

**Copyright Protection
and Enforcement
Around the World**

**IIPA's 2008
Special 301 Report**

**Submitted to the U.S. Trade Representative
by the
International Intellectual Property Alliance®**

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

February 11, 2008

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2008 SPECIAL 301 REPORT

TABLE OF CONTENTS

SUBMISSION: IIPA’S ERIC H. SMITH LETTER TO STAN MCCOY, ACTING ASSISTANT UNITED STATES TRADE REPRESENTATIVE

APPENDIX A: ESTIMATED TRADE LOSSES DUE TO PIRACY & PIRACY LEVELS (2006-2007) FOR IIPA’S 2008 SPECIAL 301 RECOMMENDATIONS

APPENDIX B: METHODOLOGY USED TO CALCULATE ESTIMATED PIRACY LOSSES, PIRACY LEVELS AND OPTICAL DISC PIRACY

APPENDIX C: COUNTRY SURVEYS

PRIORITY WATCH LIST

ARGENTINA	1
CANADA	8
CHILE	16
COSTA RICA.....	23
EGYPT	29
INDIA	40
MEXICO	51
PEOPLE’S REPUBLIC OF CHINA.....	64
PERU.....	88
RUSSIA	100
SAUDI ARABIA	114
THAILAND	122
UKRAINE	147

WATCH LIST

BANGLADESH	159
BELARUS	165
BRAZIL.....	168
BRUNEI	182
DOMINICAN REPUBLIC	185
GREECE.....	190
HUNGARY	197
INDONESIA	206
ISRAEL.....	220
ITALY	232
KAZAKHSTAN.....	244
KUWAIT.....	247
LEBANON	254
LITHUANIA	261
MALAYSIA	266
NIGERIA.....	283
PAKISTAN.....	288
PHILIPPINES	295
POLAND	312

WATCH LIST (CONTINUED)

ROMANIA	324
SOUTH KOREA	334
SPAIN	345
SWEDEN	354
TAIWAN.....	357
TAJIKISTAN.....	366
TURKEY	368
TURKMENISTAN	382
UZBEKISTAN.....	384
VIETNAM	389

306 MONITORING

PARAGUAY	401
----------------	-----

COUNTRIES DESERVING SPECIAL MENTION

BULGARIA	409
GERMANY	414
HONG KONG	416
JAPAN.....	420
JORDAN	423
NEW ZEALAND	426
SINGAPORE.....	429
SWITZERLAND	433

APPENDIX D

CHART OF COUNTRIES' SPECIAL 301 PLACEMENT (1989-2007) AND IIPA 2008 SPECIAL 301 RECOMMENDATIONS

APPENDIX E

IIPA HISTORICAL SUMMARY OF COUNTRIES' SPECIAL 301 PLACEMENT



February 11, 2008

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

Re: Special 301: Identification of Countries Under Section
182 of the Trade Act of 1974: Request for Public
Comment ("Special 301"), 73 Fed. Reg. 2958
(January 16, 2008)

Dear Mr. McCoy:

This filing responds to the Request for Written Submissions appearing on January 16, 2008 in the Federal Register. The request invites submissions from the public on policies and practices that should be considered in identifying countries that deny adequate and effective protection of intellectual property right or deny fair and equitable market access to U.S. persons who rely on intellectual property protection pursuant to Section 182 of the Trade Act of 1974, 19 U.S.C. §2242 ("Special 301").

The International Intellectual Property Alliance (IIPA) submits our discussion of the types, levels, and costs of piracy, an evaluation of enforcement practices to reduce those levels, and the status of copyright law reform in 43 separate country reports. We also recommend where these countries/territories should be ranked on the various Special 301 watch lists. We highlight challenges and initiatives in this letter that define the copyright industries' agenda for the coming year. We also discuss eight additional countries/territories that we have not recommended be on a Special 301 list but which merit attention by the U.S. government in its bilateral engagements with those countries/territories ("Special Mention" countries/territories).

A. IIPA AND THE COPYRIGHT INDUSTRIES IN THE U.S. ECONOMY

The International Intellectual Property Alliance (IIPA) is a private sector coalition formed in 1984 to represent the U.S. copyright-based industries in bilateral and multilateral efforts to improve international protection of copyrighted materials. IIPA comprises seven trade associations, each representing a significant segment of the U.S. copyright community. These member associations represent over 1,900 U.S. companies producing and distributing materials protected by copyright laws throughout the world—all types of computer software, including business applications software and entertainment software (such as videogame CDs, DVDs and cartridges, personal computer CD-ROMs and multimedia products); theatrical films, television programs, home videos and digital representations of audiovisual works; musical compositions, records, CDs, and audiocassettes; and textbooks, trade books, reference and professional publications and journals (in both electronic and print media).

On January 30, 2007, the IIPA released an economic report entitled *Copyright Industries in the U.S. Economy: The 2006 Report*, the eleventh study written by Stephen Siwek of Economists

Inc. This report details the economic impact and contributions of U.S. copyright industries to U.S. Gross Domestic Product, employment, and trade. The latest data show that the “core” U.S. copyright industries¹ accounted for an estimated \$819.06 billion or 6.56% of the U.S. gross domestic product (GDP) in 2005. These “core” industries were responsible for 12.96% of the growth achieved in 2005 for the U.S. economy as a whole (this means that the growth contributed by these core industries (12.96%) was almost double their current dollar share of GDP (6.56%)). In addition, the “core” copyright industries employed 5.38 million workers in 2005 (4.03% of U.S. workers) in 2005. And the report, for the first time, provides data on the estimated average annual compensation for a worker in the core copyright industries: \$69,839 in 2005, which represents a 40% premium over the compensation paid the average U.S. worker. Finally, estimated 2005 foreign sales and exports of the core copyright industries increased to at least \$110.8 billion, leading many other major industry sectors, including chemicals and related products; motor vehicles, parts and accessories; aircraft and associated equipment; food and live animals; and medicinal and pharmaceutical products.

The health and competitiveness of the U.S. economy thus depends on a thriving copyright sector that creates jobs and exports. It is essential to the continued growth and future competitiveness of these industries that our trading partners provide not only free and open markets, but also high levels of protection for copyright, and effective policies to enforce that protection. To meet the constantly evolving threats to copyright worldwide, our country’s response must remain flexible, innovative and committed.

B. OUTLINE OF IIPA’S SPECIAL 301 SUBMISSION

As in prior years, IIPA’s submission contains several separate sections. Included in this year’s submission are the following:

- This letter, which summarizes the submission and outlines IIPA’s recommendations for cross-cutting initiatives to be undertaken by the copyright industries and the U.S. government for 2008;
- Appendix A, which compiles IIPA’s country placement recommendations, estimated trade losses due to piracy, and estimated levels of piracy;
- Appendix B, which describes IIPA members’ methodologies for calculating estimated trade losses and piracy levels,
- Appendix C, which includes all the country surveys² and at the end lists eight countries/territories that deserve continued U.S. government attention but which we have not recommended for placement on the Special 301 lists;
- Appendix D, which provides an historical chart of countries/territories’ placement on Special 301 lists by USTR since 1989; and
- Appendix E, which contains the Special 301 histories of countries/territories that we have recommended for placement on a list this year, many other countries that have appeared on USTR’s lists in the past and are still candidates for monitoring intellectual property practices, and certain other countries that have never appeared on a USTR list but which deserve special attention.

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

² Country surveys were prepared by Maria Strong, Michael Schlesinger, Eric H. Smith, Steven Metalitz, and Eric Schwartz, and are based on information furnished by IIPA’s seven member associations. We also thank Kristen Schumacher for her contribution in preparing, producing and distributing this submission. The country reports contain information which should not be construed as providing legal advice.

C. COPYRIGHT INDUSTRIES' INITIATIVES AND CHALLENGES IN 2008

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

In the early 1980's, most countries' laws did not protect U.S. works at all, and 90% to 100% piracy levels prevailed in most developing countries. Since the first marriage of intellectual property and trade in the Trade and Tariff Act of 1984 and formation of the IIPA, the later adoption of the "Special 301" provisions in the 1988 Trade Act, and the adoption or modification of the U.S. unilateral trade preference programs, such as GSP, CBERA, ATPA and others, U.S. government initiatives have helped produce significant legal and enforcement improvements. This largely untold success story has produced billions of dollars of increased revenue and millions of new jobs to both U.S. and local copyright industries. However, despite these successes, the threats to U.S. creators and the U.S. copyright industries remain grave and are growing. These threats emanate largely from the growth of digital and on-line piracy; the increased organization and sophistication of commercial pirates; and, most importantly, the failure of governments to adequately enforce their new laws against the rampant piracy of intellectual property. An effective response to these challenges will require a renewed and expanded commitment to use both the old and new tools available to industry and governments.

The copyright industries are extremely grateful for the U.S. government's efforts in promoting copyright reform and effective enforcement. But, as is clearly demonstrated in the country surveys included in this report, organized commercial piracy, whether digital or analog, tangible or over the Internet, combined with the failure of foreign governments to enforce their existing copyright and related laws, threatens to outpace the fight to combat it. The tools exist to make significant progress on the following objectives in 2008. What is needed is the political will for governments to take the actions necessary to address piracy meaningfully and to lower piracy rates locally and globally.

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

Internet Piracy, Electronic Commerce and the WIPO Internet Treaties

The Scope of the Problem: Online copyright piracy, a serious problem for the past several years, is undergoing explosive growth. As improved mobile devices proliferate in every market and become ever more capable of transmitting and receiving copyrighted works, and as access to broadband networks becomes more ubiquitous around the globe, these new technologies are all too often placed at the service of piracy. Legitimate markets for electronic commerce in copyrighted works are being undermined – and in some cases prevented from coming into existence at all – by a flood of unauthorized copies of sound recordings, entertainment and business software, literary material, and motion pictures. The Internet, and other networks linking mobile devices, are being employed as highly efficient, low cost networks for infringing activity, reaching any part of the world with ease, no matter where infringing material first enters the system. Consequently, the U.S. copyright industries face the daunting task of trying to enforce their legal rights in an online world where borders and distances have decreasing practical significance.

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

Quantifying economic losses due to online piracy and allocating those losses to particular countries are extremely challenging problems. Because of these challenges, IIPA’s estimates of piracy levels and of trade losses due to piracy do not yet fully take into account piracy online. Affected industries are seeking to improve their ability to measure the prevalence and impact of online piracy. We already know, however, that the problem is growing rapidly, resulting in displaced sales of legitimate products and services, and that an urgent response is needed. For example, independent surveys in just ten of the biggest markets reveal that an estimated 20 billion songs were illegally downloaded through file sharing services in 2006 alone. This translates into billions of dollars in lost revenue at a time when sales of physical products are in decline. Entertainment software publishers estimate that as many as 10,000 to 20,000 copies of the most popular videogame titles are successfully downloaded each week. And new phenomena, like the illegal pre-loading of songs, games and other content onto handheld devices, pose additional threats to healthy electronic commerce.

