**

**More Effective Laws to Halt Online Infringement Needed:** The Philippine Government remains somewhat limited in what it can do under the current laws to address both hosted and non-hosted content. The E-Commerce Act and other laws should therefore be amended to provide an effective tool against both phenomena. The laws should provide both for notice and takedown of hosted content, as well as for fair and effective measures to remove availability in the Philippines of non-hosted infringements, whether through the Bureau of Legal Affairs (BLA) and the courts or other fair and effective means.

**OMB Should Be Empowered to Address Relevant Forms of Infringement:** OMB currently lacks jurisdiction to enforce against CD-R burning, mobile device piracy, “media box” piracy, and border enforcement. These should be added to OMB’s purview by amending the Optical Media Act.

**Other Comments on Current Copyright Regime:** Copyright protection is governed under Republic Act 8293, the Intellectual Property Code of the Philippines (in force January 1, 1998, last amended on March 23, 2013).<sup>8</sup> Previous IIPA submissions have identified a number of issues that should be addressed with further fixes to the law. On technological protection measures, IIPA encourages the Government to amend the law to: 1) explicitly cover access control TPMs; 2) prohibit trafficking in circumvention technologies, software, devices, components, or services related thereto; and, 3) provide deterrent civil, administrative, and criminal remedies for TPM violations, rather than simply having TPM offenses be an aggravating circumstance. TPMs are crucial to new distribution models, which make content more widely available, on more devices, and add significant convenience to consumers. Legal protections against circumvention of TPMs are an increasingly critical aspect of a modern copyright system.

In addition, IIPA continues to highlight the need for the law to: 1) ensure civil damages are adequate to compensate the right holder for injury suffered as required by TRIPS, and provide per infringement statutory damages; 2) ensure that the duty to account does not constitute an unreasonable restriction on the ability of the parties to freely contract; 3) restore the right to “exploit” an audiovisual work in the producer; 4) include within the meaning of “notice” (in the landlord liability provision) the concept of constructive knowledge; 5) ensure that new provisions on designation of an agent and collective management do not restrict the tariff structure in the Philippines or restrict the number of collecting societies operating in the Philippines; and 6) enact copyright term extension which was previously proposed.

## **MARKET ACCESS CONCERNS**

Several market access issues continue to hinder legitimate right holders operating in the Philippines. These include: 1) unreasonable taxes and duties on motion picture businesses; 2) foreign ownership restrictions for media companies; 3) potential limitations on the ability of audiovisual content providers to enter into exclusive distribution agreements with local cable providers; 4) vague methods of valuation of Customs duties for films, which should remain based on the physical carrier medium; and 5) potential introduction of restrictions on advertising by right holders on pay TV channels.

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<sup>8</sup>Republic Act No. 10372, “An Act Amending Certain Provisions of Republic Act No. 8293, Otherwise Known as the “Intellectual Property Code of the Philippines,” and for Other Purposes.”

# ALBANIA

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2014 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Several copyright industries, and in particular the software industry, are concerned about the weak overall enforcement in Albania<sup>1</sup>. The government has given very little priority, if any, to IPR enforcement, and has not allocated any significant resources to address piracy in the country. According to BSA | The Software Alliance (BSA), there were no criminal or administrative enforcement actions against enterprise end-user software piracy in 2013. Public awareness of the importance of IPR is extremely limited. Police, prosecutors and judges also exhibit an insufficient understanding of the investigation, prosecution and adjudication of copyright piracy. These factors all contribute to the persistently high software piracy rate in Albania, estimated at 75% in 2011, significantly higher than the regional average.<sup>2</sup>

Legislation to revise the Copyright Law has been stalled for almost three years. The amendments are intended to implement key European Union directives (such as the 2004 Enforcement Directive) and the Government of Albania's "Intellectual Property Rights Enforcement Strategy 2010-2015" which establishes a dedicated interagency organization to conduct IPR enforcement, the *ad hoc* IPR Inspection Agency.

IIPA recommends that the government enact amendments to the Criminal Code to improve enforcement. Provisions related to industrial property (patents and trademarks) were amended in 2012, but further amendments are required for copyright enforcement to, among other things, grant state prosecutors *ex officio* authority to prosecute copyright infringements. The government should also collaborate with rights holders to conduct public awareness campaigns to promote the economic benefits of establishing a legitimate market for copyright content that can only be accomplished by respect for IPR and effective enforcement.

### **PRIORITY ACTIONS REQUESTED IN 2014**

IIPA recommends that the Government of Albania urgently take the following steps:

- Enact the long stalled amendments to the Copyright Law.
- Enact amendments to the Criminal Code to provide, among other things, *ex officio* authority to prosecutors in order to prosecute copyright piracy.
- Establish the *ad hoc* IPR Inspection Agency and begin conducting enforcement operations against copyright piracy, including enterprise end-user software piracy.
- Conduct more training programs for police, prosecutors, and judges on IPR investigation and prosecution.
- Collaborate with rights holder to implement effective educational campaigns to improve public awareness of copyright laws and the importance of IPR protection to the economy. Such programs should also include outreach to enterprises to raise awareness on the risks of using unlicensed software.

<sup>1</sup>For more details on Albania's Special 301 history, see previous years' reports at <http://www.iipa.com/countryreports.html>. For the history of Albania's Special 301 placement, see <http://www.iipa.com/pdf/2014SPEC301HISTORICALCHART.pdf>. For a discussion of IIPA's 2014 Key Initiatives and Challenges, see IIPA, *2014 Special 301 Submission*, at <http://www.iipa.com/pdf/2014SPEC301COVERLETTER.pdf>.

<sup>2</sup>Data on software piracy rates and commercial values are taken from the 2011 BSA Global Software Piracy Study at [www.bsa.org/globalstudy](http://www.bsa.org/globalstudy). This study assesses piracy rates and the commercial value of unlicensed software installed on personal computers during 2011 in more than 100 markets. The study includes a detailed discussion of the methodology used. BSA plans to release an updated study in the second quarter of 2014.



# BOSNIA AND HERZEGOVINA

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

### 2014 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Several copyright industries, and in particular the software industry, are concerned about the weak overall enforcement in Bosnia and Herzegovina and the decline in both criminal and administrative IPR enforcement activities in the past year.<sup>1</sup> According to BSA | The Software Alliance (BSA), the software piracy rate in Bosnia and Herzegovina was 66% in 2011.<sup>2</sup>

There are several procedural deficiencies in the Bosnian IPR enforcement regime as well. First, evidence collected in the few administrative enforcement cases that do go forward is often gathered using sub-standard techniques that jeopardize the success of these cases. This also harms rights holders' ability to seek damages because the necessary information is not available, resulting in non-deterrent awards. For the cases that do proceed, for example in civil courts, judges and prosecutors are not experienced with IPR cases, and that, plus lengthy and burdensome procedures, leads to poor results. Creating specialized IPR courts and judges would improve the quality of civil cases and increase the confidence of rights holders in using the civil enforcement system.

Although police have *ex officio* authority, they rarely use it. In cases where complaints are filed by rights holders, the investigative stage of a case can last for years. The police prefer that IPR infringements be handled via administrative mechanisms, making criminal cases rare and difficult to pursue.

Furthermore, the government does not seem to have much interest in public awareness campaigns, even if some have occurred in the past, ceding these activities to rights holders.

### **PRIORITY ACTIONS REQUESTED IN 2014**

The Government of Bosnia and Herzegovina should take the following actions in 2014:

- Harmonize the state Copyright Law and the local procedural laws governing the market inspectorates in charge of enforcement.
- Raise public awareness on IPR through joint educational campaigns between the government and rights holders organizations, including a focus on the risks of using unlicensed software by enterprises.
- Conduct more training programs for market inspectors, customs and border control officials, police, prosecutors, and judges on IPR protection and enforcement.
- Improve the quantity and quality of administrative enforcement; improve information sharing with rights holders.
- Increase the quantity and quality of criminal enforcement to create deterrence in the market.
- Improve civil cases through the training of judges and through procedural fixes (i.e., shortening case times), and ensuring that IPR cases are only brought before trained judges.
- Develop a comprehensive IPR protection and enforcement plan.

<sup>1</sup>For more details on Bosnia and Herzegovina's Special 301 history, see previous years' reports at <http://www.iipa.com/countryreports.html>. For the history of Bosnia and Herzegovina's Special 301 placement, see <http://www.iipa.com/pdf/2014SPEC301HISTORICALCHART.pdf>. For a discussion of IIPA's 2014 Key Initiatives and Challenges, see IIPA, *2014 Special 301 Submission*, at <http://www.iipa.com/pdf/2014SPEC301COVERLETTER.pdf>.

<sup>2</sup>Data on software piracy rates and commercial values are taken from the 2011 BSA Global Software Piracy Study at [www.bsa.org/globalstudy](http://www.bsa.org/globalstudy). This study assesses piracy rates and the commercial value of unlicensed software installed on personal computers during 2011 in more than 100 markets. The study includes a detailed discussion of the methodology used. BSA plans to release an updated study in the second quarter of 2014.



# ESTONIA

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

### 2014 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Several copyright industries, and in particular the software industry, are concerned about the weak overall enforcement in Estonia.<sup>1</sup> The software piracy rate was estimated at 48% in 2011, far higher than the Western European region.<sup>2</sup> IPR enforcement is not a priority for the government and recent efforts to amend relevant laws threaten to weaken protections for rights holders. Notably, the Ministry of Justice has proposed amendments to the Penal Code that would require evidence of several additional criteria in order to qualify certain forms of wilful copyright piracy, such as enterprise end-user software piracy, for criminal liability. Depending on how these new criteria are interpreted this could, in effect, decriminalize many forms of copyright piracy that are currently criminal offenses in Estonia. A draft amendment has been approved by the government and has been sent to the Parliament for enactment. The Ministry of Justice has also initiated an effort to codify the IPR laws and to create a new Copyright Act. An initial draft appears to impose limitations on some of the rights of copyright holders that exist under current law.

These legislative developments are compounded by a dismal record on enforcement. Resources have shrunk over the past few years, from four special IPR units, comprised of four or five dedicated officers devoted to IPR enforcement, to only one officer specializing in IPR enforcement (and with additional, non-IPR responsibilities as well). There are virtually no examples of recent *ex officio* enforcement actions, and for a variety of reasons, most criminal actions that were initiated, were terminated during the investigation phase. Those investigations that do move forward to prosecution are often terminated on the grounds of a “lack of public interest” even when there is evidence of substantial damages to rights holders; many of those investigations take over one year before they are terminated. Only one or two criminal cases per year are brought to court, resulting in a judiciary that is largely unfamiliar with presiding over cases involving copyright piracy.

Civil proceedings in Estonia are complicated, and costly. The burden of proof for rights holders is quite high. There are no punitive or preventive damages provided by Estonian law. For example, damage awards against enterprises that are found to have used unlicensed software are, at most, the license fee that would have been paid during the period of infringing activity. This, of course, provides no deterrence against using unlicensed software.

This situation runs counter to the aim of the Government of Estonia to develop a knowledge-based economy. Rather than protecting rights holders and incentivizing the risks and rewards of creativity and innovation, Estonia’s dismal record and worsening trends on IPR protection are stifling the development of new products and new delivery models and businesses in Estonia.

Estonia should, as an urgent matter, take steps to: improve the legal framework for IPR protection, including by ensuring that copyright piracy can be criminally prosecuted and that there is a legal basis for deterrent penalties and damage awards; increase resources and training for IPR enforcement; and collaborate with rights holders to conduct educational campaigns to promote greater public awareness of the importance of IPR to the Estonian economy.

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<sup>1</sup>For more details on Estonia’s Special 301 history, see previous years’ reports at <http://www.iipa.com/countryreports.html>. For the history of Estonia’s Special 301 placement, see <http://www.iipa.com/pdf/2014SPEC301HISTORICALCHART.pdf>. For a discussion of IIPA’s 2014 Key Initiatives and Challenges, see IIPA, *2014 Special 301 Submission*, at <http://www.iipa.com/pdf/2014SPEC301COVERLETTER.pdf>.

<sup>2</sup>Data on software piracy rates and commercial values are taken from the 2011 BSA Global Software Piracy Study at [www.bsa.org/globalstudy](http://www.bsa.org/globalstudy). This study assesses piracy rates and the commercial value of unlicensed software installed on personal computers during 2011 in more than 100 markets. The study includes a detailed discussion of the methodology used. BSA plans to release an updated study in the second quarter of 2014.



# GEORGIA

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2014 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Several copyright industries, particularly the software industry, are concerned about the weak overall enforcement in Georgia, especially the absence of effective criminal or administrative IPR enforcement in the past year.<sup>1</sup> High piracy rates have remained unchanged in Georgia, especially for the software industry. According to BSA | The Software Alliance (BSA), the software piracy rate in Georgia remains one of the highest in the world, estimated at 91% in 2011.<sup>2</sup> The Government of Georgia has shown little interest in protecting or enforcing copyright materials, or in making IPR enforcement a priority. Even the Financial Police, tasked with IPR enforcement, do not see it as a priority.

In 2013, BSA provided a training program for the Financial Police, but the knowledge gained by the police from the program has not been put into action. Civil litigation is not a viable alternative option (in the absence of criminal enforcement) because judges are neither trained nor knowledgeable on IPR cases or enforcement, and cases can take over two years to reach final disposition.

Generally, Georgia's current IPR-related legal regime is adequate. The primary concern for rights holders in Georgia is the failure of the government to conduct effective IPR enforcement operations and the failure to allocate sufficient resources to IPR enforcement.

### **PRIORITY ACTIONS REQUESTED IN 2014**

The Government of Georgia should take the following actions in 2014 to improve the IPR enforcement environment:

- Increase the number of training programs for police, prosecutors, and judges on IPR protection and enforcement.
- Commence basic IPR enforcement activities using all existing civil, criminal and administrative laws.
- Raise public awareness on the importance of IPR 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 toehold in the legitimate marketplace in Georgia. BSA would recommend that these campaigns include information on the harm caused by the use of unlicensed software by enterprises.

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<sup>1</sup>For more details on Georgia's Special 301 history, see previous years' reports at <http://www.iipa.com/countryreports.html>. For the history of Georgia's Special 301 placement, see <http://www.iipa.com/pdf/2014SPEC301HISTORICALCHART.pdf>. For a discussion of IIPA's 2014 Key Initiatives and Challenges, see IIPA, *2014 Special 301 Submission*, at <http://www.iipa.com/pdf/2014SPEC301COVERLETTER.pdf>.

<sup>2</sup>Data on software piracy rates and commercial values are taken from the 2011 BSA Global Software Piracy Study at [www.bsa.org/globalstudy](http://www.bsa.org/globalstudy). This study assesses piracy rates and the commercial value of unlicensed software installed on personal computers during 2011 in more than 100 markets. The study includes a detailed discussion of the methodology used. BSA plans to release an updated study in the second quarter of 2014.



# MACEDONIA

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

### 2014 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Several copyright industries, particularly the software industry, are concerned about the weak overall IPR enforcement in Macedonia.<sup>1</sup> The software industry is also concerned about the incidence of government agencies using unlicensed (or under licensed) software. According to BSA | The Software Alliance (BSA), the software piracy rate in 2011 was 66%, which is above the average for the Central and Eastern European region, and far above the global average.<sup>2</sup>

**Enforcement:** IPR enforcement in Macedonia could be significantly improved if the government would take the following steps. First, following the example of the Customs Administration within the Ministry of Interior Affairs, the Economic Crimes Division should establish a special unit dedicated to investigating copyright piracy. Such a unit should not only be tasked with enforcing copyright violations according to the Criminal Code, but it should improve the transparency and accountability of enforcement efforts. Currently, the Coordinative Body for Intellectual Property, an intergovernmental body in charge of coordinating IPR enforcement with representatives from the Ministry of Interior, the State Market Inspectorate, the State Office for Industrial Property, the Ministry of Culture, and the Ministry of Finance – Tax Administration, does not provide rights holders with information on the number of raids conducted or their outcome, whether they be *ex officio* actions or rights holders initiated investigations.

**Legal Reform:** The legal underpinnings of IPR protection are generally satisfactory and in line with international norms. The Law on Copyright and Related Rights and the Civil Procedure Law, which govern civil litigation of copyright infringement, allow for damage awards, including the possibility of punitive damages. The courts conduct civil cases in a fair and transparent manner, and in accordance with the law. The Criminal Law and the Law on Criminal Procedure are also generally adequate, although for the software industry, two important amendments are recommended. First, the penalties applied to the unauthorized use of software by enterprises should be increased to match the remedies available for other IPR crimes. Second, the law should make clear that privacy protections do not render a special court order necessary to authorize the seizure of computers by enforcement authorities.

**Public Policy – Computer Hardware Procurement:** In addition to the recommendations above regarding IPR protection and enforcement, BSA urges the Government of Macedonia to reconsider one concerning development. In the last two years, several administrative agencies and the Bureau for Public Procurement announced that public procurement tenders for the acquisition of computer hardware will require that the machines not be pre-installed with operating system software. This is also a common practice among local and municipal government agencies. Without clear guidelines and procedures to ensure the procurement and installation of legal software, as well as systems for managing and verifying the continued use of legal software, the use of unlicensed or under licensed software is likely to increase in government agencies in Macedonia.

**Public Awareness:** BSA approached the Coordinative Body for Intellectual Property several times in 2013 with proposals to cooperate on public education campaigns to improve awareness among enterprises of the risks of using unlicensed software. While these proposals were well received, there has been no decision from the government to implement any such activities.

<sup>1</sup>For more details on Macedonia's Special 301 history, see previous years' reports at <http://www.iipa.com/countryreports.html>. For the history of Macedonia's Special 301 placement, see <http://www.iipa.com/pdf/2014SPEC301HISTORICALCHART.pdf>. For a discussion of IIPA's 2014 Key Initiatives and Challenges, see IIPA, *2014 Special 301 Submission*, at <http://www.iipa.com/pdf/2014SPEC301COVERLETTER.pdf>.

<sup>2</sup>Data on software piracy rates and commercial values are taken from the 2011 BSA Global Software Piracy Study at [www.bsa.org/globalstudy](http://www.bsa.org/globalstudy). This study assesses piracy rates and the commercial value of unlicensed software installed on personal computers during 2011 in more than 100 markets. The study includes a detailed discussion of the methodology used. BSA plans to release an updated study in the second quarter of 2014.





# MALTA

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

### 2014 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

The rate of software piracy in Malta is far above the average in Western Europe, and the local software industry reports mounting difficulties in enforcement. Criminal cases of software piracy are not initiated by Malta's overburdened police, preventing these cases from working their way through the court system to deterrent sentencing. Malta's legislative IPR framework is adequate, though there are a few relatively minor but crucial revisions in the civil and criminal laws that would strengthen the ability to conduct effective enforcement operations against enterprise end-user piracy. Strong governmental support and collaboration with rights holders is needed to raise awareness in the country on the importance of respecting intellectual property rights. BSA | The Software Alliance (BSA) reports the software piracy rate in Malta was 43% in 2011.<sup>1</sup>

**Enforcement:** The Economic Crimes Unit (ECU) is responsible for enforcement against fraud and intellectual property crimes. However, the ECU is overburdened by its current workload and the officers not sufficiently sensitized to the economic and security risks involved in software piracy. Their failure to bring criminal cases in this field has prevented any meaningful progress in tackling this serious problem. The police force should establish a dedicated IP Unit, charged with the enforcement of the IP-related provisions in the Maltese Criminal Code. Such a unit could be set up in a manner similar to the Police Cyber Crime Unit (which has been very successful since its creation a few years ago) and the IPR Unit within the enforcement division of Maltese Customs.

Police are unable to take *ex officio* actions in cases of criminal copyright piracy in Malta, including situations where unlicensed software is loaded on the hard drive of a PC offered for sale (known as hard disk loading). As a result, police are unable to respond on their own to leads regarding copyright cases, weakening their effectiveness.

**IP Awareness:** BSA made several proposals to the Maltese Government in 2012 and 2013 for programs to raise awareness of the risks of using unlicensed software. While government officials have been receptive, the Government of Malta has taken no formal action to implement a much needed awareness campaign on this topic.

**Legislation:** The Criminal Code of Malta contains a number of deficiencies inhibiting effective enforcement of copyright for the software sector. Article 298B, addressing copyright infringement, does not clearly apply to end-user software piracy or to ordinary channel of trade cases (such as hard disk loading). There is also a need to revise and increase the existing penalties under Article 298B, to bring the penalties on par with those for other intellectual property crimes, such as criminal trademark or design infringement. BSA has made a number of proposals to the Maltese Government to address these and other deficiencies in the Criminal Code.

The Maltese Copyright Act allows rights holders to seek damages or lost profits together with additional damages in situations of flagrant copyright infringement. But there is no civil *ex parte* search procedure. This long-standing legal deficiency has made it extremely difficult to preserve evidence, without which a successful action cannot be instituted in court. This may be inconsistent with Malta's WTO TRIPS obligations requiring members to ensure their courts have the authority to order provisional measures, including *ex parte* measures where any delay would cause irreparable harm to rights holders. Similar requirements are found in the EU IPR Enforcement Directive (EU Enforcement Directive 2004/48/EC).

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<sup>1</sup>Data on software piracy rates and commercial values are taken from the 2011 BSA Global Software Piracy Study at [www.bsa.org/globalstudy](http://www.bsa.org/globalstudy). This study assesses piracy rates and the commercial value of unlicensed software installed on personal computers during 2011 in more than 100 markets. The study includes a detailed discussion of the methodology used. BSA plans to release an updated study in the second quarter of 2014.



# MOLDOVA

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2014 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

The copyright industries, particularly the software industry, note significant enforcement problems in Moldova.<sup>1</sup> According to BSA | The Software Alliance (BSA), the software piracy rate in Moldova remains among the highest in the world, at 90% in 2011.<sup>2</sup>

Compared with other countries in the region, there are insufficient raids and seizures, criminal cases and convictions. IPR protection is no longer a priority for the Government of Moldova. As a consequence, significant investments made by the software industry in past training programs for local law enforcement officials are being squandered. There are generally good relationships between rights holders and the new Intellectual Property Division within the Police General Inspectorate and the IT and cyber-crimes section within the General Public Prosecutor's Office. However, 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. In 2013, the government completed its restructuring of the police forces, resulting in the creation of the Intellectual Property Division (referenced above), which should improve IPR enforcement if properly resourced. One other positive note: the Ministry of Internal Affairs approved an internal reform strategy intended to ultimately improve IPR enforcement.

Unnecessarily lengthy court proceedings are an additional concern; as a result, the copyright industries cannot secure effective enforcement or get a strong foot-hold in a legal marketplace in Moldova. One suggested starting point 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.

### **PRIORITY ACTIONS REQUESTED IN 2014**

The Government of Moldova should take the following steps to improve the IPR enforcement environment in 2014:

- Provide training programs for police, prosecutors, and judges on IPR protection and enforcement – including a focus on online piracy problems.
- Increase – significantly – the overall number and size of raids and cases against IPR infringers.
- Conduct joint public awareness relations campaigns between the government and rights holders, including conferences on the value of IPR and IPR enforcement, to help local and foreign rights holders establish a legitimate marketplace in Moldova and a campaign on the risks of using unlicensed software by enterprises, led by the Agency for Intellectual Property Rights Protection.

In addition Moldova should amend Article 37(1)(d) of its Copyright Law to provide an exclusive right of making available as required by the WIPO Performances and Phonograms Treaty (WPPT) and an exclusive right of reproduction as required by the WTO TRIPS Agreement. Instead, Moldova now permits a statutory license for the making available to the public of phonograms. In October 2013, draft amendments were introduced in the Parliament, including a provision to amend Article 37.

<sup>1</sup>For more details on Moldova's Special 301 history, see previous years' reports at <http://www.iipa.com/countryreports.html>. For the history of Moldova's Special 301 placement, see <http://www.iipa.com/pdf/2014SPEC301HISTORICALCHART.pdf>. For a discussion of IIPA's 2014 Key Initiatives and Challenges, see IIPA, *2014 Special 301 Submission*, at <http://www.iipa.com/pdf/2014SPEC301COVERLETTER.pdf>.

<sup>2</sup>Data on software piracy rates and commercial values are taken from the 2011 BSA Global Software Piracy Study at [www.bsa.org/globalstudy](http://www.bsa.org/globalstudy). This study assesses piracy rates and the commercial value of unlicensed software installed on personal computers during 2011 in more than 100 markets. The study includes a detailed discussion of the methodology used. BSA plans to release an updated study in the second quarter of 2014.



# MONTENEGRO

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2014 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Several copyright industries, and in particular the software industry, are concerned about the weak overall enforcement in Montenegro.<sup>1</sup> According to BSA | The Software Alliance (BSA), the software piracy rate in Montenegro was 79% in 2011, far exceeding the regional average.<sup>2</sup> The problems in Montenegro are three-fold: little to no enforcement, several key deficiencies in the legal IPR regime of Montenegro, and a general lack of awareness on the benefits of IPR protection and enforcement.

To rectify the public education problem, BSA, in cooperation with the Government of Montenegro (the Ministry of the Economy) and the local American Chamber of Commerce, conducted a massive IPR awareness campaign in the Spring of 2013 aimed at raising awareness on the importance of using licensed software. The campaign was widely disseminated with billboards and other media advertisements.

The Montenegro Intellectual Property Rights Law (last amended in 2011), established a Market Inspectorate as the key enforcement agency for IPR. Members of the Inspectorate have shown a clear willingness to enforce IPR and have been formally trained (including through programs organized by BSA), but have conducted, to date, limited actions, in large part due to legislative deficiencies in the existing IPR regime. Formal recommendations on legislative reforms have been provided to the relevant government ministries by rights holders.

### **PRIORITY ACTIONS REQUESTED IN 2014**

The Government of Montenegro should take the following steps as a matter of urgency:

- Amend the IPR Law to:
  - Define misdemeanor penalties for infringements of the works of authors of copyrighted works and related rights;
  - Implement the penal provisions in the IPR Law pertaining to economic offenses, including monetary fines for misdemeanors; and
  - Define infringements as including not only the distribution of infringing works, but also other exploitations of them, for example, by including the unauthorized use of unlicensed software on personal computers (PCs) – so that enforcement authorities do not need to wait for the distribution of the PCs (such as by legal entities that own the PCs) to seize unlicensed software contained in them.
- Undertake effective enforcement actions using existing criminal, administrative and civil remedies.

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<sup>1</sup>For more details on Montenegro's Special 301 history, see previous years' reports at <http://www.iipa.com/countryreports.html>. For the history of Montenegro's Special 301 placement, see <http://www.iipa.com/pdf/2014SPEC301HISTORICALCHART.pdf>. For a discussion of IIPA's 2014 Key Initiatives and Challenges, see IIPA, *2014 Special 301 Submission*, at <http://www.iipa.com/pdf/2014SPEC301COVERLETTER.pdf>.

<sup>2</sup>Data on software piracy rates and commercial values are taken from the 2011 BSA Global Software Piracy Study at [www.bsa.org/globalstudy](http://www.bsa.org/globalstudy). This study assesses piracy rates and the commercial value of unlicensed software installed on personal computers during 2011 in more than 100 markets. The study includes a detailed discussion of the methodology used. BSA plans to release an updated study in the second quarter of 2014.



# APPENDIX B: METHODOLOGY

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

### 2014 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

#### SOFTWARE

Data on software piracy rates and commercial values are taken from the 2011 BSA Global Software Piracy Study at [www.bsa.org/globalstudy](http://www.bsa.org/globalstudy). This study assesses piracy rates and the commercial value of unlicensed software installed on personal computers during 2011 in more than 100 markets. The methodology of the study is discussed below. BSA plans to release an updated study in the second quarter of 2014.

#### **Survey of Software Users**

A key component of the Global Software Piracy Study is a global survey of software users, led by the highly regarded research firm Ipsos Public Affairs. The survey was conducted among 14,700 business and consumer PC users, online or in-person, in 33 markets that make up a globally representative sample of geographies, levels of IT sophistication, and geographic and cultural diversity.

The survey is used, in part, to determine the "software load" for each country — that is, a picture of the number of software programs installed per PC, including commercial, open-source and mixed source programs. Respondents are asked how many software packages, and of what type, were installed on their PC in the previous year; what percentage were new or upgrades; whether they came with the computers or not; and whether they were installed on a new computer or one acquired prior to 2011.

In addition, the surveys are used to assess key social attitudes and behaviors related to intellectual property, software piracy, and other emerging technology issues. This insight provides fresh perspective each year on the dynamics underlying software piracy around the world.

Going forward, 11 countries will be surveyed annually, and 42 countries will be surveyed at least once every two to three years to enhance country coverage year upon year. The remainder will be surveyed on an ad hoc basis, generally one a year. As has been the case, the total survey population in any given year will account for approximately 90 percent of the PC software market.

#### **Calculating Software Piracy Rates**

Since 2003, BSA has worked with IDC, the leading provider of market statistics and forecasts to the IT industry, to determine software piracy rates and the commercial value of pirated software.

The basic method for coming up with the piracy rate and commercial value of unlicensed software in a country is as follows:

1. Determine how much PC software was deployed during the year.
2. Determine how much was paid for or otherwise legally acquired during the year.
3. Subtract one from the other to get the amount of unlicensed software. Once the amount of unlicensed software is known, the PC software piracy rate is computed as a percentage of total software installed.



Unlicensed Software Units/Total Software Units Installed = Piracy Rate

To calculate the total number of software units installed — the denominator — IDC determines how many computers there are in a country and how many of those received software during the year. IDC tracks this information quarterly in 105 countries, either in products called "PC Trackers" or as part of custom assignments. The remaining few countries are researched annually for this study.

Once IDC has determined how many computers there are, and using the software load data collected in the survey, it can determine the total software units installed — licensed and unlicensed — in each country.

Number of PCs Getting Software x Installed Software Units per PC = Total Software Units Installed

To estimate the software load in countries not surveyed, IDC uses a series of correlations between the known software loads from surveyed countries and their scores on an emerging market measure published by the International Telecommunications Union, called the ICT Development Index. These correlations are used to group the countries into cohorts, wherein the average software load of surveyed countries in each cohort is applied as the estimated software load for non-surveyed countries in that cohort. In 2011, IDC expanded the number of cohorts from four to six in order to provide more precision in applying surveyed values to similar countries.

To get the number of unlicensed software units —the numerator of the piracy equation — IDC must determine the value of the legally acquired software market. IDC routinely publishes software market data from about 80 countries and studies roughly 20 more on a custom basis. For the few remaining countries, IDC conducts annual research for the purposes of this study. This research provides the value of the legally acquired software market.

To convert the software market value to number of units, IDC computes an average price per software unit for all of the PC software in the country. This is done by developing a country specific matrix of software prices — such as retail, volume-license, OEM, free, and open-source — across a matrix of products, including security, office automation, operating systems, and more.

IDC's pricing information comes from its pricing trackers and from local analysts' research. The weightings — OEM versus retail, consumer versus business — are taken from IDC surveys. IDC multiplies the two matrices to get a final, blended average software unit price.

To arrive at the total number of legitimate software units, IDC applies this formula:

Software Market Value/Average Software Units Price = Legitimate Software Units

In 2011, IDC implemented several measures to validate its calculations of average software unit price. Analyst teams in 25 countries have been asked to provide additional information on software price by category and estimates of acquisition type (e.g. retail, volume-license, free/open source) to serve as a cross-check against IDC's computed values. Rotating the countries for which information is collected each year will allow IDC to recalibrate software prices periodically, providing a more accurate estimate of legitimate software units from industry revenues.

Finally, subtracting the number of legitimate software units from the total software units reveals the number of unlicensed software units installed during the year.

Total Software Units Installed – Legitimate Software Units = Unlicensed Software Units

This process provides the underlying data for the basic piracy rate equation.

## Calculating the Commercial Value of Pirated Software

The commercial value of pirated software is the value of unlicensed software installed in a given year, as if it had been sold in the market. It provides another measure of the scale of software piracy and allows for important year-over-year comparisons of changes in the software piracy landscape.

It is calculated using the same blend of prices by which IDC determines the average software unit price, including: retail, volume license, OEM, free, open-source, etc. The average software unit price is lower than retail prices one would find in stores.

Having calculated the total units of software installed, as well as the number of legitimate and unlicensed software units installed and the average price per software unit, IDC is able to calculate the commercial value of unlicensed software.

$$\underline{\text{Number of Unlicensed Units Installed} \times \text{Average Software Unit Price} = \text{Commercial Value}}$$

## Which Software Is Included

The BSA Global Software Piracy Study calculates piracy of all software that runs on personal computers — including desktops, laptops, and ultra-portables, including netbooks.

It includes operating systems, systems software such as databases and security packages, business applications, and consumer applications such as games, personal finance, and reference software. The study also takes into account the availability of legitimate, free software and open-source software, which is software that is licensed in a way that puts it into the public domain for common use. It is typically free but can also be used in commercial products.

The study excludes software that runs on servers or mainframes and routine device drivers, as well as free downloadable utilities, such as screen savers, that would not displace paid-for software or normally be recognized by a user as a software program.

It includes software as a service if it is paid for, but excludes free, Web-based services that might supplant the need for a paid-for package to be installed on a PC. Software sold as part of a legalization program — such as a bulk sale to a government to distribute to schools — is included in the study.

For more information, see <http://portal.bsa.org/globalpiracy2011/methodology.html>.

## **ENTERTAINMENT SOFTWARE**

In select countries, the Entertainment Software Association (ESA) provides rankings to demonstrate anecdotally the growth of online game piracy through P2P networks. The methodology underlying these estimates is as follows:

Vendors for ESA's online enforcement program monitor for connection activity involving select 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.

## **RECORDS AND MUSIC**

The Recording Industry Association of America (RIAA) has in various markets data from the local industry or from executives with responsibility for the particular territory. Any estimates contained within the country appendices to this Submission 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;
- Legitimate sales or other revenue;
- Enforcement data and anti-piracy developments;
- Where possible, economic indicators, professional surveys and academic studies of piracy or counterfeit goods.

Any monetary figures as to harm to 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. Where possible, losses and piracy rates occurring via online and mobile networks are reported and would be so designated in the text of the country report.

**APPENDIX C: CHART OF COUNTRIES' SPECIAL 301 PLACEMENT (1989-2013)  
AND IIPA 2014 SPECIAL 301 RECOMMENDATIONS**

USTR 301 PLACEMENT (as of April/May of each year)																											
COUNTRY	IIPA Recommendation February 2014	2013	2012	2011	2010	2009	2008	2007	2006	2005	2004	2003	2002	2001	2000	1999	1998	1997	1996	1995	1994	1993	1992	1991	1990	1989	
Albania	AC																										
Algeria		PWL	PWL	PWL	PWL	PWL	WL																				
Argentina	PWL	PWL	PWL	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			OL <sup>1</sup>						WL	WL	PWL	PWL	WL + OCR	OCR	OCR												
Bahrain																		WL	WL	WL	WL						
Bangladesh																											
Barbados		WL	OL <sup>1</sup>																								
Belarus	WL	WL	WL	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	WL	WL	WL	OO	WL	OO								
Bosnia and Herzegovina	AC																										
Brazil	WL	WL	WL	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	WL																					
Bulgaria	WL	WL							WL	WL	WL						PWL	WL	OO	OO							
Burma (Myanmar)																											
Cambodia																											
Canada	WL	WL	PWL	PWL	PWL	PWL	WL	WL	WL + OCR	WL + OCR	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	OO		WL	WL	WL	WL
Chile	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	WL + OCR	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL
China (PRC)	PWL + 306	PWL	PWL + 306	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	
Colombia		WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	PWL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	
Costa Rica	PWL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL + OCR	PWL	WL	WL	WL	WL	WL							
Croatia									WL	WL	WL	WL															
Cyprus																			OO	OO	OO	WL	WL	WL	WL		
Czech Republic					WL	WL	WL	OCR								WL	WL	WL	OO								
Denmark															WL	WL	WL	WL									
Dominican Republic		WL	WL	WL	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	WL	WL			WL	WL	PWL	PWL	WL				WL	WL			
Egypt		WL	WL	WL	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	AC																	OO									
European Union			OL <sup>4</sup>						WL	WL + OCR	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	
Fiji							OCR																				
Finland		WL	WL	WL	WL	WL																					
Georgia	AC													OCR													
Germany			OL <sup>3</sup>														OO	OO	OO	OO	OO			WL	WL		
Greece	WL	WL	WL	WL	WL	WL	WL						WL	WL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	WL	WL	WL	WL	WL	
Guatemala		WL	WL	WL	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	SM															OCR	WL	WL	OO								
Hungary						WL	WL	WL	WL	WL	WL	WL	PWL	PWL	WL	WL	OO	OO					PWL	PWL	WL		
Iceland																											
India	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PFC	PFC	PFC	PWL	PWL
Indonesia	PWL	PWL	PWL + GSP	PWL	PWL	PWL	WL	WL	PWL + OCR	PWL + OCR	PWL	PWL	PWL + OCR	PWL	WL	PWL	PWL	PWL	PWL	PWL	WL	WL	WL	WL	WL	WL	



**APPENDIX C: CHART OF COUNTRIES' SPECIAL 301 PLACEMENT (1989-2013)  
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USTR 301 PLACEMENT (as of April/May of each year)																										
COUNTRY	IIPA Recommendation February 2014	2013	2012	2011	2010	2009	2008	2007	2006	2005	2004	2003	2002	2001	2000	1999	1998	1997	1996	1995	1994	1993	1992	1991	1990	1989
Ireland															WL	WL	WL	WL	OO							
Israel	WL	WL	PWL (9/12 to WL)	PWL	Pending	PWL + OCR	PWL + OCR	PWL	PWL	PWL	WL + OCR	WL	PWL + OCR	PWL	PWL	PWL	PWL	WL	OO	OO	OO					
Italy	OCR	WL	WL	WL + OCR	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	WL	WL	WL									
Japan			OL <sup>3</sup>											OCR		WL	WL	WL	PWL	PWL	PWL	WL	WL	WL	WL	WL
Jordan																WL	WL	WL	OO	OO						
Kazakhstan	WL									WL	WL	WL	WL	WL	WL		OO									
Kenya																										
Kuwait	WL	WL	WL	WL	WL	WL	WL	WL	WL	PWL	PWL	WL	WL	WL	WL	PWL	PWL	WL	WL	OO						
Kyrgyz Republic														OCR												
Laos																										
Latvia									WL + OCR	WL	WL	WL	WL	WL	WL											
Lebanon		WL	WL	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	AC																									
Malaysia	SM		OFF	WL	WL	WL	WL	WL	WL	WL	WL + OCR	WL	WL	PWL	PWL	OCR									WL	WL
Malta	AC																									
Mexico	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	OCR			WL	OO	OO	OO							PWL
Moldova	AC														WL											
Montenegro	AC																									
Morocco																										
Netherlands																	OO									
New Zealand			OL <sup>3</sup>										WL	WL		WL							WL	WL		
Nicaragua																	OO	OO								
Nigeria																										
Norway			WL	WL	WL	WL	WL																			
Oman															WL	WL	WL	WL	WL	OO						
Pakistan		PWL	PWL	PWL	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		WL	306	306	306	306	306	306	306	306	306	306	306	306	306	306	306	PFC	PWL	WL	OO	OO		WL		
Peru		WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	
Philippines	SM	WL	WL	WL	WL + OCR	WL + OCR	WL + OCR	WL	WL	PWL + OCR	PWL	PWL	PWL + OCR	PWL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL
Poland			OL <sup>3</sup>			WL + OCR	WL	WL	WL	WL	WL + OCR	PWL	WL + OCR	WL	PWL	WL	WL	WL	WL	WL	WL	WL	PWL	PWL		
Portugal																			OO							WL
Qatar													WL		WL	WL	WL	OO	OO	OO						
Romania	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	OO	OO	OO	WL						
Russian Federation	PWL	PWL	PWL	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	OO					
Slovak Republic										WL	WL	WL	WL	WL												
Slovenia															OCR											

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COUNTRY	IIPA Recommendation February 2014	2013	2012	2011	2010	2009	2008	2007	2006	2005	2004	2003	2002	2001	2000	1999	1998	1997	1996	1995	1994	1993	1992	1991	1990	1989	
South Africa																	WL	WL		OO	WL						
South Korea			OL <sup>3</sup>				WL	WL	WL	WL	PWL	WL + OCR	WL	PWL	PWL	WL	WL	WL	PWL	PWL	PWL	PWL	PWL	WL	WL	PWL	
Spain	OCR		OFF	WL	WL	WL	WL								WL	WL	OO				WL	WL	WL	WL	WL	WL	
Sri Lanka																											
Sweden																	WL	WL	WL								
Switzerland	WL		OL <sup>2</sup>																								
Taiwan	WL		OL <sup>3</sup>				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	WL	WL	WL												
Thailand	PWL	PWL	PWL	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	
Trinidad & Tobago		WL	OL <sup>1</sup>																								
Tunisia																	OO										
Turkey	WL	WL	WL	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	WL	WL	WL												
UAE	WL													WL	OCR	WL	WL	WL	WL	WL	WL	WL	WL	WL			
Ukraine	PFC	PFC	PWL+GSP	WL	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	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL												
Venezuela		PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	WL	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	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: Special Mention  
OCR: Out-of-Cycle Review to be conducted by USTR  
GSP: GSP IPR review ongoing, except in Ukraine and Indonesia where GSP IPR review initiated June 2012.  
DS: Dispute Settlement  
OL: Other Listing - "Section 1. Developments in Intellectual Property Rights Protection and Enforcement"  
<sup>1</sup> Trends in Trademark Counterfeiting and Copyright Piracy  
<sup>2</sup> Piracy over the Internet and Digital Piracy  
<sup>3</sup> Supporting Pharmaceutical and Medical Device Innovation through Improved Market Access  
<sup>4</sup> WTO Dispute Settlement  
AC: Additional Countries

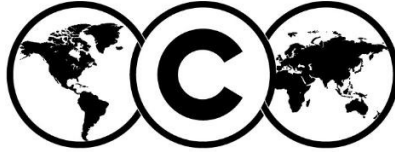
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## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE 2014 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

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Copyright Industries' Key Challenges for 2014:  
Reduce Copyright Piracy ▪ Open Markets ▪ Strengthen Laws



## COPYRIGHT INDUSTRIES' KEY CHALLENGES FOR 2014

### REDUCE COPYRIGHT PIRACY ♦ OPEN MARKETS ♦ STRENGTHEN LAWS

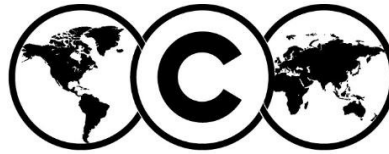
- **The Need for Deterrent Enforcement Responses to Copyright Piracy:** The overarching objective for the copyright industries.
- **Internet Piracy:** The overwhelming challenges of online and mobile piracy continue to impede opportunities for copyright owners.
- **Unauthorized Use of Copyright Materials by Governments or Businesses:** Too many government agencies or enterprises permit use of unlicensed copyright materials or use of their networks to infringe copyright.
- **Hard-Disk Loading, Mobile Device, and Media Box Piracy:** Installation of pirated materials onto hard disks, mobile phones, tablets or other devices (either at the point of sale or by enabling online downloading or streaming) must be addressed.
- **Circumvention of Technological Protection Measures (TPMs):** TPMs – technologies that enable legitimate distribution and diversify consumer choices – are threatened by those who build their business models on trafficking in devices, software, technologies, and services to circumvent them.
- **Illegal Camcording of Theatrical Motion Pictures:** A single illegal camcord copy off the movie theater screen can rapidly destroy the global market for a film. Governments and stakeholders (including cinema owners) must take steps to address this problem.
- **Piracy of Books and Journals:** Large-scale unauthorized photocopying, principally on and around university campuses; sophisticated infringing offset print; unauthorized translations; and online distribution/sharing of books, all harm publishers worldwide.
- **Optical Disc Piracy:** Pirate optical discs continue to cause harm in markets where Internet or mobile penetration is low.
- **Pay TV Piracy and Signal Theft:** Unauthorized broadcast, cablecast, satellite delivery, or retransmission (e.g., over the Internet) cause significant harm to the copyright industries. Media boxes often facilitate unauthorized receipt of pay TV channels.
- **Implementation of IPR Provisions in Trade Agreements:** Trade agreements (including those currently under negotiation) remain important means to create enforceable obligations to modernize IP laws and improve enforcement best practices.
- **Implementation of the WCT and WPPT:** Effective implementation of the WIPO Internet treaties is a critical step in the fight against online piracy.
- **Market Access:** Efforts against piracy will be unavailing if countries impose market access and discriminatory barriers. Investment barriers, quotas, procurement preferences for locally-developed IP, content review, high tariffs, etc. should be eased or eliminated.

### CONCRETE SOLUTIONS COUNTRIES CAN UNDERTAKE

- **Update laws and enforcement tools, and dedicate adequate enforcement resources** to provide for “effective [civil, administrative, and criminal] action” and “remedies that constitute a deterrent” to infringements as required by the TRIPS Agreement.
- **Address the operation of websites whose business model is based on providing access to infringing materials** by taking criminal and/or administrative actions against such businesses and their owners.
- **Train and empower enforcement authorities** to investigate and prosecute copyright offenses.
- **Encourage cooperation by Internet service providers** with all content owners, including through notice and takedown systems and effective and fair mechanisms to deal with hosted and non-hosted infringements, and repeat infringers.
- Issue and enforce directives to governments, SOEs, contractors, and educational institutions to **use only licensed copyright materials, including legal copies of textbooks, and ensure their computer networks are not used to infringe.**
- **Prohibit possession of an audiovisual recording device in a theater** with intent to copy or transmit a movie in whole or in part.
- Support multilateral, bilateral, and regional trade agreements that modernize IP laws and implement enforceable best practices.
- **Ratify and fully implement the WCT and the WPPT.**
- **Dismantle market access and other discriminatory barriers,** including investment barriers, quotas, content review regimes, high tariffs, preferences for locally-developed IP, and conditioning market access on transfers of IP.

IIPA testimony before House Foreign Affairs Committee on  
Trans-Pacific Partnership (2013)

# INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE®



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Written Testimony of

Steven J. Metalitz

Counsel, International Intellectual Property Alliance

Before the

House Committee on Foreign Affairs  
Subcommittee on Terrorism, Non-proliferation and Trade

August 1, 2013

Hearing on

“The Trans-Pacific Partnership: Outlook and Opportunities”

# INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE®



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Thank you for this opportunity to present the views of the International Intellectual Property Alliance (IIPA) on progress toward a Trans-Pacific Partnership Agreement (TPP).

IIPA represents the U.S. copyright-based industries that seek to open up foreign markets closed by piracy and other market access barriers. We are a coalition of seven trade associations, representing over 3,200 U.S. companies producing and distributing materials protected by copyright laws throughout the world. For nearly 30 years, this coalition has worked to ensure that U.S. trade policy fully reflects the importance of copyright-based industries to the U.S. economy, jobs and international competitiveness. Members of the IIPA include the Association of American Publishers (AAP); BSA | The Software Alliance; Entertainment Software Association (ESA); Independent Film & Television Alliance (IFTA); Motion Picture Association of America (MPAA); National Music Publishers' Association (NMPA); and Recording Industry Association of America (RIAA).

Over the past five years, IIPA has followed closely and with great interest the progress toward a TPP agreement. Such an agreement has enormous potential to open up important foreign markets to the products and services that are the fruit of American creativity, ingenuity, and talent. Opening up these markets can mean more and better U.S. jobs for men and women involved in creating, marketing, distributing and disseminating these works. But these gains can only be achieved if the TPP embodies both high standards of copyright protection and enforcement, and strong compliance mechanisms to ensure that our trading partners deliver on their obligations.

It is well established that industries dependent on copyright protection are critical to our country's economic health, to our international competitiveness, and to a growing and more highly skilled U.S. workforce. A long series of economic studies commissioned by IIPA has quantified this conclusion, using well-accepted methodologies endorsed by the World Intellectual Property Organization and employed in similar studies across the globe. The most recent IIPA study, released two years ago, found that the "core" copyright industries – those primarily engaged in creating, producing, distributing or exhibiting copyrighted works – accounted for over 6.3% of U.S. GDP in 2010, or more than \$930 billion in economic activity. These industries provided nearly 5.1 million U.S. jobs, or 4.75% of the entire U.S. private sector workforce; and those jobs paid, on average, 27% more than the overall workforce average. The latest edition of the study is in preparation, and we are confident that when it is released later this year, it will once again show how critical the copyright industries are to the American economy and to good U.S. jobs. The basic conclusions of these studies are also consistent with those from many other sources, including the comprehensive study of U.S. intellectual property-intensive industries released last year by the U.S. Department of Commerce.

These economic studies also underscore the growing importance of international trade to the copyright sector, and therefore to the economy as a whole. The most recent IIPA study



concluded that, in 2010, the core copyright industries collectively are responsible for foreign sales and exports of \$134 billion, well exceeding the corresponding figures for major industry sectors such as automobiles, agricultural products, food or pharmaceuticals. Businesses and consumers around the world have demonstrated an insatiable appetite for U.S. books, movies, music, and software applications, both for business uses and for entertainment and games.

Those foreign sales figures would be even larger were it not for the barriers that our industries encounter in many overseas markets. One of the most virulent and troubling of these barriers is pervasive piracy of copyrighted materials of all kinds. The widespread availability, both in physical marketplaces and in the online environment, of unauthorized, illicit copies of U.S. works makes it difficult for legitimate distributors to gain a foothold in overseas markets; and even where there are well-established legitimate distribution channels, their growth is inevitably stunted when they must compete with pirates who pay nothing for the content they distribute or make available, who flout local rules and requirements with which legitimate market entrants must comply, and who pay no taxes on their ill-gotten gains.

These facts underscore why the U.S. has long included strong copyright rules and enforcement obligations within our agreements with major trading partners, and why building on that progress is so critical. Because trade in copyrighted materials is vital to U.S. economic interests, and because piracy in overseas markets is a major obstacle to growth of that trade, it must be a top priority to get our trading partners to ensure the adequacy of their copyright laws and their regimes for enforcing those laws. This has been a cornerstone of U.S. trade policy for more than two decades, under both Republican and Democratic Administrations, and with strong and consistent bipartisan support from Congress. This policy has helped to grow our economy, support millions of U.S. jobs, nurture our creative spark, and, not incidentally, foster the growth of the copyright sectors within our trading partners, thus building a global constituency for copyright protection and enforcement. The KORUS FTA, which was approved last Congress, was in many ways the culmination of this effort. It includes a state-of-the-art copyright chapter that we have urged U.S. negotiators to employ as a benchmark in the TPP.

A TPP agreement provides an important opportunity to build upon this long-standing policy. Four of the seven trading partners with whom the initiative was originally launched have already signed bilateral Free Trade Agreements with the United States, and all of those FTAs – with Australia, Chile, Peru and Singapore – included strong intellectual property chapters with meaningful copyright provisions. A successful TPP will build on and extend these achievements, by bringing the copyright law and enforcement regimes of countries like New Zealand, Vietnam, Brunei and Malaysia into compliance with these best practices.

In recent months, three of our country's four largest trading partners – Canada, Mexico and Japan – have joined the TPP negotiations, thus dramatically expanding its importance. Each of these countries is a critically important export market for the U.S. copyright industries; and each has a relatively modern copyright law. Yet in each of these countries there are also important and in some cases long-standing gaps, either in legal protections under copyright or in enforcement standards (or both), which hamper our industries' ability to fully compete in these markets. Their engagement in TPP offers the potential to resolve some of these problems. Moreover, the TPP countries hope that other nations will join the finished agreement. It is critical that we get it right.

Let me offer a few examples of the kinds of specific improvements in the laws and enforcement practices of our trading partners that IIPA hopes will be achieved in the TPP negotiations. In each of these areas, the status quo falls short of meeting the current global norms, as embodied in KORUS FTA and other instruments, in ways that are damaging to U.S. copyright industries. Of course it is not possible here to provide a comprehensive list, but the following may hit some of the high points.

Term of Copyright Protection. Over the past couple of decades, most major economies have moved to extend the term of copyright protection beyond the minimum levels required by the WTO TRIPS Agreement, to reflect longer life-spans and the need to maintain incentives for investment in the conservation and dissemination of older works. Many TPP partners have extended term for at least some types of works, but there are some important outliers, notably Canada, New Zealand, and Japan (other than for films). Greater harmonization of term will facilitate international commerce by minimizing the friction that occurs when a work is still under copyright protection in one country but not in another. The TPP agreement should commit all participants to adhere to the evolving global norm of longer terms.

Technological Protection Measures. The Internet has opened up new and exciting ways of delivering content to consumers, using a variety of business models and price points. The viability of these innovative means of delivery – notably including cloud computing services – depends directly on the ability to use technology to manage access to these services and the underlying content. For this reason, strong legal protections for technological measures employed by rights holders to protect their works, and meaningful civil and criminal remedies against trafficking in tools or services aimed at circumventing these technological controls, are critical features of all 21st century copyright laws. While those TPP partners that have recently entered into FTAs with the U.S. have taken on (and in most cases implemented) detailed obligations in this field, the other partners generally have not, and in a number of cases there are significant gaps to be filled. Few improvements are more critical to growing international digital marketplaces for copyrighted materials in the years ahead.

Government Legalization. Governments are among the world's biggest consumers of software, but problems persist with high levels of unlicensed software use by government agencies. The KORUS FTA and other U.S. trade agreements impose obligations on governments to ensure that their software use is legal. The TPP should build on and strengthen these obligations on government legalization programs, both to ensure legal software use in the public sector and to encourage governments to set a strong example for the private sector on the need to address IP infringement and implement best practices in IT management.

Civil and Criminal Remedies. To provide the right incentives for creation and dissemination of works within the economies of all our TPP partners, their enforcement regimes must also be strong, comprehensive and up-to-date, and they must deliver fully compensatory and deterrent remedies. Among other requirements, TPP should address:

Pre-set (Statutory) Damages. Traditional formulations for calculating civil compensatory damages for copyright infringement too often fall short of deterrent levels. This is not a theoretical problem: in many markets, very low damages awards allow infringers to treat liability (if one gets caught) as simply a cost of doing business. A key

element of solving this problem is to establish pre-set damage levels that can be chosen by right holders in lieu of proving actual damages. Such a regime provides needed deterrence, and responds effectively to scenarios (such as illicit Internet uploading and streaming) in which calculation of actual damages is extremely difficult. While statutory damages are a well-established feature of U.S. law, most of our TPP partners do not yet provide this important enforcement tool.

Camcording. The great majority of pirate movies distributed via the Internet are sourced to cinemas where high-quality digital copies are surreptitiously recorded off the screen, usually in the first few days of theatrical release. While technically this constitutes copyright infringement, few countries have effectively combatted illicit camcording without putting a specific law on the books against it. Experience has demonstrated that when specific anti-camcording laws are enacted and are vigorously enforced, they are extraordinarily effective in choking off this supply channel for Internet audio-visual pirates. As many of our current FTAs predate the proliferation of high-quality camcording, this gap remains to be filled among several of our TPP partners, although important markets such as Japan, Canada and Malaysia are already largely in compliance.

Criminal Remedies. Piracy remains a big business; but the Internet has brought with it high-volume piracy operations in which money does not directly change hands between supplier and customer. There is also the pervasive problem of enterprises that gain commercial benefit from using unlicensed software and other copyright products to conduct their business. It is thus essential that criminal remedies be available for all piracy carried out “on a commercial scale,” whether for direct or indirect commercial benefit, as defined in part by the volume of infringement. This is particularly important in the many TPP countries in which the civil courts are unlikely to be effective in imposing deterrent remedies.

Other important copyright issues at play in the TPP negotiations include providing a strong framework for enforcement against online piracy, including effective incentives for cooperation among all participants in the digital networked environment, as well as ensuring that exceptions and limitations to copyright protection conform to well-established international norms.

The issues summarized above are technically complex, and we recognize that negotiations on these issues with such a large group of major trading partners is challenging. While we appreciate the challenges that U.S. negotiators face, and are grateful to them for their hard work and unstinting dedication, the end goal for our industries remains the same: negotiation of a high standard agreement that provides for strong protections and enforcement of copyrighted products and services.

Despite some claims to the contrary, strong copyright protection and enforcement is critical to bolstering innovation, the growth of the Internet and free expression. The copyright industries represented by IIPA depend upon freedom of speech, which is the lifeblood of creators everywhere. As the Supreme Court has acknowledged, “copyright is the engine of free expression.” Companies that are members of IIPA’s associations are also at the forefront of

innovation in the delivery of content – providing more creative works to more people in more ways at more price points and on more devices than ever before in human history. U.S. copyright law has made a huge contribution to achieving this result; and a TPP that adopts provisions similar to prior U.S. FTAs such as KORUS – which are fully consistent with U.S. law – will help spread this creativity and innovation throughout TPP markets.

Finally, it is important to note that while my remarks today have focused on the copyright elements of the TPP given the focus of IIPA’s work, many other aspects of the agreement are critically important to allowing U.S. copyright industry companies to access and compete in TPP markets. Among other features, TPP must provide non-discriminatory market access for companies, products and services, including provisions to enable cross-border data flows and prohibit local server requirements. Addressing these issues, along with strong copyright protection and enforcement, is key to the success of this agreement for the copyright industries.

Whatever emerges from the TPP process, a good outcome will depend on a vigorous, prompt and consistent compliance effort. While most of our trading partners have done a good job of living up to the commitments they have made in previous FTAs to upgrade their copyright law and enforcement regimes, some have not. Realistically we must anticipate that concluding a successful TPP agreement is only the first chapter, and the rest of the story will be written in the legislatures, ministries and marketplaces of our trading partners, where these critical commitments must bear fruit. The U.S. government needs to redouble its efforts, and its commitment of personnel, intellectual bandwidth, and other resources, to the proactive enforcement of our trade agreements, including what IIPA hopes will be a strong and comprehensive copyright chapter in the TPP.

IIPA written comments before the Section 301 Committee on  
the Section 301 investigation on Ukraine (2013)

# INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE®



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## Pre-Hearing Written Comments International Intellectual Property Alliance

Before the Section 301 Committee  
Docket: USTR-2013-0023 Ukraine – Section 301 Investigation

September 9, 2013

### I. Introduction

The International Intellectual Property Alliance (IIPA) appreciates the opportunity to provide written testimony and to appear at the September 9 public hearing on the Section 301 investigation of Ukraine.

This Section 301 investigation was initiated on May 30, 2013, in accordance with the Trade Act of 1974, as amended. As mandated by Section 302(b)(2) of the Trade Act (19 U.S.C. 2412(b)(2)), the U.S. Trade Representative is authorized to initiate an investigation under Chapter 1 of Title III of the Trade Act (commonly referred to as “Section 301”) with respect to any “act, policy, or practice” that was the basis of the identification of a country as a priority foreign country under section 182 of the Trade Act. The U.S. Trade Representative identified such “acts, policies and practices” pertaining to three discrete copyright issues in the May 30th announcement designating Ukraine as a Priority Foreign Country (PFC) which initiated this Section 301 investigation. As set out in the Federal Register notice regarding the investigation and public hearing, these three issues are:

- (1) “the unfair, nontransparent administration of the system for collecting societies, which are responsible for collecting and distributing royalties to U.S. and other rights holders...”
- (2) the “widespread use of infringing software by Ukrainian government agencies...” and
- (3) the failure of the Government of Ukraine “to implement an effective and systemic means to combat the widespread online infringement of copyright and related rights, including failures to institute transparent and predictable provisions on intermediary liability and liability for third parties that facilitate piracy; to introduce limitations on such liability for Internet Service Providers (ISPs); and to enforce takedown notices for infringing online content.” 78 Fed. Reg. 33,886-7 (June 5, 2013).

The IIPA, formed in 1984, is a private sector coalition of seven trade associations representing U.S. copyright-based industries working to improve international protection and

enforcement of copyrighted materials and to open foreign markets closed by piracy and other market access barriers.<sup>1</sup> As such, we focus our testimony on the copyright law and enforcement issues confronting our members in Ukraine, and specifically on how the three issues identified by the U.S. Trade Representative are adversely impacting our members.

A Section 301 investigation is supposed to examine “whether these acts, policies, and practices are actionable under section 301(b) of the Trade Act, and, if so, what action the Trade Representative should take under Section 301(b).” *Id.* at 33,887. Acts, policies, or practices of a foreign country are “actionable under section 301(b) if they are unreasonable and burden or restrict U.S. commerce.” *Id.* Further the Trade Act specifies (in section 301(d)(3)(B)(i)(II)), as set out in the Federal Register notice, “that unreasonable acts, policies, or practices include any act, policy, or practice which denies fair and equitable provision of adequate and effective protection of intellectual property rights, notwithstanding the fact that the foreign country may be in compliance with the specific obligations of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement)...[and may]...also include any act, policy, or practice which denies fair and equitable nondiscriminatory market access opportunities for persons that rely upon intellectual property protection.”<sup>2</sup> *Id.*

The Federal Register notice (78 Fed. Reg. 33,886 (June 5, 2013)) specifically requested that public witnesses for the July 18 hearing include four elements in their testimony: (i) the “acts, policies and practices” of the Government of Ukraine that are the subject of this investigation; (ii) the “burden” on U.S. commerce and, in our case, specific to the IIPA-represented rightsholders, caused by these acts, policies and practices; (iii) a description of why, in our view, these acts, policies and practices are actionable under Section 301(b); and, (iv) recommended actions for the U.S. Government under Section 301(b). Our testimony incorporates all four of these elements and we include as well, recommended actions by the Government of Ukraine to improve the economic climate for the copyright industries in Ukraine.

## **II. IIPA Summary of Conclusions and Recommendations**

In sum, the “acts, policies and practices” of the Government of Ukraine, relating to the three copyright issues identified, have caused severe economic harm to (i.e., are a “burden” on) IIPA-represented copyright rightsholders in Ukraine (as well as to Ukrainian and other foreign rightsholders) for the reasons detailed below.

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<sup>1</sup> IIPA’s seven member associations represent over 3,200 U.S. companies producing and distributing materials protected by copyright laws throughout the world—all types of computer software, including operating systems, systems software such as databases and security packages, business applications, and consumer applications such as games, personal finance, and reference software, free software, open source software, and software as a service, entertainment software including interactive games for videogame consoles, handheld devices, personal computers and the Internet, and educational software; motion pictures, television programming, DVDs and home video and digital representations of audiovisual works; music, records, CDs, and audiocassettes; and fiction and non-fiction books, education instructional and assessment materials, and professional and scholarly journals, databases and software in all formats. Members of the IIPA include Association of American Publishers, BSA | The Software Alliance, Entertainment Software Association, Independent Film & Television Alliance, Motion Picture Association of America, National Music Publishers’ Association, and Recording Industry Association of America.

<sup>2</sup> There are two critical market barriers to access that are not directly a part of the Section 301 investigation, but which are preventing the motion picture industry from freely and fairly conducting business in Ukraine at present and which deserve the attention of the Government of Ukraine. These two barriers are: (1) an obligation to manufacture film prints and digital encryption keys in Ukraine; and (2) customs valuation rules that assess valuation on projected royalties, rather than on the underlying carrier medium.

The Government of Ukraine, by allowing problems to persist pertaining to collecting societies, illegal software in government agencies, and digital piracy have denied adequate and effective protection of intellectual property rights, and have resulted in unfair and inequitable discrimination of market access opportunities, for U.S. rightsholders. The ineffective and inadequate response to date, by the Government of Ukraine, to address these “acts, policies and practices” is, in our view, actionable under Section 301(b) of the Trade Act because of the economic harm to American (and other) rightsholders.

IIPA makes several specific recommendations on actions the Government of Ukraine can take to address these “acts, policies and practices,” that is, to properly and adequately address each of the three copyright issues that are the subject of this Section 301 investigation. The proper solutions require administrative and executive actions by the Government of Ukraine, as well as legislative reforms in some instances.

IIPA also recommends that, unless the Government of Ukraine fully responds to these problems and takes corrective actions to fix them, the U.S. Government should take all appropriate actions and measures permissible under Section 301(b).<sup>3</sup> The ultimate goal of IIPA and its members is not to harm trade relations between the U.S. and Ukraine, but to enhance the economic climate and conditions in Ukraine for copyright creators and producers (U.S. and Ukrainian), and to avoid any further escalation of trade tensions between the two governments. In our view, undertaking the recommended actions on the three copyright issues as set out below, will best accomplish this goal.

### **III. “Acts, Policies and Practices” by the Government of Ukraine, the Burden on U.S. Commerce, and Recommended Actions to Correct These IPR Deficiencies**

The U.S. creative industries represent a core sector of the U.S. economy that contributes to a positive balance of trade. It is essential to the continued growth and future competitiveness of these industries and the U.S. economy, that U.S. trading partners provide free and open markets and effective levels of protection to the copyrights on which this trade depends, both for “hard copy” goods and especially for works and recordings in the digital marketplace.

Unfortunately, at present in Ukraine, there are myriad obstacles to adequate and effective copyright protection, ranging from rampant digital copyright piracy to governmental decisions related to the operation of collecting societies that have removed the ability of rightsholders to determine how their rights will be administered. Piracy rates are exceedingly high in Ukraine. In addition, the use of unlicensed software by government ministries is a long-festering systemic problem that the Government of Ukraine has not corrected.

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<sup>3</sup> One of the additional critical trade “tools” used to combat the problems of a weak IPR regime in developing countries is to enforce the IPR obligations in the Generalized System of Preferences (GSP) program. Separate from the PFC designation and Section 301 investigation, the IIPA filed a petition for consideration, and the U.S. Government is reviewing Ukraine’s eligibility for GSP benefits. According to the intellectual property provisions of the 1974 Trade Act (sections 502(b) and 502(c)), one of the bases for a country’s GSP eligibility is “the extent to which such country is providing adequate and effective protection of intellectual property rights.” 19 U.S.C. § 2462(c)(5). In our view, the Government of Ukraine is not complying with these eligibility requirements because the Ukrainian legal and enforcement regime is inadequate and ineffective in many key areas. In addition, for the reasons stated in this filing and others, Ukraine is not “provid[ing] equitable and reasonable access to [its] markets...” which is also a requirement for GSP eligibility. Unless these issues are addressed, IIPA recommends that Ukraine lose its eligibility for GSP benefits.



Weak copyright protection has been a long-standing problem in Ukraine, but in the past two years the situation has substantially worsened. Ukraine is a key country in the region for effective enforcement of IPR because it exports piracy, especially digital piracy, into both European Union markets and other countries in the Commonwealth of Independent States (CIS). For example, there are several notorious websites hosted in Ukraine by Ukrainian Internet Service Providers (ISPs) that, while identified to Ukrainian enforcement officials, continue to act with impunity.

As noted, the U.S. Trade Representative has specifically identified the three copyright shortcomings in areas of “acts, policies and practices” by the Government of Ukraine that are the subject of this Section 301 investigation. We treat each of these issues in the order identified in the Federal Register notice:

### 1) Collecting Societies

In the music sector, and specifically in connection with broadcasting, public performances and other communications to the public, collecting societies provide an effective and indispensable means for licensing. Under the current scenario in Ukraine there is an unfair and unworkable system in place for collecting societies. The accreditation process is in chaos. There has been the de-accreditation of the society representing the majority of rightsholders resulting in a system which effectively denies a rightsholder the fundamental right to make fair and open decisions about whether to be represented by a particular society. This failed system is preventing the development of the marketplace for legal music services, and resulting in the loss of millions of dollars in legitimate business for music rightsholders in Ukraine. Ironically, while IIPA has long highlighted the problem of rogue societies issuing “licenses” which they lacked authority to grant, rather than addressing this criminality, the Government of Ukraine decided instead to act against the legitimate society representing rightsholders (UMRL), removing their accreditation and launching a new and risky accreditation process that caused tremendous confusion in the Ukrainian marketplace, and which undermines the ability of rightsholders to determine how to license the use of their works.

There is a proposed solution: American and many other music producers and performers have existing fair and transparent societies (UMA/UMRL) that are both already authorized, and which represent a majority of music rightsholders in Ukraine. UMA’s accreditation has never been revoked, but it operates in an environment of uncertainty, and UMRL’s accreditation was unfairly revoked. The Government of Ukraine should promptly reverse UMRL’s revocation order, thereby restoring its accreditation, and should issue an order clarifying the legal authority of UMA and UMRL to engage in licensing without any further action. At some future point, the Government of Ukraine may wish to begin a new accreditation procedure. If the Government of Ukraine determines to do so, it is essential that there be absolute clarity that an authorized society must hold the majority of commercially relevant repertoire as a pre-requisite to conducting business. The current state-owned society, UACRR, does not represent a majority of repertoire, and is instead responsible for much of the unfair and nontransparent practices that persist and must not be rewarded with a state monopoly.

The Government of Ukraine has proposed an alternative suggestion. It would make the to-date unfair and nontransparent collecting society, the state-owned UACRR, as the (only)

collecting society for composers, music publishers, producers and performers, either on a permanent, or perhaps on an interim basis. This not a good solution, either temporarily or permanently, not only because it rewards the wrong society, but also because it will not be supported by either Ukrainian or foreign composers, music publishers, producers and performers. Nor is a new accreditation procedure necessary to allow UMA/UMRL to conduct their business since they were already authorized under previous regulations. Instead, their status simply needs to be reconfirmed, and they need to be able to operate fully.

## 2) Software Legalization

The second ground for the Section 301 (PFC) investigation is the use by various ministries within the Government of Ukraine (especially the Ministry of Interior, the offices of State Tax Inspection, and the Prosecutor's Office) of unlicensed software and the lack of any systemic means to deal with this situation.

Industry reports indicate that the rate of personal computer (PC) software piracy in Ukraine is well over 80%, with unlicensed software use by government agencies a significant part of the problem. Ukraine's own State Intellectual Property Service (SIPSU) estimates the software piracy rate in Ukrainian state agencies to be 40%; industry sources believe the rate to be significantly higher.

After passing regulations in 2003 and 2004 to ensure the legal use of software in government agencies, the Government of Ukraine has failed to properly finance or implement these measures. For example, in 2011, the Ministry of Education request for centralized funds to purchase legal software in government ministries in the 2012 budget year was denied by the Cabinet of Ministers. The Government of Ukraine has never properly allocated funds to legalize software used by its institutions, ministries or state-owned enterprises. The continued use by state agencies of illegal software sets a poor example for the business sector, where illegal software use (i.e., enterprise end-user piracy) is practically the norm. IIPA has long recommended that the Government of Ukraine allocate to each ministry dedicated funds for software legalization, that it perform software audits, and, that it expeditiously develop and make public an action plan for ongoing software legalization including an organized procurement program that can be properly administered.

In April 2013, the Government of Ukraine re-iterated the need for licensed software and pledged to allocate 100 million UAH (USD\$12.3 million) for software licensing in state institutions. Unfortunately, the government has not yet disbursed these funds or established an effective mechanism for doing so before these monies revert to the treasury. Even those monies, while a very positive first step, would only address a small fraction of the widespread unlicensed software use within many ministries and state institutions. IIPA urges Ukraine to establish an ongoing, multi-year plan to address software legalization. We are advised that multi-year budget expenditures are not provided for under the present structure, but believe that the Ukraine authorities and the Verkhovna Rada can find a workable solution to ensure this problem is addressed on an ongoing basis. This issue has always been susceptible to quick, inadequate and marginal fixes rather than long-term solutions that address – in a meaningful way – a problem that is both harmful to businesses and detrimental to the effective functioning of the government.

IIPA has repeatedly noted the lack of accountability within the Ukrainian governmental structure to address this problem in a meaningful way. IIPA recommends that the Ministry of Finance be directly engaged in this process, including by obtaining multi-year budgeting and procurement and the necessary government guarantees. Additionally, SIPSU needs to be empowered to implement and enforce a legalization program with appropriate checks and balances, accountable directly to the Council of Ministers, for example. Without such changes, software legalization will receive only sporadic attention and there will be no systemic plan that builds upon the progress that SIP has managed to achieve.

IIPA and its members continue to recommend that this implementation needs to be expedited: to allocate dedicated funds for software legalization sufficient to meet each ministry's software needs with an effective procurement program, and to perform software audits, in order to eliminate the use of unlicensed software in the public sector. IIPA recommends one way to quickly implement a software legalization plan: set aside the appropriate and necessary funds, and make one individual responsible for coordinating implementation (and appointing individuals within each ministry to carry out the plan).

### 3) Internet Enforcement

The third ground for the Section 301 (PFC) investigation is the failure by the Government of Ukraine to take effective action against Internet piracy, and to implement an effective and systemic means to combat the widespread online infringement of copyright and related rights.

Ukraine is home to a number of notorious pirate websites. In December 2012, ex.ua was listed by the U.S. Government as one of thirty "Notorious Markets" as a part of the Special 301 Out-of-Cycle review, because of the site's ongoing illegal activity and what the U.S. Government described as its "full range of infringing content." Ex.ua is the most popular cyberlocker and user-generated content website in Ukraine, allowing free streaming and downloading of unauthorized copyrighted content. It is one of the top 10 most popular websites in Ukraine, generating revenue through advertising, without sharing any monies with creators or content owners. Other pirate sites include: extratorrent.com and sumotorrent.com, which both offer large quantities of unauthorized downloaded content from the BitTorrent network, and newalbumreleases.net, which offers unauthorized pre-release and recently released music materials via cyberlocker links (posted by the administrator and users of the site).

An effective legal regime would include instituting transparent and predictable provisions clarifying the existence of liability for parties that promote or induce infringement, as well as more general provisions enhancing accountability and responsibility in the Internet environment. The Government of Ukraine has not introduced legislation to properly address any of these issues.

In short, Ukraine is not providing the legal or enforcement framework necessary to address its serious piracy problem, and which it obligated itself to provide in numerous bilateral commitments to the United States. These commitments include: the 2010 IPR Action Plan; the 2000 Joint Action Plan; and the 1992 Bilateral Trade Agreement. Nor is it complying with its multilateral commitments to establish an adequate and effective IPR enforcement regime to address copyright piracy, including digital piracy. Instead, Ukraine has established itself as a

“safe haven” for copyright pirates, and in particular, for digital piracy. Ukraine is now one of the few countries in the world (along with Russia) with pay-for-download piracy of music and film, and is the source of some of the world’s top BitTorrent sites, with some sites advertising openly on billboards. As a consequence, legitimate online marketplaces cannot develop for copyrighted materials in Ukraine. Ukraine’s rampant online piracy is being exported to other countries, seriously impairing the global digital marketplace. As one example, efforts to address the BitTorrent and free streaming and downloading sites (including www.ex.ua) have, so far, neither resulted in a suspension of services, (in fact, in the ex.ua case, the site is back in operation and the criminal case was closed), nor in a single Internet criminal case being brought to the court in 2012 or in 2013.

IIPA and its members have long advocated for improved enforcement against digital (and hard copy) piracy, including by the full implementation of the U.S.-Ukraine Action Plan of 2010. The 2010 IPR Action Plan was developed by agreement of the two governments – first, by a formal document presented by the U.S. Government in October 2010, and approved and signed by the Government of Ukraine in February 2011 (the plan is “effective” October 2010). The “plan” was actually a formal summary of obligations made by the Government of Ukraine over the past several years, especially targeting digital piracy. Unfortunately, to date, the Government of Ukraine has failed to implement the Action Plan (or prior plans). As a result of the failure to act, illicit peer-to-peer hosting and illegal websites have grown rapidly in Ukraine in the past few years. IIPA continues to recommend stepped-up criminal, administrative and civil enforcement, as well as reforms to Ukrainian laws (detailed in other IIPA filings)<sup>4</sup> to effectively address digital piracy.

The Government of Ukraine has not proposed or introduced any legislation to address intermediary liability and liability for third parties that facilitate piracy. It has attempted, wrongly, to address only one piece of the required complete architecture for Internet enforcement, namely a notice and takedown regime. Without the other major parts, including intermediary and third party liability, the notice and takedown proposal will not be effective in reducing infringement or deterring commercial operators from engaging in practices designed to provide access to infringing materials. Even worse, the notice and takedown proposal is flawed – it is missing key elements, so that even if it were adopted, it would not work. The proposal (draft law) was introduced on June 1, 2013 and is entitled: a law “regarding the protection of copyright and related rights on the Internet.” If enacted, the draft law would create a highly

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<sup>4</sup> In other filings, IIPA has recommended enforcement actions and legal reforms, many of which overlap the recommendations in this filing on the three identified issues in the Section 301 investigation. The key enforcement actions that IIPA and its members recommend the Government of Ukraine focus on are: (1) criminally prosecuting the owners of the numerous pay-per-download and BitTorrent sites; (2) criminally prosecuting the principals of the rogue collecting societies that offer “licenses” to both online and physical businesses, that they do not have the authority to grant; (3) immediately taking down illegal websites; (4) systematically taking enforcement actions against 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), and including long-term closures of illegal businesses, plus the use of search warrants against “closed” premises and warehouses; (5) taking immediate actions to prevent the sale of pirated entertainment software products bearing illegitimate holograms at retail chains; (6) targeting organized criminal syndicates, applying criminal prosecutions and deterrent sentences (to date, the Government has instead relied heavily on non-deterrent administrative penalties); (7) targeting corporate end-user piracy of software with an emphasis on large-scale infringers (rather than targeting small companies and individuals); (8) stopping and prosecuting camcording piracy; (9) targeting infringers of cable transmissions and retransmissions, public performances, and unauthorized TV and radio broadcasts; and (10) properly implementing the Customs Code amendments, in force since February 2007, which provided customs officers with *ex officio* authority.

bureaucratic set of procedures (dependent on SIPSU administration), that would be time-consuming and costly just to take down infringing materials. It is our view that this legislation would create impediments rather than progress in the fight against Internet piracy, and that the draft bill should be withdrawn from consideration.

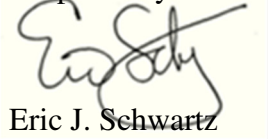
There is one digital piracy enforcement action that deserves special mention. IIPA members appreciate that a multi-national effort to stop the operations of demonoid.me is ongoing, including actions undertaken in August 2012 by Ukraine enforcement officials against a server located in Ukraine. IIPA and its members are closely following the progress of the criminal case in Mexico, Ukraine and Panama, and hope that a proper criminal investigation will commence and proceed accordingly – although almost one year later, no such criminal case has commenced. While the actions that began a year ago in Mexico, and are now proceeding in Ukraine are a positive step, this is but one of many illegal Internet distribution services in Ukraine that should be addressed—most notably, ex.ua. To be clear, Ukraine is not providing “adequate and effective” protection or enforcement with regard to digital piracy and this is causing significant harm to the copyright creators and industries represented by the IIPA.

#### **IV. Conclusion**

In sum, the denial of fair and transparent collecting societies, the pervasive use of illegal software in government agencies, and the overall absence of effective laws or enforcement directed at digital piracy is denying fair and equitable treatment for U.S. rightsholders and adequate and effective protection of intellectual property rights in Ukraine.

IIPA recommends that the Section 301 investigation conclude with this finding, and that the U.S. Government should apply all of the available trade remedies unless or until the Government of Ukraine properly addresses these problems as outlined in the U.S. Government PFC announcement, and the harm caused to U.S. rightsholders as set out in this, and other, IIPA filings.

Respectfully submitted,



Eric J. Schwartz

Counsel

International Intellectual Property Alliance

IIPA request to testify and written testimony regarding Russia's  
implementation of its WTO obligations (2013)

# INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE®



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September 12, 2013

## VIA ELECTRONIC SUBMISSION

Docket number: USTR-2013-0025 Russia

Douglas Bell  
Chair, Trade Policy Staff Committee (TPSC)  
Office of the U.S. Trade Representative  
1724 F Street, N.W.  
Washington, D.C. 20508

### RE: Russia – Implementation of its WTO Obligations

To the Trade Policy Staff Committee:

On behalf of the International Intellectual Property Alliance (IIPA), I would like to appear as a witness at the September 27, 2013 public hearing on Russia's implementation of its obligations as a Member of the World Trade Organization (WTO). The IIPA testimony will focus specifically on Russia's implementation of its copyright law and enforcement obligations under the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). Marrakesh Agreement Establishing the World Trade Organization, Annex 1C (Apr. 15, 1994).

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This filing provides a short summary of our September 27 testimony on the WTO TRIPS Agreement and related copyright protection and enforcement issues. As requested by the TPSC in the Federal Register notice, IIPA's testimony will address "Russia's implementation of the commitments made in connection with its accession to the WTO...[on] intellectual property rights (including intellectual property rights enforcement)" which include the obligations set forth in the WTO TRIPS Agreement and in the Report of the Working Party of the WTO on the Accession of the Russian Federation. 78 Fed. Reg. 49789 (Aug. 15, 2013). Also, attached is IIPA's Special 301 filing (February 8, 2013) on Russia which sets out the broad concerns of the IIPA-members regarding copyright protection and enforcement in Russia.

In addition to its WTO TRIPS Agreement and Working Party Report obligations, the U.S. and Russian governments completed a detailed Intellectual Property Rights (IPR) Action Plan in December

2012, which set out a number of important copyright enforcement and legal reform priorities for Russia, and which, if properly and fully implemented along with the WTO TRIPS Agreement and other related obligations, could significantly improve copyright protection and enforcement in Russia.

The copyright and related rights obligations of the WTO TRIPS Agreement consist of the substantive copyright law and related rights provisions set out in Articles 9 through 14, as well as the enforcement provisions in Articles 41 through 61.

Russia has made a number of important IPR legal reforms over the past several years, in part leading up to its WTO accession, as well as to comply with its other multilateral and (U.S.) bilateral IPR commitments. However, there remain many critical legal reform and enforcement steps for full treaty and trade agreement compliance, including full compliance with the WTO TRIPS Agreement (and the 2012 Action Plan).

Article 41 of the WTO TRIPS Agreement requires that Member-countries “ensure that enforcement procedures...permit effective action against any act of infringement of intellectual property rights...including expeditious remedies to prevent infringements and remedies which constitute a deterrent to further infringements.” TRIPS Agreement, art. 41. The Russian enforcement regime has not lived up to this obligation, not for hard-copy piracy, and certainly not for the prevalent digital piracy in Russia that confronts all of the copyright industries represented by the IIPA – the music, motion picture, book publishing, enterprise software and entertainment software industries. The forms of piracy in Russia vary, but include (for some or all of these industries) a wide-variety of illegal sites and services including: paid download sites, file-sharing and cyberlocker sites, BitTorrent services and other peer-to-peer services, and Russian service providers either hosting or providing proxy services to a number of the world’s largest and most popular illegal linking sites. Russia is also home to the world’s most prolific criminal motion picture release groups – that is, groups who camcord films in local theaters and then upload these illegal camcords onto the Internet, as well as selling hard copies. The existing remedies and enforcement actions under Russian law, including the civil, administrative and criminal provisions, are not in actuality or practice either “expeditious,” “effective” or “deterrents to further infringements” as required by Article 41 of the WTO TRIPS Agreement.

The priority recommendation by the IIPA is for the Government of Russia to fully comply with these enforcement commitments in order to effectively and immediately address digital piracy in Russia, and especially to focus on effective (including criminal) enforcement against wide-scale commercial actors, and other wilful infringers. Yet, to date, Russia has not done so. For example, according to the information available to us, there was not a single Internet piracy criminal conviction in Russia in 2012 or in 2013, with only a handful of digital piracy criminal cases commenced, and the other civil and administrative remedies against digital piracy, have proven, so far, to be ineffective. The new digital piracy law which entered into force in August, may provide some enforcement assistance as initial reports indicate some websites have been noticed, and have begun to take-down illegal content. The law is reviewed in more detail below. It is both limited in its subject matter (to motion picture and television materials) and scope. Effective enforcement against wilful infringers, and large-scale piratical commercial enterprises should be the focus for the enforcement authorities and future legal reforms.

For the business software industry, copyright piracy also includes illegal end-user piracy of software by private enterprises and government ministries. Yet, the Government of Russia has not adequately addressed this problem either.

Russia is home to several of the U.S. Government’s “Notorious Markets” for copyright piracy, especially digital piracy. vKontakte, the most popular online social network in Russia (over 140 million registered members worldwide and 39 million visits per day) is the largest single distributor of infringing



music in Russia and also a hotbed for online piracy of movies and television programming, which is why it is on the “Notorious Markets” list. It is also one of the largest illegal distributors of music in the world (and is listed as one of the top 40 most visited websites worldwide). To date, the Government of Russia has taken little or no action against this site, or the other sites or services identified by the U.S. and other foreign governments and copyright rightsholders. This is symptomatic of the problems of ineffective enforcement in Russia, and why Russia has not fully implemented its copyright protection or enforcement obligations under the WTO TRIPS Agreement or its other bilateral and multilateral trade and treaty agreements.

The following is a brief summary of Russia’s WTO TRIPS and Working Party Report commitments, and its shortcomings to date, on effective copyright enforcement.

## WTO TRIPS (AND BILATERAL) OBLIGATIONS

The substantive copyright and related rights obligations of the TRIPS Agreement found in Articles 9 through 14, have not been the focus of concern for the copyright industries, with the exception of overly broad exceptions in the copyright law – Civil Code, Part IV (detailed in our prior Special 301 filings). Rather, the primary concern for the copyright industries has been the failure of the Russian IPR legal regime to fully comply with the enforcement provisions in Articles 41 through 61, to provide “effective action” and “deterrent” remedies, and especially against “wilful...copyright piracy on a commercial scale.” TRIPS Agreement, arts. 41 and 61.

Here are two examples of commitments made, but not yet realized, by the Government of Russia as part of its WTO accession – directed at digital piracy and the collective administration of rights (in the music industry).

Digital Piracy: As part of its WTO accession, in the Working Party Report (paragraph 1339), the Government of Russia pledged that it would “continue to take actions against the operation of websites with servers located in the Russian Federation that promote illegal distribution of content protected by copyright or related rights, such as phonograms (sound recordings) and investigate and prosecute companies that illegally distribute objects of copyright or related rights on the Internet.”

In addition to its Working Party Report obligations, the Government of Russia also made commitments to take effective action against Internet piracy in separate bilateral agreements. In the 2006 U.S.-Russia IPR Agreement, Russia agreed 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 registered in Russia’s .ru domain name, or whose servers are situated in Russia) and “to investigate and prosecute companies that illegally distribute objects of copyright or related rights on the Internet.”

Most recently, in December 2012, in the U.S.-Russia Action Plan on IPR, the Government of Russia agreed it would take “enforcement actions targeting piracy over the Internet” and more specifically it would, inter alia: “Take measures in order to disrupt the functioning of websites that facilitate criminal copyright infringement, and provide for takedown of infringing content...Take actions against the creators and administrators of websites through which intellectual property crimes are committed...Conduct meaningful consultations with rights holders to target and to take action against high-priority infringing websites.”

Unfortunately, in a current marketplace plagued by digital piracy, the Government of Russia, has to date, taken few of these steps.

Collective Administration: In addition to its WTO obligations directed at digital piracy, the Government of Russia also pledged to significantly improve the transparency and governance for the state accredited collecting societies for authors, record labels and performers, to ensure that rightsholders are being fairly represented and treated. During WTO accession, in the Working Party Report, paragraph 1218, Russia assured its trading partners it would “review its system of collective management of rights in order to eliminate non-contractual management of rights within five years after Part IV of the Civil Code entered into effect” (in 2008). This is an obligation that must be completed this year (2013) – to bring the management societies in line with international standards on governance, transparency and accountability. To date, the Government of Russia has not acted to resolve the issue of the state accreditation of collecting societies.

In order for U.S. rightsholders to be properly represented in Russia, and to establish legal digital music services, it is essential that the state-accredited collecting society (VOIS) operate in a transparent manner that reflects the interests of the broader community for which it is now responsible, requiring an integration of non-VOIS members into their governing bodies, and with reasonable agreements between the respective societies.

#### DIGITAL PIRACY LAW (2013)

In June 2013, the Russian Duma enacted a new law to address some of its legal regime shortcomings pertaining to digital infringement, and in order to improve effective digital piracy enforcement in Russia. The law, entitled “On making amendments to legislative acts of the Russian Federation relating to protection of intellectual property rights in information and telecommunications networks” (Law No. 187-FZ) was signed by President Putin on July 2, and entered into force on August 1, 2013.

It is too early to assess the effectiveness of the new law, in part, because of many ambiguities in the law that have yet to be tested either by the enforcement authorities, or the courts. In addition, the law has not been fully implemented because it is subject to implementing regulations by the Federal Service for Communications, Information Technology and Mass Media. In sum, there are two key features of the new federal law: (1) amendments to the Civil Code, Part IV – to provide third party liability (and exclusions); and (2) amendments to the Civil Procedure Code – to provide for notice and takedown and other judicial provisional remedies against websites and intermediaries. There are also corresponding amendments to the Arbitration Procedure Code and the Federal Law on Information and Information Technologies (2006) to provide administrative notice and takedown procedures.