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

The Legal and Enforcement Solutions: Well established international norms such as the WTO TRIPS Agreement contribute valuable elements to the needed legal infrastructure to protect electronic commerce and combat Internet piracy. The WTO TRIPS Agreement contains a technology-neutral obligation to provide “expeditious remedies to prevent infringements and remedies which constitute a deterrent to future infringements” (Article 41). The enforcement tools described in TRIPS must be applied against online piracy.

The two treaties adopted by the World Intellectual Property Organization (WIPO) Diplomatic Conference in Geneva in December 1996 provide an additional and more tailored framework for what is needed to protect the transmission of content in the new e-commerce economy. These treaties, the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT), have been in force since 2002. Effective implementation of the global legal minimum standards embodied in the WCT and WPPT is critical in the fight against online piracy, and is a key element of the “adequate and effective” copyright protection that is demanded under the Special 301 program. These standards include clarifying exclusive rights in the online world, and specifically prohibiting the production of or trafficking in tools that circumvent technological protection measures (TPMs) used by right holders to protect copyrighted works, coupled with criminal prohibitions that effectively deter commercial circumvention activities.

Ever since the WIPO Treaties were adopted, IIPA and its members have joined with their counterpart copyright industries around the world to push for ratification and full implementation of the WCT and WPPT in all countries. Sixty-four countries now belong to the WCT; 62 have acceded to the WPPT; and the momentum continues to build, with the other 14 original EU member states expected to join Belgium by ratifying both treaties in the near future.

Ensuring that these standards are effectively embodied in national law is critical. If countries delay in making these needed changes, the prejudicial impact on electronic commerce and the protection of intellectual property online might be irreversible. The U.S., which was one of the first countries to implement these changes in its laws a decade ago, should continue to make it a priority to encourage other countries to follow this path.³

Finally, as described further below, the U.S. government's Free Trade Agreements specify and clarify the standards in TRIPS and the WIPO Treaties. The binding obligations that the FTAs create should form the underpinnings of the online enforcement systems in these countries, and eventually in all countries.

In parallel with the physical world, there is no substitute for vigorous enforcement of the new and existing laws against digital and online piracy. To protect the revenue streams and millions of new jobs created by the copyright industries, governments must become flexible and fast moving to deal with a medium that is constantly shifting and evolving. Laws and practices of nations must be designed to secure broad cooperation among all relevant parties to prevent piracy in the first place; to quickly locate and bring down infringing Internet sites or content; and to pursue actions against offenders. Public education about the dangers of online infringement must be emphasized as well. As global boundaries continue to lose much of their practical relevance because of Internet growth, the usual lines separating the roles of industry and government in policy, enforcement and education must also evolve. Close coordination will be the key to success in this challenging new environment. Global adoption of the Council of Europe Cybercrime Convention, which requires countries to adopt effective remedies for online copyright infringement, and which facilitates law enforcement cooperation across borders, is a key element of a successful strategy.

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

Practical and understandable regimes of secondary liability for online infringement are essential to motivate all participants to cooperate in implementing the reasonable practices that will make the online marketplace less hospitable to infringers. While voluntary arrangements among copyright owners, service providers and equipment manufacturers are of course very important in the fight against online piracy, the U.S. government should also urge all its trading partners to refine their secondary liability regimes to reflect the current realities, or to adopt modern, flexible systems where they do not exist. The goal must be to encourage responsible conduct on the part of all parties involved in the transmission of copyright materials. This involves deployment of available technological measures that can detect, and restrict or prevent infringing transmissions at all levels of the delivery chain; swift and cost-effective ways to achieve takedowns of infringing content and services; and ensuring that repeat infringers find no safe harbor on the Internet.

Finally, we must find a global solution that discourages unauthorized peer-to-peer file sharing through aggressive enforcement against unauthorized uploaders of infringing product,

³ The U.S. implemented the WCT and WPPT by enacting Title I of the Digital Millennium Copyright Act of 1998, Pub. L. No. 105-304, 112 Stat. 2860 (1998). The United States deposited instruments of accession for both treaties on September 14, 1999.

whether of musical recordings, movies, business or entertainment software or literary material, as well as against services that provide these tools for the purpose of encouraging and profiting from infringement. As we know from our own experience here in the U.S, new legal online services for delivery of copyrighted material can succeed only if they are not undermined by unfair competition from unauthorized sources.

It is critical that governments, educational institutions and similar enterprises that provide broadband connections to their employees, students or others develop and enforce strong internal policies (such as executive orders in the case of governments) to prevent illegal file sharing of copyrighted materials, including through the use of peer-to-peer technologies. When their networks transmit only authorized copyrighted material, they are also helping to ensure the security of their networks against unauthorized incursions or other potentially crippling interventions into their systems. In addition, governments should help to ensure that Internet cafés use only legitimate software in the operation of their business, and that they prohibit use of their facilities for the commission of further infringements.⁴

Industry has been hard at work on these critical issues, but we need the help of the U.S. and foreign governments to make the Internet safe for e-commerce in copyrighted materials.

Effective and Deterrent Enforcement Against Copyright Piracy

The copyright industries' most important global goal is to significantly reduce piracy levels in order to open foreign markets, and create increased revenue and employment. Only through effective and deterrent enforcement, as required by the WTO TRIPS Agreement and the various Free Trade Agreements (FTAs) which the U.S. has negotiated, can this goal be met.

The industries and the U.S. government have been engaged for over twenty years in many countries to try to bring piracy down to acceptable levels. But many still have not meaningfully upgraded their enforcement systems to meet their international obligations by adopting effective remedies and imposing deterrent penalties. In a growing number of countries, police agencies are more able, and often more willing, than in the past to conduct raids against pirate producers, wholesalers and retail sites. But all too often the legal system fails to follow through. For effective deterrence, prosecutors and judges (or, where applicable, administrative agencies) must impose penalties that would remove the monetary incentives that drive the pirate trade. Small fines will not deter pirates who stand to gain hundreds of thousands to millions of dollars; deterrence requires substantial prison sentences in these cases. Again and again, in country after country, major pirates either manipulate the system to evade conviction (often as a result of systemic delays or corruption), or suffer only small monetary fines that utterly fail to discourage them from continuing in their illegal business, or others from following their example. Again and again, raided stores reopen quickly with new pirate product, online pirates move their servers or take on a new online identity, or major pirate producers continue their trade in a new guise to avoid the next enforcement action, which may never

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

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

come, or may come only after the pirate has lined his pockets with millions more in illegal income.

Since no country will ultimately undertake effective reform unless it understands that it is in its own interest, it is essential that the U.S. government continue to take steps that will facilitate such an understanding and increase the capacity of willing governments to take effective action. Among the strategies that could be employed are:

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

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

The Special 301 process must specifically target enforcement in a direct and clear way. Many countries believe that Special 301 ranking decisions can be made on the basis of law reform, followed by enforcement “promises” alone. Experience has taught us that this simply has not worked. Countries should be made acutely aware that they will not see a change in their Special 301 placement unless they take the *specific* enforcement actions necessary that actually *reduce* piracy rates (and, conversely, that they will see a change in placement when such actions are in fact undertaken).

Optical Disc Piracy

Piracy of optical disc (OD) products continues to cause major losses to most copyright industries. Increasingly, many sectors of the copyright industry use a common set of media to distribute their products worldwide. These “optical disc” products include formats such as compact discs (CD), video CDs (VCD), CD-ROMs, CD-Recordables (CD-Rs), digital versatile discs (DVDs), DVD-Recordables (DVD-Rs), universal media discs (UMD), and newer, high definition formats such as Blu-ray or HD-DVD. An explosion in the world’s capacity to produce optical disc products has been driven by the ever-growing worldwide demand for copyrighted high-tech, entertainment and educational products, but also by the potential for pirates to generate billions of dollars in illegal income. Optical disc production capacity has for years greatly exceeded the legitimate demand for such products, whether pre-recorded discs or blank media, with much of the difference inuring to the benefit of illegal pirate enterprises.

In recent years, the problem of industrial production of pirate OD product in factories has to a great extent been overtaken by more decentralized, smaller-scale operations that use blank recordable optical media and OD “burners” to make unauthorized copies on a commercial basis.

Whether “burned” or factory-produced, pirate CDs, VCDs, CD-ROMs and DVDs, CD-Rs and DVD-Rs containing protected music, sound recordings, audiovisual works, business and entertainment software and books and journals have decimated the market for legitimate U.S. products.

Optical Disc Piracy: Factory Production: For 2008, IIPA identifies the key optical disc piracy factory production trouble spots as: **China, Indonesia, Malaysia, Nigeria, Russia, and Thailand**. These are markets where immediate actions should be taken by the governments to curtail pirate production.

The optical disc factory piracy problem confronting the copyright sectors, now familiar to governments worldwide, has demanded new and creative legislative and enforcement solutions. As part of countries’ WTO TRIPS obligations to provide deterrent enforcement against piracy “on a commercial scale,” every country whose optical disc production facilities are producing significant pirate product should create and enforce a specialized regulatory framework for tracking the growth of optical disc production capacity, including the cross-border traffic in production equipment and raw materials, principally optical-grade polycarbonate. These regulatory regimes should include strict licensing controls on the operation of optical disc mastering and replication facilities, and the requirement to use identification tools that identify the plant in which production occurred and that help lead the authorities to the infringer. So far such regimes have been established in Bulgaria, China, Hong Kong, Indonesia, Macau, Malaysia, Nigeria, the Philippines, Poland, Singapore, Taiwan, Thailand, Turkey, and Ukraine, and are under consideration in Bahrain, Oman, India, Vietnam, and other countries. Increasingly, pirate optical disc production is migrating from jurisdictions with optical disc production regulatory regimes to countries that have not adopted these regulatory tools or do not enforce them, such as Bangladesh, Nigeria, Vietnam, and many others mentioned in this submission.

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

IIPA and its members have developed a number of resources to help governments in fashioning an effective optical disc regulatory system. We also note that governments have recognized the importance of effective regulations. In October 2003, APEC leaders agreed on the need to “stop optical disc piracy” and endorsed a set of “Effective Practices.” We commend these to all governments addressing this problem. We stand ready to work with USTR to assist governments in understanding, drafting and implementing these recommendations into national law.

Optical Disc Piracy: Commercial “Burning”: As noted above, as regulatory regimes have been put into place and enforced, the pirates have again taken advantage of technological developments, and moved production increasingly from the “factory” locus to smaller, more mobile venues that are more private and harder to police. Using cheaper and more portable consumer “recordable” technology, pirates with a very small investment can easily and cheaply burn thousands of CD-Rs and DVD-Rs of copyrighted material for commercial sale. We refer here not to individual consumers “burning” copies but to aggressive commercial exploitation – often by the very same syndicates that operated the factories. In territories like Taiwan, Brazil, Mexico, Spain and many others, seizures of pirate product in 2007 were overwhelmingly of “burned” product. Commercial “burning” has probably become the biggest piracy threat in the “hard goods” optical media market.

This new development calls for innovative responses. Improved enforcement machinery must aim at implementing zero tolerance policies against the offer for sale of pirate product. If pirates have no place to sell their products, their ability to manufacture becomes superfluous. Some

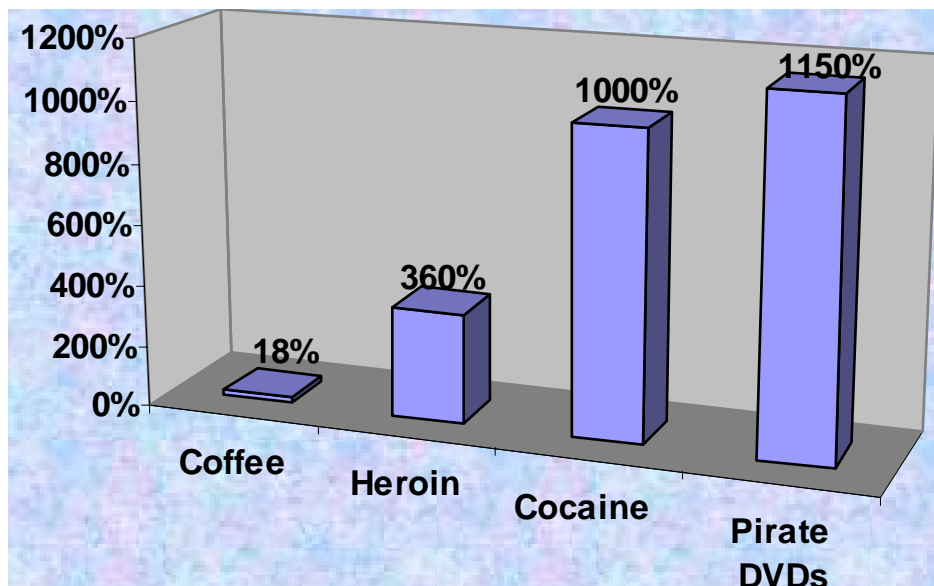
countries are already responding by enacting absolute bans on street sales, with some positive results. More countries should do the same.

Piracy by Organized Crime Syndicates

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

These syndicates operate worldwide. For example, syndicates with optical disc production facilities in Southeast Asia work with partners in South America to conduct a thriving trans-Pacific trade in pirate music CDs, entertainment software, and other optical disc products. These criminal networks are highly sophisticated and are becoming increasingly dangerous to deal with. Starting in 2003, responding to improved enforcement against factory pirate production, the syndicates began moving their illegal trade into CD-R and DVD-R “burning” and to the Internet. This phenomenon has reached epidemic proportions in 2007.

In an October 2005 study by MPA, it was reported that the estimated criminal revenue in 2004 for IPR theft was \$512 billion, while for drug trafficking it was \$322 billion.⁵ The following table from that same study shows graphically that the mark-up for DVD piracy is higher than that for cocaine and heroine, with the risk of getting caught and receiving deterrent punishment significantly less.⁶



⁵ Motion Picture Association, *Optical Disc Piracy v. Illegal Drug Trafficking*, October 2005, p. 2. About the same time, MPA released another new study, *Organized Crime & Motion Picture Piracy*, from which some of the examples in the text are taken.

⁶ *Id.*, at 3

Source: Adapted from UK National Criminal Intelligence Service SU/Drug Project (2004); Cocaine markup is Colombia to Spain/U.K.; Heroin markup is from Iran to U.K.; DVD markup is from Malaysia to UK.

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

- In December 2007, Saudi Arabian police ran raids against four warehouses seizing close to 500,000 units of pirated music and video cassettes, VCDs and DVDs. The police also found a large cache of explosives and weapons and arrested 15 people.
- In the summer of 2007, Italian anti-piracy police cracked an illicit distribution network operating in Catania, Sicily, in raids that uncovered a significant seizure of arms and bombs. During the search of one home, the police discovered eight guns, five rifles, ammunition for rifles and machine guns, two kilograms of TNT and bomb making equipment. More than 2,000 CDs and DVDs were seized during the raids as well as several stolen archaeological treasures, such as ancient Roman and Greek pottery. Police arrested two men and are investigating the connection between them and members of criminal organizations closely linked to mafia families.
- In December 2005, Italy's anti-terrorist squad conducted a series of raids aimed at dismantling an arm of the Algerian-based GIA Islamic terrorist network. The group was securing funding by selling pirated CDs, DVDs and fashion goods.
- In March 2006, Uruguayan Customs seized two containers containing 2 million blank CD-Rs manufactured in Malaysia and Taiwan destined for illegal use in Brazil.
- In April 2006, Spanish police raided a gang that has produced very high quality pirate sound recordings for many years that were sold at or near the price of legitimate CDs. The pirates enormous financial benefit from their activity, included a house valued at €2 million (US\$2.9 million). Their total fraud could amount to €15 million (US\$21.75 million)
- In June 2006, Nigerian police raided an international marketplace in Lagos, during which pirates shot two police officers and burned a police vehicle. Tear gas had to be used to quell the violence.
- In July 2006, in a raid on a residential suburb of southern Metro Manila, authorities found, in addition to pirate (and pornographic) DVDs and CD-ROMs, several hand grenades, hundreds of rounds of 5.56 mm ammunition, and sachets of a highly addictive and illegal amphetamine derivative known locally as "Shabu" and elsewhere as "ice." The seized ammunition is of the sort used in high-powered automatic assault weapons.
- During the summer of 2006, Italy's Fiscal Police acted against a nation-wide operation involved in the online sale of pirate CDs and DVDs.
- In September 2006, Mexican police raided several warehouses and laboratories containing huge quantities of blank and pirate CDs, reproduction machinery, as well as large quantities of cocaine, marijuana and other drugs.
- In October 2006, an industry representative who was working on an anti-piracy team was shot and killed in Nakorn Pratom Province, Thailand, and in December 2006, a staff person of a company supporting the industry was attacked during a raid in Open Market in Nonthaburi Province.

The copyright industries cannot fight organized crime alone. Company representatives and counsel have in some countries already experienced threats on their lives or physical intimidation when their investigations began to make progress. In some cases, this has prevented any enforcement activity by the private sector. The U.S. government should take a leadership role, both bilaterally and in multilateral fora, to place the issue of effective copyright piracy enforcement on the agenda of agencies dealing with organized economic crime. It should encourage countries with existing laws and special investigative procedures against organized crime to bring them to bear against syndicate operations involved in piracy. Where such laws and procedures are not in place,

the U.S. government should encourage governments to adopt them and to include, among predicate offenses, intellectual property right violations.

End-User Piracy of Business Software and Other Copyrighted Materials

The unauthorized use and copying of software by businesses result in tremendous losses to the U.S. and global economies. The great majority of the billions of dollars lost to U.S. software companies from business software piracy in 2007 were attributable to this end-user software piracy. To safeguard the marketplace for legitimate software, governments must have in place both substantive standards of protection and adequate enforcement mechanisms.

For the business software industry, it is particularly critical, given the growing use of electronic networks to make software available commercially to corporate and other end users, to ensure that the reproduction right covers both temporary as well as permanent reproductions. It is likely that very soon, virtually all consumers will engage in the full exploitation of software they license and receive over a network without ever making a permanent copy on their hard drive. They will simply access the software, in accordance with mutually agreed license terms, then load it into the random access memory (RAM) of their workstation or server, use the software and, when finished, close the program or shut down the computer—all without the software ever being permanently stored on the computer's or server's hard drive. Failure to make clear that such temporary reproductions are covered by the exclusive reproduction right is a violation of the Berne Convention, the WTO TRIPS Agreement and the WIPO Copyright Treaty. Great progress has been made globally on this critical issue, and IIPA calls upon the U.S. government to continue to seek legislative changes and clarifications on this point. As of today, over 100 countries/territories provide protection for temporary copies as part of the reproduction right either explicitly or by interpretation, or had committed to do so, or had draft legislation pending which would provide such protection.

Enforcement is a critical part of reducing global piracy rates for business software, which exceed 50% of the market in the developing world. The biggest challenge to the business software industry is to persuade governments to take effective enforcement action against enterprises that use unlicensed software in their businesses. To effectively enforce against corporate end-user piracy, countries must provide an effective civil system of enforcement, provisional remedies to preserve evidence, and deterrent criminal penalties for piracy. More specifically, it is critical that countries provide *ex parte* search orders in an expeditious manner, deterrent civil damages and criminalization of corporate end-user piracy as required by Article 61 of TRIPS. Industry, along with USTR, has raised the need for strong procedural and remedial enforcement measures around the world. Although some countries have made attempts to improve enforcement through special enforcement periods and action plans, most of these proposals for action have not been sustained over time or have not resulted in deterrent criminal fines and jail terms. Additionally, many countries still do not criminalize corporate end-user piracy or provide civil *ex parte* measures in practice—even though their TRIPS obligations require both.

End-user piracy is of course not limited to business software but now affects all copyright sectors. For example, in government, school and university facilities, photocopy machines are routinely used for commercial-scale book piracy. Where the government is directly involved or directly responsible for the facilities and implements used, policies and decrees must be promulgated and strictly enforced to ensure that these facilities are not used for infringing conduct. In addition, internet café piracy in several countries continues to plague the entertainment software industry. While entertainment software publishers are increasingly making available specialized licensing terms for these establishments, the lack of government oversight or incentives for legitimizing use only emboldens internet café owners in their use of pirated or unlicensed product.

Increasingly, for all sectors, the Internet has allowed end-user piracy to proliferate. Online venues are used to advertise and sell pirate hard goods, and unauthorized downloading of music, movies, videogames, books and journals from websites as well as through peer-to-peer file swapping services has skyrocketed. Unauthorized digital streaming, where bandwidth permits, is also growing. A great deal of this activity is being conducted through government-owned Internet Service Providers and from servers owned and operated by governments, schools and universities.

Where the activity is confined to the private sector and to private individuals, mechanisms for strict enforcement against pirate websites, P2P services and against individual uploaders and downloaders must be put into place and deterrent penalties imposed. Where lacking, legislation must be passed clarifying secondary liability as well as infringement liability for unauthorized uploading and downloading. Statutory notice and takedown regimes, with narrowly crafted safe harbors for ISPs, should be adopted, which allow for expedited action (with minimal and reasonable notification procedures) to block access to infringing material or take down infringing websites or FTP sites. Piracy directly by individuals, enterprises or government end-users is on the increase; the appropriate and effective enforcement tools must be put into place immediately.

Piracy of Books and Journals

The book and journal publishing industry faces not only the same challenges encountered by other entertainment and high-tech industries (digital and online piracy), but must contend with other methods of infringement as well. This piracy comes primarily in two forms—commercial photocopying and print piracy.