The formal notice and takedown and other “provisional” remedies (amendments to the Code of Civil Procedure and the Law on Information) provide for both the removal of infringing materials, and the restriction of access against non-compliant websites. These takedown and access provisions apply only to a limited number of works – movies and television programs, and do not apply, at all, to the vast majority of copyrighted works. According to recent news reports, further amendments to the law are being considered by the Russian Duma to broaden the scope of the current law to apply to all copyrighted materials, as well as to enhance the remedies for failing to comply with the takedown or restricted access provisions.

The limited scope of the current law means that there are no effective or expeditious remedies for all copyrighted works and related rights, with the exception of motion pictures and television works. Further, even for the covered works, the law is too new, and the provisions are too unclear at this time, to provide a fair and full assessment on whether the remedies are effective, expeditious and will serve as deterrents to further infringements, as required by the WTO TRIPS Agreement.

## COPYRIGHT ENFORCEMENT IN GENERAL

The IIPA's Special 301 reports in recent years (for example, the 2013 report, attached) details many of the enforcement shortcomings in Russia, including the criminal civil and administrative enforcement issues, and makes numerous recommendations for improvement. In sum, despite the accession to the WTO and the signing of the U.S.-Russia IPR Action Plan, and despite the passage of the new law (albeit only recently, and for a limited scope of works), there has been little on-the-ground progress with copyright enforcement in the past few years.

Russian authorities have failed to effectively address the very serious threat of Internet and other digital forms of piracy. The number of criminal raids and police activity in general, declined significantly last year from previous years. Following legislation passed in 2011, there was a major reorganization of the police force and a drop in resources (there are currently about half the number of IPR economic crime police as there were a few years ago), and not coincidentally, in 2012 (the last year of Russian Government-provided statistics), the initiation of criminal IPR cases was at about half its level from five years ago.

Additionally, there were too few administrative actions or deterrent level administrative penalties against commercial enterprises that use or operate as distribution hubs for infringing content.

## MARKET ACCESS

IIPA would also like to urge Russia to fulfill its WTO accession commitment to join the multilateral Information Technology Agreement (ITA). Russia's failure to join the ITA means that IT products important to the creative industries face continued and significant tariffs. IIPA urges Russia to join the ITA, and to engage in the current efforts to expand that agreement to further increase global trade in information and communications technology products.

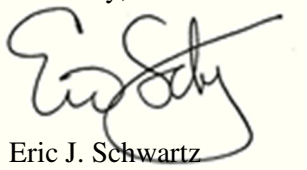
Additionally, as part of its accession to the WTO, Russia obligated itself to provide national treatment for taxes on similar products. However, the Government of Russia may be in violation of this obligation as it is currently applying a higher value-added tax (VAT) to non-Russian films than is applied to domestic (Russian-made) films.

## CONCLUSION

This briefly summarizes the IIPA's oral testimony for the September public hearing. At the hearing, we will, of course, be happy to address any other issues, or answer any questions that the TPSC would like to address regarding copyright law and enforcement in Russia, and Russia's implementation of its WTO/TRIPS obligations.

Thank you.

Sincerely,

A handwritten signature in black ink, appearing to read "Eric J. Schwartz", is written over a light yellow rectangular background.

Eric J. Schwartz

Counsel, International Intellectual Property Alliance

# RUSSIAN FEDERATION

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2013 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** IIPA recommends that the Russian Federation be retained on the Priority Watch List in 2013.<sup>1</sup>

**Priority Recommendations in Russia – Key Legal Reform and Enforcement Actions:** Here is a list of IPR legal reform and enforcement priorities that IIPA recommends to the Government of Russia for 2013:

- Undertake effective actions against Internet piracy – including:
  - (a) stopping the infringement that occurs via unlicensed streaming services including those incorporated into social networks, as well as actions against pay-per-download websites and against cyberlockers, BitTorrent sites, and Internet cafes, with criminal and/or administrative actions commenced (and deterrent penalties) against owners and operators of such sites, regardless of whether the servers are located in Russia or elsewhere. This includes actions against commercial enterprises that provide services with the clear intent to promote or induce infringement, such as vKontakte’s music service (which consists predominantly of infringing material); and
  - (b) properly staffing and resourcing of Internet enforcement units in the Ministry of Internal Affairs (MVD), and in the various police enforcement agencies (including a sub-unit within Department K).
- 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) clarify (or confirm, if existing) the illegality of providing services that are inducing or encouraging the infringement of copyright and related rights, or that facilitate infringement and do not take reasonable steps to prevent it (i.e., providing a clear basis for liability for such service providers);
  - (c) implement notice and takedown procedures to ensure that websites hosting illegal material take expeditious action to remove links to, or copies of, infringing material. Such procedures should be efficient, scalable (e.g., capable of being fully automated), and likely to result in the permanent removal of links to, or copies of, infringing material;
  - (d) provide legal norms that create incentives for Internet Service Providers (ISPs) to cooperate with right holders in fighting infringement taking place over their networks or platforms through the adoption and implementation of effective business practices that address infringement;
  - (e) introduce a duty on ISPs to provide information to law enforcement agencies and rights holders; and, ensure that injunctions are available against ISPs and other services;

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<sup>1</sup>For more details on Russia’s Special 301 history, see IIPA’s “History” appendix to this filing at <http://www.iipa.com/pdf/2013SPEC301HISTORICALCHART.pdf>, as well as the previous years’ reports, at <http://www.iipa.com/countryreports.html>. For a summary of IIPA’s 2013 global issues, see our cover letter at <http://www.iipa.com/pdf/2013SPEC301COVERLETTER.pdf>.



(f) implement effective measures to address websites that are hosted outside of the jurisdiction of Russia or where the domain owner and/or website administrator are foreign entities, or where the website is registered outside of Russia, and, establish liability for domain name owners and/or website administrators regardless of the location of the servers; and

(g) ensure that an unauthorized online distribution, communication or making available is considered an act of infringement, regardless of whether it is undertaken for profit-making purposes or other commercial benefit or advantage.

- Strengthen copyright liability under the Administrative Code by:
  - (a) eliminating the for-profit requirement in Article 7.12 of the Code of Administrative Offences, and raising administrative penalties to deterrent levels, for example, by implementing: (i) higher fixed fines for violations by legal entities and individuals; (ii) fines proportionate to corporate revenues (e.g., as is done for anti-monopoly violations); or (iii) penalties to disqualify, for one to three years, managers of legal entities.
  - (b) ensuring that the Federal Anti-Monopoly Control uses its enforcement authority to take effective administrative actions against services that distribute protected materials without the proper authority to do so, such as, vKontakte and odnoklassniki.ru; and
  - (c) establishing a police unit with clear responsibility to conduct administrative IPR enforcement or prioritize this task for Department K (and properly training and resourcing that police unit).
- Increase the overall number of criminal IPR cases to previous levels, and 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 certain rights operate in a fair and transparent manner based on principles of accountability and fair governance, 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.
- Amend the Criminal Code and undertake effective enforcement against illegal camcording of motion pictures.
- Ensure government agencies and state owned enterprises procure and use only legal software.
- Establish a uniform methodology for the Russian enforcement agencies on the investigation and prosecution of copyright and related rights infringements to ensure that prosecutors can properly investigate administrative and criminal actions, and to ensure a consistent and uniform approach to these cases throughout the country (particularly, for Internet and software enterprise end-user cases). Prepare and adopt judicial guidelines for civil search procedures (consistent with WTO TRIPS Agreement), and the retention of evidence (after raids) for civil and arbitration proceedings.
- Amend the Criminal Code to establish criminal liability against legal entities, including for IPR crimes.

**Executive Summary of IPR Issues:** In 2012, Russia completed its accession to the World Trade Organization. It is now obligated to be in full compliance with the WTO TRIPS Agreement, along with the detailed additional obligations spelled out in the Working Party Report. In addition, in December 2012, the U.S. and Russian governments completed a detailed IPR Action Plan which sets out a number of important enforcement and legal reform priorities for Russian IPR enforcement, which, if properly and fully implemented, should significantly improve copyright protection and enforcement in Russia. These two important steps undertaken in 2012, if fully implemented,

provide an historic opportunity for the Government of Russia to make great progress in improving copyright protection and enforcement. Although Russia has made a number of important IPR legal reforms over the past several years for WTO accession and in order to comply with its other multilateral and (U.S.) bilateral IPR commitments, there remain many critical steps for full treaty and trade agreement compliance, and most importantly, to effectively and immediately address digital piracy in Russia.

Despite the accession to the WTO and the signing of the U.S.-Russia IPR Action Plan, 2012 was a year where little concrete progress was made in Russia on either legal reforms or, more importantly, enforcement. Russian authorities failed to effectively address the very serious threat of Internet and other digital forms of piracy. The number of criminal raids and police activity in general, declined significantly in 2012 from previous years. Following legislation passed in 2011, there was a major reorganization of the police force and a drop in resources (there are about half the number of IPR economic crime police as there were a few years ago), and not coincidentally, in 2012, the initiation of criminal IPR cases is at about half its level from five years ago. Most tellingly (according to the information available to us), there was not a single Internet piracy criminal case commenced in Russia in 2012. Additionally, there were too few administrative actions or deterrent level administrative penalties against commercial enterprises that use or operate as distribution hubs for infringing content. To curb piracy, the Government of Russia needs to pursue more, and more effective criminal and administrative actions, and strengthen administrative penalties, particularly against large-scale enterprises, and law enforcement agencies should seek, and judges should administer, deterrent criminal penalties.

For the past several years, the business software industry has been the only copyright industry that has seen a positive trend in piracy rates in Russia. Software industry piracy rates declined significantly in the past several years (a 10% drop from 2007 to the current rate of 63% in 2011),<sup>2</sup> due to criminal and civil enforcement efforts directed against end-user software piracy and progress made on legalization of software purchased by the government. However, this progress is likely to stall unless Russian authorities reverse the significant decline in enforcement activity by Russian enforcement authorities and recommit to ensuring legal software use in government institutions and state owned enterprises.

Hard goods piracy remains a serious concern for some industries even though Russia's laws are generally adequate for addressing this problem (although some gaps remain). But it is the online piracy situation where Russia's legal regime is wholly inadequate and in need of modernization. There are important legal reforms needed to move forward – as detailed above. And, the Russian legal regime must avoid backsliding. For example, last year there were efforts to amend the copyright law to clearly exempt from copyright liability all third parties – including hosting providers and service providers who openly encourage infringement, and to excuse almost all online infringing activity as “private” copying. Had these provisions been adopted, the Russian legal regime would have taken a step even further backward in its ability to address its serious digital piracy problem.

The music industry is particularly concerned about the continued operation of infringing music services, such as the one operated by vKontakte (still operating despite several Russian court rulings against it). In December 2012, vKontakte was listed by the U.S. Government as one of thirty Special 301 Out-of-Cycle Review of Notorious Markets because of its ongoing illegal activity. Peer-to-peer piracy is a major concern in Russia, as it is globally, although it is presently dwarfed by the problems associated with hosted content at sites such as vKontakte, and at Russia's second largest social network site, odnoklassniki.ru, which also operates an unlicensed music service.

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<sup>2</sup>BSA | The Software Alliance's 2012 Global Software Piracy Study, conducted with two leading independent research firms, IDC and Ipsos Public Affairs, measured the rate and commercial value of unlicensed PC software installed in 2011 in more than 100 markets. In 2011, the software piracy rate in Russia was 63%, representing a commercial value of unlicensed software of US\$3.23 billion. These statistics follow the methodology compiled in the Ninth Annual BSA and IDC Global Software Piracy Study (May 2012), <http://portal.bsa.org/globalpiracy2011/index.html>. The BSA study covers piracy of all software run on PCs, including desktops, laptops, and ultra-portables, including netbooks. It includes operating systems, systems software such as databases and security packages, business applications, and consumer applications such as games, personal finance, and reference software. It also takes into account free software, open source software, and software as a service if it is paid for. It does not cover software that runs on servers or mainframes and routine device drivers, free downloadable utilities such as screen savers, and software loaded onto tablets or smartphones. The methodology used to calculate this and other piracy numbers are described in IIPA's 2013 Special 301 submission at <http://www.iipa.com/pdf/2013spec301methodology.pdf>

Those two and the many other illegal music services noted in this filing, combine to prevent the development of a legitimate online market place. The music industry is also concerned with the lack of transparency and governance issues in connection with the state accredited collecting societies for authors, record labels and performers, including VOIS, and calls upon the Government of Russia to use its oversight authority to ensure that right holders are being fairly represented and treated, in accordance with commitments that it made to the U.S. Government and other of Russia's trading partners who had expressed concern with the accreditation process. Fair representation in these societies includes direct representation on the board in a manner that is proportionate to market share (and that reflects commercial realities). During WTO accession (in the Working Party Report, paragraph 1218), Russia assured its trading partners it would "review its system of collective management of rights in order to eliminate non-contractual management of rights within five years after Part IV of the Civil Code entered into effect" (in 2008); so, that is an obligation for 2013 – to bring the management societies in line with international standards on governance, transparency and accountability.

Book publishers are also concerned by the prevalence of online piracy in Russia, particularly on hosted-content sites such as pdfchm.com, and note very low compliance rates in response to rights holder requests to takedown links to infringing content this past year. Peer-to-peer piracy continues to be an issue, with sites such as rutracker.org providing free unauthorized access to e-books. Publishers and other rights holders still find a number of phishing sites hosted in Russia purporting to offer instant downloads of free e-books, as well as other copyrighted content, for a minimal membership fee. Customers providing credit card information do not actually get any files, but do incur unauthorized charges on their credit cards. In addition, Russia continues to have a very serious camcording problem, one of the worst in the world, affecting worldwide markets.

Russia is a beneficiary of the Generalized System of Preferences (GSP) program. One key factor in determining eligibility for GSP benefits is whether a country is providing adequate and effective protection of intellectual property rights. In the first eleven months of 2012, more than US\$522.1 million in imports to the U.S. from Russia enjoyed duty-free treatment under the GSP program (and more than US\$574.8 million in 2011).

## **COPYRIGHT ENFORCEMENT IN RUSSIA**

**Internet Piracy Enforcement:** Russia has one of the largest and most active online communities in Europe. Internet and wireless access by Russian citizens is growing rapidly; according to the ITU, as of June 2012, almost 49% of the Russian population now has Internet access, up from 43% just a year earlier. Yet, basic copyright enforcement of Internet piracy has lagged far behind the rapid growth of Internet and wireless access in Russia.

In three separate bilateral and multilateral agreements over the past five years, the Government of Russia has made commitments to take effective action against Internet piracy. In the 2006 U.S.-Russia IPR Agreement, Russia agreed 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 registered in Russia's .ru domain name, or whose servers are situated in Russia) and "to investigate and prosecute companies that illegally distribute objects of copyright or related rights on the Internet." As part of its WTO accession, in the Working Party Report (paragraph 1339), the Government of Russia pledged that it would "continue to take actions against the operation of websites with servers located in the Russian Federation that promote illegal distribution of content protected by copyright or related rights, such as phonograms (sound recordings) and investigate and prosecute companies that illegally distribute objects of copyright or related rights on the Internet." Most recently, in December 2012, in the U.S.-Russia Action Plan on IPR, the Government of Russia agreed it would take "enforcement actions targeting piracy over the Internet" and more specifically it would, inter alia: "Take measures in order to disrupt the functioning of websites that facilitate criminal copyright infringement, and provide for takedown of infringing content...Take actions against the creators and administrators of websites through which intellectual property crimes are committed...Conduct meaningful consultations with rights holders to target and to take action against high-priority infringing websites." Unfortunately, in a current marketplace plagued by digital piracy, the Government of Russia, has to date, taken few of these steps. The success of Russia's WTO accession, and the

Action Plan, will be measured by how it implements the many pledges and commitments it has made, especially those directed against Internet piracy.

One recommendation to significantly improve Internet enforcement, is to centrally coordinate law enforcement actions, including both administrative and criminal efforts. In addition to increasing the number of IPR cases and conducting expeditious investigations, another recommendation is to have relevant administrative agencies (e.g., the Federal Anti-Monopoly Control) targeting large-scale illegal distribution enterprises. One key priority would be actions against the large commercial enterprises that are now responsible for most of the illegal distribution of music in Russia (since these enterprises operate without licenses from music rights holders).

In addition, prosecutors should coordinate their efforts with the police, as should the Investigative Committee of Russia, the Investigative Department of MVD, the Federal Security Service of the Russian Federation (FSB), and Customs, now that they all can initiate criminal cases. Beginning in 2011, the General Prosecutor's Office can supervise, but not initiate, criminal cases. One recommendation is that the General Prosecutor's Office, the Investigative Committee of Russia, and the Investigative Department of MVD develop an updated and detailed methodology for investigations of copyright infringements which would help to increase the quality, effectiveness and consistency of IPR enforcement activities (work on a draft methodology was indefinitely suspended two years ago).

A fundamental enforcement shortcoming is the lack of clear authority and jurisdiction to act against copyright infringement crimes occurring on the Internet, whether through administrative or criminal means. The Code of Administrative Procedure fails to provide sufficient clarity on the ability to bring actions against commercial actors involved in the massive distribution of infringing material where there is no direct fee charged by the enterprise for the infringing materials, and Internet piracy is a very low priority for the MVD's Department K (the department with responsibility for combating technological crimes and Internet fraud, including Internet copyright piracy). Although Department K has equipment and expertise, there is not a single person in the department assigned to the sole task of combating IP crime – which is why IIPA continues to recommend the proper staffing, equipping and resourcing of a sub-unit within Department K, and that other such units be formed within the MVD to deal exclusively with IPR Internet cases, and to ensure officers are 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 MVD, even though they have occasionally taken action. So, Department K's authority and responsibility to act in cases of online infringement should be further 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, launched in response to the takedown of torrent.ru. Rutracker.org has an estimated four million users and a worldwide Alexa website ranking of 248; it is also one of the thirty "Notorious Markets" named by the U.S. Government in December 2012 for its blatant online piracy. One particularly problematic site is GameTorrent, a BitTorrent tracker and online pirate discussion forum that is owned by a Russian national, but currently hosted in Estonia; neither ISPs nor website owners respond to takedown requests for this site. In 2012, Russia was first in the world in the number of connections by peers participating in the unauthorized file sharing of select Entertainment Software Association (ESA) member titles on public peer-to-peer networks – a dramatic increase from its tenth place ranking in 2010 (and fourth place in 2011). ESA also reports that Russian service providers either host or provide proxy services to a number of the world's largest and most popular linking sites, including warez-bb.org, final4ever.com and the warezscene.org.

Russia is also home to the world's two most prolific criminal release groups. The pirates obtain their source infringing copies by camcording films from local theater screens and then uploading these illegal camcords onto the Internet (and sell hard copies as well). Pre-release DVDs of major film titles often appear on the Internet (and then in pirate hard copies sold online or in markets), within a few days after the authorized theatrical release. The illicit



camcords sourced from Russia are of exceptional quality and remain in high demand by international criminal syndicates for Internet uploading.

vKontakte, the most popular online social network in Russia (over 140 million registered members worldwide and 39 million visits per day) is the largest single distributor of infringing music in Russia and also a hotbed for online piracy of movies and television programming, which is why it is on the U.S. Government's "Notorious Markets" list. It is also one of the largest illegal distributors of music in the world (and is listed as one of the top 40 most visited websites worldwide). It has a functionality specifically designed to enable members to upload music and video files, which includes hundreds of thousands of unlicensed copyright works (films and television programs) and recordings. It is available in many languages, including English, and 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, stream and download the content available on the site. While vKontakte will generally takedown specific content when notified, that is an inappropriate enforcement mechanism for a problem of vKontakte's own making. Although vKontakte has a dedicated music feature, it has no licenses to distribute musical content – it either must eliminate this service, or license it properly. In January 2012, Gala Records, a Russian record label, won several civil cases (including from the highest court) against vKontakte for copyright infringement, but very low remedies were awarded – (even though the Civil Code, Part IV, Article 1301 provides statutory damages of 10,000 to 5 million rubles, in the discretion of the court). Now that the Copyright Law has been interpreted to impose liability on vKontakte, enforcement authorities should use this decision as a springboard for criminal and/or deterrent administrative actions against not only vKontakte, but the many other Russian-based sites targeting users inside or outside of Russia (such as, fast-torrene.ru, my-hit.ru, okinj.tv, etc.).

The recording industry reports that paid download sites remain 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 thirty copycat sites based on the same business model as the original allofmp3.com (which were also named to the Notorious Markets list by the U.S. Government in 2012). The user interface of these sites looks very professional and can easily deceive users into believing the sites are legal (they offer "give away" incentives to attract more users; some sell albums for as little as US\$1). Some of the sites use up to thirty different domain names (but the same user interface). These and other pay-per-download websites remain a problem for the music industry. The Russian Government should takedown the sites, and criminally prosecute the site operators. Other important pirate sites (that are not pay-per-download sites) include: zaycev.net, rutracker.org, best-mp3.ru, hotcharts.ru, musicstorm.org, muzoff.ru, primemusic.ru, poiskm.ru, mp3wall.ru, video.mail.ru, my.mail.ru, prostopleer.com, nnm.ru, rutor.org and tfile.ru (there are over 2,500 sites). In addition, in December 2012, the U.S. Government named two other Russian "Notorious Markets": one a linking site (warez-bb – registered in Sweden but hosted by a Russian ISP), and one cyberlocker (rapidgator.net – originally hosted in the United Kingdom, but now in Russia after U.K. officials shut it down).

The independent segment of the film and television 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 films and television programming. These authorized distributors find it nearly impossible to compete with pirates and report that piracy in Russia has reached disastrous levels. Independent producers and distributors confirm that DVD sales have been particularly impacted since pirated digital copies are routinely offered for free online and with the same quality viewing experience that a DVD can provide. Unable to compete with free, legitimate distributors cannot commit to distribution agreements, or alternatively, offer drastically reduced license fees which are inadequate to support the financing of independent productions. As a result, piracy severely undermines and may permanently damage legitimate distribution networks essential to reaching consumers in Russia and leaves little confidence for investment in intellectual property. Revenue from these distribution services, which is licensed country-by-country, is critical to financing the development of new creative works worldwide. Since Internet piracy in one territory, affects other markets instantly, this type of infringement not only undercuts anticipated revenue from the distribution of a particular asset, it also harms the ability of independent producers to secure financing for future productions. The

independent production sector cannot easily shift 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.

As noted, there was not one Internet criminal case commenced in Russia in 2012. There were some notable criminal enforcement cases in 2010 and 2011, but with mixed results: for example, in August 2010, Russian enforcement authorities commenced a case against filehoster.ru – an infringing cyberlocker and a BitTorrent site. However, following staffing changes at Department K, the investigation into that case ended. MPAA reports that in October 2011, a case against Interfilm.ru was reopened and the public prosecutor charged two of the administrators of Interfilm.ru under Article 146 of the Criminal Code; the case has been referred to the Timiryazevky District Court, where it is still pending. The prosecutor told the media, in announcing the case, that damages to the film industry were US\$1.24 billion. Also in 2011, MPAA reported that the Economic Crime Police and Department K raided Sib-Port.ru, confiscating equipment and arresting three of the site’s owners, but that case is also still pending.

BSA | The Software Alliance (BSA) reported only one raid against Internet users or services in 2012 (compared with 22 in 2011, 14 in 2010, and 25 in 2008), which did not result in the commencement of a criminal case (compared with 6 in 2011 and 15 in 2008), and thus, no convictions (there were three such convictions in each of 2011 and 2010).

To develop legal online music markets, the Government of Russia must resolve the issue of the state accreditation of collecting societies. IIPA remains very concerned with the lack of transparency and governance issues in connection with VOIS, the sole state accredited collecting body for record labels and performers. VOIS has not demonstrated compliance, thus far, with international standards in terms of accountability and transparency. In order for U.S. rights holders to be properly represented in Russia, and to establish legal digital music services, it is essential that VOIS operates 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 needs to act on this as it obligated itself to do in its international agreements (e.g., as specified in the Working Party Report, to be undertaken by 2013).

Overall responsiveness to takedown notices in Russia is mixed. Some ISPs cooperate and take down pirate materials once identified, but many ISPs are 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. The motion picture industry reports that in 2012, most of the ISPs did generally cooperate and respond to RAPO cease and desist letters. There were attempts in 2012 by the Ministry of Economic Development to develop formal notice and takedown procedures between rights holders and ISPs, but those efforts were not successful.

**Criminal Enforcement in General:** For both digital and hard copy piracy, criminal enforcement in Russia remains a priority for IIPA and its members. Criminal enforcement by the government in 2012 was aimed at physical piracy; as already noted, there was not a single criminal case directed at digital piracy. IIPA recommends that Russian authorities step up their efforts to investigate Internet piracy of business software, entertainment software, books, music, and film material, by a variety of technical means, and increase the number and disposition of effective criminal investigators.

In 2012, the Russian police continued to take actions against copyright infringers, including against street vendor piracy and companies involved in the installation and use of pirated software. However, the overall number of raids, seizures, and especially criminal cases commenced, was down from the number of cases undertaken only a few years ago. 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 copyright industries, such as the motion picture industry, have seen a decline of 5% to 10% in hard goods piracy in the past two years, in major cities, including Moscow, St. Petersburg, Rostov-on-Don, and Novosibirsk (and an overall decline in the size of the hard goods

market by about 50% since 2010). They also report continued cooperation by enforcement authorities with the Russian-Anti Piracy Organization (RAPO) in 2012.

There were also a considerable number of administrative and criminal penalties imposed against illegal hard copy vendors. The motion picture industry noted several markets, including Gorbushka, Savelovskiy, Sherbakovsky, Luzniki, and Radio that no longer contain pirate DVDs, and only sell legitimate DVDs. Further, the local motion picture industry (Motion Picture Association, MPA) reported very good cooperation with law enforcement authorities in organizing raids against problematic kiosks.

All of the copyright industries reported substantial declines in the number of raids in 2012 from previous years, in part due to the severe cuts in police resources. In addition, the copyright industries are concerned that the proportion of raids to the initiation of cases, and to criminal verdicts, remains disproportionately low. The Government of Russia (MVD) usually provides comprehensive annual statistics on intellectual property cases, and investigations commenced; however, the full 2012 report was not available before the Special 301 filing deadline. From preliminary data, however, it is clear that criminal enforcement by the Government of Russia is down significantly, from prior years. According to the MVD statistics (through November), the number of criminal investigations was 3,455, less than half the (full year) statistics for 2007, when 7,874 investigations were commenced (there were 5,033 in 2011 and 6,118 in 2010).

BSA reported the overall number of raids decreased (as in prior years, the majority of raids are “channel” raids against CD sellers and pre-installed hard disk loaders). For example, there were 506 end-user raids in 2012 (down from 554 in 2011), and 931 “channel” case raids, down from 1161 in 2011. The number of criminal cases initiated did increase, although the number of court verdicts declined substantially. There were 97 criminal cases initiated against end-users in 2012, up from 63 in 2011, but down substantially from 200 in 2007 and 154 in 2008; there were 609 “channel” cases initiated in 2012, up from 427 in 2011 (there were no Internet criminal cases initiated in 2012). However, there were 24 verdicts in the end-user cases, up from 19 in 2011, but down substantially from 83 in 2007; there were 70 “channel” case verdicts in 2012, down from 180 in 2011, and 325 in 2010 (and no Internet verdicts in 2012).

MPA reports that enforcement activity in 2012 was about the same as in 2011, with most of it concentrated in Moscow and St. Petersburg, but like other industries, was down overall from only a few years ago, as a result of the reorganization of the police and severe reductions in enforcement personnel. The motion picture industry reported box office receipts in Russia in 2012 was US\$1.24 billion (an 8% increase from 2011).

An intensification of criminal investigations and criminal convictions against principals of organized commercial pirates is sorely needed, especially directed at Internet 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 have rarely, if ever, been imposed against owners of commercial Internet operations. One practical problem that has surfaced recently is that police and prosecutors have had difficulty applying the criminal law thresholds to Internet crimes which has resulted in very few such cases commencing and even fewer ending in court rooms. The 2011 increase in the criminal threshold without special consideration of its application to Internet offenses, as was done in the United States (in the Net Act), could exacerbate this problem; this further underscores the importance of also using administrative authority in digital piracy cases. 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 IPR 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 rights holders), 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 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 it is recommended 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. The problems are further exacerbated by ongoing reforms of the investigative bodies. ESA continues to report delays in examination reports from government experts, due to a lack of technical expertise.

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 (court of general jurisdiction) – 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 Investigative Department of MVD should continue to work with IIPA members on future training programs. IIPA recommends that the General Prosecutor's Office (along with the MVD-IC) appoint a government liaison with IP rights holders to more effectively bring criminal investigations and trials to successful conclusions. The approval in 2011 of a specialized IP court in Skolkovo (the innovation center), to be implemented in February 2013 (with thirty trained judges), is a positive step (and even more so if these courts are eventually created in other cities and regions across Russia). In 2012, the Government of Russia, including Prime Minister Medvedev, convened an anti-piracy/anti-counterfeiting forum that included over 1000 participants from the copyright and trademark industries (including IIPA members); one recommendation is to make this an annual event.

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 or against a business using pirated software), 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.

**Raids Against Businesses Using Pirate Products:** While the number of criminal end-user raids (and verdicts) were down substantially from a few years ago, as noted above, BSA did report good cooperation with enforcement officials. In 2012, the number of *ex officio* end-user raids declined even in major cities including Moscow and Rostov-on-Don (among others), and there was inconsistent enforcement in other cities and regions. The continued inconsistency in the number and quality of raids stems from the lack of a uniform methodology promulgated by the Investigative Department of MVD, the Investigative Committee of Russia, and the General Prosecutor's Office in relation to implementation of Article 146 of the Criminal Code. Investigators often 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.

**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. Amendments to the Criminal Code to allow corporate entities to be held criminally liable would help to correct this problem. As one example, CDs and DVDs with illegal software are readily available in markets and in kiosks, but the police only take action against the vendors, not the organized illegal businesses that make those materials available. There were no reported raids against large pirate warehouses in 2012, but there were eight raids (and the seizure of materials) against mid-sized warehouses.

**Civil Enforcement:** The commercial-scale piracy harming all of the copyright industries can and should be addressed through enhanced administrative actions (and penalties), and criminal remedies. Civil measures are not capable of providing the requisite level of deterrence. 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.

While criminal enforcement (by the police) remains the primary IPR enforcement tool in Russia against commercial piracy, beginning in 2011, the business software industry has been able to expand its civil search practices against commercial end-user infringers as a secondary enforcement method. While the number of searches is low (six in 2011, eleven in 2012), this activity has contributed to public awareness for businesses especially, about legal versus illegal activities, as well as helping to legalize software in commercial entities.

**Administrative Enforcement:** 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 (for natural persons) and arbitration courts (for legal entities). Imposing significant administrative fines on legal entities, for example, for the distribution of infringing content or 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). Unfortunately, current administrative procedures are inadequate because of the very low level of fines and the inability to reach commercial enterprises that distribute infringing content (especially when there is no direct payment for such infringing content, but only, for example, advertising revenue, such as at vKontakte). When administrative actions have been undertaken, they have resulted in the imposition of wholly inadequate penalties. BSA reported only 18 administrative court decisions against infringing end-users, and 24 against “channel” pirates in 2012 (none against Internet pirates). This was an increase from the 11 end-user and one “channel” decision in 2011, but is down from the 37 end-user decisions in 2008, or the 11 “channel” decisions in 2009. During 2012, the average administrative fine imposed on legal entities was about 30,000 rubles (approximately, US\$1,000) per case, which is too low to be a deterrent.

## **DEFICIENCIES IN THE RUSSIAN LEGAL REGIME**

**Overview of Legal Reforms:** Russia did make progress on legal reforms as part of its WTO accession. 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. Another positive step was the removal of camcording from the scope of the private copy exception, allowing for enforcement against illicit camcording in theaters. Amendments were made in 2012 to the Criminal Code (Articles 81 and 82) pertaining to the seizure and retention of electronic evidence obtained in pre-trial investigations.

However, there remain many key missing pieces to having an effective legal regime – especially for 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 (unclear ISP liability, no notice and takedown procedure, and the other list of deficiencies noted in previous IIPA filings). A 2010 draft set of amendments prepared by the Center for Private Law, had some very troubling provisions pertaining to: (i) the liability of ISPs (Article 1253(1)); (ii) technological protection measure exceptions (Article 1299(4)), and (iii) broad exceptions (Articles 1274 and 1275); it was never enacted. More recently, in 2012, amendments were offered to introduce liability for ISPs (intended to comply with the EU e-Commerce Directive). However, there are no concrete proposals yet on formal notice and takedown provisions or other key proposals; there was discussion in 2012 of a separate concept for a voluntary registry to share information between rights holders and intermediaries.

Since the adoption of the new Civil Code, IIPA and its members have commented on three major overarching concerns: (a) a lack of clarity on numerous provisions (especially exceptions); (b) administrative law principles throughout the Civil Code that likely cannot be enforced by civil or criminal procedures; and (c) the absence of rules that clarify the illegality of providing services that are intended to promote the infringement of copyright and related rights (i.e., a clear basis of liability for online websites and services that induce or encourage infringement). This latter issue is a principal challenge for IIPA: for Russia to define ISPs (and the various services they provide), 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. Further, it is critical that Russia amend its regime to allow for injunctive relief, especially for Internet matters.

Two other existing hurdles to effective civil and criminal enforcement are: (a) the failure of courts and police to apply statutory presumptions of copyright ownership; and (b) overly burdensome evidentiary requirements to prove title – requiring a “full” chain of title for each recording in every investigation which is especially problematic for foreign rights holders with translation, notarization and other costs. For the music industry, the criminal threshold, now raised to 100,000 rubles, equals 4,000 songs based on the current calculation methodology; this presents a virtual bar to commencing most criminal investigations and denies critical enforcement remedies.

For a detailed list of IIPA’s comments on the Civil Code, and the other relevant laws, 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 should continue to apply in light of the adoption of the 2008 Civil Code and the repeal of the copyright law. Last, we recommend 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”). Unfortunately, the resolution did not resolve a number of legal issues that remain unclear, and as a result problematic for judges trying to enforce IPR infringements. These issues include: the treatment of temporary copies, i.e., defining reproduction as the storage of a digital copy of a work in an electronic medium; the failure to craft explicit liability rules for infringers who pre-install business software on PCs; the failure to establish rules to determine damages (i.e., the value of works), including in instances of a “making available”; and, the failure of courts to apply provisional measures (and to clarify evidentiary rules in civil searches including the retention of materials after raids).

IIPA request to testify and written testimony regarding China's  
compliance with its WTO commitments (2013)

# INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE®



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September 20, 2013

## Filed Via Regulations.gov, Docket USTR–2013–0026

Douglas M. Bell  
Chair, Trade Policy Staff Committee  
Office of the United States Trade Representative  
1724 F Street, NW  
Washington, DC 20508

Re: **China's WTO Compliance** - Notification of Intent to Testify and Testimony Re:  
"Request for Comments and Notice of Public Hearing Concerning China's  
Compliance With WTO Commitments" (78 Fed. Reg. 49787, August 15, 2013)

To the Trade Policy Staff Committee:

This written notification responds to the TPSC's Request for Comments and Notice of Public Hearing Concerning China's Compliance With WTO Commitments. The request requires persons wishing to testify orally at a hearing that will be held in Washington, DC on Friday, October 4, 2013, to provide written notification of their intention, as well as a copy of their testimony, which is attached hereto.

### **Notice of Request to Testify**

We hereby notify the TPSC that the following person wishes to testify orally at the above-referenced hearing on behalf of the International Intellectual Property Alliance (IIPA):

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### **Summary of Testimony**

IIPA will use its five minutes of oral testimony to indicate why we believe China's enforcement infrastructure for copyright requires further improvements to fully meet the standards of the WTO TRIPS Agreement and how the products of U.S. creative industries continue to face some significant market access restrictions. While there continue to be some signs of positive change in the IP infrastructure in China, piracy remains a serious problem.



# CHINA (PRC)

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

### 2013 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** IIPA recommends that USTR maintain China on the Priority Watch List and that China be monitored under Section 306 of the Trade Act.<sup>1</sup>

**Executive Summary:** The situation in China for copyright owners remains an enormous challenge, despite some positive developments that deserve recognition. High copyright piracy levels persist in China, from widespread online piracy of music, films, television programming, books and journals, and other copyright materials, to pervasive use of unlicensed software by enterprises (including state-owned enterprises) and pre-installation of unlicensed software and other copyright materials (hard disk loading piracy) at the distribution level, and physical piracy including the export of relatively high-quality counterfeits and “media boxes,”<sup>2</sup> as well as the export of counterfeit/pirated books. While periodic enforcement campaigns (including one in June 2012 to address online infringements), some continued administrative actions, and transfers of some cases for criminal prosecution have had some effect, piracy will not abate until the Chinese government takes a much more active approach to criminal enforcement. In addition, China still maintains too many significant barriers to creative content (like the console ban) harming U.S. companies as well as Chinese businesses, and preventing the development of a healthy marketplace for copyright materials.<sup>3</sup> China must fully implement the market reforms required by the WTO market access decision, and needs to rationalize its regulatory structure to facilitate rather than hinder the creation of a legitimate online market. Failure to legalize the use of software and other copyright materials by government agencies and state-owned enterprises (SOEs), as promised in previous years and again in the 2012 U.S.-China Strategic & Economic Dialogue (S&ED) and the 2012 U.S.-China Joint Commission on Commerce and Trade (JCCT), results in significant lost opportunities for creative companies’ commercial growth in China. Notwithstanding the recent U.S.-China Film Agreement, the Chinese government should move towards promoting and granting necessary approvals on a non-discriminatory and transparent basis to other companies to engage in national distribution of foreign motion pictures for theatrical release, should support further movement to normalize the relationship between producers and distributors of foreign films, should develop transparency in the censorship approval process, and should avoid periods of “special protection” for domestic films that interfere with the normal commercial practices for the release and scheduling of imported films.

However, some positive developments in China in the past year deserve recognition. These include the historic U.S.-China Film Agreement in February 2012, the issuance of long-awaited Supreme People’s Court (SPC) *Judicial Rules on Several Issues Concerning the Application of Law in Hearing Civil Dispute Cases Involving Infringement of the Right to Network Dissemination of Information* (2012 Network Rules) in December 2012, cooperative activity between stakeholders and Chinese online services aimed at curbing infringements of U.S. right holders’ copyright materials,<sup>4</sup> and the welcome news that China’s *Gougou* pirate search engine shut down over piracy concerns (*Gougou* was run by notorious site *Xunlei*, which had cancelled a planned IPO in 2012, also over

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<sup>1</sup>For more details on China’s Special 301 history, see Additional Appendix available at <http://www.iipa.com/pdf/2013SPEC301HISTORICALSUMMARY.pdf>. Please also see previous years’ reports at <http://www.iipa.com/countryreports.html>. Section 306 monitoring is with respect to, among other obligations, those set out in Ministry of Foreign Trade and Economic Cooperation Minister Wu Yi, *People’s Republic of China Intellectual Property Rights Memorandum of Understanding—1995 Action Plan*, February 26, 1995.

<sup>2</sup>“Media box” piracy consists of hardware sold that facilitates remote access to music videos, karaoke, audiovisual, and other creative materials. These boxes are being manufactured in China and exported to overseas markets throughout Asia. This next generation piracy threatens not only the Chinese market for content but is exported from China, harming other markets.

<sup>3</sup>The Guangdong Chamber of Audio and Video Distributors ceased its operations in February 2011 because of rampant piracy problem and the lack of Chinese government support. While we do not have quantitative information of exact revenue losses due to piracy, we know that due to rampant piracy, over 90% of a Chinese film’s return on investment comes from theatrical box office revenues, while in the United States theatrical revenue averages 25-30% of total revenue. Thus, it appears that piracy has a dramatic effect on revenues in China from non-box office sources.

<sup>4</sup>Industry reports that the PSBs, prosecutors, and judges in some cities (e.g., Shanghai, Shenzhen, and the Beijing Haidian District) ramped up their efforts in addressing online piracy and counterfeit software in 2012.



piracy concerns). In addition, the Chinese government moved forward with a process to make much needed amendments to the Copyright Law, and started to research and draft a new amendment to the IPR criminal liability provisions in the Criminal Code, which will continue in 2013.

China amended its Catalog of Foreign Investment Guidelines in December 2011 in part to align Chinese measures with the 2009 WTO case involving market access of movies, music, and publications, partially opening some of those industries' sectors to foreign investment for the first time. However, China's restrictions remain both vague and onerous, undermining business clarity and predictability. China must fully comply with the decision of the Appellate Body in the 2009 WTO market access case, and should eliminate its discriminatory censorship processes. In addition, Chinese and foreign firms engaged in more partnerships in 2012, including U.S.-Chinese film co-productions and numerous licensing deals with online portals providing opportunities for the development of programming and establishment of authorized online distributors. Significantly, during the 2012 S&ED, China recognized the importance of increasing sales of legitimate IP-intensive products and services in line with China's status as a globally significant consumer of these goods. This was an important recognition by the Chinese government that real progress on IP protection and enforcement must be measured based on whether there have been significant increases in sales of copyright and other IP-intensive products. Sadly, for IIPA members, this has yet to be realized. We urge that increased sales of IP-intensive products and services continue to be used as the benchmark of progress in bilateral negotiations with China on IP issues.

As a new leadership group comes to power in China, we urge them to build on the signs of progress we saw in 2012 and devote greater resources and attention to addressing market barriers that keep the Chinese market closed and ultimately stunt commercial growth for the U.S. copyright industries, as well as providing deterrent levels of enforcement against piracy in all its forms.

## **PRIORITY ACTIONS REQUESTED IN 2013**

### **Market Access**

- Meaningful implementation of the WTO cases, to provide creators with meaningful access to the Chinese market for their goods and services, as well as faithful and comprehensive implementation of the February 2012 U.S.-China Film Agreement, including: actively promoting and approving Chinese companies to engage in national distribution of theatrical films; providing for transparency in the censorship process; eliminating special periods of protection for domestic films, so as to permit foreign films to be released and scheduled (permitting both the Chinese distributor and the producer to achieve maximum commercial benefits); and ceasing other actions taken by the government and SOEs (formal or otherwise) which have a discriminatory impact on foreign producers.
- Cease discriminatory and suspect censorship for online distribution of music in China and remove the exclusive licensee requirement for online music distribution.
- Remove prohibitions against foreign enterprises and foreign-invested enterprises (FIEs) participating in publishing activities.
- Ensure that no measure in China conditions market access on local ownership or development of a service or product's intellectual property, or compels transfers of foreign intellectual property and R&D to China, including sales of information security software and cloud computing products.
- Refrain from introducing mandates or preferences favoring the acquisition of Chinese (over foreign) software.
- Ease the ban on the sale and importation of videogame consoles.

### **Enforcement**

- Ensure full implementation of the 2012 Network Rules to ensure that those who intentionally facilitate infringement, including through services which build on or otherwise encourage infringement of creative materials, are held liable for their activities.
- Bring effective administrative and criminal investigations and enforcement against online piracy services that facilitate piracy (such as *Sohu/Sogou*, *Xiami*, and *PaiPai*), mobile piracy (including on mobile networks, such as unauthorized wireless access protocol (WAP) sites and mobile "apps" which enable users to carry out

unauthorized downloading and streaming of infringing music to smart phones), commercial end-user and hard-disk loading piracy of software, and physical piracy such as at *Buynow PC Malls*.

- Allow more specialized IPR judges to hear criminal cases and allow right holders as victims to file collateral civil claims for compensation during the trial of criminal IPR cases.
- Follow through with JCCT commitments that government agencies and SOEs, the latter which account for a substantial share of the country's economy, will use only legal software, and implement transparent and verifiable programs to ensure government agencies and SOEs comply with this requirement.
- Follow through with respect to China's promise to implement mechanisms, including transparent performance indicators, to hold local government officials responsible for effectively enforcing IP violations, including Internet and mobile piracy, and enterprise end-user piracy of software.
- Ensure that the State Administration of Radio, Film, and Television (SARFT) is implementing watermarking in theatrical prints and ensure that the Chinese government and those involved in the value chain for theatrical distribution step up efforts to deter illegal camcording.
- Follow through with JCCT commitments to resolve the longstanding complaint regarding entities engaged in unauthorized copying and distribution of academic, scientific, technical and medical journals.<sup>5</sup>
- Establish a central authority responsible for compiling statistics of ongoing and completed civil, administrative, or criminal enforcement actions and cases involving copyright infringement; and provide those statistics to the U.S. government and affected stakeholders.
- Increase actions by SARFT, the General Administration on Press and Publication (GAPP), the Ministry of Culture (MOC), and the Ministry of Industry and Information Technology (MIIT) to revoke business licenses and halt online services by enterprises that deal in/provide access to infringing materials, and shut down websites that engage in such activities.<sup>6</sup>
- Enhance "pre-release" administrative enforcement for motion pictures, sound recordings, and other works, e.g., by establishing voluntary government-backed online copyright bulletin boards.
- 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.
- Allow foreign right holder associations to increase staff and conduct anti-piracy investigations.
- Confirm shorter, more reasonable time limits for civil IP infringement trials, if necessary, through amendments to the Copyright Law or the promulgation of a new judicial interpretation.

### **Legislation and Related Matters**

- Amend the Copyright Law, Criminal Code, and subordinate legislation/regulations to ensure full compliance with the Berne Convention, the TRIPS Agreement, the WIPO Copyright Treaty (WCT), and the WIPO Performances and Phonograms Treaty (WPPT).
- Ensure the criminalization (if necessary through amending the thresholds) of: 1) unauthorized use of software by enterprises (enterprise end-user software piracy); 2) hard disk loading of software or other copyright materials; 3) Internet piracy including the communication to the public or the making available of any work/related right; and 4) circumvention of technological protection measures, trafficking in circumvention technologies and providing circumvention services.
- Specify and lower the proof requirements for evidence preservation orders and injunctions in civil copyright infringement actions.
- Make it a violation of law to use, or attempt to use, an audiovisual recording device to make or transmit a copy of a cinematographic work or other audiovisual work, or any part thereof, from a performance of such work in an exhibition facility.

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<sup>5</sup>In particular, the Ministry of Education should adopt regulations to ensure that all books and journals acquired by and used at universities (whether by professors, professional staff or students) and by the government are legitimate copies.

<sup>6</sup>At an annual meeting of the Internet Society of China and the Mediation Center Internet Legal Professionals held in Beijing in mid-January 2013, MIIT announced it would be establishing a digital dispute-resolution center to deal with disagreements over intellectual property and online copyright issues. Ellyne Phneah, *China to Establish Center to Resolve IP Disputes*, ZDNet, January 23, 2013, at <http://www.zdnet.com/cn/china-to-establish-center-to-resolve-ip-disputes-7000010164/>.

- Lower the threshold for criminal enforcement actions to be taken against infringers, including Internet infringers, and including infringements undertaken for purposes other than commercial gain.

## **PIRACY AND ENFORCEMENT CHALLENGES IN CHINA**

Previous IIPA submissions<sup>7</sup> have described in great detail the many forms of copyright piracy faced by IIPA members in China. Such piracy activities greatly disadvantage companies that respect copyright, whether they are Chinese or foreign entities. For example, the BSA | The Software Alliance's annual Global Software Piracy Study indicates that the commercial value of unlicensed software piracy in China rose to \$8.9 billion in 2011 – an amount that has more than doubled since 2005 and that is almost half the value of all unlicensed software in the Asia-Pacific region. The piracy rate remained an extremely high 77%, well above the global average of 42% and the Asia-Pacific average of 60%.<sup>8</sup> As another example, a new business model involving media boxes facilitating remote access to music videos, karaoke, audiovisual, and other creative materials, are being manufactured in China and exported to overseas markets throughout Asia. The negative effects of Chinese piracy were already well apparent. A May 2011 ITC report found that copyright infringement was the largest category of reported IP infringement in China in 2009 and that overall IP infringement in China costs the U.S. economy as much as \$107 billion and upwards of 2.1 million jobs.<sup>9</sup> Meanwhile, the enforcement situation in China remains difficult. For example, the recording industry reports that less than 17% of the complaints filed against unlicensed online music services led to termination of the service in question. The following highlights some key piracy challenges faced by the copyright industries in China.

**Internet and Mobile Piracy Updates:** Internet and mobile piracy in China remain severe problems. China boasted 538 million Internet users as of the end of June 2012, or 39.9% of the entire Chinese population (up from 38.3% at the end of 2011) (according to the China Internet Network Information Center (CNNIC)).<sup>10</sup> According to the MIIT, the total number of mobile phone subscribers in China amounted to more than 1.095 billion by the end of October 2012,<sup>11</sup> approximately 212 million of whom (nearly 19%) are connected to high speed 3G networks. 388 million Chinese access the Internet through their mobile devices, making mobile devices the top manner in which people in China access the Internet. Among these users, those who access mobile videos also increased dramatically to top 100 million users, or 27.7% of all mobile users. In addition to the mobile Internet users, almost all of whom enjoy high-speed wireless networks, the number of broadband users continues to grow exponentially in China, although still lagging behind many developed economies. According to MIIT, by April 2012, the number of broadband users in China reached 159 million, or 11.7% in terms of the penetration rate (whereas most developed markets are around 25% penetration rate). According to CNNIC, most Internet users, whether through wire or wireless, fixed or mobile, use the Internet to access content.<sup>12</sup> Sadly, most of this content accessed is illegal.

<sup>7</sup>See, e.g., International Intellectual Property Alliance, *China's WTO Compliance - Notification of Intent to Testify and Testimony Re: "Request for Comments and Notice of Public Hearing Concerning China's Compliance With WTO Commitments"* (77 Fed. Reg. 50206, August 20, 2012), September 19, 2012, at [http://www.iipa.com/pdf/2012\\_Sep19\\_China\\_WTO\\_Compliance\\_Request\\_to\\_Testify\\_and\\_Testimony.pdf](http://www.iipa.com/pdf/2012_Sep19_China_WTO_Compliance_Request_to_Testify_and_Testimony.pdf); International Intellectual Property Alliance, *IIPA Written Submission Re: IIPA Written Submission Re: 2012 Special 301 Out-of-Cycle Review of Notorious Markets: Request for Public Comments*, 77 Fed. Reg. 48583 (August 14, 2012), Docket No. USTR-2011-0011, September 14, 2012, at [http://www.iipa.com/pdf/2012\\_Sep14\\_Notorious\\_Markets.pdf](http://www.iipa.com/pdf/2012_Sep14_Notorious_Markets.pdf).

<sup>8</sup>BSA | The Software Alliance's 2012 Global Software Piracy Study, conducted with two leading independent research firms, IDC and Ipsos Public Affairs, measured the rate and commercial value of unlicensed PC software installed in 2011 in more than 100 markets. In 2011, the software piracy rate in China was 77%, representing a commercial value of unlicensed software of US\$8.9 billion. These statistics follow the methodology compiled in the Ninth Annual BSA and IDC Global Software Piracy Study (May 2012), <http://portal.bsa.org/globalpiracy2011/index.html>. The BSA study covers piracy of all software run on PCs, including desktops, laptops, and ultra-portables, including netbooks. It includes operating systems, systems software such as databases and security packages, business applications, and consumer applications such as games, personal finance, and reference software. It also takes into account free software, open source software, and software as a service if it is paid for. It does not cover software that runs on servers or mainframes and routine device drivers, free downloadable utilities such as screen savers, and software loaded onto tablets or smartphones. The methodology used to calculate this and other piracy numbers are described in IIPA's 2013 Special 301 submission at <http://www.iipa.com/pdf/2013spec301methodology.pdf>.

<sup>9</sup>United States International Trade Commission, *China: Effects of Intellectual Property Infringement and Indigenous Innovation Policies on the U.S. Economy*, Investigation No. 332-519, USITC Publication 4226, May 2011, available at [www.usitc.gov/publications/332/pub4226.pdf](http://www.usitc.gov/publications/332/pub4226.pdf).

<sup>10</sup>China Internet Network Information Center (CNNIC), *The 30th Survey Report*, September 28, 2012, at [http://www1.cnnic.cn/IDR/ReportDownloads/201209/t20120928\\_36586.htm](http://www1.cnnic.cn/IDR/ReportDownloads/201209/t20120928_36586.htm).

<sup>11</sup>Ministry of Industry and Information Technology (MIIT), *October 2012 Report on Changes in Mobile Connectivity*, November 29, 2012, at <http://www.miit.gov.cn/n11293472/n11293832/n11294132/n12858447/15036659.html>.

<sup>12</sup>According to CNNIC, in 2011, of all Internet users, 75.2% used the Internet for "Web music," 63% used the Internet for "Web game," 63% used the Internet for "Web video," and 40% used the Internet for "Network literature." CNNIC reported that by the end of 2011, "online music, online games and entertainment applications such as online literature slightly increased in the number of users, but usage has declined. In contrast, the number of network video users increased (...continued)

The harm caused by Internet piracy can perhaps be best understood in numbers by comparing the values of China's legitimate market for certain types of creative products with that of other countries. For example, the value of total legitimate digital sales for music in 2010 in China was a mere US\$48.8 million, and total revenue (both physical and digital) was a mere US\$64.3 million. This compares to almost \$4.4 billion in the U.S., US\$178.4 million in South Korea and US\$68.9 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 almost US\$1.4 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 well more than US\$1 billion in subsidies to Chinese Internet companies who can provide their users with access to music without negotiating licenses therefor.

**Online Music Piracy Update:** Online music piracy is still rampant despite the nationwide campaign, and despite the welcome news that in early January 2013, *Gougou* closed down its pirate search engine operations. Run by *Xunlei*, *Gougou* closed just after being listed by the U.S. Trade Representative on its Notorious Markets list. The parent site *Xunlei* was slated to launch an IPO in 2012, but postponed that, apparently due to piracy concerns.<sup>13</sup> Aside from this notable development, the music industry notes that there has been a significant proliferation of unlicensed video websites and user-generated content (UGC) sites where music can be found. In general, unlicensed music can be easily found through one-click hosting sites (referred to as cyberlockers), forums, deep-linking services (like *Sohu/Sogou*),<sup>14</sup> through peer-to-peer (P2P) services (like *Xiami*), and through unlicensed music portal sites (although we see a decreasing number of such sites). By the end of June 2012, with continuous growth of mobile phone subscribers, unlicensed music WAP sites resumed operation and more WAP sites have been identified as providing unauthorized music content through mobile networks.<sup>15</sup> Rapid growth of smartphones further facilitates music piracy via mobile applications. The rapid expansion of Internet connectivity is also leading to the development of cloud services which will pose new challenges to copyright protection.<sup>16</sup> A wide range of newly released and/or pre-release content is posted at forums/blogs which then direct users to download or stream unauthorized music files saved in one-click hosting sites (cyberlockers). Functionality facilitating one-click sharing to a long list of "social networks" is also not uncommon in China. Micro-blogging sites like *Weibo* (China's version of Twitter but having nearly 170 million users as of mid-2012, according to CNNIC) are being used for easy and simultaneous sharing of copyright content without authorization.

Enforcement challenges for the music industry in the online environment abound. They include reluctance of police in many places to investigate Internet piracy cases by using technical means and working with other divisions to track down pirates who operate on the Internet. These procedural and capacity problems are exacerbated by the fact that the Internet protocol (IP) addresses of music servers where unlicensed music content originates and the domain name system (DNS) servers of domains of unlicensed services are changed by the pirates frequently and easily. This causes concern among the law enforcement agencies as it affects the increasing costs of evidence collection and, in some cases, may cause concerns with respect to jurisdiction over the infringing services. In addition, in the mobile environment, it is difficult to identify the developers of unlicensed mobile applications when no identification details are made available through the online "app" marketplaces. In terms of the music industry's experience enforcing against online piracy in 2012, take down rates of unlicensed content listed in cease and desist notices were about 61% in 2012; however, the major problem is that the same infringing content may become available *via* a different URL at the same online service. Judicial enforcement continued in 2012 with several cases

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14.6% over the previous year, reaching 325 million people, while the utilization rate increased to 63.4%." CNNIC, *29th China Internet Development Statistics Report*, January 16, 2012, at [http://www.cnnic.cn/dtyqg/dtgg/201201/t20120116\\_23667.html](http://www.cnnic.cn/dtyqg/dtgg/201201/t20120116_23667.html).

<sup>13</sup>China's *Gougou.com* 'Pirate Search Engine' Shuts Down, BBC News, January 2, 2013, at <http://m.bbc.co.uk/news/technology-20888465>.

<sup>14</sup>Deep linking services like *Sohu/Sogou* collect links to infringing content and provide users the ability to engage in piracy through "deep linking," by which users bypass the homepage of the site where the pirated illegal content resides and link to it directly.

<sup>15</sup>Mobile broadband provides instant access to infringing copyrighted material, not only music, but also video, books, software and videogames. The recording industry notes that a wide range of unauthorized WAP sites and mobile applications, and other domestic mobile platforms offer infringing song files for streaming and download.

<sup>16</sup>The software industry also reports the emergence of cloud pirate lockers, in which pirated software titles are stored by users using "cloud" services and making them available to others, thus harming legitimate software copyright holders.

resulting in what were regarded as heavy penalties; unfortunately, these few cases do not seem to have had an overall deterrent effect on operators of many other unlicensed services.

**Online Motion Picture Piracy Update:** For the motion picture and television industry, the most significant commercial development in China in 2012 came with the conclusion of the U.S.-China Film Agreement. The industry also benefitted from increased pressure applied to online video piracy sites, e.g., through the U.S. government's Notorious Markets listings, and as a result, major motion picture companies have developed meaningful digital businesses in China and entered into major commercial deals with leading online websites in China. Nonetheless, Internet piracy remains the largest threat to the entire U.S. film and television industry in China. Online rogue video sites facilitated and/or supported by P2P streaming and download software, e.g., *QVOD*<sup>17</sup> and *Baidu Yingyin*, have become threats to legitimate websites as sources of pirated video content online. In addition to these rogue sites, increasingly, mobile apps facilitate copyright violations over many of the websites already under NCAC's monitoring list. Live sports telecasts also suffer from unlicensed programming retransmission, by which users or services on the Internet take protected telecasts and broadcasts and make them freely available, often simultaneously with the television broadcast.

Regarding enforcement, the motion picture industry reports fluctuations in takedown compliance rates for some of the larger-scale websites monitored under the NCAC's "self-discipline" list, notwithstanding a reported takedown rate of over 90% for other sites. Out of the 18 major online video websites under the NCAC monitoring, many still have a substantial amount of infringing content. One overriding enforcement concern is the increasingly transnational nature of the infringing activity. Some illegal Chinese online video sites locate their servers in third countries (e.g., in the U.S., Korea, or Taiwan). The off-shore location of the server poses jurisdictional problems and requires cross-border enforcement cooperation.

**Online Sale of Hard Goods Piracy:** Given China's explosive growth of e-commerce, the online sale of pirated hard goods, for example, through auction sites, business-to-business (B2B) sites, and business-to-consumer (B2C) sites, has become an increasing problem for the industry. This phenomenon consists of websites and/or online sellers targeting foreign buyers, distributing and selling illicit copies of copyright material, or other products, such as circumvention tools to bypass technological protection measures used by right holders to protect their works. In 2012, in part through pressure from the U.S. government's Notorious Markets list, some significant movement occurred on many such sites toward eradicating piracy or addressing right holder concerns; in some cases, significant voluntary agreements or MOUs resulted. There remain some problematic auction, B2B, and B2C sites. One specific problem regarding these sites is that pirates using them operate anonymously. As a result, the identification details of sellers are usually available only to the payment gateway and/or the online market operators, and further investigations into problematic test purchases were impossible by copyright owners. Another online commercial phenomenon involves "karaoke" players loaded with infringing music content and media boxes (such as the "Asibox") facilitating remote access to music videos sold at online marketplaces for both local consumption as well as for export.

**Online Journal Piracy:** The existence of unlicensed online journal delivery services continues to plague scientific, technical and medical (STM) publishers. As the result of attention from the industry, some services have become more cautious, keeping a lower profile and shifting their profiles to 'appear' more legitimate, but the core issues remain the same. *KJ Med* is an example of a site which provides and delivers unauthorized digital copies of millions of articles from leading academic, scientific, technical and medical journals on an illegal subscription basis to customers in libraries and hospitals throughout China, with neither the consent of, nor payment of subscription fees to, right holders. Despite the issue being a key agenda item in several years' JCCT dialogues,<sup>18</sup> and despite some

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<sup>17</sup>While it is difficult to peg QVOD as a direct infringer, since it merely facilitates others' provision of infringing materials, there may be some hooks that enable a finding of liability, particularly in light of the new Internet JIs. For example, the QVOD site has a search functionality called "Happy Search" which, if a link to QVOD can be shown, might be a basis for liability. Similarly, it should be noted that smaller websites that use QVOD to facilitate infringement would most certainly be considered infringing under the law and Internet JIs. Cf. Luo Yanjie, *Why It Is Not Easy to Combat QVOD Copyright Infringement?*, Bridge IP Law Commentary, August 27, 2012, at <http://www.chinainlawyer.com/easy-combat-qvod-copyright-infringement/>.

<sup>18</sup>The *KJ Med* issue was first raised with Chinese enforcement authorities in 2006. Following a number of transfers among several agencies, the case was lodged with the Beijing Copyright Administration Enforcement Department where it languished.

positive developments over the last year, the longstanding complaint against sites that provide unauthorized access to STM journal articles remains unresolved.<sup>19</sup> The unauthorized copying and distribution of publishers' content is in violation of the Copyright Law and applicable international norms, and should be meaningfully and expeditiously resolved. The Chinese government should make clear that such blatant copyright piracy will not be permitted under China's copyright regime, particularly in light of statements regarding the government's desire to develop an internationally competitive publishing industry and the still ongoing copyright law reform process.

**Online Videogame Piracy:** The entertainment software industry continues to report extreme levels of 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 videogame product that can be accessed from home PCs and from Internet cafés, which make available not only unauthorized games but also unauthorized videos and music for viewing, listening or copying by customers onto discs or mobile devices. In 2012, China placed eighth in the world in the number of connections by peers participating in the unauthorized file sharing of select Entertainment Software Association (ESA) member titles on public P2P networks.<sup>20</sup>

**Enterprise End-User Piracy:** The software industry continues to face unlicensed software use by enterprises on a massive scale – including private enterprises, state-owned enterprises and government agencies.<sup>21</sup> Piracy of U.S. 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.<sup>22</sup>

A significant hurdle to effectively dealing with enterprise end-user piracy in China remains the lack of clarity with respect to criminalization of this form of piracy. While the SPC indicated in a 2007 Judicial Interpretation (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. The Chinese government should take the necessary steps to clearly criminalize enterprise end-user piracy, through amending the Criminal Code and Copyright Law and issuance of a new judicial interpretation by the SPC and the Supreme People's Procuratorate (SPP). One hurdle to bringing criminal end-user cases has been Chinese authorities' narrow interpretation of the "for-profit" requirement in Article 217. 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."

Without a criminal remedy, the only avenues for seeking redress have been the administrative and civil systems, which are under-funded and under-resourced, and which generally result in non-deterrent penalties. First, administrative copyright authorities in most areas are reluctant to do raids against businesses suspected of using pirated software. IIPA remains disappointed with the lack of concrete results from administrative actions against businesses using unlicensed software.<sup>23</sup> Unfortunately, in 2010, software end-user complaints shifted jurisdiction from the local copyright administrations to the LCEAs, leading to even fewer administrative actions. In 2012, BSA

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<sup>19</sup>In the 2010 JCCT IPR Working Group meeting, the Chinese government requested that the publishing industry file its case anew with the NCAC, which publishers did in 2011. To date, the case remains under investigation.

<sup>20</sup>ESA's reporting on P2P activity does not take into account downloads of these titles that occur directly from hosted content, such as games found on "cyberlockers" or "one-click" hosting sites, which appear to account each year for progressively greater volumes of infringing downloads.

<sup>21</sup>See *supra* note 8.

<sup>22</sup>China's 77% software infringement rate means essentially that Chinese enterprises on average pay for only slightly more than 1 out of 5 copies of software they use and then compete unfairly with U.S. businesses that pay for more than 4 out of 5 copies of the software they use to run their businesses and improve productivity.

<sup>23</sup>For example, we still have not been provided with any information on progress or outcomes arising out of 23 administrative actions filed with NCAC during the Special IPR Enforcement Campaign in 2010.

lodged 12 complaints against enterprise end-user piracy, and only five administrative raids were conducted in 2012.<sup>24</sup> The situation remains difficult with regard to civil enforcement, but has seen some incremental improvement in recent years. The civil system is marred with difficulties when it comes to end-user piracy actions, as some courts set excessively high evidentiary burdens for evidence preservation, and pre-trial evidence preservation order applications or applications for injunctions are often rejected by the courts in some areas.<sup>25</sup> In addition, where a civil order is issued, right holders and authorities often face on-site resistance against evidence preservation (e.g., deletion of infringing software while enforcement authorities are carrying out an inspection) and have only a limited amount of time to conduct software infringement inspections. Another key hurdle is the accounting method for damages, highlighting the need to significantly increase statutory damages beyond that currently laid out in the most recent revised amendment to the Copyright Law.

**Government and Enterprise Legalization of Software and Related Issues:** Through both the JCCT and the S&ED, the Chinese government has repeatedly made commitments to ensure legal software use by government agencies and SOEs. These include the commitments made at the 2011 JCCT to: 1) ensure that government agencies at all levels use only legitimate software and that all types of software used by government agencies are licensed; 2) devote increased resources to conducting software license audits and inspections of government agencies and publish the results; 3) complete software legalization by provincial governments by mid-2012 and by municipal and county governments by 2013; and 4) promote and conduct enterprise software management pilot projects and publish progress reports. This was followed by a commitment at the 2012 S&ED that China would expand its efforts to promote legal software use by enterprises and conduct more regular audits of software on government computers. At the 2012 JCCT, the Chinese government gave assurances that it requires SOEs under the authority of the China Banking Regulatory Commission and the State-Owned Assets Supervision and Administration Commission of the State Council to purchase and use legitimate software, though no details were provided on how the Chinese government will ensure SOE's comply with these requirements. The Chinese government should follow through with these commitments by implementing transparent, verifiable and comprehensive software legalization programs at all levels of government (central, provincial, municipal, and local) and for all SOEs. These should include providing sufficient budgets for government purchases of legal software, targeting all categories of software (not just select ones) for legalization and instituting a process for government agencies and SOEs to implement software asset management (SAM) best practices to ensure compliance. 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.

**Pre-Installation Piracy (Hard Disk Loading):** The sale of hard drives or other devices with pre-installed illegal content in large computer malls or electronic shopping centers in Beijing and Guangdong, like *Buynow PC Malls*, remains a major problem for copyright holders. To “sweeten the deal,” merchants provide “value-added” services to download software, illegal films and television programs, or other content (very often the audiovisual content comes from illegal websites offering infringing HD content). The practice is now causing significant losses of revenue from Blu-ray disc sales for motion picture companies and unlicensed use of karaoke videos for the recording industry, in addition to traditional hard disk loading of software. Another serious problem is that it is common for PC resellers to install pirated software in new PCs shipped to large buyers including government, schools, hospitals, enterprises, etc. even though these buyers clearly required genuine software in their procurement requests. The practice is clandestine and enforcement authorities are reluctant to prioritize enforcement against it. The Chinese government should clarify criminal liability for “hard disk loading” and carry out deterrent enforcement efforts including criminal cases. Unfortunately, there have been very few cases, penalties awarded vary dramatically in different localities, and some refuse to apply “sampling” during the examination of computers in order to assess damages or

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<sup>24</sup>Not all cases resulted in administrative fines, and fines remain generally non-deterrent. In many of these cases, there were no seizures of the unlicensed software and computers employing it. In 2010, BSA lodged 36 complaints against end-users, including 13 with the local authorities, on top of the original 23 complaints filed with NCAC, but only 10 administrative raids resulted.

<sup>25</sup>The courts require copyright owners to provide preliminary evidence of infringement, which is difficult if not impossible since they are not in a position to check an alleged infringer's computers even for preservation of the evidence. The court has rejected applications for pre-trial evidence preservation orders or injunctions, claiming the preliminary evidence submitted is insufficient to prove infringing use of copyrighted software. This creates an impossible situation.



penalties. At least three cases are reportedly in the preliminary investigation phase by different local Public Security Bureaus (PSBs).<sup>26</sup>

**Book, Textbook, and Journal Piracy:** In addition to the online piracy issues described above, the U.S. publishing industry continues to suffer from physical piracy including unauthorized copying of academic textbooks, unauthorized printing of commercial bestsellers, print- or copy-to-order services, and the availability of pirated or counterfeit books through itinerant street vendors. Well known university presses suffer from trademark infringement as well, with university names and seals reproduced on content bearing no relation to the pertinent university press. Smaller, often private “copy shops” on or near university campuses, are now the norm and while local enforcement agencies appear willing to take action, the lack of adequate personnel and the one-off nature of the transactions (i.e., copy/print-to-order) make enforcement difficult. These shops engage in unauthorized copying of books to order (brought in by customers for copying) to having popular titles pre-printed and available for purchase, to the most serious and sophisticated arrangements where massive catalogues of thousands of titles in digital form are available for immediate printing-to-order. Pirated or counterfeit bestsellers remain available for sale openly on the streets of Beijing in a number of locations. Individual vendors are often mobile and do not carry large stocks. Wholesalers carry larger stocks, but typically the English language titles are only a relatively small proportion of their stocks. Previous attempts to disrupt the supply chain feeding the street and wholesale traders have been frustrated by the lack of available personnel, e.g., in the Beijing Copyright Bureau, to conduct coordinated or simultaneous raids on multiple targets at different levels of the chain. In one exceptional case, the industry referred two shops with a significant level of activity to local law enforcement. One of the shops also had an online store through which it offered for sale pirated copies of pirated text books. While the referrals themselves were not resolved conclusively against the shops, the local enforcement agency did take additional measures and, on their own initiative, conducted inspections against a number of other copy shops which resulted in the seizure of a large quantity of unauthorized copies of English Language Teaching (ELT) materials.

The partnership of the Ministry of Education (MOE) with GAPP, NCAC and local authorities remains essential to tackling the ongoing textbook piracy issues. The industry has positive relations with the authorities, but finds their attention is diverted as soon as pressure (e.g., out of the JCCT or a “special campaign”) wanes. Many limitations remain for addressing hard goods book and journal piracy in China, including a lack of resources in the administrative enforcement authorities, inability to react to time-critical information, inability to handle coordinated raids against multiple targets, lack of power and/or willingness to enter unmanned premises without very clear evidence of specific infringing copies being present in the premises at that time.

**Hard Goods Piracy and Availability of Circumvention Devices:** The industries note resurgent physical piracy in China,<sup>27</sup> including: the manufacture and distribution of factory optical discs (determined through forensic matches of pirate CDs submitted to the Ministry of Public Security (MPS) for testing);<sup>28</sup> the burning of recordable

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<sup>26</sup>For example, on September 3, 2012, the Shenzhen Municipal Cultural Market Administration Enforcement General Task Force conducted a raid on an illegal hard drive “loading” service supplier in Longgan District in Shenzhen. Seven computers, one notebook, two servers (each equipped with 24 hard drives of 1-2 TB each), one router, 45 hard disks and related business records were seized. One female computer operator and one male courier were taken into custody for questioning. During the preliminary search at the scene more than 1,000 movies and TV episodes indexed on one of the computers were found, of which more than 500 titles were infringing U.S. movies/TV shows. After the investigation, the police claimed that the evidence did not meet the criminal threshold requirement hence no criminal charges were filed and the two offenders were let go with a warning.

<sup>27</sup>Physical piracy harms the legitimate markets for all IIPA members but in different ways. 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 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.

<sup>28</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”). In May 2011, the recording industry obtained positive forensic examination reports from the “PRC Police Bureau for Disc Production Source Identification Center” implicating three optical disc plants. These reports were submitted to GAPP which reportedly initiated criminal investigations into the plants with the PSB. The recording industry was later informed that the PSB intended to initiate a criminal investigation into an optical disc plant in Sichuan. Copyright verification reports and an affidavit regarding the lack of a license were submitted to support the case in early 2012, but updates on the status of the case are not available despite repeated requests.

discs, either retail or industrial, using disc drives or towers; production and/or sale of pirate videogames and circumvention devices used for games; the production in China (generally for export) of high-quality counterfeit packages of software, music, movies, or games;<sup>29</sup> the loading of pirate music on karaoke machines; and sales of “media boxes” as discussed above.<sup>30</sup> The piracy levels for video and audio in physical formats, continue to range between 90% and 95% of the market. A noted problem remains shops in cosmopolitan areas in Shanghai and Beijing where pirated “AV” shops heavily target expatriate communities in China.<sup>31</sup> Recidivism is endemic. As an example, an “AV” shop and corner stand inside Beijing’s Silk Street Market to this day openly sells a large quantity of pirated optical discs, even after several “crackdowns” by law enforcement. The U.S. government and industry have noted in the “Notorious Markets” filing several markets which remain active and open for pirate and counterfeit business, including *China Small Commodities Market (Yiwu)*, *Luohu Commercial Center (Shenzhen)*, *Buynow PC Mall* (a very large personal computer mall chain in China, operating 22 stores across the country, known for selling computers with illegal operating system software and other unlawfully pre-installed software), the *Silk Market (Beijing)*, and *San Li Tun District (Beijing)* (where most shops openly sell infringing movies and television programs). Test purchases made at *Guangdong Audio Video Centre* in 2011 also indicated that pirate audiovisual products can still be easily found, and the wholesaling centre in Guangzhou is replete with pirate audiovisual materials.

Regarding enforcement against pirate optical disc plants, right holders have experienced procedural problems, since positive forensic matches of a pirate optical disc with an “exemplar” collected from the replication plant are needed to prove a *prima facie* case against the plant in China. However, in cases where positive forensic matches have been made and investigations by the authorities have been initiated, copyright owners are most often not informed of the status of the cases. Anecdotally, industry reports that most pirate optical discs identified have fake source identification (SID) code but features found in the pirate product indicate that they are manufactured in China. The existence of such product reflects either that underground plants have gone undetected by the GAPP, or that certain registered replication plants in China are taking the risk to manufacture pirate products. Unfortunately, law enforcement agencies have been unwilling to take up cases where no forensic match is available, and thus, industry has also seen fake mould codes used in pirate products to avoid detection. Right owners also report that Customs officials will not take *ex officio* actions regarding pirate optical discs, instead suggesting with regard to exports of discs that right owners file recordation to facilitate detection. Such a recordation system is unwieldy, since many right holders own thousands of titles and each recordation involves an administration fee of several hundred RMB.

**Media Box Piracy:** A new business model has emerged in China involving media boxes facilitating remote access to music videos, karaoke, audiovisual, and other creative materials. These boxes are being manufactured in China and exported to overseas markets throughout Asia. This next generation piracy threatens not only the Chinese market for content but is exported from China, harming other markets. For example, one of the well known products is called *AsiaBox*, which is a media box that enables streaming and downloading of online audio and visual content. A total of 70 applications are made available at the “Apps Market” of *AsiaBox* for installation. *AsiaBox* provides online streaming of content from sites like *PPSLive* and *PPStv* which are popular P2P online services in China. Three different companies are distributing *AsiaBox* in Malaysia, Singapore and Taiwan but *AsiaBox* can also be used in countries such as Japan, Australia, Hong Kong, China, and elsewhere. Right holder groups know that the country of origin of the product is China, though the details of manufacture are unavailable.

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<sup>29</sup>China remains a source country for manufactured counterfeit optical discs (particularly music box sets), harming markets in Hong Kong, Macau, Singapore, the Philippines, Russia, and the United Kingdom, the United States, and elsewhere.

<sup>30</sup>Media boxes, which can be plugged directly to TVs, facilitate easy access to remote online sources of unauthorized entertainment content including music, movies and TV dramas. Such media boxes are not only sold in China but also in Malaysia, Singapore and Taiwan and are believed to have been manufactured in China.

<sup>31</sup>U.S. Embassies have been helpful in spreading the word throughout the Embassy communities and to U.S. expatriates not to engage in the purchase of pirated or counterfeit merchandise. Such initiatives by the U.S. and other Embassies should be strengthened, and the Chinese government can assist by posting notices in airports and ports indicating that the export of pirated or counterfeit material out of China, and the importation of such materials into most countries, is illegal.

**Illegal Camcording:**<sup>32</sup> The number of forensic matches from illegal camcords of Motion Picture Association of America (MPAA) companies' major motion pictures traced to Chinese theaters in 2012 increased to ten (up from nine in 2011). Camcording piracy is a source of pirate films on major Chinese UGC sites and provides source material for infringing DVD masters. SARFT should immediately implement watermarking of theatrical prints and ensure that China Film Group and other exhibitors step up efforts to deter illegal camcording. The Copyright Law should be amended to add as a violation of law the use of, or attempt to use, an audiovisual recording device to make or transmit a copy of a cinematographic work or other audiovisual work, or any part thereof, from a performance of such work in an exhibition facility. Anyone committing this act should be subject to civil, administrative, and criminal remedies. Barring this, NCAC should coordinate with SARFT or through the State Council to ensure that the China Film Industry Promotion Act is amended to prohibit unlawful camcording. There is evidence that such a statute is 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. Chinese industry associations have been very cooperative working with the local MPAA in investigations and trainings, but Chinese government involvement is needed.

**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), 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.

**Pay-TV Piracy/Circumvention Devices:** While there are instances of pay-TV piracy occurring in China, the more serious problem is China's role as the manufacturing and export/distribution hub for pay-TV circumvention devices and services. According to the Cable and Satellite Broadcasters Association of Asia (CASBAA), these take two principal forms: 1) "hacked" set-top boxes and smart cards; and 2) control word/encryption key distribution. In the first instance, circumvented devices, when attached to cable systems or satellite antennas, permit the unauthorized reception of pay-TV programs. There are reportedly millions of these boxes installed throughout China. In addition, it is reported that circumvention devices numbering in the hundreds of thousands have been exported to, and are damaging legitimate TV suppliers in, among others, Hong Kong, the Philippines, Malaysia, Vietnam, Indonesia, the Middle East, and Latin America. It is reported that the syndicates selling the boxes often take non-infringing "generic" boxes and load software on them which enables the unauthorized receipt of programming. In the second instance, since the encryption software within many set-top boxes relies on a decryption key ("control word") which interacts in real time with software in the set top box to enable decryption of the signal, piracy syndicates extract the keys or "control words" from a legitimate box/smart card and use Internet servers to share them in real time with a multitude of other users, enabling those users to view the signal without authorization or remuneration to the broadcaster/content owner. The current Copyright Law and regulations prevent the circumvention of technological measures used by copyright owners to protect their works. The Copyright Law revision process should be used to further modernize protection by including prohibitions on trafficking in such hacking devices (or providing services as to them), the receipt and use of the signal unlawfully decrypted, and the onward distribution of unlawfully decrypted signals or even lawfully decrypted signals when such onward distribution is without authorization and done for commercial advantage. The entertainment software industry also registers its frustration in the failure of the Chinese government to bring criminal actions against manufacturers and distributors of pirated entertainment software and circumvention devices.

## **ADDITIONAL ENFORCEMENT OBSERVATIONS IN CHINA**

In addition to the enforcement issues related to the specific areas of piracy recounted above, there are also cross-cutting enforcement concerns affecting all the industries. Most notably, an overall lack of deterrence persists due to various factors, including over-reliance on the administrative enforcement system, difficulty in obtaining effective evidence and preserving it for criminal transfer, lack of transparency, and difficulty in obtaining deterrent

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<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.

criminal convictions. These deficiencies exist notwithstanding continued good relationships with China's law enforcement and a willingness to cooperate with foreign right holders. In general, right holders report criminal law enforcement in China against piracy did not significantly improve in 2012 except in a few notable cases,<sup>33</sup> as police authorities devoted more efforts in dealing with counterfeit drugs and shoddy food products. The Chinese government must send a strong message that piracy of all forms will not be tolerated by enforcing against key bad actors, including criminal enforcement to meet its TRIPS Article 61 requirements and drive down piracy levels. The following recount some specific enforcement hurdles that remain bottlenecks in the Chinese system.

**Criminal Thresholds:** IIPA has long complained about the unreasonably high thresholds for criminal liability under the laws, ancillary regulations, and previous Judicial Interpretations. Unfortunately, the thresholds remain too high to criminalize all piracy on a commercial scale as required by the TRIPS Agreement, and in practice, the thresholds are not being followed consistently by Chinese government authorities. As a case in point, many law enforcement agencies in China fail to follow the "500 copy" threshold (as set forth in the April 2007 SPC/Supreme People's Procuratorate JI) to prosecute infringing shop owners. However, according to some in the industry, this is slowly improving and now the Chaoyang District of Beijing, along with several other judiciary districts in China are more regularly prosecuting illegal optical disc vendors according to the threshold.<sup>34</sup> Unfortunately, other provinces and districts are not following the threshold. The January 2011 *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* (Criminal IP Opinions) appear to set out some important elements for Internet and related criminal cases and help clarify and address other ongoing issues related to criminal liability in China. The Opinions 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.

The Criminal IP Opinions provide several criteria upon which the threshold for criminal liability can be met:

- illegal operation costs amount to over RMB50,000 (US\$8,020);
- disseminating over 500 copies of third parties' works (the "aggregate quantity of others' works being transmitted is more than 500 pieces");
- disseminating third parties' works with the actual number of clicks amounting to over 50,000 ("[w]here others' works being transmitted has been actually clicked for more than 50,000 times");
- 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 the first four 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.

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 of 25,000 downloads, for criminal liability, or as another example, in the case of a membership site, proof of 500 members combined with proof of dissemination of "250 copies." The Copyright Law amendment should specify that "copy" includes a download, so that the Opinions do not become an impediment for right holders in bringing criminal cases against copyright violators on the Internet. In addition, the decision as to whether the threshold is met should be vested with the Procuratorate, rather than with the MPS or PSB, since reports indicate MPS and PSB have refused to accept cases on the basis of onerous evidentiary requirements. MPS and PSB do appear, however, to be investigating the illegal gains of website operators and collecting evidence directly from advertising platforms and agencies, which is a positive sign.

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<sup>33</sup>Exceptions include the "Radish Garden" online software piracy case in Shanghai, the "Shang Yajun" counterfeit software case in Beijing Haidian District, and the cracking down on four counterfeit software groups in Shenzhen.

<sup>34</sup>The motion picture industry regularly helps the authorities from this District with "title verifications" in order to prosecute such cases. The industry indicates an average of 10 prison sentences have been meted out annually against illegal audiovisual shop owners.

**Problems with Reliance on Administrative Enforcement:** The significant hurdles in bringing civil and criminal enforcement actions in China has led to an over-reliance on non-deterrent administrative enforcement measures. Administrative enforcement, without the risk of criminal prosecution, has little effect against commercial pirates that have neither legitimate business enterprise nor any assets. The Chinese government has ironically failed to employ available administrative measures with respect to infringers for whom administrative measures might be effective, such as in the case of Internet infringements, where maximum daily fines, if employed, could have a devastating effect on the ability of online infringement models to operate. IIPA members also find administrative enforcement authorities inconsistent in their handling of foreign right holder complaints. For example, enforcement agencies in the provinces of Anhui, Jiangsu, and Zhejiang Provinces have been more cooperative and efficient in handling foreign right holder cases in recent years. However, the software industry's experience is different – it seems there are only very few cities, including Beijing, that will accept complaints against enterprise end-user piracy and most other regions do not accept such cases at all. There also remain problems in transfer of administrative cases for criminal prosecution. For example, regarding Internet cases, since there is a different standard of proof in a criminal case as in an administrative case, right holders sometimes find that evidence collected by administrative authorities may become inadmissible. IIPA urges greater coordination between administrative authorities and the Public Security Bureaus at the outset of the handling of a potential copyright criminal case.

**Burdensome and Costly Documentary Requirements Stymie Some Foreign Right Holders:** Foreign publishers have complained about the requirement to submit not only a notarized and legalized power of attorney, but also a notarized and legalized copyright registration certificate and certificate of legal representative. All of these documents have to be translated by a qualified translation organization. Further, in some legal actions, Chinese authorities require software owners to obtain a certification of copyright in the software from the local copyright authority. As previously reported, a copyright-owner/publisher brought suit against three different entities in China that were systematically republishing information from the publisher's proprietary database and related publications on a daily basis, and in direct competition with the publisher's own information service. Meeting the evidentiary burdens to prove the legitimate publisher's ownership of the infringed materials cost hundreds of thousands of dollars in legal fees. Unfortunately, the damages recovered were so small as to be non-deterrent, and represented only a fraction of the costs incurred by the publisher in bringing the actions.

**Concurrent "Civil Claim" to a Criminal Prosecution; Transfer of Cases to Intermediate Courts:** The industries have reported for several years that there is a jurisdictional bar limiting foreign right holders from commencing a private "civil claim" against those being prosecuted for copyright crimes in local district courts. In the *51wma.com* case, for example, despite the fact that the prosecutor initially invited sound recordings right holders to commence "incidental civil claims" against the defendant (the operator of an illegal music website) in the local district court, the Jiangsu Higher People's Court and the Suzhou Intermediate Court advised that jurisdiction to hear the civil claim rests with the Suzhou Intermediate Court because foreign right holders were involved. It appears from this that foreign right holders cannot commence "incidental civil actions" (running together with the criminal proceedings) against a defendant at the local court level in practice. The law should be amended to allow foreign right holders to commence "incidental civil claims" against copyright offenders at the local level court.

## **COPYRIGHT LAW AND REGULATIONS UPDATES**

The Copyright Law of the People's Republic of China, subordinate regulations, judicial interpretations, various rules, and "opinions," provide the basis for copyright protection in China.<sup>35</sup> The Chinese government has

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<sup>35</sup>Currently, copyright is governed by the basic law, the Copyright Law of the People's Republic of China (as last amended in 2010) ("Copyright Law"). In October 2001, the Standing Committee of the National People's Congress adopted the "Decision to Amend Copyright Law of the People's Republic of China," thereby amending the 1990 Copyright Law of the People's Republic of China. Copyright Law of the People's Republic of China, Adopted at the Fifteenth Session of the Standing Committee of the Seventh National People's Congress on September 7, 1990, Amended in Accordance with "Decision to Amend Copyright Law of the People's Republic of China," Adopted at the Twenty-fourth Session of the Standing Committee of the Ninth National People's Congress on October 27, 2001. The Copyright Law was further amended in 2010 to make minor changes to come into compliance with a decision of a World Trade Organization Panel. See "The Decision of the Standing Committee of the National People's Congress on Amending the Copyright Law of the People's Republic of China, adopted at the (...continued)

taken some significant steps in the past year toward establishing a stronger legal framework for the protection of copyright. The Chinese government is currently in the process of revising its Copyright Law, Criminal Code, and many related laws, and just passed new rules to deal with online infringements. These revision processes provide important opportunities to update the legal regime in China for more effective copyright protection and enforcement.

**Supreme People's Court Issues "2012 Network Rules" to Deal With Online Infringements:** On November 26, 2012, the SPC issued long-awaited *Judicial Rules on Several Issues concerning the application of Law in Hearing Civil Dispute Cases Involving Infringement of the Right to Network Dissemination of Information* (2012 Network Rules or Rules).<sup>36</sup> IIPA applauds the SPC for its issuance of the Rules, which went into force January 1, 2013, and which aim to improve the existing legal framework on the protection of online (information network) dissemination rights provided for in the Copyright law and in State Council regulations. The 2012 Network Rules provide relatively clear guidance for courts as to how to deal with ISP liability issues in civil cases (and replace the *Regulations on the Protection of the Right of Communication through Information Networks* in effect since July 1, 2006). We look forward to seeing these rules implemented in practice and hope that their effect will be immediate and robust, and will help to transition what is currently an internet landscape dominated by theft to a legitimate online marketplace.

**Draft Copyright Law Amendments at State Council:** In late 2011 and throughout 2012, NCAC engaged in a several-part drafting exercise for an overhaul and modernization of the Copyright Law. IIPA and various copyright industry associations and companies have provided comments. In October 2012, the third draft was apparently completed but was not made available for public comment. Many important topics were taken up in the second draft Copyright Law revision, and reportedly remain in the third draft, including setting forth liability principles for the online environment that appear aligned with the 2012 Network Rules.<sup>37</sup> In addition, the draft apparently also includes: 1) coverage of reproductions in the online environment; 2) the communication to the public right (including an interactive making available right as contemplated under the WIPO "Internet" Treaties, the WCT and WPPT); 3) technological protection measures (TPMs); 4) rights in broadcasts; 5) computer program protection provisions; 6) remedy provisions including an increase in statutory damages and punitive damages for repeat infringements,<sup>38</sup> and the addition of criminal remedies for the first time; 8) collective management; and 9) exceptions.