Unauthorized commercial-scale photocopying of books and journals is responsible for the industry's biggest losses in most territories worldwide. This photocopying takes place in a variety of venues—commercial photocopy shops located on the perimeters of university campuses and in popular shopping malls; on-campus copy facilities located in academic buildings, libraries and student unions; and wholly illicit operations contained in residential areas or other underground establishments. These operations are highly organized and networked, and technology advances are making the problem worse. Digitally scanned covers, for instance, allow pirates to conceal text that is often of poor quality, and electronic files containing book text are now routinely seized as part of enforcement actions against copy shops. This shift from physical copy machines to electronic files—allowing shops to print infringing books on demand—complicates the enforcement process due to lack of infringing stock in hard goods form. Authorities must recognize this shifting pattern and tailor enforcement incentives and activities accordingly. Publishers also suffer from unauthorized institutional or business-related photocopying for commercial research (often accompanied by failure to compensate rights holders through collective means or otherwise for copies made).

In addition, the U.S. publishing industry continues to lose hundreds of millions of dollars per year from unauthorized printing of entire books, including academic textbooks, professional reference books and trade books. These printers come in two varieties. In some cases, they are licensed printers or distributors who are engaged in offset printing beyond the scope of a valid license granted by the publisher. Others are wholly illegal pirate operations that have no license from the copyright owner at all. Print piracy is especially prevalent in South Korea, Egypt, Thailand, Pakistan, India, China and other countries with large printing capacity, and where printing may still be less expensive for pirates than photocopying. While many pirated copies are rife with errors or obviously of inferior quality, in some cases sophisticated printing technologies result in extremely high-quality pirate editions of books, making it difficult for users to distinguish between legitimate and pirate products.

Publishers continue to suffer from unauthorized translations of books and journals of all kinds and genres, as well as counterfeiting in the form of “bogus” books or trademark misuse. Unauthorized and unlicensed compilations abound in the academic context as well, in the form of course packs or even “original textbooks” that consist of sections of U.S. publishers’ material, in English or in translation.

These types of piracy call for the same kind of aggressive enforcement techniques discussed throughout this submission, accompanied by the political will and awareness of governments to recognize the serious damage done to economies, culture and the educational environment by letting such infringements persist. IIPA urges the U.S. government to ensure that such acts of piracy are fully covered in all bilateral, plurilateral and multilateral engagements.

Camcorder and Videogame Cartridge Piracy

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

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

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

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

Using FTAs to Improve Global Standards of Copyright Protection and Enforcement

The negotiation of bilateral and regional free trade agreements (FTAs) continues to hold a place of importance to the copyright industries and to U.S. trade policy. These negotiations offer an important opportunity to persuade our trading partners to modernize their copyright law regimes so they can maximize their participation in the new e-commerce environment, and to improve enforcement procedures. Since copyright issues are not being addressed in the Doha Round of

multilateral negotiations under the World Trade Organization, the FTA process has become by far the most fruitful avenue to address the law reform challenges brought on by developments in technology.

At the time of this submission, FTAs with Singapore, Chile, Australia, Jordan, Morocco, Bahrain and Oman, as well as five of the six nations in the Central America-the Dominican Republic-U.S. FTA, have entered into force. Negotiations with South Korea, Peru, Colombia and Panama have been concluded. Unfortunately, negotiations with the United Arab Emirates and Thailand have stalled. Negotiations with Malaysia continue despite the expiration of Trade Promotion Authority (TPA) in 2007. IIPA strongly supports the renewal of TPA fast track negotiating authority and urges the new Congress to renew it in 2009 and for a new Administration to conclude existing negotiations and commence new FTAs with as many countries as possible.

IIPA trusts and expects that the valuable precedents established in these earlier agreements will be carried forward to the ongoing FTA negotiations, and with any more FTA negotiations opened in the future. In all these negotiations, industry will continue to seek full implementation of the WIPO Internet Treaties; stronger substantive protection in other areas, including the extension of the term of copyright protection; and detailed and effective enforcement obligations that make clear the requirement to enforce copyright in all areas, including in particular on the Internet, with expeditious and deterrent civil and criminal remedies. We again commend the Administration and Ambassador Schwab for moving swiftly and aggressively to secure new high levels of protection and enforcement that will be critical to the development of e-commerce in the coming years.

Market Access

In the experience of IIPA, its members and companies, there is a strong connection between a country's ability to foster the introduction of legitimate product quickly and efficiently to market, and its ability to combat piracy effectively. We call upon policymakers to recognize and draw on this relationship to help make the reduction of market access impediments a key component of ongoing efforts to combat piracy. Denial of effective market access for copyright industries is an integral part of the Special 301 process.

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

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

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

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

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

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

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

D. IIPA RECOMMENDATIONS FOR THE 2008 SPECIAL 301 LISTS

This year IIPA has analyzed the copyright law and enforcement problems in 43 countries/territories and has recommended them for placement in the categories on the Priority Watch List, Watch List, and Section 306 Monitoring. We also mention specific issues in eight additional countries/territories that deserve increased U.S. government attention.

IIPA recommends that 13 countries be placed on the Priority Watch List: Argentina, Canada, Chile, Costa Rica, Egypt, India, Mexico, the People's Republic of China, Peru, Russia, Saudi Arabia, Thailand, Turkey, and Ukraine. IIPA also recommends that 29 countries/territories be designated or kept on the Watch List. We also recommend that out-of-cycle reviews be taken in three countries: Italy, the Philippines and Thailand.

With respect to the People's Republic of China, IIPA recommends that USTR maintain China on the Priority Watch List and continue monitoring under Section 306 of the Trade Act. China has failed to "significantly reduce infringement levels," as promised by China's Vice Premier Wu Yi at the Joint Commission on Commerce and Trade (JCCT) meetings in April 2004. Piracy rates still hover between 80% and 90% for most copyright sectors.

With respect to Russia, the priority for IIPA members is to step up enforcement activity well beyond current levels, including the imposition of deterrent criminal penalties and improved criminal investigations and prosecutions. Russia is at a critical juncture in the development of its IPR regime. The (November 19, 2006) IPR Bilateral Agreement signed by the U.S. and Russian governments reflects Russia's acknowledgment of the numerous legal reforms and enforcement steps it needs to

undertake to modernize and improve its copyright system for the benefit of Russian and foreign authors, performers and producers. The U.S. government has consistently reiterated its position that Russia must provide protection and enforcement of IPR consistent with the requirements of the IPR Agreement before the U.S. would support Russia's entry into the WTO. Russia's full compliance with the IPR Agreement's obligations is essential, and should be considered in the Special 301 context, as well as during its review under the General System of Preferences (GSP) program.

IIPA recommends that USTR continue to monitor developments in Paraguay under Section 306 of the Trade Act of 1974. We expect concrete results in 2008 to implement the renewed IPR MOU. While there have been certain positive developments—in particular the operation of the specialized IPR unit (the UTE), piracy remains prevalent and Ciudad del Este continues to operate as a hub for the distribution of pirate materials and raw materials destined for clandestine labs.

Appendix C contains a survey of a total of 51 countries/territories. The countries/territories appear by recommended category and in alphabetical order within each category.

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

Appendix D provides a history of countries/territories appearing on IIPA and USTR lists since 1989, a year after the Special 301 legislation became effective. Fifteen of these countries/territories have appeared on a Special 301 list each year since 1989, and are recommended by IIPA to appear there again. A 1994 amendment to Section 182 of the Trade Act, dealing with identification of

“priority foreign countries,” provides that the U.S. Trade Representative must take into account “the history of intellectual property laws and practices in the foreign country, whether the country has been identified as a priority foreign country previously, and U.S. efforts to obtain adequate and effective intellectual property protection in that country.”⁷ Under this criterion, these 15 countries/territories named by IIPA are particularly vulnerable, having failed to correct their piracy and/or market access problems during the 19 years that Special 301 has been in existence.

Ongoing GSP IPR Reviews: IIPA also calls attention to ongoing intellectual property rights reviews under the Generalized System of Preferences (GSP) trade program. IIPA has been a strong supporter of the GSP program, and over the years has filed numerous petitions requesting the U.S. government to initiate GSP IPR reviews of copyright law and enforcement practices in targeted countries.⁸ As of February 11, 2008, the U.S. government is continuing GSP IPR investigations on the copyright law and enforcement practices in three countries in which IIPA was the original petitioner: Russia, Lebanon, and Uzbekistan. Now that Congress has reauthorized the GSP program, it is imperative that the Administration actually use this program and hold beneficiary countries accountable to the IPR obligations in the statute. The GSP program expires at the end of 2008 and should be renewed.

E. COUNTRIES/TERRITORIES DESERVING SPECIAL MENTION IN 2008

In addition to the 43 countries/territories for which IIPA has provided comprehensive country reports, IIPA also highlights issues in eight countries/territories which deserve special attention this year but which are not recommended for placement on the Special 301 Lists. These countries/territories and the problems encountered in them are: Bulgaria, Germany, Hong Kong, Japan, Jordan, New Zealand, Singapore, and Switzerland.

F. ESTIMATED LOSSES DUE TO PIRACY

As a result of deficiencies in the copyright regimes of the 51 countries/territories highlighted in this submission, the U.S. copyright-based industries suffered estimated trade losses due to piracy in these of over **\$18.4 billion** in 2007.⁹ On a global basis (that is, in all countries/territories including the U.S.), IIPA conservatively estimates that total losses due to piracy were at least **\$30-35 billion** in 2007, not counting significant losses due to Internet piracy, for which meaningful estimates are not yet available.

Appendix A presents a chart which quantifies losses for the five copyright-based industry sectors—the entertainment software, business software, motion picture, sound recording and music publishing, and book and journal publishing industries—for 2006 and 2007. In most surveys, IIPA has described the piracy levels in each of the sectors in each of these countries/territories (where available). This should prove helpful in identifying trends and in determining whether enforcement efforts have actually been successful in reducing piracy levels in the particular country.

⁷ Uruguay Round Agreements Act Statement of Administrative Action, *reprinted in* H.R. Doc. No. 103-316, vol. I, at 362 (1994).

⁸ Since 1999, IIPA (and in one case, a coalition of 6 of 7 IIPA members) has filed 18 GSP IPR petitions with USTR, requesting the initiation of IPR investigations against the following countries: Poland, Peru, Lebanon, Dominican Republic, Ukraine, Moldova, Uzbekistan, Armenia, Kazakhstan, Belarus, the Kyrgyz Republic, Brazil, Russia, Guatemala, Costa Rica, Uruguay, Thailand, and Pakistan. Of these 18 petitions, USTR initiated reviews in 10 countries: the Dominican Republic, Ukraine, Moldova, Uzbekistan, Armenia, Kazakhstan, Brazil, Russia, Lebanon, and Pakistan. IIPA withdrew its request to initiate reviews in three cases (Peru, Uruguay and Thailand). Of these 10 reviews, so far USTR has completed its investigations and terminated its reviews in 8 cases (Armenia, Moldova, Dominican Republic, Ukraine, Brazil, Pakistan, plus Turkey—a case which IIPA petitioned for in 1993 and was closed in 2001). In May 2006, USTR closed its investigation against Kazakhstan.

⁹ The methodology used by IIPA member associations to calculate these estimates is described in IIPA's 2008 Special 301 submission, at www.iipa.com/pdf/2008spec301methodology.pdf.

ESTIMATED TRADE LOSSES DUE TO COPYRIGHT PIRACY IN 51 SELECTED COUNTRIES/TERRITORIES IN 2007 (in millions of U.S. dollars)		
Industry	Estimated Losses 2007	Estimated Losses 2006
Sound Recordings & Musical Compositions	2,229.5	2,176.3
Business Software	12,940.0	10,662.0
Entertainment Software ¹⁰	2,655.8	1,865.6
Books	531.0	560.5
Motion Pictures ¹¹	Not Available	Not Available
Total	18,356.3¹²	15,264.4¹²

Appendix B summarizes the methodology used by the IIPA member associations to calculate these estimates. They represent a crushing burden on the U.S. economy, on U.S. job growth, and on world trade generally. They result from the blatant theft of one of this country's most valuable trade assets—its cultural and technological creativity.

G. CONCLUSION

Special 301 remains a cornerstone of U.S. intellectual property and trade policy. We urge the Administration to use Special 301, and the tools available under the GSP, CBI, ATPA, CBTPA, and AGOA programs, and to consider IIPA's proposals to amplify attention to ineffective and non-deterrent enforcement—to encourage the countries/territories identified in our recommendations this year to make the political commitments, followed by the necessary actions, to bring their enforcement (and where necessary their copyright) regimes up to international standards. The U.S. government should also use the WTO dispute settlement machinery to ensure that countries/territories bring their substantive and their enforcement regimes into compliance with their international obligations under TRIPS. The dispute settlement mechanisms in FTAs should also be used, where necessary, with those trading partners. We look forward to our continued work with USTR and other U.S. agencies to bring about major improvements in copyright protection and enforcement worldwide.

Respectfully submitted,

Eric H. Smith
International Intellectual Property Alliance

¹⁰ ESA's reported dollar figures reflect the value of pirate product present in the marketplace as distinguished from definitive industry "losses." The methodology used by the ESA is further described in Appendix B of this report.

¹¹ MPAA's trade loss estimates and piracy levels for 2006 and 2007 are not available. MPAA did provide 2005 estimates for a select group of countries, using a new methodology that analyzed both physical/"hard goods" and internet piracy. Details regarding MPAA's methodology for 2005 and prior years are found in Appendix B of this IIPA submission.

¹²For many countries, the "total" loss figure does not include losses for one or more industry sectors where figures are unavailable (NA). Consequently, the totals for these countries are even more conservative.

APPENDIX A

IIPA 2008 "SPECIAL 301" RECOMMENDATIONS
 2006 and 2007 ESTIMATED TRADE LOSSES DUE TO COPYRIGHT PIRACY
 (in millions of U.S. dollars)
 and 2006-2007 ESTIMATED LEVELS OF COPYRIGHT PIRACY

	Business Software ¹				Records & Music ²				Motion Pictures ³				Entertainment Software ⁴				Books		Totals		
	Losses		Levels		Losses		Levels		Losses		Levels		Losses		Levels		Loss	Loss	Loss	Loss	
	2007	2006	2007	2006	2007	2006	2007	2006	2007	2006	2007	2006	2007	2006	2007	2006	2007	2006	2007	2006	
PRIORITY WATCH LIST																					
Argentina	226.0	182.0	77%	75%	84.7	82.0	60%	60%	NA	NA	NA	NA	NA	NA	NA	65%	NA	4.0	310.7	268.0	
Canada	511.0	494.0	33%	34%	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	511.0	494.0	
Chile	98.0	82.0	67%	68%	29.6	29.6	44%	44%	NA	NA	NA	NA	NA	NA	NA	NA	NA	1.0	127.6	112.6	
Costa Rica	17.0	15.0	63%	64%	14.5	15.1	60%	60%	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	31.5	30.1	
Egypt	49.0	49.0	60%	63%	15.0	12.0	75%	70%	NA	NA	NA	NA	NA	NA	NA	NA	NA	31.0	96.0	92.0	
India	732.0	574.0	69%	71%	13.8	52.7	55%	55%	NA	NA	NA	NA	NA	129.9	85.6	89%	86%	38.0	40.0	913.7	752.3
Mexico	425.0	374.0	61%	63%	527.0	486.6	71%	67%	NA	NA	NA	NA	273.0	182.0	88%	85%	41.0	41.0	1266.0	1083.6	
People's Republic of China	2472.0	2172.0	80%	82%	451.2	206.0	90%	85%	NA	NA	NA	NA	NA	NA	95%	NA	52.0	52.0	2975.2	2430.0	
Peru	40.0	32.0	73%	71%	58.5	53.5	98%	98%	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	98.5	85.5	
Russian Federation (GSP)	1075.0	1208.0	75%	80%	313.0	423.0	58%	65%	NA	NA	NA	NA	NA	282.1	79%	72%	42.0	42.0	1430.0	1955.1	
Saudi Arabia	120.0	115.0	51%	52%	25.0	20.0	60%	50%	NA	NA	NA	NA	NA	NA	NA	NA	NA	8.0	145.0	143.0	
Thailand (OCR)	211.0	253.0	79%	80%	21.7	20.7	50%	50%	NA	NA	NA	NA	91.4	NA	77%	82%	37.0	35.0	361.1	308.7	
Ukraine	213.0	185.0	84%	84%	35.0	30.0	60%	60%	NA	NA	NA	NA	NA	NA	80%	NA	NA	NA	248.0	215.0	
WATCH LIST																					
Bangladesh	NA	NA	NA	NA	NA	40.0	NA	70%	NA	NA	NA	NA	NA	NA	NA	NA	NA	8.0	0.0	48.0	
Belarus	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	0.0	0.0	
Brazil	680.0	574.0	59%	60%	151.6	176.5	48.0	40%	NA	NA	NA	NA	NA	159.3	91%	88%	18.0	18.0	849.6	927.8	
Brunei	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	0.0	0.0	
Dominican Republic	12.0	11.0	79%	79%	NA	9.9	NA	65%	NA	NA	NA	NA	NA	NA	NA	NA	NA	1.0	12.0	21.9	
Greece	102.0	93.0	59%	61%	NA	30.0	NA	60%	NA	NA	NA	NA	NA	30.2	NA	68%	NA	NA	102.0	153.2	
Hungary	71.0	58.0	42%	42%	20.0	20.0	35%	50%	NA	NA	NA	NA	15.9	NA	79%	40%	NA	NA	106.9	78.0	
Indonesia	203.0	191.0	85%	85%	20.2	17.2	92%	91%	NA	NA	NA	NA	NA	NA	NA	NA	32.0	32.0	255.2	240.2	
Israel	52.0	47.0	32%	32%	NA	45.0	50%	50%	NA	NA	NA	NA	NA	11.4	NA	84%	NA	1.0	52.0	104.4	
Italy (OCR)	890.0	729.0	50%	51%	45.0	48.0	23%	27%	NA	NA	NA	NA	817.0	647.7	64%	40%	20.0	20.0	1772.0	1444.7	
Kazakhstan	54.0	47.0	79%	81%	NA	NA	NA	66%	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	54.0	47.0	
Kuwait	37.0	33.0	62%	64%	10.0	9.0	75%	70%	NA	NA	NA	NA	NA	NA	NA	NA	NA	0.5	47.0	42.5	
Lebanon (GSP)	24.0	23.0	73%	73%	2.8	2.6	60%	60%	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	26.8	25.6	
Lithuania	20.0	17.0	56%	57%	14.0	13.0	80%	85%	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	34.0	30.0	
Malaysia	149.0	159.0	60%	60%	16.0	22.0	45%	45%	NA	NA	NA	NA	NA	28.0	83%	90%	9.0	9.0	174.0	218.0	
Nigeria	65.0	59.0	82%	82.0	55.0	52.0	95%	95%	NA	NA	NA	NA	NA	NA	NA	NA	NA	8.0	120.0	119.0	
Pakistan	76.0	78.0	85%	86%	25.0	25.0	100%	100%	NA	NA	NA	NA	NA	NA	NA	NA	55.0	55.0	156.0	158.0	
Philippines (OCR)	75.0	71.0	71%	71%	88.3	50.3	80%	62%	NA	NA	NA	NA	NA	NA	NA	NA	49.0	49.0	212.3	170.3	
Poland ^d	337.0	251.0	57%	57%	28.0	24.0	36%	35%	NA	NA	NA	NA	76.0	NA	60%	75%	NA	NA	441.0	275.0	
Romania	80.0	63.0	70%	69%	15.0	12.0	65%	60%	NA	NA	NA	NA	NA	NA	89%	77%	NA	NA	95.0	75.0	
South Korea	247.0	220.0	44%	45%	NA	0.3	NA	7%	NA	NA	NA	NA	461.9	353.5	66%	68%	44.0	45.0	752.9	618.8	
Spain	568.0	471.0	46%	46%	16.7	25.0	20%	22%	NA	NA	NA	NA	510.0	111.5	35%	48%	NA	NA	1094.7	607.5	
Sweden	192.0	171.0	25%	26%	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	53%	NA	NA	NA	192.0	171.0	

APPENDIX A

IIPA 2008 "SPECIAL 301" RECOMMENDATIONS

2006 and 2007 ESTIMATED TRADE LOSSES DUE TO COPYRIGHT PIRACY
(in millions of U.S. dollars)
and 2006-2007 ESTIMATED LEVELS OF COPYRIGHT PIRACY