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13th Meeting of the Standing Committee of the Eleventh National People's Congress on February 26, 2010, is hereby promulgated and shall go into effect as of April 1, 2010," in Order of the President of the People's Republic of China No. 26. Implementing Regulations were issued on August 2, 2002 (effective September 15, 2002). Implementing Regulations of The Copyright Law of the People's Republic of China Issued by Premier Zhu Rongji on August 2, 2002, effective as of September 15, 2002. The 1991 Implementing Regulations were thereby abolished. Since the 2001 revision, very few changes have been made to the basic law (the Copyright Law) and no changes have been made to the Implementing Regulations. The Copyright Law was amended by, among other changes, replacing the original Article 4 with the following: "Copyright owners should not exercise their copyrights in a manner that violates the Constitution or relevant laws, or harms the public interests. The country will supervise publication and distribution of the works in accordance with law." Copyright protection in China cannot be understood fully, however, without reference to other basic laws, and a web of ancillary regulations, rules, judicial interpretations, and opinions, all of which inform Chinese government agencies having purview over various aspects of the copyright system in China, and the courts. Copyright protection in China has evolved since 2001 through the passage of other basic laws, such as the Criminal Law of the People's Republic of China (1997), which established crimes of copyright infringement in Articles 217 and 218, and through the issuance of other regulations, judicial interpretations, rules, and opinions. Among the most important of the ancillary laws for interpretation and understanding of the current Copyright Law are: 1) State Council Regulations for the Protection of the Right of Communication through Information Network (effective July 1, 2006) ("Network Regulations"); 2) Supreme People's Court Interpretation Concerning Some Issues Concerning Application of Law in Cases Involving Computer Network Copyright Disputes (Second Revision) (2006) ("Network JIs"); 3) NCAC Copyright Administrative Punishment Implementation Rules (effective June 15, 2009); and 4) Interpretations of the Supreme People's Court concerning the Application of Laws in the Trial of Civil Disputes over Copyright (2002). Criminal copyright protection has also evolved through the issuance of ancillary regulations, judicial interpretations, and opinions, including: 1) Interpretation by the Supreme People's Court and the Supreme People's Procuratorate on Several Issues of Concrete Application of Law in Handling Criminal Cases of Infringing Intellectual Property Rights (I) (2004); 2) Interpretation by the Supreme People's Court and the Supreme People's Procuratorate on Several Issues of Concrete Application of Law in Handling Criminal Cases of Infringing Intellectual Property Rights (II) (2007); 3) Supreme People's Court, Supreme People's Procuratorate and Ministry of Public Security Opinions on Certain Issues Concerning the Application of Laws for Handling Criminal Cases of Infringement of Intellectual Property Rights (issued January 11, 2011) ("2011 Criminal Opinions"); and 4) Opinions on the Timely Transfer of Suspected Criminal Cases Encountered in the Course of Administrative Law Enforcement.

<sup>36</sup>*Rules of Supreme Court on Several Issues Concerning the Application of Law in Adjudication of Civil Disputes Related to Infringement of Right of Communication over Information Networks*, Approved at No. 1561 Meeting of the Supreme People's Court Adjudication Commission held on November 26, 2012. In effect as of January 1, 2013, Fashi (2012) No. 20.

<sup>37</sup>The draft reportedly still attempts to adopt into the structure of this basic law some principles for determining the joint liability of service providers in the online environment (the second draft created aiding and abetting-type liability for services that abet or instigate infringements including non-hosted infringements of third parties), and reportedly aligns very closely to the 2012 Network Rules.

<sup>38</sup>Statutory damages are reportedly increased to maximum of RMB 1 million in the third draft, and punitive damages are provided for repeat infringements, at 2 to 3 times the damages amount.

Some of the current proposals need to be carefully considered and revised before enactment to avoid conflicts with China's WTO obligations. In particular, IIPA has identified potential issues with the proposed changes related to: 1) software protection (both definitions as well as a potentially harmful compulsory license); 2) evidence preservation orders; 3) *ex parte* civil search orders; 4) confiscation of tools and materials used in infringing activity; 5) a compulsory reprint license; 6) recovery of costs and attorneys' fees; 7) statutory/compulsory license provisions;<sup>39</sup> and in particular, 8) a compulsory license to create compilations. In addition to the above, we urge the Chinese government to take other important steps such as to increase statutory damages for copyright infringement and provide for criminal liability for enterprise end-user software piracy, hard disk loading piracy and the circumvention of technological protection measures.

Regarding collective management, reportedly, the third draft still introduces extended collective management, although the scope of extended collective licensing is limited to licensing of the use of karaoke works only in the third draft, which is an improvement over the first two drafts. It is a matter of great importance that extended collective licensing should not be introduced at this stage of development of the market for any categories of works.<sup>40</sup> The draft apparently still contemplates "single window licensing," so in the case two or more collective management organizations (CMOs) are collecting royalties from the same user, the CMOs are required to consult and agree in advance which of the CMOs would be responsible for the collection of the total royalties. In addition, the set up of CMOs reportedly requires approval of and supervision by NCAC regarding the establishment, modification, cancellation or other matters of regulations of the CMO. The requirement for pre-approval of tariffs with the Chinese Copyright Administration should not be introduced. CMOs should be allowed to determine their own tariffs in a manner that reflects the market value of their members' rights. IIPA's view is that further revisions in relation to CMOs are needed to address these deficiencies.

IIPA looks forward to the further opportunity to review the draft after being passed from NCAC to the State Council Legislative Affairs Office (SCLAO) in October 2012. SCLAO may then further amend the Bill and will pass the final version to State Council for approval, and the State Council approved version may then be sent to National People's Congress for review and enactment in 2013 or 2014.

**Criminal Law and Related Ancillary Regulations, Etc.:** IIPA has contended for many years that a credible criminal remedy in China (under Articles 217 and 218 of the Criminal Law and accompanying Judicial Interpretations) is needed to effectively curtail piracy and related violations in all their forms. Remaining gaps include thresholds that are too high (in the case of illegal income) or unclear (e.g., in the case of the copy threshold), proof requirements that may leave some critical commercial scale infringements without a remedy (e.g., the requirement to show that the infringement is carried out "for the purpose of making profits" which is undefined and in certain circumstances, like many forms of internet piracy, as well as enterprise end-user software or hard disk loading cases, it is difficult for law enforcement authorities or right holders to prove that the infringer is operating for the purpose of making profits), the failure to cover all piracy on a commercial scale as required by TRIPS Article 61,<sup>41</sup> the failure to separately define criminal violations related to the WCT and WPPT (e.g., violations involving TPMs), the limited criminal accomplice liability with respect to imports and exports (with lower penalties available), and uncertainties with respect to repeat offenders (the 1998 Jis included repeat infringers but were inadvertently not included in the 2004 JIs). The January 2011 *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* set out some important elements for Internet and related criminal cases and help clarify and address other ongoing issues related to criminal liability in China.<sup>42</sup>

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<sup>39</sup>A statutory license for the use of released musical works for broadcasting has reportedly and disturbingly been re-introduced in the third draft; it had been removed in the second draft.

<sup>40</sup>The concept of collective management is relatively new in China and existing CMOs may not have the necessary experience to deal with all aspects of licensing on behalf of their members. Right holders have concerns with respect to the transparency, governance and distribution practices of existing CMOs in China.

<sup>41</sup>For example, China fails to criminalize satellite, cable and broadcast piracy, bootlegging and a number of other acts of piracy when they are "on a commercial scale."

<sup>42</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* (...continued)

Importantly, and consistent with the liability provisions in the 2012 Network Rules, 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 one-click hosting sites 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 deep links, and that the Opinions can address 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 (“[o]ther 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, discussed above.

**Administrative Criminal Transfer Regulations “Reasonable Suspicion” Rule Needed:** 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.

**TRIPS/Berne Obligation to Pay for Broadcasts of Musical Compositions:** China has long been in violation of its TRIPS/Berne Convention obligation to compensate copyright owners for the broadcast of musical compositions.<sup>43</sup> In late 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* were intended to 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 right 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\$0.24) for TV. Advertising revenue for Chinese broadcasting was reported to be US\$10.16 billion in 2008.<sup>44</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. In the 2011 JCCT, the Chinese government agreed to “hold government/industry roundtables in China to discuss online copyright protection and enforcement, including library copyright protection,” and agreed that an exchange will also be set up to deal with issues related to music “broadcast tariff rates” in China.<sup>45</sup>

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(...continued)

*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/>. See also 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.watsonband.com.cn/news/detail?id=182&language=en\\_US](http://www.watsonband.com.cn/news/detail?id=182&language=en_US).

<sup>43</sup>The recording industry 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>44</sup>*On Screen Asia, China in Focus*, April 1, 2009, at <http://www.onscreenasia.com/article-4897-chinafocus-onscreenasia.html>.

<sup>45</sup>See 21st U.S.-China Joint Commission on Commerce and Trade Fact Sheet, December 2011, at <http://www.commerce.gov/node/12467>.



**Other Regulations:** IIPA is also monitoring other regulatory developments, such as the MIIT proposal in June 2012 to revise the Draft Internet Administration Rules aimed at strengthening the regulation on online services such as forums and *weibo*. We are also aware of the State council adoption of Opinions on the Convergence Between Administrative Law Enforcement and Criminal Justice in the Work of Combating IPR Infringement and Selling Counterfeit and Shoddy Goods, issued on September 13, 2012. These Opinions provide guidelines/procedures for administrative law enforcement agencies and public security organs to handle evidence of infringement and counterfeiting offenses detected. We understand the full text of the Opinions are not available to the public, however. Finally, IIPA has been monitoring Draft Guidelines for the Implementation of the Anti-Monopoly Law, issued in August 2012. There are two potentially concerning provisions, one related to collective management organizations and one related to the use of technological protection measures. In short, IIPA views it as important that CMOs be permitted to operate without Chinese government interference and that normal day-to-day operations of CMOs should not be viewed as anti-competitive. Similarly, the use of TPMs on copyright materials should not be presumed to be an unreasonable restraint on competition.

## **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. Last year saw progress for some industries in the struggle to achieve market access. The February 2012 U.S.-China Film Agreement has already borne some fruit such as increased revenues for those films that secured quota slots, an uptick in licensing to Chinese distributors as well as numerous U.S.-Chinese co-productions, and the December 2011 amendments to the Catalog of Foreign Investment Guidelines promises to open the market for several creative product categories, creating new opportunities for foreign right holders. We recognize the Chinese government for having taken these important steps, although significant restrictions remain for many copyright industries.

**U.S.-China Film Agreement:** In February 2012, the United States and China reached an historic deal, in which the Chinese agreed to: 1) permit the importation by SOEs and the theatrical distribution of at least 34 foreign films into China annually on a revenue-sharing basis (up from 20 films), with the 14 additional films initially entering China in “enhanced formats” such as 3D or IMAX; 2) increase the percentage of revenue shared with the foreign producer to 25%; 3) actively promote and license Chinese companies to engage in national theatrical distribution providing competition in the market; 4) increase transparency to the administration of its content review process; and 5) observe commercial terms, consistent with the terms prevailing in comparable markets, in any contract for the distribution of “films other than revenue sharing films.” China has begun its implementation of the Film Agreement, which holds promise of greater predictability and increased access to the Chinese marketplace on more favorable terms for U.S. films. A couple of new problems have emerged, stemming mainly from measures purportedly aimed at protecting China’s domestic industry share of the film market. Chiefly among them were two month long periods during which no foreign films were scheduled for release and simultaneous release dates imposed upon major U.S. motion pictures (so-called “double-booking”).<sup>46</sup> While these serious issues appear to be resolved, the government must not permit discriminatory practices to reemerge or the potential gains out of the accord between the U.S. and the Chinese governments on the issue of film distribution in China will not be achieved. It has been almost a year since the Agreement was struck, and the two countries have agreed to consult and review the Agreement after five years to ensure it is working as envisioned. If necessary, the United States can return to the WTO to seek relief and it is hoped that the Chinese will vigorously and comprehensively implement the Agreement to achieve the agreed upon goals of a more robust Chinese marketplace and a transparent non-discriminatory distribution infrastructure.

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<sup>46</sup>The blackouts are unpredictable and the “double-bookings” force the limited supply of imported foreign films to compete head-on against each other, effectively cannibalizing the box office receipts for each film. Such restrictive release patterns present serious problems for U.S. right holders, who are prohibited from directly engaging in local marketing of a film until its release date is announced, often leaving only a limited period of time to promote the film’s release, further reducing the potential box office receipts. Similarly, Chinese film producers are negatively impacted by these sporadic release patterns, as they are forced to adapt to inflexible scheduling on short notice.

**WTO Market Access Case Implementation:** In the landmark market access case (DS 363) brought by the U.S. in 2007 and which concluded in 2009,<sup>47</sup> the United States prevailed on many claims against China's regime restricting the importation (trading rights) and distribution of publications, sound recordings, audiovisual home entertainment, and films for theatrical release. As a result of the case, China must:

- 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 books and periodicals, electronic publications, audiovisual materials and sound recordings, including through sound recording distribution services and electronic distribution products in China.<sup>48</sup>
- discard discriminatory commercial hurdles for imported reading materials, sound recordings intended for electronic distribution, and films for theatrical release.<sup>49</sup>

On December 24, 2011, China's National Development and Reform Commission (NDRC) and Ministry of Commerce (MOC) jointly issued a newly revised version of its Foreign Investment Industries Guidance Catalogue. The Catalogue went into effect on January 30, 2012. As a result, at least on the books, importation of "books, newspapers and periodicals," as well as "audio-visual products," "electronic publications," and online music, have been moved off of the "prohibited" investment list (although audio-visual products remain on the "restricted" list). The amended Catalogue goes part of the way toward meaningfully implementing the WTO Market Access case. IIPA urges the U.S. government to stock-take as to these and other steps the Chinese government has taken to ease any WTO-incompatible restrictions and take other market-opening steps.<sup>50</sup>

**Discriminatory Censorship Practice With Respect to Sound Recordings (and AV Works):** For several years, IIPA has complained that U.S. (and other foreign) right holders in music have to go through an onerous and discriminatory censorship review process from Chinese right holders with respect to online music. While the WTO Panel and Appellate Body, in a technical finding, concluded that they lacked sufficient information to determine

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<sup>47</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.org>. 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>48</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>49</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. China may also not prohibit foreign-invested enterprises from engaging in the distribution of imported reading materials.

<sup>50</sup>IIPA would be interested to know, for example:

- 1) steps being taken to provide a simple process for foreign enterprises to exercise their publication importation rights, and confirm that certain parts of the Regulations on Administration of Publishing (for example, Article 42) do not create new requirements on foreign enterprises to exercise their importation rights as to publications;
- 2) how Chinese laws provide market access to, and do not discriminate against, foreign companies wishing to engage in wholesale, master distribution (exclusive sale) of books and periodicals, as well as electronic publications, and allow the participation of foreign capital in a contractual joint venture engaged in the distribution of reading materials or audiovisual home entertainment products;
- 3) how Chinese laws allow foreign-invested enterprises to engage in the distribution of imported reading materials;
- 4) how Chinese laws ease commercial presence requirements for the distribution of DVDs; and do away with China's 15-year operating term limitation on foreign joint ventures;
- 5) how Chinese laws discard discriminatory commercial hurdles for imported reading materials, sound recordings intended for electronic distribution, and films for theatrical release, and in particular, how the laws avoid: improperly and discriminatorily limiting distribution for imported newspapers and periodicals to "subscriptions"; limiting such materials and other reading materials to Chinese wholly state-owned enterprises; and limiting the distributor of such reading materials to a State-owned publication import entity particularly designated by a government agency; and
- 6) how the revised GAPP rules on imported subscription publications ease the ability for persons in China to subscribe to imported publications, including those in the so-called "non-limited category," and how an individual wanting to subscribe to an imported publication may submit a subscription application to the publisher or distributor directly.

whether this discriminatory censorship regime with respect to online music violated China's General Agreement on Trade in Services (GATS) commitments, this was not a "green light" for the Chinese government to continue its discriminatory censorship practices. China's discriminatory regime is unfair and highly suspect under WTO rules. Promulgation of the September 2009 Circular on Strengthening and Improving Online Music Content Examination only exacerbated and complicated the issue by putting into place a censorship review process premised on an architecture ruled to be in violation of China's GATS commitments, namely, that only wholly-owned Chinese digital distribution enterprises may apply for censorship approval.<sup>51</sup> The Circular violates China's WTO commitments under GATS to provide nondiscriminatory market access for foreign suppliers of sound recording distribution services; it violates China's commitments on trade in goods under the General Agreement on Tariffs and Trade 1994 (GATT); and it violates China's Accession Protocol commitment to authorize trade in goods by any entity or individual. China must revoke or modify the Circular to avoid making the country subject to an immediate challenge at the WTO. A set of newly amended Measures on the Administration of Importation of AV Products (2011), introduced a new definition for the term "publication of audio-video product" to include "dissemination via Information Network." As a result, the Measures impose an additional, duplicative, and possibly confusing layer of censorship on online music.

**"Network Publications Service Management Regulations" Draft Contains Potentially Concerning Market Access and Censorship Provisions:** In December 2012, the General Administration of Press and Publications (GAPP) released for comment a draft set of "Network Publications Service Management Regulations," in addition to two other proposed measures.<sup>52</sup> The draft Network Publications Regulations contain some positive elements related to online copyright protection, but also almost entirely exclude foreigners from "network publishing services" in China (even "cooperation" must be approved by GAPP),<sup>53</sup> and contain potentially onerous censorship provisions.<sup>54</sup> The music industry is concerned that these draft Regulations would, if finalized, create confusion in the market, since, for example, it is unclear whether approval for network distribution will have to be obtained both from the Ministry of Culture (as required under the Circular) and/or from the Publication Importation Unit (as required under the Draft Rules). The publishing industry raised concerns regarding the draft measures, the additional or new restrictions they would impose on online or network publishing, and how they might implicate China's WTO commitments.

**Delays in Content Review of Entertainment Software Products/Ban on Consoles:** The entertainment software industry continues to face lengthy delays of weeks or sometimes even months in the GAPP censorship approval process, wiping out the already-short window for legitimate distribution of entertainment software products. The Chinese government also fails to immediately seize infringing copies of titles intended for release while they are still undergoing censorship review, resulting in inadequate protection and enforcement. In addition, an onerous ban on the sale and importation of videogame consoles remains a major barrier. The current ban on the 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 and denies Chinese consumers the benefits of these technologies, including use of parental controls. The ban

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<sup>51</sup>Under the Circular, pre-release content examination procedures apply to imported online music products, whereas domestic online music products go through a post-release examination and filing procedure only. Further, titles for imported music products previously cleared by GAPP for publication in the physical format have to be submitted to MOC for additional content examination prior to online distribution, whereas for previously published domestic music products, a mere self-examination and filing by the domestic producer is sufficient. Imported music products and domestic music products should have the same treatment in relation to content examination.

<sup>52</sup>GAPP issued a notice related to the draft provisions on: 1) network publications service management; 2) news publishing industry standardized management (revised draft); and 3) administrative measures on foreign press and publishing institutions establishing an office in China (draft). These measures may touch upon WTO issues related to publishing as well as other industries. See <http://www.chinalaw.gov.cn/article/cazjgg/201212/20121200379100.shtml>.

<sup>53</sup>A number of articles limit the establishment of network publishing businesses. Most onerous is the provision prohibiting foreigners from engaging in network publishing services at all. Article 10 provides, "Sino-foreign joint venture operations, Sino-foreign cooperative operations and foreign-invested operations may not engage in network publishing services." Even cooperation involving foreigners must go through GAPP (the controlling entity of all activities).

<sup>54</sup>Two provisions target online games: 1) Article 25, which provides, "Before network games are published online, an application must be put forward with the provincial, autonomous region or municipal administrative publishing controlling department, after examination, verification and agreement, they are to be reported to the General Administration of Press and Publications for examination and approval;" and 2) Article 51, which provides, "Those who, without approval, engage in unauthorized network publishing services, or provide unauthorized network publications provided by foreigners, or publish unauthorized network games online (including network games authorized by foreign copyright holders), will be banned by the administrative publishing controlling department and administrative industry and commerce management department, according to statutory powers, according to the provisions of Article 61 of the 'Publishing Management Regulations,' and the local provincial-level telecommunications management department may cease allowing access and close the website."

has also been extended 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.

**Import Monopoly and Distribution Duopoly for Films/Master Contract:** While the WTO Panel and Appellate Body concluded that the China Film Group duopoly did not constitute a “measure,” and cited the lack of evidence that a third distributor had been denied upon an application from operating in the Chinese market, the decisions equally make clear that if a *de facto* duopoly exists as to foreign films only, China would be in violation of its WTO obligations. The decisions confirm that, to be consistent with WTO rules, China must approve legitimate applications for other theatrical film importers and distributors in China, a key step that 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. Furthermore, such approval of other importers and distributors of foreign films in China along with the corresponding importation rules and processes should be applied in a transparent, timely, non-discretionary and non-discriminatory manner. By the terms of the U.S.-China Film Agreement, China affirmed that additional Chinese firms could be eligible to distribute foreign revenue sharing films and to move to approve and license such firms. This is an important step, and U.S. industry expects meaningful movement in 2013 to ensure a more competitive and robust marketplace.

Unfortunately, there remain a range of market access restrictions that affect most of the copyright industries. Chinese market access restrictions include:

- restrictions on the ability to engage fully in the development, creation, production, distribution, and promotion of music and sound recordings;<sup>55</sup>
- the inability to fully engage in the import and export, distribution, and marketing online of published materials in China;
- an onerous ban on the manufacture, sale and importation of videogame consoles;
- a range of policies that China has developed under the banner of promoting “indigenous innovation” that have the effect of discriminating against foreign software and other technology products or compelling transfers of technology and intellectual property to China in order to access the market;<sup>56</sup> and
- ownership and investment restrictions (some of which were addressed in the amendments to the Catalog of Foreign Investment Guidelines).

**Addressing Other Barriers and Discriminatory Industrial Policies, Including Indigenous Innovation:**

The Chinese government must continue to address other barriers and industrial policies, including indigenous innovation policies, that impose discriminatory requirements on foreign right holders and/or deny them the exercise of their IP rights, and must not erect or retain barriers to entry such as outright bans on products or services or other onerous requirements that shut out foreign right holders from the Chinese market.

**Indigenous Innovation:** Over the past several years, China has rolled 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 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 shares these concerns and strongly believes that the best ways for China to further enhance its innovative capacity are to: further open its market to foreign investment; provide incentives to innovate by ensuring full respect for

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<sup>55</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 very few 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>56</sup>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.

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. Last year, the Chinese government announced they would be investing US\$1.7 trillion over the next five years in designated “Strategic Emerging Industries” (SEIs). This initiative, on top of a SPC Opinion on IP released in mid-December 2011 which seems to instruct lower courts to make decisions that assist domestic “cultural” industries, once again raised the specter of discriminatory policies. The 2011 JCCT outcomes included China’s commitment to eliminate catalogues or other measures by provincial and municipal governments and autonomous regions linking innovation policies to government procurement preferences. This follows Chinese commitments made in prior JCCT and S&ED negotiations to “delink” innovation policies from government procurement. At the 2012 S&ED, China made a broader commitment to treat IPR owned or developed in other countries on the same basis as IPR owned or developed in China. These commitments must be fulfilled to give copyright industries fair access to China’s vast procurement market.

***Software Procurement Preferences:*** The software industry remains concerned that China’s efforts to legalize software use in government agencies and SOEs may be accompanied by mandates or preferences favoring the acquisition of Chinese software over non-Chinese software. This is inconsistent both with China’s efforts to join the WTO’s Government Procurement Agreement and with China’s commitment in its WTO working party report that the government “would not influence, directly or indirectly, commercial decisions on the part of state-owned or state-invested enterprises, including the quantity, value or country of origin of any goods purchased or sold ... .” The Chinese government should, consistent with its WTO, JCCT, and S&ED obligations, refrain from instructing or encouraging government agencies or SOEs to implement preferences for Chinese software in carrying out its legalization efforts, and should communicate this policy to relevant government agencies at the central, provincial and local levels.

***Local IP Ownership Requirements for Information Security Products Including Software:*** The “Multi Level Protection Scheme” (MLPS) imposes major restrictions on procurement of software and other information security products for an overly broad range of information systems the government considers sensitive. Among other requirements, procurements of such products are limited to those with IP rights owned in China. This applies to procurements by the government and increasingly to procurements by SOEs and others in the public sector. IIPA is concerned that the MLPS defines “critical infrastructure” in too broad a way, thus restricting foreign cyber-security products from the Chinese market based on nationality of the owner of the IP. This results in an undue market access restriction for foreign software and other information security products and will in many cases prevent information systems in China from procuring the most effective security tools to meet their needs. We welcome the commitment made by China in the 2012 JCCT that it will review and revise the MLPS rules through a process that will seek the views of all parties, including through dialogue with US parties.

***Additional Barriers for the Independent Film Industry:*** The independent film industry continues to experience limited access to the Chinese marketplace, although the expanded 34 foreign film quota system provides some additional opportunities for revenue-sharing. However, most independent films imported and theatrically distributed in China are on a non-revenue share basis. It remains the case that both the financial return and the license fees for the underlying films are massively eroded by the lack of qualified theatrical distributors who can adequately support a nationwide theatrical release and a relatively non-competitive and non-transparent marketplace. The lack of certainty in China’s censorship process for films causes unstable commercial transactions and poses a market access barrier to independent film producers. For example, local distributors have reported the inability to obtain official written responses from the censorship authorities and some continue to use a film’s censorship rejection as a way to avoid payment of license fees. Additionally, uncertainty regarding the releases of foreign and domestic films in China negatively impacts all independent film producers and their local Chinese distribution partners. As part of the U.S.-China Film Agreement, the Chinese government committed to actively promote and license qualified entities to engage in national theatrical distribution to create a competitive market where commercial terms prevail. It is critical that signals of this commitment begin to emerge in China. The hope is that comparable commercial terms in all licensing arrangements will increase the overall demand for films in China and more opportunities for independent foreign producers will rapidly stem from such increased competition.



IIPA members hope for several important changes by the Chinese Government in the coming year:

1) follow-through with Joint Commission on Commerce and Trade (JCCT) and Strategic & Economic Dialogue (S&ED) commitments to:

- a) ensure legal software use by government agencies and state-owned enterprises (SOEs) by implementing transparent, verifiable and comprehensive software legalization programs at all levels of government (central, provincial, municipal, and local) and for all SOEs;
- b) fully implement recent Judicial Interpretation (JI) to significantly reduce incidents of Internet infringements, including by holding liable businesses that promote online infringement and sites that do not expeditiously remove or deal with infringing materials made available through the sites;
- c) resolve the longstanding complaint regarding entities engaged in unauthorized copying and distribution of academic, scientific, technical and medical journal; and
- d) making the State Council-level enforcement leadership structure more effective.

2) enactment of modern copyright (and related) reforms, including through amendments to the Copyright Law of the People's Republic of China, which would, among other improvements:

- a) address digital or online piracy by confirming liability standards and fostering cooperation among services which build on or otherwise encourage infringement of creative materials;
- b) strengthen rules related to evidence preservation orders;
- c) increase statutory damages for copyright infringement; and
- d) criminalization (if necessary through amending the thresholds) of: 1) unauthorized use of software by enterprises (enterprise end-user software piracy); 2) hard disk loading of software or other copyright materials; 3) Internet piracy including the communication to the public or the making available of any work/related right; and 4) circumvention of technological protection measures, trafficking in circumvention technologies, and providing circumvention services.

3) continued meaningful implementation of the two WTO cases, in order to provide creators with access to the Chinese markets for their goods and services, commercially meaningful changes to eradicate discriminatory censorship of online music, and continued progress toward full implementation of the U.S.-China Film Agreement;

4) addressing other market access barriers and industrial policies, including indigenous innovation policies, that impose discriminatory requirements on foreign right holders and/or deny them the



exercise of their IP rights, and refraining from erecting or retaining barriers to entry such as outright bans on products or services that shut out foreign right holders from the Chinese market; and

5) sending a strong message that piracy of all forms will not be tolerated by enforcing against key bad actors, including criminal enforcement to meet its TRIPS Article 61 requirements and drive down piracy levels.

IIPA believes that these steps are crucial components to a successful U.S. trade and economic policy with China. During the 2012 S&ED, China recognized the importance of increasing sales of legitimate IP-intensive products and services in line with China's status as a globally significant consumer of these goods. This was an important recognition by the Chinese Government that real progress on IP protection and enforcement must be measured based on whether there have been significant increases in sales of copyright and other IP-intensive products. Sadly, for IIPA members, this has yet to be realized. We urge that increased sales of IP-intensive products and services continue to be used as the benchmark of progress in bilateral negotiations with China on IP issues. Thus, we believe it is imperative that progress in China be measured based on results related to legitimate industry sales in the country. We appreciate the efforts already underway by the U.S. Government to develop appropriate sales metrics to measure progress on key commitments and ensure they translate into tangible results for U.S. industries and U.S. economic and job growth.

We thank the TPSC for permitting us to testify in this proceeding.

Respectfully submitted,

Michael Schlesinger  
International Intellectual Property Allian

Attachments: 1 – IIPA Testimony  
2 – IIPA 2013 Special 301 Country Report on China

# INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE®



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## TESTIMONY OF MICHAEL SCHLESINGER INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

### PUBLIC HEARING CONCERNING CHINA'S COMPLIANCE WITH WTO COMMITMENTS

TO BE DELIVERED FRIDAY, OCTOBER 4, 2013  
BEFORE THE TRADE POLICY STAFF COMMITTEE  
WASHINGTON, DC





Good morning. My name is Michael Schlesinger, and I appreciate the opportunity to appear on behalf of the International Intellectual Property Alliance (IIPA) – a coalition of seven member associations each of which represents a significant segment of the U.S. copyright industries.<sup>1</sup> This year, we highlight the reasons we believe China's enforcement infrastructure for copyright requires further improvements to fully meet the standards of the WTO TRIPS Agreement and how the products of U.S. creative industries continue to face some significant market access restrictions. While there continue to be some signs of positive change in the IP infrastructure in China, piracy remains a serious problem. This year, IIPA members hope for several important changes by the Chinese Government in the coming year:

- 1) follow-through with Joint Commission on Commerce and Trade (JCCT) and Strategic & Economic Dialogue (S&ED) commitments to:
  - a) ensure legal software use by government agencies and state-owned enterprises (SOEs) by implementing transparent, verifiable and comprehensive software legalization programs at all levels of government (central, provincial, municipal, and local) and for all SOEs;
  - b) fully implement recent Judicial Interpretation (JI) to significantly reduce incidents of Internet infringements, including by holding liable businesses that promote online infringement and sites that do not expeditiously remove or deal with infringing materials made available through the sites;
  - c) resolve the longstanding complaint regarding entities engaged in unauthorized copying and distribution of academic, scientific, technical and medical journal; and

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<sup>1</sup> The IIPA is a private sector coalition, formed in 1984, of trade associations representing U.S. copyright-based industries in bilateral and multilateral efforts working to improve international protection and enforcement of copyrighted materials and open up foreign markets closed by piracy and other market access barriers. IIPA's seven member associations represent over 3,200 U.S. companies producing and distributing materials protected by copyright laws throughout the world—all types of computer software, including business applications software, entertainment software (interactive games for videogame consoles, handheld devices, personal computers and the Internet), and educational software; theatrical films, television programs, DVDs and home video and digital representations of audiovisual works; music, records, CDs, and audiocassettes; and fiction and non-fiction books, education instructional and assessment materials, and professional and scholarly journals, databases and software in all formats. Members of the IIPA include [Association of American Publishers](#), [BSA | The Software Alliance](#), [Entertainment Software Association](#), [Independent Film & Television Alliance](#), [Motion Picture Association of America](#), [National Music Publishers' Association](#), and [Recording Industry Association of America](#). In November 2011, IIPA released the latest update of the comprehensive economic report, *Copyright Industries in the U.S. Economy: The 2011 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 \$931.8 billion or 6.36% of the U.S. gross domestic product (GDP) in 2010. These industries provide nearly 5.1 million U.S. jobs, which is 4.75% of the entire private sector labor force in 2010, and pay on average over \$78,000, 27% higher than the overall workforce average. Estimated 2010 foreign sales and exports of key sectors of the core copyright industries amounted to \$134 billion, a significant increase over previous years, and more than foreign sales of other major U.S. industry sectors such as aircraft, automobiles, agricultural products, food, and pharmaceuticals.



- d) making the State Council-level enforcement leadership structure more effective.
- 2) enactment of modern copyright (and related) reforms, including through amendments to the Copyright Law of the People's Republic of China, which will, among other improvements:
- a) address digital or online piracy by confirming liability standards and fostering cooperation among services which build on or otherwise encourage infringement of creative materials;
  - b) strengthen rules related to evidence preservation orders;
  - c) increase statutory damages for copyright infringement; and
  - d) criminalization (if necessary through amending the thresholds) of: 1) unauthorized use of software by enterprises (enterprise end-user software piracy); 2) hard disk loading of software or other copyright materials; 3) Internet piracy including the communication to the public or the making available of any work/related right; and 4) circumvention of technological protection measures, trafficking in circumvention technologies, and providing circumvention services.
- 3) continued meaningful implementation of the two WTO cases, in order to provide creators with access to the Chinese markets for their goods and services, commercially meaningful changes to eradicate discriminatory censorship of online music, and continued progress toward full implementation of the U.S.-China Film Agreement;
- 4) addressing other market access barriers and industrial policies, including indigenous innovation policies, that impose discriminatory requirements on foreign right holders and/or deny them the exercise of their IP rights, and refraining from erecting or retaining barriers to entry such as outright bans on products or services that shut out foreign right holders from the Chinese market; and
- 5) sending a strong message that piracy of all forms will not be tolerated by enforcing against key bad actors, including criminal enforcement to meet its TRIPS Article 61 requirements and drive down piracy levels.

IIPA believes that these steps are crucial components to a successful U.S. trade and economic policy with China. During the 2012 S&ED, China recognized the importance of increasing sales of legitimate IP-intensive products and services in line with China's status as a globally significant consumer of these goods. This was an important recognition by the Chinese Government that real progress on IP protection and enforcement must be measured based on whether there have been significant increases in sales of copyright and other IP-intensive products. Sadly, for IIPA members, this has yet to be realized. We urge that increased sales of IP-intensive products and services continue to be used as the benchmark of progress in bilateral negotiations with China on IP issues. Thus, we believe it is imperative that progress in China be



measured based on results related to legitimate industry sales in the country. We appreciate the efforts already underway by the U.S. Government to develop appropriate sales metrics to measure progress on key commitments and ensure they translate into tangible results for U.S. industries and U.S. economic and job growth.

Previous testimony has well documented the challenges faced by the movie, music, software, publishing, and entertainment software industries, and the 2013 IIPA Special 301 report survey on China (which is appended to our testimony for the record) provides great detail on the situation as it stood in February of this year. The following discusses how addressing the five key areas of change noted above can secure positive commercial gains for the creative industries, and raises some additional WTO concerns in China's laws.

### ***1. Following Through on China's JCCT and S&ED Commitments***

The U.S.-China Joint Commission on Commerce and Trade (JCCT) and U.S.-China Strategic and Economic Dialogue (S&ED) have played an important role in securing commitments from China on issues of importance to IIPA members. Addressing the issues discussed below will ensure that right holders can operate in China on a more level playing field with Chinese counterparts and would bring significant commercial benefits to affected U.S. companies trying to do business in China.

#### ***Government and SOE Software Legalization***

The Chinese Government has issued a number of directives to legalize software at all levels of government (central, provincial, municipal, local). These efforts have resulted in some U.S. software companies experiencing an incremental or modest increase in sales to the Chinese Government, while others have made no meaningful progress. Overall, U.S. software sales to the Chinese Government lag far behind what would be expected if the government had implemented a comprehensive legalization program for agencies at all levels. The Chinese Government has not launched any comparable legalization efforts for the much larger and commercially important state-owned enterprise (SOE) sector. In the 2012 JCCT, the Chinese Government confirmed that SOEs under the authority of the China Banking Regulatory Commission and the State-Owned Assets Supervision and Administration Commission of the State Council are required to purchase and use legitimate software, but provided no details on a process to ensure this. In the 2013 S&ED, China further committed to promote the use of legal software by SOEs by strengthening supervision of central SOEs and large state-owned financial institutions through establishing software asset management systems (SAM), enforcing China's requirement to purchase and use legitimate software by SOEs, providing budget guarantees for software and promoting centralized procurement.

As such, the Chinese Government should follow through on commitments to ensure legal software use by government agencies and SOEs by implementing transparent, verifiable and comprehensive software legalization programs at all levels of government (central, provincial, municipal, and local) and for all SOEs. These should include providing sufficient budgets for



government purchases of legal software, targeting all categories of software (not just select ones) for legalization and instituting a process for government agencies and SOEs to implement SAM best practices to ensure compliance. 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.

### ***Full Implementation of Judicial Interpretation to Significantly Reduce Incidents of Internet Infringements***

On November 26, 2012, the Supreme People's Court (SPC) issued long-awaited *Judicial Rules on Several Issues concerning the application of Law in Hearing Civil Dispute Cases Involving Infringement of the Right to Network Dissemination of Information* (Internet JIs), which went into force January 1, 2013. The Internet JIs aim to improve the existing legal framework on the protection of online (information network) dissemination rights provided for in the Copyright law and in State Council regulations. The Internet JIs provide relatively clear guidance for courts as to how to deal with ISP liability issues in civil cases (and replace the Regulations on the Protection of the Right of Communication through Information Networks in effect since July 1, 2006).

The Chinese Government should now fully implement the Internet JIs to significantly reduce incidents of Internet infringements, including by holding liable businesses that promote online infringement and sites that do not expeditiously remove or deal with infringing materials made available through the sites. A new campaign, imposing maximum administrative penalties on Internet infringers to clamp down on Internet piracy (drawing on a 2009 JCCT commitment) would be instrumental (including daily fines for failure to remove infringing materials). In particular, China should commit to increase actions by SARFT, the General Administration on Press and Publication (GAPP), the Ministry of Culture (MOC), and the Ministry of Industry and Information Technology (MIIT) to revoke business licenses and halt online services by enterprises that deal in/provide access to infringing materials, and shut down websites that engage in such activities.

### ***Addressing Unauthorized Copying and Distribution of Journals***

China must follow through with JCCT commitments to resolve the longstanding complaint regarding entities engaged in unauthorized copying and distribution of academic, scientific, technical and medical journals. An investigation remains ongoing into a major online service facilitating online infringement of academic journals, but there remains no framework under which libraries will be subject to review for compliance with the requirements of a 2009 public "Notice" (conveying to state-run libraries the importance of strengthening protection of copyright-protected academic and medical journals). It is critical that previous commitments be adhered to, including but not limited to successfully concluding investigations into, and taking prompt action against, complaints by academic journal publishers about web-based enterprises' piracy of library academic journals, and confirming liability for "those who facilitate online



infringement.” The U.S. should also seek commitments to make libraries subject to review for compliance with the requirements of the 2009 Notice.

***Make State Council Leadership Structure for Enforcement More Effective, Increase Government Resources, and Permit Staffing Increases in Foreign Right Holder Organizations***

China has established a Vice Premier-led State Council-level leadership structure, to lead and coordinate intellectual property rights (IPR) enforcement across China. This leadership structure should be employed to follow through on commitments to enhance crackdowns on IPR infringements, including by increasing available resources to National Copyright Administration of China (NCAC), holding local provincial governments accountable,<sup>2</sup> and effectively and measurably reducing piracy levels both in the physical and online environments, including Internet and mobile piracy and enterprise end-user piracy of business software. An important measure of continued success in enforcement by the Chinese Government should include establishment of a central authority responsible for compiling statistics of ongoing and completed civil, administrative, or criminal enforcement actions and cases involving copyright infringement, and providing those statistics to the U.S. Government and affected stakeholders.

In addition, it has been well documented for many years that NCAC, local copyright administrations and Law and Cultural Enforcement Administrations (LCEAs) have been under-resourced. A simple comparison of human resources at SAIC and local AICs demonstrates the gap in coverage for copyright enforcement in China. The Chinese Government should be urged to commit to expand resources at the NCAC, local Copyright Administrations, and LCEAs, commensurate with the scale of the piracy problem. Along with inadequate resources within Chinese Government agencies responsible for enforcement of copyright, for many years, foreign copyright associations have been prohibited from properly staffing their offices in order to assist authorities in combating copyright infringements in China. The Chinese Government should be urged to allow foreign right holder associations to increase staff and conduct anti-piracy investigations.

**2. *Enact Modern Copyright Law (and Related Measures) to Strengthen Protection and Remedies Against All Forms of Infringement***

The Chinese Government has taken some significant steps in the past year toward establishing a strong WTO-consistent legal framework for the protection of copyright, particularly to address rampant online infringements. For example and as noted, on November 26, 2012, the Supreme People's Court (SPC) issued long-awaited Internet JIs. The Chinese Government is also currently in the process of revising its Copyright Law, Criminal Code, and

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<sup>2</sup> On November 9, 2010, the State Council issued *Opinions of the State Council on Strengthening the Building of a Government Ruled by Law*. The State Council then announced that it would implement mechanisms, including transparent performance indicators, to hold local government officials responsible for effectively enforcing IP violations.



related laws. IIPA has provided its views in these processes, which provide important opportunities to update the legal regime in China for more effective copyright protection and enforcement.

The draft overhaul of the Copyright Law has gone through several iterations and now reportedly sits with the State Council Legislative Affairs Office. The current draft, while differing in certain respects from the JIs discussed above, establishes a framework for cooperation to remove online infringements, specifically, by adopting principles of potential joint liability of service providers that knowingly and actively encourage infringement, including the creation of aiding and abetting-type liability for services that abet or instigate infringements (including non-hosted infringements) of third parties. In so doing, the law may make it possible to efficiently remove infringing materials from the Internet as well as halt people from engaging in massive infringements, but much would depend on the implementation of these measures.

Other important topics taken up in the draft Copyright Law revision include coverage of reproductions in the online environment, the communication to the public right (including an interactive making available right as contemplated under the WIPO “Internet” Treaties, the WCT and WPPT), technological protection measures (TPMs), rights in broadcasts, computer program protection provisions, remedy provisions, statutory/compulsory license provisions, collective management, and exceptions. Some of the current proposed provisions need to be carefully considered and revised before enactment to avoid conflicts with China’s WTO obligations or charting a path that is inconsistent with current international practice or veers from common commercial practices.<sup>3</sup> IIPA has identified some significant issues with the current proposed changes in previous filings and submissions. Included in those are: a) clarifying that enterprise

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<sup>3</sup> As an example of proposed measures which would interfere with current commercial practices, the collective management provisions of the latest Draft Copyright Law we have reviewed remain concerning, in that they appear to exert state control over collective management. They appear to provide that the state administration shall determine the “scope of business” of CMOs in China, a troubling sign of exertion of state control. There is also the concern that the latest draft would allow CMOs to assert the authority to manage rights for entities on a non-voluntary basis. In this regard, it should be noted that extended collective licensing has been adopted only in a limited number of jurisdictions (and where there is a strong tradition of collective management) and under limited circumstances. The language in the current draft is dangerously vague with respect to the circumstances under which collective licensing organizations may represent the interests of right holders at a nationwide level. It states that a collective licensing organization may represent right holders in general “[w]here collective copyright management organizations obtain authorization from right holders and can represent the interests of right holders at a nationwide level.” It does not state how many right holders must authorize it or provide any criteria for determining whether a particular organization “can represent the interests of right holders at a nationwide level.” The requirement should be that a majority of right holders have authorized the organization to represent them. In addition, the latest draft refers to “the entire body of rights owners,” particularly troubling given the expansion of this language from broadcasting to all public dissemination of audiovisual works in that same Article. While the draft provides right owners with the possibility of rejecting the collective management in writing, this presumption should essentially be reversed by requiring right holders to opt in rather than opt out. The latest draft also remains concerning since it appears to mandate a joint “unified standard of royalty fee.” CMOs acting on behalf of different categories of right holders should remain free to collect their remuneration separately; the draft creates a default presumption that the “unified standard of royalty fee” will be collected by a joint CMO, which is not in line with current best practice.



end user software piracy is subject to criminal penalties;<sup>4</sup> b) strengthening rules related to evidence preservation orders;<sup>5</sup> c) increasing statutory damages for copyright infringement;<sup>6</sup> and d) providing for criminal liability for other key copyright offenses, including hard disk loading of unlicensed software or other copyright materials;<sup>7</sup> Internet piracy including the communication to the public or the making available of any work/related right; and circumvention of technological protection measures, trafficking in circumvention technologies, and providing circumvention services.

Several other issues should be addressed when engaging in copyright reform that would significantly improve available protection and enforcement in China. One would be to lift the jurisdictional bar limiting foreign right holders from commencing a private “civil claim” against those being prosecuted for copyright crimes in local district courts. In the 51wma.com case, for example, despite the fact that the prosecutor initially invited sound recordings right holders to commence “incidental civil claims” against the defendant (the operator of an illegal music

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<sup>4</sup> A significant hurdle to effectively dealing with enterprise end-user piracy in China remains the lack of clarity with respect to criminalization of this form of piracy. While the SPC indicated in a 2007 Judicial Interpretation (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. The Chinese Government should take the necessary steps to clearly criminalize enterprise end-user piracy, through amending the Criminal Code and Copyright Law and issuance of a new judicial interpretation by the SPC and the Supreme People’s Procuratorate (SPP). One hurdle to bringing criminal end-user cases has been Chinese authorities’ narrow interpretation of the “for-profit” requirement in Article 217. 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 by 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.” The latest draft Copyright Law dealing with end-user software infringement remains objectionable in that it creates a general limitation on liability for end-user software infringement unless the user “knows” or “should know” the “duplicate copy is an infringing copy.” The provision should be converted into a workable solution against the severe problem of unauthorized uses of computer programs, including by 1) confirming liability for the possessor, including a legal entity, of unauthorized computer programs, 2) confirming liability for the unauthorized use of computer programs, and 3) confirming that end-user piracy of software is subject to criminal penalties (and making corresponding amendments to the Criminal Code and the Copyright Law and case referral rules for the Ministry of Public Security and Supreme People’s Procuratorate as needed).

<sup>5</sup> We remain concerned that the latest drafts dealing with preservation orders, including the possibility of *ex parte* civil searches (which has been relegated to a single provision in the latest draft) do not on their face meet the TRIPS Article 50 obligations, and wish to ensure, for example, that: preservation orders would issue within 48 hours of receipt of the application; written decisions regarding applications be provided, and an opportunity to appeal a written decision be afforded.

<sup>6</sup> The draft Copyright Law should be revised to provide a minimum of 10,000 RMB per work in the statutory damages section. While the maximum administrative penalties have been increased, a minimum daily administrative fine could also be extremely effective in the context of combating Internet infringements in China.

<sup>7</sup> Regarding “hard-disk loading” the Chinese Government should clarify criminal liability and carry out deterrent enforcement efforts including criminal cases. Unfortunately, there have been very few criminal prosecutions for this form of piracy, penalties awarded vary dramatically in different localities, and some refuse to apply “sampling” during the examination of computers in order to assess damages or penalties. At least three cases were, as of early 2013, reportedly in the preliminary investigation phase by different local Public Security Bureaus (PSBs).



website) in the local district court, the Jiangsu Higher People's Court and the Suzhou Intermediate Court advised that jurisdiction to hear the civil claim rests with the Suzhou Intermediate Court because foreign right holders were involved. It appears from this that foreign right holders cannot commence "incidental civil actions" (running together with the criminal proceedings) against a defendant at the local court level in practice. The law should be amended to cease such an apparent discriminatory practice and should allow foreign right holders to commence "incidental civil claims" against copyright offenders at the local level court.

The Chinese Government should also be urged to make it a violation of law to use, or attempt to use, an audiovisual recording device to make or transmit a copy of a cinematographic work or other audiovisual work, or any part thereof, from a performance of such work in an exhibition facility. Anyone committing this act should be subject to civil, administrative, and criminal remedies. Barring this, NCAC should coordinate with State Administration of Radio, Film, and Television (SARFT) or through the State Council to ensure that the China Film Industry Promotion Act is amended to prohibit unlawful camcording. There is evidence that such a statute is needed in China. The number of forensic matches from illegal camcords of Motion Picture Association of America (MPAA) companies' major motion pictures traced to Chinese theaters increased to ten in 2012 (up from nine in 2011). Camcording piracy is a source of pirate films on major Chinese UGC sites and provides source material for infringing DVD masters. Legal reform is needed, since the first camcording case in China (in November 2008), involving a Chinese film, resulted in the three suspects being released by the police. In addition, SARFT should implement watermarking in theatrical prints and ensure that the Chinese Government, China Film Group, and those involved in the value chain for theatrical distribution step up efforts to deter illegal camcording.

### ***3. Meaningfully Implementing the WTO Cases Brought Against China***

The dominance of piracy and market access barriers (which are well documented in detail in previous IIPA submissions), led most creative industries to conclude in 2007 that the best alternative to seek redress was through the WTO dispute settlement process. As a result, two WTO cases were launched, one focused on IPR inadequacies, and one focused on deficiencies in China's compliance with its WTO commitments on market access for published materials and audio and audiovisual entertainment products. In 2009, both cases concluded, with a WTO dispute settlement Panel rendering its decision in the IPR case in January 2009, and with the WTO Appellate Body rendering its decision in the market access case in December 2009. In both cases, the U.S. largely prevailed, but evaluation of success will be based on the details of implementation.

#### ***IPR Case***

In the IPR case (DS 362), the WTO Panel set out a comprehensive market-based test for what constitutes "piracy on a commercial scale" which must be subject to criminal penalties under TRIPS. China must be fully subjected to this market-based test, which we believe continues to require China to examine and lower its current thresholds for criminal liability, in





order to criminalize all “copyright piracy on a commercial scale” as required by TRIPS Article 61.<sup>8</sup>

### *Market Access Case*

In the landmark market access case (DS 363),<sup>9</sup> the United States prevailed on many claims against China’s regime restricting the importation (trading rights) and distribution of publications, sound recordings, audiovisual home entertainment, and films for theatrical release. As a result of the case, China must:

- 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 books and periodicals, electronic publications, audiovisual materials and sound recordings, including through sound recording distribution services and electronic distribution products in China.<sup>10</sup>
- discard discriminatory commercial hurdles for imported reading materials, sound recordings intended for electronic distribution, and films for theatrical release.<sup>11</sup>

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<sup>8</sup> The U.S. challenged two other measures and prevailed on both claims. The U.S. challenged China’s copyright law which denied copyright protection for content deemed objectionable by the government and which was prohibited from being distributed within China. The Panel ruled this measure, codified in old Article 4 of China’s Copyright Act, to be inconsistent with China’s WTO obligations. The Panel decision made clear that China must protect all works regardless of content including, in particular, works which are pending censorship review and which were banned from distribution pending conclusion of such review. The U.S. finally challenged several of China’s Customs rules for releasing into the marketplace counterfeit goods once the infringing mark has been removed. The Panel found this default rule to be inconsistent with Articles 46 and 59 of the TRIPS Agreement. China implemented the Panel finding related to Article 4 by amending its Copyright Law in March 2010, and implemented the Panel finding related to the Customs rules by amending its Customs Regulations in April 2010.

<sup>9</sup> *China – Measures Affecting Trading Rights And Distribution Services For Certain Publications And Audiovisual Entertainment Products*, WT/DS363/AB/R, December 21, 2009. The U.S. Government requested consultations in this case on April 10, 2007, supported by the China Copyright Alliance (a coalition consisting of MPAA, IFTA, RIAA/IFPI, AAP, and others).

<sup>10</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>11</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. China may also not prohibit foreign-invested enterprises from engaging in the distribution of imported reading materials.



In December 2011, China's National Development and Reform Commission (NDRC) and Ministry of Commerce (MOC) jointly issued a newly revised version of its Foreign Investment Industries Guidance Catalogue. The Catalogue went into effect on January 30, 2012. As a result, at least on the books, importation of "books, newspapers and periodicals," as well as "audio-visual products," "electronic publications," and online music, have been moved off of the "prohibited" investment list (although audio-visual products remain on the "restricted" list).

It is well past the time for the market access decision to be meaningfully implemented, in order to provide the publishing, audiovisual, music, and other industries with access to the Chinese markets for their goods and services. Specifically, the March 19, 2011 deadline for full implementation has now long passed. IIPA views it as a critical part of this docket for the U.S. Government to take a proactive approach with respect to Chinese Government implementation of its commitments. In this WTO review, IIPA urges the U.S. Government to ascertain what steps the Chinese Government has taken to ease other WTO-incompatible restrictions and take other market-opening steps. There remain many technical violations of WTO rules along the lines of the Appellate Body Report.<sup>12</sup> Commercially meaningful implementation would also include addressing discriminatory online music censorship, and continuing implementation of the U.S.-China Film Agreement.

***Discriminatory Censorship Practice With Respect to Sound Recordings (and AV Works)***

For several years, IIPA has complained that U.S. (and other foreign) right holders in music have to go through an onerous and discriminatory censorship review process from Chinese right holders with respect to online music. While the WTO Panel and Appellate Body, in a technical finding, concluded that they lacked sufficient information to determine whether this discriminatory censorship regime with respect to online music violated China's General Agreement on Trade in Services (GATS) commitments, this was not a "green light" for the Chinese Government to continue its discriminatory censorship practices. China's discriminatory regime is unfair and highly suspect under WTO rules. Promulgation of the September 2009 *Circular on Strengthening and Improving Online Music Content Examination* only exacerbated and complicated the issue by putting into place a censorship review process premised on an architecture ruled to be in violation of China's GATS commitments, namely, that only wholly-owned Chinese digital distribution enterprises may apply for censorship approval. The *Circular* violates China's WTO commitments under GATS to provide nondiscriminatory market access for foreign suppliers of sound recording distribution services; it violates China's commitments on trade in goods under the General Agreement on Tariffs and Trade 1994 (GATT); and it violates China's Accession Protocol commitment to authorize trade in goods by any entity or individual. China must revoke or modify the Circular to avoid making the country subject to an immediate challenge at the WTO. A set of amended Measures on the Administration of Importation of AV Products (2011) introduced a new definition for the term "publication of audio-video product" to include "dissemination via Information Network." As a result, the

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<sup>12</sup> IIPA has highlighted these many commitments in previous submissions in this docket and in other contexts.



Measures impose an additional, duplicative, and possibly confusing layer of censorship on online music.

***China-U.S. Film Agreement, Remaining Restrictions on Importation of Film Prints, and Problematic “Blackouts” on U.S. Film Releases and Restrictive Release Patterns***

In February 2012, and as part of the meaningful implementation of the WTO market access case, the United States and China reached an historic deal, in which the Chinese agreed *inter alia* to: 1) permit the importation by SOEs and the theatrical distribution of at least 34 foreign films into China annually on a revenue-sharing basis (up from 20 films), with the 14 additional films initially entering China in “enhanced formats” such as 3D or IMAX; 2) for these 34 films only, increase the percentage of revenue shared with the foreign producer to 25%; 3) actively promote and license Chinese companies to engage in national theatrical distribution providing competition in the market; 4) increase transparency to the administration of its content review process; and 5) observe commercial terms, consistent with the terms prevailing in comparable markets, in any contract for the distribution of “films other than revenue sharing films.” It is important to note that, each year, there are as many or more films licensed theatrically in China on a non-revenue sharing model, than films that are theatrically distributed under the limited quota for revenue sharing.

It is critical that the United States maintain pressure on China to implement the U.S.-China Film Agreement fully, including those elements designed to introduce broader competition and transparency into the Chinese marketplace, rather than allowing China to concentrate only on the superficial increases to the revenue sharing quota. Specifically, the U.S. Government must continue to seek the active promotion and approval of Chinese companies to engage in national distribution of theatrical films, transparency in the censorship process, elimination of the special periods of protection for domestic films, so as to permit foreign films to be released and scheduled (permitting both the Chinese distributor and the producer to achieve maximum commercial benefits) and to ensure that other actions taken by the Chinese Government and SOEs (formal or otherwise) do not have a discriminatory impact on foreign producers.

Problems emerged in 2012 and into 2013, stemming mainly from measures purportedly aimed at protecting China’s domestic industry share of the film market. Chiefly among them were two unpredicted month long periods during which no foreign films were scheduled for release (so called “blackouts”) and simultaneous release dates imposed upon U.S. films. In addition, the Chinese Government often announces release dates with only a few weeks’ notice, and even so, such dates are routinely moved, perhaps multiple times. Recently, there was also major confusion on whether the non-Chinese producer’s share of film revenue was subject to a newly levied national value-added tax in China. However, the language of the U.S.-China Film Agreement clearly states that, “the Chinese state enterprise shall be responsible for the payment of all taxes, duties and expenses.” While these serious issues appear to be resolved for the moment, the Chinese Government must not permit discriminatory practices to reemerge. The U.S. and China have agreed to consult and review the Agreement after five years to ensure it is working as envisioned. If necessary, the United States can return to the WTO to seek relief.



#### ***4. Addressing Other Market Access Barriers and Discriminatory Industrial Policies, Including Indigenous Innovation***

The Chinese Government must address other market access barriers and industrial policies, including indigenous innovation policies, that impose discriminatory requirements on foreign right holders and/or deny them the exercise of their IP rights, and must not erect or retain barriers to entry such as outright bans on products or services or other onerous requirements that shut out foreign right holders from the Chinese market.

##### ***Indigenous Innovation, Strategic Emerging Industries, and Multi Level Protection Scheme***

Over the past several years, China has rolled 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 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.

For example, in 2012, the Chinese Government announced they would be investing US\$1.7 trillion over the next five years in designated “Strategic Emerging Industries” (SEIs). This initiative, on top of a SPC Opinion on IP released in mid-December 2011 which seems to instruct lower courts to make decisions that assist domestic “cultural” industries, raised the specter of discriminatory policies. China had, in 2011, committed to the U.S. to eliminate catalogues or other measures by provincial and municipal governments and autonomous regions linking innovation policies to government procurement preferences. This follows Chinese commitments made in prior years to “delink” innovation policies from government procurement. At the 2012 S&ED, China made a broader commitment to treat IPR owned or developed in other countries on the same basis as IPR owned or developed in China. These commitments must be fully satisfied to give copyright industries fair access to China’s vast procurement market.

##### ***Software Procurement***

The software industry remains concerned that China’s efforts to legalize software use in government agencies and SOEs may be accompanied by mandates or preferences favoring the acquisition of Chinese software over non-Chinese software. This is inconsistent both with China’s efforts to join the WTO’s Government Procurement Agreement (to date, China has not made an acceptable offer to join the GPA) and with China’s commitment in its WTO working party report that the government “would not influence, directly or indirectly, commercial decisions on the part of state-owned or state-invested enterprises, including the quantity, value or country of origin of any goods purchased or sold . . . .” The Chinese Government should, consistent with its WTO obligations (and JCCT and S&ED commitments), refrain from instructing or encouraging government agencies or SOEs to implement preferences for Chinese software in carrying out its legalization efforts, and should communicate this policy to relevant



government agencies at the central, provincial and local levels. The Chinese Government should also enhance its past offer to join the GPA so that it provides significant protection against procurement discrimination.

In May 2013, China's Ministry of Finance issued new rules on software procurement, the "Notice on Generic Software Assets Allocation Standards in Government Agencies," that impose price caps and preferred licensing terms on procurement of software that appear aimed at discriminating against the purchase of foreign brands. Moreover, the directive focuses on the procurement of only certain types of software – operating systems, office productivity software, and anti-virus software – suggesting that procurement may not be authorized or, at a minimum, that budget will not be made available for other types of software. This directive does not comport with best practices for software procurement, does not adequately take into account the speed with which software products and services are developing and appears to put in place de facto preferences for procuring domestic software products and services that are not in keeping with China's commitments in bilateral negotiations with the United States.

#### ***Local IP Ownership Requirements for Information Security Products Including Software***

China's "Multi Level Protection Scheme" (MLPS) imposes significant restrictions on procurement of information security products for an overly broad range of information systems the government considers sensitive. Among other requirements, procurements of such products are limited to those with IP rights owned in China. This applies to procurements by the Chinese Government and increasingly to procurements by SOEs and others in the public sector. This results in an undue and discriminatory market access restriction for foreign information security products and will in many cases prevent information systems in China from procuring the most effective security tools to meet their needs. We welcome the commitment made by China in the 2012 JCCT that it will review and revise the MLPS rules through a process that will seek the views of all parties, including through dialogue with U.S. parties, and urge that China use this process to remove requirements that discriminate against products that are foreign-owned or have foreign-owned IP.

#### ***Delays in Content Review of Entertainment Software Products and the Console Ban***

The entertainment software industry continues to face lengthy delays of weeks or sometimes even months in the GAPP censorship approval process, wiping out the already-short window for legitimate distribution of entertainment software products. The Chinese Government also fails to immediately seize infringing copies of titles intended for release while they are still undergoing censorship review, resulting in inadequate protection and enforcement. In addition, an onerous ban on the sale and importation of videogame consoles remains a major barrier. The current ban on the 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 and denies Chinese consumers the benefits of these technologies, including use of parental controls. The ban has



also been extended 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.

### ***TRIPS/Berne Obligation to Pay for Broadcasts of Musical Compositions***

China has long been in violation of its TRIPS and Berne Convention obligations to compensate copyright owners for the broadcast of musical compositions.<sup>13</sup> In late 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* were intended to correct the 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>14</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.

In the 2011 JCCT, the Chinese Government agreed to "hold government/industry roundtables in China to discuss online copyright protection and enforcement, including library copyright protection," and agreed that an exchange will also be set up to deal with issues related to music "broadcast tariff rates" in China.<sup>15</sup> Very little progress has been made to date with this commitment. To our knowledge, no meeting has occurred between stakeholders, including MCSC and U.S. right holders, with the support of the U.S. and Chinese Governments. The U.S. should commence bilateral consultations into the non-payment of royalties for broadcasts of works from the period 2001-2009, and seek commitments to increase royalties in commercially relevant increments royalty payments to be made going forward.

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<sup>13</sup>The recording industry 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>14</sup>*On Screen Asia, China in Focus*, April 1, 2009, at <http://www.onscreenasia.com/article-4897-chinainfocus-onscreenasia.html>.

<sup>15</sup>See *21st U.S.-China Joint Commission on Commerce and Trade Fact Sheet*, December 2011, at <http://www.commerce.gov/node/12467>.



### ***Restriction on Licensees for Online Music Distribution***

The MOC *Circular on Strengthening and Improving Online Music Content Examination* dealing with online music contains a restriction on “exclusive licenses” of online music services. Currently, there are very few licensed services in China providing repertoire from non-local record companies. The Chinese government should commit to revise the Circular to allow record companies to more freely choose their licensees.

### ***Cloud Computing***

Cloud computing is quickly becoming a major way in which legitimate software products and services are utilized the world over. A U.S.-China Cloud Computing Seminar was held in April 2012 with participants from government and industry from both countries. This Seminar laid an important foundation for future discussions on cloud policy issues. We urge the governments to continue to build on the 2012 Seminar to address particular areas of policy concern, including licensing restrictions on foreign companies wishing to offer Internet-based services and the inclusion of cloud computing services in China's Telecom Services Catalogue.

## ***5. Criminal Penalties “To Be Applied” for Deterrent Enforcement***

The Chinese Government must send a strong message that piracy of all forms will not be tolerated by enforcing against key bad actors, including criminal enforcement to meet its TRIPS Article 61 requirements and drive down piracy levels. The WTO cases discussed above did not cover all the statutory TRIPS deficiencies that exist in the Chinese criminal enforcement system. For example, China's Criminal Law fails to subject to criminal liability the infringement of some exclusive rights<sup>16</sup> which constitute “copyright piracy on a commercial scale,” all arguably in violation of Articles 41 and 61 of the TRIPS Agreement. China has also never brought a criminal case against the unauthorized use (usually involving reproduction, distribution, or both) of software in a business setting, so-called enterprise end-user piracy of software, even in egregious cases involving many computers being used in a commercial enterprise for business profits. In this regard, the Supreme People's Court and the Supreme People's Procuratorate (SPP) should issue a Judicial Interpretation clarifying that enterprise end-user piracy of software is subject to criminal penalties and make corresponding amendments to the Criminal Code and Copyright Law and case referral rules for the Ministry of Public Security and SPP as needed.<sup>17</sup>

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<sup>16</sup> For example, China fails to criminalize satellite, cable and broadcast piracy, bootlegging and a number of other acts of piracy when they are “on a commercial scale.”

<sup>17</sup> The 2011 Criminal Opinions, discussed below, appear to create an opening for the possibility that end-user piracy of software could be criminalized since Article 10 of the Opinions criminalizes infringements occurring with “[o]ther circumstances that make profits by taking advantage of others' works.” Enterprise end-user piracy of software is clearly a circumstance which results in increased profits for an enterprise by taking advantage of others' works, and thus it may be questioned whether end-user piracy is considered a crime under these Opinions.



### ***Reliance on Administrative Enforcement; Possible Strengthening of Such in the Internet Context***

Another serious problem in China is the failure to provide effective and deterrent enforcement required under Article 41 and 61 of TRIPS, although as noted, we are beginning to see some increasing criminal enforcement activity against notorious websites engaged in online infringement which is a positive sign. This reliance on administrative enforcement measures in the past was largely to blame for the failure of the criminal enforcement system to properly deter piracy. Administrative enforcement, without the risk of criminal prosecution, has little effect against commercial pirates that have no legitimate business enterprise nor any assets. In other cases, the Chinese Government has ironically failed to employ available administrative measures with respect to infringers for whom administrative measures might be effective. Administrative measures such as minimum and maximum daily fines should be employed. We urge the Chinese Government to develop a TRIPS compatible anti-piracy enforcement regime that employs both administrative and criminal measures where appropriate in order to create meaningful deterrence.

### ***Criminal Thresholds***

IIPA has long complained about the unreasonably high thresholds for criminal liability under the laws, ancillary regulations, and previous Judicial Interpretations. Unfortunately, the thresholds remain too high to criminalize all piracy on a commercial scale as required by the TRIPS Agreement, and in practice, the thresholds are not being followed consistently by Chinese government authorities. As a case in point, many law enforcement agencies in China fail to follow the “500 copy” threshold (as set forth in the April 2007 SPC/Supreme People’s Procuratorate II) to prosecute infringing shop owners. However, according to some in the industry, this is slowly improving and now the Chaoyang District of Beijing, along with several other judiciary districts in China are more regularly prosecuting illegal optical disc vendors according to the threshold.

Unfortunately, other provinces and districts are not following the threshold. The January 2011 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 (Criminal IP Opinions) appear to set out some important elements for Internet and related criminal cases and help clarify and address other ongoing issues related to criminal liability in China. The Opinions 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.

The Criminal IP Opinions provide several criteria upon which the threshold for criminal liability can be met, including “disseminating over 500 copies of third parties’ works (the ‘aggregate quantity of others’ works being transmitted is more than 500 pieces’); “disseminating third parties’ works with the actual number of clicks amounting to over 50,000





(‘[w]here others’ works being transmitted has been actually clicked for more than 50,000 times’); and “disseminating third parties’ works in a membership system with the number of members amounting to over 1,000.”

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 of 25,000 downloads, for criminal liability, or as another example, in the case of a membership site, proof of 500 members combined with proof of dissemination of “250 copies.” The Copyright Law amendment should specify that “copy” includes a download, so that the Opinions do not become an impediment for right holders in bringing criminal cases against copyright violators on the Internet. In addition, the decision as to whether the threshold is met should be vested with the Procuratorate, rather than with the MPS or PSB, since reports indicate MPS and PSB have refused to accept cases on the basis of onerous evidentiary requirements. MPS and PSB do appear, however, to be investigating the illegal gains of website operators and collecting evidence directly from advertising platforms and agencies, which is a positive sign.

#### ***Establish Voluntary Government-Backed Online Copyright Bulletin Boards***

As a related matter, we believe the Chinese Government should enhance “pre-release” administrative enforcement for motion pictures, sound recordings, and other works, e.g., by establishing voluntary government-backed online copyright bulletin boards. This would effectively help address “pre-release” piracy by which pirates take advantage of right holders by beating the release date of the legitimate product, which as mentioned, could be held up due to delays (sometimes discriminatory censorship delays).

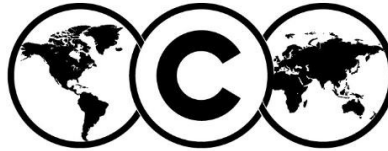
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Thank you for the opportunity to share the copyright industries’ experiences in China. I would be pleased to answer any questions you may have.

\*\*\*\*\*

IIPA comments on the 2013 annual review of country eligibility  
for benefits under the African Growth and Opportunity Act  
(AGOA)

# INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE®



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October 25, 2013

## **VIA REGULATIONS.GOV (Docket No. USTR–2013–0035)**

Constance Hamilton  
Deputy Assistant U.S. Trade Representative for Africa  
Office of the U.S. Trade Representative  
600 17th Street, NW  
Washington, DC 20508

**Re: Public Comments on Annual Review of Country Eligibility for Benefits Under the African Growth and Opportunity Act in 2014, 78 Fed. Reg. 60367 (October 1, 2013)**

To the Trade Policy Staff Committee:

The International Intellectual Property Alliance (IIPA) submits these comments in response to the October 1, 2013 request for public comments circulated by the African Growth and Opportunity Act (AGOA) Implementation Subcommittee of the Trade Policy Staff Committee, chaired by the U.S. Trade Representative, in connection with the review of the eligibility of sub-Saharan African countries to receive AGOA benefits.

### **A. Description of the IIPA and its Members**

The IIPA is a coalition of seven trade associations representing copyright-based industries in bilateral and multilateral efforts working to improve international protection of copyrighted materials and address market access barriers for the creative industries we represent.<sup>1</sup> IIPA's seven member associations represent over 3,200 companies producing and distributing materials protected by copyright laws throughout the world—all types of computer software, including business applications software and entertainment software (such as videogame discs and cartridges, personal computer CD-ROMs, and multimedia products); theatrical films, television programs, DVDs and home video and digital representations of audiovisual works; music, records, CDs, and audiocassettes; and textbooks, trade books, reference and professional publications and journals (in both electronic and print media).

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<sup>1</sup> IIPA's seven member associations are: the Association of American Publishers (AAP), BSA | The Software Alliance (BSA), the Entertainment Software Association (ESA), the Independent Film & Television Alliance (IFTA), the Motion Picture Association of America (MPAA), the National Music Publishers' Association (NMPA) and the Recording Industry Association of America (RIAA).

The U.S. copyright-based industries are one of the fastest-growing and most dynamic sectors of the U.S. economy. Inexpensive and accessible reproduction technologies, and the massive growth of the Internet, however, make it easy for copyrighted materials to be pirated in other countries. IIPA strives in foreign countries for the establishment of copyright law and enforcement that deter piracy. Such regimes create a framework for trade in IIPA members' creative products, foster technological and cultural development, and encourage investment and employment in the creative industries.

## **B. AGOA and the Protection and Enforcement of Intellectual Property Rights**

The IIPA continues to look to the AGOA as an important opportunity for U.S. trade interests to partner in the growth of new and growing foreign markets, including in the copyright sector, as AGOA-eligible beneficiary countries gain access to the U.S. market. As an economy develops, it should look to intellectual property law and enforcement mechanisms that can incentivize its own creative industries and foster economic growth and stability. The U.S. Government's AGOA review is one of only few regularly occurring opportunities to examine intellectual property protection and enforcement in AGOA-eligible countries and to provide guidance to make those mechanisms more effective.

As the experience of the copyright industries has shown, where young markets fail to take steps toward protection and enforcement, piracy can take hold regardless of a country's size or capacity and cause damage on a global scale. Governments should take note that as economies expand into new platforms, so must the scope of the rule of law. For many regions of the developing world, including Africa, this has implicated a need for laws and enforcement measures to address illegal activities that take place over broadband Internet access and, increasingly, mobile devices. Mobile devices have brought incredible economic opportunity for individuals and legitimate businesses in sub-Saharan Africa, reaching an estimated 545 million subscriptions on the continent in 2013 (more than 63 subscriptions per 100 inhabitants), according to the UN's International Telecommunication Union (ITU).<sup>2</sup> In 2012, the ITU reports that there were about 100 mobile phone subscriptions per 100 inhabitants in Ghana, over 71 subscriptions per 100 inhabitants in Kenya, over 67 subscriptions per 100 inhabitants in Nigeria, over 87 subscriptions per 100 inhabitants in Senegal, and 134 subscriptions per 100 inhabitants in South Africa. This impressive technological growth, unfortunately, is accompanied by illegitimate activities that could hamper legitimate economic growth if unchecked.

For these reasons, it is crucial that countries demonstrate some measure of progress toward adequate and effective protection of intellectual property, as a key element to AGOA eligibility. We urge the Administration to continue to examine copyright laws and enforcement practices under the intellectual property rights (IPR) eligibility criteria of AGOA with a view toward positive growth in the economic futures of AGOA-eligible countries. Under section 104 of the AGOA Act, the President may designate a country as eligible for AGOA benefits if, among other criteria, it "has established, or is making continual progress toward establishing ... [t]he elimination of barriers to United States trade and investment, including by ... the protection

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<sup>2</sup> See <http://www.itu.int/en/ITU-D/Statistics/Pages/stat/default.aspx>.

of intellectual property.” 19 USC 3703(a)(1)(C)(ii). Under the GSP program, section 502(c)(5) of the 1974 Act provides that the President “shall take into account” in “determining whether to designate” a country under GSP, “the extent to which such country is providing adequate and effective protection of intellectual property rights.” 19 USC 2462(c)(5). In exchange for the trade benefits these programs offer, such key intellectual property rights provisions ensure that countries with adequate capacity have established the necessary laws and enforcement measures to protect copyright works, and that countries with lesser capacity make continual progress toward establishing such laws and measures.

As IIPA has explained in previous AGOA-related filings,<sup>3</sup> just what amounts to “adequate and effective” protection of intellectual property rights is a flexible measure that changes over time. The requirements of the WTO Agreement on Trade-related Aspects of Intellectual Property Rights (TRIPS Agreement), including regarding copyright protection and enforcement, are key considerations in this determination. Today, in the face of challenges such as optical media piracy, piracy that occurs over the Internet and mobile networks, and unauthorized uses of copyright works by businesses, the two “Internet” treaties of the World Intellectual Property Organization (WIPO) – the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT) – contemplate many of the needed legal changes. These treaties provide essential legal frameworks for the continued growth of e-commerce in coming years by ensuring that valuable content is protected from piracy on the Internet.

### **C. Request for Review of Conditions in Sub-Saharan Africa**

The IIPA requests that the Administration continue to assess the progress of AGOA-eligible governments in legislative measures and in the enforcement of copyright, and to identify those countries that could benefit from U.S. assistance in capacity building to meet the requirement to provide “adequate and effective” protection of intellectual property rights (IPR). Such an exercise would further benefit both AGOA-eligible nationals and U.S. companies seeking to do business in those nations by creating better conditions for creators, thereby encouraging economic development, cultural diversity and the rule of law.

Cable piracy in AGOA-eligible countries is an ongoing concern in 2013. The transition from analog to digital signals has resulted in a notable decline in some incidents of piracy in the region; still, older and easier-to-pirate technology is still widely used in many Francophone countries, making platform operators in those countries more susceptible to incidents of piracy. Incidents of cable piracy have also been reported in **Ghana, Kenya, Nigeria, and Tanzania** in the past year. Efforts are in place to legitimize local operators so as to limit the inclination to engage in piracy of popular channels. In one example, the MPAA reports that in January 2013, it learned that a cable operator known as Coconut Digital TV in Tanzania was pirating two major cable channels; local affiliates have sought the intervention of the Tanzania Communications Regulatory Authority.

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<sup>3</sup> See, for example, IIPA’s 2009 Public Comments in the Annual Review of AGOA Country Eligibility, available at <http://www.iipa.com/agoa.html>.

Widespread copyright piracy remains a very serious problem among all African countries. As a result, it may be the case that many copyright-based sectors and companies are still reluctant to invest in these smaller markets where piracy is, in effect, uncontrollable. As AGOA-eligible countries consider reforms to their copyright systems, they should be encouraged to work with stakeholders and the U.S. Government, while considering the requirement to provide adequate and effective protection of IPR under AGOA. Some recent developments include:

- The **Nigerian** Copyright Commission is currently undertaking an effort to review the country's copyright law. This effort was sparked in part by the recognition that Nigeria's domestic copyright industries are generating levels of revenue that are extremely low in light of the high levels of consumer demand for Nigerian cultural products, such as Nollywood motion pictures.<sup>4</sup>
- **South Africa** recently sought comments on a draft Intellectual Property Strategy that includes recommendations regarding its copyright policy.<sup>5</sup> Notably, the recommendations discourage accession to the WIPO Copyright Treaty and appear to criticize U.S. and EU laws implementing that agreement, stating that the "DCMA [sic] and EU Directive restrict the number of downloads, whether for commercial or personal/research use." A broad exception to copyright that would allow unrestricted copying (such as downloads) of copyright works for "personal" use could result in severe harm to the legitimate online markets for both South African and foreign copyrighted works alike. Moreover, such an exception could bring the country out of compliance with its obligations under Article 13 of the TRIPS Agreement, which requires members to "confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder."

Several countries have either enacted legislation or are considering the implementation of the WIPO treaties. So far, nine countries in Africa (excluding North Africa) have deposited their instruments to join the WCT and the WPPT: Benin, Botswana, Burkina Faso, Gabon, Ghana, Guinea, Mali, Senegal and Togo. While Kenya, Namibia, Nigeria, and South Africa signed the WCT and WPPT between 1996 and 1997, these four important AGOA-eligible countries have yet to ratify or implement either of the treaties.

Again this year, we suggest that USTR incorporate as part of the annual review process a request that the eligible AGOA countries provide a brief update on the status of their current copyright legislation as well as their plans, if any, to amend their copyright legislation. Such information would be most useful at this stage of the review, before the final report is issued.

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<sup>4</sup> See <http://www.copyrightreform.org/reforms/economic-rationale.aspx>.

<sup>5</sup> See [http://www.greengazette.co.za/pages/national-gazette-36816-of-04-september-2013-vol-579\\_20130904-GGN-36816-003](http://www.greengazette.co.za/pages/national-gazette-36816-of-04-september-2013-vol-579_20130904-GGN-36816-003), pages 29-30.

## CONCLUSION

IIPA appreciates this opportunity to provide the TPSC and the AGOA Subcommittee with its views on the AGOA. It is essential that the annual AGOA review remain an opportunity to evaluate the progress of its beneficiaries toward meeting their intellectual property rights criteria. It is also essential to undertake reviews of the conditions in such countries to determine if capacity building assistance can make a difference. We look forward to working with you to foster improved copyright protection in sub-Saharan Africa as a region.

Respectfully submitted,



Amanda Wilson Denton

International Intellectual Property Alliance

IIPA comments regarding the 2013 Special 301 Out-Of-Cycle  
Review of Notorious Markets





October 25, 2013

**Filed via [www.regulations.gov](http://www.regulations.gov), Docket No. USTR-2013-0030**

Stanford K. McCoy, Esq.

Assistant U.S. Trade Representative for Intellectual Property and Innovation

Office of the U.S. Trade Representative

Washington, DC 20508

Re: **IIPA Written Submission Re: 2013 Special 301 Out-of-Cycle Review of Notorious Markets: Request for Public Comments, 78 Fed. Reg. 57924 (September 20, 2013), 78 Fed. Reg. 60367 (October 1, 2013) (Extending Deadline)**

Dear Mr. McCoy:

In response to the September 20, 2013 Federal Register notice referenced above, the International Intellectual Property Alliance (IIPA)<sup>1</sup> provides the Special 301 Subcommittee with the following written comments to provide examples of Internet and physical “notorious markets” – those “where counterfeit trademark or pirated copyright products are prevalent to such a degree that the market exemplifies the problem of marketplaces that deal in infringing goods and help sustain global piracy and counterfeiting.” We hope our filing will assist the Office of the United States Trade Representative (USTR) in “identifying potential Internet and physical notorious markets that exist outside the United States and that may be included in the 2013 Notorious Markets List.”

We commend USTR for publishing a notorious markets list as an “Out of Cycle Review” separately from the annual Special 301 Report. This list has successfully identified key online and physical marketplaces that are involved in intellectual property rights infringements, and has led to positive developments, including closures of some Internet websites whose businesses were built on illegal conduct; greater cooperation from some previously identified “notorious” and other suspect sites; and the facilitation of licensing agreements for legitimate distribution of creative materials. Particularly noteworthy in the past year are the welcome news that **Xunlei’s GouGou** pirate search engine shut down over piracy concerns (**Xunlei** cancelled a planned IPO

<sup>1</sup> The IIPA is a private sector coalition, formed in 1984, of trade associations representing U.S. copyright-based industries in bilateral and multilateral efforts working to improve international protection and enforcement of copyrighted materials and open up foreign markets closed by piracy and other market access barriers. IIPA’s seven member associations represent over 3,200 U.S. companies producing and distributing materials protected by copyright laws throughout the world—all types of computer software, including business applications software, entertainment software (interactive games for videogame consoles, handheld devices, personal computers and the Internet), and educational software; theatrical films, television programs, DVDs and home video and digital representations of audiovisual works; music, records, CDs, and audiocassettes; and fiction and non-fiction books, education instructional and assessment materials, and professional and scholarly journals, databases and software in all formats. Members of the IIPA include [Association of American Publishers](#), [BSA | The Software Alliance](#), [Entertainment Software Association](#), [Independent Film & Television Alliance](#), [Motion Picture Association of America](#), [National Music Publishers’ Association](#), and [Recording Industry Association of America](#).



in 2012 over piracy concerns), as well as **Isohunt**, which by virtue of a court settlement, agreed to shutter its services as of October 24, 2013.

This year, IIPA highlights the following illustrative list of notorious markets (described in greater detail below). Country references in the online section are based on the most current information available to IIPA.

2013 Notorious Markets (Online) <sup>2</sup>	Registrant Country <sup>3</sup>	Server Host Location <sup>4</sup>
vk.com (known as vKontakte)	Hidden	Saint Petersburg, Russia
piratebay.sx	Sweden	Bern, Switzerland
kickass.to	Hidden	Quebec, Canada
torrentz.eu	Hidden	Quebec, Canada <sup>7</sup>
extratorrent.cc	Seychelles	Mykolayiv, Ukraine
torrentz.cd (torrent.cd)	Hidden	Kharkiv, Ukraine
1337x.org	Hidden	Stockholm, Sweden
torrenthound.com (torrents.net)	Hidden	Stockholm, Sweden
uloz.to	Unknown	Prague, Czech Republic
torrentroom.com	New Zealand	Steinsel, Luxembourg
bittorrent.am	Czech Republic	San Francisco, U.S. <sup>4</sup>
torrentbit.net	Belize	Kharkiv, Ukraine
sumotorrent	Hidden	Ukraine
eztv.it	U.K.	London, U.K.
t411.me	Belgium	Bucharest, Romania
bitsnoop	Sweden	Hidden
arenabg.com	Hidden	Canada, Bulgaria
rutracker	Hidden	Russia
bt.rutor.org	Sweden	Stockholm, Sweden
todotorrents.com	Hidden	Madrid, Spain
tracker.openbittorrent.com	Hidden	Quebec, Canada
tracker.publicbt.com	Hidden	Rouvais, France <sup>8</sup>
qvod	China	Changsha, China
xunlei	China	Guangzhou, China

<sup>2</sup> IIPA draws its data on these sites from industry reporting, as well as Alexa, the web information company, [www.alexa.com](http://www.alexa.com), Domain Tools LLC, [whois.domaintools.com](http://whois.domaintools.com), and [www.centralops.net](http://www.centralops.net).

<sup>3</sup> Registrant (and registrar) data can be difficult to ascertain. In the best cases, publicly traded or legitimate for-profit companies provide transparent information. Many sites employ privacy services (which can be located anywhere in the world; Fundacion Private Whois, for example, located in Panama, serves rutracker, putlocker, 1337x.org, tracker.publicbt.com, and rapidgator.net, and other sites identified in this filing), masking all registrant data. It is not uncommon for others, including many highlighted in this filing, to provide false registrant (or registrar) information. Efforts are underway through ICANN to ensure the accuracy and availability of registrant (and registrar) data.

<sup>4</sup> Where the city of the server host location is mentioned, this is based on “IP location” information from the sites listed previously, and is believed to be current as of the date of this filing. Hosting country and city data is fluid and may change over time. Also, in some instances, the indication of a city in domain records, e.g., notations for “San Francisco, U.S.,” “London, England,” or “New York, U.S.” does not necessarily reflect the server location information; many sites listed are serviced through CloudFlare, a content delivery network, which may mask the location of the origin server.

<sup>5</sup> The registrant is believed located in New Zealand but is listed as “On behalf of tubeplus.me owner.”

<sup>6</sup> The registrant is listed as “AnonyousSpeech” in Tokyo, Japan.

<sup>7</sup> Based on publicly available information about individual associated with service, it is believed the registrant is from Finland. The registrar is located in Poland.

<sup>8</sup> The “IP location” of this site is with a firm called Ovh Systems which has been notoriously non-compliance with takedown requests according to industry.



2013 Notorious Markets (Online) <sup>2</sup>	Registrant Country <sup>3</sup>	Server Host Location <sup>4</sup>
4shared.com	British Virgin Islands	British Virgin Islands
putlocker.com	Hidden	Manchester, U.K.
zippyshare	Hidden	Rouvais, France <sup>8</sup>
rapidgator.net	Hidden	Bryansk, Russia
turbobit	Hidden	Frankfurt, Germany
extabit	Hidden	Amsterdam, Netherlands
catshare	Hidden	Rouvais, France <sup>8</sup>
share-online.biz	Belize	Amsterdam, Netherlands
netload.in	Denmark	Frankfurt, Germany
uploaded.net	Switzerland	U.S., U.K., Netherlands
youwatch.org	Hidden	Stockholm, Sweden
nowvideo.ch	Seychelles	Zurich, Switzerland
xiami.com	China	Hangzhou, China
sina.com.cn	China	San Jose, U.S.
wenku.baidu.com	China	China
docin.com	China	China
ex.ua	Ukraine	Kiev, Ukraine
mp3.zing.vn	Vietnam	Vietnam
primewire.ag	Latvia	Stockholm, Sweden
filmesonlinegratis.net	Hidden	London, England <sup>4</sup>
free-tv-video-online.me	Belize	New York, U.S. <sup>4</sup>
megafilmeshd.net	Hidden	San Francisco, U.S. <sup>4</sup>
movie4k.to	Unknown	British Virgin Islands
seriesyonkis	Spain	Sevilla, Spain
solarmovie.so	Croatia	Quebec, Canada
telona.org	Hidden	Balotesti, Romania
yyests.com	China	Changsha, China
mp3skull.com	Hidden	Rochester, U.S.
watchfreemovies.ch	Ukraine	Bucharest, Romania
tubepius.me	Hidden <sup>5</sup>	Valencia, Spain
darkwarez.pl	Poland	Zurich, Switzerland
boerse.bz	Hidden	Balotesti, Romania
freshwap.me	Hidden	San Francisco, U.S. <sup>4</sup>
argentinawarez.com	Sweden	San Francisco, U.S. <sup>4</sup>
filetube	Poland	Szczecin, Poland
dpstream.net	Hidden	Balotesti, Romania
cuevana.tv	Hidden	Singapore
warez-bb.org	Sweden	Hong Kong
heroturko.org	Hidden	San Francisco, U.S. <sup>4</sup>
gfxtra.com	Turkey	San Francisco, U.S. <sup>4</sup>
forum.cgpersia.com	Hidden	Dronten, Netherlands
avaxhome.ws	Belarus	Belgium
usenext.com	Germany	Frankfurt, Germany
discuss.com.hk	Hong Kong	Hong Kong
chipspain.com	Spain	Madrid, Spain
todoconsolas.com	Spain	A Coruna, Spain
gigabytesistemas.com	Spain	Madrid, Spain
moltenwow.com	Hidden	Portland (OR), U.S.