	Business Software ¹				Records & Music ²				Motion Pictures ³				Entertainment Software ⁴				Books		Totals	
	Losses		Levels		Losses		Levels		Losses		Levels		Losses		Levels		Loss	Loss	Loss	Loss
	2007	2006	2007	2006	2007	2006	2007	2006	2007	2006	2007	2006	2007	2006	2007	2006	2007	2006	2007	2006
Taiwan	104.0	91.0	40%	41%	4.9	16.2	21%	28%	NA	NA	NA	NA	202.9	NA	94%	NA	16.0	18.0	327.8	125.2
Tajikistan	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	0.0	0.0
Turkey	193.0	184.0	64%	64%	22.0	20.0	80%	80%	NA	NA	NA	NA	NA	NA	NA	NA	23.0	23.0	238.0	227.0
Turkmenistan	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	0.0	0.0
Uzbekistan (GSP)	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	0.0	0.0
Vietnam	82.0	53.0	90%	88%	NA	NA	95%	95%	NA	NA	NA	NA	NA	NA	NA	NA	17.0	18.0	99.0	71.0
SPECIAL 306 MONITORING																				
Paraguay*	6.0	6.0	81%	82%	128.0	128.0	99%	99%	NA	NA	NA	NA	NA	NA	NA	98%	NA	2.0	134.0	136.0
SPECIAL MENTION																				
Bulgaria	37.0	25.0	71%	69%	NA	7.0	NA	75%	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	37.0	32.0
Germany	1089.0	NA	28%	NA	NA	2.9	NA	17%	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	1089.0	2.9
Hong Kong	113.0	90.0	53%	53%	NA	NA	NA	NA	NA	NA	NA	NA	77.8	59.9	80%	60%	4.0	5.0	194.8	154.9
Japan	876.0	891.0	24%	25%	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	876.0	891.0
Jordan	11.0	11.0	60%	61%	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	11.0	11.0
New Zealand	32.0	29.0	22%	22%	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	32.0	29.0
Singapore	75.0	63.0	38%	39%	NA	1.2	NA	5%	NA	NA	NA	NA	NA	NA	NA	27%	2.0	2.0	77.0	66.2
Switzerland	199.0	177.0	25%	26%	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	199.0	177.0
TOTALS	12940.0	10721.0			2251.5	2228.3			NA	NA			2655.8	1951.2			531.0	568.5	18378.3	15469.0

Endnotes:

¹ BSA's 2007 statistics are preliminary. They represent the U.S. software publishers' share of software piracy losses in [country], and follow the methodology compiled in the Fourth Annual BSA and IDC Global Software Piracy Study (May 2007), available at <http://w3.bsa.org/globalstudy/>. These figures cover, in addition to business applications software, computer applications such as operating systems, consumer applications such as PC gaming, personal finance, and reference software. BSA's 2006 piracy statistics were preliminary at the time of IIPA's February 12, 2007 Special 301 filing and were finalized in June 2007 (see <http://www.iipa.com/statistics.html>) as reflected above.

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

³ MPAA's trade losses and piracy levels for 2006 and 2007 are not available. Details regarding MPAA's methodology for 2005 and prior years are found in Appendix B of this IIPA submission.

⁴ ESA's reported dollar figures reflect the value of pirate product present in the marketplace as distinguished from definitive industry "losses." The value of pirate product in the market in Poland reflects only the value of pirate product for personal computers. ESA's methodology is described in Appendix B of IIPA's submission.

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

"OCR" means out-of-cycle review to be conducted by USTR.

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2008 SPECIAL 301 REPORT

APPENDIX B:

METHODOLOGY

Estimated losses due to piracy are calculated by IIPA's member associations. While it is impossible to gauge losses for every form of piracy, we believe that our members' reported estimates for 2007 actually underestimate the losses due to piracy experienced by the U.S. copyright-based industries.

Piracy levels are also estimated by IIPA member associations and represent the share of a country's market that consists of pirate materials. Piracy levels, together with losses, provide a clearer picture of the piracy problem in different countries. Low levels of piracy are a good indication of the effectiveness of a country's copyright law and enforcement practices. IIPA and its member associations focus their efforts on countries where piracy is rampant due to inadequate or nonexistent copyright laws and/or lack of enforcement.

BUSINESS SOFTWARE

The Business Software Alliance (BSA)'s calculation method compares two sets of data – the number of new software units installed (based on hardware shipments and software load), and the legal supply of new software units. The amount of pirated software is equal to the difference between paid-for or legitimate packaged software units and the total software base. The piracy rate is the percentage of the total packaged software base that is pirated.

The total amount of software, legitimate and pirated, installed during the year (the total software base) is obtained by multiplying the number of new hardware units and the number of existing hardware units getting new software by their respective software loads.

Hardware shipments are determined from tracking data on 60+ countries that IDC collects as a matter of routine. For the additional 30+ countries and markets, the data was either collected in-country or modeled regionally out of our rest-of-region estimates. The basic tracking data is generated from suppliers, including local suppliers. Similarly, the hardware-installed base is based on this tracking data.

The software load is the amount of software units installed and/or pre-installed (OEM) on the computers during the year. To obtain the number of software units for each type of hardware platform, including those running software on Windows and those running software on non-Windows operating systems, IDC surveyed consumers and business in 15 countries: China, Malaysia, Taiwan, Spain, Romania, Brazil, Bolivia, Chile, Colombia, Mexico, Costa Rica, Dominican Republic, Guatemala, Kuwait, and the United States. The results of these surveys were used to populate our input models for the other countries. Within software load, IDC accounted for:

- Software running on new computers
- New software running on existing computers
- Software obtained from retired computers
- Software obtained for free as shareware or open source
- Software that runs on Windows and non-Windows OS

Legitimate software shipments are determined by dividing the software revenues in a country by the average system value (ASV) for that country. Software revenues are captured annually in 60+ countries by IDC software analysts around the world. Revenues are gathered from interviews with suppliers in the country and cross-checked with global numbers and financial statements. For the countries not normally covered by IDC, the data were either collected in-country or modeled regionally out of our rest-of-region estimates. Software revenues are gathered by type – such as application, infrastructure, and development tools – and by software running on Windows and non-Windows operating systems. It was also allocated to software running on new systems bought during the year and on systems that were already in place.

ASVs are estimated country-by-country by country and regional analysts for five software categories (e.g., collaboration, office, security, OS, other) for each hardware type and Windows and non-Windows software. Prices were gathered from IDC's pricing trackers, local research, and interviews with the channel. They included adjusting for OEM and channel-loaded software, as well as software from local suppliers. ASVs were gathered in the appropriate currency depending on how the country analysts collected software revenues.

Dollar losses are calculated off the piracy rate and the market for legitimate software in a country. For instance, if the piracy rate is 60% and the market \$100 million, then the legitimate market is 40% of the total value of all software, which would be \$250 million (\$100M/40%). Pirated software is that total minus the legitimate market (\$250M-\$100M). Thus the value of pirated software is \$150 million. The dollar losses to U.S. vendors are computed by multiplying the value of pirated software by the percentage market share of U.S. vendors in a particular country.

For the February submission of the IIPA's 2008 report to U.S. Trade Representative, BSA's statistics for 2007 are preliminary. Final data for 2007 will be released later in 2008.

ENTERTAINMENT SOFTWARE

The Entertainment Software Association (ESA) bases its estimates on local surveys of market conditions in each country and other factors bearing on the presence of pirated products in the marketplace, including public and proprietary data on sales and market share. The reported dollar values reflect the value (at pirate prices) of the pirated product present in the marketplace as distinguished from definitive industry losses.

Based on the data collected, calculations are performed to arrive at an estimate of the overall quantity of pirated games present in a marketplace. Estimates of the overall number of games in use are based on what is known about the presence of game-playing hardware in each market and the number of games in use on each of these platforms. Separate estimates are generated for PC, handheld and console product insofar as they may differ in at least three key respects – price per game, ratio of games per platform, and data sources. These estimates of overall game usage are compared to what is known about the relative percentages of pirate sales to legitimate sales to arrive at an estimate of the amount of pirated product in circulation.

ESA relies on prior year's reporting as a methodological check on newly-acquired data, and test overall results with the opinion of experts. Conservative assumptions such as the following are employed throughout, producing results likely to underestimate the overall quantity of pirate product present in the marketplace and its value:

- The methodology accounts only for pirated PC games estimated to be present on home PCs, and thus does not include pirated games that may be in use on business computers.
- The methodology accounts only for consoles estimated to have been modified to facilitate play of pirated games.

- The methodology values pirated games in circulation according to localized pirate prices as opposed to optimal or actual prices at which legitimate sales might occur.
- The methodology assigns the localized pirate price to game downloads in lieu of assigning the average price paid, which is often zero and which would result in significant underestimations in high-volume download countries.

Because the reported figures reflect only the value of pirated product present in the market, it does not measure, and thus vastly understates, the overall harm done to rights holders and the industry in countries engaged in mass factory overproduction for export. However, the dollar figures may nonetheless be taken to reflect a sense of the relative harm done to software developers, publishers, distributors and retailers through the loss of potential sales opportunities. Because a number of the estimates needed in these calculations were of necessity approximate, considerable effort was expended to cross-reference multiple sources of information where possible.

RECORDS AND MUSIC

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

- Optical disc industry data provided by third-party consultants;
- Legitimate sales;
- Enforcement data and anti-piracy developments;
- Historical piracy estimates; and where possible,
- Economic indicators, professional surveys and academic studies of piracy or counterfeit goods.

The numbers produced by the music industry in most cases reflect estimates of the level and value of pirate sales of U.S. repertoire. This does not take into account downstream (or value chain) losses from high piracy levels acting as a drag on the economic development of legitimate markets. In cases where circumstances permit, rather than reporting pirate sales, RIAA projects unit displacement (real losses). In such cases, "loss" data does not reflect the value of pirate sales but rather the value of estimated lost sales. In most cases, this would be significantly higher than the value of pirate sales.

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

BOOKS AND JOURNALS

The book and journal publishing industry relies on local representatives to determine losses. These representatives base their estimates on the availability of pirated books and journals, especially those found within or near educational institutions. Publishing industry representatives also take into account the number of users in a jurisdiction, the estimated need for the product (based, in the case of educational materials, on university and school adoptions) and the number of legitimate sales. Given the diverse types of products offered by different publishing companies, these estimates cover only a portion of the market lost in each territory and are thus rather conservative in most cases.

MOTION PICTURES

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

In recent years, MPAA has revised and updated its methodological measures. MPAA is in the process of reviewing how we measure piracy and do not currently have piracy loss figures for 2006 or 2007.

METHODOLOGY FOR 2005 DATA:

Prior loss calculations reported by MPA involved supply (see discussion below). In 2005, loss calculations were based on demand.

- Piracy loss figures are based on a direct measurement of consumer purchasing/pirating behavior, including hard goods and Internet piracy.
- Piracy levels are based on the percentage of potential market lost to piracy. Calculations involve revenue losses, legitimate market sizes, and potential legitimate markets without piracy.

METHODOLOGY FOR 2004 and PRIOR YEARS' DATA:

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

- **For developed markets:**
 - The number of stores that rent pirate video product and the number of shops and vendors that sell pirate video product are multiplied by the average number of pirate video product rented or sold per shop or vendor each year.
 - The resulting total number of pirate video product sold and rented each year in the country is then multiplied by the percent of pirate video product that would have been sold or rented legitimately and adjusted to reflect the U.S. producers' share of the market.
 - The figure resulting from the foregoing calculations is an estimate of the number of legitimate sales of U.S. motion pictures that are lost each year in the market due to video piracy. These estimates are adjusted to reflect the wholesale price of legitimate video product, to equal losses due to video piracy.
- **For partially developed markets:**
 - The number of legitimate video product sold or rented in the country each year is subtracted from the estimated total number of videos sold or rented in the country annually to estimate the number of pirate video product sold or rented annually in the country.
 - The resulting total number of pirate video product sold and rented each year in the country is then multiplied by the percent of those pirate video product that would have been sold or rented legitimately and adjusted to reflect the U.S. producers' share of the market.
 - The figure resulting from the foregoing calculations is an estimate of the number of legitimate sales of U.S. motion pictures that are lost each year in the market due to video piracy. These estimates are adjusted to reflect the wholesale price of legitimate video product, to equal losses due to video piracy.