2013 Notorious Markets (Online) <sup>2</sup>	Registrant Country <sup>3</sup>	Server Host Location <sup>4</sup>
dispersion-wow.com wowis.org alibaba paipai eachnet.com taobao	Hidden Hidden <sup>6</sup> China China China China	Bucharest, Romania Vilnius, Lithuania U.S. Zhengzhou, China Beijing, China China

2013 Notorious Markets (Physical)	Country
<ul style="list-style-type: none"> <li>• La Salada and La Saladita (Buenos Aires, branches)</li> <li>• Tepito, Lomas Verdes, Salto del Agua, Bazar Pericoapa, Bazar del Entretenimiento y el Videojuego, Toreo Markets, and Plaza Maeve (Distrito Federal), Mercado San Juan de Dios (Guadalajara), La Fayuca (Guadalajara)</li> <li>• Galeria Pagé (São Paulo), Camelódromo Uruguaiana (Rio De Janeiro), Mercado Popular de Uruguaiana (Rio De Janeiro), Feira Dos Importados/Do Paraguay (Brasília) (Brazil)</li> <li>• Zona Franca de Iquique</li> <li>• San Andrecito</li> <li>• Unilago Zone (Bogotá, various locations)</li> <li>• Zona Libre de Colon</li> <li>• Tri-Border Region</li>   <li>• Buynow PC Mall Chain</li> <li>• Hua Qiang Bei Market</li> <li>• Quiapo, Binondo, Baclaran, Makati Cinema Square, Metrowalk, 168 Mall, Divisoria, Juan Luna Plaza, New Divisoria Mall (Metro Manila)</li> <li>• Petaling Street, Chinatown; Holiday Plaza (Kuala Lumpur; Johor Bahru)</li> <li>• Harco Glodok, Mangga Dua Mall, Ambassador Mall/ITC, Ratu Plaza (Jakarta)</li> <li>• 7 Kilometer Open Market and Barabashovo Open Market (Odessa and Kharkov)</li> <li>• Caribbean Gardens &amp; Markets (Victoria)</li> <li>• Greater Toronto Area</li> <li>• Hailong Electronics Shopping Mall (Zhongguancun - 中关村) (Beijing)</li> <li>• Jonesborough Market</li> <li>• Mayak Open Market and Petrovka Open Market</li> <li>• Panthip Plaza, Klong Thom, Saphan Lek, Baan Mor Shopping Area, Patpong and Silom Shopping Areas, Mah Boon Krong (MBK) Center, and Sukhumvit Road</li> <li>• Richie Street, Censor Plaza and Burma Bazaar (Chennai); Bara Bazaar (Kolkata); Chandini Chowk, Palika Bazaar and Sarojini Nagar Market (Delhi); Navyuk Market Ambedkar Road and Nehru Nagar Market (Ghaziabad); Kallapur Market and Laldarwajah (Ahmedabad); Jail Road and Rajwada (Indore); Manish Market, Lamington Road, Dadar Train Station, Andheri Station Market, Borivili Train Station and Thane Station Market (Mumbai)</li> </ul>	<ul style="list-style-type: none"> <li>• Argentina</li> <li>• Mexico</li>   <li>• Brazil</li>   <li>• Chile</li> <li>• Colombia</li> <li>• Colombia</li> <li>• Panama</li> <li>• Paraguay, Argentina, and Brazil</li> <li>• China</li> <li>• China</li> <li>• The Philippines</li>   <li>• Malaysia</li> <li>• Indonesia</li>   <li>• Ukraine</li>   <li>• Australia</li> <li>• Canada</li> <li>• China</li> <li>• Northern Ireland</li> <li>• Ukraine</li> <li>• Thailand</li>   <li>• India</li> </ul>



## I. INTEREST OF THE IIPA IN THE NOTORIOUS MARKETS LIST

Since 1984, IIPA and its association members, representing industries reliant on copyright – producers and distributors of software, movies, music, videogames, and books and journals for the world – have worked in partnership with the U.S. government to improve the ability of the copyright industries to do business in foreign markets. These efforts have resulted in significant improvements in copyright laws and enforcement around the world and in the lowering of market access barriers and other policies that hinder these industries' ability to compete on a level playing field in global markets. Even with these improvements comes a need to remain focused on enforcing against notorious markets – specific bad actors – where intellectual property rights are not respected and which merit further investigation for intellectual property rights infringements. IIPA considers the notorious markets list as critical to successfully heightening awareness of the extreme harm being caused by those whose business models are built upon providing access to infringing materials, and reemphasizes the continued importance of addressing physical piracy markets where pirates continue to operate with relative impunity.<sup>9</sup>

While IIPA notorious markets recommendations do not single out specific countries, IIPA identifies the country locations known of either the physical business operations, or, in the case of online notorious markets listed, of the registrant or server location to the extent known or suspected. Governments must continue to play a critical role in addressing such notorious market activity, and indeed, have international obligations requiring them to take effective action, including increasing cross-border cooperation.<sup>10</sup> In many instances, several countries may be involved in relation to a single notorious market. Thus, it is incumbent upon governments to consider ways to address such transnational activity. There is a growing list of examples of law enforcement authorities working together across national borders to address copyright piracy that involves cross-border activities, and the situation will be no different with respect to these notorious markets.

The IIPA notorious markets recommendations address many forms of online and physical piracy, but do not identify or capture all challenges the copyright industries face today. For example, the unauthorized use of software – organizational end-user piracy of software – is the principal and most damaging form of piracy to the software industry. In 2011, the software piracy rate worldwide stood at 42%, while the commercial value of unlicensed software stood at \$63.4 billion. Similarly, market access barriers and other discriminatory or preferential policies deny copyright owners fair and equitable opportunities to participate in commerce in copyright materials.<sup>11</sup> As another example, one of the greatest concerns to the motion picture industry

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<sup>9</sup> The IIPA notorious markets recommendations are mostly well known markets. In many cases, the notorious markets identified are the subject of ongoing investigations by law enforcement or court adjudications. We also note that in identifying “notorious markets,” IIPA and its members focus on the bad behavior of individuals and enterprises dedicated to promoting piracy, and do not intend to single out any specific technology or type of service used by the infringers (since these technologies can be used for both legitimate and illegitimate purposes).

<sup>10</sup> The case against the notorious market MegaUpload and related websites is an example in which cross border cooperation among the U.S., New Zealand, and other authorities was critical in shutting down those sites which allegedly amassed huge profits from facilitating massive copyright infringement.

<sup>11</sup> We do not here recount the kinds of piracy or market access barriers IIPA members face across the globe, but refer the Subcommittee to our many public filings, including our 2013 Special 301 Submission. See International Intellectual Property Alliance, *IIPA Written Submission Regarding 2013 Special 301 Review: Identification of Countries Under Section 182 of the*



involves illegal recordings of movies from theaters, especially immediately after a title's theatrical exhibition window opens. An unauthorized recording may include a video capture, an audio capture, or both. Approximately 90% of newly released movies that are pirated can be traced to thieves who use a digital recording device in a movie theater to steal the audiovisual work (whether image or sound or both) from the theater screen. The increase in the severity of this problem in recent years tracks the development of camcorder technology that makes detection difficult and copies nearly 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 theatrical release and well before it becomes available for legal home entertainment rental or purchase from legitimate suppliers.

Addressing IP theft successfully through processes such as USTR's "notorious markets" out-of-cycle review inures to the benefit of the U.S. copyright industries and the U.S. economy as a whole. The latest indicators show that the copyright industries make up a large percentage of value added to GDP; create more and better-paying jobs; and contribute substantially to U.S. foreign sales and exports, outpacing many industry sectors.<sup>12</sup> The degree to which this capability is sustained depends in large part upon the extent to which piracy and market access barriers can be reduced. Notorious markets – egregious examples of open and blatant piracy – play a disproportionate role in harming the copyright industries, and thus, have a disproportionately negative impact on the U.S. economy and on U.S. employment.

Finally, we refer the Subcommittee to the filings of members of the IIPA – the Association of American Publishers, BSA | The Software Alliance, the Entertainment Software Association, the Motion Picture Association of America, and the Recording Industry Association of America, which contain additional examples of notorious markets. The IIPA filing, together with those associations' filings, results in an even more complete list of notorious markets.

## II. IIPA RECOMMENDATIONS FOR ONLINE AND PHYSICAL PIRACY "NOTORIOUS MARKETS"

### *Internet Piracy Notorious Markets*

- **vk.com** (known as vKontakte) (Russia) is a Russian social networking site that features search functionality specifically designed and operated to enable members to upload music

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*Trade Act of 1974: Request for Public Comment and Announcement of Public Hearing Request to Testify at 2013 Special 301 Hearing (7 Fed. Reg. 77178, Dec. 31, 2012)*, available at <http://www.iipa.com/pdf/2013SPEC301COVERLETTER.pdf>.

<sup>12</sup> The *Copyright Industries in the U.S. Economy: The 2011 Report*, prepared by Stephen Siwek of Economists Incorporated, details the economic impact and contributions of U.S. copyright industries to U.S. Gross Domestic Product (GDP), employment, and trade. The "core" copyright-based industries in the U.S. – those industries whose primary purpose is to create, produce, distribute or exhibit copyright materials, and which include computer software, videogames, books, newspapers, periodicals and journals, motion pictures, recorded music, and radio and television broadcasting – continued to be major contributors to the U.S. economy, accounting for an estimated \$931.8 billion or 6.36% of the U.S. GDP in 2010. These industries provided nearly 5.1 million U.S. jobs, or 4.75% of the entire private sector labor force in 2010, and pay on average over \$78,000, 27% higher than the overall workforce average. Estimated 2010 foreign sales and exports of key sectors of the core copyright industries amounted to \$134 billion, a significant increase over previous years, and more than foreign sales of other major U.S. industry sectors such as aircraft, automobiles, agricultural products, food, and pharmaceuticals. See Steven E. Siwek, *Copyright Industries in the U.S. Economy: The 2011 Report*, November 2, 2011. The entire report as well as summaries can be accessed at [http://www.iipa.com/copyright\\_us\\_economy.html](http://www.iipa.com/copyright_us_economy.html). An updated copyright industries report is in progress.



and video files, hundreds of thousands of which contain unlicensed copyright works; users then search for and stream such files without permission or license on their computers and mobile devices.<sup>13</sup>

- **ThePirateBay.sx** (Sweden, Switzerland);<sup>14</sup> **Kickass.to** (Canada);<sup>15</sup> **Torrentz.eu** (Canada);<sup>16</sup> **Extratorrent.cc** (Seychelles, Ukraine);<sup>17</sup> **Torrentz.cd** (Ukraine);<sup>18</sup> **1337x.org** (Sweden);<sup>19</sup> **TorrentHound.com** (Sweden);<sup>20</sup> **Uloz.to** (Czech Republic); **TorrentRoom.com** (New Zealand, Luxembourg);<sup>21</sup> **BitTorrent.am** (Czech Republic); **TorrentBit.net** (Belize, Ukraine); **SumoTorrent.com** (Ukraine); **Eztv.it** (United Kingdom);<sup>22</sup> **T411.me** (Belgium, Romania);<sup>23</sup> **BitSnoop** (Sweden);<sup>24</sup> and **Arenabg.com** (Bulgaria);<sup>25</sup> are examples of sites that

<sup>13</sup> vKontakte is the 20th most visited website in the world, according to Alexa. It is the 2nd most visited site in Russia and the 3rd most visited site in Ukraine. The site was found civilly liable for copyright infringement in early 2012, but this has had no impact on the way vk.com conducts business. No affirmative efforts are taken by the site operators to prevent copyright infringement. According to public filings, London-listed Russian internet company, Mail.ru, holds 39.99% ownership share in the company. In 2013, it was reported that United Capital Partners, US\$3.5 billion fund owned by Ilya Shcherbovich bought a 48 per cent stake. The remaining share is reported to be owned by Pavel Durov, a founder of the site.

<sup>14</sup> ThePirateBay.sx remains ranked as one of the most accessed sites in the world. Alexa ranks the site 76th in the world and the 13th most accessed in Sweden. The site also ranks 33rd most accessed site in Canada and Australia, and the 37th most accessed site in Saudi Arabia. The site ranks extremely high in Spain (52), Brazil (52), Mexico (55), India (58), and the United States (75). ISPs have been cooperative in disabling access to the site upon request in certain countries. However, the operators of the site have practiced evasive tactics to ensure the site remains open for its illegitimate business. ThePirateBay.sx promoted its tenth year as an index website by releasing the PirateBrowser, a self-contained portable web browser with preset bookmarks to BitTorrent websites hosted on the TOR network.

<sup>15</sup> The prior domain of this site, kat.ph, was seized by the IPO of the Philippines. Kickass.to has the meta-description “Search and download new TV shows & TV series, movies, mp3, music and PC/PS2/PSP/Wii/Xbox games absolutely for free.” The site is ranked by Alexa as the 117th most accessed site in the world, ranking 23rd in the Philippines, 26th in Pakistan, 33rd in South Africa, and 42nd in the Netherlands. The site also ranks high in India (51), Australia (53), and Canada (71). The site is notorious for low compliance with takedown notices; the entertainment software industry reports only 7% compliance in 2013.

<sup>16</sup> Canada-based Torrentz.eu is ranked 158th most accessed site in the world according to Alexa. It is one of the most accessed sites in South Asia, including 41st in India and 45th in Pakistan, but also has broad geographic reach, ranking 59th in the Netherlands and 99th in Australia. The site is also highly ranked in Canada (122), Italy (123), and the U.K. (165).

<sup>17</sup> ExtraTorrent.cc claims it is “The World’s Largest BitTorrent System,” and clams on its Facebook page, “The Largest Collections of Movies, Music and Software and Other Torrents Online.” The predecessor site, ExtraTorrent.com, has been the subject of enforcement actions in some jurisdictions, so the site operators changed domains just recently. The site’s users have apparently easily re-routed themselves to the new site since ExtraTorrent.cc remains ranked very high in India, Pakistan, Malaysia, Australia, and the U.K. The predecessor site claimed to offer more than 13 million files with sharing optimized through over 43 million seeder and more than 60 million leechers. Website features included sections highlighting “the most pirated movies,” and “first cams,” which are camcordings of motion pictures currently available only through theatrical distribution.

<sup>18</sup> Torrentz.cd is highly ranked in South Asia, and is another example of a torrent indexing site targeting pirate software and with servers apparently located in Ukraine. Torrent.cd appears to be affiliated and is also ranked relatively high.

<sup>19</sup> 1337x.org remains a very popular site. The site is noted in this filing for a significant drop in compliance with takedown notices in 2012 and 2013. The entertainment software industry reports compliance at less than 10%.

<sup>20</sup> TorrentHound.com and apparently affiliated Torrents.net rank relatively high in South Asia, the U.K., and Italy. TorrentHound boasts “4,000 new torrents” each day, while Torrents.net implores users to “Download verified free public torrents, Download movies, games, tv-shows, music, software, anime other torrents.” A third site, Torrentfunk, appears affiliated (with servers in California), and advertises itself as a “fast download search engine,” promising users: “You can find the latest TV shows, Movies, Games, Software and Anime with the most verified torrents right here. Come download them for free now.” The entertainment software industry reports only 2% of all files identified in notices to the site were taken down in 2013.

<sup>21</sup> TorrentRoom.com is particularly popular in South Africa and parts of Europe.

<sup>22</sup> Eztv.it ranks extremely high in Australia (165), Sweden (194), South Africa (198), and the Philippines (229), and also ranks very high in Canada.

<sup>23</sup> T411.me ranks extraordinarily high in France (67th most accessed site), and ranks high in countries in North and West Africa, as well as Switzerland and Canada.

<sup>24</sup> While access to BitSnoop has been limited in some jurisdictions, BitSnoop remains ranked extremely high in South Korea (199).



employ or facilitate the use of the BitTorrent file sharing protocol to enable pirated content – including very large files – to be quickly located and downloaded.<sup>26</sup>

- **Rutracker.org** (Russia);<sup>27</sup> **Bt.rutor.org** (Sweden); **Todotorrents.com** (Spain); **Tracker.openbittorrent.com** (Canada); and **Tracker.publicbt.com** (France); are examples of BitTorrent trackers, which are servers that facilitate transfers between peers using the BitTorrent protocol. BitTorrent trackers direct traffic among BitTorrent users, each simultaneously tracking millions of torrents and connecting tens of millions of BitTorrent users with one another. They are used to facilitate the illegal uploading and downloading of millions of unauthorized copies of files.
- **Qvod** (China)<sup>28</sup> is a P2P protocol software used by Chinese rogue linking sites to distribute infringing copies of copyright materials. **Xunlei.com** (China),<sup>29</sup> while noted above for the closure of the GouGou search engine, unfortunately reemerges as a notorious market candidate due to its proprietary, high speed P2P file sharing system that distributes unauthorized copies of motion picture and television content.
- **4Shared.com** (British Virgin Islands);<sup>30</sup> **Putlocker.com** (United Kingdom);<sup>31</sup> **ZippyShare.com** (France);<sup>32</sup> **Rapidgator.net** (Russia);<sup>33</sup> **TurboBit.net** (Germany);<sup>34</sup>

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<sup>25</sup> Arenabg.com remains very popular in Bulgaria as the 29th most accessed site in that country despite previous enforcement efforts.

<sup>26</sup> It should be noted here that piracy websites have been in the process of migrating to so-called “magnet linking” which has been adopted for the stated purpose of reducing bandwidth and making them even less vulnerable to enforcement. Notwithstanding this change in their infrastructure, the nature and purpose of their operations remains largely the same.

<sup>27</sup> Rutracker is one of the most accessed sites in the world, ranking 243rd. It is one of the top 25 sites accessed in Russia, Ukraine, Belarus, Kazakhstan, and Uzbekistan, and ranks high in Lithuania (66), Azerbaijan (174), and even Thailand. The site’s meta-description is in Russian (Крупнейший русскоязычный битторрент трекер. Скачать бесплатно фильмы, музыку, книги, программы) meaning “The largest Russian-language BitTorrent tracker. Download free movies, music, books, software.”

<sup>28</sup> QVOD, or “Kuaibo.com,” is actually a P2P protocol and application widely used by Chinese rogue linking sites to distribute infringing copies of copyright materials including movies and television shows. The site thus serves a similar function to cyberlockers. QVOD is a downloadable application and there is no need to return to the site, so Alexa rankings do not reflect the popularity of this rogue market’s services. Many rights holders and licensees in China have identified QVOD and the websites utilizing its network as a primary threat to the stability of legitimate digital distribution in China.

<sup>29</sup> Xunlei’s system incorporates the website’s own desktop download manager with file formats unique to the system. Recently, Xunlei’s public service, Kankan, transitioned in format and now streams some authorized motion picture content. However, it also offers a “VIP Offline” service which distributes infringing content for a monthly fee. With this service, infringing content is downloaded by Xunlei from the external source and is stored to its servers for unauthorized on demand viewing.

<sup>30</sup> 4shared is ranked as the 150th most visited site in the world according to Alexa. The site ranks 23rd in Indonesia, 26th in Saudi Arabia, and 33rd in Brazil, to give an indication of its geographic scope, but also ranks high in Egypt (51), Thailand (57), Pakistan (88), Iran (95), and India (123). The meta-description for the site is “Online file sharing and storage - 15 GB free web space. Easy registration. File upload progressor. Multiple file transfer. Fast download.” The meta-tags include “photo image music mp3 video sharing.”

<sup>31</sup> Putlocker.com is now the 314th most visited site in the world according to Alexa. High rankings include Egypt (116), Pakistan (138), Indonesia (168), Mexico (200), Italy (235), Canada (239), Germany (250), and the U.K. (252), showing the site’s extensive geographic reach. Following the takedown of MegaUpload, Putlocker ceased paying uploaders for each viewing of uploads, but users continued to be required to pay \$44.99 a year for premium accounts that enable them to download copies of content or stream it ad-free. Alexa.com has identified about 17,000 websites linking to Putlocker, suggesting that Putlocker is one of the most popular sources of content for linking sites.

<sup>32</sup> ZippyShare.com has risen quickly to become the 366th most accessed site in the world. The site boasts extremely high access rates in Indonesia (133), Pakistan (168), Mexico (209), India (266), Brazil (312), as well as Spain, Germany, and the U.K.

<sup>33</sup> Rapidgator.net retains a global Alexa ranking of 450. In August 2013, the site was responsible for hosting more than 542,000 infringing game-related files available for download. The site continues to offer monetary rewards for uploaders, encouraging uploaders to distribute popular content such as unauthorized copies of movies and television programs as widely as possible. Premium subscription plans are available, allowing users to avoid throttled download speeds and data-download limits.





**Extabit.com** (Netherlands),<sup>35</sup> **Catshare.net** (France);<sup>36</sup> **Share-online.biz** (Belize, Netherlands);<sup>37</sup> **Netload.in** (Denmark, Germany);<sup>38</sup> **Uploaded.net** (Switzerland, U.S., United Kingdom, Netherlands);<sup>39</sup> **YouWatch.org** (Sweden); **NowVideo.ch** (Seychelles, Switzerland);<sup>40</sup> and **Xiami** (China),<sup>41</sup> are examples of “one-click hosting sites,” sometimes referred to as cyberlockers, which provide access to large libraries of infringing files for download (hence they are also considered download hubs).

- **Sina.com.cn** (China);<sup>42</sup> **Wenku.baidu.com** (China);<sup>43</sup> and **Docin** (China);<sup>44</sup> are open online platforms where users can upload and share documents. These services employ “digital coin” systems, whereby coins earned through uploading documents may be used to “purchase” documents for download. All services have ineffective notice and takedown processes for reporting infringements.
- **Ex.ua** (Ukraine);<sup>45</sup> **Mp3.zing.vn** (Vietnam);<sup>46</sup> **Primewire.ag** (formerly 1channel.ch) (Latvia, Sweden);<sup>47</sup> **Filmesonlinegratis.net** (Hidden);<sup>48</sup> **Free-tv-video-online.me** (Hidden);<sup>49</sup>

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<sup>34</sup> TurboBit.net is among the most accessed sites in Turkey, Ukraine, Egypt, Mexico, France, and Spain.

<sup>35</sup> Extabit, which advertises itself as a “file hosting - exchange service” but provides premium accounts for faster downloading, remains popular in Pakistan, Indonesia, Mexico, India, and Spain. In the summer of 2013, payment provider PayPal stopped handling payments for the company.

<sup>36</sup> Catshare.net hosted more than 42,000 links to infringing game content in August 2013. The site operator has refused to act against almost 90% of the links identified in takedown notices by the game industry.

<sup>37</sup> Share-online.biz was responsible in August 2013 for hosting over 15,000 infringing game-related files available for download by third parties. Attempts to contact the site operators have reportedly gone unanswered.

<sup>38</sup> Netload.in operates in 10 different languages. The site earns revenues by threatening to throttle download speeds and purge files every 30 days for users who do not purchase the \$64.99 annual premium membership.

<sup>39</sup> Uploaded.net has a current global Alexa ranking of 223 and is ranked high in Germany (102), Spain (112), Brazil (125), Mexico (132), and France (141). The site is a download hub that incentivizes users to upload large files, such as those associated with television episodes and motion pictures, by paying rewards based on the file size, as well as a percentage of premium account sales referred by the user. Download speeds are throttled for users who do not purchase the \$95.99 annual premium membership. The site continues to offer infringing content with file names clearly associated with illicit filesharing and illicit release groups. The website operates through multiple redundant domains that include Uploaded.to and Ul.to, and appears to have a multinational presence.

<sup>40</sup> NowVideo.ch is the 89th most accessed site in Italy.

<sup>41</sup> Xiami remains very popular in China, Taiwan, and Hong Kong.

<sup>42</sup> Sina.com.cn is one of the most accessed sites in the world, being the 4th most visited site in China, and ranking extremely high in Korea (10), Hong Kong (13), Japan (33), Taiwan (44), and the U.S. (360). Sina.com.cn categorizes hosted documents, mostly infringing, according to content (e.g., “educational materials,” “computer science,” “law,” etc.). The process for receiving infringement notices is complicated and Sina.com.cn has been entirely non-responsive to notices sent.

<sup>43</sup> Wenku.baidu.com is an affiliate of Baidu.com, which is the most accessed website in China and Korea, and the 5th most accessed site in the world, ranking extremely high in Hong Kong (6), Venezuela (10), Japan (12), Taiwan (18), and the U.S. (139). Wenku.baidu.com is host to many unauthorized publications, including consumer books, textbooks and journal articles, all available for download. While the site appears to operate an online complaint center, the system is complicated as right holders are required to send hard copies of notices. Though publishers have attempted to work within the online reporting system, the infringing links notified are not taken down. Wenku.baidu.com typically takes 7 to 19 days to respond to a takedown notice.

<sup>44</sup> Docin hosts hundreds of infringing publications, allowing users, after signing in, to review or read online or download documents in a variety of formats. Docin’s online reporting system is largely ineffective, although it does allow for email notifications of infringement. Responses to rights holder notices have been inconsistent. It typically takes Docin 6 days to respond to a notice, which given the volume of infringing material available on the site renders the process largely ineffective.

<sup>45</sup> Ex.ua remains the 16th most accessed site in Ukraine.

<sup>46</sup> Mp3.zing.vn, an affiliate site of zing.vn, remains an extremely damaging site in Vietnam for infringing music. Zing.vn ranks as the 5th most visited site in Vietnam, but is also popular in South Korea (635) and Singapore (525), giving it a strong global ranking according to Alexa.

<sup>47</sup> Primewire.ag is one of the most visited websites in the world to locate links to illicit copies of first run motion picture and television content.



**Megafilmeshd.net** (Hidden);<sup>50</sup> **Movie4k.to** (British Virgin Islands, Romania);<sup>51</sup>  
**Seriesyonkis.com** (Spain);<sup>52</sup> **Solarmovie.so** (Croatia, Canada, Latvia);<sup>53</sup> **Telona.org**  
(Romania);<sup>54</sup> **Yyets.com** (China);<sup>55</sup> and **Mp3skull.com** (Russia, U.S.);<sup>56</sup>  
**Watchfreemovies.ch** (Ukraine, Romania);<sup>57</sup> **Tubeplus.me** (Spain);<sup>58</sup> **Darkwarez.pl** (Poland,  
Switzerland);<sup>59</sup> **Boerse.bz** (Romania);<sup>60</sup> **Freshwap.me** (Hidden);<sup>61</sup> **Argentinawarez.com**  
(Sweden);<sup>62</sup> **Filestube** (Poland);<sup>63</sup> **DpStream.net** (Romania);<sup>64</sup> and **Cuevana.tv**  
(Singapore);<sup>65</sup> are linking sites that aggregate, organize and index links to infringing files,  
mostly stored on other sites (so-called deep-linking). Linking sites typically organize illegal

<sup>48</sup> Filmesonlinegratis.net has an Alexa ranking of 94 in Brazil. This popular streaming and linking site has been active since May 2009 and is dedicated to the distribution of national and international television series' and films. Industry reports indicate the server is currently hosted in Romania.

<sup>49</sup> Free-tv-video-online.me is one of the most visited websites in the world to locate links to illicit copies of first run motion picture and television content. The website's current Alexa ranking is 612. The site is evading domain seizure by registering with a .me domain, and is moving to different hosting providers continuously. Industry reports the site's server host is currently Canada.

<sup>50</sup> Megafilmeshd.net is a popular streaming linking site that currently offers about 5,000 links to both national and international content including films, television series', and concerts. The site offers updated illegal content in Portuguese, driving its Alexa ranking of 107 in Brazil. Industry reports the site is currently hosted in the Netherlands.

<sup>51</sup> Movie4k.to, formerly Movie2k.to, is a popular streaming and linking site. Users submit links of first run motion picture and television content through this website with tags designating the picture and sound quality. Last year, the operator posted a lengthy statement on the website in response to the shutdown of several infringing websites associated with Kino.to in Germany, claiming copyright laws are outdated. Industry indicates the server has been hosted in Romania with a proxy server out of Europe; other research indicates a link to servers in the British Virgin Islands.

<sup>52</sup> SeriesYonkis now stands as the 58th most visited site in Spain (up from 93rd in 2012) and remains strong generally in Spanish-speaking countries, including the Dominican Republic (122), Argentina (155), Venezuela (173), Peru (180), as well as Chile, Mexico, and Colombia. It is a dedicated linking/streaming site for infringing first-run movies and television content and advertises itself as such.

<sup>53</sup> Solarmovie.so continues to rise in popularity as a source for links to first run motion picture and television streaming content. The website has been reported as hosted in multiple countries including Canada and Latvia.

<sup>54</sup> Telona.org caters its content to Portuguese speakers in Brazil and Portugal. The site is ranked 683rd in Brazil and high in Portugal for access to illegal (often camcorded) first run motion pictures. The content may be video cammed in one country, and then will have the Portuguese audio captured from a local theatre or will add subtitles.

<sup>55</sup> Yyets.com is a download and streaming portal popular in China, boasting an Alexa ranking in China of 421. Although many types of content are available, Yyets specializes in providing unauthorized Chinese subtitles for foreign movies and TV shows, many of which are created by volunteers in the Yyets community.

<sup>56</sup> Mp3skull has shot up in popularity in 2012-2013, now ranking in the top 100 most accessed sites in Pakistan (83) and Indonesia (97), while maintaining high rankings in Nigeria (127), South Africa (214), India (254), and Malaysia (304). The website subtitle "mp3skull.com - free Mp3 Download," reveals the purpose of the site to infringe music copyrights.

<sup>57</sup> Formerly Ichannel.com and before that, Letmewatchthis.com, this site, which boasts in its meta description "LetMeWatchThis Movies. Watch movies online on LetMeWatchThis - the biggest library of free full movies. Stream content fast and easy. Free Movies Online on LetMeWatchThis," remains popular in regionally diverse countries such as the U.K., Pakistan, Canada, and Malaysia.

<sup>58</sup> Tubeplus.me advertises itself by enticing users to "Watch all the latest tv shows and blockbuster movies for free as well as a huge archive of past cinema and your favorite series only on tubeplus the world's biggest video streaming website." The site is popular in the U.K., the Netherlands, and Australia, but also ranks highly in Pakistan, Canada, the U.S., and Mexico.

<sup>59</sup> Darkwarez.pl generates a tremendous amount of traffic by featuring a high volume of links to a wide variety of infringing content. In August 2013, over 143,000 new links to infringing videogames were detected. The harm being caused by the site to game right holders has increased substantially since 2012.

<sup>60</sup> Despite its server location in Romania, Boerse.bz is in German, and provides tens of thousands of links to infringing games.

<sup>61</sup> The operators of Freshwap.me are believed to participate in uploading of infringing content and posting links to it. Along with affiliated sites Heroturko.me, Downtr.co, Downloading.ws and Allulook4.com, tens of thousands of links to pirated games have been posted.

<sup>62</sup> Argentinawarez.com is a Spanish language site boasting over eight million users and reportedly providing access to a large variety of infringing files.

<sup>63</sup> Filestube is ranked 631st most accessed site in the world, and ranks even higher in Italy, the U.K., India, Mexico, and Germany.

<sup>64</sup> DpStream.net is very popular in France (89th most accessed site), Belgium (273), Switzerland, and North Africa.

<sup>65</sup> Cuevana.tv is particularly popular in Spanish-speaking countries including Mexico (175), Argentina (139), and Central and South America, and maintains relative popularity in Spain.



copies by title or genre. Depending on the website, users are commonly presented with the option to either stream the content in a video-on-demand format or download a permanent copy to their computer.

- **Warez-bb.org** (Sweden, Hong Kong);<sup>66</sup> **Heroturko.org** (Hidden); **Gfxtra.com** (Turkey); **Forum.cgpersia.com** (Netherlands); **Avaxhome.ws** (Belarus, Belgium); **Usenext.com** (Germany);<sup>67</sup> and **Discuss.com.hk** (Hong Kong);<sup>68</sup> are examples of “bulletin boards,” blogs, forums, or newsgroups used for posting links to pirate copyright materials available through BitTorrent protocols or via direct download. Software is particularly hard hit by these sites, although in the case of Usenext.com, the pirate content of choice is high-quality Blu-ray rips of major motion pictures.
- **Chipspain.com** (Spain);<sup>69</sup> **Todoconsolas.com** (Spain);<sup>70</sup> and **Gigabytesistemas.com** (Spain);<sup>71</sup> are examples of notorious markets that continue to sell hardware devices, such as “mod chips” or “game copiers,” that bypass technological protection measures (TPMs) in game consoles or handheld devices. Such devices and technologies enable the use or copying of unauthorized game software. Sites that sell software used to defeat TPMs (“soft mods”) are also a growing concern. Device or soft mod sites may distribute directly to end users or may furnish raw materials to circumvention services, i.e., online sites or store fronts that install such devices for end users.
- **Molten-wow.com** (registrant hidden, U.S. server);<sup>72</sup> **Dispersion-wow.com** (Romania);<sup>73</sup> and **Wowis.org** (Lithuania);<sup>74</sup> are examples of unauthorized, third-party, “private” game servers in which users are diverted to play free multi-player games, robbing the legitimate game publishers of revenues from their online games. Establishing and maintaining these unauthorized game servers often involves multiple acts of copyright infringement (copying the game server software and copyrighted materials) as well as the circumvention of TPMs (since the legitimate game architecture contains TPMs to prevent people from using unauthorized servers or to prevent diversion of users to such unauthorized servers).

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<sup>66</sup> Warez-bb.org maintains popularity as self-proclaimed “World’s Best Bulletin Board” and maintains high rankings in regionally diverse countries as Malaysia, Pakistan, Belgium, the U.K., and Australia, among others. The site provides links to significant amounts of infringing content, including 700 new links to infringing videogame files daily. The site also allows for the distribution of hacked or cracked software codes and programs.

<sup>67</sup> Usenext.com provides a free trial period to users and then subscription plans start as low as US\$11 per month for a 12 month subscription and go up based on the quantity of content downloaded.

<sup>68</sup> Discuss.com.hk and its sister site Uwants.com are two of Hong Kong’s most popular sites, coming in at 15th and 25th, respectively. Massive numbers of infringing music file links have been detected on these sites.

<sup>69</sup> Chipspain.com contains a multilingual platform (including global shipping) to sell a variety of circumvention devices for all major game consoles.

<sup>70</sup> Todoconsolas.com makes available circumvention devices and game copiers to consumers around the world.

<sup>71</sup> Gigabytesistemas.com sells game copiers and mod chips which it also ships globally. The site also offers modification services for consoles.

<sup>72</sup> Molten-wow.com receives its financing from donations from its over 20,000 users and provides free access to play World of Warcraft without having to pay for the monthly subscription fee established by Blizzard Entertainment.

<sup>73</sup> Dispersion-wow.com provides access to more than 65,000 “members” to play Blizzard’s World of Warcraft without paying. The site also offers an unauthorized shop where users can purchase in-game items.

<sup>74</sup> Wowis.org, while having its servers located in Lithuania, is an Italian-language pirate server offering 28,000 users unauthorized access to play World of Warcraft.



- **Alibaba.com** (China, U.S.); **Paipai.com** (China); **Eachnet.com** (China); and **Taobao** (China);<sup>75</sup> are examples of B2B or B2C websites. While much of the activity on the B2B sites is legitimate, there are also cases in which sellers and distributors offer counterfeit software products in bulk and high volume. For-profit buyers purchase the counterfeit products and redistribute them through online marketplaces and other websites. Taobao is an example of an extremely popular B2C/auction site. While Taobao had previously been a notorious market, it was removed from that list last year. IIPA appreciates the site owners' proactive approach to working with some right holders to address piracy (and counterfeiting) activities undertaken by third parties on the site. Taobao has entered into several MOUs with right holders. The Motion Picture Association of America reports exemplary cooperation from Taobao. IIPA also appreciates that Taobao has sought to implement an English-language version of its online reporting portal that would be open to all right holders. However, for example, BSA | The Software Alliance continues to express some concerns over listings for pirated software appearing on the site.<sup>76</sup>

### *Physical Piracy Notorious Markets*

- **La Salada** and **La Saladita** (Buenos Aires, Argentina; branches in other cities) are well known as networks of fairs, comprising approximately 20,000 stores hosted just outside of Buenos Aires. They are referred to as South America's biggest mall and biggest black markets, providing access to infringing software, CDs, and DVDs.<sup>77</sup> The market also has a website for e-commerce sales. The success of La Salada prompted the rise of new markets using the same model, known as La Saladita, and located in several neighborhoods of Buenos Aires. Raids occur periodically but apparently have little effect on the availability of pirate merchandise.
- **Tepito**, **Lomas Verdes**, **Salto del Agua**, **Bazar Pericoapa**, **Bazar del Entretenimiento y el Videojuego**, **Toreo Markets**, and **Plaza Maeve** (Distrito Federal), **Mercado San Juan de Dios** (Guadalajara), **La Fayuca** (Guadalajara) (Mexico) are examples of the widespread and well-entrenched street piracy in Mexico. These informal markets sell pirated and counterfeit goods connected to or purchased from organized crime syndicates.
  - **Tepito** continues to be the center of distribution for pirate copyright materials. It is the site of active trafficking of all kinds of copyright content. The market is known for pirated games, modified consoles and game circumvention devices, such as game copiers. Tepito is an especially harmful market as it is also the location of several burn labs which manufacture counterfeit video games and serve as a distribution center for other markets in the area.

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<sup>75</sup> Taobao is an extremely popular auction site originating out of China, ranking as the 13th most accessed website in the world. It is the 3rd most visited website in China, and ranks extraordinarily high in Korea (7), Hong Kong (7), Venezuela (22), Japan (24), Taiwan (32), and Russia (134).

<sup>76</sup> BSA reports that the sale of unauthorized software and keys remain extremely popular and ubiquitous on the website. BSA further notes that in 2013 alone BSA has identified nearly 28,000 infringing and unauthorized sales of its members' products on the Taobao platform for which BSA has been unable to submit takedown requests due in part to procedural hurdles. BSA remains in discussions with Taobao with the aim to achieve more effective notice and takedown procedures and other practices for its members.

<sup>77</sup> La Salada revenues equaled US\$15 billion in 2009, more than the US\$8.5 billion earned by the country's regular shopping centers combined, according to the government statistic agency INDEC.



- **Bazar Pericoapa** is a middle class flea market selling both genuine and pirate/counterfeit goods. Since raiding occurs mainly at night, vendors have learned to move their illegal products out of the market by the end of the day. More recently, the market has become a popular source of downloaded games, modified consoles, and game circumvention devices, such as game copiers.
- **Bazar del Entretenimiento y el Videojuego** is located in a popular shopping area in downtown Mexico City. The sale of pirate and counterfeit goods is still pervasive, and it is suspected, due to the market's proximity to Tepito, that store owners from Tepito own some booths in this market or are responsible for the distribution of items sold. CD/DVD burning towers have been seized in prior raids indicating it is a source of production.
- **Plaza Meave** is a multi-story building in downtown Mexico City which contains numerous shops and outlets that offer for sale pirate and counterfeit goods, including pirate games. Booth owners no longer store their products onsite to avoid seizure during night raids.
- More than one third of **Mercado San Juan de Dios'** approximately 3,000 vendors offer pirate products, including pirate game software in their electronics sections. Despite some pressure from past enforcement actions, piracy has not decreased, in part due to failure to follow through with criminal prosecutions.
- **La Fayuca** is an alternative to Mercado San Juan de Dios for obtaining pirate and counterfeit products (a July 2012 raid resulted in seizures of over 128,000 pirate copies of videogames).
  
- **Galeria Pagé (São Paulo), Camelódromo Uruguaiiana (Rio De Janeiro), Mercado Popular de Uruguaiiana (Rio De Janeiro), Feira Dos Importados/Do Paraguay (Brasília) (Brazil):** These markets in some of Brazil's largest cities remain particularly notorious for piracy, including game piracy and console modifications.
  - **Galeria Pagé** is a multi-story shopping complex located in the center of São Paulo, housing over 170 vendors that sell a variety of products. Many shops specialize in electronic products and counterfeit merchandise including pirate videogames, game circumvention devices, and modified consoles.
  - **Camelódromo Uruguaiiana** is a large flea market complex stretching out over several blocks in the middle of downtown Rio de Janeiro, with both open and covered sections, featuring over 2,000 stores offering all kinds of goods and merchandise, including clothes, food, and electronics. On any given day, but particularly on weekends, there are dozens of vendors of pirated games, modified consoles, and game copiers. Recent efforts to bring the "Piracy Free City" campaign in Rio de Janeiro have resulted in many raids but no lasting impact on the availability of pirate goods.
  - **Mercado Popular de Uruguaiiana** is the largest and most famous shopping market in Rio, set on four street blocks and containing more than 1,500 kiosks, many of which sell counterfeit optical discs.
  - **Feira Dos Importados/Do Paraguay** is a large open flea market covering four main city blocks in the middle of the capital city of Brasilia, featuring more than 2,000 booths and kiosks offering a variety of products but with a heavy concentration on electronics. Pirate games have been sold there for many years. The recent creation of a very active Task Force in Brasilia, combining forces of the Special IP Unit, SEOPS (Secretary of



Public Order), Customs, and the Federal Highway Patrol, is showing promising results, but more needs to be done to clean up this market.

- **Zona Franca de Iquique** (Iquique, Chile) is a center of border trade in Chile, including imports from Asia (China, Hong Kong, and Taiwan reportedly make up 60% of imports into the market), and has become a transshipment point to Argentina, Brazil, Paraguay, Peru, and Bolivia. Its strategic location allows it to be the entrance and exit to products that make trade between the Mercosur, Asia, and Latin America. Trade unfortunately includes illegal importation and smuggling of pirate goods. Blank optical discs are also shipped and transshipped through this point to be burned with pirate content and service South America.
- **San Andrecito** (Colombia, various locations) are shopping centers/markets in various locations in Colombia where contraband is known to be sold. Pirated and counterfeit software has been detected in these markets. Pirate intellectual property, including software, music, and motion pictures are all readily available in these markets and Colombians treat them like mainstream shopping centers despite the fact that vendors are offering illegal products.
- **Unilago Zone** (Bogotá, Colombia). Numerous shops located near the Unilago Technology Center offer pirate and counterfeit computer hardware and software. The illegal shops are interspersed among legitimate resellers, creating an atmosphere that undoubtedly confuses consumers.
- **Zona Libre de Colon** (Panama), located on the Caribbean coast of Panama in the province of Colon, is the continent's largest and world's second largest trade zone, including sales and transshipments of all kinds. The main imports are from Hong Kong, Japan and the United States to countries in South America, Central America, and the Caribbean. Unfortunately, counterfeit and pirate goods as well as pirate optical discs make their way from Asia into the Americas through this trade zone.
- **Tri-Border Region including Ciudad del Este** (Paraguay, Argentina, Brazil) remains a focus of street piracy of copyright content. Most of the product found in this area is manufactured in Asia, notably China. Street vendors are found storing the majority of material in warehouses but only displaying small amounts.
- **Buynow (百脑汇) PC Mall** (China, various locations) is a very large personal computer mall chain in China, operating 22 stores across the country. Buynow PC Malls lease space to sellers of electronics equipment, software, games and accessories and many vendors offer pirated operating systems and other software. Vendors will install the pirate software directly onto their customers' hard disks. Buynow PC Mall also exists as an e-commerce site but it is unclear the extent to which the vendors leasing physical space also make use of this e-commerce platform.
- **HuaQiangBei (华强北) Market** (Shenzhen, China) is a concentrated shopping area in Shenzhen, which contains streets lined by large markets (buildings) each specializing in



commercial electronics, consumer electronics, or fashion. The markets remain the central point from which counterfeit software is distributed to other regions in China and elsewhere. Several criminal counterfeit software cases in China have involved counterfeit distributors operating out of these markets. The Chinese government has performed several sweeps in this market during periodic ‘special enforcement campaigns’, but the situation has not improved in any meaningful way.

- **Quiapo, Binondo, Baclaran, Makati Cinema Square, Metrowalk, 168 Mall, Divisoria, Juan Luna Plaza, and New Divisoria Mall** (Metro Manila, the Philippines) continue to contain retail pirate trade. While Manila’s Quiapo district was removed from USTR’s notorious markets list in 2012, unfortunately, recent raids (including a major raid in August 2013) revealed hundreds of thousands of pirate discs, including pirate and counterfeit software.
- **Petaling Street, Chinatown** (Kuala Lumpur, Malaysia) and **Holiday Plaza** (Johor Bahru, Malaysia)<sup>78</sup> are examples of numerous Malaysian markets (including night markets) reportedly offering for sale a substantial number of pirate copyright products.
- **Harco Glodok, Mangga Dua Mall, Ambassador Mall/ITC, and Ratu Plaza** (Jakarta, Indonesia) remain active markets in Indonesia for counterfeit copyright goods of all types, including pirate software, games, music, and movies. Many outlets also offer the service of installing pirated material onto computers provided by customers. Enforcement officials remain reluctant to conduct enforcement actions.
- **7 Kilometer Open Market** (Odessa) and **Barabashovo Open Market** (Kharkov) (Ukraine). These Ukrainian markets contain an array of counterfeit products in their more than 40,000 kiosks. Russian-replicated counterfeit movies continue to be sold.
- **Caribbean Gardens & Markets** (Victoria, Australia). Caribbean Gardens and Markets is Australia’s largest underground market operating every Wednesday and Sunday. There are between ten and twenty individual market sellers offering pirate DVDs, together with other sellers offering burned DVDs of recently released titles. The total number of sellers has increased recently due to a lack of enforcement, and police have shown no interest in enforcing the issue despite right holder requests.
- **Greater Toronto Area** (Canada). Despite enforcement including seizures of over one million pirated DVDs from flea markets since 2012, the markets remain a problematic area in 2013. Peel Region flea markets, which are marred by the presence of organized crime, remain the most active.
- **Hailong Electronics Shopping Mall (Zhongguancun - 中关村)** (Beijing, China). Hailong is one of the largest markets in Beijing hosting shops with bundled sales of hard drives loaded with counterfeit movies. Hard drives can be wiped and reloaded with new movies at a very low cost.

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<sup>78</sup> Holiday Plaza in Johor Bahru is a three-story shopping mall located directly across the strait from Singapore.



- **Jonesborough Market** (Northern Ireland). Infamous within the UK and Ireland, this market sits in an isolated area on the border of Northern Ireland and Ireland and is monitored by illegal traders who deploy counter-surveillance measures. Despite enforcement activity in 2012 and 2013, it remains a problematic market and illegal traders often escape across the porous border during raids. Operators of this market have historically strong ties to paramilitary groups and sell an array of counterfeit products, including pirated optical discs.
- **Mayak Open Market** (Donetsk) and **Petrovka Open Market** (Kiev) (Ukraine). While counterfeit products appear to be diminishing following police raids, counterfeit movies are still burned on demand at Mayak's 40 kiosks and Petrovka's 20 kiosks.
- **"Red Zones,"** including **Panthip Plaza, Klong Thom, Saphan Lek, Baan Mor Shopping Area, Patpong and Silom Shopping Areas, Mah Boon Krong (MBK) Center, Sukhumvit Road** (Thailand). These locations in Thailand are notorious for openly selling pirated and counterfeit goods, with the government even designating the areas as "red zones," which are markets targeted for increased raids due to their high piracy and counterfeiting rates, and "yellow zones," which are targets to be aware of for possible piracy activities. Many vendors openly sell pirate and counterfeit goods (as well as engage in other crimes such as the sale of child pornography). The Royal Thai Government has promised on repeated occasions that the Red Zones would be shuttered, and despite some activity by landlords to address their tenants' illegal activities, the markets remain open for business.
- **Richie Street, Censor Plaza and Burma Bazaar** (Chennai); **Bara Bazaar** (Kolkata); **Chandini Chowk, Palika Bazaar and Sarojini Nagar Market** (Delhi); **Navyuk Market Ambedkar Road and Nehru Nagar Market** (Ghaziabad); **Kallapur Market and Laldarwajah** (Ahmedabad); **Jail Road and Rajwada** (Indore); **Manish Market, Lamington Road, Dadar Train Station, Andheri Station Market, Borivili Train Station and Thane Station Market** (Mumbai) (India). These Indian markets with clusters of street vendors attract significant pedestrian traffic and are known for their high volume of pirated DVDs and other counterfeit products.

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IIPA appreciates this opportunity to provide input to the Special 301 Subcommittee in this Out-of-Cycle Review regarding notorious markets for copyright piracy.

Respectfully submitted,

Michael Schlesinger  
International Intellectual Property Alliance



IIPA testimony to USITC on *Trade, Investment, and Industrial Policies in India: Effects on the U.S. Economy* investigation  
(2014)



January 30, 2014

*Submitted Electronically via EDIS and in Copies to the Commission, Investigation Nos. 332-543*

Lisa R. Barton  
Acting Secretary to the Commission  
United States International Trade Commission  
500 E Street, SW  
Washington, D.C. 20024

Re: IIPA Pre-Hearing Brief and Statement Related to: United States International Trade Commission, *Trade, Investment, and Industrial Policies in India: Effects on the U.S. Economy*, 78 Fed. Reg. 54677, September 5, 2013.

To the International Trade Commission:

The International Intellectual Property Alliance (IIPA) hereby submits its Pre-Hearing Brief and Statement, plus Appendices, Related to: United States International Trade Commission, *Trade, Investment, and Industrial Policies in India: Effects on the U.S. Economy*. We understand the hearing is scheduled for February 13, 2014, and look forward to appearing before the Commission on that date.

Respectfully submitted,

Michael Schlesinger

Attachments



## **Pre-Hearing Brief and Statement of the International Intellectual Property Alliance (IIPA)<sup>1</sup> before the United States International Trade Commission Trade, Investment, and Industrial Policies in India: Effects on the U.S. Economy**

The International Intellectual Property Alliance (IIPA),<sup>2</sup> a private sector coalition formed in 1984 of trade associations representing U.S. copyright-based industries, is pleased to submit its Pre-Hearing Brief and Statement Related to the United States International Trade Commission, *Trade, Investment, and Industrial Policies in India: Effects on the U.S. Economy* investigation. As has been documented in the Federal Register notice (78 Fed. Reg. 54677, September 5, 2013), the Senate Committee on Finance and the House Committee on Ways and Means (Committees) have requested the above-referenced investigation which would result in delivery of a Commission report to the Committees scheduled for November 2014.

According to the USITC, the Commission has been asked to “conduct an investigation regarding Indian industrial policies that discriminate against U.S. imports and investment for the sake of supporting Indian domestic industries, and the effect that those barriers have on the U.S. economy and U.S. jobs.” The Commission will then, based on the results of its investigation, provide in its report, among other things: 1) An “overview of trends and policies in India affecting trade and foreign

<sup>1</sup> Appearing at the February 13, 2014 hearing will be Michael Schlesinger, Counsel to IIPA.

<sup>2</sup> The International Intellectual Property Alliance (IIPA) is a private sector coalition, formed in 1984, of trade associations representing U.S. copyright-based industries working to improve international protection and enforcement of copyrighted materials and to open foreign markets closed by piracy and other market access barriers. IIPA’s seven member associations represent over 3,200 U.S. companies producing and distributing materials protected by copyright laws throughout the world—all types of computer software, including operating systems, systems software such as databases and security packages, business applications, and consumer applications such as games, personal finance, and reference software, free software, open source software, and software as a service, entertainment software including interactive games for videogame consoles, handheld devices, personal computers and the Internet, and educational software; motion pictures, television programming, DVDs and home video and digital representations of audiovisual works; music, records, CDs, and audiocassettes; and fiction and non-fiction books, education instructional and assessment materials, and professional and scholarly journals, databases and software in all formats. Members of the IIPA include [Association of American Publishers](#), [BSA | The Software Alliance](#), [Entertainment Software Association](#), [Independent Film & Television Alliance](#), [Motion Picture Association of America](#), [National Music Publishers’ Association](#), and [Recording Industry Association of America](#).



direct investment in that country's ... service sectors, as well as the overall business environment," including "changes in tariff and nontariff measures, including measures related to the protection of intellectual property rights, and other actions taken by India's government to facilitate or restrict the inflow of trade and FDI"; 2) a "description of ... any significant restrictive trade and FDI policies currently maintained or recently adopted by India ...; ... the sectors in the U.S. economy most affected by these restrictive policies; and ... the general competitiveness of sectors in India's economy that are subject to the identified restrictions"; 3) "[t]o the extent feasible, a quantitative analysis of the economic effects of India's identified restrictive measures on the U.S. economy as a whole, on U.S. trade and investment, and on selected sectors of the U.S. economy"; and 4) "to the extent feasible, a summary of U.S. firms' perception of ... recent changes in India's trade and investment policies in selected sectors and ... the effects of these changes on U.S. firms' strategies towards India (e.g., reducing investment or altering product mix), and analysis of whether the effects of these policy changes differ by firms' characteristics, such as size, IP-intensiveness, or export status."

In this Pre-Hearing Brief and Statement, IIPA will endeavor to assist the Commission in the preparation of its report by providing concrete information pertaining to tariff and non-tariff barriers in India involving intellectual property rights or IP-intensive businesses, with a focus on IIPA members' core businesses.<sup>3</sup> The key impediments to IIPA members' doing business in India are IP theft in the form of piracy and counterfeiting. In addition, India imposes market access and discriminatory barriers on IIPA members' businesses which hinder their entry into the market. In addition to this testimony and IIPA's previous report on India in the annual "Special 301" process submitted to the United States Trade Representative (and included herein as Appendix A), IIPA will also provide to the Commission

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<sup>3</sup> IIPA's previous reports, including in the annual "Special 301" process, may be relevant to these proceedings. See IIPA, *India*, 2013 Special 301 Report, February 8, 2013, at <http://www.iipa.com/rbc/2013/2013SPEC301INDIA.PDF> (included herein as Appendix A).



prior reports by IIPA and others which present information for examining the effect of notable barriers and impediments to trade in IIPA members' core businesses in India.

## **1. Overview of Trends and Policies in India, Including Measures Related to IPR**

India should provide fertile ground for trade in copyright-intensive goods and services. This is demonstrated by a large local industry. For example, India produces the greatest number of films in the world (estimated at more than 1,000 full-length feature films in 2013), boasts a creative and diverse Indian and international music market, retains a prolific publishing industry (estimated informally at 19,000 publishers producing 90,000 titles per year),<sup>4</sup> and supports a vibrant software market (made up of distributors, but also IT and business process outsourcing, as the largest sources of revenues).

Unfortunately, content theft – piracy – and market access barriers, negatively impact the ability of domestic and foreign creators alike to fully enjoy their rights, resulting in significant under-performance. Problems include: massive and growing online and mobile (smart phone and tablet) piracy; unauthorized camcording of movies in the theaters; unauthorized use of software and published materials (including imports of pirate publications from locales like Bangladesh, and exports of India-only books throughout the world); lack of priority assigned to copyright piracy cases; lack of uniform enforcement procedures among different regions' law enforcement authorities; and market access barriers such as high taxes, “must provide” requirements in the pay TV sector, and discriminatory procurement practices.

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<sup>4</sup> *Publishing in India Today: 19,000 Publishers, 90,000 Titles, Many Opportunities*, Publishing Perspectives, July 6, 2011, at <http://publishingperspectives.com/2011/07/publishing-in-india-today-19000-publishers-90000-titles/>.



The Copyright Act was amended in 2012 with some positive features. However, some aspects of that reform remain problematic, such as: inadequate protection for access control technological protection measures and against trafficking in circumvention technologies, devices, and services; burdensome restrictions on freedom of contract that are at odds with industry practices and threaten the fabric of longstanding business models; and TRIPS- and Berne-incompatible compulsory and statutory licenses.

Copyright holders generally have positive relationships with Indian Government authorities, including the Ministry of Human Resources and Development (MHRD). The Indian Government runs significant numbers of raids (in the 1,000s) and several effective court mechanisms remain viable, including Anton Piller (*ex parte* search), John Doe, and Mareva (asset freezing) orders. Police will often take enforcement actions on their own recognizance (so-called *suo moto* cognizance). Actions against “release” groups engaged in the unauthorized camcording of movies in cinemas, and court orders disabling access to dedicated piracy websites in India, have had a temporary ameliorative effect, and while unauthorized camcording is down somewhat in 2013 (compared with 2012, when India-sourced camcords were responsible for 53% of all illegal detections of major U.S. motion pictures in the entire Asia region), Internet piracy and, to a lesser extent, mobile device (smart phone, tablet) piracy remain serious.

A developing National IPR Strategy in India offers a forum to achieve results in line with Prime Minister Singh’s call for India to experience a “decade of innovation.” However, an environment in which piracy persists, coupled with policies put into place to disfavor foreign right holders, results in a highly distorted marketplace. Examples of market access restrictions include:



- Bans on exclusivity in the pay TV sector and similar restrictions in the Direct-to-Home (DTH) market (the reception of satellite programs with a personal dish in an individual home), imposing “must provide” restrictions.
  - Price controls on the pay TV sector.
  - Inordinately high and discriminatory entertainment taxes on theatrical admissions, VAT taxes, services taxes, and unconstitutional localized taxes based on the language of the film.
  - Price fixing on tickets in South India as well as quotas on the number of screenings per title per day.
  - Onerous regulations on uplink and downlink of satellite signals beaming into India.
  - High tariffs on entertainment software and hardware products, including PC game products, console game products, game console hardware, and game activation cards.
  - An array of software goods and services taxes, including transfer pricing rules based on global profit split attributions to outsourced R&D activity in India and double taxation of software as both a good and service.
  - An array of technology and procurement mandates which capture software.

For many years, stakeholders have urged the Indian Government to take into account the important role IP and innovation play in the Indian economy. The World Intellectual Property Organization (WIPO) has worked with over 40 countries to conduct studies calculating the contribution of their copyright industries to their national economies.<sup>5</sup> India’s MHRD and other

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<sup>5</sup> Linkages between copyright protection and economic development are documented by the World Intellectual Property Organization’s study, *WIPO Studies on the Economic Contribution of Copyright: Overview* (2013), available at [http://www.wipo.int/export/sites/www/copyright/en/performance/pdf/economic\\_contribution\\_analysis\\_2012.pdf](http://www.wipo.int/export/sites/www/copyright/en/performance/pdf/economic_contribution_analysis_2012.pdf), last accessed December 17, 2013. 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). The Guide, developed by an experts’ group, describes



agencies are currently considering the feasibility of such a study. Other studies have measured the contribution of certain sectors to national economies, including India. For example, the Motion Picture Association Asia-Pacific has issued the study, *Economic Contribution of the Indian Film and Television Industry 2010* (a copy of that study is included as Appendix B).<sup>6</sup> An update of that study is expected out soon. Further studies have measured the multiplier effects of reducing piracy on contribution to GDP, job growth, and tax revenues.<sup>7</sup> For example, in 2010, BSA (now BSA | The Software Alliance) and IDC issued *Piracy Impact Study: The Economic Benefits of Reducing Software Piracy*. The India report from that Study concluded that “[r]educing the PC software piracy rate in India by 10 percentage points in four years [2009-2013] would deliver: US\$4.66 billion in new economic activity; 59,728 new IT jobs; and US\$512 million in additional tax revenues by 2013.”<sup>8</sup> That report is included as Appendix C. India last conducted a nationwide review of the contribution of copyright to the Indian economy in 1995, finding that copyright made up over 5% of the economy.<sup>9</sup>

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methodologies for measuring the role of copyright industries in domestic economies adopted in the latest overview. These national studies provide the economic underpinnings for efforts to reform copyright law and enforcement and to lower rates of copyright piracy. Studies include: Australia (2007), Bhutan (2011), Brunei (2012), Bulgaria (2011), Canada (2004), China (2011), Colombia (2010), Croatia (2010), Finland (2011), Hungary (2006), Jamaica (2008), Kenya (2011), Latvia (2006), Lebanon (2008), Malaysia (2011), Mexico (2008), Netherlands (2011), Pakistan (2011), Panama (2011), Peru (2011), Philippines (2008), Republic of Korea (2012), Romania (2010), Russia (2010), Singapore (2004), Slovenia (2011), South Africa (2012), Thailand (2012), Ukraine (2010), and United States (2011).

<sup>6</sup> The India study can be accessed at Motion Picture Association Asia-Pacific, *Research and Statistics*, at [http://mpa-i.org/index.php/research\\_statistics](http://mpa-i.org/index.php/research_statistics). Other studies have been conducted for Indonesia (2012), Japan (2012), South Korea (2012), Thailand (2012), New Zealand (2009, 2012), Australia (2011), and Hong Kong (2009).

<sup>7</sup> See, e.g., BSA (now BSA | The Software Alliance) and IDC, *Piracy Impact Study: The Economic Benefits of Reducing Software Piracy*, 2010, at <http://portal.bsa.org/piracyimpact2010/>.

<sup>8</sup> *Id.*, India, at [http://portal.bsa.org/piracyimpact2010/cps/cp\\_india\\_english.pdf](http://portal.bsa.org/piracyimpact2010/cps/cp_india_english.pdf).

<sup>9</sup> See IIPA, *Initial Survey of the Contribution of the Copyright Industries to Economic Development*, April 2005, at [http://www.iipa.com/pdf/2005\\_Apr27\\_Economic\\_Development\\_Survey.pdf](http://www.iipa.com/pdf/2005_Apr27_Economic_Development_Survey.pdf). IIPA noted (citing Shahid Alikhan, *Socio-Economic Benefits of Intellectual Property Protection in Developing Countries* 61-63 (2000):

In 1995, Indian copyright industries accounted for 5.06% of that country’s GDP. This can be accounted for by the fact that India’s book publishing, film and music industries are among the largest in Asia. The Indian book publishing industry is among the largest in the world in terms of volume, turning out 57,400 titles in 1997. The Indian film industry makes roughly 800 films a year, contributing significantly to the local economy. India is also an enormous producer and consumer of recorded music. In 1997, the total unit sales reached nearly 412 million. The growth of the Indian software industry is likewise staggering. Between 1990 and 1997, the industry grew more than 50%. Exports in this area have grown from US \$225 million in 1992-93 to US \$1.7 billion in 1997-98. The domestic software industry grew from US \$490 million in 1995-96 to US \$1.25 billion in 1998-99.





All of these statistics help make the case for stronger support for IP-intensive industries in India as a driver of its own economic growth, and highlight the harm being caused by restrictive trade and FDI policies to India's own economic, social, and cultural well-being.

## **2. Detailed Description of Significant Restrictive Trade and FDI Policies Currently Maintained or Recently Adopted by India**

IIPA has long reported on significant restrictive trade practices, including in the areas of IPR protection and market access or discriminatory impediments to the copyright industries' ability to avail itself of the Indian market on a level playing field. The following provides more detail on specific trade or market access barriers of note.

**Internet and Mobile Piracy:** Within the next two years, India will be the second largest Internet market in the world, and the world's leading English language market, with an estimated 330-370 million Internet users. Mobile penetration stands at around 70% with an increasing number of mobile (smart phone and tablet) users (estimated at around 22 million) having 3G Internet access.<sup>10</sup> The Indian Government continues investing in infrastructure to support this growth under its National Broadband Policy, and opportunities for expansion of India's online marketplace for copyright content theoretically abound. However, without adequate legal protection and enforcement against illegal BitTorrent, cyberlocker, web-based file hosting, wireless access protocol (WAP), blogs, and online radio sites or services (catering to Indian demand for music, movies and television programming, software, games, and books), India's legitimate online marketplace will remain stunted.<sup>11</sup>

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<sup>10</sup> See generally International Telecommunications Union, *Facts and Figures*, <http://www.itu.int/en/ITU-D/Statistics/Pages/facts/default.aspx>.

<sup>11</sup> Indian consumers have legitimate choices today, including BigFlix, Eros On Demand, Box TV, Rajshri, iTunes India, Yahoo India, YouTube India, Ditto TV, BSNL Hungama, Spuul, NFDC Cinemas of India, Biscot Talkies. On top of these legitimate online platforms, retail chains such as Landmark, Crossword and Planet M now sell legitimate copies of films in DVD and VCD format.



A recent reported study tracking downloading IP-addresses on P2P networks for films and television content found India to be in the top 10 Internet (P2P) piracy countries in the world.<sup>12</sup> In 2013, the Entertainment Software Association (ESA) reported that India once again placed sixth in the world in terms of the number of connections by peers participating in the unauthorized file sharing of select ESA member titles on public P2P networks. Pirated versions of movies often appear on the Internet in India within hours of their release in the movie theater, available through BitTorrent, cyberlocker, or web-based file hosting sites or services. The Internet piracy situation in India is fluid, as sites subject to enforcement or court orders merely migrate to avoid enforcement or further detection. Currently, top international sites for accessing illegal content in India include *kickass.to* (the 43rd most accessed site in the country), *torrentz.eu* and *torrentz.in* (47th and 112th, respectively), *extratorrent.cc* (66th), *thepiratebay.se* (69th), and *4shared.com* (127th). In addition, many sites target local Indian audiovisual content, such as *exdesi.com*, *netload.in*, *bollyrulez.net*, *bollyzone.ch*, *cramit.in*, *gorillavid.in*, *daclips.in*, *djluv.in*, *ictorrents.com*, *moviespack.com*, *movpod.in*, *hdvdosongs.com*, *torrentz.cd*, *thefilmovie.com*, and *mediafiremoviez.com*. Hundreds of sites including some cited above and sites like *songspk3.in* target both international and Indian music repertoire. The prevalence of these readily accessible sites indicates that local Indian creators as well as foreign creators are being harmed significantly by online piracy, a factor that the Indian Government should take into account when devising its policies in this space.

Regarding enforcement, in 2012 and again in 2013, the music industry association obtained civil court orders against more than 250 dedicated piracy sites (operating through hundreds of ISPs). These orders are a helpful indicator of a nascent government willingness to address online

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<sup>12</sup> Utpal Borpujari, *India Major Online Film Piracy Hub*, Deccan Herald, January 30, 2014, at <http://www.deccanherald.com/content/41541/india-major-online-film-piracy.html>.



infringement, but much more will be required to drive down online music piracy and create the space needed for the operation of legitimate music services. The motion picture industry notes some cooperation for takedowns of hosted content on traditional sites (e.g., user-generated content sites) but inadequate support from ISPs and law enforcement for disabling access to dedicated piracy sites. Piracy sites and those offering the sale of pirated materials for mobile devices generally operate openly in India without fear of legal action.

The Copyright Act provision on notice and takedown will not by itself be adequate to address online piracy, since it only provides takedown for a period of 21 days, and failure of the right owner to furnish a court order within 21 days of the takedown notice allows the ISP to reinstate the content. The Indian Government has also been asked to convene regularized communications between right holders and the major ISPs, or at least ensure that such meetings occur, to foster voluntary and mutual cooperative efforts.

Where investigations reveal that piracy websites have a nexus to or contact details in India, the music industry is bringing criminal complaints. Twenty-two such criminal complaints were lodged in 2012 by the music industry. One court case, *Super Cassettes Industries Ltd. v. Myspace Inc. & Another* (2011),<sup>13</sup> may also be helpful in defining the contours of liability for intermediaries in the online space and fostering greater cooperation among ISPs and other intermediaries. In that case, the plaintiff was granted an interim injunction against the defendant whose social network was found to be secondarily infringing through allowing its “webspaces” or “places” to be used for sharing infringing materials.

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<sup>13</sup> *Super Cassettes Industries Ltd. v. Myspace Inc. & Another* (High Court of Delhi, July 29, 2011, IA No.15781/2008 & IA No. 3085/2009 in CS (OS) No. 2682/2008.



**Unauthorized Camcording:** There was an alarming proliferation of unauthorized camcording in 2012 which drove not only online piracy but also harmed markets outside India. In 2012, there were 69 incidents of major U.S. motion pictures for which audio, video, or audio/video captures were detected as being sourced from Indian movie theaters.<sup>14</sup> That number dropped to 43 incidents in 2013. This is a positive indicator, but does not include unauthorized camcording of local Indian, foreign, or independent films. The local film industry and cinema owners are quickly coming to understand there is a dire need for urgent action. Recent joint efforts in the first half of 2013 by the Motion Picture Distributors Association, MPAA, and the Andhra Pradesh Film Chamber of Commerce (APFCC) resulted in the arrest of members of two major criminal camcording syndicates operating in previously reported piracy hotbeds of Surat (Gujarat) and Indore (Madhya Pradesh).<sup>15</sup> As a consequence of these successful enforcement operations, there were no camcording incidents reported in these areas during the latter part of 2013. Another positive development was the creation, with the assistance of the motion picture industry, of a mobile “app” launched in Andhra Pradesh to detect and report piracy and camcording incidents. Unfortunately, camcording incidents are now being reported in some of India’s smaller cities and towns and are exacerbated by the growth of multiplexes in these cities. Increased camcording incidents were observed in Bhopal (Madhya Pradesh), Lucknow, Noida, and Muzaffarnagar (Uttar Pradesh), and Aurangabad (Maharashtra).

The Indian Government Ministry of Information & Broadcasting (MIB) is planning to amend the Cinematograph Act, 1952, and has been urged to include a prohibition on unauthorized

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<sup>14</sup> In IIPA’s 2013 Special 301 report on India, IIPA reported that 53% of all pirated versions of major U.S. releases detected in Asia were sourced to an Indian cinema.

<sup>15</sup> The first operation targeted a major camcording syndicate nicknamed ‘Yamraaj’ located in Indore during the release of ‘Ironman 3.’ The second operation, based on evidence linked to the first operation was against a major release group operating out of Surat in India nicknamed ‘NICKkkDon.’ The second camcording syndicate owned 33 websites and comprised 6000 members. Extensive seizures were made in both cases.



camcording, specifically, making it unlawful to possess an audiovisual recording device (such as a video camera or other device) with the intent to make or transmit (or attempt to make or transmit) a copy, in whole or in part, of a motion picture while inside a theater. The emerging international trend is to provide explicit protection against unauthorized camcording. The U.S. and many other countries have addressed the problem successfully through legislation; instances of camcording have been reduced in several markets with relatively minimal devotion of Government resources – a true win-win. Continued efforts by cinema owners (e.g., showing slides and placing messages on tickets and within theater premises conveying that illegal camcording is not allowed), as well as industry initiatives like the “Make a Difference” campaign working directly with cinema owners, have raised awareness of this problem and may provide some level of deterrence.

***Suo Moto Raids by State Cells and Investigations of Sophisticated Computer Piracy Networks:*** The Indian Government has established various state enforcement cells in the state police headquarters, and the states have appointed nodal officers to handle IPR related offenses. In addition, the non-bailable nature of copyright offenses has traditionally been helpful, meaning the state cells can run raids on *suo moto* cognizance (such has not been the case for book publishers, however, who usually only get a raid after lodging a formal complaint under Section 200 of the Code of Criminal Procedure). It has been difficult for right holders to get clearly delineated information as to the proper office to approach with respect to either online piracy (a form of cybercrime) or physical forms of piracy. Time frames from registration of “First Information Report” or criminal complaints to the execution of a raid have not been swift enough to maintain enforcement momentum, particularly against covert networks where speed of response, confidentiality, and adaptability are key factors. Law enforcement in smaller cities and towns, where piracy and pirate networks now percolate, reportedly



take up to three or four days from complaint to raid. Reports also indicate the concern over the high risk that information about the raid is being leaked. Many of the states also have laws against organized or immoral crimes (so-called ‘Control of Goonda Acts’), which have been helpful in addressing piracy. The Goonda Acts have not to date been used to address software and book piracy.

The publishing industry notes that the lack of a central standard operating procedure in relation to piracy cases across Indian enforcement authorities (i.e., district police departments among the states) in relation to pre-raid documentation requirements for lodging complaints, evidence gathering details during raids, including adhering to required safeguards and post-raid recordation, is a hurdle for effective anti-piracy enforcement, leading to differing enforcement attitudes/inclinations, awareness, and processes. These hurdles invariably lead to duplication of efforts and low conviction rates.

**Court Reform to Address Piracy Issues in India:** Use of the courts in India remains a mixed experience, depending on the state and issue. Generally, the High Courts in Delhi, Mumbai, Chennai, and Kolkata (which also retain jurisdiction as “courts of first instance”) do a creditable job in civil cases, and most positive civil relief and court orders emanate from these areas of the country. The experience in other courts, where district courts are the courts of first instance for piracy issues, is spottier, with endemic factors which prevent effective judicial enforcement of copyright including:

- clogged dockets;
- procedural delays due to archaic procedural laws;
- problems with retaining evidence (and lack of familiarity with the evidentiary requirements in relation to electronic evidence in online piracy cases);
- onerous requests to produce evidence of ownership and/or witnesses;



- failing to grant seizure orders to copyright owners as a matter of right in civil cases; and
- difficulty enforcing civil court orders.

Discussion has ensued on establishing special IP courts throughout the country, not just in Delhi. In addition, with fewer civil cases settling, discussion has ensued on the need for more adequate damage awards to fully compensate right holders for injury suffered (a TRIPS requirement), and the desirability of adopting pre-established (statutory) damages, elected by the right holder, in civil cases. A disturbing report indicates the Delhi High Court has proposed higher court costs (up to 300% of the current costs) for cases valued at Rs.20 million (US\$333,000). This would be a serious blow to anti-piracy efforts in India, since the Delhi High Court is one of the few to have IP specialist judges and is often used by right holders in civil copyright cases.

Criminal cases have not yielded effective and deterrent results in most cases. While copyright piracy is a non-bailable offence, in practice, bail is often secured on the first day after arrest. There are no provisions for forfeiture of pirate product, although equipment used to manufacture such goods may be subject to seizure. Criminal prosecutions often take years, by which time relevant witnesses and officers are untraceable and in many cases evidence secured is also compromised, leading to acquittals. In plea bargains (the recording industry reports 80 plea bargains in 2013) or even convictions, fines remain low and non-deterrent, with most falling under US\$1,000. Restitution is not being awarded in criminal cases but doing so would have a stronger effect, both to make the victim whole and to provide a level of deterrence as to the defendant. Experiences of the industries with criminal cases differ by region, but overall, further training of judges, prosecutors (there are no dedicated or IP expert prosecutors), and police officers on the seriousness of IP offenses, and linkages to organized crime and investigating up the chain, would be helpful.



**Unauthorized Use of Software by Enterprises:** The software industry reports that the rate of software piracy has continued to decline gradually in India, though it remains high at a rate of 61% in 2013 (down from 63% in 2011, and 69% in 2007), representing a commercial value of unlicensed software used in India of well over US\$2 billion.<sup>16</sup> The number of actions taken against unauthorized end-users in India increased from 12 (in 2012) to 24 (in 2013). The courts effectively employ Anton Piller orders to preserve evidence and retain the element of surprise, which is critical in the software space. Still, more *suo moto* cognizance raids would have a greater deterrent effect (since it would obviate the need for a complaint or application for an order, as well as broaden the scope of the search). Unfortunately, many states and localities do not view unauthorized use of software by enterprises as a serious infringement, much less a crime. As a result, software piracy has become acute in some parts of the country, e.g., commercial/industrial hubs such as Coimbatore, Chennai, and Baroda. In addition, in certain cities in India, it is extremely difficult to get police cover in civil end-user actions despite court orders. In such cases, instructions from the highest officers should be issued to provide unstinting support.

The Indian Government has been urged to amend Indian tax laws to classify software piracy as a form of tax evasion and define corresponding tax violation rules in line with international best practices. Tax inspectors and external and internal auditors would then be empowered to check and account for genuine software licenses inside public and private companies, allowing the recovery of hundreds of millions of dollars in lost direct and indirect taxes.<sup>17</sup> The Government has also been asked

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<sup>16</sup> Data on software piracy rates and commercial values are taken from the 2011 BSA Global Software Piracy Study at <http://www.bsa.org/globalstudy>. This study assesses piracy rates and the commercial value of unlicensed software installed on personal computers during 2011 in more than 100 markets. The study includes a detailed discussion of the methodology used. BSA plans to release an updated study in the second quarter of 2014.

<sup>17</sup> A study by IDC estimates the Indian Exchequer lost US\$866 million in 2009 due to failure to capitalize on direct and indirect taxes which would have been owed in the absence of software piracy in India.





to amend the Companies Act, 1956 to require software compliance audits by duly qualified and appointed auditors. Such requirements might be targeted by reference to a minimum threshold (for example, revenue, total assets, etc.) to determine the set of companies to which such an audit requirement would apply. Corporate disclosure rules should also be revised to require more specific disclosure of genuine software licenses.

The Indian Government has been urged to issue a directive or strict policy guidelines mandating that all Government departments across the country use legal software and follow due diligence while procuring software assets. This would ensure software license compliance in Government, protect Government systems from security vulnerabilities, and send a strong message to the private sector about the importance of software license compliance. The Government has also been urged to adopt software asset management (SAM) best practices and promote these with private enterprises. BSA and the Department of IT established a roadmap for the promotion of SAM best practices in government and private enterprises in a joint report they issued in November 2011. BSA's "Certified in Standards-based SAM for Organizations (CSS(O))" program – the first SAM program aligned with ISO standards – is one possible model which may be followed.

**Unauthorized Use of Books and Lack of Export Monitoring Needed:** Unauthorized commercial-scale photocopying and unauthorized reprints of academic textbooks and professional books remain the predominant piracy problems facing the publishing industry in India.<sup>18</sup> There has also been an increase in the availability of pirated trade (or consumer) books, which are often sold by

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<sup>18</sup> Some local publishers in East India report piratical imports coming in from Bangladesh, and have asked for support of Indian Customs to curtail this problem; however, porous borders pose hurdles to being able to eradicate the entirety of the problem, meaning the Bangladeshi authorities must also take accountability over pirate exports from their territory. While judgments from the Indian High Courts (for example in *John Wiley & Sons v. Prabhat Kumar*) have clarified that the export of Indian editions outside of territories prescribed by the copyright owner would amount to an infringement of copyright, the Copyright Act, 1957 does not expressly include "exports" in the provision defining acts of infringement. This issue needs clarity so that right holders' interests continue to be protected while also ensuring that low-cost India-only editions continue to be available to the population of India.



itinerant (street) vendors to motorists in the middle of intersections. In efforts to combat rampant piracy, publishers long ago established the practice of creating market-specific low-priced textbooks editions to meet domestic demand – a significant benefit to Indian students and academics.

Two significant developments over the past year may portend major problems for U.S. and Indian publishers and distributors going forward. First, the export of India-only, low-priced editions has long been a significant problem for U.S. publishers. In 2013, India-only reprints were shipped to, and detected in, the Middle East, Africa, Europe (including the United Kingdom), and the United States. The United States Supreme Court decision in *Kirtsaeng v. John Wiley & Sons, Inc.* (568 U.S. \_\_\_) (2013), deeming legal the import into the U.S. of books lawfully made and distributed in Thailand, threatens to exacerbate this problem, and adversely affect the longstanding system of providing less expensive reprints exclusively for the Indian market. The Indian Government has been urged to take immediate action to protect continued access by its students to textbooks by empowering Customs to take *ex officio* actions with respect to illegal exports as well as imports at the border. This would send a positive signal to all publishers, including those printers and distributors who rely on copyright in the India-only editions for their livelihoods. It should also be pointed out that, notwithstanding the U.S. decision, exporting the India-only reprints remains illegal in much of the world.

Second, in August 2012, a group of university presses and academic publishers brought suit against Delhi University and a photocopy shop operating on the premises of the university. The suit seeks to draw the line between an exception for face-to-face teaching, in which teachers might be able to avail themselves of appropriate narrowly tailored exceptions to provide materials to students, and the activity concerned in this case – the commercial production of course packs which Delhi



University has outsourced to a commercial, for-profit, copy shop. There is a major difference between the two activities, with the former falling within the scope of what may be permissible under global norms, and the latter falling squarely outside those strictures. Nonetheless, the highly charged case has caused much debate among Delhi University faculty and students. The suitable middle ground appears to be what publishers have requested of the courts, namely, to enjoin the copy shop and the University from commercial acts of unauthorized photocopying, reproduction, and distribution of course packs without appropriate licenses from publishers. The courts can grant the injunction, preserving authors' rights against commercial reprography and requiring that licenses be granted with appropriate payments for course packs, while still preserving appropriate fair dealing. Doing so will also reaffirm the well-established three-step test which India must adhere to under the TRIPS Agreement and Berne Convention.

**Retail Piracy, Including Mobile Device Piracy:** Retail physical piracy continues to harm right holders, including: burned, factory, and imported optical disks containing all kinds of content;<sup>19</sup> mobile device piracy in which shops as an after-service offer to upload content to mobile device customers or sell flash or pen drives filled with content; hard-disk loading of pirated software and content onto computers at the point of sale; pirate rental of motion pictures; and pirate sales of games supported by sales of circumvention devices (in the market or online) and modification services for consoles. Both USTR and IIPA members have noted various physical marketplaces in India as “notorious” for the availability of pirated/illegal materials. IIPA’s latest notorious markets filing in November 2013 included the following markets: Richie Street, Censor Plaza, and Burma Bazaar (Chennai); BaraBazaar (Kolkata); Chandini Chowk, Palika Bazaar, Gaffar Market, and Sarojini Nagar

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<sup>19</sup> In addition to Hollywood, Hindi, Tollywood, and South Indian movie titles, the hard goods market also caters to titles in other regional languages.



Market (Delhi); Navyuk Market Ambedkar Road and Nehru Nagar Market (Ghaziabad); Kallapur Market and Laldarwajah (Ahmedabad); Jail Road and Rajwada (Indore); Manish Market, Lamington Road, Dadar Train Station, Andheri Station Market, Borivili Train Station and Thane Station Market (Mumbai). Much pirate material is “pre-release” (for example, Indian and international music records available on the streets before they are released legitimately to the public), causing significant harm to such works/materials. The Government of India has been urged to establish enhanced penalties for this highly damaging activity.

The most effective enforcement against these markets continues to be police raids taken on the basis of *suo moto* cognizance. Overall, the authorities continue to run thousands of raids on an annual basis. In a positive sign, legitimate resellers in Nehru Place in New Delhi have taken the initiative and complained to the responsible police unit, but reports of irregularities among the local police and leaks of raids hinder or even prevent enforcement activities. Even when raids take place and sellers of pirated material are arrested, the situation reverts within a few days, as the actual pirates may be based elsewhere (e.g., China, Pakistan, or Nepal) and are out of the reach of the authorities.

**Copyright Law (and Rules):** Copyright protection in India is governed by the Copyright Act, 1957 as amended last by the Copyright (Amendment) Act, 2012, and implemented in The Copyright Rules, 2013 (in force March 14, 2013). The Act (as amended) and Rules contain some improvements, and largely leave in place the enforcement structure of the Copyright Act and related laws and regulations.

The Act (and Rules which, under the Constitution, as “delegated legislation,” are limited in scope to supporting and prescribing the processes and formalities to implement the Act but never going beyond the Act) unfortunately leave some important concerns unresolved and raise new



concerns, some which call into question India's conformity with its international obligations under the TRIPS Agreement and Berne Convention, and conformity with the standards set out in the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT). In summary terms, problems include;

- Ownership and assignment provisions that are harming and altering existing commercial arrangements in India.<sup>20</sup>
- No express coverage of access control technological protection measures (TPMs) and no prohibition on trafficking in circumvention technologies, devices, components, and services, in full accord with the WCT and the WPPT.<sup>21</sup>
- Compulsory or statutory licenses that do not meet the provisions of the Berne Convention and TRIPS Agreement.<sup>22</sup>

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<sup>20</sup> The Act now contains independent rights for authors of 'underlying works' incorporated in cinematograph films including granting 'non-waivable' & 'non-assignable' royalty rights in favor of authors (Sections 17, 18-3, 19). The Act also barred assignment of future rights in respect of modes and mediums of exploitation which have not been invented or are not in commercial use (Section 18-2). As IIPA has previously indicated, the new provisions limit the ability of right holders to freely engage in contractual relationships with the authors of literary or musical works and set exact percentages or amounts ascribed to be paid to such authors, undermining the flexibility of parties to negotiate agreements on royalties' distribution which could be more beneficial or appropriate under the circumstances. To our knowledge, the Rules: 1) do not confirm only the prospective (i.e., non-retroactive) application of Articles 17-19; 2) retain the Section 18 proviso that assignments are deemed invalid as to "any medium or mode of exploitation of the work which did not exist or was not in commercial use" at the time the assignment was made unless that medium or mode was "specifically" mentioned in the assignment, which could wreak havoc with existing distribution arrangements, in particular with respect to digital distribution; 3) do not clarify that the Act governs the relationship of creative parties with respect to the production of works in India, and not contracting parties outside of India.

<sup>21</sup> The Act now contains a criminal (but not civil) prohibition, in Section 65A, of the act of circumvention of a technological protection measure (TPM) "with the intention of infringing" an exclusive right. The provision falls short of full WCT and WPPT compliance. The exception on the act of circumvention remains too broad. For example, the Rules do not adequately require, in the case of an exception to circumvent, reporting of 1) information about the tools used to circumvent; 2) the provision under which the exception to the prohibition is based; 3) the underlying work and subject matter being accessed by virtue of the circumvention; and 4) a declaration that under no circumstances will the underlying work be subject to onward distribution, transmission, making available, public performance, or communication to the public. It is helpful that the reporting does include under Section 80(2)(c) the reason for the circumvention, but Section 80(2)(d) is not as helpful. While it requires the person circumventing to sign an undertaking to accept responsibility for infringement as a result of the circumvention, it imposes no liability on the party enabling the circumvention. Finally, civil as well as criminal relief should be available. As India is witnessing the roll out of the National Broadband Policy, and cable TV digitization is due for completion by December 2014, and the Internet subscriber base in India grows year on year, TPMs become very relevant both to curb online piracy levels and make space for new legitimate distribution models.

<sup>22</sup> The Rules unfortunately do not alter the fact that two existing compulsory licenses, which were applicable only to Indian-origin works, now include all foreign works. The extension of these compulsory licenses to foreign works appears to run counter to India's Berne Convention and TRIPS obligations.



- The absence of statutory provisions regarding online infringements to permit expeditious takedowns without automatic put-back and address both hosted and non-hosted infringing activities and services.<sup>23</sup>
- Exceptions and limitations that may not meet the well-established Berne three-step test (e.g., the “private or personal use” exception in Section 52(a)(1); the software exceptions in Sections 52(1)(aa) and (ad)).
- No provision of statutory damages, upon the election of the right holder, on a per-copy basis, adequate to compensate right holders in cases in which proof of infringing numbers of copies or distributions cannot be determined.
- No provisions (such as those provided in the U.S. Family Entertainment and Copyright Act of 2005) that provide for increased civil and criminal penalties in cases involving defendants who make available to the public pre-release works or other subject matter.

**Tax Benefits for Associations Involved in Anti-Piracy and Capacity Building:** The Indian Government is urged to amend the tax code to provide exemptions for copyright associations involved in anti-piracy and capacity building activities. Providing this support will help create a win-win situation, since right holder groups will have the wherewithal to provide greater levels of support and

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<sup>23</sup> The Act now includes a safe harbor provision for ISPs engaged in the ‘transient or incidental storage of ‘works’ with requirements mandating takedown notices, disabling of access, and liability of such persons providing “access, links or integration” (Section 51 (1) (c)). The Rules provide for takedown within 36 hours of a notice but is otherwise problematic. While Rule 75(3) provides that the person responsible for the storage of the copy shall take measures to refrain from facilitating such access within 36 hours, this rule shifts the responsibility to right holders that have to comply with burdensome rules and requirements that may not be met in practice. For instance, according to Rule 75(2)(c) right holders have to provide evidence that the copy of the work in question is not covered under a Section 52 or other exception, inappropriately shifting the burden of proof to the right holder. The exception for certain acts of transient and incidental storage of works should be narrowed to those that do not have an independent economic significance and the sole purpose for which is to enable transmission in a network between third parties by an intermediary for a lawful use. Further, while the Information Technology (Intermediaries Guidelines) Rules 2011 imposed due diligence requirements on ISPs, it does not effectively provide incentives for them to assist in curbing online piracy, and carved out from their due diligence requirements certain transient reproductions without regard to whether the transaction taking place is an authorized one. In addition to gaps in the Copyright Act, the Department of Telecom (DOT) should enforce the conditions of their licenses with ISPs and the current Information Technology (IT) Act and relevant Implementing Rules should be utilized to full effect to address online copyright infringements and infringing websites.



capacity building. Such cooperative efforts will both raise awareness of the issues surrounding copyright protection in India as well as promote greater cooperation and more effective enforcement.

**Patent Pendency:** The software industry faces a significant and longstanding backlog of patent applications in India. Over the past five years, only 37% of the patent applications filed in India (and available for examination) have been examined by the Intellectual Property Office. The backlog as of late 2012 currently stands at approximately 100,000 applications across all industries. Addressing the backlog as a priority will promote R&D investment, ICT innovation, and national competitiveness in India.

**Ban on Exclusivity Including “Must Provide” Requirement in the Pay TV Sector:** A 2007 Telecom Regulatory Authority of India (TRAI) regulation creates a potentially Berne- and TRIPS-incompatible ban on exclusivity (prohibiting broadcasters of audio-visual content from granting exclusive contracts with any distributors) combined with a “must provide” requirement (obligating broadcasters of audio-visual content to provide channel programming to all requesting distributors on a nondiscriminatory basis). The exclusive contract prohibition, along with “must provide” requirements, eliminates all potential for competition and any incentive to develop programming or buy any “rights.” The industry has made numerous submissions to the Indian government opposing restrictions in the functioning of India’s cable and satellite market, arguing that the draft regulation would remove private parties’ ability to negotiate standard free market transactions and would ultimately limit the quality and quantity of legitimate content available to consumers. This regulation eliminates all potential for competition and any incentive to develop programming or buy any “rights.”

**Restrictions on Direct-to-Home (DTH) Market:** MIB has also taken similar restrictive steps with respect to the DTH market (the reception of satellite programs with a personal dish in an



individual home). Specifically, it issued a set of guidelines to include, among other things, prohibitions against DTH operators from entering into exclusive contracts with any broadcaster; and 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. These regulations and guidelines limit choice and undermine anti-competition laws.

**Price Controls on Pay TV Sector:** TRAI has also introduced price caps for pay channels and “price bands” for bouquets in areas with set-top-boxes. TRAI says they will relax the price controls once other television platforms are widely adopted (e.g., satellite TV, Internet Protocol TV). Such rate regulation is stifling to the growth of this clearly competitive industry sector.

**Onerous, Arbitrary, and Sometimes Discriminatory Entertainment Taxes:** Entertainment taxes on theatrical admissions, including unconstitutional taxes based on the language of the film, vary widely among Indian states, ranging from 15% to 40% in some key markets, and from 40 to 70% in other states. The average tax rate, computed on a country-wide basis, is estimated to be between 27% to 36%, and constitutes a significant disincentive to investment in the industry, including in the much needed area of cinema construction. The film industry, including the MPAA’s India group, in association with the Film Federation of India, continues to encourage the federal and various state governments to rationalize the high taxation levels and the Indian Government has also stepped in to persuade various state governments to impose a uniform entertainment tax not exceeding 60%. Citing revenue considerations, however, most states are reluctant to conform. In addition, at the request of their local state film industry representatives, some states discriminate between local and non-state originated films, charging nothing (or even offering incentives) for local films, while assessing higher rates for non-state originated films. 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. Subsuming all taxes into a unified tax such as the GST will rationalize practices.

**Price Fixing on Tickets in South India and Theatrical Exhibition Quotas:** The Indian Government in various of the southern states has engaged in price fixing on tickets as well as quotas on the number of screenings per title per day.

**Onerous Restrictions on Satellite Services:** For years, foreign content providers wishing to make their programming available by satellite have been stymied by onerous restrictions on their ability to uplink and downlink satellite signals beaming into India. Under 2005 Guidelines, foreign broadcasters are required, among other things, to set up offices in India, be subject to licensing by the government, and pay prescribed fees per channel beaming into India.

**High Tariffs on Entertainment Software and Hardware Products:** Entertainment software publishers continue to be hindered by the existence of high tariffs on PC game products, console game products, game console hardware, and game activation cards. Additional taxes compound to create an environment where the market share of authorized hardware and software is only a fraction of what it would be under less restrictive market conditions. India maintains unbound tariffs on consoles and accessories, including activation and value cards used in software and online game transactions, creating an uncertain business climate for trade and investment in the Indian market.

**Taxation of Software:** An array of tax policies negatively impact market access for software goods and services in India. These include transfer pricing rules based on global profit split attributions to outsourced R&D activity in India and double taxation of certain software as both the sale of a good and service.



**Technology and Procurement Mandates:** The Indian Government has issued a number of policies that raise concerns they will be implemented in a manner that provides significant preferences and mandates for procurement of products and services that are locally manufactured, that utilize a particular technology, or that have IP owned and/or developed in India. These include the National Electronics Policy, the National IT Policy and the National Telecom Policy, and the Preferential Market Access (PMA) policy for domestically manufactured electronic products. The Indian Government recently announced that the PMA policy would not apply to procurement by Government licensees and other private sector enterprises as it had originally intended. This is a step in the right direction, but IIPA remains troubled by the implementation of policies that would provide significant mandates and preferences for local products in government procurement. Such policies not only impede sales of foreign software and other technology products, but deny the Indian Government the ability to choose the best available products and services for its needs.

### **3. Quantitative Analysis of the Economic Effects of India's Identified Restrictive Measures**

The USITC has indicated that the Commission report will provide, “[t]o the extent feasible, a quantitative analysis of the economic effects of India’s identified restrictive measures on the U.S. economy as a whole, on U.S. trade and investment, and on selected sectors of the U.S. economy.” IIPA does not compile such quantitative analyses, in part because the nature of digital, online, mobile, and other forms of piracy (e.g., pay TV piracy, which may involve unauthorized tapping, head end, or under-declaration), are not susceptible to exact loss estimates or substitution rates.

Independent studies support with quantitative data that, overall, piracy remains a damaging barrier to trade in copyright goods and services. A study released by BASCAP (Frontier Economics),



*Estimating the Global Economic and Social Impacts of Counterfeiting and Piracy* (February 2011),<sup>24</sup> estimated the value of digitally pirated music, movies and software (not losses) at \$30-75 billion in 2010, and growing to \$80-240 billion by 2015. On January 14, 2014, the United Nations Office on Drugs and Crime (UNODC) launched a new global campaign to raise awareness among consumers of the harm being caused by the estimated \$250 billion a year illicit trafficking of counterfeit goods.<sup>25</sup> Rampant piracy and counterfeiting not only impedes the evolution of legitimate channels for distribution, but also threatens to damage permanently or displace existing and authorized distribution channels which are unable to compete with infringing business models. Market access barriers, investment barriers, and discriminatory treatment make it difficult to compete in foreign markets on a level playing field, and all efforts to crack down on piracy will be unavailing if legitimate products and services cannot be brought into a market to meet consumer demand.

Regarding India specifically, the software industry has compiled data about the quantitative effects of piracy. In 2013, 61% of software used by enterprises in India is estimated to be unlicensed, representing a commercial value of unlicensed software used in India of well over US\$2 billion. This number is slightly down from 63% in 2011, when the value of unlicensed software was estimated to be US\$2.9 billion. These numbers do not include quantitative estimates due to other forms of piracy such as hard-disk loading of software onto computers at the point of sale, or counterfeiting of software. Other quantitative estimates may be gleaned from the BSA piracy impact study, mentioned above,

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<sup>24</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 (on file with IIPA). The report builds on a previous OECD study (*The Economic Impact of Counterfeiting and Piracy* (2008))

<sup>25</sup> See 'Counterfeit: Don't buy into organized crime' - UNODC launches new outreach campaign on \$250 billion a year counterfeit business, UNODC website, January 14, 2014, at <http://www.unodc.org/unodc/en/frontpage/2014/January/counterfeit-dont-buy-into-organized-crime---unodc-launches-new-outreach-campaign-on-250-billion-a-year-counterfeit-business.html?ref=fs2>, accessed January 24, 2014. The campaign, *Counterfeit: Don't buy into organized crime*, informs consumers that buying counterfeit goods could be funding organized criminal groups, puts consumer health and safety at risk and contributes to other ethical and environmental concerns



showing that “[r]educing the PC software piracy rate in India by 10 percentage points in four years [2009-2013] would deliver: US\$4.66 billion in new economic activity; 59,728 new IT jobs; and US\$512 million in additional tax revenues by 2013.”<sup>26</sup> Further quantitative evidence may be deduced from Entertainment Software Association (ESA) figures on the download of select ESA member game titles. Among major countries surveyed, India ranked 6th in 2013 in sheer numbers of complete downloads of select ESA member titles through P2P file sharing protocols.

#### **4. Summary of Perception of Recent Changes and Effect of Those Changes on Strategies**

Finally, the USITC indicates the Commission report will provide, “to the extent feasible, a summary of U.S. firms’ perception of ... recent changes in India’s trade and investment policies in selected sectors and ... the effects of these changes on U.S. firms’ strategies towards India (e.g., reducing investment or altering product mix), and analysis of whether the effects of these policy changes differ by firms’ characteristics, such as size, IP-intensiveness, or export status.” Copyright industries have much at stake in the development of India’s IP and market access climate over the coming years. India has the potential to be one of the world’s leading legitimate markets for the creative industries – both foreign and domestic. India’s policies in recent years demonstrate an understanding of the important economic, social, and cultural development components that are at stake. However, the piracy situation in India remains extremely difficult, with new challenges such as online and mobile forms of piracy, unauthorized camcording and a changing business and legal environment for publishers not being met with speed by the Indian Government. Market access barriers – many of them longstanding (such as those imposed on broadcasters), but some newly

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<sup>26</sup> See *supra* note 8.



imposed as a reaction to perceived weaknesses within the Indian marketplace (such as those which impose transfers of IP, put into place domestic preferences for technology and software services) – and other structural difficulties (e.g., patent pendency) just fuel uncertainty. This uncertainty has real-world repercussions in terms of firms’ decision-making in FDI and onward engagement in the country. It is hoped that IIPA’s situational updates provided herein will assist the Commission in achieving a comprehensive plan for India to reduce piracy and address market access and structural difficulties identified in this brief.

### **Conclusion**

IIPA appreciates the opportunity to provide the Commission with the perspectives of the U.S. creative industries on the issues presented in this investigation, and we look forward to continued work with the Commission to address the barriers and impediments in India’s trade, investment, and industrial policies identified herein.



**APPENDIX A**

International Intellectual Property Alliance, *India*, 2013 Special 301 Report,  
February 7, 2013, available at  
<http://www.iipa.com/rbc/2013/2013SPEC301INDIA.PDF>.

# INDIA

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2013 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** IIPA recommends that India remain on the Priority Watch List in 2013.<sup>1</sup>

**Executive Summary:** India can be one of the world's leading legitimate markets for the creative industries – both foreign and domestic. The country continues to produce the greatest number of films in the world (estimated at nearly 1,000 full-length feature films per year), boasts a creative and diverse music market, a prolific publishing industry (19,000 publishers producing 90,000 titles per year), and a vibrant software market.<sup>2</sup> Other key economic studies (including by international organizations like UNCTAD and the Motion Picture Distributors Association) indicate that growth will continue. Unfortunately, content theft negatively impacts the profitability of creators, as a recent study highlighting the film industry<sup>3</sup> and piracy's effects the livelihoods of the professionals and workers involved demonstrates.<sup>4</sup>

Physical, online, and mobile piracy (through both mobile uploading/downloading, as well as mobile applications being used to infringe), illegal camcording of movies from cinema screens, the unlicensed use of software by enterprises, print and photocopy piracy, circumvention of technological protection measures (TPMs), e.g., through the use of mod chips and game copiers, and pay-TV theft stifle the market for other creative sectors and keep India's creative economy from reaching its full potential. Market access barriers in India further stifle the film, software, and entertainment software industries' businesses in India, fueling piracy. Some effective approaches to physical piracy (such as the implementation of the Goondas Act in many of the states, though to be a truly comprehensive framework it should include piracy of books and software within its scope) and online piracy (mainly through the IT Act and ancillary regulations) have been taken in recent years, but these steps have not been enough to stem the tide of piracy.

The Copyright Law as amended in 2012 leaves some remaining issues, but it is hoped the new law along with the IT Act and ancillary regulations (in particular, the Information Technology (Intermediaries guidelines) Rules, 2011) will result in strengthened law enforcement and judicial enforcement in dealing with all forms of piracy. A National IPR Strategy is under development, offering a forum to make needed changes that can achieve results in line with Prime Minister Manmohan Singh's call for India to experience a "decade of innovation."

### PRIORITY ACTIONS REQUESTED IN 2013

#### Enforcement

- Implement a national anti-piracy task force to reduce piracy, *inter alia*, by working with state Nodal officers,<sup>5</sup> 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). Our understanding is that the Task Force is now preparing recommendations to present to MHRD.

<sup>1</sup>For more details on India's Special 301 history, see Additional Appendix available at <http://www.iipa.com/pdf/2013SPEC301HISTORICALSUMMARY.pdf>. Please also see previous years' reports at <http://www.iipa.com/countryreports.html>.

<sup>2</sup>For example, NASSCOM estimates that software and services revenues (excluding hardware) is expected to reach \$87 billion in fiscal year 2012, a 14.9% increase over 2011. Another recent industry report pegged the Indian film and television industry's total gross output at US\$20.4 billion, higher than the advertising industry. PricewaterhouseCoopers, *Economic Contribution of the Indian Film and Television Industry*, March 2010. Employment generated by this industry is estimated at 1.83 million workers, most of whom are daily wage earners.

<sup>3</sup>A report issued by KPMG in March 2012 indicated India's film industry grew by 11.5% in 2011, to US\$1.85 billion (Rs93 billion). Liz Shackleton, *India's Film Industry Revenues Up 11% in 2011*, Screen Daily, March 13, 2012, at <http://www.screendaily.com/news/asia-pacific/indias-film-industry-revenues-up-11-in-2011/5039184.article>.

<sup>4</sup>A separate Ernst and Young study concluded that the Indian Film Industry lost US\$959 million and 571,896 jobs due to film piracy in 2008.

<sup>5</sup>Nodal officers in the Indian State enforcement system are designated contact individuals relevant to intake and response.



- Reinvigorate “IP cells” within the state police, provide them with significantly increased resources, and establish specialized IP prosecutors, to be more effective in addressing piracy, including Internet/mobile device piracy.
- Encourage judicial reform, including establishing IP courts or panels with expert judges and prosecutors, which will help in accelerating the adjudication process in criminal and civil cases, and imposing deterrent fines and imprisonment, and civil remedies, including statutory damages.
- Develop a national-level database to track IP criminal cases.
- Increase the number of *suo moto* raids, including against corporate end-user software piracy, and empower government tax inspectors, including external and internal auditors, to check and account for genuine software licenses inside organizations, whether public or private.
- Mandate management officials of companies to account for and declare genuine software licenses in their books of accounts and financial statements, including by providing a regulation under the existing Companies Act.
- Promote and require the use of legitimate (original) books and scholarly journals at educational institutions.
- Empower customs to effectuate *ex officio* seizures, followed by destruction, of pirate goods.
- Ensure Anton Pillar orders are readily available in infringement cases to allow for preservation of evidence, and thereby minimize harm caused by defendant’s delay of proceedings as evidence can be preserved by court appointed commissioners.
- Issue a directive or strict policy guidelines mandating all government departments across the country use legal software and follow due diligence while procuring software assets.

### Legislation

- Continue to pursue effective remedies through the IT Act and ancillary regulations (including the Information Technology (Intermediaries guidelines) Rules, 2011), to ensure fair and effective measures to address repeat infringers, and include effective mechanisms to disable infringing content on domestic and foreign websites.
- Adopt legislation making it an offense to use (or attempt to use) an audiovisual recording device in a movie theater to make or transmit a copy of an audiovisual work, in whole or in part.
- Establish enhanced penalties for “pre-release” piracy, with provisions comparable to those adopted in the U.S.
- Adopt statutory damages in civil cases and allow restitution to be awarded in criminal cases.
- Provide that *ex parte* search and seizure orders should be granted to copyright owners as a matter of right in civil cases.
- Amend Indian tax laws to classify software piracy as a form of tax evasion and define corresponding tax violation rules in line with international best practices.
- Regulate production of optical discs including a licensing requirement, among other provisions.
- Amend state anti-piracy statutes laws (Goondas Acts) to include software and book piracy in addition to other forms of piracy.
- Provide tax benefits for associations involved in anti-piracy actions and capacity building.

### Market Access

- Eliminate significant market access barriers imposed on the motion picture industry including:
  - Bans on exclusivity in the pay-TV sector and similar restrictions in the Direct-to-Home (DTH) market (the reception of satellite programs with a personal dish in an individual home).
  - Price controls on the pay-TV sector.
  - Foreign ownership restrictions.
  - Inordinately high and discriminatory entertainment taxes on theatrical admissions, including unconstitutional taxes based on the language of the film.
  - Price fixing on tickets in South India as well as quotas on the number of screenings per title per day.
  - Onerous regulations on uplink and downlink of satellite signals beaming into India.
  - Disruptive content control rules for television.
- Eliminate high tariffs on entertainment software products.
- Eliminate double taxation of software.



- Refrain from imposing technology or procurement preferences or mandates for products using technology or IP owned and developed in India.

## **PIRACY UPDATES IN INDIA**

Online and mobile device piracy have become serious problems in India as Internet and broadband penetration have widened. The ubiquitous use of mobile devices and the rapid expansion of mobile and console-based game playing have led to new opportunities for right holders but unfortunately also to new challenges, as evidenced by the spread of mobile device piracy and modification chips for circumventing TPMs used to protect console-based games. Losses are very difficult to calculate for most industries, but for example, the music industry estimates a total loss of \$431 million in 2012 (the largest percentage of that attributable to mobile device piracy, then physical piracy, Internet piracy, public performance piracy, and radio/TV broadcast piracy) and upwards of 90% music piracy online,<sup>6</sup> while the software industry reported a 63% rate of PC software piracy in 2011 with a commercial value of unlicensed software estimated to be over US\$2.9 billion. The motion picture industry continues to be hammered by a devastating combination of illegal camcording, Internet, and hard goods piracy, notwithstanding the launch of some legal services for audiovisual materials.<sup>7</sup>

**Internet and Mobile Piracy Devastating Creative Industries in India:** With the growth of Internet connectivity, and increasing mobile penetration, Internet and mobile device piracy have grown worse in 2012 for the copyright industries in India. Internet & Mobile Association of India (IAMAI) reports 150 million Internet users in India as of December 2012,<sup>8</sup> with 12.8 million fixed broadband connections,<sup>9</sup> and 78.7 million mobile Internet users as of October 2012.<sup>10</sup> Illegal downloading sites, P2P filesharing, BitTorrent trackers and indexes,<sup>11</sup> streaming sites, deep linking sites, blogs, forums, and social network sites directing users to infringing files, cyberlockers used to advertise massive amounts of infringing materials, and piracy through auction sites all continue to plague right holders in India. A study undertaken by MPDA has India among the top ten countries in the world for Internet piracy, as pirated films out of India appear on the Internet in an average of 3.15 days.<sup>12</sup> During 2011, Peer Media Technologies reported that users initiated over 25 million downloads/uploads of unauthorized copies of major U.S. movie titles via certain P2P protocols in India. There is no indication that this situation improved in 2012.<sup>13</sup> In 2012, the Entertainment Software

<sup>6</sup>The music piracy rate remains extremely high notwithstanding the recent launch of many legitimate services, including Saregama, Nokia Music, Flipkart, Cyworld, 7digital, Gaana, In, Indiaone, Meridhun, My Band, Raaga, Radio One, Saavn, Dhingana, Artist Aloud, Telugu One, and Smashits.

<sup>7</sup>Legitimate entertainment content is available through legitimate retail chains such as Landmark, Planet M, and Ezone. Online retailers such as Ebay.com and Flipkart.com also sell legitimate DVDs. There are more legitimate avenues available in India to watch movies and TV shows online than ever before. In India, iTunes, Movieflix.com, Rajshri.com, Eros Digital, BigFlix.com, Hungama.com, Indya.com, Bollywoodmoviemax.in and Myplex.com have all emerged as legitimate platforms to access legitimate entertainment content.

<sup>8</sup>Internet and Mobile Association of India, Vernacular Report 2012, January 9, 2013, at [http://www.iamai.in/rsh\\_pay.aspx?rid=avDLOK1zAl8=](http://www.iamai.in/rsh_pay.aspx?rid=avDLOK1zAl8=).

<sup>9</sup> International Telecommunication Union, *Fixed Broadband Subscriptions 2000-2011*, at <http://www.itu.int/ITU-D/ict/statistics/material/excel/Fixed%20broadband%202000-2011.xls>, accessed on January 10, 2013.

<sup>10</sup>Internet and Mobile Association of India, *Mobile Internet in India December 2012*, January 2, 2013, at [http://www.iamai.in/rsh\\_pay.aspx?rid=Yh0mbvBD9VI=](http://www.iamai.in/rsh_pay.aspx?rid=Yh0mbvBD9VI=).

<sup>11</sup>For example, the International Intellectual Property Alliance (IIPA) listed Canada-based *Torrentz.eu* as a notorious market in its 2012 submission to the U.S. Trade Representative in its Special 301 out-of-cycle review to identify notorious piracy markets. *Torrentz.eu* is ranked the 121st most popular site in the world, according to Alexa.com traffic rankings. The site is particularly highly ranked in the city of Calcutta (12th) and in all of India it is ranked as the 18th most visited site (it is ranked in the top 32 sites throughout South Asia). See International Intellectual Property Alliance (IIPA), *Submission Re: IIPA Written Submission Re: 2012 Special 301 Out-of-Cycle Review of Notorious Markets: Request for Public Comments*, 77 Fed. Reg. 48583 (August 14, 2012), Docket No. USTR-2011-0011, September 14, 2012, at [http://www.iipa.com/pdf/2012\\_Sep14\\_Notorious\\_Markets.pdf](http://www.iipa.com/pdf/2012_Sep14_Notorious_Markets.pdf). IIPA also listed Ukraine-based *ExtraTorrent.com* (which claims it is "The World's Largest BitTorrent System") as a notorious market. That site claims, "Any torrents for FREE download. Download music, movies, games, software, iPod, anime, porn, adult, books, pictures and other torrents," and is particularly popular in South Asia, coming in, for example, as the 88th most visited site in all of India, according to Alexa.com. The Recording Industry Association of America cited in its notorious markets filing *exmasters.com* which it describes as "a web hosting company and is one of the biggest providers of services to BitTorrent trackers/indexing sites." While the site's servers are located in the Czech Republic, they have administrative control of more than 150 foreign websites whose primary function is to facilitate the download of illegal content, and the domain names for these websites are registered in India as well as Pakistan and elsewhere in Asia evidencing their global reach. See *RIAA Notorious Markets Submission*, *supra* note Error! Bookmark not defined.

<sup>12</sup>See PricewaterhouseCoopers Report, *supra* note 2.

<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 pirates. Internet piracy also prevents the establishment of legitimate online distribution platforms and services for consumers, which independents can use to finance future productions.

Association reports that India placed sixth in the world in terms of the number of connections by peers participating in the unauthorized file sharing of select ESA member titles on public P2P networks, up from seventh in 2011.<sup>14</sup>

The music industry reports a significant increase in 2012 of mobile chip piracy, in which retail establishments sell or offer for free flash cards or other storage devices (or chips) 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).<sup>15</sup> In addition, there are numerous “apps” for mobile phones, for example, operating on iOS and Android phones, used to make available Indian and international music to mobile subscribers without authorization. For the software industry, Internet piracy takes the form of auction sites and sites offering unauthorized copies of software for download. For the motion picture industry, camcorded versions of a film hit the Internet on infringing websites through release groups within a few hours of a film’s release. The illegal online copy may be used further to produce hard goods for sale in key markets across India. The top ten illegal websites in India for piracy of motion pictures are: *Tamilwire.com*, *moviemobile.net*, *bharatmovies.com*, *tamilthunder.com*, *tamilcreation.com*, *bwtorrents.com*, *torrents.in*, *extratorrent.com*, *filestube.com*, *hindi5.com*, *movi91.com*, *fullmovies.com*, *moviespack.com*, *kat.ph*, *desitorrents.com*, *tamiltorrents.net*, *doregama.in* and *dctorrents.com*. These sites cater to the demand for local language dubs of U.S. films as well as Indian films. Many of the illegal websites and other services affecting India operate from foreign servers including Ukraine, Canada, Russia, Pakistan, South Africa, Afghanistan, and the United States.

**Camcording Piracy Has Grown Out of Control in India:** Illegal camcords from India have been globally redistributed through release groups at least 32 times in 2012, and paired with audio tracks globally in 12 different languages.<sup>16</sup> There was a significant rise in the number of camcording incidents in India in 2012 (67), with India accounting for 53% of all forensic matches in the Asia Pacific region in 2012. Increased camcording incidents were observed from Ahmedabad (Gujarat), Indore (Madhya Pradesh), and Ghaziabad.

**Retail Piracy and Circumvention of TPMs Continue to Harm Right Holders:**<sup>17</sup> The predominant form of retail piracy in India consists of burned optical discs,<sup>18</sup> 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 software, entertainment software and books/reference materials. Some imported discs and factory-produced discs from India have reportedly still been detected in recent years.<sup>19</sup> Publishers continue to report cases where many best-selling medical and technical textbooks are being loaded onto CD-ROMs and being sold for US\$5 or less. The pirate assembly of PCs (so-called hard disk loading piracy) is also prevalent in India.<sup>20</sup> There is almost no legitimate rental video market in India, since cottage pirate rental video stores dominate the market. Movie piracy

<sup>14</sup>ESA’s reporting on P2P activity does not take into account downloads of these titles that occur directly from hosted content, such as games found on “cyberlockers” or “one-click” hosting sites, which appear to account each year for progressively greater volumes of infringing downloads.

<sup>15</sup>The local music industry association has launched MMX to license mobile chip practices with respect to music and has thereby been able to turn a loss into a relative gain. Nonetheless, illegitimate mobile piracy dwarfs such efforts to date. See <http://www.mmxindia.org/>.

<sup>16</sup>The motion picture industry identified 33 forensic matches of its members’ films in 2011 and 23 in 2009.

<sup>17</sup>The music industry alone reports losses due to hard goods piracy of Rs300 crores (US\$55.8 million).

<sup>18</sup> *Accused Arrested in Mapusa Pirated CDs Case Out on Bail*, The Times of India – Goa, December 22, 2011, at [http://articles.timesofindia.indiatimes.com/2011-12-22/goa/30546598\\_1\\_mapusa-police-cds-dysp-sammy-tavares](http://articles.timesofindia.indiatimes.com/2011-12-22/goa/30546598_1_mapusa-police-cds-dysp-sammy-tavares) (in which the shop “Suresh Music” at the Mapusa municipal market was raided, resulting in seizure of around 5,000 pirated CDs and a CD writer; the complaint was laid by famous *tiatr* artist Francis de Tuem, after finding a pirated CD of his latest *tiatr* titled *Illegal*, with the Mapusa police. See also *Pirated CDs Seized from House in Beemapally*, January 29, 2012, BuzzExpress, at <http://expressbuzz.com/cities/thiruvananthapuram/pirated-cds-seized-from-house-in-beemapally/358030.html> (reporting the seizure of massive numbers of DVD covers and hundreds of DVD-Rs burned with content, mostly pornographic, as well as burners; the accused was apparently able to produce 60 discs in a period of three seconds, which translates to many thousands of discs per hour).

<sup>19</sup>There reportedly remain dozens of optical disc factories in India which have a capacity to produce millions of discs per year. To ensure all factories reproduce only legitimate discs, in recent years, industry presented draft optical disc legislation which would regulate the plants’ activities, but a major company in India, Moser Baer, opposed the legislation and its inclusion of blank disc licensing. The music industry reported three factory cases brought which were settled through plea bargaining.

<sup>20</sup>Calicut (Kerala), Belgaum (Karnataka), Gulbarga (Karnataka), Nagpur (Dhantoli), Tilak Road (Pune), Canada Corner (Nasik), Golani Market (Jalgaon), Nehru Place (Delhi), Naza Market (Lucknow), Agra, Ludhina Market (Ludhiana) contain a tremendous number of computer resellers, retailers and assemblers selling tens of thousands of computers pre-loaded with pirated operating system software. It has been estimated that between 70-90% of all computers sold in these markets have infringing software on their hard drives.

hard goods remained available for open sale through street vendors who were most prominent in metropolitan areas like Mumbai, Delhi, Chennai, Kolkatta, and Ahmedabad. The high rate of piracy of entertainment software in India is made possible by the widespread availability of circumvention devices used to bypass TPMs, with vendors openly selling circumvention devices on the Internet, in retail stores and kiosks, or selling game consoles that are already modified. Both USTR and IIPA members have noted various physical marketplaces in India as “notorious” for the availability of pirated/illegal materials.<sup>21</sup>

**Signal Theft and Public Performance Piracy:** Pay-TV piracy is another problem which plagues the content industries. Unlicensed films/titles are aired by local cable operators. At times even new releases are broadcast over cable networks. In the past, cable operators in India routinely “under declared” the number of subscriptions for which they were being paid, so they paid right holders in movies and television content substantially less than they were rightfully owed. Given the size of the Indian market, the losses to the industry from such levels of underdeclaration were huge. Cable TV digitization, which has by now been implemented in the four primary metropolitan areas in India (and second and third tier metro areas now set to roll out as well) is expected to reduce the incidence of under-declaration. Up to the present, these practices resulted in substantial losses in tax revenue to the Indian states, and several of the states have begun complaining loudly about losses. Public performance piracy (e.g., in hotels, bars, restaurants, retail establishments) is also widespread for the music and sound recording industry.

**Software Piracy:** The software industry reports that the rate of software piracy has continued to decline in India, though it remains high at a rate of 63% in 2011 (down from 69% in 2007), representing a commercial value of unlicensed software of almost US\$3 billion.<sup>22</sup> A key part of this problem remains the unlicensed use of software by enterprises in India. There have also been decreases in hard disk loading (the consumption of “white boxes” or assembled hardware with unlicensed software), although this remains a problem in some states. Moreover, companies appear to be gradually more concerned and diligent about ensuring that they use licensed software programs. A 2010 study conducted by IDC and 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 ten point reduction was achieved in two years, yielding \$6.1 billion in GDP and \$676 million in tax revenues.

Notably, in November 2011, BSA launched in India a new global program for certifying enterprises that meet International Organization for Standardization (ISO) standards for software asset management (SAM) – the “Certified in Standards-based SAM for Organizations (CSS(O))” program. Several Indian enterprises have completed or are in the process of obtaining this certification, which will recognize them as implementing SAM best practices. Also in November 2011, BSA and the Department of IT issued a joint report establishing a roadmap for promotion of SAM

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<sup>21</sup>In its December 2012 announcement, USTR cited Nehru Place (New Delhi, India) as “one of the many markets in major cities throughout India that are known for dealing in large volumes of pirated software, pirated optical media containing movies and music, and counterfeit goods.” See United States Trade Representative, *Out-of-Cycle Review of Notorious Markets*, December 13, 2012, at <http://www.ustr.gov/sites/default/files/121312%20Notorious%20Markets%20List.pdf>. The Motion Picture Association of America (MPAA) recently identified in its Special 301 out-of-cycle review submission on “notorious markets” for piracy. Specifically cited were Richie Street and Burma Bazaar (Chennai); Bada Bazaar (Kolkata); Palika Bazaar (underground market in Delhi); Manish Market, Lamington Road, Fort, Andheri Train Station, Thane Train Station, Borivli Train Station, and Dadar Train Station (Mumbai). These Indian markets with clusters of street vendors attract significant pedestrian traffic and are known for their high volume of pirated DVDs and other counterfeit products. See Michael O’Leary, Motion Picture Association of America, *Request for Public Comment on the 2012 Special 301 Out of Cycle Review of Notorious Markets*, Docket No. USTR-2012-0011, September 14, 2012.

<sup>22</sup>BSA | The Software Alliance’s 2012 Global Software Piracy Study, conducted with two leading independent research firms, IDC and Ipsos Public Affairs, measured the rate and commercial value of unlicensed PC software installed in 2011 in more than 100 markets. In 2011, the software piracy rate in India was 63%, representing a commercial value of unlicensed software of over US\$2.9 billion. These statistics follow the methodology compiled in the Ninth Annual BSA and IDC Global Software Piracy Study (May 2012), <http://portal.bsa.org/globalpiracy2011/index.html>. The BSA study covers piracy of all software run on PCs, including desktops, laptops, and ultra-portables, including netbooks. It includes operating systems, systems software such as databases and security packages, business applications, and consumer applications such as games, personal finance, and reference software. It also takes into account free software, open source software, and software as a service if it is paid for. It does not cover software that runs on servers or mainframes and routine device drivers, free downloadable utilities such as screen savers, and software loaded onto tablets or smartphones. The methodology used to calculate this and other piracy numbers are described in IIPA’s 2013 Special 301 submission at <http://www.iipa.com/pdf/2013spec301methodology.pdf>.

best practices in government and private enterprises and collaborative efforts between government and industry continue under this framework. Both of these efforts offer promising opportunities to drive down unlicensed software uses by enterprises.

**Pirate Printing and Photocopying of Books and Journals:** Piracy of trade books, textbooks, professional books (scientific, technical, and medical), and scholarly journals continues to harm the publishing industry in India. Book piracy occurs in a variety of ways in the country. While online piracy of trade books, textbooks, journals and reference books is beginning to rise, publishers' main problem in India remains hard goods piracy. Unauthorized photocopying as well as the compilation and sale of "course packs" are commonly seen in relation to textbooks used in educational institutes. Print piracy (off printing presses or reprints) affects academic titles as well as trade titles. Unauthorized and scanned copies of books (particularly in the scientific, technical and medical sectors) and the hosting of such copies on websites created and maintained by university students are also on the rise in India. 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 course packs, 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 the MHRD to issue a long-promised government order/circular to all educational and research institutions to combat illegal photocopying on university campuses.

Another persistent problem continues to be the export of India-only, lower-priced editions of books intended only for distribution in the Indian market. Such India-only copies are being exported to countries in Africa, the U.S., the United Kingdom, and other European markets. The lower-priced edition program was intended to benefit and meet the specific needs of the Indian market, but unfortunately, the export of such editions out of India is now adversely affecting more developed markets. In 2012, the publishing industry conducted a global investigation into the export of India-only editions. The investigation identified a known distributor which has since agreed to cease engaging in the infringing activity.

## **ENFORCEMENT UPDATES IN INDIA**

**Internet Enforcement Experiences Mixed in India:** The Internet enforcement situation in India demonstrates the complex nature of fighting piracy in India. The Copyright Law (both before and after the 2012 amendments) fails to provide a wholly adequate framework for a systematic and effective approach to Internet piracy.<sup>23</sup> As such, takedowns have been generally patchy and never entirely successful. The music industry reports a takedown rate in India of 30% to 40%, with better luck against established user generated content (UGC) sites with established takedown processes,<sup>24</sup> but only some relief in the case of court-mandated takedowns due to claimants' efforts to serve orders on ISPs, who comply for a short period of time after which compliance is an issue. One of the largest problems in India remains rogue foreign sites operating within the country, despite criminal cases having been filed against many of these sites. With ISPs taking the position that they will only take instructions from the Department of Telecommunications, and with no MOU in place with ISPs, there is no real remedy except for seeking to disable access to such foreign rogue sites.

It is against this backdrop that local right holders have requested courts to order the disabling of access to foreign rogue sites causing significant harm to their interests.<sup>25</sup> The latest instance involves the local music industry

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<sup>23</sup>The Copyright (Amendment) Act, 2012 now incorporates specific ISP safe harbor provisions requiring right owners to issue takedown notices, to which ISPs are required to remove identified content for a period of 21 days. Failure of the right owner to furnish a court order within a period of 21 days from issuance of takedown notice will allow the ISP to reinstate the content. This can only be a part – and a small one at that – of an adequate approach to online piracy.

<sup>24</sup>Difficulties in enforcing against Internet-based piracy in India are compounded by the difficulties right holders have finding correct IP addresses and the inability to locate pirate operating websites.

<sup>25</sup>In 2011, industry used John Doe orders (known locally as "Ashok Kumar" orders and commonly used in India to target individual sellers and cable TV operators) to have ISPs disable access to infringing materials. In July 2011, a local Indian film studio (Reliance) in the process of releasing a major Indian film (...continued)

association obtaining orders from the Calcutta High Court directing all ISPs (387 in all) to disable access to 104 music sites from India (this included *songs.pk* mentioned in the 2011 IIPA report as particularly egregious, but many others with clear linkages to Bollywood, music or movies of India, or other indicia such as inclusion of words like “desi” or “tamil”).<sup>26</sup>

Where investigations reveal that websites have a nexus to or contact details in India, the music industry is bringing criminal complaints. Twenty-two such criminal complaints were lodged in 2012 by the music industry. One of these criminal cases was lodged in Rajkot Gujrat involving two websites (both shut down) and resulted in the arrest of two students in connection with running the websites; the case is ongoing. With respect to growing mobile device piracy, the Indian music industry is bringing to the police more than 500 mobile device piracy cases per month (up from 200 per month in 2011). However, cases such as these are not high on the agenda of Indian police, since they are instead focused principally on Internet or mobile cases involving credit card fraud or false names and addresses. One court case may also be helpful in defining the contours of liability for intermediaries in the online space and fostering greater cooperation among ISPs and other intermediaries. In *Super Cassettes Industries Ltd. v. Myspace Inc. & Another*,<sup>27</sup> decided in July 2011, the plaintiff was granted an interim injunction against the defendant whose social network was found to be secondarily infringing through allowing its “webspace” or “place” to be used for sharing infringing materials. The local Indian record industry was involved in this legal action, as well as other complaints filed with the Mumbai Cyber Cell against 23 other websites (many of which have been shut down as a result of the actions in Calcutta).

**Camcording and the Nexus to Internet and Hard-Goods Piracy:** For the motion picture industry, the strong nexus between illegal camcording in India, a problem which is growing out of control, and Internet piracy and even hard goods piracy involving motion pictures, requires a multi-faceted approach. Several actions were taken in 2012 against syndicates engaged in the illegal camcording of films and the release of those films on websites or on hard goods. For example, joint efforts between the MPA’s representative office in India, the Motion Picture Distributors Association (India) Pvt Ltd., and the Andhra Pradesh Film Chamber of Commerce (APFCC), resulted in arrests of four members of two major syndicates in southern India specializing in illegal camcording as well as online and hard goods piracy. The arrested operated out of Bangalore, Hyderabad, and Vijayawada and had links with syndicates in Delhi. The arrests led to the taking down of *spicyden.com*, *tollyzone.com*, and *desibuffer.com*. In another case during the fall of 2012, the arrests of three individuals distributing illegal copies of films online led to the takedown of *team-cc.com*, *rockerzone.com*, *southreels.com*, *southdownloads.com*, and *southcreations.com*. This latter operation was primarily initiated by the APFCC.<sup>28</sup> Industry reports some awareness activities on “source” piracy have been helpful, and that cinema owners are showing slides in cinema halls and placing messages on tickets conveying that illegal camcording is not allowed. Industry has also launched the “Make a Difference” campaign working directly with cinema owners, whose interest should include clamping down on illegal camcording.

**Some Retail Enforcement Ensues, But Piracy Remains a Low Priority Offense:** Some industries continued to experience good support from Indian authorities in 2012, with law enforcement generally willing to conduct complaint-based raids and, e.g., running *suo moto* raids for the music industry. The music industry reported

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(...continued)

(*Singham*) in the market, and following up on a similar request by another film studio (having released another major Indian motion picture earlier in the year), obtained an “Ashok Kumar” Order, allowing it to send cease and desist notices to disable access to its new film which was to be released two days later. Similar enforcement was undertaken in August for the film *Bodyguard* and in December for *Don 2*. Shortly thereafter the ISPs started some limited disabling of access to various notorious sites including *Megaupload.com*, *Mediafire.com*, and *Megavideo.com*. Other successful industry actions included one initiated in 2010 by Alliance Against Copyright Theft (AACT) (MPA allied with the local Hindi film industry). In July 2011, the Mumbai Cyber Police arrested two suspected operators of the site *moviemax.in* in Gujarat, which was one of five locally based sites (among 99 notified to police), and the police were helpful in ensuring those sites could be taken down as well, although industry has no confirmation as to the current status of the other four sites.

<sup>26</sup>The local music industry group adopted the strategy of highlighting that the infringing sites were operating without a copyright license, so even though the sites were outside India, the ISPs were deemed inside India and governed by Indian law, since revenues from users came from India.

<sup>27</sup>*Super Cassettes Industries Ltd. v. Myspace Inc. & Another* (High Court of Delhi, July 29, 2011, IA No.15781/2008 & IA No. 3085/2009 in CS (OS) No. 2682/2008.

<sup>28</sup>These actions follow others in 2011. For example, in 2011, there were two interdictions and two arrests of individuals illegally recording films in Indian cinemas. In November 2011, the police in Thane arrested an individual camcording *The Adventures of Tin Tin* on the opening day of its theatrical release in India.

more than 2,260 raids during 2012 (up from 1,400 in 2011), many of which were run *suo moto*, while the number of piracy cases remaining in litigation stands at an estimated 18,000. Publishers, on the other hand, note that police rarely ever initiate *suo moto* raids to address book piracy, usually only taking action after receiving a right holder's formal complaint under Section 200 of the Code of Criminal Procedure. The motion picture industry notes a couple of raids in 2012 conducted in Nasik, involving illegal DVD manufacturing and retail stores where more than 10,000 DVDs were seized and two people were arrested. The second raid was conducted in a warehouse, and led to the seizure of 5,535 DVDs and one person being arrested. Major hurdles remain, given the lack of anti-piracy teams among the Indian government other than in Tamil Nadu and Kerala, the lack of dedicated prosecutors or police, and the fact that piracy continues to be in general a low-priority offense amongst enforcement authorities. Moreover, publishers report that there are often threats of violence against rights holder representatives engaged in anti-piracy activities.

**Enforcement Against Software End-User Piracy Improving:** Enforcement is improving against software enterprise end-user piracy due in large part to the impact of civil enforcement actions. Civil actions comprising injunctions and Anton Piller orders continue to have a significant impact. On the other hand software "channel piracy," i.e., the reproduction of infringing/counterfeit software on physical media remains largely the same in India. Criminal enforcement remains an ineffective means of combating end-user software piracy.

**Enforcement Through State Cells in India Should be Enhanced Further 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>29</sup> However, there remains no Federal government-led initiative to coordinate enforcement with and between the state governments. A national anti-piracy task force with goals to reduce piracy, *inter alia*, by working with state cells and Nodal officers should be established forthwith. The state cells, first established in 2002, are apparently starting to run more significant numbers of *suo moto* raids against piracy.<sup>30</sup> The industries all report good working relationships with the state cell in Delhi, while one or more industries reports good working relationships and effective assistance from Tamil Nadu, Kerala, Punjab, Mumbai, Bangalore, Chennai, and Hyderabad.<sup>31</sup> One issue that publishers have encountered, however, is that the jurisdiction of various teams are not clearly defined, leading to delays and confusion as to the most efficient approach for addressing instances of piracy. For example, in the Delhi Economic Offences Wing there are sections dealing with cyber crime and IPR. However, there are no clear guidelines about which section a right holder should approach.

**State Anti-Piracy Statutes:** Many states have enacted state anti-piracy laws (Goondas Acts) that recognize the link between piracy and organized crime. These statutes should cover all forms of piracy including software and books and journal piracy which are often not within the scope of these laws.

**Civil and Criminal Court Processes Remaining Somewhat Problematic:** Despite some positive case results in both civil and criminal cases in the past couple of years, industry notes some endemic problems. First, criminal fines (reportedly roughly 200 fines were meted out in copyright cases in 2012) are invariably low and non-deterrent, with most falling under US\$1,000. Second, while the number of criminal convictions has gone up in the

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<sup>29</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>30</sup> A 2009 raid involved 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>31</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.mumbaipolice.org/%5Cspecial%5Corg\\_fun5.htm](http://www.mumbaipolice.org/%5Cspecial%5Corg_fun5.htm). See *Other States: Anti-piracy cell for Punjab*, February 27, 2009, at <http://www.thehindu.com/2009/02/27/stories/2009022752740300.htm>. See *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-andassociates-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-andassociates-conduct-raids-across-the-city_100363186.html).

past couple of years, the sheer number of piracy cases still pending indicates that much more needs to be done to effect judicial reform and speed dockets; the music industry reports roughly 18,000 pending cases. Third, many courts, particularly outside Delhi, remain of concern, due to the endemic delays in court proceedings, the lack of trained prosecutors, problems with retaining evidence, and failure to investigate up the chain. Further problems involve unreasonable demands on right holders to produce copyright registration certificates, and demands for right holders to physically make witnesses available.<sup>32</sup> Even in civil cases, in which credible IP judges have developed in the High Court in Delhi, Chennai and Kolkata, the high pendency rate, low damages, and the years that it takes to enforce any kind of court judgment, remain problematic features of the legal system in India. For these reasons, IIPA continues to urge the Indian government to establish special IP courts throughout the country with expert judges and prosecutors.

## **COPYRIGHT LAW AND RELATED ISSUES**

**Copyright (Amendment) Act, 2012 In Force, Further Modernizing India's Copyright Law:** Copyright protection in India is governed by the Copyright Act, 1957 as amended last by the Copyright (Amendment) Act, 2012, effective June 21, 2012, and related laws and regulations. The Act (as amended) contains some improvements over the previous (2010) draft,<sup>33</sup> and largely leaves in place the enforcement structure of the Copyright Act, 1957 (as last amended), and related laws and regulations.<sup>34</sup> Nonetheless, the Act also leaves in place existing, and raises some new, concerns which can be summarized as follows:

- unprecedented ownership and assignment provisions that could unduly restrict existing commercial arrangements in India;
- expanded compulsory license provisions;
- inadequate provisions on the protection of technological protection measures (TPMs) against unlawful circumvention as well as trafficking in circumvention devices and services; and inadequate protection of rights management information (RMI);

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<sup>32</sup>Right holders have noted that some police departments have now begun asking for the presence of company officials in order to commence a criminal action. However, some right holders have also noted that courts are allowing cross-examination by video-conferencing, and would encourage the expansion of this practice to all IP cases.

<sup>33</sup>Among improvements accomplished by the "Notice of Amendments" are the following: 1) it resolves satisfactorily a proposed change that would have damaged the Indian exhaustion (parallel imports) regime; and 2) it narrows the availability of a loophole to the prohibition on unauthorized rental to "a non-profit library or non-profit educational institution."

<sup>34</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 one year to three years and a fine 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 seven days to three years and a 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 two years and a 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 a fine or both for making false entries in the register (Section 67).
- Imprisonment for a term up to one year or a 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 a fine for publication of a sound recording or video film in contravention of provisions of Section 52A (Section 68 A).

Government of India. *Submission by India Under Special 301 for 2010*, February 26, 2010, at 5 (on file with IIPA). 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 8th 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."

- failure to address adequately online infringement/Internet piracy issues and to promote ISP responsibility and foster cooperation with right holders to combat such infringements; and
- some overly broad exceptions and limitations.

Additional issues of concern that were not addressed in the amendments include: 1) the lack of statutory damages; and 2) overbreadth of the statutory exemption for making copies of software in sections 52(1)(aa) and (ad) (there is no numerical limit on the number of copies).

In the fall of 2012, MHRD released the Draft Copyright Rules, 2012 (“Draft Rules”) for comment. IIPA provided comments to the Director & Registrar of Copyright on the Draft Rules. Herein below is a discussion of IIPA’s remaining concerns with the Act as amended, noting where the Draft Rules could be employed to address these concerns.

**Ownership Issues (Section 17), Assignment of Copyright (Sections 18 and 19):** Changes to the Indian Copyright Act restructure ownership and assignment issues, having the potential effect of undermining and upsetting longstanding commercial arrangements as to cinematographic works and sound recordings. First, under amended Section 17(e),<sup>35</sup> authors of “original literary, dramatic, musical and artistic works” incorporated into a cinematographic work are now deemed the original owners of copyright, and the default rules on works made “at the instance of any person” or on works for hire (employers) no longer apply to such works.<sup>36</sup> In effecting this change, the legislature has essentially overturned case law previously holding that the producer of a film is the first owner of copyright in the literary and musical works used in recorded songs which are synchronized for inclusion in a film, unless there is a contract to the contrary.<sup>37</sup> Note that this change also affects other works incorporated into a cinematographic work. The practical effects of this change are yet to be seen. It should be confirmed that this provision applies prospectively and not retroactively, and IIPA has requested confirmation of the prospective application of this provision (as well as Articles 18 and 19) in the Draft Rules.

The more far-reaching changes are effectuated in Section 18. Several recent Indian court decisions concluded that musical works included in audiovisual works or in sound recordings are not subject to payment of public performance royalties, i.e., the public performance rights in such musical works are deemed assigned to the producers of sound recordings or the audiovisual works in which they are used. These court decisions denied right holders in musical compositions the ability to enjoy their exclusive rights and run counter to India’s compliance with its international obligations under the Berne Convention and the TRIPS Agreement. The Act fixes the problems created by the court decisions in some respects but creates new problems in the process.

In Section 18(1), provisos indicate the author of a literary or musical work shall not be deemed to have assigned or waived “the right to receive royalties to be shared on an equal basis with the assignee of copyright” in two cases: 1) when included in a “cinematograph film” for all “utilization” other than “the communication to the public of the work along with the cinematograph film in a cinema hall”; and 2) when “included in the sound recording but not forming part of any cinematograph film.” New Sections 19(9) and (10) of the Act preserve the right of the author “to claim an equal share of royalties” as to: 1) “utilization” of “any work” in a cinematograph film in any form other than “for the communication to the public of the work, along with the cinematograph film in a cinema hall”; and 2) “utilization” of “any work” in “a sound recording which does not form part of any cinematograph film.”

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<sup>35</sup>Section 17(e) provides, “Provided that in case of any work incorporated in a cinematograph work, nothing contained in clauses (b) and (c) shall affect the right of the author in the work referred to in clause (a) of sub-section (1) of section 13.”

<sup>36</sup>As to copyright in works incorporated into a cinematographic work, this remains covered by Section 13(4) which provides, “The copyright in a cinematograph film or a sound recording shall not affect the separate copyright in any work in respect of which or a substantial part of which, the film, or as the case may be, the sound recording is made.”

<sup>37</sup>See *Indian Performing Right Society v Eastern India Motion Picture Association*, AIR 1977 (2) SCC 820.



IIPA agrees that mere inclusion of works in an audiovisual work or sound recording should not deem assigned or waived the rights of the authors of those works, or deny them the ability to negotiate and receive payments for the utilization of those works, e.g., public performances of musical works, or the exercise of other exclusive rights. At the same time, the new provisions should not limit the ability of right holders to freely engage in contractual relationships with the authors of literary or musical works. IIPA is also concerned about the exact percentages or amounts ascribed to be paid to such authors, such as the Section 18 proviso that the royalties be shared with the assignee “on an equal basis,” or the Section 19 mandate of “an equal share.” This text does not specify the basis on which an “equal share” is calculated, although reports indicate this will result in a “net” 50/50 share between the publisher/owner and author following deductions of collecting societies’ costs. These provisions undermine the freedom of contract and the flexibility of parties to negotiate other agreements on royalties’ distribution which could be more beneficial or appropriate under the circumstances. It should be confirmed that the scope of application of this provision is specifically limited to works created after the effective date of the law and has requested confirmation of this in the Draft Rules. Otherwise, it would upset existing freely negotiated contractual relationships and hinder the ability of right holders in such films or sound recordings to distribute their works without fear of disputes over conflicts between such arrangements and the statutory mandates.

Other parts of the Act unfortunately provided for significant limitations on assignments of works. According to a Section 18 proviso, assignments are deemed invalid as to “any medium or mode of exploitation of the work which did not exist or was not in commercial use” at the time the assignment was made unless that medium or mode was “specifically” mentioned in the assignment. This change precludes “all rights” assignments which historically have been treated by both authors and publishers/producers as the norm in the business, and could wreak havoc with existing distribution arrangements, in particular with respect to digital distribution.<sup>38</sup> To the extent the provisions apply retroactively, they are also subject to possible constitutional challenge; IIPA has requested that in the Draft Rules it be confirmed that they do not apply retroactively. The software industry is also concerned about this provision, which severely limits the scope of a possible assignment of copyright in any work including software; given technological advances, it is not realistic to expect that the modes and media of exploitation can be fully spelled out in a contract as this provision would require.

Finally, IIPA has indicated to MHRD our operating assumption that the Act governs the relationship of the creative parties with respect to the production of works in India, and does not also convey an intention to interfere with the intention of contracting parties outside of India. IIPA has requested that the Draft Rules be modified to explicitly acknowledge that there is no intention for Articles 17 through 19 to affect the decisions of parties with respect to the creation of works outside of India, or their decisions about how to allocate revenue for the use of such non-Indian works in India.

**Extension to Foreign Works of, and Addition of New, Berne- and TRIPS-incompatible Compulsory Licenses:** The Act extends two existing compulsory licenses, which are currently applicable only to Indian-origin works, to include all foreign works. The extension of these compulsory licenses to foreign works appears to run counter to India’s Berne Convention and TRIPS obligations.<sup>39</sup> This is because the Berne/TRIPS framework permits compulsory licensing in only very limited and specific circumstances, including: 1) the recording of musical works under Article 13(1) of the Berne Convention;<sup>40</sup> and 2) the exclusive rights recognized under Article 11*bis*.<sup>41</sup> In

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<sup>38</sup>One industry group indicates that the “medium” and “mode” restrictions can be dealt with through careful drafting of assignments, e.g., through use of language such as “shall extend to and include, but are not limited to, the following modes and mediums of reproduction, performance, distribution and communication to the public of the works, which are in existence or which the parties anticipate may come into existence in future,” with a list of as many specific modes or mediums as possible. We remain skeptical that this can capture the limitation on coverage of modes or mediums that “did not exist or was not in commercial use” at the time of the assignment. It is also suggested that it may be possible, as a practical matter, to draft around this limitation by characterizing transactions as “exclusive licenses” rather than assignments, although it is uncertain whether courts would give any effect to such a characterization.

<sup>39</sup>In 2010, the Standing Committee was also concerned about the international implications of compulsory licenses and recommended they be reviewed.

<sup>40</sup>Article 13(1) of the Berne Convention provides,

Each country of the Union may impose for itself reservations and conditions on the exclusive right granted to the author of a musical work and to the author of any words, the recording of which together with the musical work has already been authorized by the latter, to authorize  
(...continued)

addition, the Berne Convention includes an Appendix containing compulsory licenses with respect to the translation and reproduction of works protected under the Convention that may be invoked under certain limited conditions by developing countries, notably for educational and developmental purposes. India has neither availed itself of the Berne Appendix, nor adhered to the stringent tests of the Berne Convention Appendix in crafting the new compulsory licenses.

- **Section 31:** The first, Section 31, involves a compulsory license to “republish,” “perform ... in public,” or “communicate ... to the public by broadcast” any work for which the right holder has “refused to republish or allow the republication of the work or has refused to allow the performance in public of the work, and by reason of such refusal the work is withheld from the public,” as well as any work for which the right holder “has refused to allow communication to the public by broadcast, of such work or in the case of a sound recording the work recorded in such sound recording, on terms which the complainant considers reasonable.”
- **Section 31A:** Section 31A, an “orphan works” provision, provides for a compulsory license to “publish” or publish a “translation thereof in any language” ... “unpublished Indian works” for which “the author is dead or unknown or cannot be traced, or the owner of the copyright in such work cannot be found.” The Act extends this compulsory license to all “unpublished or published works” that are being “withheld from the public.”
- **Section 31B:** Section 31B is included for the benefit of the disabled. Section 31B fails to contain necessary protections to ensure that such works are limited solely to the disabled and that they otherwise fully meet the Berne Convention three-step test, and the 2011 amendments extend the availability of the compulsory license to “[a]ny person working for the benefit of persons with disability on a profit basis or for business....”
- **Section 31D:** The broadcast compulsory license in Section 31D is unprecedented, covering both radio broadcasts and television broadcasts, and appears to be inconsistent with India’s Berne Convention and TRIPS obligations.<sup>42</sup> It is not limited on its face to those activities under Berne Article 11*bis* for which appropriate

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(...continued)

the sound recording of that musical work, together with such words, if any; but all such reservations and conditions shall apply only in the countries which have imposed them and shall not, in any circumstances, be prejudicial to the rights of these authors to obtain equitable remuneration which, in the absence of agreement, shall be fixed by competent authority.

See discussion of the possibility of compulsory licensing under this provision in Sam Ricketson, *WIPO Study on Limitations and Exceptions of Copyright and Related Rights in the Digital Environment*, World Intellectual Property Organization Standing Committee on Copyright and Related Rights, Ninth Session (Geneva), June 23 to 27, 2003, SCCR/9/7, April 5, 2003, at 28-30.

<sup>41</sup>Article 11*bis*(2) of the Berne Convention provides,

It shall be a matter for legislation in the countries of the Union to determine the conditions under which the rights mentioned in the preceding paragraph may be exercised, but these conditions shall apply only in the countries where they have been prescribed. They shall not in any circumstances be prejudicial to the moral rights of the author, nor to his right to obtain equitable remuneration which, in the absence of agreement, shall be fixed by competent authority.

See discussion of the possibility of compulsory licensing under this provision in Sam Ricketson, *WIPO Study on Limitations and Exceptions of Copyright and Related Rights in the Digital Environment*, World Intellectual Property Organization Standing Committee on Copyright and Related Rights, Ninth Session (Geneva), June 23 to 27, 2003, SCCR/9/7, April 5, 2003, at 30-32.

<sup>42</sup>Specifically, Section 31D provides, in its entirety, the following:

“31D. (1) Any broadcasting organisation desirous of communicating to the public by way of a broadcast or by way of performance of a literary or musical work and sound recording which has already been published may do so subject to the provisions of this section.

(2) The broadcasting organisation shall give prior notice, in such manner as may be prescribed, of its intention to broadcast the work stating the duration and territorial coverage of the broadcast, and shall pay to the owner of rights in each work royalties in the manner and at the rate fixed by the Copyright Board.

(3) The rates of royalty for radio broadcasting shall be different from television broadcasting and the copyright Board shall fix separate rates for radio broadcasting and television broadcasting.

(4) In fixing the manner and the rate of royalty under sub-section (2), the Copyright Board may require the broadcasting organisation to pay an advance to the owners of rights.

(5) The names of the authors and the principal performers of the work shall, except in case of the broadcasting organisation communicating such work by way of performance, be announced with the broadcast.

(...continued)

“conditions” may be set (and with respect to musical works and sound recordings, does not comport with Berne Article 13(1)). It does not indicate as a default that private contractual agreements shall govern. It threatens to throw existing copyright arrangements with respect to both audiovisual works, sound recordings, and musical compositions into chaos.<sup>43</sup>

The Section 31D compulsory license reads as far broader than the “conditions” permitted by Article 11 *bis* of the Berne Convention (and incorporated by reference into the TRIPS Agreement). The new provision does not provide for ability to freely contract, i.e., as a default, private contractual agreements should govern before the possibility of remuneration set by the “competent authority.” Section 31D also contains no such limitation on the kinds of broadcasts subject to the compulsory license, e.g., whether free-to-air television broadcasts (local or distant) or encrypted pay broadcasts, or whether by wire or wireless means.

The Draft Rules addressed the administration of some but not all of the compulsory licenses. The Draft Rules did not include provisions for the administration of the Section 31 license to “republish,” “perform ... in public,” or “communicate ... to the public by broadcast” any work (or sound recording) for which such use has been refused by the right holder “on terms which the complainant considers reasonable.” The Draft Rules do address other compulsory licenses, such as the Section 31A compulsory license to “publish” or publish a “translation thereof in any language” ... “unpublished” ... [or] “published works” for which “the author is dead or unknown or cannot be traced, or the owner of the copyright in such work cannot be found,” the Section 31B compulsory license included for the benefit of the disabled, and the Section 31D broadcast statutory license which covers both radio broadcasts and television broadcasts. While not endorsing the adoption of these licenses or their application to foreign subject matter, the Draft Rules should confirm a narrow scope and application of the licenses, and drafters can look to the Berne Appendix for guidance on ways of achieving this. As just some examples, drawing from the Berne Appendix, the Rules should at least confirm that:

- 1) any such licenses are only available when the applicant “has requested, and has been denied, authorization by the owner of the right” ... “or that, after due diligence on his part, he was unable to find the owner of the right”;
- 2) if the works or sound recordings in question are made available at “a price reasonably related to that normally charged in the country for comparable works,” the license is not available;
- 3) any such licenses apply to limited purposes, e.g., “only for the purpose of teaching, scholarship or research”;
- 4) if the author or right holder chooses (e.g., on artistic grounds) to “withdraw from circulation all copies of his work,” the license should automatically terminate;

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(...continued)

(6) No fresh alteration to any literary or musical work, which is not technically necessary for the purpose of broadcasting, other than shortening the work for convenience of broadcast, shall be made without the consent of the owners of rights.

(7) The broadcasting organisation shall —

(a) maintain such records and books of account, and render to the owners of rights such reports and accounts; and

(b) allow the owner of rights or his duly authorised agent or representative to inspect all records and books of account relating to such broadcast, in such manner as may be prescribed.

(8) Nothing in this section shall affect the operation of any licence issued or any agreement entered into before the commencement of the Copyright (Amendment) Act, 2012.”

<sup>43</sup>In relation to the music industry, record producers and music composers enjoy an exclusive broadcasting right under Indian law. This right is seriously undermined by Section 31D. Under this license, broadcasters would not need permission to use works but simply need to notify their intention to broadcast the work and pay royalties as prescribed by the Copyright Board. The compulsory statutory license would diminish the exclusive nature of the broadcasting right, effectively turning it into a mere right to receive royalties. This would not only negatively impact on creators’ ability to negotiate license terms with broadcasters, but would also cause significant losses to right holders in terms of costs they will need to bear in Board proceedings. There are not even any limiting conditions, for example, a time period (e.g., of three years) before newly released recordings become subject to any license regime, the requirement that a license only be contemplated under the rare circumstances that right holders and broadcasters fail to achieve a negotiated agreement, or that “the rate paid by the broadcasters should reflect what would have been agreed between a willing seller and a willing buyer.” The intervention of the Copyright Board should only take place as a last resort.

5) six months must elapse between the sending, “by registered airmail,” of the application for a license and the granting of a license to the competent authority as well as “to the publisher whose name appears on the work and to any national or international information center which may have been designated” when the author or right holder cannot be found;

6) if copies of the work in question are already available to the general public “to the general public or in connection with systematic instructional activities” by the right holder or with his authorization, “at a price reasonably related to that normally charged in the country for comparable works,” any license granted shall be terminated; and

7) appropriate time limits are established (e.g., the Berne Appendix time frames are no longer than three or five years).

Without these safeguards and more, it will be difficult for the Indian government to ensure that its licenses do not run afoul of India’s international obligations under the Berne Convention and the TRIPS Agreement.

**Inadequate Protection for Technological Protection Measures Against Unlawful Circumvention, and Rights Management Information (RMI):** The Act left unchanged the previous draft amendments which sought to implement the anti-circumvention provisions (protection of TPMs) of the WCT (Article 11) and WPPT (Article 18). While India has not yet ratified these treaties, the amendments are intended to address the WCT and WPPT issues to make India ready for such ratification.

- **Technological protection measures:** Section 65A of the Act remains of concern as, on its face, it is incompatible with the WCT and WPPT. The provision falls short of international best practices without some clarifications and possibly revisions. IIPA has proposed certain of these through the Draft Rules process, as noted below.
  - The Act as amended does not expressly cover access controls as is required by the treaties.<sup>44</sup> It should define “effective technological measure” as “any technology, device, or component that, in the normal course of its operation, controls access to a protected work, performance, phonogram, or other protected subject matter, or protects any copyright or any rights related to copyright” to ensure proper coverage. IIPA has recommended that the Rules could confirm this definition of “effective technological measure.”
  - The Act appears to cover only the “act” of circumvention and only when the person engaging in circumvention activities acts “with the intention of infringing” an exclusive right.
  - The Act does not expressly prohibit manufacturing, importing or trafficking in circumvention technologies, 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. This is highly unfortunate.<sup>45</sup> Working within the framework of the Act as amended, the Draft Rules, referring to Section 65A of the Act, impose a recordation requirement on entities that “facilitate[e] circumvention of technological protection measures for another person.” Without more far-reaching amendments to outlaw trafficking, such a recordation requirement is critical to ensuring that only individuals with a legitimate non-infringing objective will seek to make use of circumvention services. To ensure that this objective is not undermined, the recordation requirement should be extended to include:

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<sup>44</sup>Many digital rights management (DRM) and product activation systems, for example, function by controlling access to works, and it is essential that these be covered by the anti-circumvention provision.

<sup>45</sup>From a practical enforcement perspective it is more effective, and less intrusive, to target businesses that traffic in circumvention tools than to target individuals who carry out acts of circumvention. With circumvention devices and services widely available globally on the Internet and from sources without any locus in India, a “record keeping” obligation cannot come close to meeting the treaties obligation to provide “adequate legal protection and effective legal remedies” against circumvention of TPMs.

- information about the tools used to circumvent;
- the provision under which the exception to the prohibition on circumvention is based;
- the underlying work and subject matter being accessed by virtue of the circumvention; and
- a declaration that under no circumstances will the underlying work be subject to onward distribution, transmission, making available, public performance, or communication to the public.

The Rules should also provide for regular audits of such records by the Ministry of those facilitating circumvention. The Rules should in no case allow for indemnification of the person facilitating circumvention. Furthermore, the Draft Rules provide that the records being kept by the person “facilitating” circumvention may only be disclosed to police (“not below the rank of a sub-inspector of police”) upon a “court order.” The Rules should not limit disclosure in this way (especially within the government), and should provide a mechanism as well for right holders to obtain access to records where there is strong indication that circumvention is taking place contrary to the law.

- The Act does not define an “effective technological measure.”
- The Act would permit circumvention to take advantage of any exception, such as fair dealing, contained in the Copyright Act (thereby potentially eviscerating protection), and creates other overbroad exceptions.<sup>46</sup> While this exception provision clearly places India outside the scope of the “adequate and effective” protection needed regarding unlawful circumvention, there may be ways to limit the scope of this provision through the Draft Rules. The Draft Rules currently permit a person to “approach anyone who can assist him to circumvent the technological protection measures.” The Draft Rules should at the very least limit the scope of entities eligible to assist in circumvention, e.g., an approved list by the Ministry of those who it has verified will keep proper records and ensure that no act of circumvention is performed outside of any permitted purpose.
- The Act provides for criminal remedies, but not civil remedies.<sup>47</sup>

In addition to the above, IIPA has indicated that in no case should the Draft Rules condone the online provision of circumvention services due to elevated risk for abuse, and because of the likelihood that such services will be made available to individuals in countries where such conduct is proscribed by law. The Standing Committee in approving Section 65A suggested that the judiciary could evolve the law to cover TPMs applied to control access to works. It is hoped that this and other changes can be confirmed through future explanation or technical amendments, namely, to ensure that: 1) access controls are covered (e.g., through a proper definition of “effective technological measures”), 2) manufacturing, importing or otherwise trafficking in circumvention technologies, devices, or services are prohibited, 3) exceptions are limited to those which will preserve the adequacy and effectiveness of protection, and 4) civil as well as criminal remedies are available against unlawful circumvention.

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<sup>46</sup>It is critical that any exceptions or limitations be narrowly tailored to avoid a scenario in which an exception effectively “swallows” the rule. The currently drafted 65A(2)(a) is, therefore, not an appropriate starting place, since it exempts all acts of circumvention “for a purpose not expressly prohibited by this act” which would seem to subsume all limitations and exceptions. By contrast, U.S. law provides narrowly tailored exceptions designed to facilitate specific uses, and also provides for a triennial rulemaking undertaken “to determine whether there are particular classes of works as to which users are, or are likely to be, adversely affected in their ability to make noninfringing uses due to the prohibition on circumvention of access controls.” Since 2001, only a few narrowly tailored classes of works have been identified. The EU approach is to ensure that “rightsholders make available” the “means of benefiting from” a certain narrow list of exceptions, and have special provisions related to private use, with appropriate safeguards in place with respect to limiting the number of copies that can be made and with regard to the Berne three-step test.

<sup>47</sup>Civil liability is important for several reasons. First, given limited law enforcement resources, private enforcement through civil litigation would be a critical adjunct to ensure the provision has the desired deterrent effect. Second, a civil cause of action is necessary to ensure that right holders are appropriately compensated for any losses they suffer as a result of circumvention.

- **Rights management information (RMI):**<sup>48</sup> The amendments define RMI to mean the title or other information identifying a work or performance, the name of the author or performer, the name and address of the owner of rights, terms and conditions regarding the use of the rights, and any number or code that represents this information (new Section 2(xa)). The definition expressly excludes any device or procedure intended to identify the user. The exclusion of devices or procedures intended to identify the user from the definition of RMI may hamper the ability of right holders to identify persons who have tampered with RMI, consistent with the WCT and WPPT.

**Failure to Deal Adequately with Online Infringement or to Promote ISP Responsibility:** A sound approach to this issue of dealing with online violations of law and the role of intermediaries is contained in the Information Technology Act, 2000, which provides for power to intercept or decrypt information through any computer source on certain grounds mentioned therein.<sup>49</sup> 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. In 2010, the Parliamentary Committee urged that the Copyright Act be aligned with the principles laid out in the IT Act, recommending that a designated authority for managing copyright issues and piracy should be created with sufficient policing powers. In April 2011, the Information Technology (Intermediaries Guidelines) Rules, 2011<sup>50</sup> were issued, making some important clarifications to the Information Technology Act, 2000 (21 of 2000), for example, specifically mentioning “copyright” infringement as a trigger for a notice from an “intermediary,” and setting takedown times for detected violations online to 36 hours. The Rules indicate the trigger for “disabling” access is “actual knowledge” through a notice and they do not appear to provide for red-flag notice (i.e., where the “intermediary” is aware of facts or circumstances from which an infringement is apparent) which is unfortunate. Also, since they carve out from the notice and takedown requirement certain transient reproductions without regard to whether the transaction taking place is an authorized one, questions remain as to how effective the Rules along with the IT Act will be in addressing infringements in the non-hosted environment.<sup>51</sup>

Taken in this context, the Copyright Act (as amended by the “Notice”) is a missed opportunity to comprehensively deal with the issue of online infringement and the role to be played by ISPs over infringements of third parties, and leaves some important matters unclear. Section 52(1)(c) provides an exception for the following:

“transient or incidental storage of a work or performance for the purpose of providing electronic links, access or integration, where such links, access or integration has not been expressly prohibited by the right holder, unless the person responsible is aware or has reasonable grounds for believing such storage is of an infringing copy.”<sup>52</sup>

A proviso states:

“Provided that if the person responsible for the storage of the copy has received a written complaint from the owner of copyright in the work, complaining that such transient or incidental storage is an

<sup>48</sup>Article 65B provides a criminal remedy including up to two years imprisonment and/or a fine for violations involving rights management information.

<sup>49</sup>The IT Act 2000 also provides the power, but not the duty, to monitor information through any computer source on certain grounds mentioned therein. IIPA does not support any duty to monitor computer systems or services.

<sup>50</sup>Information Technology (Intermediaries Guidelines) 2011, April 11, 2011 (on file with IIPA).

<sup>51</sup>The Information Technology (Intermediaries Guidelines) Rules, 2011 provide that an “intermediary” (as defined in the Information Technology Act, 2000) is not deemed to be directly liable for certain “temporary or transient storage” regardless of knowledge or red-flag knowledge and without regard to the legality of the temporary or transient storage, or of the transaction taking place across its network. Specifically, Section 3(3)(a) essentially provides that a service provider shall not be directly liable for the “temporary or transient or intermediate storage of information automatically within the computer resource as an intrinsic feature of such computer resource, involving no exercise of any human editorial control, for onward transmission or communication to another computer resource.”

<sup>52</sup>This new exception appears to confirm that the reproduction right under the Copyright Act, 1957, covers temporary copies, such as those made in the random access memory of a computer or other electronic device. The IT Act and the Information Technology (Intermediaries Guidelines) Rules, 2011 also appear to confirm such coverage, in that they provide an exception with respect to a narrow subset of temporary or transient reproductions. Sections 52(b) and (c) also provide for exceptions from the exclusive right of reproduction for the transient and incidental storage of works in certain circumstances, and applying the *a contrario* principle it would appear that all such copies, including those not subject to such exceptions, are protected as reproductions.

infringement, such person responsible for the storage shall refrain from facilitating such access for a period of twenty-one days or till he receives an order from the competent court refraining from facilitating access and in case no such order is received before the expiry of such period of twenty-one days, he may continue to provide the facility of such access.”

By crafting the ISP provision as an exception rather than establishing liability and creating safe harbors for ISPs that cooperate to remove or halt online infringements, the Act creates some ambiguity and uncertainty. The following is a summary of some of the issues raised by the Act, noting areas on which IIPA would seek clarity.

- **Scope of Activities Covered Should be Clarified:** The scope of activities covered is unclear, including “transient or incidental storage” undertaken “for the purpose of providing electronic links, access or integration.”<sup>53</sup> It would be helpful to confirm, perhaps through the Draft Rules process, that information location tools, facilitating access to infringing materials, and non-hosted services that provide “electronic links or access” to infringing materials are covered under the new provisions and subject to the knowledge and notice requirements.
- **Define “Person Responsible”:** The exception is not applicable if “the person responsible” has actual or constructive knowledge. It is unclear who is included as the “person responsible,” which presumably would include the service provider providing links, access or “integration.”
- **Define “Integration”:** It would be helpful to define the term “integration” to include information location tools, facilitating access to infringing materials, and non-hosted services that provide “electronic links or access” to infringing materials.
- **Notice in Addition to Actual or Constructive Knowledge Should Trigger Immediate Takedown Responsibility:** The exemption will not apply if the “right holder” ... “expressly prohibit[s]” the provision of “such links, access or integration,” or if the “person responsible” has actual or constructive knowledge that “such storage is of an infringing copy.” Notices, or knowledge or constructive knowledge, should trigger a responsibility on the part of the service provider (“person responsible”) to immediately take down infringing materials or disable links or access to infringing materials. This is especially important in the case of materials not yet released to the public, or so-called “pre-release” materials, or other materials at the beginning of their commercial life-cycles. We highlight that in such cases, takedowns should be carried out urgently, and certainly should not take days.
- **Need for Expeditious Takedown, No Automatic Put Back:** The proviso contains a period lasting 21 days that the “person responsible” must “refrain from facilitating such access” and requires the right holder to obtain a court order within that 21 days to avoid the “person responsible” from “continu[ing] to provide the facility of such access” to the alleged infringement. There is nothing in the Act defining the speed with which a service provider must react to actual or constructive knowledge or a notice. Under the IT Act 2011 Rules, the takedown time for detected copyright infringements online is 36 hours (which is too long, especially with respect to content such as pre-release materials as noted above). In addition, there should be no automatic put back after 21 days, with put back occurring only if: 1) there is a counter notice; and 2) the right holder fails to obtain a court order or fails to provide a copyright registration certificate. Requiring the right holder to obtain a court order under any circumstances, even when there is no counter notice, imposes a significant burden.<sup>54</sup>
- **Fair and Effective Policies for Non-Hosted Infringements and to Address Infringements Affecting India Instigated from Domestic or Foreign Websites:** To the extent not covered in the current Act, the Indian

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<sup>53</sup>This list suggests some coverage of information location tools and facilitating access to infringing materials – which are some, but not all, of the activities for which an effective response is needed to online infringement.

<sup>54</sup>In the U.S. and other jurisdictions, once allegedly infringing content is taken down in response to a right holder’s notice, the burden falls on the affected party to object to the takedown. Only then is it necessary for a right holder to seek a court order. This approach works well in practice, and is burdensome to neither the right holder nor the affected party.

government should implement fair and effective policies to deal with non-hosted infringements and repeat infringers, and include effective mechanisms to stop users accessing infringing content through domestic and foreign websites.

**National Exhaustion:** While the “Notice of Amendments” did resolve the exhaustion issue (i.e., it retains protection against unauthorized imports of works), publishers report that the National Council of Applied Economic Research (NCAER) is currently reviewing a provision that would damage the Indian exhaustion regime. Adopting such a provision would seriously undercut the current low-priced editions program that publishers offer to Indian students and consumers and would jeopardize the future of such a program. In addition, Indian publishers would be harmed by the volume of international books that could be imported into India from abroad and would lose control over the territorial reach of their own books, contrary to the traditional principles of copyright embodied in sections 19 and 30A of the Copyright Act (as amended).

**Overly Broad Exceptions:** The proposed changes to Section 52 in the Act create a number of new and overbroad exceptions to protection, some of which are particularly dangerous in the networked environment. The Act also leaves in place other exceptions which have troubling implications on India’s Berne Convention and TRIPS compliance, especially if extended into the digital environment.

- **New Broad “Private or Personal Use” Exception (Section 53(a)(1)).** The industries are concerned that the exception in Section 52(1)(a)(1) could be interpreted in overly broad ways. We appreciate the Indian government’s explanations 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, we remain concerned that this narrowing of the language 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,” must still comply with the three-step test in the Berne Convention and TRIPS. It would be important to further limit the exception through an explicit recitation of the three-step test, and an explanation that the exception would rule out any act in which a use rendered a work or other protected subject matter available online or to anyone outside the person entitled to use under this exception, would certainly rule out copying of whole or part of a cinematographic work in a movie theater, and could be claimed only by the person who is entitled to a permitted use, and not by any other party or service.

Concerns also remain over existing overbroad exceptions for copying of computer programs for backup (Section 52(1)(aa)), including a provision allowing such copying for any “noncommercial personal use” beyond the usual making of a back-up copy (Section 52(1)(ad)). IIPA proposes that the Draft Rules limit the number of copies which may be made under exceptions for copying of computer programs, for backup, including a provision allowing such copying for any “noncommercial personal use” beyond the usual making of a back-up copy. Concerns are also expressed over an exception permitting the performance of films in educational contexts and in “clubs” (Section 52(1)(i)); IIPA proposes that this exception be limited in the Draft Rules. IIPA expresses concern over the disability exception (Section 52(1)(zb)), e.g., the term “accessible format” includes “talking books” and “digital formats such as MS Word, pdf, epub etc.” as well as “all other formats that can be used by persons with disabilities.” The Draft Rules should limit the scope of this exception by ensuring that the beneficiaries of such exceptions are individuals who are eligible or who may qualify to receive books and other publications produced in specialized formats. These and certain other exceptions must be scrutinized in conjunction with India’s obligations under the Berne Convention and the TRIPS Agreement.

**Other Issues:** The Indian government missed some opportunities to further modernize the Copyright Act in this latest amendment process and should consider additional amendments to the Act and other laws that would be beneficial to foreign and Indian right holders alike:



**1) Confirm That Camcording of a Motion Picture is Illegal:** With the increase in illegal camcording of movies in theaters in India, the Indian government should adopt national legislation making it unlawful to possess an audiovisual recording device (such as a video camera or other device) with the intent to make (or attempt to make) a copy, in whole or in part, 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 emerging trend is to provide explicit protection against this activity, and the U.S. and several other countries already have legislation in force, while other countries are considering bills which accomplish the same. We hope this activity will be prohibited in the Cinematograph Bill which emerged in 2010.

**2) Deal with Damaging “Pre-Release” Piracy:** It is exceedingly important to preserve the market for creative products in India prior to or during the first weeks of a product’s release. The Indian government should adopt provisions that provide for increased civil and criminal penalties in cases involving defendants who make available to the public pre-release works.<sup>55</sup>

**3) Adopt Statutory Damages:** Proving actual damages, e.g., in end-user software, book publishing, and other piracy cases, can be difficult, and in order to expedite civil judicial processes and provide much-needed deterrence to a civil regime which relies almost completely on interim injunctions and Anton Piller orders to deal with piracy, India should adopt statutory damages at the election of the right holder.

**4) Allow Seizure Orders as a Matter of Right:** The Indian government should provide that seizure orders are granted to copyright owners as a matter of right in civil cases.

**5) Allow for Restitution in Criminal Cases.**

**6) Amend Tax Laws to Make Software Piracy a Form of Tax Evasion:** A study conducted by research firm IDC examining the direct and indirect tax implications of software piracy in India found that it cost the State exchequer \$866 million in tax receipts in 2009. The Indian government should amend Indian tax laws to classify software piracy as a form of tax evasion and define corresponding tax violation rules in line with international best practices. Further, governmental tax inspectors and external and internal auditors should be empowered to check and account for genuine software licenses inside public and private companies.

**7) Enhance Corporate Audit and Disclosure Requirements:** The Indian government should amend the Companies Act, 1956 to require software compliance audits by duly qualified and appointed auditors. Such requirements might be targeted by reference to a minimum threshold (for example, revenue, total assets, etc.) to determine the set of companies to which such an audit requirement would apply. Corporate disclosure rules should also be revised to require more specific disclosure of genuine software licenses.

**8) Adopt Policies to Ensure Legal Software Use and Software Asset Management (SAM) Best Practices in Government Agencies and Promote the Same With Private Enterprises:** The Indian government should issue a directive or strict policy guidelines mandating all government departments across the country use legal software and follow due diligence while procuring software assets. This would ensure software license compliance in government, protect government system from security vulnerabilities and send a strong message about the importance of software license compliance to the private sector. The government should also adopt software asset management best practices and promote these with private enterprises.<sup>56</sup>

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<sup>55</sup>For example, the U.S. Family Entertainment and Copyright Act of 2005 contains effective civil and criminal provisions to deter online pre-release piracy.

<sup>56</sup>As noted above, BSA and the Department of IT established a roadmap for promotion of SAM best practices in government and private enterprises in a joint report they issued in November 2011. BSA’s new “Certified in Standards-based SAM for Organizations (CSS(O))” program – the first SAM program aligned with ISO standards – is one possible model which may be followed.

**9) Patent Pendency:** The software industry faces a significant and long-standing backlog of patent applications in India. Over the past five years, only 37% of the patent applications filed in India (and available for examination) have been examined by the Intellectual Property Office. The current backlog currently stands at approximately 100,000 applications across all industries. Due to this backlog, a significant portion of our members' intellectual property is not adequately protected in India. While we recognize that measures have been taken by the Indian government to address this backlog, including by the recent hiring of new examiners, we believe more needs to be done to address the significant increase in the number of patent applications in India, particularly in the ICT sector. As a result, there is a risk that the backlog may increase rather than decrease in the coming years, despite these measures. We urge the Indian government to address this backlog as a priority. Doing so is important to promote R&D investment, ICT innovation, and national competitiveness in India.

**10) Adopt an Effective Optical Disc Law:** Since India still has a reported 36 optical disc factories, industry along with FICCI have been engaged in the drafting process for an effective OD law. The issue has long been delayed by the controversy over coverage of blank discs, which some (including Moser Baer) oppose.

**National IPR Strategy:** During the fall of 2012, the Department of Industrial Policy and Promotion (DIPP), having established the Sectoral Innovation Council on IPR, initiated a process to review a *Draft National IPR Strategy*, inviting views of stakeholders. The SIC's stated goals of the National IPR Strategy were "for encouraging innovation with a view to adequately address the key concerns of sustainable development," as well as "to formulate the medium term policy objectives that can be the building blocks of the envisaged IPR strategy," and include recognition of the need to establish a National IP Enforcement Taskforce. IIPA and BSA submitted comments in the process. In IIPA's comments, we note the importance of properly defining intellectual property rights,<sup>57</sup> that copyright and creativity have long played an important role in India's economic development,<sup>58</sup> and the importance of providing adequate and effective levels of protection and enforcement in India as a means to achieve the goals of the IP system (citing the priority actions from the 2011 Special 301 report as guideposts). BSA's submission highlighted the need to, among other things, 1) cover software under the Goondas Acts which recognize the link between piracy and organized crime; and 2) make software-specific changes to the Copyright Act consistent with this report; 3) make changes to disclosure and audit requirements in the Companies Act, 1956, to ensure that companies are properly procuring and licensing software; 4) establish a "National Intellectual Property Council" under the Prime Minister's Office to monitor progress of the National IPR Strategy and for other purposes; 5) put into place a directive or strict policy guideline mandating all government departments across the country use legal software and follow due diligence while procuring software assets, including the adoption of latest software asset management (SAM) practices; and 6) not discriminate in procurement or adoption practices on the basis of their business model, their place of origin, or the type of technology they employ.

## **MARKET ACCESS ISSUES**

India currently imposes significant market access hurdles on the motion picture, entertainment software, book publishing, and software industries.<sup>59</sup> One reason for this is the various taxes and charges that are imposed on right holders at various points in the distribution or dissemination of creative product in India. One measure which the Indian Parliament is considering is the Goods and Services Tax (GST) expected to be taken up in the 2013 Parliamentary Budget Session. Some hurdles remain to achieving consensus on the GST, particularly in regard to the states' views on 1) fiscal autonomy, 2) revenue-neutral rates, and 3) which items will be included in the GST list.

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<sup>57</sup>The drafters defined an intellectual property right as "a private right recognized within the territory of a country and assigned to an individual or individuals for a specific period of time in return for making public, the results of their creativity or innovation." This description encompasses some key aspects of intellectual property, but IIPA suggested that the drafters refer to the World Intellectual Property Organization (WIPO) descriptions of intellectual property to ensure a complete description. WIPO defines intellectual property as "creations of the mind: inventions, literary and artistic works, and symbols, names, images, and designs used in commerce."

<sup>58</sup>Here we noted the UNCTAD, MPDA, and PricewaterhouseCoopers reports mentioned above.

<sup>59</sup>Many barriers are set forth in documents such as the FICCI "Key recommendations for Media & Entertainment Sector presented to the Finance Ministry" (February 2011), and in general, we concur with FICCI's findings therein.

Nonetheless, adoption of the GST could resolve many issues below related to entertainment taxes, high tariffs on entertainment and double taxation.<sup>60</sup>

**Motion Picture Barriers:** The U.S. motion picture industry faces numerous market access barriers in India.

- **TRAI Bans Exclusivity, Includes “Must Provide” in the Pay TV Sector; MIB Also Restricts “Direct-to-Home” Business:** A 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) combined with a “must provide” requirement (obligating broadcasters to provide channel programming to all requesting distributors on a nondiscriminatory basis). The exclusive contract prohibition, along with “must provide” requirements, eliminates all potential for competition and any incentive to develop programming or buy any “rights.” The industry has made numerous submissions to the Indian government, opposing restrictions in the functioning of India’s cable and satellite market, arguing that the draft regulation would remove private parties’ ability to negotiate standard free market transactions and would ultimately limit the quality and quantity of legitimate content available to consumers. This regulation eliminates all potential for competition and any incentive to develop programming or buy any “rights” and should be deleted or significantly altered.
- **Restrictions on Direct-to-Home (DTH) Market:** The Ministry of Information and Broadcasting (MIB) has also taken similar restrictive steps with respect to the DTH market (the reception of satellite programs with a personal dish in an individual home). Specifically, it issued Guidelines to include, among other things, prohibitions against DTH operators from entering into exclusive contracts with any broadcaster; and 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. These regulations and guidelines limit choice and undermine anti-competition laws.
- **Price Controls on Pay TV Sector:** TRAI has also introduced price caps for pay channels and “price bands” for bouquets in areas with set-top-boxes. TRAI says they will relax the price controls once other television platforms are widely adopted (e.g., satellite TV, Internet Protocol TV). Such rate regulation is stifling to the growth of this clearly competitive industry sector, and TRAI should make a strong commitment to relax price controls.
- **Foreign Ownership Restrictions:** Foreign ownership/investment in cable television systems is limited to 74%. IIPA opposes such ownership restrictions, which ignore the fact that significant capital infusion, which may be accessed from international markets, is necessary to further develop the television industry in India. A task force in the Ministry of Information and Broadcasting (MIB) was set up to re-examine the foreign ownership caps in broadcasting, particularly in electronic commerce, but there have been no reports of its conclusions.
- **Entertainment Taxes:** Entertainment taxes vary widely among Indian States, ranging from 15 to 40% in some key markets, and from 40 to 70% in other States. The average tax rate, computed on a country-wide basis, is estimated to be between 27-36%, and constitutes a significant disincentive to investment in the industry, including in the much needed area of cinema construction. The film industry, including the MPAA’s India group, in association with the Film Federation of India, continues to encourage the Federal and various State governments to rationalize the high taxation levels and the Indian government has also stepped in to persuade various State governments to impose a uniform entertainment tax not exceeding 60%. Citing revenue considerations, however, most states are reluctant to conform. In addition, at the request of their local state film industry representatives, some states discriminate between local and non-state originated films, charging nothing (or even offering incentives) for local films, while assessing higher rates for non-state originated films.

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<sup>60</sup>CNBC-TV18, Budget 2013: GST stuck between states' demands, India Inc's pleas, SME Mentor, January 17, 2013, at <http://www.moneycontrol.com/smentor/news/indian-markets/budget-2013-gst-stuck-between-states-demands-india-incs-pleas-808898.html>.

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.

- **Price Fixing on Theatrical and Quotas:** The Indian government in various of the southern states has engaged in price fixing on tickets as well as quotas on the number of screenings per title per day.
- **Onerous Restrictions on Satellite Services:** For years, foreign content providers wishing to make their programming available by satellite have been stymied by onerous restrictions on their ability to uplink and downlink satellite signals beaming into India. Under 2005 Guidelines, foreign broadcasters are required, among other things, to set up offices in India, be subject to licensing by the government, and pay prescribed fees per channel beaming into India.
- **Disruptive Content Control Rules for Television:** 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. This change was 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.
- **Service Taxes on Transfers of IP:** IIPA notes positively the addition of temporary transfers of IP rights to the Negative List, but also notes that litigation (Constitutional challenges filed by local Hindi studios in July 2010 and Motion Picture Association members in September 2010 in the Delhi and Mumbai High Courts) remains pending for the 2010-2012 period. A further service tax has now been imposed on the “input”/production side (i.e., the services of actors, composers, and musicians) which cannot be offset, with negative effects on those who produce locally or are engaged in local co-productions.