- **For fully pirate markets:**
 - Either: (a) the number of blank video media sold in the country annually is multiplied by the percent of media used to duplicate U.S. motion pictures to equal the number of pirate copies of U.S. motion pictures estimated to be sold in the country each year; or (b) the number of VCRs/VCD/DVD players in the country is multiplied by an estimated number of U.S. motion pictures on video that would be rented and sold per VCR/VCD/DVD player per year.
 - The figure resulting from each of the foregoing calculations is an estimate of the number of legitimate sales of U.S. motion pictures lost each year in the market due to video piracy. These estimates are adjusted to reflect the wholesale price of legitimate video product, to equal losses due to video piracy.

Television and Cable: Losses were estimated using the following method.

- The number of broadcast television and cable systems that transmit U.S. motion pictures without authorization is multiplied by the average number of U.S. motion pictures transmitted without authorization by each system each year.
- The resulting total number of illegal transmissions is multiplied by the average number of viewers per transmission.
- The number of viewers of these illegal transmissions is allocated among those who would have gone to a theatrical exhibition, or who would have rented or purchased a legitimate video. The number of legitimate transmissions of the motion picture that would have been made is also estimated.
- These figures are multiplied by the producers' share of the theatrical exhibition price, the wholesale share of the video cost or the license fee per legitimate transmission, as appropriate, to estimate the lost revenue from the illegal transmissions.

Public Performance: Losses were estimated using the following method.

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

###

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2008 SPECIAL 301 REPORT

ARGENTINA

Special 301 Recommendation: IIPA recommends that Argentina remain on the Priority Watch List in 2008.

EXECUTIVE SUMMARY

During 2007, growing Internet and optical disc piracy (primary CD-burning) continued to threaten the copyright industries' legitimate markets in Argentina. Street piracy, especially at the public market in Buenos Aires known as "La Salada," remains widespread. The industries again report that cooperation with the police remains good, and cooperation with border authorities improved last year. Unfortunately, despite raids and seizures, few criminal cases move forward for prosecution and fewer reach final judgment. Sorely missing is a national strategy to protect and enforce copyrights. Civil actions are ineffective because of the lack of a statutory damages remedy and extensive delays in the courts. The government needs to review its agencies to ensure that legal software is being used. On the legislative front, implementation of the WIPO Treaties' obligations is moving at a glacial pace. In addition, Argentina should strengthen criminal sanctions and remedies and provide measures to protect copyrighted materials in the digital age.

PRIORITY ACTIONS IN 2007

Legislation

- Reinvigorate efforts to revise Argentina's 1933 copyright law and implement its WIPO Treaties' obligations. Long overdue amendments should, for example: (i) implement the "making available right to the public" as required by WIPO treaties in order to give legal background to digital businesses for authors, performers and phonogram producers; (ii) implement protection and remedies/sanctions for technological protection measures (TPMs) and rights management information (RMI); (iii) make uniform the protection term of all the copyrighted works regardless of genre; (iv) extend the term of protection for sound recordings to 95 years from publication as well as extend term for juridical persons; (v) extend the scope of reproduction right to clearly cover temporary copies, (vi) increase the minimum penalty for piracy (1 month) up to 3 years in order to apply deterrent sanctions; (vii) create statutory damages provisions for civil cases allowing judges to apply deterrent compensations; (viii) provide notice and takedown provisions and ISP liability; and, (ix) adopt provisions on border measures (*ex officio*).
- Support Bill 1546-S-05 which would address some of the issues above, in providing criminal sanctions for the circumvention of TPMs and modification or suppression of digital rights management, as well as statutory damages.
- Support efforts to issue an executive decree that would require government legalization of current business software programs within a balanced and neutral system to select the technical solutions and improve procurement practices.
- Select, at an appropriate moment in the near future, a method of protection against the unauthorized re-distribution of digital broadcast signals.
- Take the necessary administrative and/or regulatory measures to clarify that the income tax withholding provisions such that royalties earned by juridical persons are "authors' rights" (copyright) of no different legal nature than the royalties earned by human authors.

Enforcement

- Have the government, at the highest level, commit to a coordinated anti-piracy campaign as a matter of national priority.
- Require that the federal and Buenos Aires provincial governments to take appropriate measures to halt the distribution of pirate and counterfeit merchandise at the “La Salada” Fair and other large, public markets.
- Promote cancellation of municipal operating licenses to any establishment or locale selling pirate product.
- Improve resources assigned to police Internet crime units to address the problem of illegal downloads.
- Instruct Argentine prosecutors and courts to make copyright piracy cases a priority.
- Improve border enforcement. Forge partnerships at the tri-border region with counterpart Brazilian and Paraguayan officials that would include establishing a program to inspect goods in-transit for potential pirate product.
- Consider creating a special public prosecutors’ office devoted to all sectors of intellectual property (not only to trademarks, as is proposed currently).

ARGENTINA¹										
Estimated Trade Losses Due to Copyright Piracy										
(in millions of U.S. dollars)										
and Levels of Piracy: 2003-2007²										
INDUSTRY	2007		2006		2005		2004		2003	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Sound Recordings & Musical Compositions³	84.7	60%	82.0	60%	69.5	60%	41.5	55%	30.6	53%
Business Software⁴	226.0	77%	182.0	75%	109.0	77%	63.0	75%	44.0	71%
Motion Pictures⁵	NA	NA	NA	NA	318.0	90%	30.0	45%	30.0	45%
Books	NA	NA	4.0	NA	4.0	NA	4.0	NA	4.0	NA
Entertainment Software⁶	NA	NA	NA	65%	NA	NA	NA	80%	NA	NA
TOTALS	310.7		268.0		500.5		138.5		108.6	

¹ Argentina is a beneficiary country under the U.S. Generalized System of Preferences (GSP) trade program. During the first 11 months of 2007, \$587 million worth of Argentine goods entered the U.S. under the duty-free GSP code.

² The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA’s 2008 Special 301 submission at www.iipa.com/pdf/2008spec301methodology.pdf. For information on the history of Argentina under Special 301 review, see Appendix D at (<http://www.iipa.com/pdf/2008SPEC301USTRHISTORY.pdf>) and Appendix E at (<http://www.iipa.com/pdf/2008SPEC301HISTORICALSUMMARY.pdf>) of this submission. Prior IIPA reports on Argentina are also posted on the country reports page at <http://www.iipa.com/countryreports.html>.

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

⁴ BSA’s 2007 statistics are preliminary. They represent the U.S. software publishers’ share of software piracy losses in Argentina, and follow the methodology compiled in the Fourth Annual BSA and IDC Global Software Piracy Study (May 2007), available at <http://w3.bsa.org/globalstudy/>. These figures cover, in addition to business applications software, computer applications such as operating systems, consumer applications such as PC gaming, personal finance, and reference software. BSA’s 2006 piracy statistics were preliminary at the time of IIPA’s February 12, 2007 Special 301 filing and were finalized in June 2007 (see <http://www.iipa.com/statistics.html>) as reflected above.

⁵ MPAA’s trade losses and piracy levels for 2006 and 2007 are not available. MPAA did provide 2005 estimates for a select group of countries, using a new methodology that analyzed both physical/“hard goods” and internet piracy. Details regarding MPAA’s methodology for 2005 and prior years are found in Appendix B of this IIPA submission.

⁶ ESA’s estimated piracy rates for Argentina in 2006 reflect the piracy rate for handheld products, which may differ from and often underestimate overall piracy levels in-country. ESA’s reported dollar figures reflect the value of pirate product present in the marketplace as distinguished from definitive industry “losses.”

COPYRIGHT PIRACY IN ARGENTINA

Internet piracy on the rise: Internet piracy in Argentina has grown dramatically over the last three years. This growth is not surprising considering that Argentina has over 1.5 million broadband connections (according to internetworldstats.com). With this increased availability of broadband both in homes and Internet cafés, the copyright industries' are worried that illegal Internet downloads will become even more of a threat to legitimate sales and distribution.

The widespread offering of "home delivery" for pirate product continues. Services advertise on the Internet and via email to offer copies of copyrighted content for direct delivery to a customer's home. For the business software industry, the Internet offers local packages of pirated and counterfeit software, including compilations containing dozens of computer programs, and hard copies are delivered directly to the consumer. The Business Software Alliance (BSA) notes that, in general, most of the local ISPs help to stop these kinds of offers from the various e-commerce websites, but for every site removed, more appear. The Motion Picture Association (MPA) adds that most of its Internet problem continues to be on the sales of hard goods via Internet; peer-to-peer and download piracy of films are increasing, however. Argentina plays an important role as a distributor of subtitled and dubbed films for the rest of Latin America; in fact, some of the top visited websites in Argentina are subtitle sites.

The recording industry reports that a third party survey performed between 2006 and 2007 places the total level of illegal downloads in Argentina at about 600 million songs per year. This number is up by 50% from 400 million songs discovered in a similar survey performed at the beginning of 2005. Cybercafés in Argentina contribute significantly to illegal downloads. In fact, a survey carried out by Knack Consulting at the request of the local industry group showed that about 38% of all downloads are taking place at these locations. This is a common occurrence around the region because it provides for many people a less expensive alternative to access broadband and the ability to download illegal files massively. The recording industry has been taking action against Internet cafés (see discussion below). But all this industry-led action is not a substitute for legislation that clearly outlines the liability for ISPs and provides clear take-down procedures.

Widespread street piracy and burning: Blank optical media products, mostly from Southeast Asia, enter the Argentine market via Uruguay or Paraguay. As a result, the phenomenon of "burning" is widespread throughout the country, and adversely affects the markets of almost all the content industries. According to official statistics provided by Argentine Customs, in 2007, 187 million CD-Rs and 104 million of DVD-Rs entered the country.

Thousands of street vendors sell burned CD-Rs. A very notorious street location distributing pirated and counterfeit materials is the "La Salada Fair." This market area is about 2 million square feet in size, and approximately 50,000 consumers visit this fair daily. The estimated annual sales of this retail fair is about US\$470 million, with real estate dealings amounting to more than US\$80 million annually. La Salada is a center of piracy, full of illegal copies from all copyright sectors. Some in the industry fear that La Salada is coming close to the organization and size of Ciudad del Este's piracy and counterfeiting. Although some raids have taken place in downtown Buenos Aires, the interior of the country remains plagued with street vendors selling pirate product (like cities of Tucuman and Santa Fe). Pirate stands are often seen around train stations and other high traffic areas.