**High Tariffs on Entertainment Software and Hardware Products:** Entertainment software publishers continue to be hindered by the existence of high tariffs on PC game products, console game products, game console hardware, and game activation cards. Additional taxes compound to create an environment where the market share of authorized hardware and software is only a fraction of what it would be under less restrictive market conditions. India maintains unbound tariffs on consoles and accessories, including activation and value cards used in software and online game transactions, creating an uncertain business climate for trade and investment in the Indian market.

**Taxation of Software:** An array of tax policies negatively impact market access for software goods and services in India. These include transfer pricing rules based on global profit split attributions to outsourced R&D activity in India and double taxation of certain software as both the sale of a good and service. IIPA urges that these and other problematic tax policies impacting market access for software be amended to be consistent with international practices.

**Technology and Procurement Mandates:** The Indian government has issued a number of policies that raise concerns they will be implemented in a manner that provides significant preferences and mandates for government procurement, and in some cases private sector procurement, of products and services that are locally manufactured, that utilize a particular technology, or that have IP owned and/or developed in India. These include the National Electronics Policy, the National IT Policy and the National Telecom Policy, all of which culminated in the February 2011 Preferential Market Access (PMA) policy and subsequent implementation guidelines. The PMA policy represents an unprecedented interference in the operations of U.S. IT and software companies in India by imposing onerous and discriminatory local content requirements on certain “electronic” goods and services. Importantly, the Policy imposes these requirements on both government and private sector procurements, which is clearly inconsistent with India’s WTO obligations. Moreover, the rules will apply to all “Managed Service Providers” operating in India.

As written, the PMA will capture software for a number of reasons: 1) the local content and value addition requirements will capture pre-installed software in relevant ICT hardware, including PCs, tablets, and printers that have already been notified for government procurement; 2) Indian government officials have verbally indicated to U.S. company representatives that software will be captured in some form by the policy, although they have not provided further details; 3) neither the February 2011 PMA document nor subsequent implementation guidelines create any clear distinction between hardware and software in local content/value addition calculations; and 4) the PMA policy's broad definition of an MSP as "a provider of Information Technology (IT) and Communications related services, who provide such services by establishing Information Technology (IT)/Communications infrastructure," could capture software and services. IIPA believes that an open and competitive market is an essential component of a world-class IT sector that fosters IP development. The Indian government should avoid policies that restrict market access through such mandates or stringent procurement preferences.

## **TRAINING AND PUBLIC AWARENESS**

IIPA member associations continued to conduct training in 2012. For example, the motion picture industry stepped up trainings, in particular, for movie theater employees at high-risk theaters, conducting "Make a Difference" trainings on investigative and enforcement techniques for over 1,200 theater staff. In addition, a roundtable discussion headed by the local Motion Picture Distribution Association (MPDA) was attended by Indian government authorities and representatives of the Multiplex Association of India to apprise the government and cinema industry of the alarming growth rate of illegal camcording in India. MPDA also made a presentation on the effects of piracy and the growing threat of online piracy to approximately 80 representatives of law enforcement at a conference jointly organized by the Central Bureau of Investigation (CBI) and Interpol. As in previous years, the local music industry and the International Federation of Phonographic Industries (IFPI) conducted several training programs for police and public prosecutors in Andhra Pradesh, Punjab, Mumbai, Delhi, West Bengal, Kerala, Tamil Nadu, Maharashtra, and also organized meetings with law enforcement and members of Parliament to discuss better implementation of IPR protections.

## **GENERALIZED SYSTEM OF PREFERENCES**

India enjoys preferential trade benefits under the Generalized System of Preferences trade program. Among the criteria the President must take into account in determining whether a country should continue to be designated as a GSP beneficiary country are "the extent to which such country is providing adequate and effective protection of intellectual property rights," and "the extent to which such country has assured the United States that it will provide equitable and reasonable access to the markets ... of such country." 19 USC 2462(c)(4) and (5). In 2011, India was the largest recipient of GSP preferences, with more than US\$3.73 billion worth of Indian goods entering the U.S. under the duty-free GSP code, accounting for almost 10.4% of its imports into the U.S. and around 20% of all U.S. imports under the program (US\$18.5 billion). In the first eleven months of 2012, more than US\$4.1 billion of India's exports to the U.S., or almost 11.1% of its total exports to the U.S., received duty-free treatment under the GSP code. India needs to continue to endeavor to meet the adequate and effective test under the statute to remain eligible to receive favorable treatment under the GSP program.



## APPENDIX B

PricewaterhouseCoopers (for Motion Picture Distributors Association (India)), *Economic Contribution of the Indian Film and Television Industry 2010*, available at [http://mpa-i.org/index.php/research\\_statistics](http://mpa-i.org/index.php/research_statistics).

March 2010

# ECONOMIC CONTRIBUTION OF **INDIAN** FILM AND TELEVISION INDUSTRY

Prepared by PricewaterhouseCoopers for  
Motion Picture Distributors Association (India)



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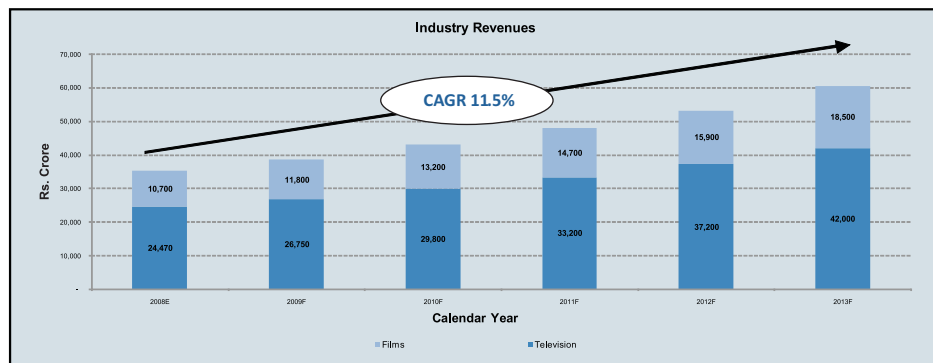
## 1. Executive Summary

This study on the "Economic Contribution of the Indian Film and Television Industry" has been conducted by Price waterhouseCoopers, for Motion Picture Distributors Association (India) ("MPDAI"), with the objective of highlighting the contribution of the film and television industry to the Indian economy. This overall contribution is based on the direct and indirect impact of the industry, on the economy, considering the spending, income and employment generated by the industry, and its effect on other related industries as well. The contribution has been estimated based on the financial performance of companies for the financial year 2008-09. **Please note the assumptions and limitations as specified in section 2 of this study.**

The key segments of the film and television industry covered in this study include:

1. Indian films
  - Hindi films
  - Key regional films
2. Indian television industry covering content production, broadcasting and distribution
3. U.S. /International films in India
4. Indian home video industry

The combined revenues of the Indian film and television industry were over Rs. 35,000 crores (USD 7.7 billion) in calendar year 2008. These are expected to grow at a CAGR of 11.5% over the period 2009 - 2013, reaching a size of over Rs. 60,000 crores (USD 13.2 billion).



Source: PricewaterhouseCoopers' Indian Entertainment & Media Outlook 2009

Figure 1: Revenue Projections for the Indian Film and Television Industry

To quantify the economic contribution of the film and television industry, the following four measures have been used:

- **Gross Output:** This represents the total value of goods and services supplied by the entities in the industry. This is measured by the aggregate revenues of all companies in the industry.
 

**Note:** Gross Output as a measure, is different from the total consumer spend in the industry, and may vary based on the industry structure. However, the measures of "Gross Value Added", "Net Indirect Taxes" and "Employment" would remain the same, irrespective of industry structure. This has been further explained in the methodology section of this report.
- **Gross Value Added ("GVA"):** This factor measures the returns to labour and capital, i.e. the value of output generated by the entity's factors of production. This measure, along with the Net Indirect Taxes indicates the industry's contribution to the economy.
- **Net Indirect Taxes ("NIT"):** Indirect taxes (net of subsidies) paid by the industry.
- **Employment:** This measures the number of workers that are employed in the industry.

Table 1 provides a summary of the results of the economic impact study. The total Gross Output of the film and television industry is estimated to be **Rs. 92,645 crores** (USD 20.4 billion) for the year 2008-09.

The total contribution (direct and indirect), defined as the sum of the "Gross Value Added" and "Net Indirect Taxes", of the film and television industry was **Rs. 28,305 crores** (USD 6.2 billion) for the year 2008-09, which approximately constitutes **0.532 % of the Gross Domestic Product ("GDP") of India**. In comparison, the contribution of the Indian advertising industry constitutes 0.4% of the GDP of India. The employment generated by the industry was estimated to be **18.30 lakh (1.83 million) workers**.

## Executive Summary

**Table 1: Economic Impact (Direct and Total) of the Indian Film and Television Industry**

	Gross Output (Rs. crores)		Contribution (GVA + NIT) (Rs. crores)		Employment (in lakhs)	
	Direct	Total	Direct	Total	Direct	Total
Indian Film Industry	12,312	20,467	2,932	6,846	1.4	4.2
Indian Television Industry	42,545	70,723	7,348	20,873	4.2	13.9
U.S. / International Film Industry in India	492	818	147	304	0.029	0.14
Home Video Industry	384	637	161	283	0.003	0.089
<b>Total</b>	<b>55,733</b>	<b>92,645</b>	<b>10,587</b>	<b>28,305</b>	<b>5.7</b>	<b>18.3</b>

Source: Industry estimates and PricewaterhouseCoopers analysis

**Table 2: Economic Impact (Direct and Total) of the Indian Film and Television Industry**

	Gross Output (USD million)		Contribution (GVA + NIT) (USD million)		Employment (in thousands)	
	Direct	Total	Direct	Total	Direct	Total
Indian Film Industry	2,709	4,503	645	1,506	139	417
Indian Television Industry	9,361	15,561	1,617	4,592	424	1,386
U.S. / International Film Industry in India	108	180	32	67	3	14
Home Video Industry	84	140	35	62	0.3	9
<b>Total</b>	<b>12,263</b>	<b>20,384</b>	<b>2,329</b>	<b>6,228</b>	<b>567</b>	<b>1,826</b>

Source: Industry estimates and PricewaterhouseCoopers analysis

Note: exchange rate used Rs. 45.45/1 USD

From amongst the industries considered, the Indian television industry was estimated to have the largest economic contribution (Rs. 20,873 crores / USD 4.6 billion) and the highest employment generated (13.86 lakh / 1.38 million workers)

The film and television industry in India is one of the world's largest markets in terms of number of consumers and offers significant growth potential. Over the past few years the industry has experienced rapid double-digit growth and it is expected that this trend will continue in the future, thereby resulting in an increasing contribution to the Indian economy.

## 2. Methodology, Approach and Assumptions

### 2.1. Measures of Economic Impact

The measures of economic impact that have been considered for the purpose of this study are:

- **Gross Output:** This represents the total value of goods and services supplied by the entities in the industry. This is measured by the aggregate revenues of all companies in the industry.

**Note:** While estimating Gross Output i.e. the aggregate revenues generated in the industry, there may exist an element of double counting. For example, if Firm A earned revenue of Rs. 100 crores and outsourced some activities to Firm B, for which it paid expenses of Rs. 50 crores (which is the revenue for Firm B), the combined Gross Output of Firms A and B would be Rs. 150 crores. However if Firm A were to conduct the activities itself and not outsource to Firm B, the Gross Output would be Rs. 100 crores (assuming Firm B earns revenue only from Firm A). Thus the Gross Output estimates could vary depending on the industry structure, however, the other measures- value added, Net Indirect Taxes and employment- would remain the same. The contribution to the Indian economy for a particular industry is measured by sum of the Gross Value Added parameter ("GVA") and Net Indirect Taxes ("NIT"), as explained below.

- **Gross Value Added ("GVA"):** This represents the returns to labour and capital, i.e. the value of output generated by an entity's factors of production. This measure, when combined with Net Indirect Taxes, indicates the industry's contribution to the economy, and consists of the following:
  - **EBITDA (Earnings before Interest, Taxation, Depreciation and Amortization)** - This is the total operating profits generated by the firm, and represents the income generated by the firm's capital inputs.
  - **Wages** - This measure represents the income generated by the firm's labour inputs.

**Therefore, Gross Value Added = EBITDA + Wages**

**Note:** Subsidies and incentives provided to an industry should be deducted from the Gross Value Added because they are a cost to the economy. For the purpose of this study, we have considered only the net reported revenue / earnings which excludes subsidies. Therefore the Gross Value Added estimate does not require adjustment.

- **Net Indirect Taxes ("NIT"):** Indirect taxes (net of subsidies) paid by the industry, are a contribution to the economy. This includes taxes such as Entertainment Tax, Service Tax, Value Added Tax etc.
- **Employment:** This measures the number of workers that are employed in the industry.
- **Multiplier Effect:** In addition to the direct impact of the industry, which is measured by estimating the economic indicators for the industry participants, there is also an indirect impact on other external sectors. This indirect impact is also called the multiplier effect, and together with the direct impact gives the total impact of the industry.

### 2.2. Our Approach

- **Gross Output and Gross Value Added:** For the purpose of this study, we have followed a bottom-up approach to estimate the economic measures of **Gross Output and Gross Value Added**. This approach involves the following:
  - The industry / sector value chain is considered, and the economic contribution is calculated for each stage of the value chain.
  - Total industry revenue and percentage break-up/flow of revenue for each stage is estimated based on PwC information / industry sources and reports.
  - For each stage, the following measures of economic activity are calculated:
    - Gross Output = Revenue
    - Gross Value Added = EBITDA + Wages
  - The above data is calculated for a sample of organisations based on information available in the public domain.
  - Based on the sample estimates, the values are extrapolated for the stage-wide Gross Output and Gross Value Added.

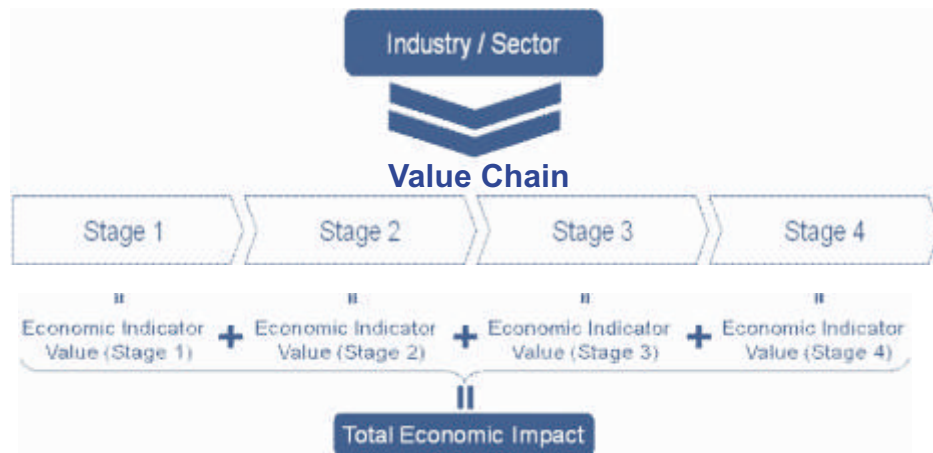


Figure 2: Overview of Approach (Calculating the Gross Output and Gross Value Added)

- **Indirect Taxes:** As certain segments of the film and television industry are largely unorganised, it is difficult to estimate the indirect taxes contributed by the industry. Accordingly, Entertainment Tax estimates have been arrived at based on the actual / budgeted collections by the Government.

Other tax categories such as VAT and Service Tax have not been considered in detail, as the industry-wise tax collections for these categories are not available. In such cases, estimates have been arrived at based on an extrapolation of information obtained through discussions with industry representatives.

In certain cases, due to non-availability of relevant information, the estimates of indirect taxes have been derived based on the overall "Net Indirect Taxes (NIT) to Gross Output" ratio calculated from the "Input Output Transactions Table (2003-04)" - Matrix 1 (Provided by the Central Statistical Organisation) for the sector classified as IOTT Sector No: 129 ("Other Services"). This classification covers recreation & entertainment, radio and TV broadcasting services, among others. This ratio has then been applied to the relevant industry Gross Output estimates.

**Note:** The assumptions for different segments are listed in section 2.4. These estimates may vary significantly from actual tax collections, especially for segments with a large number of unorganised players.

- **Employment:** For estimating the employment generated by each sector, the overall average Gross Value Added ("GVA") per worker has been considered and applied to the industry GVA to arrive at the employment generated. The estimate for average GVA per worker has been obtained from the **National Sample Survey Organization ("NSSO") Report on "Service Sector in India (2006-07) - Economic Characteristics of Enterprises" (63rd Round)** for "National Industrial Classification (2004): Code 92 (Recreational, Cultural and Sporting Activities)". Since the Indian film and television industry is primarily based in urban India, the ratios relevant to the "Urban" sector have been considered.

**Note:** The NSSO report estimates that at an overall level, 90 percent of the workers in urban India are full-time, and 10 percent are part-time workers.

In some cases where industry information is available, the direct employment generated has been estimated based on the ratio of average number of employees per Rs. lakh of revenue. This ratio has been derived from the sample information obtained for select companies within a particular segment, and then extrapolated for the overall segment revenue, to arrive at the employment generated.

**Note:** The assumptions for different segments are listed in section 2.4.

- **Indirect Impact:** The **Gross Output multiplier** for the industry has been obtained from the "Input Output Transactions Table (2003-04)" - Matrix 7: **Leontif Inverse Matrix (Provided by the Central Statistical Organization)** for the sector classified as IOTT Sector No: 129 ("Other Services"). This classification covers recreation & entertainment, radio and TV broadcasting services, among others.

The indirect impact on **GVA** and **NIT** has been calculated based on the "GVA to Output" ratio and the "NIT to Output" ratio respectively, also derived from the Input Output Transactions Table (2003-04) - Matrix 1.

## Methodology, Approach and Assumptions

The indirect impact of employment has been estimated, assuming the overall average GVA per worker for all the service categories, obtained from the **National Sample Survey Organization Report ('NSSO') on "Service Sector in India (2006-07) - Economic Characteristics of Enterprises" (63rd Round)**. The ratios relevant to the "Urban" sector have been considered.

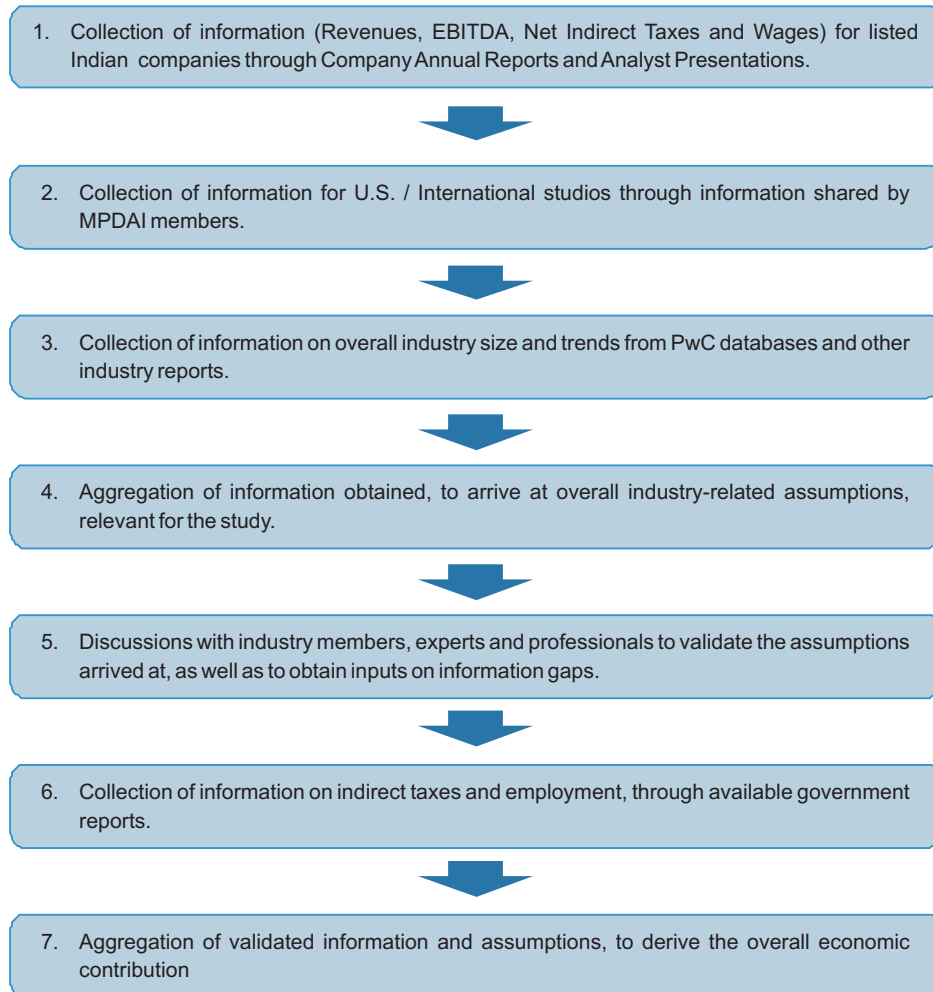
**Note:** The estimation of indirect impact based on the above approach is only a broad approximation, as industry specific multipliers are not available. Multipliers from other countries have not been considered, as the structure and functioning of the Indian film and television industry is quite unique, as compared to other developed nations and hence not comparable.

- The study has been based on company performance for the financial year 2008-09. However the figures for industry consumer and advertising spend used in the report, pertain to the calendar year 2008. We have assumed these calendar year figures to be representative of the industry size in the financial year as well.
- The exchange rate considered for conversion to US Dollars is Rs. 45.45 /USD, the average exchange rate for the Financial Year 2008-09. Currency figures are rounded off to the nearest crores / million.
- India's GDP for 2008-09, at current prices was **Rs. 53,21,753 crores**. As the study is based on company performances for the financial year 2008-09, we have used the GDP for 2008-09 and not 2009-10.

*(Source: Economic Survey 2008-09, Ministry of Finance, Government of India)*

### 2.3. Information Collation and Validation

For this study, the collation and validation of information, was based on the following steps:



**Note:** We have not independently verified the accuracy of information provided to us, and have not conducted any form of audit in respect of organisations that have provided the information necessary to undertake this assignment. Accordingly, we express no opinion on the reliability, accuracy, or completeness of the information provided to us and upon which we have relied. The statements and analysis expressed herein have been made in good faith, and on the basis that all information relied upon is true and accurate in all material respects, and not misleading by reason of omission or otherwise. The statements and analysis expressed in this report are based on information available as at the date of the report. We reserve the right, but will be under no obligation, to review or amend our Report, if any additional information, which was in existence on the date of this report was not brought to our attention, or subsequently comes to light.

### 2.4. Key Assumptions / Limitations

- **Overall**
  - Estimates of indirect economic contribution would be difficult to state due to a lack of appropriate multipliers in India. As a result, approximations from the broader industry classification have been used on an overall basis.
  - The effect of piracy has not been considered in the scope of this study.
- **Indian Film Industry**
  - Estimates of Entertainment Tax, is based on the overall budgeted Entertainment Tax collection by the Government, as per Indian Public Finance Statistics Report 2008-2009. Based on our discussions with industry representatives, we estimate that approximately 80-90 percent of total Entertainment Tax collections are from the film exhibition segment.  
There may be an additional impact on indirect taxes from other categories such as VAT and Service Tax - however, due to the absence of relevant industry-wise information, this has not been considered in the analysis for this segment.
  - The impact of revenue generated from the film music industry has been considered as a part of the ancillary revenues earned by the film producer. The remaining part of the value chain of the Indian music industry has not been covered in this analysis.

## Methodology, Approach and Assumptions

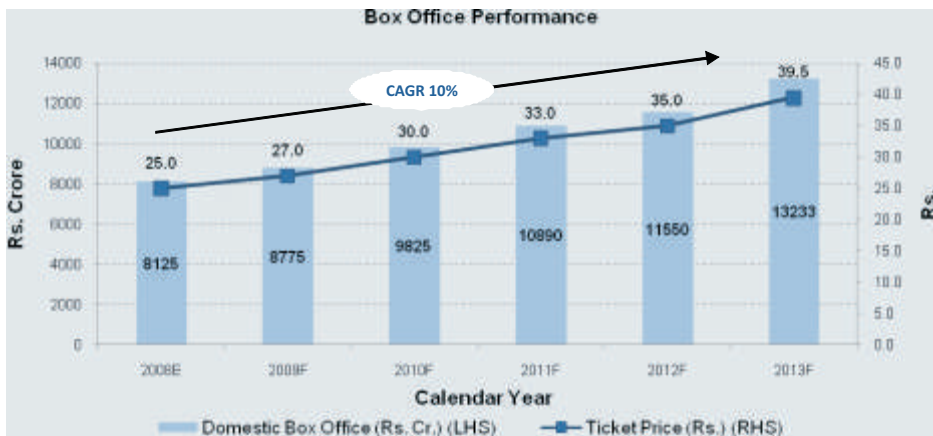
- o Direct employment estimates have been arrived at based on the average Gross Value Added per worker for "National Industrial Classification (2004): Code 92 (Recreational, Cultural and Sporting Activities)" from the National Sample Survey Organization ("NSSO") Report on "Service Sector in India (2006-07) - Economic Characteristics of Enterprises" (63rd Round).
- **Indian Television Industry**
  - o Film production, has not been considered, as part of the television industry value chain, inspite of being a source of content for television. The value-added and output from this segment has been considered in the "Indian film industry" economic contribution. Therefore, production houses producing only TV content have been considered.
  - o There are multiple channels available, covering multiple languages and genres. Since the variety of channels is extensive, large players with a portfolio of channels across multiple genres and languages have been assumed to be representative of the overall broadcasting segment.
  - o Due to its unorganised nature, economic measures such as revenue, operating margins and wages for the Local Cable Operators ("LCOs") have been derived based on discussions with industry experts.
  - o The overall share of subscription revenue for cable television, between Broadcasters, Multi-System Operators and Local Cable Operators, has been assumed based on the prescribed revenue share arrangement by TRAI for CAS areas. The revenue share arrangement in non CAS areas has not been considered separately, as it may vary significantly on location or operator basis.
  - o Indirect taxes have been assumed at 2 percent of revenue based on the NIT / Output Ratio for the overall sector 129 ("Other Services") in the Input Output Transactions Table (2003-04), developed by the Central Statistical Organization.
  - o Direct employment estimates have been arrived at based on the average Gross Value Added per worker for "National Industrial Classification (2004): Code 92 (Recreational, Cultural and Sporting Activities)" from the National Sample Survey Organization ("NSSO") Report on "Service Sector in India (2006-07) - Economic Characteristics of Enterprises" (63rd Round).
- **U.S. / International Film Industry in India**
  - o The average net profit margin earned by the International production houses has been deducted from the average EBITDA margin - for the calculation of EBITDA/ GVA. This is based on the assumption that most of this profit is repatriated to the studios' home country.
  - o Estimation of indirect taxes is based on the average taxes paid as a percentage of revenue for a sample list of organizations, and subsequently extrapolated for the overall industry.
  - o Estimation of the employment generated in this industry, is based on the average number of employees per lakh of revenue, for the segments considered (based on a sample list of organizations).
- **Home Video Industry**
  - o This analysis covers the overall distribution of home video titles in India, considering all languages.
  - o For our analysis, the segments related to the retail sale and rental of CDs and DVDs has not been considered, as these segments are largely unorganised.
  - o Indirect taxes have been assumed at 2 percent of revenue based on the NIT / Output Ratio for the overall sector 129 ("Other Services") in the Input Output Transactions Table (2003-04), developed by the Central Statistical Organization.
  - o Estimation of the employment generated in this industry, is based on the average number of employees per lakh of revenue, for the segments considered (based on a sample list of organizations).



### 3. The Indian Film Industry

#### 3.1. Overview

On an overall basis, the size of the Indian film industry is estimated at Rs. 10,700 crores (USD 2.5 billion) in 2008 and is expected to grow at a CAGR of 11.5% over the period 2008-2013. Out of Rs. 10,700 crores, domestic box-office collections accounted for Rs. 8,130 crores (USD 1.8 billion) with overseas box-office, ancillary rights and home video making up the balance.



Source: PricewaterhouseCoopers' Indian Entertainment & Media Outlook 2009

Figure 3: Projected Box Office Performance for the Indian Film Industry

Domestic box office collections are projected to increase to Rs. 13,000 crores (USD 2.8 billion) by the year 2013, growing at a CAGR of 10%. This growth is primarily attributable to the growth in average ticket prices, projected to increase from Rs. 25 (USD 55 cents) in 2008 to Rs. 40 (USD 88 cents) by 2013.

**Some of the key trends in this industry include:**

- **Growing industry size** - The growth in India's per capita income coupled with an increasing tendency to spend on discretionary items has led to a larger audience and consumption market for the industry. As a result, many new players have entered this segment and the existing players are

focusing on expanding their own portfolio. For example, Yash Raj Films, one of India's most well known and respected film production houses, has recently started production of television serials for Sony Television.

- **Largest number of movie releases in the world** - India is one of the largest producers of films in the world, in terms of number of films produced. This coupled with the growing international movie market in India has led to the Indian consumer having access to a huge variety of content.
- **Piracy impacting returns<sup>1</sup>** -The Indian film industry is significantly impacted by online piracy. A study undertaken by Motion Picture Distributors Association (MPDAI) has put India among the top ten countries in the world, where online piracy is at its highest. Hollywood (English Films), Bollywood (Hindi Films), Tollywood (Telugu Films) and Kollywood (Tamil Films) are the prime victims of the crime. Research has shown that online piracy of film and television content in India is mainly through file sharing networks. 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.
- **U.S. / International studios in India** - Hollywood and other international players have been making determined efforts to enter and consolidate their positions in India. Their endeavours have ranged from joint productions (for example Warner Bros. joint production with Ramesh Sippy for Chandni Chowk to China , Walt Disney's joint production with Yash Raj Films for Roadside Romeo and others) to international films being released in English and regional languages. Hollywood/ international efforts to dub their films in Indian regional languages has been an attempt to reach out to a wider audience and boost box-office numbers and this effort has been very successful in the recent past.

<sup>1</sup>Source:  
● www.businessofcinema.com

- **Exhibition facilities** - The expansionary tendencies of the multiplexes and the growing demographic trend of increasing consumer spend on entertainment has led to multiplexes expanding into other properties. However, the recession in FY 2008-09 and the high cost of developing property has led to a slow down in the rate of expansion with different operating models (like managing mall properties) being explored. The ability of better facilities to attract audiences has also caused many single screens to upgrade their premises.
- **Better realization for producers in FY 2009-10** - The agreement of higher revenue share from exhibitors post the exhibitor-producer strike as well as more accurate reporting of ticket sales has led to improved realization for producers. With many exhibitors now opting for digitization of content and computerized ticketing, the reduction in under reporting of revenue and cost of prints has improved profitability. Additionally, the digitization of content has led to an ability to service a large geography in a timely manner which has helped in reducing piracy.
- **Entertainment Tax exemptions** - The Entertainment Tax exemption provided by the State Governments has served as an incentive for multiplex expansion and as a result, most multiplex properties have been functioning under subsidies on Entertainment Tax. With the expiry of these subsidies, we can expect a drop in realisations over the next 5 years creating changes in the profit and loss account structure of such exhibitors.
- **New distribution platforms** - With digital content gaining ground as the preferred media, it is natural that other digital delivery mechanisms would also be explored. Coupled with an audience willing to experience new delivery streams, this has led to a convergence of media enabling content on mobile phones, MP3 players and computers. This in turn has led to higher realizations for content producers and added new players in the distribution chain.

### 3.1.1. Regional Films in India

Mainstream cinema in India is dominated by Hindi language films which typically make up a significant portion of total domestic box-office collections. However, over the last few years, regional language films have been growing in popularity with releases in a greater number of theatres both within and outside the Indian Territory.

Within regional languages, the South-Indian segment is an important market in terms of number of film releases with the four southern states comprising Andhra Pradesh, Tamil Nadu, Karnataka and Kerala together accounting for a majority of the total number of film releases in India. Other regional language markets in India include films made in Bengali, Bhojpuri, Marathi, Punjabi etc. The total domestic box-office collections from regional language films in India are estimated to be about **Rs. 1,508 crores**.

## 3.2. Economic Contribution of the Indian Film Industry

### 3.2.1. Direct Contribution

The direct contribution of the Indian film industry is estimated at Rs. 2,931 crores (USD 645 million), comprising of Gross Value Added ("GVA") amounting to Rs. 2,132 crores (USD 469 million) and Net Indirect Taxes being Rs. 800 crores (USD 176 million). The Gross Output (Total Revenue) of the industry is estimated to be Rs. 12,312 crores (USD 2.7 billion).

In our analysis, we estimate that Entertainment Tax paid by the industry to be Rs. 1,010 crores (USD 222 million) as per Indian Public Finance Statistics Report 2008 - 09. Based on our discussions with industry representatives, we estimate that approximately 80-90 percent of total Entertainment Tax collections are from the film exhibition segment. There may be an additional impact on indirect taxes from other categories such as VAT and Service Tax - however, due to the absence of relevant industry-wise information, this has not been considered in the analysis for this segment.

## The Indian Film Industry

The following table highlights the contributions across the value chain:

**Table 3: Direct Impact of the Indian Film Industry**

	Gross Output		EBITDA		Wages		Gross Value Added (GVA)= EBITDA + Wages	
	Rs. crores	USD million	Rs. crores	USD million	Rs. Crores	USD million	Rs. crores	USD million
Film Production and Distribution	3,201	704	463	102	241	53	704	155
Film Exhibition								
Hindi	7,393	1,627	701	154	466	103	1,167	257
Tamil	711	156	62	14	40	9	103	23
Telugu	579	127	51	11	33	7	84	18
Kannada	29	6	2	1	2	0	4	1
Others	400	88	35	8	35	8	70	15
<b>Total</b>	<b>12,312</b>	<b>2,709</b>	<b>1,315</b>	<b>289</b>	<b>817</b>	<b>180</b>	<b>2,132</b>	<b>469</b>

The total value added by the film industry is taken as the sum of GVA as above (Rs 2,132 crores) and Net Indirect Taxes (NIT) paid. Based on the analysis of available information, the NIT paid by the film industry is estimated to be Rs. 800 crores (USD 1.7 billion).

**Thus, total Direct Economic Contribution (GVA + NIT) of the Indian Film Industry is estimated to Rs. 2,931 crores (USD 645 million).**

**Table 4: Direct Economic Contribution of the Indian Film Industry**

	Gross Output		Gross Value Added (GVA)		Net Indirect Tax (NIT)		Employment
	Rs. crores	USD million	Rs. crores	USD million	Rs. crores	USD million	
Indian Film Industry	12,312	2,709	2,132	469	800	176	1.4

## 3.2.2. Total Contribution

Using the methodology outlined in section 2 of the report, the indirect and total impact of the film industry is estimated to be as below:

**Table 5: Total Contribution of the Indian Film Industry (Rs. Crores)**

	Gross Output		Contribution (GVA + NIT)		Employment Lakhs
	Rs. Crores	USD Million	Rs. Crores	USD Million	
<b>Direct Impact</b>	12,312	2,709	2,932	645	1.4
<b>Indirect Impact</b>	8,154	1,794	3,914	861	2.8
<b>Total Impact</b>	<b>20,467</b>	<b>4,503</b>	<b>6,846</b>	<b>1,506</b>	<b>4.2</b>

**Table 6: Multipliers for Indirect Impact of the Indian Film Industry**

	Gross Output	GVA/Output	NIT/Output	GVA/Worker (Rs. lakhs)
<b>Multipliers / Ratios</b>	1.66	0.46	0.02	1.34

- The Gross Output multiplier has been obtained from the "Input Output Transactions Table (2003-04)" - Matrix 7: Leontif Inverse Matrix (Provided by the Central Statistical Organization) for the sector classified as IOTT Sector No: 129 ("Other Services").
- The "GVA to Output" ratio and the "NIT to Output" ratio has been derived from the "Input Output Transactions Table (2003-04)" - Matrix 1: Leontif Inverse Matrix (Provided by the Central Statistical Organization) for the sector classified as IOTT Sector No: 129 ("Other Services").

## The Indian Film Industry

- The average GVA per worker (considered for all service sectors) has been obtained from the National Sample Survey Organization Report ("NSSO") on "Service Sector in India (2006-07) - Economic Characteristics of Enterprises" (63rd Round).

**Thus, the economic impact of the Indian film Industry is estimated at Rs. 6,846 crores (USD 1.5 billion) which is approximately 0.13% of GDP.** The estimated total employment generated by the Indian film Industry is estimated at 4.2 lakh (0.42 million) workers.

## 4. The Indian Television Industry

### 4.1. Overview

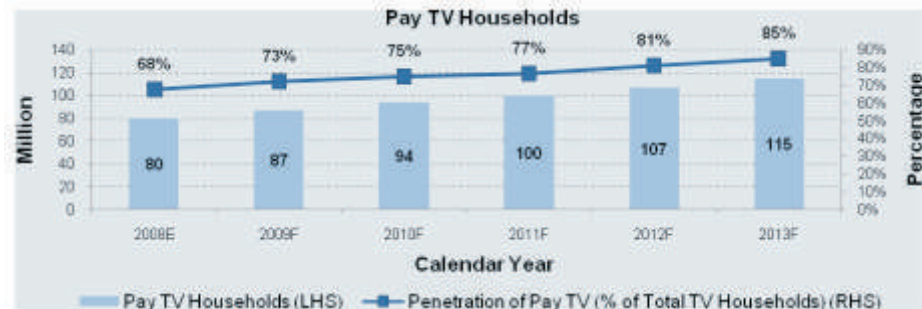
The Indian television industry has grown at a healthy rate of 17.4% (CAGR) over the period 2004-08, to an estimated size of Rs. 24,470 crores (USD 5.4 billion) in 2008. Of the total industry revenues, approximately 60 percent is contributed via television subscription income. The other major revenue contributor to the industry revenues is television advertising income. As shown in the figure below, the industry is projected to increase to a size of Rs. 42,000 crores (USD 9.2 billion) by 2013, thus growing at a CAGR of 11.4%.



Source: PricewaterhouseCoopers' Indian Entertainment & Media Outlook 2009

Figure 4: Revenue Trends for the Indian Television Industry

The growth in the television industry is driven primarily by the increasing penetration of DTH (Direct-to-home) and Cable television homes in the country. The number of pay-television households in India is projected to reach 115 million households by 2013 and projected to penetrate 85 percent of total television households in India. The average ARPU (average-realisation per user) is also projected to increase to Rs. 180 (USD 4) per month.



Source: PricewaterhouseCoopers' Indian Entertainment & Media Outlook 2009

Figure 5: Pay TV Households in India

Some of the key trends in this industry include:

- Increased fragmentation in viewership:** Viewership, especially in the Hindi general entertainment genre, is increasingly getting fragmented as a result of a large number of such channels being broadcast in India. However, a few players continue to dominate the market, commanding a significant share of the industry segment revenues.
- Increased competition amongst broadcasters:** With new channels being introduced at regular intervals, there is increased competition amongst broadcasters, for viewership and advertising revenue. This coupled with high content and marketing costs is expected to impact the profitability of broadcasters in the medium to long term.
- Increasing penetration of DTH (Direct-to-home):** There has been rapid growth of DTH subscribers in the last year, albeit from a relatively smaller base. This trend is expected to continue over the next few years. However, operating profits are still negative for the industry, due to high customer acquisition costs, and is expected to remain this way until a critical mass of subscribers is reached.
- Acquisition of LCOs:** Cable television distribution in India is dominated by Local Cable Operators ("LCOs") which are largely unorganised in nature. During recent times, Multi-System Operators ("MSOs") have started acquiring LCOs to gain greater control over the distribution network and prevent revenue leakage.

## 4.2. Economic Contribution of the Indian Television Industry

### 4.2.1. Direct Contribution

The direct contribution of the Indian television industry is estimated at Rs. 7,348 crores (USD 1.6 billion), comprising of Gross Value Added ("GVA") amounting to Rs. 6,497 crores (USD 1.4 billion) and Net Indirect Taxes being Rs. 851 crores (USD 187 million). The Gross Output (Total Revenue) of the industry is estimated to be Rs. 42,545 crores (USD 9.4 billion).

The television broadcasting segment is the largest contributor, in terms of GVA, primarily due to higher operating margins. While the television distribution segment is the largest in terms of Gross Output, but due to significantly lower operating margins, the GVA of the segment is relatively low. However, the distribution segment contributes the most, in terms of wages. The television production segment, a relatively smaller segment, is low both in terms of Gross Output and GVA. The following table highlights the contributions across the value chain:

**Table 7: Direct Impact of the Indian Television Industry**

	Gross Output		EBITDA		Wages		Gross Value Added (GVA)= EBITDA + Wages	
	Rs. Crores	USD Million	Rs. Crores	USD Million	Rs. Crores	USD Million	Rs. Crores	USD Million
TV Production	1,500	330	120	26	60	13	180	40
TV Broadcasting	15,283	3,363	3,057	673	1,375	303	4,432	975
TV Distribution	25,763	5,668	(149)	-33	2,033	447	1,885	415
<b>Total</b>	<b>42,545</b>	<b>9,361</b>	<b>3,028</b>	<b>666</b>	<b>3,469</b>	<b>763</b>	<b>6,497</b>	<b>1,429</b>

The total value added by the television industry is taken as the sum of GVA as above (Rs 6,497 crores) and Net Indirect Taxes (NIT) paid. Based on the extrapolation of available information, the NIT paid by the television industry is estimated to be Rs. 851 crores (USD 187 million).

Thus, total Direct Economic Contribution (GVA + NIT) of the Indian Television Industry is estimated at Rs. 7,348 crores (USD 1.6 billion).

**Table 8: Direct Economic Contribution of the Indian Television Industry**

	Gross Output		Gross Value Added (GVA)		Net Indirect Tax (NIT)		lakhs
	Rs. crores.	USD million	Rs. crores.	USD million	Rs. crores.	USD million	
Indian Television Industry	42,545	9,361	6,497	1,429	851	187	4.24

### 4.2.2. Total Contribution

Using the methodology outlined in section 2 of the report, the indirect impact of the television industry is estimated to be as below:

**Table 9: Economic Impact of the Indian Television Industry**

	Gross Output		Contribution (GVA + NIT)		Employment Lakhs
	Rs. crores.	USD million	Rs. crores.	USD million	
Direct Impact	42,545	9,361	7,348	1,617	4.24
Indirect Impact	28,178	6,200	13,525	2,976	9.62
<b>Total Impact</b>	<b>70,723</b>	<b>15,561</b>	<b>20,873</b>	<b>4,592</b>	<b>13.86</b>

**Table 10: Multipliers for Indirect Impact of the Indian Television Industry**

	Gross Output	GVA/Output	NIT/Output	GVA/Worker (Rs. lakhs)
Multipliers / Ratios	1.66	0.46	0.02	1.34

## The Indian Television Industry

- The Gross Output multiplier has been obtained from the "Input Output Transactions Table (2003-04)" - Matrix 7: Leontif Inverse Matrix (Provided by the Central Statistical Organization) for the sector classified as IOTT Sector No: 129 ("Other Services").
- The "GVA to Output" ratio and the "NIT to Output" ratio has been derived from the "Input Output Transactions Table (2003-04)" - Matrix 1: Leontif Inverse Matrix (Provided by the Central Statistical Organization) for the sector classified as IOTT Sector No: 129 ("Other Services").
- The average GVA per worker (considered for all service sectors) has been obtained from the National Sample Survey Organization Report ("NSSO") on "Service Sector in India (2006-07) - Economic Characteristics of Enterprises" (63rd Round).

**Thus, the economic impact of the Indian television industry is estimated at Rs. 20,873 crores (USD 4.6 billion) which is approximately 0.39% of GDP.** The estimated total employment generated by the Indian television industry is estimated at 13.86 lakh (1.38 million) workers.

## 5. U.S. / International Film Industry in India

### 5.1. Overview

The U.S. / International film industry in India had an estimated size of Rs 300 crores (USD 66 million) in FY 09 and is expected to increase steadily going forward. This industry revenue consists of the box office collections of U.S. / International films released in India in FY 09.

#### Some of the key trends in this industry are<sup>2</sup> :

- U.S. / International cinema appealing to Indian masses -U.S. / International films are making a mark with the Indian masses and are no longer confined to audiences in metro and large cities. Dubbed versions of U.S. / International films are appealing to the Indian masses staying in small towns and villages.
  - 2012 turned out to be a huge hit in India in 2009, with box office collections of over Rs 90 crores, surpassing the previous highest grossing Hollywood film in India, Spiderman-3. The film had the widest release ever for a Hollywood film with a total count of 766 prints in English, Hindi, Tamil and Telugu. The film proved successful in both urban multiplex cinemas and traditional single screen cinemas in small towns and villages.
  - For Spider-Man 3, Sony had released 558 prints across the country. Of these, 261 prints were in Hindi, 162 in English, 156 in Tamil and Telugu, three special IMAX prints, and six, in Bhojpuri. It was a first for a Hollywood movie. A three-month long marketing campaign covered nine metros and nearly 70 small towns. The Bhojpuri version of the movie ran to packed houses at halls in Bihar's interiors.
  - Hollywood blockbuster Avatar, has grossed over Rs 100 crores in India, making it the biggest ever film for Fox in India after breaking Titanic's record collections of Rs. 55 crores. As discussed below, Avatar heralds the trend for viewers to pay higher prices for a 3D movie experience.
- **Children films** - A recent trend has been the release of children films by U.S. / International studios in India in the summer season and their success at the box office. Bollywood produces lesser number of such children films where Hollywood has taken lead in India. Last year, the two stars of Hollywood for

Indian summer were Harry Potter and Night at the Museum.

- Night at the Museum, a 20th Century Fox release, grossed Rs 2.3 crores in India over its opening weekend and about Rs 4 crores overall.
- Harry Potter, an all time children's favourite, grossed about Rs. 20 crores. Warner Bros released Harry Potter & the Half Blood Prince with 350 prints and 450 screens in India.

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<sup>2</sup>Sources:

- [www.businessofcinema.com](http://www.businessofcinema.com)
- [www.livemint.com](http://www.livemint.com)
- [www.boxofficemojo.com](http://www.boxofficemojo.com)
- [www.exchange4media.com](http://www.exchange4media.com)



**Past Trends<sup>3</sup>:**

- **Global players' entry into the Indian Film business** - Walt Disney produced and released its first film in India in 2008 with Yash Raj Films, Roadside Romeo, a full-length animation feature film. Tamil superstar Kamal Haasan also starred in two Disney productions - Marmayogi and 19 Steps. Disney also bought the home video rights of Aamir Khan's directorial debut Taare Zameen Par for release in the US.
- Warner Bros released its film made in association with Ramesh and Rohan Sippy: Chandni Chowk to China in January 2009. It ventured in India as distributors with the film Saas, Bahu Aur Sensex. Warner Bros also signed a three-movie deal with People Tree Films and a one film tieup with Tandav Films. The production house has also brought in internationally acclaimed Indian filmmaker Shekhar Kapur to direct a USD 200 million Hollywood fantasy-epic Larklight.
- Fox STAR Studios tied up with Vipul Shah for a multiple-film exclusive deal.
- Mexican global multiplex operator Cinapolis announced plans to invest Rs 1,700 Cr in India for its film exhibition business over the next seven years. It has already established an Indian subsidiary that is in talks with mall developers for opening 500 movie screens by 2016. In the first phase of expansion, the company plans to invest Rs 370 Cr for opening 110 screens across eight locations. In July 2009, the exhibition chain tied up with Advance India Projects Limited (AIPL), to set up its property in their mall project in Amritsar.

**Future trends<sup>3</sup>:**

- **3D movies** - The success of Avatar has paved the way for 3D cinema in India. 3D presentations have accounted for 81 percent of Avatar's gross box office collection. That is by far the largest 3D gross ever, and "Avatar" is effectively most people's first sampling of the new 3D technology. With the release of Avatar, 3D screens in India have seen a rise in cities like Mumbai, Delhi, Pune, Bangalore, Chennai and Hyderabad as well as in smaller centres like Coimbatore, Amritsar, Kerala, Jaipur and Ahmedabad.

<sup>3</sup>Sources:

- www.businessofcinema.com
- www.boxofficemojo.com
- www.livemint.com
- www.exchange4media.com



**5.2. Economic Contribution of the U.S. / International Film Industry in India**

**5.2.1. Direct Contribution**

The direct contribution of the U.S. / International film industry is estimated at Rs. 147 crores (USD 32 million), comprising of Gross Value Added ("GVA") amounting to Rs. 97 crores (USD 21 million) and Net Indirect Taxes being Rs. 50 crores (USD 11 million). The Gross Output (Total Revenue) of the industry is estimated to be Rs. 492 crores (USD 108 million). The following table highlights the contributions across the value chain:

**Table 11: Direct Impact of the U.S. / International Film Industry in India**

	Gross Output		EBITDA		Wages		Gross Value Added (GVA)= EBITDA + Wages	
	Rs. crores	USD million	Rs. Crores	USD million	Rs. Crores	USD million	Rs. crores	USD million
Film Production and Distribution	98	22	5	1	7	1	12	3
Film Exhibition	394	87	50	11	36	8	85	19
<b>Total</b>	<b>492</b>	<b>108</b>	<b>55</b>	<b>12</b>	<b>43</b>	<b>9</b>	<b>97</b>	<b>21</b>

The total value added by the U.S. / International film industry in India is taken as the sum of GVA as above (Rs 97 crores) and Net Indirect Taxes (NIT) paid. Based on the extrapolation of available information, the NIT paid by the U.S. / International film industry in India is estimated to be Rs. 50 crores (USD 11 million).

**Thus, total Direct Economic Contribution (GVA + NIT) of the U.S. / International Film Industry in India is estimated at Rs. 147 crores (USD 32 million).**

**Table 12: Direct Economic Contribution of the U.S. / International Film Industry in India**

	Gross Output		Gross Value Added (GVA)		Net Indirect Tax (NIT)		Employment lakhs
	Rs. crores	USD million	Rs. crores	USD million	Rs. crores	USD million	
International Film Industry	492	108	97	21	50	11	0.029

### 5.2.2. Total Contribution

Using the methodology outlined in section 2 of the report, the indirect impact of the U.S. / International film industry in India is estimated to be as below:

**Table 13: Economic Impact of the U.S. / International Film Industry in India**

	Gross Output		Contribution (GVA + NIT)		Employment lakhs
	Rs. crores	USD million	Rs. crores	USD million	
Direct	492	108	147	32	0.029
Indirect	326	72	157	34	0.11
<b>Total</b>	<b>818</b>	<b>180</b>	<b>304</b>	<b>67</b>	<b>0.14</b>

**Table 14: Multipliers for Indirect Impact of the U.S. / International Film Industry in India**

	Gross Output	GVA/Output	NIT/Output	GVA/Worker (Rs. lakhs)
<b>Multipliers / Ratios</b>	1.66	0.46	0.02	1.34

- The Gross Output multiplier has been obtained from the "Input Output Transactions Table (2003-04)" - Matrix 7: Leontif Inverse Matrix (Provided by the Central Statistical Organization) for the sector classified as IOTT Sector No: 129 ("Other Services").

- The "GVA to Output" ratio and the "NIT to Output" ratio has been derived from the "Input Output Transactions Table (2003-04)" - Matrix 1: Leontif Inverse Matrix (Provided by the Central Statistical Organization) for the sector classified as IOTT Sector No: 129 ("Other Services").
- The average GVA per worker (considered for all service sectors) has been obtained from the National Sample Survey Organization Report ("NSSO") on "Service Sector in India (2006-07) - Economic Characteristics of Enterprises" (63rd Round).

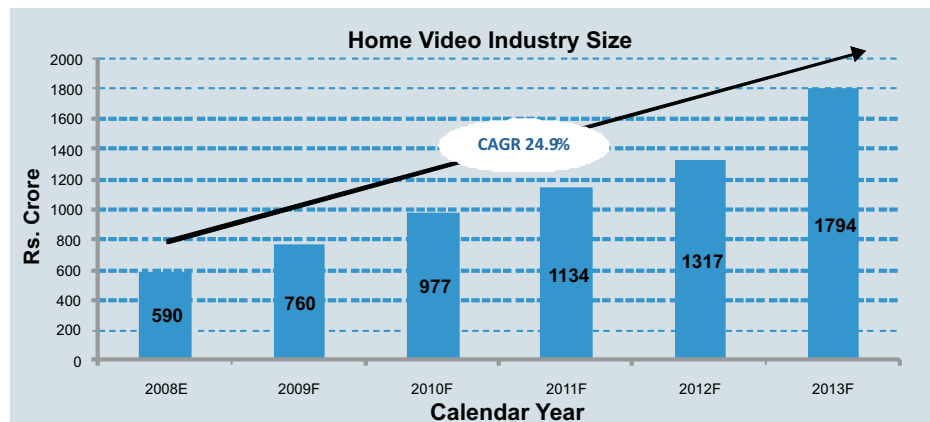
**Thus, the economic impact of the U.S. /International film industry in India is estimated at Rs. 304 crores (USD 67 million) which is approximately 0.006% of GDP.** The estimated total employment generated by the U.S. /International film industry in India is estimated at 0.14 lakh (0.01 million) workers.

## 6. Home Video Industry

### 6.1. Overview

The Home Video market has grown at a healthy rate of 14.3% over the period 2004-2008, to an estimated size of Rs. 590 crores (USD 130 million) in 2008. As shown in the figure below, the industry is projected to increase to a size of Rs. 1,794 crores (USD 395 million) by 2013, thus growing at a CAGR of 24.9%.

The home video market is driven primarily by new film content in Hindi (informally referred to as 'Bollywood' films) and other Indian languages.



Source: PricewaterhouseCoopers' Indian Entertainment & Media Outlook 2009

Figure 6: Growth of Home Video Industry in India

#### Some of the highlights of this industry are:

- Changing Business Models** - The home video market is converting to sell-through from rental, which constituted 100 percent of sales in 2004. By 2013, sell-through is expected to constitute 92 percent of the market. Sell-through spending will jump from about Rs. 180 crores (USD 40 million) in 2008 to about Rs.1,650 crores (USD 363 million) in 2013. The migration to sell-through is leading to sharp declines in rental spending. Rental spending dropped by 41 percent in 2008.

- This change in business models was spurred by the entry of Moser Baer in the market in 2007. Moser Baer slashed the retail prices of its DVDs and VCDs to the levels at which pirated products were sold and rented. As a result of this disruptive strategy, other players in the business were also forced to slash their prices to similar levels as Moser Baer. This boosted the sell-through market as DVDs were now available to consumers at low prices.
- This severely impacted on margins as the content acquisition prices for home video were at similar levels. However, the retail prices are now being increased to appropriate levels and the home video market is expected to grow at a CAGR of 25 percent over the next five years.
- The online rental market is growing steadily but is still at a significantly smaller scale as compared to the physical sell-through model. It does not pose a serious threat to physical sales over the next five years.
- Piracy is the biggest risk the home video industry faces. Piracy is being curbed with digitisation, shortening of the release window between theatre and home video release and government regulation such as the Copyright Act.
- Key Players** - The home video market is dominated by a few large participants such as Moser Baer, EROS, Big Home Video and Excel Home Video.
  - Moser Baer - Moser Baer is one of India's leading technology companies with interests in storage media, photovoltaic, entertainment and IT peripherals, and consumer electronics. It currently offers home video titles in 18 major Indian languages and has acquired the rights for close to 10,000 titles. It is estimated to hold approximately 33 percent market share.
  - EROS International - Eros International plc is a global player in the rapidly expanding Indian media and entertainment arena. Eros not only produces and commissions film projects but also globally distributes films across all formats including cinemas, digital and home entertainment and television syndication. Eros has a catalogue of over 1,900 film titles and about 20 percent market share.

- o Big Home Video - BIG Music & Home Entertainment is a Reliance Big Entertainment Company. It started operations in 2008. The company is the exclusive licensee for distribution & marketing of all titles on Home Video for Warner Home Video, Paramount Home Entertainment, Dreamworks Studios and Universal Studios Home Entertainment. The company also forayed into regional home video by acquiring selective prestigious titles. It has built and consolidated an impressive depth and width in distribution, along with localization of International content, with dubbing of English films in 6 regional languages.
- o Excel Home Video - Excel Home Videos is the home entertainment distribution and marketing arm of Excel Productions Audiovisuals Pvt. Ltd. Excel is focussed on international movies and holds about 40 percent market share in that segment.
- o Reliance BigFlix, Showtime and Moviemart are movie rental companies.
- **Future Trends** - Over the longer run, growth in Blu-ray high definition ("HD") videos will offset a declining DVD market and propel overall sell-through. Rental company Movie Mart launched its online Blu-ray disc renting and selling facility in 2009. It is the first online Blu-ray discs renting website in India.

## 6.2. Economic Contribution of the Home Video Industry

### 6.2.1. Direct Contribution

The direct contribution of the home video industry is estimated at Rs. 161 crores (USD 35 million), comprising of Gross Value Added ("GVA") amounting to Rs. 153 crores (USD 34 million) and Net Indirect Taxes being Rs. 8 crores (USD 1.7 million). The Gross Output (Total Revenue) of the industry is estimated to be Rs. 384 crores (USD 84 million). The following table highlights the contributions across the value chain:

**Table 15: Direct Economic Contribution of the Home Video Industry**

	Gross Output		EBITDA		Wages		Gross Value Added (GVA) = EBITDA + Wages		Net Indirect Taxes		Employment
	Rs. crores	USD million	Rs. crores	USD million	Rs. crores	USD million	Rs. crores	USD million	Rs. crores	USD million	lakhs
Home Video Distribution	384	84	107	23	46	10	153	34	8	1.7	0.00272

The total value added by the home video industry is taken as the sum of GVA as above (Rs 153 crores) and Net Indirect Taxes (NIT) paid. Based on the extrapolation of available information, the NIT paid by the home video industry is estimated to be Rs. 8 crores (USD 1.7 million).

**Thus, total Direct Economic Contribution (GVA + NIT) of the home video industry is estimated at Rs. 161 crores (USD 35 million).**

### 6.2.2. Total Contribution

Using the methodology outlined in section 2 of the report, the indirect impact of the home video industry is estimated to be as below:

**Table 16: Economic Impact of the Home Video Industry**

	Gross Output		Contribution (GVA + NIT)		Employment
	Rs. Crores	USD million	Rs. crores	USD million	lakhs
Direct Impact	384	84	161	35	0.0027
Indirect Impact	254	56	122	27	0.087
<b>Total Impact</b>	<b>637</b>	<b>140</b>	<b>283</b>	<b>62</b>	<b>0.089</b>

**Table 17: Multipliers for Indirect Impact of the Home Video Industry in India**

	Gross Output	GVA/Output	NIT/Output	GVA/Worker (Rs. lakhs)
Multipliers / Ratios	1.66	0.46	0.02	1.34

- The Gross Output multiplier has been obtained from the "Input Output Transactions Table (2003-04)" - Matrix 7: Leontif Inverse Matrix (Provided by the Central Statistical Organization) for the sector classified as IOTT Sector No: 129 ("Other Services").
- The "GVA to Output" ratio and the "NIT to Output" ratio has been derived from the "Input Output Transactions Table (2003-04)" - Matrix 1: Leontif Inverse Matrix (Provided by the Central Statistical Organization) for the sector classified as IOTT Sector No: 129 ("Other Services").
- The average GVA per worker (considered for all service sectors) has been obtained from the National Sample Survey Organization Report ("NSSO") on "Service Sector in India (2006-07) - Economic Characteristics of Enterprises" (63rd Round).

**Thus, the economic impact of the home video industry is estimated at Rs. 283 crores (USD 62 million) which is approximately 0.005% of GDP.** The estimated total employment generated by the home video industry is estimated at 0.089 lakh (0.008 million) workers.

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IIPA written submission on USITC *Digital Trade in the U.S. Economy* investigation (2014) (omitting most appendices)



March 21, 2014

***Submitted Electronically via EDIS and in Copies to the Commission, Investigation No. 332-540***

Lisa R. Barton

Acting Secretary to the Commission.

United States International Trade Commission

500 E Street, SW

Washington, D.C. 20024

Re: IIPA Written Submission Related to: *International Trade Commission, Digital Trade in the U.S. and Global Economies, Part 2*, 78 Fed. Reg. 12787, February 25, 2013.

To the United States International Trade Commission:

The International Intellectual Property Alliance (IIPA),<sup>1</sup> a private sector coalition formed in 1984 of trade associations representing U.S. copyright-based industries, appreciates the opportunity to provide the United States International Trade Commission with this written submission related to *International Trade Commission, Digital Trade in the U.S. and Global Economies, Part 2*. IIPA participated in Part 1 through the submission of a Pre-Hearing Brief and Statement related to: *International Trade Commission, Digital Trade in the U.S. and Global Economies, Parts 1 and 2* in February 2013 and testified at the March 2013 hearing.<sup>2</sup>

<sup>1</sup> The IIPA is a private sector coalition, formed in 1984, of trade associations representing U.S. copyright-based industries working to improve international protection and enforcement of copyrighted materials and to open foreign markets closed by piracy and other market access barriers. IIPA's seven member associations represent over 3,200 U.S. companies producing and distributing materials protected by copyright laws throughout the world. These include all types of computer software, including operating systems, systems software such as databases and security packages, business applications, and consumer applications such as games, personal finance, and reference software, free software, open source software, and software as a service; entertainment software including interactive games for videogame consoles, handheld devices, personal computers and the Internet, and educational software; motion pictures, television programming, DVDs and home video and digital representations of audiovisual works; music, records, CDs, and audiocassettes; and fiction and non-fiction books, education instructional and assessment materials, and professional and scholarly journals, databases and software in all formats. Members of the IIPA include [Association of American Publishers](#), [BSA | The Software Alliance](#), [Entertainment Software Association](#), [Independent Film & Television Alliance](#), [Motion Picture Association of America](#), [National Music Publishers' Association](#), and [Recording Industry Association of America](#).

<sup>2</sup> See International Intellectual Property Alliance (IIPA), *IIPA Pre-Hearing Brief and Statement Related to: International Trade Commission, Digital Trade in the U.S. and Global Economies, Part 1; Institution of Investigation and Scheduling of Hearing, Investigation No. 332-531, 78 Fed. Reg. 2690, January 14, 2013; and International Trade Commission, Digital Trade in the U.S. and Global Economies, Part 2; Institution of Investigation and Scheduling of Hearing, Investigation No. 332-540, 78 Fed. Reg. 12787, February 25, 2013, February 28, 2013, at [http://www.iipa.com/pdf/2013\\_Feb28\\_IIPA\\_USITC\\_Digital\\_Trade\\_Statement.pdf](http://www.iipa.com/pdf/2013_Feb28_IIPA_USITC_Digital_Trade_Statement.pdf). See also IIPA, *IIPA Supplemental Post-Hearing Written Submission Related to: International Trade Commission, Digital Trade in the U.S. and Global Economies, Part 1; Institution of Investigation and Scheduling of Hearing, Investigation No. 332-531, 78 Fed. Reg. 2690, January 14, 2013; and International Trade Commission, Digital Trade in the U.S. and Global Economies, Part 2; Institution of Investigation and Scheduling of Hearing, Investigation No. 332-540, 78 Fed. Reg. 12787, February 25, 2013, March 21, 2013, at [http://www.iipa.com/pdf/2013\\_Mar21\\_IIPA\\_USITC\\_Digital\\_Trade\\_Supplemental.pdf](http://www.iipa.com/pdf/2013_Mar21_IIPA_USITC_Digital_Trade_Supplemental.pdf).**





## ***Digital Trade in the U.S. and Global Economies Part 2 Report Objectives***

According to the USITC, following from its first report,<sup>3</sup> and to “the extent practicable,” the second report will: 1) estimate the value of U.S. digital trade and the potential growth of this trade (with the potential growth estimates to highlight any key trends and discuss their implications for U.S. businesses and employment); 2) provide insight into the broader linkages and contributions of digital trade to the U.S. economy (such linkages and contributions may include effects on consumer welfare, output, productivity, innovation, business practices, and job creation); 3) present case studies that examine the importance of digital trade to selected U.S. industries that use or produce such goods and services, with some of the case studies to highlight, if possible, the impact of digital trade on small and medium-sized enterprises; and 4) examine the effect of notable barriers and impediments to digital trade on selected industries and the broader U.S. economy.

## ***IIPA Input Into Digital Trade in the U.S. and Global Economies Part 2***

In Part 2 of the USITC’s *Digital Trade in the U.S. and Global Economies* investigation, IIPA urges the Commission to make further attempts to evaluate more comprehensively the contribution of copyright-intensive goods and services to digital trade, given the known data points from the series of *Copyright Industries in the U.S. Economy* reports (the latest which was released in November 2013, and which is attached as Appendix A),<sup>4</sup> the U.S. Commerce Department’s 2012 report, *Intellectual Property and the U.S. Economy: Industries in Focus* (which is attached as Appendix B),<sup>5</sup> the December 2013 White Paper from the U.S. Bureau of Economic Analysis and the National Endowment for the Arts Office of Research & Analysis, *NEA Guide to the U.S. Arts and Cultural Production Satellite Account: Including a Blueprint for Capturing the Economic Value of Arts and Cultural Workers and Volunteers* and related documents (the *Guide* is attached as Appendix C) (describing positive adjustments in the “Arts and Cultural Production Satellite Account (ACPSA)”), and other available data points.<sup>6</sup> While limited by the scope of publicly-available U.S. Government data, and the relative lack of disaggregation of data points which would encompass the Commission’s definition of “digital trade,” we hope the Commission can employ methodologies to disaggregate some of this already-available data to appropriately reflect the size and scope of U.S. digital trade,

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<sup>3</sup> United States International Trade Commission, *Digital Trade in the U.S. and Global Economies, Part 1*, Investigation No. 332-531, USITC Publication 4415, July 2013, at <http://www.usitc.gov/publications/332/pub4415.pdf> [hereinafter USITC Digital Trade Part 1].

<sup>4</sup> Stephen E. Siwek, *Copyright Industries in the U.S. Economy: The 2013 Report*, November 19, 2013. The report and summary can be accessed at [http://www.iipa.com/copyright\\_us\\_economy.html](http://www.iipa.com/copyright_us_economy.html).

<sup>5</sup> United States Commerce Department, Economic and Statistics Administration and the United States Patent and Trademark Office, *Intellectual Property and the U.S. Economy: Industries in Focus*, March 2012, at [http://www.uspto.gov/news/publications/IP\\_Report\\_March\\_2012.pdf](http://www.uspto.gov/news/publications/IP_Report_March_2012.pdf) [hereinafter Commerce Department, *IP and the U.S. Economy*].

<sup>6</sup> Art Works and National Endowment for the Arts, *NEA Guide to the U.S. Arts and Cultural Production Satellite Account: Including a Blueprint for Capturing the Economic Value of Arts and Cultural Workers and Volunteers*, December 2013, at [http://arts.gov/sites/default/files/nea\\_guide\\_white\\_paper.pdf](http://arts.gov/sites/default/files/nea_guide_white_paper.pdf). See National Endowment for the Arts, *Arts Data Profile 2, Accounting for the Nation’s Arts and Cultural Goods and Services*, December 5, 2013, at <http://arts.gov/artistic-fields/research-analysis/data-profiles/issue-2> and <http://arts.gov/artistic-fields/research-analysis/data-profiles/issue-2#sthash.viyDxkqZ.dpuf> [hereinafter NEA/BEA Arts and Culture Satellite Account]. See also National Endowment for the Arts, *U.S. Bureau of Economic Analysis and National Endowment for the Arts Release Preliminary Report on Impact of Arts and Culture on U.S. Economy: Arts and Cultural Production Account for 3.2 Percent -- or \$504 Billion -- of Gross Domestic Product in 2011*, December 5, 2013, at <http://arts.gov/news/2013/us-bureau-economic-analysis-and-national-endowment-arts-release-preliminary-report-impact>.



taking into account the integral linkage between copyright-related products and services to the overall valuation of digital trade.

## **The Significance of Copyright-Intensive Industries Within the Valuation of Digital Trade**

The size and scope of copyright-intensive goods and services within the overall valuation of digital trade is considerable, even taking into account the exclusion of “commerce in most physical goods, such as goods ordered online and physical goods that have a digital counterpart such as books and software, music, and movies sold on CDs or DVDs.” In Part 2, we urge the Commission to make further attempts to evaluate the contribution of copyright-intensive goods and services to digital trade. In November 2013, IIPA released the latest update of the comprehensive economic report, *Copyright Industries in the U.S. Economy: The 2013 Report*, prepared by Stephen Siwek of Economists Inc. The study tracks the economic impact and contributions of U.S. industries creating, producing, distributing, broadcasting or exhibiting copyright materials, including computer software, videogames, books, newspapers, periodicals and journals, motion pictures, music, and radio and television programming. For the first time, the “core” copyright industries added over \$1 trillion in value to the U.S. economy in a single year, accounting for almost 6.5 percent of the total U.S. GDP.<sup>7</sup> The “total” copyright industries contributed \$1.7 trillion in value to the U.S. economy.<sup>8</sup>

The core copyright industries employed nearly 5.4 million U.S. workers – nearly 5 percent of total private sector employment– with jobs paying an average of 33 percent more than the rest of the workforce. Employment in the core industries also grew at an aggregate annual rate of 4.7 percent, more than twice the rate of growth for the U.S. economy as a whole. Certain sectors of the core copyright industries accounted for \$142 billion in foreign sales and exports, far more than sectors such as aerospace, agriculture, food, and pharmaceuticals and medicines.<sup>9</sup> Studies employing virtually the same agreed-upon methodology in 40 countries have been documented by the World Intellectual Property Organization (WIPO) in its report, *WIPO Studies on the Economic Contribution of Copyright: Overview* (2013).<sup>10</sup> Other studies have measured the contribution of certain sectors to

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<sup>7</sup> The “core” copyright industries are those whose primary purpose is to create, produce, distribute, or exhibit copyright materials.

<sup>8</sup> The “total” copyright industries include not only the core copyright but also the partial copyright, non-dedicated support, and interdependent industries. “Partial” copyright industries are industries in which only some aspect or portion of the products that they create they can qualify for copyright protection. These industries range from fabric to jewelry to furniture to toys and games. “Non-dedicated support” industries include industries that distribute both copyright and non-copyright protected materials to business and consumers. Examples here include transportation services, telecommunications and wholesale and retail trade. As in past studies, only a portion of the total value added by these industries is considered to be part of the copyright industries. “Interdependent” industries include those that produce, manufacture, and sell equipment whose function is primarily to facilitate the creation, production, or use of works of copyrighted matter. These industries include manufacturers, wholesalers and retailers of TV sets, personal computers, and other devices, and usage dependent products including blank recording material, and certain categories of paper.

<sup>9</sup> The sectors represented in the *Copyright Industries* report are record music; motion pictures, TV, video; computer software; and newspapers, books, and periodicals. These numbers are not reflective of government statistics, although we understand that, in recent years, efforts have been undertaken to improve the scope of copyright product export statistics that are gathered in government surveys. It is important to accurately count exports, especially in light of the increasing importance of digital trade in legitimate copyright goods and services around the globe, and as reflected by the announcement of this investigation by the USITC.

<sup>10</sup> *WIPO Studies on the Economic Contribution of Copyright: Overview* (2013), available at [http://www.wipo.int/export/sites/www/copyright/en/performance/pdf/economic\\_contribution\\_analysis\\_2012.pdf](http://www.wipo.int/export/sites/www/copyright/en/performance/pdf/economic_contribution_analysis_2012.pdf), last accessed December 17, 2013. That report was provided to the Commission in IIPA’s February 2013 pre-hearing brief. In 2003, 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/export/sites/www/ftppublications/en/copyright/893/wipo\\_pub\\_893.pdf](http://www.wipo.int/export/sites/www/ftppublications/en/copyright/893/wipo_pub_893.pdf). The Guide, developed by an experts’ group, describes methodologies for measuring the role of copyright industries in domestic



national economies,<sup>11</sup> or the benefits of reducing software piracy on national GDP.<sup>12</sup> These various industry-led studies are relevant to the four indicators to be determined in Part 2 of the USITC investigation.

The U.S. Commerce Department, in April 2012, released a comprehensive report, entitled *Intellectual Property and the U.S. Economy: Industries in Focus*, which finds that intellectual property (IP)-intensive industries support at least 40 million jobs and contribute more than \$5 trillion dollars to, or 34.8 percent of, U.S. gross domestic product (GDP).<sup>13</sup> Finally, as noted, the latest reporting in December 2013 of positive adjustments in the “Arts and Cultural Production Satellite Account (ACPSA)” by the U.S. Bureau of Economic Analysis and the National Endowment for the Arts Office of Research & Analysis demonstrates that in 2011, the production of arts and cultural goods and services contributed \$504.4 billion to the U.S. economy, amounting to 3.25 percent of GDP.<sup>14</sup>

Public data disaggregating digital trade in copyright (“the delivery of [copyright] products and services over either fixed-line or wireless digital networks”) is not readily available. In Part 2, we encourage the Commission to more accurately count legitimate value-added of copyright to the digital trade valuation.<sup>15</sup>

### **The Size of the Internet Market Devoted to Infringement of Copyright**

In undertaking Part 2 of the USITC’s investigation, IIPA urges the Commission to take into account a chief impediment to growth of digital trade in copyright materials – namely, copyright infringement over the Internet and the broad distortions in legitimate trade effected by this form of unfair competition. When licensed services must compete against unlicensed competitors, not only does it result in a lack of uptake in legitimate services, but it also negatively affects the licensing environment as between creators and their licensed partners. We hope the Commission will fully examine the effect of these notable barriers and impediments to digital trade on the copyright industries and the broader U.S. economy (as indicated in the Commission’s aims). While the studies cited above amply demonstrate the contribution of copyright-based industries to the economy, they do not reveal the massive costs imposed by copyright piracy and other barriers to legitimate digital trade in copyright materials. Copyright industries are forced to face unfair competition from those who

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economies. These national studies provide the economic underpinnings for efforts to reform copyright law and enforcement and to lower rates of copyright piracy.

<sup>11</sup> For example, the Motion Picture Association Asia Pacific has issued a series of “Economic Contribution of the Film and Television Industry” studies for India (2014), Indonesia (2012), Japan (2012), South Korea (2012), Thailand (2012), New Zealand (2009, 2012), Australia (2011), and Hong Kong (2009). See Motion Picture Association Asia-Pacific, *Research and Statistics*, at [http://mpa-i.org/index.php/research\\_statistics](http://mpa-i.org/index.php/research_statistics).

<sup>12</sup> See BSA | The Software Alliance and INSEAD, *Competitive Advantage: The Economic Impact of Properly Licensed Software*, May 2013, at <http://portal.bsa.org/insead/index.html>.

<sup>13</sup> See Commerce Department, *IP and the U.S. Economy*, *supra* note 5. In the Commerce Department study, copyright made up \$641 billion in value-added, but excluded some WIPO-approved “core” categories from its calculation.

<sup>14</sup> NEA/BEA Arts and Culture Satellite Account, *supra* note 6. A great portion of this value is attributable to digital trade.

<sup>15</sup> The USITC notes certain anecdotal sources of publicly-available data. The sources include Friedlander, “News and Notes on 2012 RIAA Music Industry Shipment and Revenue Statistics” (accessed April 5, 2013); Orden, “Online Movie Sales Log Rare Increase,” January 8, 2013; NPD Group, “Research Shows \$14.80 Billion Spent on Video Game Content,” February 6, 2013; and Owen, “Ebooks Made Up 20% of the U.S. Consumer Book Industry,” May 15, 2013. See USITC Digital Trade Part 1, Table ES.2, at xvi. These anecdotal reports of “revenue” cannot be said to fully reflect the value added to GDP from the industry sectors cited, and the USITC acknowledges that “there are significant shortcomings in the available data related to the value of digital trade.”



engage in digital piracy as a high-profit, low risk enterprise. Today, legitimate online businesses built on copyright are facing increased threats, as they must compete with the massive proliferation of illegal online services unencumbered by costs associated with either producing copyrighted works or obtaining rights to use them.

IIPA participates in the Special 301 trade program, by which the U.S. government identifies countries that fail to provide adequate and effective copyright protection or fail to afford fair and equitable market access, thus, contributing to the understanding of the size and scope of piracy. IIPA's 2014 Special 301 Submission letter (without country appendices) is attached for the Commission's reference as Appendix D.<sup>16</sup> IIPA also assists in bringing to light concerns over businesses built on Internet and mobile piracy, by participating in a U.S. Government-launched Special 301 "Out-of-Cycle Review of Notorious Markets." Through this process, the U.S. Government has successfully identified key online and physical marketplaces that are involved in online (as well as physical) intellectual property rights infringements. IIPA has participated in the notorious markets OCR every year since its inception. Most recently, in an October 2013 submission, IIPA identified almost 80 notorious online marketplaces – markets "where counterfeit trademark or pirated copyright products are prevalent to such a degree that the market exemplifies the problem of marketplaces that deal in infringing goods and help sustain global piracy and counterfeiting." The notorious markets recommended by IIPA include some of the most accessed websites in the world.<sup>17</sup> The IIPA's notorious markets filing is attached for the Commission's reference as Appendix E.

On a global scale, an independent study released by BASCAP in 2011 entitled *Estimating the Global Economic and Social Impacts of Counterfeiting and Piracy* (the study is provided to the Commission as Appendix F) estimated the commercial value of digitally pirated music, movies and software (not losses) at \$30-75 billion in 2010, and growing to \$80-240 billion by 2015.<sup>18</sup> Others have issued reports on the economic consequences of piracy for specific industry sectors.<sup>19</sup> On January 14, 2014, the United Nations Office on Drugs and Crime (UNODC) launched a new global campaign to raise awareness among consumers of the harm being caused by the estimated \$250 billion a year illicit trafficking of counterfeiting and piracy.<sup>20</sup>

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<sup>16</sup> IIPA, *IIPA Written Submission Regarding 2014 Special 301 Review: Identification of Countries Under Section 182 of the Trade Act of 1974: Request for Public Comment and Announcement of Public Hearing*, 79 Fed. Reg. 420 (Jan. 3, 2014), February 7, 2014, at <http://www.iipa.com/pdf/2014SPEC301COVERLETTER.pdf> [hereinafter IIPA 2014 Special 301 Submission]. The country appendices are also available at [http://www.iipa.com/2014\\_SPEC301\\_TOC.htm](http://www.iipa.com/2014_SPEC301_TOC.htm).

<sup>17</sup> IIPA, *IIPA Written Submission Re: 2013 Special 301 Out-of-Cycle Review of Notorious Markets: Request for Public Comments*, 78 Fed. Reg. 57924 (September 20, 2013), 78 Fed. Reg. 60367 (October 1, 2013) (*Extending Deadline*), October 25, 2013, at [http://www.iipa.com/pdf/2013\\_Oct25\\_Notorious\\_Markets.pdf](http://www.iipa.com/pdf/2013_Oct25_Notorious_Markets.pdf). The U.S. Trade Representative issued its "notorious markets" list on February 12, 2014. See United States Trade Representative, *2013 Out-of-Cycle Review of Notorious Markets*, February 12, 2014, at [http://www.ustr.gov/sites/default/files/FINAL-PUBLISHED%202013\\_Notorious\\_Markets\\_List-02122014.pdf](http://www.ustr.gov/sites/default/files/FINAL-PUBLISHED%202013_Notorious_Markets_List-02122014.pdf).

<sup>18</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/Advocacy-Codes-and-Rules/BASCAP/BASCAP-Research/Economic-impact/Global-Impacts-Study/>.

<sup>19</sup> The Motion Picture Association has commissioned studies from IPSOS and Oxford Economics on *Economic Consequences of Movie Piracy: Japan* (2011) and *Economic Consequences of Movie Piracy: Australia* (2011). BSA Global Software Piracy Study (2012) estimating the software piracy rate and commercial value of unlicensed software in more than 100 markets in 2011 at [www.bsa.org/globalstudy](http://www.bsa.org/globalstudy). BSA plans to release an updated study in the second quarter of 2014.

<sup>20</sup> See United Nations Office on Drugs and Crime (UNODC), 'Counterfeit: Don't Buy Into Organized Crime' - UNODC Launches New Outreach Campaign on \$250 Billion a Year Counterfeit Business, January 14, 2014, at <http://www.unodc.org/counterfeit/>, accessed January 24, 2014. The campaign, *Counterfeit: Don't Buy Into Organized Crime*, informs consumers that buying counterfeit goods could be funding organized criminal groups, puts consumer health and safety at risk, and contributes to other ethical and environmental



Estimates now suggest that almost 2.8 billion individuals use the Internet as of 2013, according to the International Telecommunications Union (ITU). ITU estimates almost the same number of mobile and fixed broadband users, due to a surge in mobile broadband connectivity which has almost doubled in the past two years. This connectivity has had a positive transformative effect on many economies, and provides significant opportunities to copyright-intensive industries to build legitimate businesses based on digital trade in their products and services. Unfortunately, these opportunities are compromised by the challenges of Internet and mobile piracy. According to NetNames, an astonishing 23.8% of all Internet bandwidth in North America, Europe, and the Asia-Pacific was devoted to copyright infringement.<sup>21</sup> The NetNames study is attached for the Commission's reference as Appendix G. The NetNames study updated a 2011 study conducted by Envisional, concluding that nearly half of all infringing activity occurred using BitTorrent, with the rest divided among cyberlockers, peer-to-peer (P2P) downloading and uploading, forums or bulletin boards, and streaming.<sup>22</sup> Research also indicates there is a correlation between shutting down a major suspected piracy service, or improving enforcement legislation, and increases in legitimate distribution of copyright materials.<sup>23</sup>

The harm from Internet (and mobile) piracy cannot be overstated. Unauthorized downloading or streaming of a motion picture, for example, often sourced to a single illegal camcording incident, can decimate box office sales and harm subsequent release windows.<sup>24</sup> Online and mobile piracy threatens the viability of licensed platforms, and erodes the capacity of artists, musicians, filmmakers, performers and songwriters to earn a living from their craft. Online piracy of entertainment software continues at prolific rates, facilitated by sites that link to infringing copies stored on cyberlockers or through peer to peer-to-peer (P2P) networks. Book and journal publishers are harmed by sites that provide and deliver unauthorized digital copies of medical and scientific journal articles on an illegal subscription basis, as well as sites that traffic in illegally obtained subscription login credentials, and increasingly face online piracy of trade books (fiction and non-fiction) and academic textbooks. Infringing software of all types is also prevalent on online sites, which constitutes a major source for unlicensed software for both consumers and business enterprises. IIPA has identified several areas to effectively address Internet and mobile piracy, including establishing an adequate legal framework;

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concerns. *See also* International Intellectual Property Alliance (IIPA), *Statement of IIPA Hailing United Nations New Campaign "Counterfeits: Don't Buy Into Organized Crime,"* January 14, 2014, at [http://www.iipa.com/pressreleases/2014\\_Jan14\\_IIPA\\_Statement\\_UN\\_Anti\\_Counterfeit\\_Program.PDF](http://www.iipa.com/pressreleases/2014_Jan14_IIPA_Statement_UN_Anti_Counterfeit_Program.PDF).

<sup>21</sup> David Price, *Sizing the Piracy Universe*, NetNames, September 2013, at <https://s3.amazonaws.com/www2.itif.org/panelists+powerpoints/2013-netnames-piracy.pdf> (from an Information Technology & Innovation Foundation event entitled "The Size and Shape of Online Piracy," September 17, 2013, at the Russell Senate Office Building). A power point presentation given by the author at the event, explaining the updated statistics from the Envisional study is available at <https://s3.amazonaws.com/www2.itif.org/panelists+powerpoints/2013-sizing-piracy-universe-ppt.pdf>.

<sup>22</sup> Envisional, *Technical Report: An Estimate of Infringing Use of the Internet*, January 2011, at [http://documents.envisional.com/docs/Envisional-Internet\\_Usage-Jan2011.pdf](http://documents.envisional.com/docs/Envisional-Internet_Usage-Jan2011.pdf).

<sup>23</sup> *See, e.g.*, Brett Danaher, Michael D. Smith, Rahul Telang, Siwen Chen, *The Effect of Graduated Response Anti-Piracy Laws on Music Sales: Evidence from an Event Study in France*, January 21, 2012, available at SSRN: <http://ssrn.com/abstract=1989240> or <http://dx.doi.org/10.2139/ssrn.1989240> (increased consumer awareness of HADOPI caused iTunes song and album sales to increase by 22.5% and 25% respectively relative to changes in the control group); Dianna Dilworth, *How to Stop Piracy: Carnegie Mellon Professor Michael Smith at DBW*, January 16, 2013, at [http://www.mediabistro.com/appnewser/how-to-stop-piracy-carnegie-mellon-professor-michael-smith-at-dbw\\_b31162](http://www.mediabistro.com/appnewser/how-to-stop-piracy-carnegie-mellon-professor-michael-smith-at-dbw_b31162) (Carnegie-Mellon Economist Michael D. Smith indicates his research demonstrates that every 1% reduction in *Megaupload* usage translated into a 2.6-4.1% increase in legitimate digital sales).

<sup>24</sup> For the independent sector of the motion picture and television industry, such piracy also drastically reduces the license fees that may be obtained from local distributors around the world, thus removing the incentive and often the ability for the independents to finance and produce a particular film or television program altogether.



adopting appropriate civil, administrative, and criminal procedures; and fostering effective voluntary efforts.<sup>25</sup>

Increasingly, the role of advertising and ad networks in sustaining piracy has come under scrutiny. Some companies have decided to take affirmative steps to terminate such practices. In 2012, upon learning that their ad networks had placed advertising for Coca-Cola and Samsung on the notorious piracy website *zing* (a social network site which enables mass infringement of copyright materials with search portals for pirate materials in several languages and featuring infringing content from many countries), those companies responsibly halted all advertisement on the site.<sup>26</sup> In some cases, advertisers may be unaware that their advertisements appear on sites that facilitate access to infringing content. Industry has responded with best practices in some areas, but more can be done.<sup>27</sup> Similar choices are being made by payment processors (online services as well as more traditional credit card companies) to halt services to pirate or counterfeit operations.<sup>28</sup> As an indication that more needs to be done to establish the right framework for legitimate commerce in copyright materials, the music industry just noted its 100 millionth notice to a major search engine.<sup>29</sup>

## Conclusion

In conclusion, IIPA appreciates the opportunity to provide the Commission with further input into the *Digital Trade in the U.S. and Global Economies* investigation, and hope this input assists the Commission to meet its objectives for Part 2 of that investigation. We remain available as needed to assist the Commission in its ongoing work.

Respectfully submitted,

Michael Schlesinger  
International Intellectual Property Alliance

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<sup>25</sup> As IIPA has noted in public submissions, governments must attack both supply and demand. Education and criminal and administrative actions all have a role to play. A sound framework for civil actions, and legislation that creates incentives for network service providers to curb the use of their networks and services for infringing purposes, are also essential. For a more detailed discussion, see IIPA 2014 Special 301 Submission and country appendices, *supra* note 16.

<sup>26</sup> See, e.g., Chris Brummitt, *APNewsBreak: Coke, Samsung Pull Vietnam Site Ads*, Associated Press, October 3, 2012, at <http://bigstory.ap.org/article/coke-samsung-pull-ads-vietnam-website-citing-concerns-over-unlicensed-music-downloads> (reporting decisions by Coca-Cola and Samsung to divest from *zing.com* over piracy concerns).

<sup>27</sup> Interactive Advertising Bureau (IAB), *Standards, Guidelines & Best Practices*, at <http://www.iab.net/guidelines/508676>. See also *Best Practices Guidelines for Ad Networks to Address Piracy and Counterfeiting*, July 2013, at <http://www.2013ippractices.com/>.

<sup>28</sup> For example, in the “CD Cheap” case, a criminal counterfeiting ring that employed 10,000 slave computers to sell counterfeit software, was shut down when financial institutions closed the merchant accounts of the sites involved, for violations of terms of service prohibiting fraudulent activities.

<sup>29</sup> Cary Sherman, *Google's 100 Million Notices*, The Hill, January 13, 2014, at <http://thehill.com/blogs/ballot-box/195107-googles-100-million-notices> (noting the music industry had sent its 100 millionth copyright takedown notice to Google in January 2014, without a “demonstrable demotion of sites that receive a high volume of piracy notices”).



## APPENDIX A

Stephen E. Siwek, *Copyright Industries in the U.S. Economy: The 2013 Report*, November 19, 2013, available at [http://www.iipa.com/copyright\\_us\\_economy.html](http://www.iipa.com/copyright_us_economy.html).

# **COPYRIGHT INDUSTRIES IN THE U.S. ECONOMY**



## **The 2013 Report**

**By Stephen E. Siwek  
Economists Incorporated**

**Prepared for the  
International Intellectual Property Alliance®**



# **COPYRIGHT INDUSTRIES IN THE U.S. ECONOMY**



## **The 2013 Report**

*Copyright Industries in the U.S. Economy: The 2013 Report* is the fourteenth report on the U.S. copyright industries prepared for the International Intellectual Property Alliance (IIPA) since 1990.

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This latest *Report* updates and supplements thirteen previous reports produced by Economists Incorporated for the IIPA:

- Stephen E. Siwek and Harold Furchgott-Roth, *Copyright Industries in the U.S. Economy* (released in November 1990)
- Stephen E. Siwek and Harold Furchgott-Roth, *Copyright Industries in the U.S. Economy: 1977-1990* (released in September 1992)
- Stephen E. Siwek and Harold Furchgott-Roth, *Copyright Industries in the U.S. Economy: 1993 Perspective* (released in October 1993)
- Stephen E. Siwek and Harold Furchgott-Roth, *Copyright Industries in the U.S. Economy: 1977-1993* (released in January 1995)
- Stephen E. Siwek and Gale Mosteller, *Copyright Industries in the U.S. Economy: The 1996 Report* (released in October 1996)
- Stephen E. Siwek and Gale Mosteller, *Copyright Industries in the U.S. Economy: The 1998 Report* (released in May 1998)
- Stephen E. Siwek, *Copyright Industries in the U.S. Economy: The 1999 Report* (released in December 1999)
- Stephen E. Siwek, *Copyright Industries in the U.S. Economy: The 2000 Report* (released in December 2000)
- Stephen E. Siwek, *Copyright Industries in the U.S. Economy: The 2002 Report* (released in April 2002)
- Stephen E. Siwek, *Copyright Industries in the U.S. Economy: The 2004 Report* (released in October 2004)
- Stephen E. Siwek, *Copyright Industries in the U.S. Economy: The 2006 Report* (released in January 2007)
- Stephen E. Siwek, *Copyright Industries in the U.S. Economy: The 2003-2007 Report* (released in July 2009)
- Stephen E. Siwek, *Copyright Industries in the U.S. Economy: The 2011 Report* (released in November 2011)

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## ACKNOWLEDGEMENTS

Economists Incorporated is grateful to the International Intellectual Property Alliance (IIPA) and its member associations for their support and assistance in the drafting of this *Report*. In particular, we would like to thank Michael Schlesinger of the IIPA for his guidance throughout this process. We would also like to thank Pamela Burchette for her assistance in preparing this *Report*.

The IIPA is a private sector coalition, formed in 1984, of trade associations representing U.S. copyright-based industries in bilateral and multilateral efforts working to improve international protection and enforcement of copyrighted materials, and to open up foreign markets closed by piracy and other market access barriers. IIPA’s seven member associations represent over 3,200 U.S. companies producing and distributing materials protected by copyright laws throughout the world—all types of computer software, including operating systems, systems software such as databases and security packages, business applications, and consumer applications such as games, personal finance, and reference software, free software, open source software, and software as a service, entertainment software including interactive games for videogame consoles, handheld devices, personal computers and the Internet, and educational software; motion pictures, television programming, DVDs and home video and digital representations of audiovisual works; music, records, CDs, and audiocassettes; and fiction and non-fiction books, education instructional and assessment materials, and professional and scholarly journals, databases and software in all formats. Members of the IIPA include Association of American Publishers, BSA | The Software Alliance, Entertainment Software Association, Independent Film & Television Alliance, Motion Picture Association of America, National Music Publishers’ Association, and Recording Industry Association of America.

## PREFACE

Since 1984, IIPA and its association members, representing industries reliant on copyright – producers and distributors of software, movies, music, videogames, and books and journals for the world – have worked in partnership with the U.S. government to improve the ability of the copyright industries to do business in foreign markets. These efforts have resulted in significant improvements in copyright laws and enforcement around the world and in the lowering of market access barriers and addressing other policies that hinder these industries' ability to compete on a level playing field in global markets. These improvements in turn have had a substantial positive impact over the years on how these industries contribute to value added to the U.S. economy; to employment and wages; and to foreign sales and exports, thereby benefiting countless millions of individuals and enterprises in the United States.

To quantify the contribution of the copyright industries, IIPA commenced a series of economic studies in 1990. *Copyright Industries in the U.S. Economy: The 2013 Report*, the fourteenth such report, by Stephen E. Siwek of Economists Incorporated, covers the period 2009-2012. This *Report* shows that the copyright industries make up an increasingly large percentage of value added to GDP; create more and better-paying jobs; grow faster than the rest of the U.S. economy; and contribute substantially to U.S. foreign sales and exports, outpacing many industry sectors. The specific findings of this year's *Report* mark a milestone: for the first time, the contribution of the core copyright industries of the U.S. economy surpassed one trillion dollars in 2012.<sup>1</sup>

As international trade has increased and glo-

balized, foreign governments and international IP organizations such as the World Intellectual Property Organization (WIPO) have become acutely aware of the significance of copyright industries to national economies, and the linkage to their economic growth, technological innovation, and cultural diversity. In 2003, WIPO took a critical step forward in issuing a *Guide on Surveying the Economic Contribution of the Copyright-Based Industries*. The *Guide*, developed by an experts' group which included the author of this *Report*, Stephen E. Siwek, describes methodologies for measuring the role of copyright industries in domestic economies that have now been adopted in well over 40 countries' national reports, with more in the pipeline.<sup>2</sup> These national studies provide the economic underpinnings for efforts to reform copyright law and enforcement and to lower rates of copyright piracy.

Despite the robust achievements of the copyright industries during the period covered in this *Report*, significant challenges remain. As the copyright industries derive a growing percentage of their revenue from sales outside the United States, global online and physical copyright piracy, as well as market access and other stifling discriminatory barriers to doing business in various countries, inhibit the growth of the copyright industries in the U.S. and globally. Economic reports such as this one underscore what is at stake. They provide a compelling argument for more effective legal, enforcement, and market access regimes to promote and foster the growth of the copyright industries in the U.S. and in countries around the world.

– Michael Schlesinger and Steven J. Metalitz,  
International Intellectual Property Alliance

<sup>1</sup> The "core" copyright industries are those industries whose primary purpose is to create, produce, distribute or exhibit copyright materials, and include such sectors as computer software, videogames, books, newspapers, periodicals and journals, motion pictures, recorded music, and radio and television broadcasting.

<sup>2</sup> The various national studies are described and compared in a WIPO document, *2013 WIPO Studies on the Economic Contribution of the Copyright Industries Overview*. National studies conducted to date include: Australia (2011), Bhutan (2011), Brunei (2011), Bulgaria (2011), Canada (2004), China (2009), Colombia (2006), Croatia (2007), Dominica (2012), Grenada (2012), Finland (2010), Hungary (2010), Jamaica (2007), Jordan (2012), Kenya (2009), Korea (2012), Latvia (2004), Lebanon (2007), Lithuania (2012), Malawi (2013), Malaysia (2008), Mexico (2006), Netherlands (2009), Pakistan (2010), Panama (2009), Peru (2009), Philippines (2006), Romania (2008), Russia (2007), Singapore (2007), Slovenia (2010), South Africa (2011), St. Kitts/Nevis (2012), St. Lucia (2012), St. Vincent (2012), Tanzania (2012), Thailand (2012), Trinidad and Tobago (2011), Ukraine (2008), and United States (2011).

## I. EXECUTIVE SUMMARY

This report, *Copyright Industries in the U.S. Economy: The 2013 Report*, demonstrates that the core copyright industries of the United States – those industries whose primary purpose is to create, produce, distribute or exhibit copyright materials, and which include computer software, videogames, books, newspapers, periodicals and journals, motion pictures, recorded music, and radio and television broadcasting – provide significant value added to GDP; an increasing number of high-paying jobs; real growth which outpaces the rest of the economy; and substantial foreign sales and exports, surpassing many industry sectors.

### ***Copyright Industries Contribute Significantly to U.S. Gross Domestic Product (GDP)***

- In 2012, the value added by the core copyright industries to U.S. GDP exceeded \$1 trillion dollars (\$1,015.6 billion) for the first time, accounting for 6.48% of the U.S. economy.
- In 2012, the value added by the total copyright industries<sup>3</sup> to GDP exceeded \$1.7 trillion (\$1,765 billion), accounting for 11.25% of the U.S. economy.

### ***Copyright Industries Employ Millions of Workers Who Earn a “Compensation Premium”***

- The core copyright industries employed nearly 5.4 million workers in 2012, accounting for 4.04% of the entire U.S. workforce, and 4.83% of total private employment in the U.S.
- The annual 2012 compensation paid to core copyright workers – \$85,644 – far exceeds the average annual compensation paid to all U.S. workers – \$64,594 – amounting to a 33%

“compensation premium” over the average U.S. annual wage.

- The total copyright industries employed more than 11.1 million workers in 2012, accounting for 8.35% of all U.S. employment, or 10% (9.99%) of all private employment in the United States. The average annual compensation paid to employees of the total copyright industries in 2012, \$75,926, exceeds the U.S. average annual wage by 18%.

### ***Copyright Industries’ Real Growth Rates Outpace the Rest of the U.S. Economy***

- During the period 2009-2012, the core copyright industries grew at an aggregate annual rate of 4.73%. The average annual growth rate of the entire U.S. economy over the same period was only 2.14%, less than half as much.
- During the same period, the total copyright industries grew at an annual rate of 4.99%.

### ***Copyright Industries Contribute Significantly to Foreign Sales and Exports, Outperforming Many Major U.S. Industry Sectors***

- Sales of select U.S. copyright sectors in overseas markets amounted to \$142 billion in 2012, a significant increase over previous years.
- As a comparison, the foreign sales of select copyright industry sectors exceed foreign sales of other major U.S. industries, including aerospace exports (\$106 billion), U.S. agricultural exports (\$70.1 billion), food (\$64.7 billion) and pharmaceuticals and medicines (\$50.9 billion).

<sup>3</sup> The “total” copyright industries include not only the core copyright but also the partial copyright, non-dedicated support, and interdependent industries. “Partial” copyright industries are industries in which only some aspect or portion of the products that they create they can qualify for copyright protection. These industries range from fabric to jewelry to furniture to toys and games. “Non-dedicated support” industries include industries that distribute both copyright and non-copyright protected materials to business and consumers. Examples here include transportation services, telecommunications and wholesale and retail trade. As in past studies, only a portion of the total value added by these industries is considered to be part of the copyright industries. “Interdependent” industries include those that produce, manufacture, and sell equipment whose function is primarily to facilitate the creation, production, or use of works of copyrighted matter. These industries include manufacturers, wholesalers and retailers of TV sets, personal computers, and other devices, and usage dependent products including blank recording material, and certain categories of paper.

## II. INTRODUCTION

*Copyright Industries in the U.S. Economy: The 2013 Report* is the fourteenth in a series issued over the last 23 years by Economists Incorporated, updating and supplementing thirteen prior reports prepared on behalf of the IIPA. This latest *Report* presents data on the value added contributions of the copyright sector to the U.S. economy; the percentage contribution of the copyright sector to the overall U.S. economy; the relative growth of the creative industries compared with the remainder of the economy; employment levels in the creative sector; the average compensation for workers in the copyright sector in comparison to other sectors; and the contributions of selected copyright industries to exports and foreign sales. The *Report* confirms once again that the U.S. copyright industries contribute significantly to U.S. GDP. The creative industries continue to outpace the rest of the economy in real growth. The copyright industries also continue to employ millions of workers whose average compensation levels substantially exceed the average level of compensation paid to all U.S. workers. The core copyright industries of the U.S. continued to grow in terms of foreign sales and exports during 2009-2012, outperforming many key industrial sectors.

As in previous years, this study is presented in five sections:

- The copyright industries
- Value added by the copyright industries to the U.S. economy
- Employment and compensation in the copyright industries in the U.S. economy
- U.S. copyright materials in the world market
- Conclusion

This *Report* presents estimates of the copyright industries' contributions to the U.S. economy for the years 2009-2012.<sup>4</sup> The underlying data used in this *Report* are current through 2012. The period covered by this *Report* was one of generally improving economic conditions in the U.S. as a whole. In 2010, the American economy began to emerge from the painful recession of 2008-2009. Subsequently, the economy expanded in 2011 and grew even more vigorously in 2012. This *Report* clearly documents the end of negative growth in value added and in employment for the copyright industries and for the U.S. economy as a whole.

This study continues to reflect the use of industry data classifications adopted under the North American Industry Classification System ("NAICS") which has been widely implemented

<sup>4</sup> In this study, the values presented for 2009 have been updated from the 2009 results presented in *Copyright Industries in the U.S. Economy: The 2011 Report*. The updates result from data revisions published by the U.S. Bureau of Economic Analysis and by other government agencies since the last report was completed.

by U.S. statistical agencies. It also continues to follow the international standards and recommendations propounded by WIPO in 2003 regarding the development of economic and statistical standards to measure the impact of domestic copyright industries on domestic economies.<sup>5</sup>

In July 2013, the U.S. Bureau of Economic Analysis (“BEA”) announced changes in how it accounts for the costs of producing “artistic originals” in the determination of U.S. GDP, classifying them as an investment as opposed to current expenditures. Artistic originals include “books, movies, TV shows, music, photographs and greeting cards...” At this writing, BEA has not yet made use of the methodology described above to produce revised estimates of annual GDP by industry. Indications are that applying its methodology looking at the economic benefit of the “costs” of production would result in increases in the contribution of industries associated with “artistic originals.”<sup>6</sup> However, given the lack of revised data to date, the U.S. copyright industry results presented in this *Report* do not reflect the possible effect of the BEA capitalization procedures.

The data in this study quantify the size and critical importance of the copyright industries to the U.S. economy, generally using the most

current data available. As in past studies, the U.S. copyright industries’ contribution to the U.S. economy is measured by three economic indicators: value added to the U.S. GDP in current dollars; industry employment and share of national employment; and revenues generated from foreign sales and exports. Further, this study includes two additional indicators of the importance of the copyright industries to the U.S. economy: compensation per employee, and real annual growth. As set forth below, during the period 2009-2012, the copyright industries, both core and total, achieved real growth rates in excess of 4.5% per year. By contrast, during the period considered in the *Copyright Industries in the U.S. Economy: The 2011 Report* (2007-2010), the copyright industries produced real growth rates of less than 1.5% annually.

Of course, the copyright industries were not the only beneficiaries of the improving economic climate after 2009. For example, during the years 2009-2012, real GDP for the U.S. as a whole increased at an annual rate of 2.14%. This growth rate significantly exceeded the annual growth figures reported in the 2011 study for the U.S. as a whole. U.S. real annual growth over that period (2007-2010) was only 0.05%. As this study documents, the U.S. copyright industries continue to make a disproportionately positive contribution to real growth in U.S. GDP.

<sup>5</sup> The author of this *Report*, Stephen E. Siwek, participated as an expert at the meeting of the “Working Group of Experts on the Preparation of a WIPO Handbook on Survey Guidelines for Assessing the Economic Impact of Copyright and Related Rights” which was co-sponsored by WIPO and held in Helsinki, Finland, in July 2002. That meeting launched the process which resulted in WIPO’s 2003 publication of its *Guide on Surveying the Economic Contribution of the Copyright-Based Industries* which describes many of the recommendations and standards used in this *Report*.

<sup>6</sup> BEA is expected to publish revised estimates of annual value added by industry in December 2013.



### III. THE COPYRIGHT INDUSTRIES

In nine of our thirteen prior reports, we divided the copyright industries into four groups: core, partial, distribution, and copyright-related; these are the sectors we developed and defined in our first report issued in 1990. In the four most recent reports (2004, 2006, 2003-2007, and 2011), we still used four categories, but in order to conform to the international standard, we relied upon the four copyright industry categories defined by WIPO in its 2003 *Guide*: core copyright, partial copyright, non-dedicated support, and interdependent industries.

The **core** copyright industries are those industries whose primary purpose is to create, produce, distribute or exhibit copyright materials. These industries include computer software, videogames, books, newspapers, periodicals and journals, motion pictures, recorded music, and radio and television broadcasting.

**Partial** copyright industries are industries in which only some aspect or portion of the products that they create can qualify for copyright protection. These industries range from fabric

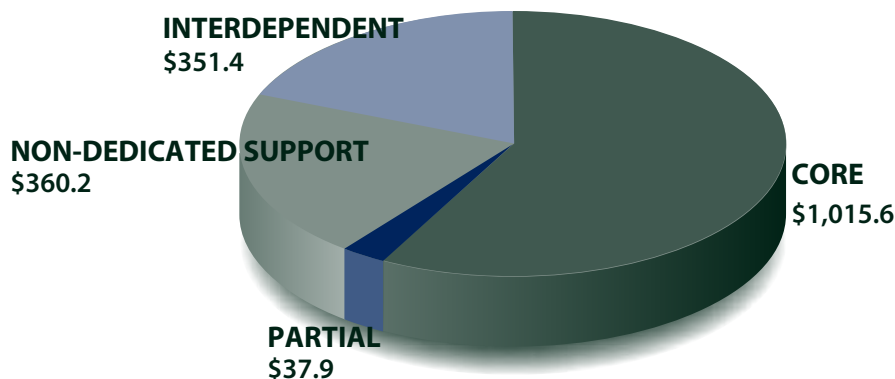
to jewelry to furniture to toys and games.

**Non-dedicated** support industries include those that distribute both copyright and non-copyright protected materials to businesses and consumers. Examples here include transportation services, telecommunications and wholesale and retail trade. As in past studies, only a portion of the total value added by these industries is considered to be part of the copyright industries.

**Interdependent** industries include those that produce, manufacture, and sell equipment whose function is primarily to facilitate the creation, production, or use of works of copyrighted matter. These industries include manufacturers, wholesalers and retailers of TV sets, personal computers and usage dependent products including blank recording material, and certain categories of paper.

We refer to the four groups together – core, partial, non-dedicated support, and interdependent – as the “**total**” copyright industries.

**COPYRIGHT INDUSTRIES IN THE US ECONOMY 2012**  
**(VALUE ADDED IN BILLIONS OF DOLLARS)**



**TOTAL: \$1,765.2 BILLION OR \$1.765 TRILLION**

## IV. VALUE ADDED BY THE COPYRIGHT INDUSTRIES

The most appropriate way to measure an industry's contribution to the national economy is to measure the industry's value added. Value added reflects the economic contribution of labor and capital of a particular industry. The sum of the value added of all industries in the United States is equal to gross domestic product (GDP), a standard measure of the size of the U.S. economy. For this reason, value added calculations can be used to draw comparisons of the relative size and growth rates of different industries in a way that is consistent with the federal government's national income and product accounting data.

The value added estimates for the copyright industries that are contained in this *Report* reflect underlying data obtained from the BEA, the U.S. Census Bureau and other government statistical agencies. In particular, the estimates of copyright industry value added make direct use of the industry-specific estimates of U.S. value added that are regularly published by the

BEA. These industry-specific estimates (in both current dollar and real terms) are used as starting points to derive the contributions made by the core and total copyright industries to U.S. GDP.<sup>7</sup>

As noted above, the harmful effects of the recession of 2008-2009 were much diminished by 2010 and most U.S. industries experienced increasing sales and profits during those years. Nevertheless, the copyright industries remained a particularly important contributor to U.S. GDP. As shown in Table 1, the current dollar value added to U.S. GDP by the core copyright industries reached over \$1 trillion (\$1,015.6 billion) in 2012. In the same year, U.S. GDP reached \$15.68 trillion. Thus, in 2012, the core copyright industries constituted a 6.48% share of nominal U.S. GDP. The value added by the total copyright industries in the same period is also shown in Table 1, which reports the value added to U.S. GDP by the total copyright industries in 2012 was \$1.765 trillion, or 11.25% of U.S. GDP.

### 2009-2012 VALUE ADDED (BILLIONS OF US DOLLARS)

TABLE 1:

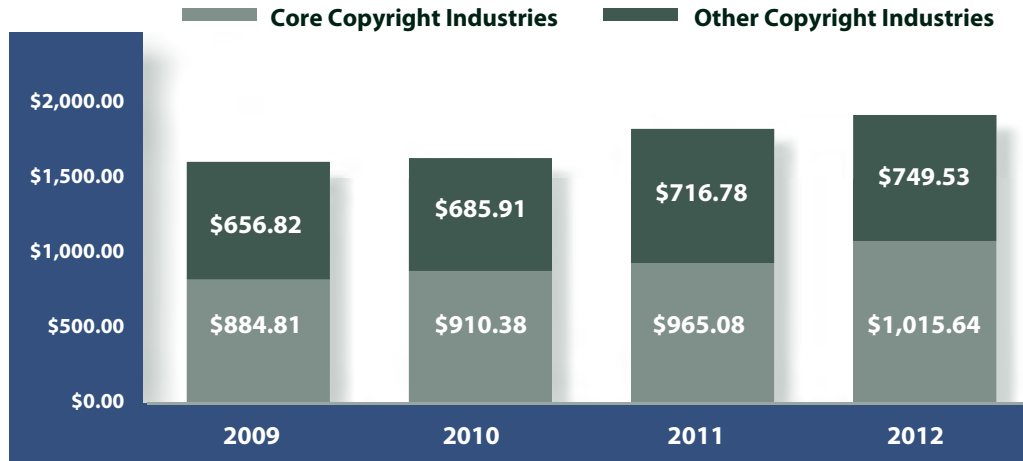
	2009	2010	2011	2012
<b>Core Copyright Industries</b>	\$884.8	\$910.4	\$965.1	\$1,015.6
<b>Total US GDP</b>	\$13,973.7	\$14,498.9	\$15,075.7	\$15,684.8
<b>Core Share of US GDP</b>	6.33%	6.28%	6.40%	6.48%
	2009	2010	2011	2012
<b>Total Copyright Industries</b>	\$1,541.6	\$1,596.2	\$1,681.9	\$1,765.2
<b>Total US GDP</b>	\$13,973.7	\$14,498.9	\$15,075.7	\$15,684.8
<b>Total Share of US GDP</b>	11.03%	11.01%	11.16%	11.25%

The current dollar estimates of the value added for the core copyright industries in 2009, 2010, 2011 and 2012, also expressed below in Chart 1, show an increase from \$884.81 billion in 2009 to \$1,015.64 billion, or more than \$1 trillion, in 2012. The estimated value added for the other (non-core) copyright industries rose from \$656.82 billion in 2009 to \$749.53 billion in 2012.

<sup>7</sup> See Section II and Appendix B for a discussion of recent changes announced in calculation of certain sectors by BEA.

## COPYRIGHT INDUSTRIES VALUE ADDED (IN BILLIONS OF CURRENT DOLLARS)

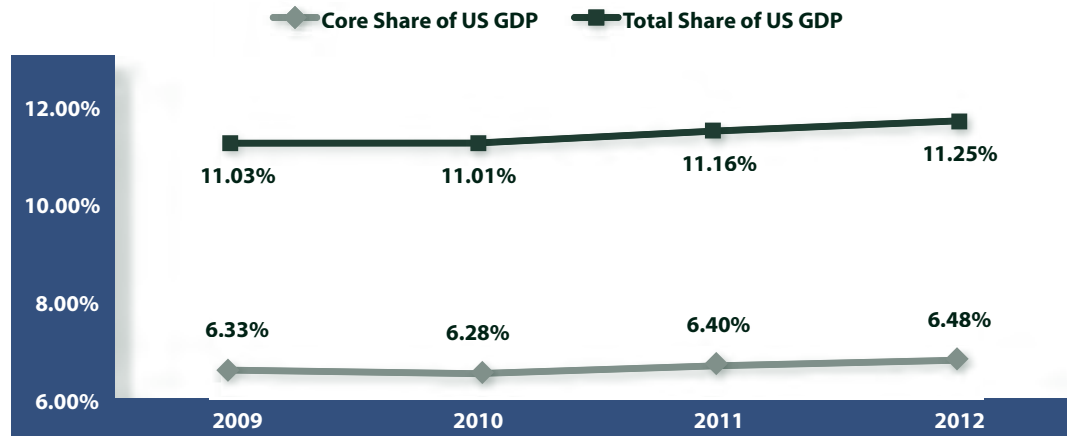
CHART 1:



The copyright industries' current dollar share of the U.S. economy is also expressed in Chart 2. On the basis of the methodology described above, we now estimate that the core copyright industries' current dollar share of the U.S. economy has increased from approximately 6.3% to nearly 6.5% of the U.S. economy over the years 2009 through 2012. The core copyright industries' current dollar share of the U.S. economy reached 6.48% in 2012. During that same period, the total copyright industries current dollar share of U.S. GDP reached 11.25% in 2012.

## COPYRIGHT INDUSTRIES SHARE OF CURRENT DOLLAR GDP

CHART 2:



To put these figures in perspective, it is useful to compare the economic contributions of the U.S. copyright industries to the contributions made by other U.S. industries in the same time period. Inter-industry comparisons to the U.S. copyright industry are shown in Table 2.

Table 2 reports the total value added to the U.S. economy by the entire federal government in 2012 was \$668.3 billion.<sup>8</sup> This amount is substantially lower than the value added by the total copyright industries in the same year. In 2012, the total value added to the U.S. economy by state and local governments was \$1,357.9 billion. This value is approximately 23% lower than the value added by the total copyright industries in 2012. Comparisons of the copyright industry's value added in 2011 and 2012, to other sectors of the U.S. economy are also provided in Table 2. These comparisons clearly document the size and importance of the copyright industries today.

### **2011 AND 2012 VALUE ADDED COMPARISONS TO OTHER SECTORS (BILLIONS OF US DOLLARS)**

**TABLE 2:**

	<b>2011</b>	<b>2012</b>
<b>Core Copyright - Value Added</b>	<b>\$965.1</b>	<b>\$1,015.6</b>
<b>Total Copyright - Value Added</b>	<b>\$1,681.9</b>	<b>\$1,765.2</b>
<b>Federal Government - Value Added</b>	<b>\$658.1</b>	<b>\$668.3</b>
<b>State and Local Government - Value Added</b>	<b>\$1,335.8</b>	<b>\$1,357.9</b>
<b>Construction - Value Added</b>	<b>\$529.5</b>	<b>\$558.7</b>
<b>Health Care and Social Assistance - Value Added</b>	<b>\$1,136.9</b>	<b>\$1,164.8</b>
<b>Finance and Insurance - Value Added</b>	<b>\$1,159.3</b>	<b>\$1,242.3</b>

Since BEA calculates both current dollar and constant dollar value added for the industry classifications that it analyzes, we can estimate real growth rates of the copyright industries. In this *Report*, the constant dollar value added figures are used to derive estimates of the real growth rates achieved by the core and total copyright industries on a year by year basis. These data are also used to measure the contribution made by the copyright industries to the real annual growth achieved by the U.S. economy as a whole.

Real growth rates in value added experienced by the U.S. copyright industries and by the U.S. economy during the period 2009-2012 are provided in Table 3.<sup>9</sup> For each of the periods 2009-2010, 2010-2011, and 2011-2012, the U.S. core copyright industries experienced positive real growth in excess of 3.9% annually. Over the entire period 2009-2012, the core copyright industries grew at a real annual growth rate of 4.73%.

<sup>8</sup> U.S. GDP figures from Elrod, A., Lindberg, B., and Morgan, E., *Annual Industry Accounts – Advanced Statistics on GDP by Industry*, Survey of Current Business, May 2013, Table 7. (Hereinafter – U.S. BEA, Annual Industry Accounts).

<sup>9</sup> Real growth rates measure changes in constant dollar value added over time. In these estimates, current dollar value added figures are converted to “chained” dollars for the year 2005.

The total copyright industries experienced a comparable pattern of real growth during the years 2009-2012. As shown in Table 3, in 2009-2010, 2010-2011, and 2011-2012, the total copyright industries grew at annual rates in excess of 4.3% per year. For the full period 2009-2012, the real value added by the total copyright industries grew at a rate of 4.99% per year.

Both the U.S. copyright industries and the U.S. economy experienced positive real annual growth during the years 2010 through 2012. In order to provide a basis of comparison, the growth patterns for the U.S. economy are also provided in Table 3.

For the period 2009-2012, the U.S. economy grew at an annual rate of 2.14%. For the individual years 2009-2010, 2010-2011, and 2011-2012, the U.S. economy increased at annual rates of 2.39%, 1.81% and 2.21% respectively. As these figures make clear, for this period, the compound annual growth rate achieved by the U.S. copyright industries significantly exceeded the compound annual growth rate achieved by the U.S. economy as a whole. Overall, these industry sectors grew more than twice as fast as the economy as a whole during the period 2009 to 2012.

### REAL ANNUAL GROWTH RATES VALUE ADDED TO US GDP

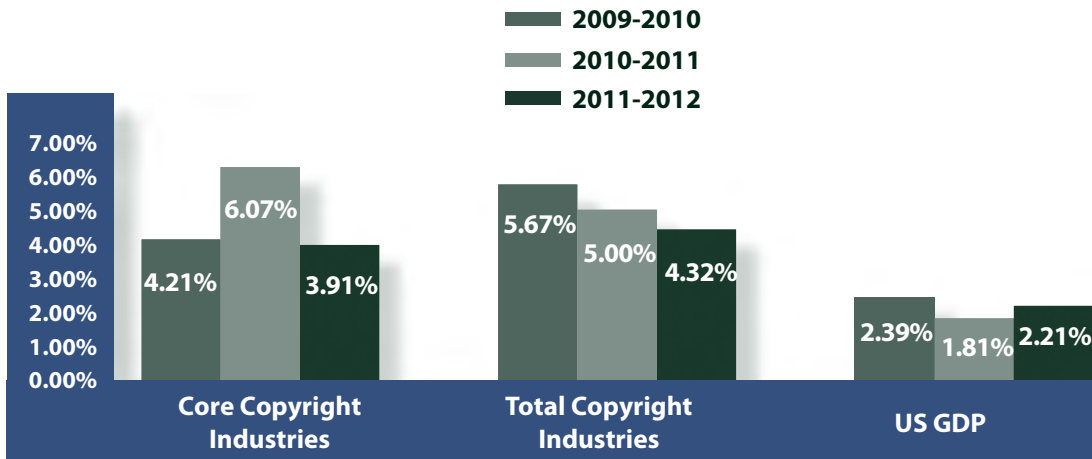
TABLE 3:

	2009-2010	2010-2011	2011-2012	<i>Annual Growth Rate 2009-2012</i>
<b>Core Copyright Industries</b>	4.21%	6.07%	3.91%	<b>4.73%</b>
<b>Total Copyright Industries</b>	5.67%	5.00%	4.32%	<b>4.99%</b>
<b>US GDP</b>	2.39%	1.81%	2.21%	<b>2.14%</b>

The real (constant dollar) annual growth rates experienced by the copyright industries during the periods 2009-2010, 2010-2011, and 2011-2012 are also expressed in Chart 3. As shown in Chart 3, the core copyright industries grew in excess of 3.9% in 2009-2010, 2010-2011, and 2011-2012, with a peak growth rate of 6.07% in 2010-2011. Similarly, as shown in the Chart, the total copyright industries grew sizably, in excess of 4.3% in 2009-2010, 2010-2011, and 2011-2012, with a peak growth rate of 5.67% in 2009-2010. By contrast, as noted, the real growth rates achieved by the U.S. economy as a whole were 2.39% in 2009-2010, 1.81% in 2010-2011, and 2.21% in 2011-2012. As Chart 3 demonstrates graphically, since 2009 the core and the total copyright industries have grown substantially faster than the real annual rate of growth experienced for the U.S. GDP as a whole.

## REAL ANNUAL GROWTH RATES COPYRIGHT INDUSTRIES AND US GDP

CHART 3:



### V. EMPLOYMENT AND COMPENSATION IN THE COPYRIGHT INDUSTRIES

In this *Report*, we estimate the number of workers employed in the core and total copyright industries for the years 2009-2012. The procedures used to derive our estimates of employment were largely based on the formulas derived in prior reports. In those reports, employee counts were derived to be consistent in both the NAICS and ISIC classification systems. As in the past, the actual employee counts by NAICS code were extracted from the Bureau of Labor Statistics (“BLS”) database.

Employment figures for the core and total copyright industries for the years 2009, 2010, 2011, and 2012 are provided in Table 4. As shown in Table 4, the core copyright industries employed 5,178,100 workers in 2009, representing 3.96% of the total U.S. workforce. By 2012, the number of core copyright employees in the United States had increased by 221,000 workers to 5,399,100. These workers represented 4.04% of the total U.S. workforce in 2012. In 2009, the total copyright industries employed more than 10.8 million workers. By 2012, employment in the total copyright industries had increased to more than 11.17 million. During the same period, total U.S. employment increased from 130,859,000 in 2009 to 133,736,200 in 2012.

## 2009-2012 TOTAL EMPLOYMENT (IN THOUSANDS)

TABLE 4:

	2009	2010	2011	2012
Core Copyright Industries	5,178.1	5,202.9	5,296.9	5,399.1
Total US Employment	130,859.0	129,911.1	131,499.8	133,736.2
Core Share of US	3.96%	4.00%	4.03%	4.04%
	2009	2010	2011	2012
Total Copyright Industries	10,818.5	10,776.9	10,944.1	11,170.9
Total US Employment	130,859.0	129,911.1	131,499.8	133,736.2
Total Share of US	8.27%	8.30%	8.32%	8.35%

For U.S. private industry, employment growth during the years 2009 through 2012 was comparable to the employment trends experienced for the U.S. economy as a whole. As shown in Table 5, total U.S. private employment increased from 108,306,000 in 2009 to 111,822,100 in 2012. During these years, the core copyright industries maintained a roughly 4.8% share of all private employment while the total copyright industries' share of private employment remained at or near 10% for the entire period.

## 2009-2012 TOTAL PRIVATE EMPLOYMENT (IN THOUSANDS)

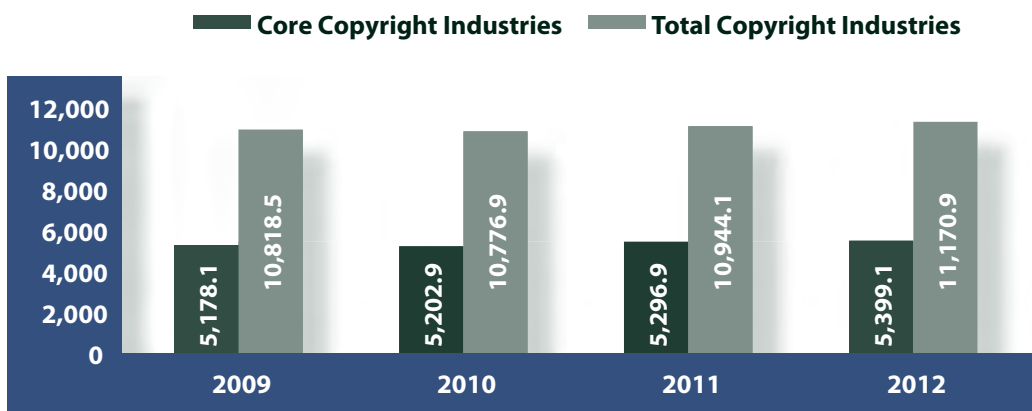
TABLE 5:

	2009	2010	2011	2012
Core Copyright Industries	5,178.1	5,202.9	5,296.9	5,399.1
Total US Private Employment	108,306.0	107,420.1	109,408.3	111,822.1
Core Share of US	4.78%	4.84%	4.84%	4.83%
	2009	2010	2011	2012
Total Copyright Industries	10,818.5	10,776.9	10,944.1	11,170.9
Total US Private Employment	108,306.0	107,420.1	109,408.3	111,822.1
Total Share of US	9.99%	10.03%	10.00%	9.99%

U.S. copyright industry employment is also expressed in Chart 4. Chart 4 demonstrates graphically that the total number of workers in the core copyright industries consistently increased from 2009 to 2012.<sup>10</sup> Because U.S. total employment also rose in this period, the core copyright industries' share of total U.S. employment remained at approximately 4%, while the total copyright industries' share of employment increased from 8.27% in 2009 to 8.35% in 2012.

### US COPYRIGHT INDUSTRY EMPLOYMENT (IN THOUSANDS)

CHART 4:



In this *Report*, we also quantify the average compensation per employee received by workers in the copyright industries and in the U.S. as a whole for the years 2009-2012. In these calculations “compensation” means “wages and salary accruals and supplements to wages and salary accruals.”<sup>11</sup> These supplements include “employer contributions for employee pensions and insurance funds and employer contributions for government social insurance.” These data are shown in Table 6.

During the period 2009-2012, average compensation per employee in both the core and total copyright industries increased. As shown in Table 6, average compensation earned by core copyright employees stood at \$85,643.9 in 2012. This value was nearly 33% higher than the average compensation paid to all U.S. employees in 2012. For total copyright industry workers, average compensation in 2012 was \$75,925.9, almost 18% higher than the U.S. average.

<sup>10</sup> As a whole, the core copyright industries have consistently been able to add jobs to the U.S. economy. Within the core however, certain component industries, particularly in the printing sector, have experienced declines in employment since the late 1990s.

<sup>11</sup> The definition of compensation used in this *Report* tracks that used by the U.S. Bureau of Economic Analysis.



## 2009 – 2012 COMPENSATION PER EMPLOYEE (US DOLLARS)

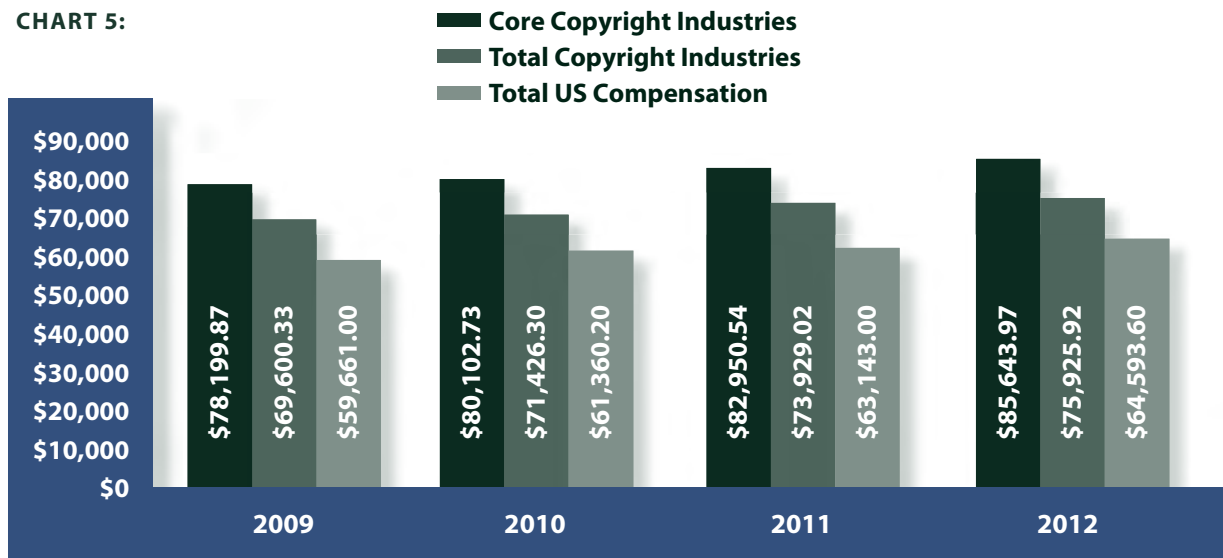
TABLE 6:

	2009	2010	2011	2012
Core Copyright Industries	\$78,199.8	\$80,102.7	\$82,950.5	\$85,643.9
Total US Compensation	\$59,661.0	\$61,360.2	\$63,143.0	\$64,593.6
Ratio: Core to US	1.31	1.31	1.31	1.33
	2009	2010	2011	2012
Total Copyright Industries	\$69,600.3	\$71,426.3	\$73,929.0	\$75,925.9
Total US Compensation	\$59,661.0	\$61,360.2	\$63,143.0	\$64,593.6
Ratio: Total to US	1.17	1.16	1.17	1.18

Compensation data are also reported graphically in Chart 5. The compensation “premium” paid to workers in the copyright industries continued and increased through 2010, 2011, and 2012.

### US COPYRIGHT INDUSTRY COMPENSATION PER EMPLOYEE

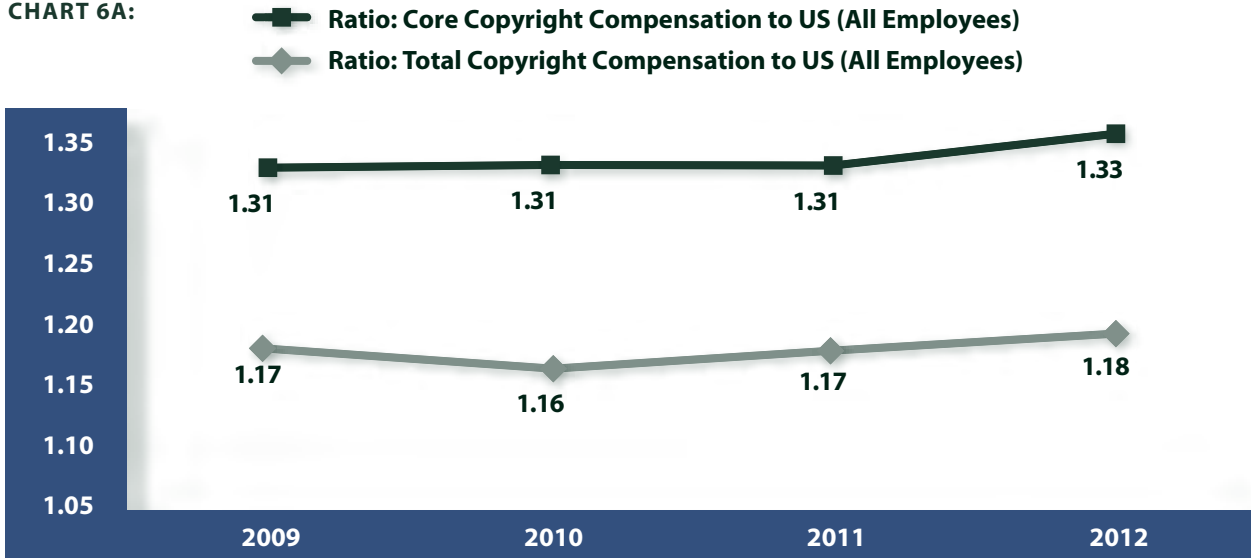
CHART 5:



The compensation premium ratio is also expressed in Chart 6A. As shown in Chart 6A, the average compensation paid to employees in the core and total copyright industries is compared to the average compensation paid to all workers in the United States. For core copyright employees, the compensation premium rose to 33% in 2012. For total copyright employees, the compensation premium rose to 18% in 2012, with its average for the period reported at about 17%. In other words, core copyright employees on average received 33% more compensation than the average U.S. worker in 2012, while total copyright industry employees received about 18% more compensation in 2012.

## US COPYRIGHT INDUSTRY COMPENSATION RATIOS COMPARED TO ALL US EMPLOYEES (1.00=100%)

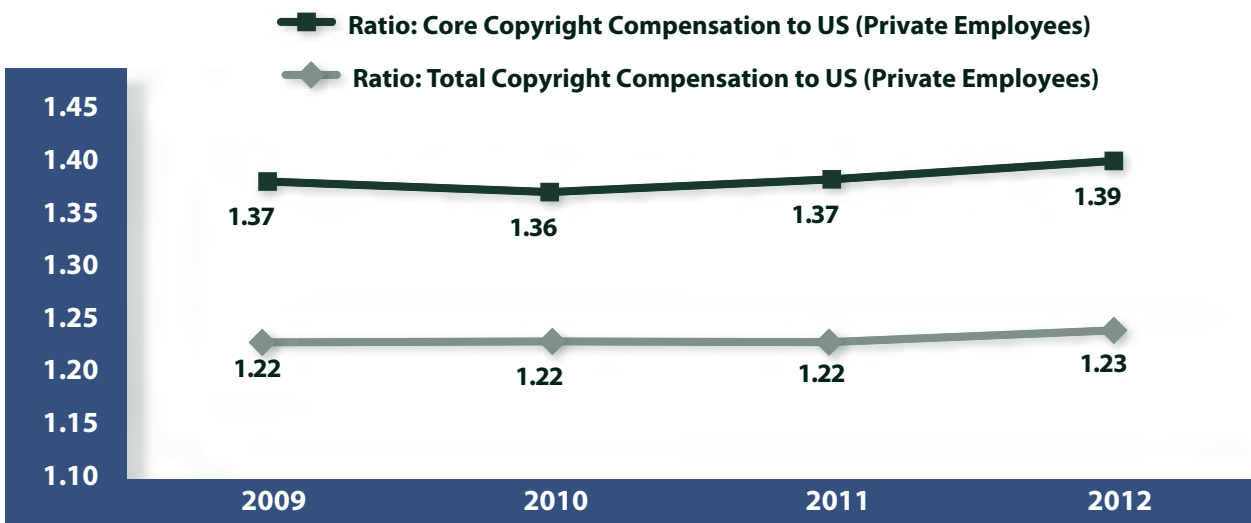
CHART 6A:



As noted, copyright industry workers are paid more than the average U.S. worker in private industry, and the compensation premium is even more pronounced when copyright workers are compared with only private industry workers. As shown in Chart 6B, the compensation paid to workers in the core copyright industries has generally been about 37% higher than the average compensation paid to U.S. private industry employees, and rose to a 39% compensation premium in 2012. Similarly, the compensation paid to workers in the total copyright industries has generally been about 22% higher than the average compensation paid to U.S. private industry employees as a whole, rising to a 23% compensation premium in 2012.

## US COPYRIGHT INDUSTRY COMPENSATION RATIOS COMPARED TO PRIVATE US EMPLOYEES (1.00=100%)

CHART 6B:



## VI. U.S. COPYRIGHT MATERIALS IN WORLD MARKETS

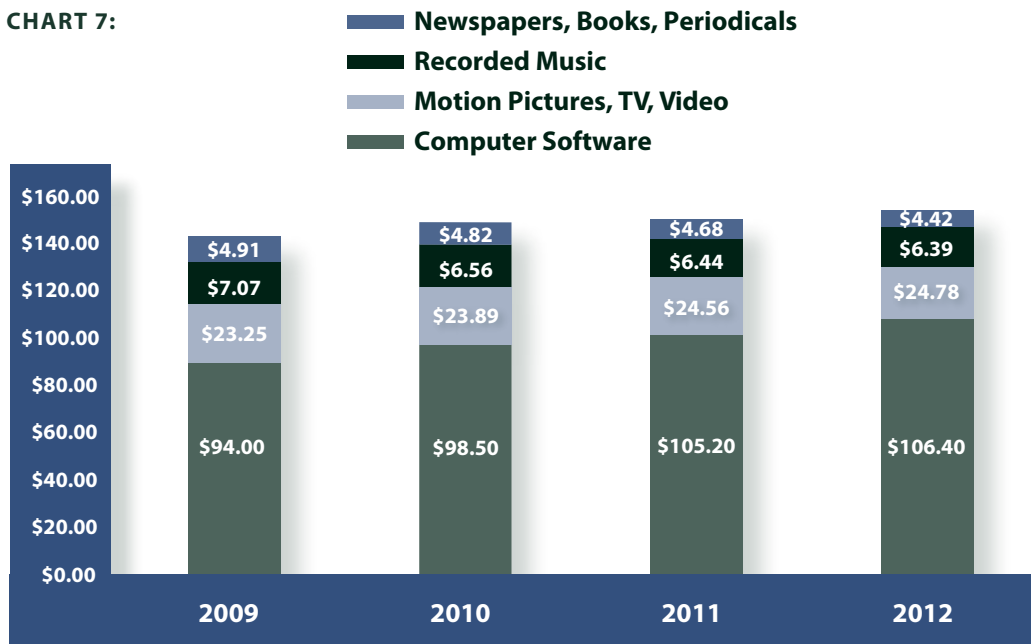
Consumers in non-U.S. markets continue to demand products that embody American creativity. Copyright products that are sold abroad may be manufactured in the U.S. or in foreign markets but, in either case, the creative components of those products are nurtured by the protection afforded under U.S. laws.

As noted in prior reports on these industries, we believe that the U.S. government's statistics on "exports" of copyright products fail to accurately measure the true value of American copyright works sold abroad, particularly in light of the increasing importance of digital trade in legitimate copyright goods and services around the globe. We recognize that, in recent years, efforts have been undertaken to improve the scope of the copyright product export statistics that are gathered in government surveys. For example, the U.S. Census Bureau now reports "Estimated Export Revenue for Employer firms," for a number of the copyright industries including the motion picture industry and the sound recording industry.<sup>12</sup> However, the export statistics reported by Census are substantially lower than foreign market sales figures derived from non-government sources.

As in past reports, we again provide estimates of foreign sales and exports for four selected core copyright industries during the years 2009 through 2012. These core industries are: the sound recording industry, the motion picture industry, the computer software industry, and the non-software publishing industry which includes newspapers, books, and periodicals. For these years, we report total foreign sales for the "selected" core copyright industries of \$129.2 billion in 2009,<sup>13</sup> \$133.8 billion in 2010, \$140.9 billion in 2011, and \$142.0 billion in 2012. In Chart 7, these estimates are disaggregated as among the four copyright industries studied. The underlying figures by industry are also provided in Appendix A, Table A.5.

### 2009-2012 REVENUE GENERATED BY FOREIGN SALES/EXPORTS OF SELECTED COPYRIGHT INDUSTRIES (IN BILLIONS OF DOLLARS)

CHART 7:



<sup>12</sup> See, e.g., U.S. Census Bureau, Information Sector Services (NAICS 51), *Estimated Export Revenue for Employer Firms*.

<sup>13</sup> See *Copyright Industries in The U.S. Economy: The 2011 Report*, Table A.3, page 17.

Annual growth rates for foreign sales of the selected core copyright industries are provided in Table 7. As shown below, foreign sales for these industries increased substantially in 2010 and 2011 but remained essentially flat in 2012.

### ANNUAL GROWTH RATE OF FOREIGN SALES AND EXPORTS

TABLE 7:

	2010	2011	2012
Growth Rate	3.6%	5.3%	0.8%

In addition, the foreign sales/exports of the core copyright industries remain significantly larger than the exports of many other major industry sectors. As reported in Table 8, in 2011, the core copyright industries generated non-U.S. sales of \$140.9 billion, exceeding foreign sales and/or exports for other key sectors of the U.S. economy, including chemicals (excluding pharmaceuticals and medicines), aerospace products and parts, agricultural products, food and kindred products, and pharmaceuticals. In 2012, the core copyright industries generated non-U.S. sales of \$142.0 billion, again out-performing most industry sectors surveyed, including U.S. aerospace exports (\$105.8 billion), U.S. agricultural exports (\$71.1 billion), food (\$64.7 billion), and pharmaceuticals and medicines (\$50.9 billion). By contrast, the U.S. chemical industry (excluding pharmaceuticals and medicines) achieved slightly higher foreign sales of \$146.7 billion in 2012.<sup>14</sup>

### FOREIGN SALES AND EXPORTS FOR SELECTED INDUSTRIES (BILLIONS OF US DOLLARS)

TABLE 8:

	2011	2012
Selected Copyright Industries (Computer Software; Motion Pictures, TV, Video; Recorded Music; Newspapers, Books, Periodicals)	\$140.9	\$142.0
Chemicals (excluding Pharmaceuticals & Medicines)	\$131.6	\$146.7
Aerospace Products & Parts	\$89.4	\$105.8
Agricultural Products	\$72.0	\$71.1
Food and Kindred Products	\$59.9	\$64.7
Pharmaceuticals & Medicines	\$47.9	\$50.9

<sup>14</sup> In this Report, U.S. exports by industry were taken from the International Trade Statistics "Censtats" data base at the U.S. Census Bureau. Export statistics by industry were identified by NAICS code.

## VII. CONCLUSION

The U.S. copyright industries have consistently outperformed the rest of the U.S. economy, in terms of their real annual growth rates and their contributions to the overall growth of the U.S. economy as a whole. These industries also command significant shares of U.S. gross domestic product and they employ millions of U.S. workers. In addition, the average compensation paid to U.S. workers in the copyright industries consistently and substantially exceeds the average compensation level paid to U.S. workers as a whole, and even more significantly exceeds the average compensation paid to U.S. private sector workers. Finally, the copyright industries continue to play a prominent role in the growth of U.S. exports.

Value added in the copyright industries continues to grow. As of 2012, the value added by the core copyright industries exceeded \$1 trillion (\$1,015.6 billion) for the first time, approximately 6.48% of U.S. GDP. In the same year, value added for the total copyright industries stood at well over \$1.7 trillion (\$1,765.2 billion), amounting to 11.25% of GDP. In 2009-2010, 2010-2011, and 2011-2012, the real annual growth rates achieved by both the core and total copyright industries were significantly higher than the real annual growth rates exhibited by the U.S. as a whole.

The U.S. core copyright industries now employ nearly 5.4 million workers while some 11.2 million people are employed by the total copyright industries. The annual compensation paid to core copyright workers now exceeds the average annual compensation paid to all U.S. workers by 33%. The average compensation paid to employees of the total copyright industries exceeds the U.S. average by 18%. Compared with all private sector workers, the compensation premium comes in even higher, at 39% for core copyright industry workers, and 23% for total copyright industry workers.

Sales for U.S. copyright sectors continue to expand in overseas markets. We estimate that total core copyright sales in foreign markets for four major copyright sectors exceeded \$129 billion in 2009, and \$142 billion in 2012. The foreign sales of the copyright industries continue to exceed foreign sales of many other U.S. industries including aerospace, agricultural products, food and kindred products, and pharmaceuticals and medicines.

These consistently positive trends solidify the status of the copyright industries as a key engine of growth for the U.S. economy as a whole. New technologies leading to the development of new distribution methods for legitimate copyrighted products, supported by good laws and enforcement, will allow the U.S. copyright-based industries to enjoy economic growth in the future.

## APPENDIX A: TABLES OF STATISTICS

### CORE COPYRIGHT INDUSTRIES VALUE ADDED TO US GDP

TABLE A.1

<b>Nominal Value Added</b> <i>(Billions of dollars)</i>	<b>2009 Rev.</b>	<b>2010</b>	<b>2011</b>	<b>2012 est.</b>
Core Copyright	\$884.81	\$910.38	\$965.08	\$1,015.64
US GDP	\$13,973.70	\$14,498.90	\$15,075.70	\$15,684.80
Share	6.33%	6.28%	6.40%	6.48%
<b>Real Value Added</b> <i>(Billions of 2005 dollars)</i>	<b>2009 Rev.</b>	<b>2010</b>	<b>2011</b>	<b>2012 est.</b>
Core Copyright	\$864.05	\$900.44	\$955.10	\$992.46
US GDP	\$12,757.90	\$13,063.00	\$13,299.10	\$13,593.20
<b>Annual Growth in Real Value Added</b>	<b>2008-2009</b>	<b>2009-2010</b>	<b>2010-2011</b>	<b>2011-2012</b>
Core	N/A	4.21%	6.07%	3.91%
US GDP	N/A	2.39%	1.81%	2.21%

#### **Compound Annual Growth Rates** *(2009-2010 to 2011-2012)*

Core	4.73%
US GDP	2.14%

**TOTAL COPYRIGHT INDUSTRIES  
VALUE ADDED TO US GDP**

TABLE A.2

<b>Nominal Value Added (Billions of dollars)</b>	<b>2009 Rev.</b>	<b>2010</b>	<b>2011</b>	<b>2012 est.</b>
Total Copyright	\$1,541.63	\$1,596.29	\$1,681.86	1,765.17
US GDP	\$ 13,973.70	\$14,498.90	\$15,075.70	\$15,684.80
Share	11.03%	11.01%	11.16%	11.25%
<b>Real Value Added (Billions of 2005 dollars)</b>	<b>2009 Rev.</b>	<b>2010</b>	<b>2011</b>	<b>2012 est.</b>
Total Copyright	\$1,536.50	\$1,623.55	\$1,704.71	\$1,778.42
US GDP	\$12,757.90	\$13,063.00	\$13,299.10	\$13,593.20
<b>Annual Growth in Real Value Added</b>	<b>2008-2009</b>	<b>2009-2010</b>	<b>2010-2011</b>	<b>2011-2012</b>
Total Copyright	N/A	5.67%	5.00%	4.32%
US GDP	N/A	2.39%	1.81%	2.21%

**Compound Annual Growth Rates  
(2009-2010 to 2011-2012)**

Total	4.99%
US GDP	2.14%

**US COPYRIGHT INDUSTRY EMPLOYMENT (IN THOUSANDS)**

TABLE A.3

<b>Core Copyright</b>	<b>2009 rev.</b>	<b>2010</b>	<b>2011</b>	<b>2012</b>
Core Copyright Employment	5,178.1	5,202.9	5,296.9	5,399.1
Total US Employment	130,859.0	129,911.1	131,499.8	133,736.2
Total Private US Employment	108,306.0	107,420.1	109,408.3	111,822.1
Core Copyright Share of US	3.96%	4.00%	4.03%	4.04%
Core Copyright Share of Private US	4.78%	4.84%	4.84%	4.83%
<b>Total Copyright</b>	<b>2009 rev.</b>	<b>2010</b>	<b>2011</b>	<b>2012</b>
Total Copyright Employment	10,818.5	10,776.9	10,944.1	11,170.9
Total U.S. Employment	130,859.0	129,911.1	131,499.8	133,736.2
Total Private US Employment	108,306.0	107,420.1	109,408.3	111,822.1
Total Copyright Share of US	8.27%	8.30%	8.32%	8.35%
Total Copyright Share of Private US	9.99%	10.03%	10.00%	9.99%

## US COPYRIGHT INDUSTRY COMPENSATION PER EMPLOYEE (DOLLARS)

TABLE A.4

<b>Core Copyright</b>	<b>2009 rev.</b>	<b>2010</b>	<b>2011</b>	<b>2012</b>
Core Copyright Compensation/Employee	\$78,199.87	\$80,102.73	\$82,950.54	\$85,643.97
Average US Compensation/Employee	\$59,661.00	\$61,360.20	\$63,143.00	\$64,593.60
Average Private US Compensation/ Employee	\$57,021.60	\$58,736.80	\$60,417.20	\$61,805.10
Ratio: Core Copyright Compensation to US	1.31	1.31	1.31	1.33
Ratio: Core Copyright Compensation to Private US	1.37	1.36	1.37	1.39
<b>Total Copyright</b>	<b>2009 rev.</b>	<b>2010</b>	<b>2011</b>	<b>2012</b>
Total Copyright Compensation / Employee	\$69,600.33	\$71,426.30	\$73,929.02	\$75,925.92
Average US Compensation / Employee	\$59,661.00	\$61,360.20	\$63,143.00	\$64,593.60
Average Private US Compensation / Employee	\$57,021.60	\$58,736.80	\$60,417.20	\$61,805.10
Ratio: Total Copyright Compensation to US	1.17	1.16	1.17	1.18
Ratio: Total Copyright Compensation to Private US	1.22	1.22	1.22	1.23

## 2009-2012 REVENUE GENERATED BY FOREIGN SALES/EXPORTS OF SELECTED US CORE COPYRIGHT INDUSTRIES (BILLIONS OF DOLLARS)

TABLE A.5

<b>Industry</b>	<b>2009 Rev.</b>	<b>2010</b>	<b>2011</b>	<b>2012</b>
Recorded Music	\$7.07	\$6.56	\$6.44	\$6.39
Motion Pictures, TV, Video	\$23.25	\$23.89	\$24.56	\$24.78
Computer Software	\$94.00	\$98.50	\$105.20	\$106.40
Newspapers, Books, Periodicals	\$4.91	\$4.82	\$4.68	\$4.42
<b>Total for Selected Industries</b>	<b>\$129.2</b>	<b>\$133.8</b>	<b>\$140.9</b>	<b>\$142.0</b>



## APPENDIX B: BEA'S REVISIONS IN TREATMENT OF ENTERTAINMENT EXPENDITURES

### *Introduction*

In July 2013, the U.S. Bureau of Economic Analysis ("BEA") announced changes in how it accounts for the costs of producing "artistic originals" in the determination of U.S. Gross Domestic Product ("GDP"), classifying them as an investment as opposed to current expenditures. Artistic originals include "books, movies, TV shows, music, photographs and greeting cards..."<sup>15</sup> The revisions have been undertaken as part of the BEA's 14<sup>th</sup> comprehensive revision of the U.S. national income and product accounts.

Historically, industry expenditures for entertainment, literary and artistic "originals" have been recorded as intermediate inputs used up during the production of other goods. Because the costs of these originals were treated as intermediate inputs, they were not included in U.S. GDP. From an end-user viewpoint however, these costs were recovered as part of the ticket sales, DVD sales and rental fees that the entertainment industries charged to view the final creative product.

In accord with its 14<sup>th</sup> comprehensive revision, the BEA now treats the costs of certain artistic originals not as current expenditures but rather as long-lived investments. In BEA's view, "These expenditures have many characteristics of other fixed assets – ownership rights can be established – and they are long lasting and used repeatedly in production processes."<sup>16</sup>

### *Measurement Process*

In order to implement the proposed revisions, BEA is adopting the following procedure. First, BEA is estimating the total current period revenue from licensing fees, merchandise sales, ticket sales, and other revenue generating activities for the industries producing the assets.<sup>17</sup> Second, the value of sales costs – such as advertising, manufacturing of reproductions, and other marketing type costs – are subtracted from the total current period revenues to derive net revenue values. Third, these net revenue values are adjusted further to include only the revenue from the release of new works (that is "originals") using BEA-derived investment values.

In the final step of the analysis, BEA is making use of Net Present Value ("NVP") ratios to complete its valuations of these assets. BEA assumes a seven percent (7%) real discount rate for all asset types and is applying an NPV adjustment factor, a ratio that represents the average NPV-to-current period revenues from new works, to current year revenues. This procedure permits BEA to derive estimates of the net current investments made by businesses in entertainment originals for any given year.<sup>18</sup>

As part of this process, BEA must also determine the appropriate service lives and depreciation rates to apply to particular entertainment investments over time. BEA estimates applying the following annual depreciation rates to specific types of entertainment assets: motion pictures – 3.8%; television programs – 16.8%; music – 26.7%; books – 12.1%; and theatrical play scripts, greeting card designs and stock photography – 10.9%.<sup>19</sup>

<sup>15</sup> Somer, Jeff, *Getting Creative with the GDP*, <http://www.nytimes.com/2013/07/28/>.

<sup>16</sup> See *BEA Expands Coverage of Intellectual Property Products*, [www.bea.gov/gdp-revisions](http://www.bea.gov/gdp-revisions).

<sup>17</sup> See *Preview of the 2013 Comprehensive Revision of the National Income and Product Accounts*, March 2013, P. 19.

<sup>18</sup> *Id.* page 19.

<sup>19</sup> *Id.*

## Initial Results

Based on the methodology described above, BEA developed estimates of the net current investment values of long-lived entertainment, literary and other artistic originals in 2007.<sup>20</sup> The industries analyzed by BEA included theatrical movies, television programs, books, music and miscellaneous entertainment. The miscellaneous category included three types of long-lived entertainment: theatrical play scripts, greeting card designs and commercial stock photography.

Recalculating its previous treatment of “artistic originals,” BEA concluded that its new methodology for these products results in an increase in U.S. GDP of \$70.6 billion in 2007. This figure represents the “current period investment value of the future revenue streams” associated with new entertainment, literary and other artistic originals. Within this total, BEA derived separate investment values for theatrical movies, television programs, books, music and miscellaneous entertainment.

At this writing, BEA has not yet made use of the methodology described above to produce revised estimates of annual GDP by industry. Indications are that applying its methodology would result in increases in the contribution of industries associated with “artistic originals.” BEA is expected to publish revised estimates of annual value added by industry in December 2013. However, given the lack of revised data to date, the U.S. copyright industry results presented in this *Report* do not reflect the possible effect of the BEA capitalization procedures.

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<sup>20</sup> BEA also developed estimates of the value of long-lived investments made in software. BEA estimated that U.S. businesses and governments invested \$278 billion in long-lived software assets in 2007.

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# Copyright Industries in the U.S. Economy: The 2013 Report



INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE<sup>®</sup>

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IIPA request to testify and written testimony regarding China's  
compliance with its WTO commitments (2014)

# INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE®



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September 17, 2014

## Filed Via Regulations.gov, Docket USTR–2014–0015

Douglas M. Bell  
Chair, Trade Policy Staff Committee  
Office of the United States Trade Representative  
1724 F Street, NW  
Washington, DC 20508

Re: **China's WTO Compliance** - Notification of Intent to Testify and Testimony Re:  
"Request for Comments and Notice of Public Hearing Concerning China's  
Compliance With WTO Commitments" (79 Fed. Reg. 48291, August 15, 2014)

To the Trade Policy Staff Committee:

This written notification responds to the TPSC's Request for Comments and Notice of Public Hearing Concerning China's Compliance With WTO Commitments. The request requires persons wishing to testify orally at a hearing that will be held in Washington, DC on Wednesday, October 1, 2014, to provide written notification of their intention, a summary of their testimony, as well as a copy of their testimony, the latter which is attached hereto.

### **Notice of Request to Testify**

We hereby notify the TPSC that the following person wishes to testify orally at the above-referenced hearing on behalf of the International Intellectual Property Alliance (IIPA):

Michael Schlesinger  
International Intellectual Property Alliance  
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### **Summary of Testimony**

IIPA will use its five minutes of oral testimony to indicate progress in China's enforcement infrastructure to address certain egregious cases of copyright infringement, and a maturing legal and court system. At the same time, the market in China for legitimate creative sectors, including movies and television content, music, publishing, and video games, remains stunted. The under-performance of these industries is at least partially attributable to the continued inability of authorities to systematically and significantly reduce infringement levels. In addition, certain market access restrictions continue to hinder the creative industries from fully enjoying the growing Chinese



market. Some of the deficiencies outlined herein implicate certain of China's obligations under World Trade Organization rules, and call for further reforms and market-opening measures in China.

IIPA members hope for several important changes by the Chinese Government in the coming year:

1) follow-through with current Joint Commission on Commerce and Trade (JCCT) and Strategic & Economic Dialogue (S&ED) commitments to:

- a) fully implement the 2012 *Network Rules* (Network JIs) to significantly reduce incidents of Internet infringements, including by holding liable businesses that promote online infringement and sites that do not expeditiously remove or deal with infringing materials made available through the sites; and
- b) resolve the longstanding complaint regarding entities engaged in unauthorized copying and distribution of academic, scientific, technical and medical journals (cooperation has been forthcoming in recent months and IIPA and AAP are grateful for the support of authorities; however, while the complaint remains unresolved, new online services facilitating traffic in infringing copies of journal articles threaten the professional publishing market yet again).

2) enactment of a modern copyright (and related) regime, including through amendments to the Copyright Law of the People's Republic of China.

3) meaningful implementation of the WTO cases on intellectual property rights and market access, to provide creators with access to the Chinese markets for their goods and services,<sup>1</sup> and continued progress in implementing the U.S.-China Film Agreement.

4) establishment of strong legal measures and remedies including criminal (with lower thresholds) to address traditional piracy and emerging issues such as circumvention of TPMs, "media box" piracy, and unauthorized camcording.

IIPA believes that these steps are crucial components to a successful U.S. trade and economic policy with China. During the 2012 S&ED, China recognized the importance of increasing sales of legitimate IP-intensive products and services in line with China's status as a globally significant consumer of these goods. This was an important recognition by the Chinese Government that real progress on IP protection and enforcement must be measured based on whether there have been significant increases in sales of copyright and other IP-intensive products. For IIPA members, this has yet to be realized. We urge that increased sales of IP-intensive products and services continue to be used as the benchmark of progress in bilateral negotiations with China on IP issues. Thus, we believe it is imperative that progress in China be measured based on results related to legitimate industry sales in the country. We appreciate the efforts already underway by the U.S. Government to develop appropriate sales metrics to measure progress on key commitments and ensure they translate into tangible results for U.S. industries and U.S. economic and job growth.

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<sup>1</sup> This would include confirming the restriction on "exclusive licensees" for online music distribution has been lifted.



We thank the TPSC for allowing us the opportunity to testify in this proceeding.

Respectfully submitted,

Michael Schlesinger  
International Intellectual Property Alliance

Attachments: 1 – IIPA Testimony  
2 – IIPA 2014 Special 301 Country Report on China



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## TESTIMONY OF MICHAEL SCHLESINGER INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

### PUBLIC HEARING CONCERNING CHINA'S COMPLIANCE WITH WTO COMMITMENTS

TO BE DELIVERED WEDNESDAY, OCTOBER 1, 2014  
BEFORE THE TRADE POLICY STAFF COMMITTEE  
WASHINGTON, DC



Good morning. My name is Michael Schlesinger, and I appreciate the opportunity to appear on behalf of the International Intellectual Property Alliance (IIPA) – a coalition of six member associations each of which represents a significant segment of the U.S. copyright industries.<sup>2</sup>

### **Summary of Testimony**

This year, IIPA notes some progress in China's enforcement infrastructure to address certain egregious cases of copyright infringement, and a maturing legal and court system.<sup>3</sup> At the same time, the market in China for legitimate creative sectors, including movies and television content, music, publishing, and video games, remains stunted. The under-performance of these industries is at least partially attributable to the continued inability of authorities to systematically and significantly reduce infringement levels. In addition, certain market access restrictions continue to hinder the creative industries from fully enjoying the growing Chinese market. Some of the deficiencies outlined herein may implicate China's obligations under World Trade Organization rules, and call for further reforms and market-opening measures in China.

IIPA members hope for several important changes by the Chinese Government in the coming year:

1) follow-through with current Joint Commission on Commerce and Trade (JCCT) and Strategic & Economic Dialogue (S&ED) commitments to:

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<sup>2</sup> The IIPA is a private sector coalition, formed in 1984, of trade associations representing U.S. copyright-based industries in bilateral and multilateral efforts working to improve international protection and enforcement of copyrighted materials and open up foreign markets closed by piracy and other market access barriers. IIPA's six member associations represent over 3,200 U.S. companies producing and distributing materials protected by copyright laws throughout the world—all types of computer and video games for video game consoles, personal computers, and the Internet; theatrical films, television programs, DVDs and home video and digital representations of audiovisual works; music, records, CDs, and audiocassettes; and fiction and non-fiction books, education instructional and assessment materials, and professional and scholarly journals, databases and software in all formats. Visit [www.iipa.com](http://www.iipa.com). Members of the IIPA include [Association of American Publishers](#), [Entertainment Software Association](#), [Independent Film & Television Alliance](#), [Motion Picture Association of America](#), [National Music Publishers' Association](#), and [Recording Industry Association of America](#). In November 2013, IIPA released the latest update of the comprehensive economic report, *Copyright Industries in the U.S. Economy: The 2013 Report*, prepared by Stephen Siwek of Economists Inc. The study, which tracks the economic impact and contributions of U.S. industries creating, producing, distributing, broadcasting or exhibiting copyright materials, including videogames, books, newspapers, periodicals and journals, motion pictures, music, and radio and television programming, found that, for the first time, the "core" copyright industries (those whose primary purpose is to create, produce, distribute, or exhibit copyright materials) added over \$1 trillion in value to the U.S. economy in a single year. This accounts for almost 6.5% of the total U.S. gross domestic product (GDP) and nearly 5.4 million U.S. workers with jobs paying an average of 33% more than the rest of the workforce. They also grew at an aggregate annual rate of 4.7%, more than twice the rate of growth for the U.S. economy. The core copyright industries accounted for \$142 billion in foreign sales and exports, far more than sectors such as aerospace, agriculture, food, and pharmaceuticals and medicines. See Stephen E. Siwek, *Copyright Industries in the U.S. Economy: The 2013 Report*, November 19, 2013. The report, summary, and infographic can be accessed at [http://www.iipa.com/copyright\\_us\\_economy.html](http://www.iipa.com/copyright_us_economy.html).

<sup>3</sup> Recent positive developments include the decision to test self content-review of music in 2014 by licensed online music distributors, the December 2013 decision to partially open the market in the Shanghai Free Trade Zone to foreign investment (which will hopefully allow the introduction of game consoles and ease restrictions on foreign online music distribution in China), and the recent strict enforcement against Kuaibo Technology and the shutting down of peer-to-peer (P2P) video player and download service *QVOD*.



- a) fully implement the 2012 *Network Rules* (Network JIs) to significantly reduce incidents of Internet infringements, including by holding liable businesses that promote online infringement and sites that do not expeditiously remove or deal with infringing materials made available through the sites; and
  - b) resolve the longstanding complaint regarding entities engaged in unauthorized copying and distribution of academic, scientific, technical and medical journals (cooperation has been forthcoming in recent months and IIPA and AAP are grateful for the support of authorities; however, while the complaint remains unresolved, new online services facilitating traffic in infringing copies of journal articles threaten the professional publishing market yet again).
- 2) enactment of a modern copyright (and related) regime, including through amendments to the Copyright Law of the People's Republic of China.
  - 3) meaningful implementation of the WTO cases on intellectual property rights and market access, to provide creators with access to the Chinese markets for their goods and services,<sup>4</sup> and continued progress in implementing the U.S.-China Film Agreement.
  - 4) establishment of strong legal measures and remedies including criminal (with lower thresholds) to address traditional piracy and emerging issues such as circumvention of TPMs, "media box" piracy, and unauthorized camcording.

IIPA believes that these steps are crucial components to a successful U.S. trade and economic policy with China. During the 2012 S&ED, China recognized the importance of increasing sales of legitimate IP-intensive products and services in line with China's status as a globally significant consumer of these goods. This was an important recognition by the Chinese Government that real progress on IP protection and enforcement must be measured based on whether there have been significant increases in sales of copyright and other IP-intensive products. For IIPA members, this has yet to be realized. We urge that increased sales of IP-intensive products and services continue to be used as the benchmark of progress in bilateral negotiations with China on IP issues. Thus, we believe it is imperative that progress in China be measured based on results related to legitimate industry sales in the country. We appreciate the efforts already underway by the U.S. Government to develop appropriate sales metrics to measure progress on key commitments and ensure they translate into tangible results for U.S. industries and U.S. economic and job growth.

Previous testimony has well documented the challenges faced by the movie, music, publishing, and entertainment software industries, and the 2014 IIPA Special 301 report survey on China (which appears as an appendix to our testimony for the record) provides details on the

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<sup>4</sup> This would include confirming the restriction on "exclusive licensees" for online music distribution has been lifted.



situation as it stood in February 2014.<sup>5</sup> The following discussion highlights both potential WTO compliance issues in China, and how addressing the key areas of change noted above can secure positive commercial gains for the creative industries going forward, which remains the ultimate goal of IIPA members' efforts in China.

## ***1. Following Through on China's JCCT and S&ED Commitments***

The JCCT and S&ED have played an important role in securing commitments from China on issues of importance to IIPA members. Addressing the issues discussed below will ensure that right holders can operate in China on a more level playing field with Chinese counterparts and would bring significant commercial benefits to affected U.S. companies trying to do business in China.

### ***Full Implementation of Judicial Interpretation to Significantly Reduce Incidents of Internet Infringements***

On November 26, 2012, the Supreme People's Court (SPC) issued long-awaited *Judicial Rules on Several Issues concerning the application of Law in Hearing Civil Dispute Cases Involving Infringement of the Right to Network Dissemination of Information* (Network JIs), which went into force January 1, 2013. The Network JIs aim to improve the existing legal framework on the protection of online (information network) dissemination rights provided for in the Copyright law and in State Council regulations. The Network JIs provide relatively clear guidance for courts as to how to deal with ISP liability issues in civil cases. Full implementation of the *Network JIs* is necessary for ensuring that service providers are: 1) subject to clear secondary liability rules, including in cases of willful blindness; 2) obligated to respond in a timely manner to takedown notices; and 3) incentivized to take action against repeat infringers.

The Chinese Government has begun taking actions to reduce incidents of Internet infringements. Positive developments include: enforcement action in April 2014 against Kuaibo Technology and the shutting down of its service *QVOD*; the shuttering of Xunlei's *GouGou* service in 2013; the criminal conviction against the founder of the *7yin* service; the results of the "2013 Special Campaign for the Crackdown on Internet Piracy," in which *Baidu Player* (v.baidu.com) and *QVOD* were ordered to cease operations and fined; and the decisions of a Beijing court holding liable P2P streaming video network and video on demand (VOD) company Beijing Funshion Online Technology Co., Ltd., owners of the website *Funshion*.

Still, the overall response lacks a comprehensiveness needed to drive illegal activities out of the market and foster the growth of legitimate services to their full potential in China. Hundreds of illegal online streaming sites remain in operation, e.g., decimating the music market, and harming all right holders. Maximum administrative penalties (drawing on a 2009 JCCT commitment) including daily fines for any service failing to remove infringing materials

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<sup>5</sup> Please note that effective July 1, 2014, BSA | The Software Alliance is no longer a member of IIPA. For updates or additional information dealt with in the 2014 IIPA Special 301 report on China, please refer to BSA.



would be helpful in seeking to drive infringement out of the online space. Also of help would be increased actions by the State Administration of Press, Publication, Radio, Film and Television (SAPPRFT), the Ministry of Culture (MOC), and the Ministry of Industry and Information Technology (MIIT) to revoke business licenses and halt online services by enterprises that deal in/provide access to infringing materials.

The Supreme People's Procuratorate remains reluctant to prosecute due to concerns about adequacy of evidence to meet the thresholds for criminal liability (i.e., they cite the lack of hard evidence on ISP servers related to P2P streaming). Thus, there remains a need to address thresholds so that non-hosted online services such as P2P streaming services can no longer escape liability. One step IIPA has noted would be helpful is the establishment of a voluntary government-backed online copyright bulletin board to enhance "pre-release" administrative enforcement for motion pictures, sound recordings, and other works.

### ***Addressing Unauthorized Copying and Distribution of Journals***

China must follow through with JCCT commitments to resolve the longstanding complaint regarding entities engaged in unauthorized copying and distribution of academic, scientific, technical and medical (STM) journals. An investigation remains ongoing into a major online service facilitating online infringement of academic and STM journals. IIPA and AAP appreciate the cooperation received to date to address this case. It is hoped that a satisfactory remedy will be achieved and effective measures adopted to prevent the emergence of similar services. As the case remains unresolved, new online services that facilitate traffic in infringing copies of journal articles are again threatening the professional publishing market. Thus far, there has not been an adequate response to these multiple threats. These services, such as *Baidu Wenku*, *Sina*, and *Docin*, employ "digital coin" systems, whereby coins earned through uploading documents may be used to "purchase" English language and Chinese translations of trade books, textbooks, and journals for download. These sharing services have ineffective notice and takedown processes for reporting and addressing infringements. Other online services provide unauthorized access to proprietary databases through the sale of login credentials or information from the databases themselves. Finally, there remains no framework under which libraries will be subject to review for compliance with the requirements of a 2009 public "Notice" (conveying to state-run libraries the importance of strengthening protection of copyright-protected academic and medical journals).

### ***Increase Government Resources and Permit Staffing Increases in Foreign Right Holder Organizations***

China has established a Vice Premier-led State Council-level leadership structure, to lead and coordinate IPR enforcement across China. This leadership structure should be employed to follow through on commitments to enhance crackdowns on IPR infringements, including by increasing available resources to all government organs responsible for copyright, holding local



provincial governments accountable,<sup>6</sup> and effectively and measurably reducing piracy levels both in the physical and online environments, including Internet and mobile piracy. An important measure of continued success in enforcement by the Chinese Government should include establishment of a central authority responsible for compiling statistics of ongoing and completed civil, administrative, or criminal enforcement actions and cases involving copyright infringement, and providing those statistics to the U.S. Government and affected stakeholders.

In addition, it has been well documented for many years that NCAC, local copyright administrations and Law and Cultural Enforcement Administrations (LCEAs) have been under-resourced. A simple comparison of human resources at SAIC and local AICs demonstrates the gap in coverage for copyright enforcement in China. Along with inadequate resources within Chinese Government agencies responsible for enforcement of copyright, for many years, foreign copyright associations have been prohibited from properly staffing their offices in order to assist authorities in combating copyright infringements in China. These resource issues should be remedied.

## **2. *Enacting Modern Copyright Law (and Related Measures) to Strengthen Protection and Remedies Against All Forms of Infringement***

The Chinese Government is currently in the process of revising its Copyright Law, Criminal Code, and related laws. The review process provides an important opportunity to update the legal regime in China for more effective copyright protection and enforcement. The draft overhaul of the Copyright Law currently sits with the State Council Legislative Affairs Office (SCLAO). IIPA provided comments to SCLAO (with copies to NCAC) in July 2014. The current draft would establish a framework for cooperation to remove online infringements, specifically, by adopting principles of potential joint liability of service providers that knowingly and actively encourage infringement, including the creation of aiding and abetting-type liability for services that abet or instigate infringements (presumably including non-hosted infringements) of third parties. In so doing, the law may make it possible to efficiently remove infringing materials from the Internet as well as halt people from engaging in massive infringements, but much will depend on the implementation of these measures.

Other important topics are taken up in the draft Copyright Law revision. Some of the current proposals may require minor revisions before enactment to avoid conflicts with China's WTO obligations, or inconsistencies with current international or best commercial practices.<sup>7</sup> IIPA has identified the below areas worthy of special attention in the current proposal.

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<sup>6</sup> On November 9, 2010, the State Council issued *Opinions of the State Council on Strengthening the Building of a Government Ruled by Law*. The State Council then announced that it would implement mechanisms, including transparent performance indicators, to hold local government officials responsible for effectively enforcing IP violations.

<sup>7</sup> As an example of proposed measures which would interfere with current commercial practices, the collective management provisions of the latest Draft Copyright Law remain concerning. First, they appear to allow CMOs to assert the authority to manage "the entire body of right owners to exercise the copyright and related rights with respect to public dissemination of works of music or audiovisual works or other use of works through self-assisted Karaoke systems" on a nationwide level, unless the right holder opts out in writing. Such extended collective management (ECM) has only been adopted in a few jurisdictions that have significant and lengthy experience with CMOs. The current draft language does not specify how many right holders must



- Ensuring the law retains flexibility to provide effective administrative and criminal remedies (beyond the express prohibitions in Articles 217 and 218 of the Criminal Law), including technological protection measures (TPMs) and rights management information (RMI) violations, pay TV signal theft, and unauthorized camcording.
- Ensuring TPMs protections cover all access controls, cover TPM “technologies” and prohibit circumvention “technologies,” contain a seizure remedy, and do not create overly broad exceptions.
- Confirming expressly the protection of temporary reproductions.
- Confirming WCT- and WPPT-compatible communication to the public and “making available” rights, including exclusive “making available” rights as to related rights, and rights of remuneration as to broadcasts and public performances of sound recordings.
- Confirming rights in original live broadcasts as audiovisual works.
- Ensuring presumptions of ownership and subsistence of copyright are afforded.
- Ensuring collective management structures do not entail mandated state controls and retain voluntary (opt-in), open and transparent, and inclusive operating structures.
- Permitting authorities to use evidence obtained in administrative enforcement, ensuring right holders have a right to information and to appeal administrative decisions, and ensuring investigative authority is not used to harass the injured right holder.
- Ensuring the availability of *ex parte* relief, preservation orders issued within 48 hours of application, and appealable written decisions from applications for such relief or order.
- Ensuring costs of litigation and attorney’s fees are fully recoverable.
- Prohibiting the use of an audiovisual recording device in a cinema to make or transmit part or whole of an audiovisual work.
- Prohibiting the trafficking in encrypted satellite or cable signals, the receipt and use of unauthorized decrypted signals, and the further unauthorized distribution of decrypted signals.
- Narrowing the software “decompilation” exception to only that part indispensable to achieving compatibility (interoperability).
- Harmonizing remedies available against unauthorized use of computer programs.
- Ensuring “orphan works” proposal preserves injunctive relief and reasonable compensation, requires “diligent search in good faith” for the owner, specifies the range of permissible uses, and the remedies available to a copyright owner that emerges.
- Ensuring the broadcast statutory license does not go beyond that permitted by the Berne Convention.

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authorize it or provide any criteria for determining whether a particular organization can “represent nationwide the interests of the right owners.” The presumption should be reversed by requiring right holders to opt in if they wish. Second, they appear to mandate a joint “unified standard of royalty fee.” CMOs acting on behalf of different categories of right holders should remain free to collect their remuneration separately. Draft Article 65 creates a default presumption that the “unified standard of royalty fee” will be collected by a joint CMO, which is not in line with current best practice. Finally, they appears to limit the damages which can be awarded to right holders for rights administered by CMOs but in which the right holder has not chosen to use a CMO. To the extent compensation to such a right holder is limited to “the fee standard of the relevant collective copyright management,” this would impinge on the ability of right holders not employing a CMO from exercising and enjoying their rights.



- Ensuring that proposed exceptions to and limitations on copyright are adequately defined and appropriately narrow in scope.
- Re-inserting the word “written” to appropriately narrow the personal study and research exception.
- Extending copyright term to life of the author plus 70 years, or 95 years for works and sound recordings whose term is calculated from publication.
- Ensuring the requirement to register a license is not enforced to create a prohibited formality.

Several other issues should be addressed when engaging in copyright reform that would significantly improve available protection and enforcement in China. For example, the law should also be amended to lift the jurisdictional bar limiting foreign right holders from commencing a private “civil claim” against those being prosecuted for copyright crimes in local district courts.

### ***3. Meaningfully Implementing the WTO Cases Brought Against China (Including the 2012 China-U.S. Film Agreement)***

The dominance of piracy and market access barriers (which are well documented in detail in previous IIPA submissions) led certain sectors of the creative industries to conclude in 2007 that the best alternative to seek redress was through the WTO dispute settlement process. As a result, two WTO cases were launched, one focused on IPR inadequacies, and one focused on deficiencies in China’s compliance with its WTO commitments on market access for published materials and audio and audiovisual entertainment products. In 2009, both cases concluded, with a WTO dispute settlement Panel rendering its decision in the IPR case in January 2009, and with the WTO Appellate Body rendering its decision in the market access case in December 2009. In both cases, the U.S. largely prevailed, but evaluation of success will be based on the details of implementation. The IPR case (DS 362) has largely been implemented in China, with, e.g., legal changes designed to ensure copyright materials are protected regardless of the nature of the subject matter. While there was insufficient evidence to determine whether China’s 500-copy criminal threshold covers all “piracy on a commercial scale,” the WTO Panel set out a helpful market-based test to determine “commercial scale.” China must be fully subjected to this market-based test, which we believe requires China to examine and lower its current thresholds for criminal liability, in order to criminalize all “copyright piracy on a commercial scale” as required by TRIPS Article 61.

#### ***Market Access Case***

In the landmark market access case (DS 363),<sup>8</sup> the United States prevailed on many claims against China’s regime restricting the importation (trading rights) and distribution of publications, sound recordings, audiovisual home entertainment, and films for theatrical release.

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<sup>8</sup> *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WT/DS363/AB/R, December 21, 2009. The U.S. Government requested consultations in this case on April 10, 2007, supported by the China Copyright Alliance (a coalition consisting of MPAA, IFTA, RIAA/IFPI, AAP, and others).





As a result of the case, China must:

- 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 books and periodicals, electronic publications, audiovisual materials and sound recordings, including through sound recording distribution services and electronic distribution products in China.<sup>9</sup>
- discard discriminatory commercial hurdles for imported reading materials, sound recordings intended for electronic distribution, and films for theatrical release.<sup>10</sup>

In early 2012, a newly revised version of the Foreign Investment Industries Guidance Catalogue went into effect on January 30, 2012, moving importation of “books, newspapers and periodicals,” as well as “audio-visual products,” “electronic publications,” and online music, off of the “prohibited” investment list (although audio-visual products remain on the “restricted” list). In this WTO review, IIPA urges the U.S. Government to ascertain what steps the Chinese Government has taken to ease other WTO-incompatible restrictions and take other market-opening steps. There remain many technical violations of WTO rules along the lines of the Appellate Body Report.<sup>11</sup>

### ***U.S.-China Film Agreement***

For the audiovisual industry, commercially meaningful implementation of the WTO market access case includes implementation of the landmark 2012 U.S.-China Film Agreement, and addressing problems arising since that Agreement. The Agreement has led to increased numbers of films distributed theatrically in China on a revenue-sharing basis, leading to

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<sup>9</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>10</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. China may also not prohibit foreign-invested enterprises from engaging in the distribution of imported reading materials.

<sup>11</sup> For example, IIPA would be interested to know how Chinese laws have been changed to allow U.S. companies to import freely into China (without going through the government monopoly) films for theatrical release, DVDs, and sound recordings; how Chinese laws have been amended to ease commercial presence requirements for the distribution of DVDs and do away with China’s 15-year operating term limitation on foreign joint ventures; and how Chinese laws discard discriminatory commercial hurdles for imported sound recordings intended for electronic distribution and films for theatrical release. Other technical violations – some of which have been addressed through changes to laws and regulations – are detailed in previous IIPA submissions and testimony.



increased revenues for major film companies in China. This progress is tempered by the fact that so few imported films are able to secure quota slots, and films that do not share in the box office revenue still meet insurmountable boundaries and lack of distribution options due to the dominant incumbent SOEs in the market, China Film Group and Huaxia. Thus, the majority of film producers still have very limited export opportunities in China. Access they do have is through intermediaries that must navigate a largely non-transparent marketplace. Further, national distribution of imported films remains mostly dominated by two state-owned enterprises (SOEs).

In addition to renegotiating the Master Contract which governs theatrical releases in China (and which reportedly is under discussion), China should immediately begin to actively promote and approve Chinese companies to engage in national distribution of theatrical films. This includes promulgating transparent business practices in which incumbents work transparently with private Chinese enterprise to coordinate importation of films (both revenue sharing and non-revenue sharing films) so that those private companies can engage unfettered in the national distribution of imported films as envisioned in Paragraphs 4 through 8 of the Agreement. Other helpful steps would include greater transparency in the censorship process for films and, e.g., the elimination of arbitrarily declared special periods of protection for domestic films that interfere with the marketing and distribution of imported and local films alike. A newly proposed centralized ticketing system may create more transparency, but also may be a new cause of concern for the strengthening of the Chinese Government's influence on the theatrical marketplace.

#### ***Free Choice of Licensees in the Online Music Market***

The MOC *Circular on Strengthening and Improving Online Music Content Examination* contains a restriction requiring foreign music companies to appoint an "exclusive licensee" in China for distribution in conjunction with budding legitimate online music services. In 2013, the Chinese Government has verbally indicated that it is no longer necessary to appoint an exclusive licensee for online music distribution. This is a positive sign. However, to avoid any uncertainty, the Chinese Government should formally revoke this requirement.

#### ***4. Establishing Strong Legal Measures and Remedies Including Criminal (With Lower Thresholds) to Address Traditional Piracy and Emerging Threats Such As Circumvention of TPMs, "Media Box" Piracy, and Unauthorized Camcording***

To significantly reduce piracy and ensure China is meeting its TRIPS Article 61 requirement to criminalize at least all piracy on a commercial scale, the Chinese Government must send a strong message that all forms of piracy (including Internet and hard goods, especially focusing on "pre-release" piracy),<sup>12</sup> as well as emerging threats, will not be tolerated and will be subject to deterrent enforcement action. This can best be achieved by ensuring

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<sup>12</sup> "Pre-release" piracy consists of movies, music, games, or books or journals not yet released through legitimate channels, that find their way into the market illegally.



criminalization of all copyright infringements,<sup>13</sup> as well as violations involving the act of circumvention of technological protection measures, and trafficking in circumvention technologies and services, engaging in or facilitating infringement through the use of “media boxes,” and unauthorized camcording of motion pictures. Unfortunately, while Criminal Law reform appears to be fast-tracked in China, the latest information suggests changes to the intellectual property provisions of the Criminal Law (e.g., Articles 217 and 218 and accompanying JIs) and other related provisions may not be considered. This would be a major missed opportunity. Remaining gaps include:

- Thresholds that are too high (in the case of illegal income) or unclear (e.g., in the case of the 500-copy threshold).
- Leaving some critical commercial scale infringements without a criminal remedy because of the requirement to show that the infringement is carried out “for the purpose of making profits,” an undefined phrase. It is often difficult for law enforcement authorities or right holders to prove that the infringer is operating for the purpose of making profits in cases of Internet piracy, for example.
- Failure to cover all acts of piracy on a commercial scale as required by TRIPS Article 61. For example, acts that Chinese law fails to expressly criminalize include: satellite, cable and broadcast piracy; and trafficking in bootleg recordings.
- Failure to separately define criminal violations related to the WCT and WPPT, for example, circumvention of technological protection measures, trafficking in circumvention technologies, software, devices, components, and services.
- No criminal remedy against “media box” piracy.
- Limited criminal accomplice liability with respect to imports and exports (with lower penalties available).
- Uncertainties with respect to increased penalties against repeat offenders.

### ***Media Box Piracy***

“Media box” piracy consists of hardware sold that facilitates: 1) unauthorized receipt and decryption (decoding) of encrypted signals, which often are programs protected by copyright; 2) organization of favorite streaming, P2P, cyberlockers, and BitTorrent websites for ready access (the latest types of devices are all Internet-enabled pre-loaded with apps to unlicensed and pirate content); and 3) internal storage devices often used to store massive amounts of infringing content. China remains a hub for manufacturing and distributing these devices and technologies that interfere with the ability of copyright owners to manage a variety of business models that offer consumers lawful access to products and services. The boxes are exported to overseas markets throughout Asia and elsewhere, and thus are not only a threat to the Chinese market but are increasingly harming right holders all over the world. Criminalization as well as targeted, deterrent actions against manufacturers, distributors and facilitators of media box piracy are

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<sup>13</sup> China’s Criminal Law fails to subject to criminal liability the infringement of some exclusive rights. For example, China fails to criminalize satellite, cable and broadcast piracy, bootlegging and a number of other acts of piracy when they are “on a commercial scale.”



critical to minimizing the negative impact on the legitimate media sector around the world and the global economy. Chinese law enforcement should coordinate efforts to address the importation of these illicit media boxes. We are pleased that the Chinese Government has recognized the need to study and address this growing problem, and we stand ready to assist the U.S. Government and engage with the Chinese Government on this issue.

### ***Unauthorized Camcording of Motion Pictures***

The Chinese Government should also be urged to make it a violation of law to use, or attempt to use, an audiovisual recording device to make or transmit a copy of a cinematographic work or other audiovisual work, or any part thereof, from a performance of such work in an exhibition facility. Anyone committing this act should be subject to civil, administrative, and criminal remedies. Unauthorized camcording of movies – a key source for online audiovisual infringements – has reemerged, particularly in southern China, with a number of illegal camcording incidents detected in Guangzhou city in 2013. The motion picture industry has raised this issue with relevant Chinese Government agencies, e.g., NCAC, NAPP, and SAPPRFT, and with the China Film Distribution and Exhibition Association. While awaiting a legislative change, the Chinese Government, theater owners, and others associated with the chain of theatrical distribution of films should take stronger efforts to deter unauthorized camcording.

### ***Pre-Release Piracy***

As a related matter, we believe the Chinese Government should enhance “pre-release” administrative enforcement for motion pictures, sound recordings, and other works, e.g., by establishing voluntary government-backed online copyright bulletin boards. This would effectively help address “pre-release” piracy by which pirates take advantage of right holders by beating the release date of the legitimate product, which may be held up due to delays.

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Thank you for the opportunity to present the viewpoints of the IIPA in connection with China’s intellectual property rights, enforcement, and market access obligations under WTO rules. We are pleased to answer any questions you may have.

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# CHINA (PRC)

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

### 2014 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** IIPA recommends that USTR maintain China on the Priority Watch List and that China be monitored under Section 306 of the Trade Act.<sup>1</sup>

**Executive Summary:** The market in China for music, software, publications, films, and video games remains stunted by a combination of piracy and stifling market access and discriminatory barriers. At the same time, there were once again some gradual signs of progress in China during 2013. The U.S. Government has long recognized the significant harm caused by IP infringement in China,<sup>2</sup> and remains deeply engaged with the Chinese Government on intellectual property issues in various fora, including the U.S.-China Joint Commission on Commerce and Trade (JCCT) and the U.S.-China Strategic and Economic Dialogue (S&ED). These engagements have yielded progress in some areas. Recent positive developments include the 2012 U.S.-China Film Agreement, the decision to test self content-review of music in 2014 by licensed online music distributors, and the December 2013 decision to partially open the market in the Shanghai Free Trade Zone to foreign investment, which will hopefully allow the introduction of game consoles and ease restrictions on foreign online music distribution in China.

Yet many commitments made by China in the JCCT, S&ED, and the U.S.-China Film Agreement remain unfulfilled and full market opening remains elusive. For example, the Chinese commitments to promote reform in the distribution of imported films, and to actively encourage more private Chinese enterprises to be licensed by the Chinese Government to engage in the distribution of these films, have not been met. National distribution of imported films remains completely dominated by two state-owned enterprises (SOEs). The theatrical film “Master Contract,” which reportedly is under discussion between some right holders and China Film Group, remains non-transparent, unfair, and inconsistent with international best practices. Investment in music production, publication, and distribution remains limited, stunting the growth of that industry. Progress to “significantly reduce piracy” and tackle unlicensed software use, including in government agencies and SOEs, remains limited. One measure of under-performance of legitimate copyright industries is per capita spending, and the evidence is telling. Software spending per PC in China ranks among the lowest in the world, while the value of unlicensed software is estimated to be over US\$8.9 billion. The size of the legitimate music market is a fraction of what it would be in the absence of piracy and market barriers. Publishers remain hindered in their efforts to engage in core publishing activities in China, and while cooperation has been forthcoming against the piracy of online journals of scientific, technical, and medical (STM) materials, new online “sharing” services threaten the professional publishing market yet again. Other problems worsened in 2013, including unauthorized camcording; sales of hard goods pirated product, or passwords and product activation keys on online trading sites; and websites employing third parties’ peer-to-peer (P2P) and streaming client services to enable infringement by their users.

## **PRIORITY ACTIONS REQUESTED IN 2014**

### **Enforcement**

- Ensure implementation of the 2012 *Network Rules* to hold liable services encouraging or facilitating infringement.
- Halt sales of physical pirate product, passwords, and product activation keys on online trading sites and other e-commerce platforms.

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<sup>1</sup>For more details on China’s Special 301 and Section 306 monitoring history, see previous years’ reports at <http://www.iipa.com/countryreports.html>. For the history of China’s Special 301 placement, see <http://www.iipa.com/pdf/2014SPEC301HISTORICALCHART.pdf>. For a discussion of IIPA’s 2014 Key Initiatives and Challenges, see IIPA, *2014 Special 301 Submission*, at <http://www.iipa.com/pdf/2014SPEC301COVERLETTER.pdf>.

<sup>2</sup>A May 2011 United States International Trade Commission (USITC) report found that overall IP infringement (of which copyright infringement was found to be the largest part) in China costs the U.S. economy as much as \$107 billion and upwards of 2.1 million jobs. USITC, *China: Effects of Intellectual Property Infringement and Indigenous Innovation Policies on the U.S. Economy*, Investigation No. 332-519, USITC Publication 4226, May 2011, available at [www.usitc.gov/publications/332/pub4226.pdf](http://www.usitc.gov/publications/332/pub4226.pdf).



- Take effective action against websites offering infringing content, as well as those deploying non-hosted platforms such as *Xunlei* and *QVOD*.
- Have the State Administration of Press, Publication, Radio, Film and Television (SAPPRFT), the Ministry of Culture (MOC), and the Ministry of Industry and Information Technology (MIIT) revoke business licenses and halt online services of enterprises providing access to infringing materials.
- Bring targeted and deterrent actions, with transparency, against unauthorized use of software by enterprises, hard disk loading, camcording, pay TV piracy, and media box piracy.
- Allow right holders as victims to file collateral civil claims for compensation during criminal IPR trials.
- Follow through on JCCT commitments for transparent, comprehensive, and verifiable progress on government and SOE software legalization, and for strengthening IP protection in university (including library) settings.
- Ensure that SAPPRFT, theater owners, and others associated with the chain of theatrical distribution of films, make efforts to prohibit (including criminal penalties) and deter unauthorized camcording.
- Establish a central authority to compile statistics of civil, administrative, or criminal cases involving copyright; and fully implement new rules on disclosure of administrative penalties.
- Enhance “pre-release” administrative enforcement for motion pictures, sound recordings, and other works, e.g., by establishing a voluntary government-backed online copyright bulletin board.
- Expand resources at National Copyright Administration of China (NCAC), local Copyright Administrations (CAs), and Law and Cultural Enforcement Administrations (LCEAs), commensurate with the scale of piracy problems.
- Allow foreign right holder associations to increase staff and conduct anti-piracy investigations.
- Meet TRIPS obligation to fairly compensate copyright owners for public performance (including broadcast) of musical compositions.

### **Legislation and Related Matters**

- Include intellectual property provisions in the Criminal Law reform consistent with this filing.
- Consider and enact comprehensive copyright law reform as “first tier” legislation, incorporating changes recommended by IIPA and member associations in various past filings.
- Ensure criminalization of: 1) unauthorized use of software by enterprises; 2) hard disk loading; 3) Internet piracy; and 4) circumvention of TPMs and trafficking in circumvention technologies, software, devices, components, and services, including the sale of passwords and product activation keys.
- Specify and lower proof requirements for evidence preservation orders and civil injunctions.
- Make it a violation of law to use, or attempt to use, an audiovisual recording device to make or transmit a copy, in whole or in part, of a cinematographic/audiovisual work, from a performance in an exhibition facility.
- Lower the threshold for criminal enforcement actions to be taken against infringers, including Internet infringers, and including infringements undertaken for purposes other than commercial gain.
- Clarify that administrative transfers of cases for criminal prosecution are required upon “reasonable suspicion” that the criminal thresholds are met.

### **Market Access**

- Ensure full implementation of the U.S.-China Film Agreement:
  - Ensure the promotion and licensing of private Chinese enterprise to engage in national distribution in competition with China Film Group and Huaxia.
  - For “Revenue Sharing Films,” ensure that all terms of the Master Contract for theatrical film distribution comply with the U.S.-China Film Agreement.
  - For “Other Than Revenue-Sharing Films,” ensure that the terms of Chinese SOE contracts comply with the Agreement and are transparent to the industry at large, including private Chinese Enterprises which may act as intermediaries in the importation and national distribution chain.
- Meaningfully implement the WTO cases to further open the market for publishing, online music distribution, and theatrical film distribution.
- Formally revoke the requirement to appoint an exclusive licensee for online music distribution, consistent with verbal assurances of the same.

- Ensure market access is not conditioned on local ownership or local development of the IP of a service or product, and does not compel the transfer of foreign IP and R&D to China, including information security software and cloud products.
- Revise new software procurement rules that impose price controls and licensing terms that discriminate against the procurement of foreign software brands.

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

Prior IIPA submissions in the Special 301 docket, as well as IIPA filings in WTO compliance reviews and other fora, have provided detailed accounts of the many piracy and enforcement challenges and issues in China. This year's filing serves as a supplement to those, and is not meant as an exhaustive review of all issues.<sup>3</sup>

**The Continuing Challenge of Addressing Online/Mobile Piracy in China:** Online piracy remains a major challenge in China.<sup>4</sup> Prior filings document the rapid growth of online access, broadband, and mobile penetration in China. With this, China is fast becoming the largest potential market in the world, and while some progress has been made to license services in China, the challenge of online infringement and illegal web and mobile services harming right holders in (and outside of) China has grown faster than the legitimate market.<sup>5</sup> Some services previously noted, like *Xunlei's GouGou* service, have ceased to operate; however, *Xunlei* remains a concern, and was nominated by IIPA as a "notorious market" in IIPA's October 2013 filing,<sup>6</sup> for its hosted *Xunlei Kuaichuan* service and its proprietary, high speed non-hosted P2P file sharing system that facilitates the distribution of unauthorized copies of motion picture and television content. *QVOD* is also noted in that October 2013 filing as a P2P protocol software used by Chinese linking sites to distribute infringing copies of copyright materials. *Xunlei* and *QVOD* are deployed on third-party websites but are responsible for massive amounts of infringement. Stakeholders from both the foreign and domestic film and television industries have identified such piracy sites/services as the biggest threat to the development of the legitimate online video industry in China.

Another major Internet piracy problem involves the unauthorized sale of physical pirate and counterfeit product on e-commerce sites. *Taobao* has demonstrated major improvements in cooperation and coordination with some right holders in recent years (mainly through MOUs), and the Motion Picture Association of America reports exemplary cooperation. Unfortunately, the software, music, and publishing industries all report continuing problems on *Taobao* and other e-commerce sites. The software industry is deeply concerned about tremendous losses resulting from the sale of unlicensed software and software product activation codes and keys via *Taobao* and other auction sites, where these materials are available for very nominal fees. The music industry similarly notes that, notwithstanding greater cooperation with *Taobao*, infringing music remains widely available on the site, as well as on other e-commerce sites. The publishing industry, while noting *Taobao's* willingness to cooperate, continues to have concerns over entities that traffic in login credentials through the *Taobao* platform.

The music industry notes the rampant rise of mobile piracy and the rapid proliferation and worsening of pirate mobile apps. Publishers have noted continuing concerns with unauthorized online distribution of copies of STM

<sup>3</sup>See, e.g., IIPA, *China*, 2013 Special 301 Report, February 8, 2013, at <http://www.iipa.com/rbc/2013/2013SPEC301CHINA.PDF>; IIPA, *China's WTO Compliance - Notification of Intent to Testify and Testimony Re: "Request for Comments and Notice of Public Hearing Concerning China's Compliance With WTO Commitments"* (78 Fed. Reg. 49787, August 15, 2013), September 20, 2013, at [http://www.iipa.com/pdf/2013\\_Sep20\\_China\\_WTO\\_Compliance.PDF](http://www.iipa.com/pdf/2013_Sep20_China_WTO_Compliance.PDF).

<sup>4</sup>The record industry reports, for example, that the total number of cease and desist notices sent to infringing websites increased from 8,692 (2012) to 11,671 (2013).

<sup>5</sup>Some music sites in China have been licensed (for example *kugou*, *baidu*, *kuwo*, *duomi*, and *xiami*), although many smaller websites remain unlicensed, those that are licensed may not cover all rights (for example, some licenses only extend to streaming), and the licenses are restricted to the territory of China. Unfortunately, *kuwo.cn* is accessible from Hong Kong, Singapore, and Taiwan; *xiami.com* is accessible from Singapore, Malaysia, and Taiwan; and *yinyuetai.com* is accessible from Hong Kong, Singapore, Malaysia, and Taiwan). The Chinese Government should apply pressure to rectify these problems. The licensed site *baidu* also remains problematic for the music industry as it operates a cyberlocker *pan.baidu.com* which hosts infringing content. The music industry sent over 2,000 notices to *pan.baidu.com* with a takedown rate of only 42%.

<sup>6</sup>IIPA, *IIPA Written Submission Re: 2013 Special 301 Out-of-Cycle Review of Notorious Markets: Request for Public Comments*, 78 Fed. Reg. 57924 (September 20, 2013), 78 Fed. Reg. 60367 (October 1, 2013) (Extending Deadline), October 25, 2013, available at [http://www.iipa.com/pdf/2013\\_Oct25\\_Notorious\\_Markets.pdf](http://www.iipa.com/pdf/2013_Oct25_Notorious_Markets.pdf). Chinese-based sites noted in that filing include: *QVOD*, *xunlei*, *xiami.com*, *sina.com.cn*, *wenku.baidu.com*, *docin.com*, *yyets.com*, *eachnet.com*, and *taobao*.

journal articles,<sup>7</sup> as well as the rise of new “sharing services,” which are open online platforms where users can upload and share documents. These services, such as *Baidu Wenku*, *Sina*, and *Docin*, employ “digital coin” systems, whereby coins earned through uploading documents may be used to “purchase” English language and Chinese translations of trade books, textbooks, and journals for download. These sharing services have ineffective notice and takedown processes for reporting and addressing infringements. Other online services provide unauthorized access to proprietary databases through the sale of login credentials or information from the databases.

Enforcement against online piracy in China over the past year has been mixed. The Chinese Government has brought several criminal actions. The continuation of the special campaign “Operation Sword Net” organized by NCAC, MPS and MIIT also demonstrates positive government commitment. IIPA members report continued cooperation with authorities and some ISPs to engage in self-help to defeat or remove piracy from rogue or notorious sites. For example, the music industry reported 437 websites to NCAC and MOC in 2013. Of these, 96 websites removed alleged infringing links, 109 were closed by the copyright bureaus and cultural enforcement agencies, and 5 no longer contain music. The other websites apparently still remain operational. The motion picture industry reports cooperation directly with many ISPs and services, with some notable exceptions (e.g., *Xunlei*).

Court cases and administrative enforcement seem to be making an impact. In November 2013, pursuant to a complaint filed by the recording industry, the founder of the *Zyin* service was convicted and sentenced to 15 months imprisonment, fined RMB50,000 (roughly US\$6,000), and subject to confiscation of illegal income of RMB100,000 (roughly US\$12,000), and the operator/owner of the website was sentenced to one year imprisonment, fined RMB40,000 (roughly US\$5,000), and subject to confiscation of the hard disks involved. In addition, in November 2013, the major Chinese site *Sohu* and several other websites sued *Baidu Player* (*v.baidu.com*) and *QVOD* for hosting P2P networks with widespread infringing content. On December 30, 2013, NCAC, together with State Internet Information Office, MIIT, and MPS, jointly held a press conference to announce the results of the “2013 Special Campaign for the Crackdown on Internet Piracy.” *Baidu* and *QVOD* were ordered to immediately cease facilitation of copyright infringement and penalties of RMB250,000 (US\$41,000), the maximum administrative fine under the law, were assessed to each service. In December 2013, IIPA further welcomed the decisions of the Beijing No. 1 Intermediate People’s Court holding liable P2P streaming video network and video on demand (VOD) company Beijing Funshion Online Technology Co., Ltd., owners of the website *Funshion.com*. This site has caused significant harm throughout Greater China, including Taiwan, as well as Hong Kong and Singapore. The total award was RMB470,875 (US\$77,647) in respect of nine civil actions filed, although the site appears to remain operational with a server location in Inner Mongolia.

Combating copyright infringement on the Internet must remain a top priority for the Chinese Government.<sup>8</sup> Full and proper implementation of the 2012 *Network Rules* is critical to hold liable websites and online and mobile services that encourage infringement. Unfortunately, rights holders indicate that promulgation of the *Network Rules* has yet to have a meaningful impact. Full implementation of the *Network Rules* is necessary for ensuring that service providers are: 1) subject to clear secondary liability rules, including in cases of wilful blindness; 2) obligated to respond in a timely manner to takedown notices; and 3) incentivized to take action against repeat infringers. While NCAC has been cooperative on the administrative side, the Supreme People’s Procuratorate remains reluctant to prosecute due to concerns about adequacy of evidence to meet the thresholds for criminal liability (i.e., they cite the lack of hard evidence on ISP servers related to P2P streaming). Thus, there remains a need to address thresholds so that non-hosted online services such as P2P streaming services can no longer escape liability. One step IIPA has noted would be helpful is the establishment of a voluntary government-backed online copyright bulletin board to enhance “pre-release” administrative enforcement for motion pictures, sound recordings, and other works.

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<sup>7</sup>Problems remain with online journal piracy in China, including a service that offers for purchase, and delivery by e-mail, articles from a massive database of journals. The site is currently down and under investigation, but unless and until there is a final conviction and the service is permanently dismantled, other potential similar services will not be deterred. While there has certainly been progress, it has come slowly, since it is now more than two and a half years since the original complaint was filed.

<sup>8</sup>Industry notes the growth of the Internet and mobile piracy problem in particular in Zhejiang, Guangdong, and Shanghai.



**Camcording Worsened in 2013 and Must Be Addressed Forthwith:** Unauthorized camcording of movies – a key source for online audiovisual infringements – has reemerged, particularly in southern China, with a number of illegal camcording incidents detected in Guangzhou city in 2013. The motion picture industry has raised this issue with relevant Chinese Government agencies, e.g., NCAC, NAPP, and SAPPRFT, and with the China Film Distribution and Exhibition Association. The Chinese Government must swiftly enact reforms to make it a violation of law to use, or attempt to use, an audiovisual recording device to make or transmit a copy, in whole or in part, of a cinematographic/audiovisual work, from a performance in an exhibition facility. While awaiting this legislative change, the Chinese Government, theater owners, and others associated with the chain of theatrical distribution of films should take stronger efforts to deter unauthorized camcording.

**Software Piracy Updates:** Chinese private enterprises, state-owned enterprises and government agencies continue to use high levels of unlicensed software. The commercial value of unlicensed software in China was \$8.9 billion in 2011 – an amount that has more than doubled since 2005. This figure represents nearly half the value of all unlicensed software in the Asia-Pacific region. The piracy rate in 2011 was 77%, well above the global average of 42% and the Asia-Pacific average of 60%.<sup>9</sup> Piracy of U.S. software in China diminishes sales and exports for U.S. software companies. It also provides an unfair competitive advantage to Chinese firms that use this unlicensed software. Namely, Chinese firms get a free ride on their software and produce products coming into the U.S. market, which then compete against U.S.-made goods produced by firms that legitimately pay for their software.

As detailed in prior filings, there are significant hurdles to effectively dealing with enterprise end-user piracy in China. These include: 1) the lack of criminal remedies against this form of software piracy; 2) ineffective civil enforcement procedures; and 3) inadequate administrative enforcement. With regard to civil cases, several critical improvements are needed. The courts must relax excessively high burdens for granting evidence preservation orders and need to increase the amount of damages awarded against end-user pirates. In 2013, more local judges granted evidence preservation orders, but this process remains unpredictable, with some judges rejecting applications or causing undue delays. While some courts have increased the amount of damages, others, when facing similar infringement situations, grant much smaller “statutory damages” in lieu of a proper compensatory award. This problem highlights the need to significantly increase statutory damages beyond those currently laid out in the third draft Copyright Law revision. Finally, in cases in which a civil order is issued, right holders and authorities often face on-site resistance against evidence preservation and have only a limited amount of time to conduct software infringement inspections.

Another major issue is the lack of progress on software legalization in Chinese Government agencies and SOEs despite numerous specific commitments by the Chinese Government to tackle this problem in the JCCT and S&ED. Reports by U.S. software companies of little to no progress on these issues clearly indicate that software legalization programs are not being implemented in a comprehensive manner. To follow through on its software legalization commitments, the Chinese Government needs to implement comprehensive legalization programs for the Chinese Government and SOEs that include: 1) audits, certification and other credible processes to verify software license compliance; 2) software asset management (SAM) best practices; 3) sufficient budgets to purchase legal software; 4) performance indicators to hold government and SOE officials accountable for ensuring measurable progress on software legalization; and 5) a prohibition on mandates or preferences for the purchase of domestic software brands as part of the legalization process.

**Physical Piracy Abates, But Hard Disk Loading, High-Quality Counterfeits, Exports, and Manufacture of Circumvention Devices, Remain Problematic:** While many companies report an overall reduction in the impact of physical piracy, hard disk loading of software and other copyright materials remains an acute problem in China,

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<sup>9</sup>Data on software piracy rates and commercial values are taken from the 2011 BSA Global Software Piracy Study at [www.bsa.org/globalstudy/](http://www.bsa.org/globalstudy/). This study assesses piracy rates and the commercial value of unlicensed software installed on personal computers during 2011 in more than 100 markets. The study includes a detailed discussion of the methodology used. BSA plans to release an updated study in the second quarter of 2014.

including at *BuyNow PC Malls* as indicated in IIPA's October 2013 "Notorious Markets" filing to USTR.<sup>10</sup> High-quality counterfeit discs continue to be manufactured in China and sold in domestic markets or exported (including to the U.S., Australia, and Europe). *Hua Qiang Bei Market* (华强北) in Shenzhen, also mentioned in IIPA's October 2013 filing, is a central point from which counterfeit software is distributed to other regions in China and exported. Several criminal counterfeit software cases in China have involved distributors operating out of this market, and while the market has been subject to several sweeps during special enforcement campaigns, the situation has not improved in any meaningful way. Publishers continue to note physical piracy, for example, in the form of English language textbooks, but this is not as substantial a problem as print piracy of trade books. Reports indicate pirate books printed in and exported from China are showing up in parts of Africa. While university-sanctioned piracy has declined over the years, the Ministry of Education should be more involved in fighting piracy on campuses and educating librarians and students. The Ministry of Science & Technology (MOST) should also become more proactive to address pirate document delivery services, and the Chinese Academy of Sciences (CAS) should do more to educate information officers/librarians of the 100 research institutes in China.

Media box piracy, as documented in prior IIPA reports, remains a serious issue and since China is the main source of this problem spreading across Asia, the Chinese Government should take immediate actions against manufacturers and key distribution points for this illegal business model.<sup>11</sup> Finally, as documented in prior IIPA reports, China remains a hub for manufacture and distribution of technologies and devices used around the world to circumvent access controls employed by copyright owners to manage access to their works and services. The reluctance of the Chinese Government to bring criminal actions against manufacturers and distributors of these circumvention technologies and devices remains deeply troubling.

**Next-Generation Pay TV Signal Theft:** IIPA has documented in prior reports not only the increasing incidence of pay TV piracy in China but China's role as the manufacturing and export/distribution hub for pay TV circumvention devices and services. It is believed that pay TV piracy has widened in China's second and third tier markets in recent years. In addition, concerns have been raised about the deployment of services providing unauthorized retransmission (including over the Internet) of digital pay TV services. The film and TV industries are still learning about the size and scope of the problem, but the emergence of this next-generation digital pay TV is certainly a cause for concern.

**Continued Need for Enhanced Chinese Government Resources to Tackle Piracy:** IIPA has long argued that the disproportionately small amount of resources devoted to fighting piracy in China, when compared, for example, with those deployed to stop counterfeiting, creates a recipe for failure. For example, the software industry continues to report that the only avenues they have for seeking redress for unauthorized use of software by enterprises are the administrative and civil systems, which are under-funded and under-resourced, and which generally result in non-deterrent penalties. The same story plays out for other industries, which report that civil enforcement efforts are plagued by non-deterrent remedies (e.g., low damages and limited injunctive relief) and overly burdensome procedures (e.g., extensive documentation and legalization requirements). As such, IIPA continues to urge the Chinese Government to expand resources at NCAC, local CAs, and LCEAs, commensurate with the scale of the piracy problem. Given the ongoing prohibition on foreign right holder investigations into piracy, it becomes even more incumbent upon the Chinese Government to enhance its own resources.

## **COPYRIGHT AND RELATED LAWS AND REGULATIONS UPDATE**

Prior IIPA filings have documented in detail developments in the Chinese legal system for the protection of copyright, including Copyright and Criminal Law reform efforts. Last year's major development was the entry into

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<sup>10</sup>Buynow (百脑汇) PC Mall (China, various locations) is a very large personal computer mall chain in China, operating 22 stores across the country, leasing space to sellers of electronics equipment, software, games and accessories. Many of these sellers offer pirated operating systems and software, which they will install directly onto their customers' hard disks.

<sup>11</sup>"Media box" piracy consists of hardware sold that facilitates remote access to music videos, karaoke, audiovisual, and other creative materials. These boxes are being manufactured in China and exported to overseas markets throughout Asia. This next generation piracy threatens not only the Chinese market for content but is exported from China, harming other markets.

force on January 1, 2013 of a 2012 set of *Network Rules* to address online infringements.<sup>12</sup> These revision processes provide important opportunities to update the legal regime in China for more effective copyright protection and enforcement. IIPA also notes the commencement of official operations of the National Leading Group (NLG) in July 2013. While the key work plan of the NLG remains unclear, one important item on its agenda should be to ensure the Copyright and Criminal Law reform processes move forward and result in updated laws that adopt copyright protection and enforcement best practices, as IIPA and many IIPA member associations have recommended in numerous submissions to the Chinese Government. In 2013, *Regulations for the Implementation of the Copyright Law of the People's Republic of China* were issued (January 30); the *Regulations* confirm increased maximum administrative penalties.<sup>13</sup> Meanwhile, several other draft measures were released for comment, including: *NCAC Measures on the Supervision and Administration of the Copyright of Film and Television Works Disseminated via Internet* (March 2013);<sup>14</sup> *Rules of Administration of Network Publication Services* (January 2013);<sup>15</sup> and *Draft Measures for Online Trading and Related Services* (September 2013).<sup>16</sup> None of these measures seems to have fully recognized the seriousness and scope of online piracy and counterfeiting. For example, the *Draft Measures for Online Trading and Related Services* simply defers the IP infringement issues to the existing Tort Law without imposing any meaningful duty over online trading platforms. If the *Draft Measures* are issued as is, China will have missed an opportunity to reform its regime of online enforcement to the benefit of creators.

**Copyright Law Reform Not Fast-Tracked:** IIPA has provided several sets of comments on the draft amendments to the Copyright Law, and IIPA's specific comments and remaining issues have been communicated to the Chinese Government. Beyond those already discussed, additional issues raised with the Chinese Government by industry most recently include:

- the proposal by the Chinese Government of possibly overly restrictive collective management provisions;
- problematic default presumptions of ownership in the draft as to audiovisual works and works for hire;
- the re-introduction of an over-broad statutory license for broadcast of certain "published works";
- concerns over the way the draft attempts to address protection and use of "orphan works"; and
- the need to ensure that: 1) evidence preservation orders would issue within 48 hours of receipt of the application; 2) written decisions on applications for such orders are provided; 3) an opportunity to appeal denials of such orders is afforded; and 4) evidence preservation provisions otherwise conform to China's TRIPS obligations.

The third NCAC draft now sits with the State Council Legislative Affairs Office, where it is reportedly not considered "first tier" legislation, meaning it may not be considered by the National People's Congress in 2014 with priority. This is unfortunate. Given the proliferation of copyright piracy in China, including illegal online services, there is an urgent need for China to update and modernize its copyright law. This includes adequate remedies in the online environment and for ISP cooperation to tackle online piracy. In the absence of Copyright Law reform, the 2012 *Network Rules* on liability (i.e., the "necessary measures" to be taken by ISPs to avoid liability) will continue to govern.

**Criminal Code Reform Should Include Intellectual Property:** Unlike Copyright Law reform which appears stalled, Criminal Law reform appears to be fast-tracked. While to IIPA's knowledge no set of comprehensive amendments has emerged, the latest information suggests changes to the intellectual property provisions of the

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<sup>12</sup>*Judicial Rules on Several Issues concerning the application of Law in Hearing Civil Dispute Cases Involving Infringement of the Right to Network Dissemination of Information*, Approved at No. 1561 Meeting of the Supreme People's Court Adjudication Commission held on November 26, 2012. These *Rules* replaced the 2006 *Regulations on the Protection of the Right of Communication through Information Networks*.

<sup>13</sup>For example, the maximum compensation for infringing related rights of sound recording producers will be increased to RMB250,000 (US\$41,000).

<sup>14</sup>The music industry suggested that cinematographic works and works created in a way similar to cinematography as well as music videos should be covered in these measures.

<sup>15</sup>The music industry recommended that: 1) the draft rules should clarify that foreign invested entities may participate in network distribution service for music; 2) online music should be subject to only one content examination procedure; 3) copyright infringement should be expressly indicated as a "prohibited" action; and 4) consequences should be clearly stated if an ISP does not strictly observe its obligations under the Rules.

<sup>16</sup>The music industry suggested that: 1) copyright and rights related to copyright should be covered; 2) a "Publication Business Permit" should be obtained and shown in order to sell audio and video products; and 3) third party trading platform service providers and related service providers should have obligations to protect copyright and rights related to copyright.

Criminal Law (e.g., Articles 217 and 218 and accompanying JIs) and other related provisions may not be considered. This would be a major missed opportunity, and we urge the Chinese Government to reconsider this decision. As IIPA has noted above and in many prior filings and in informal consultations, a credible criminal remedy in China is needed to effectively curtail piracy and related violations in all their forms. Remaining gaps include:

- Thresholds that are too high (in the case of illegal income) or unclear (e.g., in the case of the copy threshold).
- Leaving some critical commercial scale infringements without a criminal remedy because of the requirement to show that the infringement is carried out “for the purpose of making profits,” an undefined phrase. It is often difficult for law enforcement authorities or right holders to prove that the infringer is operating for the purpose of making profits in cases of Internet piracy, enterprise end-user software piracy, or hard disk loading piracy cases.
- Failure to cover all acts of piracy on a commercial scale as required by TRIPS Article 61. For example, acts that Chinese law fails to expressly criminalize include: infringement of the communication to the public or the making available right of any work/related right; satellite, cable and broadcast piracy; trafficking in bootleg recordings; and other acts of infringement even when they are “on a commercial scale.”
- Failure to separately define criminal violations related to the WCT and WPPT, for example, circumvention of technological protection measures, trafficking in circumvention technologies, software, devices, components, and services, including in particular the unauthorized sales of passwords or product activation codes or keys over the Internet.
- Limited criminal accomplice liability with respect to imports and exports (with lower penalties available).
- Uncertainties with respect to increased penalties against repeat offenders.

In addition to expanding the scope of IP criminal liability, the law should also be amended to lift the jurisdictional bar limiting foreign right holders from commencing a private “civil claim” against those being prosecuted for copyright crimes in local district courts.

**Possible New Levels of Transparency in Case Law and Administrative Enforcement:** The SPC issued a Decision, *Supreme People’s Court Decision on Publishing Written Judgment of People’s Court on the Internet*,<sup>17</sup> effective January 1, 2014, requiring all judicial opinions to be published on the Internet within seven days. The increased transparency directly corresponds to what is called for by the Resolution of Third Plenum, demanding consistency and uniformity in the court adjudication process, including those adjudicated in the IP system. On November 21, 2013 the State Council issued its *Opinion on Disclosure of Information on Administrative Sanctions against IP Piracy*. The *Opinion* indicates that, except for business confidential and private information, administrative sanctions against IP piracy shall be disclosed to the public. These are generally considered positive developments.<sup>18</sup> We hope that full implementation of these measures, as well as the establishment of a central authority to provide information on and compile statistics for civil, administrative, or criminal cases involving copyright, will usher in a new era of transparency in the Chinese enforcement system.

**TRIPS/Berne Obligation to Pay Fairly for Public Performances (Including Broadcasts) of Musical Compositions:** IIPA continues to maintain that China violates its TRIPS/Berne Convention obligation to compensate copyright owners for the broadcast of musical compositions, both for failure to pay retroactively to China’s entry into the WTO, and for an ongoing violation of establishing a payment scheme that is clearly tens of millions of dollars below what would be a fair rate. The Chinese Government has never followed through on the agreement to “hold government/industry roundtables in China to discuss online copyright protection and enforcement, including library copyright protection.” This issue should remain a top priority in bilateral discussions.

**Administrative Criminal Transfer Regulations Need Significant Improvements:** The amended *Criminal Transfer Regulations* are well intentioned but do not adequately address existing challenges to the effective transfer

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<sup>17</sup>*Supreme People’s Court Decision on Publishing Written Judgment of People’s Court on the Internet* (最高人民法院关于人民法院在互联网公布裁判文书的规定), effective January 1, 2014.

<sup>18</sup>There are genuine concerns, however, based on some recent decisions, that the arbitrary deadline may short-circuit some judges’ processes in achieving full, reasoned decisions.

of administrative cases to criminal investigation and prosecution. The *Regulations* leave unclear whether transfers are required upon “reasonable suspicion” that the criminal thresholds have been met, and thus, some enforcement authorities believe “reasonable suspicion” is insufficient to result in a transfer, requiring proof of illegal proceeds. However, administrative authorities do not employ investigative powers to ascertain such proof. The “reasonable suspicion” rule should be expressly included in amended transfer regulations. There is apparently also some reluctance about transferring cases due to administrative authorities’ wish to retain the potential financial reward for successful enforcement actions, although questions also remain about who bears the costs for storage of contraband and other expenses associated with the handling of cases.<sup>19</sup>

## **MARKET ACCESS UPDATES AND RELATED ISSUES**

IIPA has consistently stressed the direct relationship between the fight against piracy in China and the need for liberalized market access to supply legitimate product, both foreign and domestic, to Chinese consumers. Many past IIPA submissions on China have detailed key market access barriers, such as:

- investment prohibitions or restrictions on core copyright businesses, such as production (including signing musicians and recording them), publication, duplication/replication, and distribution of audiovisual (music and film/TV) and published materials;
- restrictions on “exclusive licenses” of online music services;
- the lack of competition with incumbent SOEs for national distribution of imported films, and the lack of encouragement of other private Chinese entities to participate in national distribution of imported films without interference;
- the to-date non-transparent and non-negotiable Master Contract for theatrical distribution;
- import and export restrictions;
- discriminatory, arbitrary, and opaque censorship and release processes and timelines;
- the ban on importation or distribution of videogame consoles (which may be partially lifted due to market opening in the Shanghai Free Trade Zone); and
- measures that have the effect of discriminating against foreign software and other technology products, or compelling transfers of technology and intellectual property to China in order to access the market.

While many of these restrictions remain, some of the copyright sectors have seen limited progress in the past two years toward expanded market access. For example, the December 2011 amendment to the *Catalog of Foreign Investment Guidelines* promised to open the market for several creative product categories, creating new opportunities for foreign right holders. We are also encouraged by recent high-level political pronouncements which seem to indicate a policy shift toward viewing IP overall as an important Chinese interest. In November 2013, the Chinese Communist Party issued a decision on major issues concerning comprehensive major reforms, which stated that “China will strengthen protection of intellectual property rights, improve the mechanism to encourage innovation, and explore ways of setting up an IPR court.” The reform document also mentions improving the cultural management system and developing a modern cultural market. This would include improving entry and exit mechanisms into the cultural market and the development of non-state owned cultural enterprises. The document also mentions promoting Chinese culture to the world while actively absorbing all outstanding cultural achievements from abroad. These high-level policy directives to guide the Chinese Government over the next decade seem to represent a positive policy shift, although given the industry’s experience with, e.g., indigenous innovation and concerns over strategic emerging industries (SEIs) and possible discriminatory or protectionist effect, we must urge the U.S. Government to continue to monitor this trend carefully.

**Self-Censorship of Foreign Entity Music Introduced:** On August 12, 2013, the *Administrative Measures on Content Self-Censorship of Internet Cultural Operating Units of MOC* were issued (entering into force December

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<sup>19</sup>The bottom line is that the structures in place should encourage administrative authorities and police to cooperate in seeking positive outcomes in piracy cases.

2013).<sup>20</sup> Under the *Administrative Measures*, the Ministry of Culture will not need to censor or examine either the imported or domestic music repertoire of foreign entities after self-censorship by the Internet cultural operating units. This self-censorship is considered as a pilot project until November 2014, after which time MOC will decide whether or not to extend or expand it. IIPA and members have been pressing for years for a change to the current discriminatory system, and we hope to see it implemented in a way which will provide equal treatment to both imported and domestic music. In addition, the Chinese Government has verbally indicated that it is no longer necessary to appoint an exclusive licensee for online music distribution. However, to avoid any uncertainty, it is recommended that the Chinese Government formally revoke this requirement.

**Shanghai Free Trade Zone Opens Online Music Sector (and Perhaps Consoles) to Foreign Investment, But Leaves Others Out:** In September 2013, China officially launched the pilot free trade zone in Shanghai (“Shanghai FTZ”). Foreign investment in all sectors is allowed in the Shanghai FTZ unless listed under a published *Negative List*. The *List* does not prohibit investment in internet services for “music,” so foreign record companies should be able to start online music businesses in the Shanghai FTZ. Unfortunately, the *List* expressly prohibits investment in “online audio and video programs,” as well as so-called “Internet cultural business.” In addition, I64, category 4, indicates, “Foreign investors are forbidden to be engaged or involved in operation of online games directly or indirectly.” Further, even for music, it is unclear whether music videos can be included, and whether such a foreign company established in the Shanghai FTZ could make music available throughout China. One potential breakthrough includes the ban on importing or distributing consoles in China. Since there is no express prohibition on consoles in the *List*, presumably, that market is now apparently permitted for foreign investment in the Shanghai FTZ.

**Review of the “Master Contract”:** The Master Contract governs the relationship between China Film Group and foreign producers who secure a quota slot, which are primarily major motion picture studios. This Contract, which unfairly restricts terms such as revenue-sharing percentage, is reportedly being re-negotiated. This is an extremely important development. IIPA requests that the U.S. Government make this review a priority issue, as we can expect that China Film Group may try to negotiate as few changes as possible. To the extent the Master Contract becomes the subject of bilateral discussions between U.S. Government and its counterparts at the Chinese Ministry of Commerce (MOFCOM), all industry stakeholders are prepared to work with the U.S. Government to get the most they can out of this discussion and negotiation. The financial and standard terms of the Master Contract must be transparent with the effect of the Chinese Government signaling to the marketplace that reforms to comply with the U.S.-China Film Agreement are well underway. Other private Chinese enterprises will then understand the terms on which China Film Group imports and distributes quota films so that they can finally engage in the national distribution of imported films.

**U.S.-China Film Agreement Implementation – Next Stages:** The February 2012 U.S.-China Film Agreement has had the positive result in increasing revenue sharing participation to 25% of box office revenue for up to 34 films (14 of which enter the Chinese market in enhanced formats). This change has already resulted in increased revenues for films that are able to secure the increased quota slots and share in box office revenue. This progress is tempered by the fact that so few imported films are able to secure quota slots, and films that do not share in the box office revenue still meet insurmountable boundaries and lack of distribution options due to the dominant incumbent SOEs in the market, China Film Group and Huaxia. Until the U.S.-China Film Agreement is robustly and fully implemented, and national distribution can be conducted by private Chinese enterprises in competition with the dominant incumbents, the majority of film producers will have very limited export opportunities in China.<sup>21</sup> Access

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<sup>20</sup>Before this occurred, IIPA and its members had been concerned about the 2012 draft *Network Publishing Service Management Regulations (Opinion-Seeking Revision Draft)*, but the new *Administrative Measures* appear, at least for the moment, to have overtaken those concerns.

<sup>21</sup>The independent film industry which produces the majority of U.S. films continues to experience limited access to the Chinese marketplace and is only able to secure a very limited number of revenue sharing quota slots. Most independent films are still imported and theatrically distributed in China on a non-revenue share basis and suffer from lack of distribution options and below-market commercial terms. Both the financial return and the license fees for the underlying films are massively eroded by the lack of qualified theatrical distributors who can adequately support a nationwide theatrical release, and by a relatively non-competitive and non-transparent marketplace. The lack of legitimate distribution opportunities for independent films make these films particularly vulnerable to piracy as Chinese consumers struggle or are unable to find the content they want through legitimate channels.

they do have will be through intermediaries that must navigate a non-transparent marketplace. In order to promote a level the playing field for all imported films seeking distribution opportunities in China, the PRC should immediately:

- begin to actively promote and approve Chinese companies to engage in national distribution of theatrical films. This includes promulgating transparent business practices in which the incumbents would work transparently with private Chinese enterprise to coordinate importation of films (both revenue sharing and non-revenue sharing films) so that those private companies could engage unfettered in the national distribution of imported films as envisioned in Paragraphs 4 through 8 of the Agreement;
- provide for transparency in the censorship process for films;<sup>22</sup>
- eliminate arbitrarily declared special periods of protection for domestic films that interfere with the marketing and distribution of imported and local films alike, so as to permit imported films to be released and scheduled according to commercial contracts and without Government interference (permitting both the Chinese distributor and the producer to achieve maximum commercial benefits);<sup>23</sup> and
- cease other actions taken by the Government and SOEs (formal or otherwise) which have a discriminatory impact on foreign film and television producers.

A newly proposed centralized ticketing system may create more transparency, but also may be a new cause of concern for the strengthening of the Chinese Government's influence on the theatrical marketplace. Developments must be closely monitored to ensure the Chinese Government's full compliance with the U.S.-China Film Agreement.

**Addressing Indigenous Innovation, Procurement Preferences, and Local IP Ownership Requirements for Information Security Products Including Software:** The Chinese Government must continue to address other market access barriers and industrial policies, including indigenous innovation policies, that impose discriminatory requirements on foreign right holders and/or deny them the exercise of their IP rights.<sup>24</sup>

**Indigenous Innovation:** Over the past several years, China has rolled out a series of policies aimed at promoting "indigenous innovation." The apparent goal of many of these policies is to develop national champions, but raising some concerns that the implementation of such policies may discriminate against foreign companies and compel transfers of technology. Of particular concern are policies that condition market access on local ownership or development of a service's or product's intellectual property, or that aim to compel transfers of foreign intellectual property and research and development to China.

For example, in 2012, the Chinese Government announced they would be investing US\$1.7 trillion over the next five years in designated Strategic Emerging Industries (SEIs). This initiative, in addition to a SPC Opinion on IP released in mid-December 2011 which seemed to instruct lower courts to make decisions that assist domestic "cultural" industries, could effectively promote the implementation of discriminatory policies. In 2011, China committed to eliminate catalogues or other measures by provincial and municipal governments and autonomous regions linking innovation policies to government procurement preferences. This followed previous Chinese commitments to "delink" innovation policies from government procurement. At the 2012 S&ED, China made a broader commitment to treat IPR owned or developed in other countries on the same basis as IPR owned or developed in China. These commitments must be fully satisfied to give software developers and other copyright industries fair access to China's vast procurement market.

**Software Preferences:** The software industry remains concerned that the Chinese Government is adopting mandates or preferences for domestic software brands as part of its legalization programs for government agencies

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<sup>22</sup>The lack of certainty in China's censorship process for films causes unstable commercial transactions and poses a market access barrier to independent film producers. For example, local distributors report they cannot obtain official written responses from the censorship authorities, and some continue to use a film's censorship rejection as a way to avoid payment of license fees.

<sup>23</sup>Uncertainty regarding the release of foreign and domestic films in China negatively impacts all independent film producers and their local Chinese distribution partners.

<sup>24</sup>For more market access related concerns for the software industry, please see the China section (pages 3-5) of the BSA submission for the National Trade Estimate (NTE) to USTR, at <http://www.bsa.org/~media/Files/Policy/Trade/BSASubmissionfor2013NTEFINAL10152012.ashx>.

and SOEs. This is inconsistent both with China's efforts to join the WTO's Government Procurement Agreement, and with China's commitment in its WTO Working Party Report that the Government "would not influence, directly or indirectly, commercial decisions on the part of state-owned or state-invested enterprises, including the quantity, value or country of origin of any goods purchased or sold ... ."

In May 2013, China's Ministry of Finance (MOF) issued new rules on software procurement, the *Notice on Generic Software Assets Allocation Standards in Government Agencies* (MOF Decree). The MOF Decree imposes price controls and preferred licensing terms (e.g., site-licenses) on procurement of software that favor local brands and significantly restrict market access for foreign brands. Moreover, the MOF Decree focuses on the procurement of only certain types of software – operating systems, office productivity software, and anti-virus software – suggesting that procurement may not be authorized or, at a minimum, that budgets will not be made available for other types of software. This directive does not comport with best practices for software procurement, does not adequately take into account the speed with which software products and services are developing, and puts in place *de facto* preferences for procuring domestic software products and services that are not in keeping with China's JCCT and S&ED commitments to avoid discrimination against products with foreign-owned or foreign-developed IP in its government procurement and its WTO accession obligations to refrain from imposing price controls.

Additionally, China has provided similar MOF guidance to the SOEs. This guidance has been provided directly, as well as on State-owned Assets Supervision and Administration Commission (SASAC) hosted SOE product legalization websites. This guidance: 1) creates a preference to purchase domestic-brand software; 2) erects artificial barriers that impede market access by suggesting that products are comparable when they are not (e.g., business productivity software versus basic word processing software); and 3) presses entities to support, encourage, and ensure the fast growth of the domestic software industry.

To address this situation, the Chinese Government should:

- withdraw the MOF Decree and address its discriminatory elements, including by removing the price controls and site-license preference, and refrain from adopting or implementing any other measure that would have the effect of excluding foreign software or favoring domestic software in government procurement;
- consistent with its WTO obligations and its JCCT and S&ED commitments, affirmatively declare: 1) that it will not influence, either formally or informally, the software purchasing decisions of SOEs in any way (whether through the MOF Decree or otherwise); and 2) that it will take affirmative steps to clarify to all SOEs that they remain free to make software purchasing decisions based on commercial considerations irrespective of the origin of the software or the nationality of the supplier.

In keeping with these commitments, China should remove all instances of such discriminatory guidance from all government websites directed at SOEs.

**Local IP Ownership Requirements for Information Security Products Including Software:** China's "Multi Level Protection Scheme" (MLPS) imposes significant restrictions on procurement of information security products for an overly broad range of information systems the government considers sensitive. Among other requirements, procurements of such products are limited to those with IP rights owned in China. This applies to procurements by the Chinese Government and increasingly to procurements by SOEs and others in the private sector. This results in an undue and discriminatory market access restriction for foreign information security products and will in many cases prevent information systems in China from procuring the most effective security tools to meet their needs. We welcome the commitment made by China in the 2012 JCCT that it will review and revise the MLPS rules through a process that will seek the views of all parties, including through dialogue with U.S. parties, and urge that China use this process to remove requirements that discriminate against products that are foreign-owned or have foreign-owned IP.

**Patent Law Reform:** The Chinese Government is currently undertaking a process to amend the Patent Law, led by the State Intellectual Property Office (SIPO). Among other things, the proposed amendments would give expanded enforcement powers to SIPO, who may be able to conduct *ex officio* raids and enforcement actions



against ill-defined “market-disruptive” patent infringement activities, and award fines as well as compensatory and punitive damages. This creates enormous risks for foreign patent holders in China. The Chinese judicial system is the proper forum to adjudicate patent infringement and damages, and it does not make sense to vest that same authority in administrative agencies as well. The proposed empowerment of SIPO and hundreds of local intellectual property offices (IPOs) in enforcing patents will dramatically change the current enforcement landscape, creating the potential for substantial confusion and duplication of the role that courts now play. The envisioned role for SIPO and IPOs as patent enforcement authorities is, based on our research, without analogue in any other national law.

IIPA written submission on 2014 Special 301 Out-Of-Cycle  
Review of Kuwait



October 15, 2014

*Submitted via regulations.gov Docket No. USTR–2014–0019*

Susan F. Wilson  
Director for Intellectual Property and Innovation  
Office of the U.S. Trade Representative  
600 17th Street, N.W.  
Washington, D.C. 20508

Re: 2014 Special 301 Out-of-Cycle Review of Kuwait, 79 Fed. Reg. 60229 (Oct. 6, 2014)

Dear Ms. Wilson:

The International Intellectual Property Alliance (IIPA)<sup>1</sup> provides this response to the above-captioned Federal Register Notice that invites “written comments from the public concerning any act, policy, or practice that is relevant to the decision regarding whether Kuwait should be identified under Section 182 of the Trade Act of 1974 (Trade Act) (19 U.S.C. 2242).” On February 7 of this year, IIPA made its “Written Submission” regarding the 2014 Special 301 review. As an appendix to that submission, IIPA filed on specific country practices in Kuwait. That country filing is appended to this response and provides the backdrop for this submission.<sup>2</sup>

## RECOMMENDATION

IIPA recommends that Kuwait remain on the Special 301 Watch List.

## UPDATES IN KUWAIT

There is very little to report in terms of improved copyright protection and enforcement in Kuwait. Raiding has not re-commenced since its cessation in January 2012, nor have there been (to our knowledge) any criminal cases for copyright infringement, nor any developments leading to the establishment of specialized IP courts. The law revision process (to bring the law into full compliance with the WTO TRIPS

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<sup>1</sup> The IIPA is a private sector coalition, formed in 1984, of trade associations representing U.S. copyright-based industries in bilateral and multilateral efforts working to improve international protection and enforcement of copyrighted materials and open up foreign markets closed by piracy and other market access barriers. IIPA’s six member associations represent over 3,200 U.S. companies producing and distributing materials protected by copyright laws throughout the world—all types of computer and video games for video game consoles, personal computers, and the Internet; theatrical films, television programs, DVDs and home video and digital representations of audiovisual works; music, records, CDs, and audiocassettes; and fiction and non-fiction books, education instructional and assessment materials, and professional and scholarly journals, databases and software in all formats. Visit [www.iipa.com](http://www.iipa.com). Members of the IIPA include [Association of American Publishers](#), [Entertainment Software Association](#), [Independent Film & Television Alliance](#), [Motion Picture Association of America](#), [National Music Publishers’ Association](#), and [Recording Industry Association of America](#).

<sup>2</sup> For the purpose of this submission, we note that as of July 1, 2014, BSA is no longer a member of IIPA; therefore, we refer USTR to BSA for updates regarding any end-user or related business software concerns raised in the February 2014 submission.



Agreement) is no closer to resolution today than it was in February 2014. One positive development occurred in September 2014, as Kuwait joined the Berne Convention (effective as of December 2, 2014). This is a positive indicator that Kuwait intends to protect domestic and foreign copyrights, on a non-discriminatory basis (in line with the Berne Convention's general rule of national treatment). However, to our knowledge, no steps have been taken to ratify and accede to the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty which are the basic building blocks for protection of copyright in the online marketplace.

As a result of the overall lack of protection for creators, the market in Kuwait remains stunted. For example, Kuwait's music market falls well below its potential since there is a market failure to compensate performers and record companies for the broadcast and public performance of music. In this respect, Kuwait is not alone in the region, as other markets, such as the UAE and Saudi Arabia, face similar problems. At the same time, as the UAE is hopefully moving forward in addressing this gap, so should Kuwait.

The bigger problem for the music industry remains the lack of fair and equitable market access in Kuwait (an equal pillar to IP in the Special 301 process). Simply, IP protection in the absence of meaningful market access is largely irrelevant. We call upon the Government of Kuwait to eliminate burdensome restrictions on the ability to do business, and in particular, to modify the operation of its onerous censorship processes that effectively prevent the development of a legitimate music market. Legitimate streaming service Deezer is operating in Kuwait, but continues to face many obstacles in trying to expand its operation, and currently offers a limited catalog due to censorship uncertainties. We note that these censorship issues affect only legitimate actors, and do not in any way affect the availability of content via pirate services. As such, these censorship regulations do not achieve their intended purpose, and merely operate as impediments to legitimate enterprise.

## CONCLUSION

For the reasons stated above and the ongoing issues highlighted here and in the attached, we recommend that Kuwait remain on the Special 301 Watch List. We look forward to our continued work with USTR and other U.S. agencies on addressing the concerns of copyright-intensive industries in Kuwait.

Respectfully submitted,

Michael Schlesinger  
International Intellectual Property Alliance

Attachment: IIPA 2014 Special 301 Report: Kuwait

# KUWAIT

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2014 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** IIPA recommends that Kuwait remain on the Watch List in 2014.<sup>1</sup>

**Executive Summary:** There is an urgent need to address copyright protection and enforcement in Kuwait which has been lagging for several years. Without effective protection in Kuwait including against pirate resellers and enterprises that engage in end-user software piracy, and in the face of severe market barriers for the music industry, legitimate commerce in copyright materials cannot flourish and piracy cannot effectively be countered. IIPA calls upon the Government of Kuwait to eliminate burdensome restrictions on the ability to engage in the music business, and in particular to modify the operation of its onerous content review processes that effectively prevent the development of a legitimate music market. Legitimate streaming service Deezer is operating in Kuwait, but faces many obstacles in trying to expand its operations. The service currently offers only a limited catalog due to content review uncertainties. Content review in Kuwait affects only legitimate actors and does not in any way affect the availability of the same content uncensored via pirate services. The Kuwaiti Government is considering a new draft Copyright Law to replace the current law from 1999. This new draft will hopefully bring the law into compliance with the WTO TRIPS Agreement, create a more deterrent criminal penalties structure, and implement the WIPO Copyright Treaty (WCT) and WIPO Performances and Phonograms Treaty (WPPT). IIPA recommends immediate passage of the draft Law, with changes to ensure full TRIPS compliance and compatibility with the WCT and WPPT, and thus create a legal framework that is more conducive to reducing piracy in all its forms.

IIPA recommends that the U.S. Government should, at the next meeting under the U.S.-Kuwait Trade and Investment Framework Agreement, firmly encourage the Government of Kuwait to take stronger measures in enforcement and to bring its IPR legal framework up to date and into compliance with its international obligations.

### **PRIORITY ACTIONS REQUESTED IN 2014**

#### **Enforcement**

- Have Kuwaiti authorities re-commence raiding activity which ceased since January 2012.
- Investigate and prosecute cases of unauthorized use of software in enterprises, pirate software resellers, and hard disk loading of software onto computers being sold in the market.
- Impose maximum penalties in criminal cases to drive piracy levels down and defeat recidivism.
- Enforce against pirate vendors who sell or advertise illegal products on websites or e-commerce platforms.
- Eliminate marketing restriction prohibitions (such as religious requirements), or at least implement them in an even-handed manner so that pirates do not enjoy a state-enforced monopoly to sell illegal materials.
- Create specialized IP courts.

#### **Legislative**

- Enact Copyright Law amendments to significantly increase minimum and maximum criminal penalties and mandate both fines and prison sentences.
- Further modernize the Copyright Law to meet the requirements of the TRIPS Agreement, implement the WCT and the WPPT, and update the law to more effectively address online piracy.
- Issue an Emiri decree to address enforcement pending the enactment of the new Copyright Law.

<sup>1</sup>For more details on Kuwait's Special 301 history, see previous years' reports at <http://www.iipa.com/countryreports.html>. For the history of Kuwait's Special 301 placement, see <http://www.iipa.com/pdf/2014SPEC301HISTORICALCHART.pdf>. For a discussion of IIPA's 2014 Key Initiatives and Challenges, see IIPA, 2014 Special 301 Submission, at <http://www.iipa.com/pdf/2014SPEC301COVERLETTER.pdf>.



- Eliminate burdensome and inefficient barriers to the distribution of legitimate music, in particular by addressing the operation of the current outdated content review regime.

## **PIRACY, ENFORCEMENT, AND MARKET ACCESS UPDATES IN KUWAIT**

Piracy and some market-related issues remain difficult problems in Kuwait, hindering legitimate businesses from taking hold and driving others out of the market.<sup>2</sup> Piracy in Kuwait today consists of: 1) software piracy, including unauthorized use of software by enterprises (in 2011, the software piracy rate in Kuwait was 59%, representing a commercial value of unlicensed software of US\$72 million), and hard disk loading;<sup>3</sup> 2) pirate sales in the retail markets;<sup>4</sup> and 3) Internet and mobile (smart phone, tablet, etc.) piracy. Websites apparently targeting Kuwait for infringement include *myegy.com* (the 35th most accessed site in Kuwait, with a tagline “Download the latest and the most beautiful films of Arab and foreign Sweeter games, programs and songs and more services”); *subscene.com* (36th, with the tagline “Passionate about good subtitles this community-driven site aims to disperse and produce quality subtitles for media content including Films, TV-Series, Music Videos, and Online Video”).<sup>5</sup>

The Copyright Department is no longer accepting any new complaints for Copyright cases. The Kuwaiti Emir has signed the agreement to transfer the Copyright Department of the Ministry of Commerce and Industry to the National Council for Culture, Arts and Letters (NCCAL). Unfortunately it is not clear when copyright raids will start happening under this agency. Right holders report no enforcement actions since January 2012. Court results arising from prior raids have been non-deterrent, largely because so few cases were prosecuted, and even in those brought forward, extremely low criminal penalties were imposed (given the low maximum penalties in the Copyright Law). The Kuwaiti Government should immediately re-commence raiding, and investigate and prosecute cases of unauthorized use of software in enterprises, pirate software resellers, and hard disk loading of software onto computers being sold in the market. With legitimate digital services having launched in Kuwait, it is also incumbent upon the Kuwaiti Government to ensure an adequate legal and enforcement framework to deal with piracy, including much higher and deterrent minimum mandatory sentences and maximum penalties. Included in such enforcement should be the imposition of Internet takedowns against pirate vendors who sell or advertise illegal products. ISPs have a good understanding of the issues, but the laws have not kept up to provide proper incentives to encourage cooperation between ISPs and right holders.

Censorship practices, which result in banning and on occasion confiscating legitimate product from legitimate stores, continue to inhibit effective access to the Kuwaiti market. Such burdensome and inefficient barriers to the distribution of legitimate music embodied in the current outdated content review regime should be eliminated. If marketing prohibitions (such as those based on religious requirements) are retained, they should be implemented in an even-handed manner so that pirates do not enjoy a state-enforced monopoly to sell illegal materials on the streets or over the Internet, while leaving legitimate right holders with no outlet for distribution of legal materials. Problems with existing censorship processes threaten to undermine the very ability of legal music platforms to operate in Kuwait.

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<sup>2</sup>For example, in previous filings, we noted that the Virgin Megastore in Kuwait City was closed for three months due to restrictive marketing requirements and censorship. Meanwhile, the same products which the Virgin Megastore would have sold (books as well as recorded music) were openly available on the streets in pirated copies, as well as over the Internet through pirate sites.

<sup>3</sup>Data on software piracy rates and commercial values are taken from the 2011 BSA Global Software Piracy Study at [www.bsa.org/globalstudy](http://www.bsa.org/globalstudy). This study assesses piracy rates and the commercial value of unlicensed software installed on personal computers during 2011 in more than 100 markets. The study includes a detailed discussion of the methodology used. BSA plans to release an updated study in the second quarter of 2014.

<sup>4</sup>Much of this activity takes place in Hawalli, Bin Khaldoun street, and the Al Fahahil area.

<sup>5</sup>Several notorious sites (i.e., those recommended to USTR by IIPA as “notorious markets” for piracy in October 2013) are among the top 100 sites accessed in Kuwait.

## **COPYRIGHT LAW AND RELATED ISSUES**

**Copyright Law in Need of Reform:** Copyright protection in Kuwait is governed by the Copyright Law, Decree No. 64/1999 (effective February 9, 2000). Implementing regulations have never been issued. The law fails to comply with the TRIPS Agreement in certain respects and contains other problems and ambiguities, all of which have been recounted in previous IIPA filings.<sup>6</sup> Kuwait, an original member of the WTO, has not joined the Berne Convention (although Berne is incorporated by reference into the TRIPS Agreement), the Phonograms Convention, the WCT or WPPT. IIPA has reviewed several drafts, all of which apparently intend to bring Kuwait closer into compliance with the TRIPS Agreement and make other changes, such as strengthening the penalty structure, providing rudimentary protections of technological protection measures (TPMs), making other changes to implement the WCT and WPPT, and fixing point of attachment issues in the current Decree. IIPA supports passage of a strong law taking into consideration the following, among other things:

- **TPMs:** The law should confirm full coverage under the WCT and WPPT by: 1) ensuring TPMs are defined to include access controls and controls on the exercise of exclusive rights; 2) ensuring trafficking in circumvention technologies, software devices, components, and services is prohibited; and 3) providing civil, administrative, and criminal relief.
- **Communication to the Public Right:** The law should ensure that the definition of “communication to the public” includes “the making available of the work or object of related rights in such a way that members of the public may access it from a place and at a time individually chosen by them” and ensure this interactive right applies to related rights. In addition, it is critical for the traditional broadcast and public performance of sound recordings to require compensation to performers and record companies as contemplated in Article 15 of the WPPT.
- **Internet Service Provider (ISP) Cooperation:** The law should include: principles of liability to hold accountable those who facilitate infringement on the Internet; specific provisions related to ISPs, including notice and takedown, and incentives for ISPs to cooperate with right holders against online piracy, including effective and fair policies to deal with repeat infringers and access to non-hosted infringements.
- **Enumeration of Exclusive Rights in Works:** The law should enumerate exclusive rights, as is the international best practice.
- **Presumptions of Ownership and Subsistence of Copyright:** The law should confirm a presumption of ownership, including for related rights, and a presumption of subsistence of copyright.
- **Availability of *Ex Parte* Civil Searches as Required by TRIPS:** The law should confirm expressly that civil *ex parte* searches are available in line with TRIPS.
- **Effective Civil Remedies:** The current Law contains rudimentary discussion of compensatory damages, but should also provide for the possibility of statutory damages, to be elected by the right holder, and recovery of lost profits, attorneys’ fees, and costs.
- **TRIPS-Compatible Remedy for “Materials and Implements”:** Article 42 of the current Law authorizes the Court of Urgent Matters to confiscate all materials used for illegal publications on “condition that these materials be fit only for republishing said work, performance, phonogram or broadcast program.” This narrow authority does not satisfy the clear language of TRIPS.
- **Government Legalization of Software and Other Copyright Works and Sound Recordings:** The Kuwaiti Government should clearly mandate that all Government agencies use legitimate software and other copyright materials, and adopt software asset management best practices.
- **Protection for Encrypted Programs:** The law should be amended to provide a remedy against trafficking in a device or system used to decode encrypted program-carrying signals without authorization of the right holder.
- **Term of Protection:** The Kuwaitis should take the opportunity presented by the draft law and follow the modern trend (more than 80 countries have greater than TRIPS minimum terms) to protect works for life plus 70 years for works of natural authors, and 95 years from publication for audiovisual works and sound recordings.

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<sup>6</sup>See, e.g., International Intellectual Property Alliance, *Kuwait*, IIPA 2009 Special 301 Report, at <http://www.iipa.com/rbc/2009/2009SPEC301KUWAIT.pdf>.

- **Narrow Exceptions:** Any exceptions adopted in Kuwait must meet international standards and the three-step test of the Berne Convention (incorporated into TRIPS). The prior draft law limited personal copying, which was positive, but the law must not in any case permit reprographic copies of entire books or musical works. The proposal should also require that a backup copy of software must be destroyed if there is no longer lawful ownership or license of the original.
- **Moral Rights Provisions Should be Narrowed:** The moral rights provisions should: 1) ensure that any moral right to “publish” amounts to a right of first divulcation only; 2) ensure that protection against modification does not collide with the exclusive adaptation right of an author and ensure that any translation undertaken may only be done “with authorization”; and 3) restrict the author from withdrawing a work from circulation, or allowing the author to make substantial changes after the economic rights have been transferred, since this would collide with Berne/TRIPS economic rights.
- **Rights Management Information (RMI):** To ensure full implementation of the WCT and WPPT, the law should cover rights management information, defining it properly, and prohibiting the unlawful tampering with or trafficking in RMI or works or objects of related rights which voluntarily employ RMI.



IIPA comments on the 2014 annual review of country eligibility  
for benefits under the African Growth and Opportunity Act  
(AGOA)

# INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE®



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October 23, 2014

## **VIA REGULATIONS.GOV (Docket No. USTR–2014–0018)**

Constance Hamilton  
Deputy Assistant U.S. Trade Representative for Africa  
Office of the U.S. Trade Representative  
600 17th Street, NW  
Washington, DC 20508

**Re: Public Comments on Annual Review of Country Eligibility for Benefits Under the African Growth and Opportunity Act in 2015, 79 Fed. Reg. 59342 (October 1, 2014)**

To the Trade Policy Staff Committee:

The International Intellectual Property Alliance (IIPA) submits these comments in response to the October 1, 2014 request for public comments circulated by the African Growth and Opportunity Act (AGOA) Implementation Subcommittee of the Trade Policy Staff Committee, chaired by the U.S. Trade Representative, in connection with the review of the eligibility of sub-Saharan African countries to receive AGOA benefits.

### **A. Description of the IIPA and its Members**

The IIPA is a private sector coalition, formed in 1984, of trade associations representing U.S. copyright-based industries in bilateral and multilateral efforts working to improve international protection and enforcement of copyrighted materials and open up foreign markets closed by piracy and other market access barriers. IIPA's six member associations represent over 3,200 U.S. companies producing and distributing materials protected by copyright laws throughout the world—all types of computer and video games for video game consoles, personal computers, and the Internet; theatrical films, television programs, DVDs and home video and digital representations of audiovisual works; music, records, CDs, and audiocassettes; and fiction and non-fiction books, education instructional and assessment materials, and professional and scholarly journals, databases and software in all formats.<sup>1</sup>

The U.S. copyright-based industries are one of the fastest-growing and most dynamic sectors of the U.S. economy. Inexpensive and accessible reproduction technologies, however,

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<sup>1</sup> Visit [www.iipa.com](http://www.iipa.com). Members of the IIPA include [Association of American Publishers](#), [Entertainment Software Association](#), [Independent Film & Television Alliance](#), [Motion Picture Association of America](#), [National Music Publishers' Association](#), and [Recording Industry Association of America](#).

make it easy for copyrighted materials to be pirated in other countries, including in the online environment. IIPA strives for the establishment of modern copyright law and enforcement regimes in foreign countries that deter piracy, because such regimes create a framework for trade in creative products, foster technological and cultural development, and encourage investment and employment in the creative industries.

## **B. AGOA and the Protection and Enforcement of Intellectual Property Rights**

The protection and enforcement of intellectual property rights are important prerequisites to AGOA benefits. And apart from trade relations with the United States, creators in AGOA beneficiary countries recognize that copyright protection provides needed incentives for investment in the production of cultural works, allowing local artists to sustain their livelihoods. Creators from across the continent also understand the importance of stronger enforcement against high levels of piracy for the viability of their trades.

For example, creative industries in **South Africa** are growing thanks to incentive programs, but face the challenge of illegal competition. The South African Coalition Against Copyright Theft recently reported on the high level of Internet piracy in the country, and estimated that for local film distribution, “the revenue damage from illegal downloads comes to R300 million [or about US\$27 million] a year.”<sup>2</sup> One group of South African artists lamented that they “came together as youths to try and make a living out of music, but these street vendors are killing our business by illegally selling pirated CDs and DVDs that we would have released.”<sup>3</sup>

**Nigeria**’s film industry is currently the second largest in the world, spurring the government to seek to better capitalize on its potential by improving IP-awareness among its filmmakers. As a result, “[a]ccess to such formal training is fostering a more business-oriented approach among filmmakers, and enhancing the quality of scripts, acting and other technical aspects of Nigerian film, making it an increasingly attractive investment proposition.”<sup>4</sup> Still, proponents of local artists know that without the incentives that a stronger copyright regime provides, many would-be filmmakers are not willing to take the risk: “They have known that

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<sup>2</sup> Chelsea Geach, “SA pirates a million movies a month,” *iol news* (Oct 14, 2014), available at [http://www.portalangop.co.ao/angola/en\\_us/noticias/lazer-e-cultural/2014/9/42/Writer-advises-creators-join-copyright-society,bda10b8e-b2ab-4e7c-a977-0902c594552d.html](http://www.portalangop.co.ao/angola/en_us/noticias/lazer-e-cultural/2014/9/42/Writer-advises-creators-join-copyright-society,bda10b8e-b2ab-4e7c-a977-0902c594552d.html).

<sup>3</sup> Savious Kwinika, “South Africa: Piracy Frustrates Budding Artists,” *allafrica.com* (June 9, 2014), available at <http://allafrica.com/stories/201406100742.html>.

<sup>4</sup> Sandra Oyewole, “A Peek Inside Nigeria’s Film Industry,” *WIPO Magazine* (April 2014), available at [http://www.portalangop.co.ao/angola/en\\_us/noticias/lazer-e-cultural/2014/9/42/Writer-advises-creators-join-copyright-society,bda10b8e-b2ab-4e7c-a977-0902c594552d.html](http://www.portalangop.co.ao/angola/en_us/noticias/lazer-e-cultural/2014/9/42/Writer-advises-creators-join-copyright-society,bda10b8e-b2ab-4e7c-a977-0902c594552d.html).

whatever they produce will be immediately pirated – stolen – and they will not be provided the means to develop their talent.”<sup>5</sup>

It is no coincidence that the **Republic of Seychelles** adopted a new Copyright Act in 2014 (with the goal of bringing the country in line with its expected WTO obligations),<sup>6</sup> just as major film producers are launching new initiatives there,<sup>7</sup> and the local music industry is experiencing new growth.<sup>8</sup> Creators in other African markets are looking for their own countries to follow suit. For example, **Angola** is home to successful writers and musicians, but these same artists see a need for greater copyright protection,<sup>9</sup> and for greater business investment if the local creative sector is to thrive.<sup>10</sup>

As these and other sub-Saharan economies develop, governments should look to intellectual property law and enforcement mechanisms that can incentivize their own creative industries and foster economic growth and stability. The U.S. Government’s AGOA review is one of only a few regularly occurring opportunities to examine intellectual property protection and enforcement in AGOA-eligible countries and to provide guidance to make those mechanisms more effective.

As economies expand into new platforms, so must the scope of the rule of law. For many regions of the developing world, including Africa, laws and enforcement measures are needed to address illegal activities that take place over broadband Internet access and, increasingly, mobile devices. Mobile devices have brought incredible economic opportunity for individuals and legitimate businesses in sub-Saharan Africa, reaching an estimated 629 million subscriptions on the continent in 2014 (more than 69 subscriptions per 100 inhabitants), according to the UN’s

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<sup>5</sup> Yomi Olugbodi and Steve Anu’ Adesemoye, “Digital Media, Intellectual Property Rights And The Nigerian Film Industry,” *Shoots*, available at <http://shoots.com.ng/index.php/educational-resources/47-digital-media-intellectual-property-rights-and-the-nigerian-film-industry-yomi-olugbodi-and-steve-anu-adesemoye>.

<sup>6</sup> Hajira Amla, “Seychelles’ WTO accession by end of 2014 is a ‘target we can meet’, says Finance Ministry,” *Seychelles News Agency* (July 8, 2014), available at: <http://www.seychellesnewsagency.com/articles/929/Seychelles+WTO+accession+by+end+of++is+a+target+we+can+meet,+says+Finance+Ministry#sthash.ruPTOmbc.dpuf>.

<sup>7</sup> “Bollywood backs the Seychelles as a new location for filming African stories,” *ScreenAfrica* (July 9, 2014), available at <http://www.screenafrica.com/page/news/africa/1643961-Bollywood-backs-the-Seychelles-as-a-new-location-for-filming-African-stories#.VEAikvnF98E>.

<sup>8</sup> “Tax incentives aimed at stimulating growth in the Seychelles local music industry – Hotels & Restaurants contracting local artists benefit of 125% deduction in Business Tax,” *Omarjee Holidays* (June 24, 2014), available at <http://omarjeeholidays.mu/blog/?p=684>.

<sup>9</sup> “Writer advises creators to join copyright society,” *ANGOP Agencia Angola Press* (Oct. 14, 2014), available at [http://www.portalangop.co.ao/angola/en\\_us/noticias/lazer-e-cultural/2014/9/42/Writer-advises-creators-join-copyright-society,bda10b8e-b2ab-4e7c-a977-0902c594552d.html](http://www.portalangop.co.ao/angola/en_us/noticias/lazer-e-cultural/2014/9/42/Writer-advises-creators-join-copyright-society,bda10b8e-b2ab-4e7c-a977-0902c594552d.html).

<sup>10</sup> “State of Angolan music considered positive,” *ANGOP Agencia Angola Press* (Oct. 14, 2014), available at [http://www.portalangop.co.ao/angola/en\\_us/noticias/lazer-e-cultural/2014/9/42/State-Angolan-music-considered-positive-says-Proletario,4307f4e2-81bc-40f1-96a3-f41a54e8e43d.html](http://www.portalangop.co.ao/angola/en_us/noticias/lazer-e-cultural/2014/9/42/State-Angolan-music-considered-positive-says-Proletario,4307f4e2-81bc-40f1-96a3-f41a54e8e43d.html).

International Telecommunication Union (ITU).<sup>11</sup> In 2013, the ITU reports that there were more than 108 mobile phone subscriptions per 100 inhabitants in Ghana, over 70 subscriptions per 100 inhabitants in Kenya, over 73 subscriptions per 100 inhabitants in Nigeria, over 92 subscriptions per 100 inhabitants in Senegal, and 147 subscriptions per 100 inhabitants in South Africa. This impressive technological growth, unfortunately, is accompanied by illegitimate activities that will hamper legitimate economic growth if left unchecked.

For these reasons, it is crucial that countries demonstrate some measure of progress toward adequate and effective protection of intellectual property, as a key element to AGOA eligibility. We urge the Administration to continue to examine copyright laws and enforcement practices under the intellectual property rights (IPR) eligibility criteria of AGOA with a view toward positive growth in the economic futures of AGOA-eligible countries. As IIPA has explained in previous AGOA-related filings,<sup>12</sup> just what amounts to “adequate and effective” protection of intellectual property rights is a flexible measure that changes over time. The requirements of the WTO Agreement on Trade-related Aspects of Intellectual Property Rights (TRIPS Agreement), including regarding copyright protection and enforcement, are key considerations in this determination. Today, in the face of challenges such as optical media piracy and piracy that occurs over the Internet and mobile networks, the two “Internet” treaties of the World Intellectual Property Organization (WIPO) – the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT) – contemplate many of the needed legal changes. These treaties provide essential legal frameworks for the continued growth of e-commerce in coming years by ensuring that valuable content is protected from piracy on the Internet.

### **C. Request for Review of Conditions in Sub-Saharan Africa**

The IIPA requests that the Administration continue to assess the progress of AGOA-eligible governments in legislative measures and in the enforcement of copyright, and to identify those countries that could benefit from U.S. assistance in capacity building to meet the requirement to provide “adequate and effective” protection of intellectual property rights (IPR). Such an exercise would further benefit both AGOA-eligible nationals and U.S. companies seeking to do business in those nations by creating better conditions for creators, thereby encouraging economic development, cultural diversity and the rule of law.

IIPA has reported on cable piracy in AGOA-eligible countries in previous years, and the problem is an ongoing concern in 2014. For example, in **Uganda**, representatives of the local film producers association, the Federation of Movie Industry, and the MPAA have consulted on steps to address rampant piracy in the local television and hard goods markets. Based on the Federation’s investigations, they report that most TV stations and satellite operators show only pirated content, in particular of non-Ugandan works. These content sources reportedly reach the

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<sup>11</sup> See World Telecommunication/ICT Indicators Database 2014, <http://www.itu.int/en/ITU-D/Statistics/Pages/stat/default.aspx>.

<sup>12</sup> See, for example, IIPA’s 2009 Public Comments in the Annual Review of AGOA Country Eligibility, available at <http://www.iipa.com/agoa.html>.

country through unauthorized download of pirated works via the Internet. Distributors offering pirated content consist of a mix of television channels and satellite operators and include entities called NBS television, Channel 44, Urban TV, Bukedde TV, Top TV, GO tv, Zuku TV, and Star Times. While Uganda is a party to the TRIPS Agreement and joined WIPO in 1973, Uganda has not acceded to the Berne Convention, Rome Convention or the WIPO Internet Treaties. IIPA encourages the U.S. Government to request that the Government of Uganda accede to the major international copyright, and bring its legislation up to TRIPS standards. IIPA also suggests that the U.S. Government offer to provide technical assistance and capacity building measures with a view to increasing copyright protection for local and foreign rights holders.

Widespread copyright piracy remains a very serious problem among all African countries. As a result, many copyright-based sectors and companies may still be reluctant to invest in these smaller markets where piracy is, in effect, out of control. As AGOA-eligible countries consider reforms to their copyright systems, they should be encouraged to work with stakeholders and the U.S. Government, while considering the requirement to provide adequate and effective protection of IPR under AGOA.

Several countries have either enacted legislation or are considering the implementation of the WIPO treaties. So far, nine countries in sub-Saharan Africa have deposited their instruments to join the WCT and the WPPT: **Benin, Botswana, Burkina Faso, Gabon, Ghana, Guinea, Mali, Senegal and Togo**. While **Kenya, Namibia, Nigeria, and South Africa** signed the WCT and WPPT between 1996 and 1997, these four important AGOA-eligible countries have yet to ratify or implement either of the treaties.

Again this year, we suggest that USTR incorporate as part of the annual review process a request that the eligible AGOA countries provide a brief update on the status of their current copyright legislation as well as their plans, if any, to amend their copyright legislation and to accede to relevant international instruments. Such information would be most useful at this stage of the review, before the final report is issued.

## CONCLUSION

IIPA appreciates this opportunity to provide the TPSC and the AGOA Subcommittee with its views on the AGOA. It is essential that the annual AGOA review remain an opportunity to evaluate the progress of its beneficiaries toward meeting their intellectual property rights criteria, and to identify opportunities to enhance IPR protection and to thereby expand economic development. It is also essential to undertake reviews of the conditions in such countries to determine if capacity building assistance can make a difference. We look forward to working with you to foster improved copyright protection in sub-Saharan Africa as a region.

Respectfully submitted,



Amanda Wilson Denton

International Intellectual Property Alliance

IIPA comments regarding the 2014 Special 301 Out-Of-Cycle  
Review of Notorious Markets



October 24, 2014

**Filed via [www.regulations.gov](http://www.regulations.gov), Docket No. USTR–2014–0017**

Susan F. Wilson

Director for Intellectual Property and Innovation

Office of the U.S. Trade Representative

600 17th Street, N.W.

Washington, D.C. 20508

Re: **IIPA Written Submission Re: 2014 Special 301 Out-of-Cycle Review of Notorious Markets: Request for Public Comments, 79 Fed. Reg. 58026 (September 26, 2014)**

Dear Ms. Wilson:

In response to the September 26, 2014 Federal Register notice referenced above, the International Intellectual Property Alliance (IIPA)<sup>1</sup> provides the Special 301 Subcommittee with written comments on “notorious markets” – those “where counterfeit trademark or pirated copyright products are prevalent to such a degree that the market exemplifies the problem of marketplaces that deal in infringing goods and help sustain global piracy and counterfeiting.” The Office of the United States Trade Representative (USTR) has used this process to identify “potential Internet and physical notorious markets that exist outside the United States and that may be included in the 2013 Notorious Markets List.”

We commend USTR for publishing a notorious markets list as an “Out of Cycle Review” separately from the annual Special 301 Report. This list has successfully identified key online and physical marketplaces that are involved in intellectual property rights infringements, and has led to positive developments, including closures of some Internet websites whose businesses were built on illegal conduct; greater cooperation from some previously identified “notorious” and other suspect sites; and the facilitation of licensing agreements for legitimate distribution of creative materials. Recent noteworthy developments include: closure of **Xunlei’s GouGou** pirate search engine shut down over piracy concerns; the closure of **Isohunt** by virtue of a court settlement; fines against **Baidu Player**, a criminal conviction against the owners of **7yin**, the

<sup>1</sup> The IIPA is a private sector coalition, formed in 1984, of trade associations representing U.S. copyright-based industries in bilateral and multilateral efforts working to improve international protection and enforcement of copyrighted materials and open up foreign markets closed by piracy and other market access barriers. IIPA’s six member associations represent over 3,200 U.S. companies producing and distributing materials protected by copyright laws throughout the world—all types of computer and video games for video game consoles, personal computers, and the Internet; theatrical films, television programs, DVDs and home video and digital representations of audiovisual works; music, records, CDs, and audiocassettes; and fiction and non-fiction books, education instructional and assessment materials, and professional and scholarly journals, databases and software in all formats. Visit [www.iipa.com](http://www.iipa.com). Members of the IIPA include [Association of American Publishers](#), [Entertainment Software Association](#), [Independent Film & Television Alliance](#), [Motion Picture Association of America](#), [National Music Publishers’ Association](#), and [Recording Industry Association of America](#).





closure of the **QVOD** video-on-demand service, and the decision holding liable the owners of the P2P streaming video network and video on demand (VOD) site **Funshion**. Some physical notorious markets previously cited by IIPA that have seen improvement include **Quiapo** in the Philippines.

The “notorious markets” list has successfully identified markets causing commercial harm to creators, but more importantly, successfully resulted in concrete and effective actions taken by the sites themselves, or the governments or courts in the countries in which the sites are hosted. This year, the filings of several IIPA association members, including MPAA, RIAA, and ESA identify specific bad actors which do not respect intellectual property rights and which merit further investigation. The notorious markets list heightens awareness of the extreme harm being caused by these markets and all those whose business models are built upon providing access to infringing materials. The list also reemphasizes the continued importance of addressing physical piracy markets where pirates continue to operate with relative impunity. It is incumbent upon governments to consider ways to address such transnational activity. There is a growing list of examples of law enforcement authorities working together across national borders to address copyright piracy that involves cross-border activities.

Addressing IP theft successfully through processes such as USTR’s “notorious markets” out-of-cycle review inures to the benefit of the U.S. economy as a whole. The latest indicators show that the core copyright industries make up nearly 6.5% of value added to GDP; create nearly 5.4 million well-paying jobs; and contribute \$142 billion to U.S. foreign sales and exports, outpacing many industry sectors.<sup>2</sup> The degree to which this capability is sustained depends in large part upon the extent to which piracy and market access barriers can be reduced. Notorious markets – egregious examples of open and blatant piracy – play a disproportionate role in harming the copyright industries, and thus, have a disproportionately negative impact on the U.S. economy and on U.S. employment.

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IIPA appreciates this opportunity to provide input to the Special 301 Subcommittee in this Out-of-Cycle Review regarding notorious markets for copyright piracy, and refers the Subcommittee to our members’ filings for consideration of the specific markets listed therein. We thank the Subcommittee and all those in the U.S. Government who work steadfastly to reduce harm to U.S. copyright interests through identified “notorious markets.”

Respectfully submitted,

Michael Schlesinger  
International Intellectual Property Alliance

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<sup>2</sup> *Copyright Industries in the U.S. Economy: The 2013 Report*, prepared by Stephen Siwek of Economists Inc., available at [http://www.iipa.com/copyright\\_us\\_economy.html](http://www.iipa.com/copyright_us_economy.html). Core copyright industries are those whose primary purpose is to create, produce, distribute, or exhibit copyright materials.