The recording industry reports that music piracy was at 60 % in 2007, causing an estimated \$84 million in losses due to piracy. Physical piracy in the form of burned CD-Rs still continues to plague the Argentine market for music, but the biggest negative impact has been Internet piracy. The most recent estimate shows about 27 million units of pirate product in the market, representing close to 60% of all sale units. The largest concentration of pirate product is in Buenos Aires (the capital and province) but with strong presence in all the states. The market is declining; unit sales increased by only 5% in 2007 compared to an 11% increase in 2006.

The film industry reports that the piracy for its products worsened in Argentina in 2007. MPA indicates that street vendors have increased their presence in important markets. Theatrical exhibitors and small video rental stores in the interior of Argentina are being harmed by illegal commerce of pirate DVDs. Pirates often have the new film releases more than a month prior to local theatrical release, and an average of six months

prior to the official home video releases. Unfortunately, video rental stores are also an important distribution channel for pirate products, especially in smaller cities.

BSA also reports that there was no major improvement in the software piracy situation in Argentina in 2007. Piracy of business software programs among end-users remains quite high, especially in small and medium-sized organizations. In qualitative and quantitative terms, the worst enemies of the commercial computer software copyright owners are the big organizations that ignore the use limits in their software licenses. This involves not only the federal, provincial and municipal government offices but also a number of private companies. It is not so easy now to find shops selling pirated copies of PC programs, but is still common to detect hardware dealers selling computers with illegal OEM versions or simply illegal copies pre-installed on the computer hard disk. Estimated U.S. trade losses due to business software piracy in Argentina in 2007 rose to \$226 million, with an estimated piracy rate of 77%. With respect to market legalization efforts, the industry continues to support any effort by the Argentine federal, provincial or municipal levels of government to legalize business software programs currently installed on government computers and improve procurement practices. According to a 2008 report issued by BSA-IDC, the information technology sector's contribution to the Argentine economy could be even bigger if Argentina's PC software piracy rate were to be lowered 10 percentage points over the next four years. This would create an additional 3,900 jobs, \$630 million in local industry revenues and \$81 million in additional tax revenues for federal, regional, and local governments.⁷

COPYRIGHT ENFORCEMENT IN ARGENTINA

The music, film and business software industries all report continued good cooperation and responsive actions from Argentina police forces regarding anti-piracy actions. However, federal and state police forces lack sufficient resources to provide expert reports on seized product, which delays processing of cases. Furthermore, there is no dedicated police force to handle piracy cases. While there has been significant support from the Federal Police Cyber Crime division on Internet cases, few prosecutions are pursued and few criminal cases reach final judgment in Argentina. Civil infringement actions fared no better. These all have been longstanding problems in Argentina and there was no marked improvement in 2007. Customs officials did show positive interest in 2007 and it is hoped that their cooperation with industry will grow in 2008.

Criminal raids: Criminal copyright enforcement in Argentina has been cumbersome, costly, time-consuming and lacking in deterrent impact.

The recording industry also has been active in Internet piracy enforcement. In fact, the first digital "HUB" in Latin America was shut down in Argentina last year. (A HUB is an operator who provides computer power to peer-to-peer systems to support the exchange of illegal files.) The first HUB (Digital Harbor) shut down for violations of intellectual property law took place recently in Argentina. This closure effectively shuts down a HUB with around 50 concurrent users per day that contained a structure of forums, blogs, and websites that supported the HUB's activities. This result could not have taken place without the support of the local Internet Service Providers (ISPs). In addition to the HUB, the local Internet anti-piracy team carried out sufficient actions to take down 384 web pages, 1,675 virtual auction offers of physical pirate product and over 10,000 links from forums, blogs and websites to illegal files.

The recording industry reports that the number of raids decreased slightly in 2007 over last year by two percent (832 versus 853) and the number of seized product also went up by 162% (4.6 million vs. 1.7 million units) mainly due to three opportune actions by Customs in seizing contraband blank media amounting to over two million units. Some anti-piracy actions are being carried out in metropolitan Buenos Aires; but more is needed to reduce the amount of product being offered in high traffic areas. On the judicial side, six people were convicted of piracy related charges during the course of 2007 and another seven were arrested as part of major raids.

⁷ The Economic Benefits of Reducing PC Software Piracy, commissioned by BSA and conducted independently by International Data Corporation (IDC), released January 22, 2008, looks at the bottom-line economic benefits of reducing piracy in 42 countries that together account for more than 90 percent of global IT spending in 2007. It is available online at <http://www.bsa.org/idcstudy>.

The recording industry reports several actions at the notorious pirate flea market, La Salada. In October 2007, 300 officers from the Gendarmería Nacional and the Prefectura Naval Argentina from the Buenos Aires suburb of La Salada carried out a series of raids against music pirates over two days. This operation recovered enormous quantities of infringing material during the search of 13 homes that contained storerooms and burning sites. Product seized included 8.6 million inlay cards, 273 high speed burners, 136,067 master optical discs, 11,850 blank discs and 45,200 jewel boxes. Four people were detained pending further investigation. The group behind this illegal activity had divided their operations to minimize the risk of discovery by producing discs in some locations, printing the inlays in others, and packaging the product for distribution elsewhere. In another action, the Gendarmería in Buenos Aires conducted a very large operation on December 13, 2007, in which 30 locations were raided, five people were arrested and 500,000 music and film CD-Rs/DVD-Rs and 100 burners were seized.

During 2007, MPA carried out 285 raids, seizing more than 500,000 pirate discs. Moreover, authorities conducted five arrests for camcording and, at MPAA's initiative, 1,409 websites selling pirated product were removed from the Internet and more than 1,200 infringing auctions were cancelled. Forty-six convictions were handed down for audiovisual IP violations.

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

Border enforcement: Argentina should forge a working plan with Brazilian and Paraguayan customs officials to inspect goods in transit for potential pirate product.

MPA reports that, during 2007, Argentine Customs (*Administración Nacional de Aduanas*) authorities have been more supportive and alert to piracy and blank media imports. During 2007, Customs seized 1 million blank optical discs, a 122% percent increase over 2006. BSA reports that the Customs Service continues to provide very effective cooperation to improve enforcement at the borders. BSA has not pursued interdiction of border entry of blank media or components; however, both problems are reported to continue at least at the same level as in recent years. Usually, customs authorities seize shipments of blank CDs, but their activities are directed mostly at tax evasion rather than copyright infringement.

The *Registro de Marcas y Derechos de Autor*, under the supervision of AFIP (Argentine custom and tax authority) is in charge of copyright registration, which is completely voluntary. If the registration is made before customs authorities, each time a shipment is exported or imported, the authorities give notice to the copyright holder, in order to have the chance to monitor and block the shipment. While the recording industry's national group maintains contact with Customs, they have not yet seen any results coming out of this program. The motion picture industry, however, reports that the system is functioning well, that it has improved the detection of blank media imports, prevented the importation of illegal merchandise, and has enhanced cooperation between Customs and the private sector. MPA reports that during 2007, no imports of illegal cinematographic materials were identified. An MPA representative attends monthly meeting at Customs to discuss how to improve the system. Currently, the register is being used primarily for trademarks but it is anticipated that its application to copyright will expand in 2008. BSA does not use this registration system.

Few criminal prosecutions: Industry reports that the average case takes two years to reach a verdict in the first instance, and that usually results in no jail time or jail time is suspended because the judges do not consider intellectual property crimes as serious offenses. The industries are not aware of any major sentences issued in 2007.

Delays and low damages in civil infringement cases: In 2007, the business software industry continued to rely on civil enforcement in Argentina, given the difficulties with criminal enforcement. However, the industry reports that they face procedural delays before being able to obtain and conduct civil searches in

business piracy cases. While the situation has improved in the courts of the city of Buenos Aires, civil actions are still weakened by the lack of statutory damages and extensive delays. BSA achieves some results despite the problems with enforcement, relying primarily on the process of mediations required by the civil procedure, which facilitates the resolution of cases under BSA's model. Civil actions which are brought all the way through to final judgment are too protracted to be effective. Another problem is caused by the unavailability of deterrent civil damages. This important problem could be corrected if Argentina were to introduce an effective statutory damages system.

COPYRIGHT LAW AND RELATED ISSUES IN ARGENTINA

IIPA members remain concerned about the breadth and scope of various pieces of legislation that create exceptions to protection in the digital age. On the enforcement front, there is a bill that proposes the creation of a special public prosecutor devoted to trademark protection; perhaps a similar proposal should be developed for copyright, or expanding to include all IPR sectors.

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

- express protection for the communication to the public/making available right;
- explicitly extend the scope of the reproduction right to clearly cover temporary copies;
- protect against the circumvention of technological protection measures and removal or alteration of electronic rights management information;
- establish provisions on ISP liability and procedures for notice and takedown;
- increase criminal penalties for piracy (including increasing the minimum level of criminal penalties up to deterrent levels);
- establish *ex officio* border measures;
- provide for statutory damages;
- explicitly provide for the seizures of infringing equipment;
- extend the term of protection for phonograms to 95 years from publication. This also would include making the term of protection uniform for all genres of copyrighted materials;
- provide equitable and balanced treatment for all rightsholders, including those who are juridical entities.

Pending Copyright Law amendment to increase sanctions and expand infringements: The film and recording industries drafted an amendment to the Criminal Chapter of the Copyright Law, which was presented in the Senate in 2007 and is expected to be discussed in 2008. This bill (Bill 1546-S-05) would provide criminal sanctions for the circumvention of technological protection measures (TPMs) and modification or suppression of digital rights management (RMI), and include statutory damages. The legislation covers the following: it provides criminal sanctions for the circumvention of TPMs and RMI; it includes preliminary injunctions; it empowers courts to impose fines to force the execution of the sentences; and it creates statutory damages that currently do not exist in Argentine law. This bill is pending in the criminal and justice legislation committee of the Senate.

Bill to extend the term of protection for sound recordings off-the-docket: This is an important initiative to ensure protection of the vast and rich catalog of Argentine music. The Argentine Senate approved a bill in November 2004 which would increase the term of protection for phonograms. The bill was introduced to the House of Representatives in March 2005, but has since been removed from the docket. Without any government effort to increase the term of protection, no progress will be made on this issue.

Other Criminal Code reform: Software industry colleagues report that proposed legislation to reform the Criminal Code (File No. 5864-D-2006), which has been approved by the Chamber of Deputies and is now before the Senate, contains some troubling provisions.⁸ The incorporation of certain intangibles as object of

⁸ Clause 12 of this bill states: "the following should be added to clause 183 from the National Penal Code as second and third paragraphs: that who, in any way, destroyed in whole or in part, erased, temporarily or permanently modified, or in any way prevented the use of data

protection in the damage is welcomed since current law does not provide for the punishment for damage to intangible assets. However, part of this proposal does not appear to be compatible with the WIPO Treaties to which Argentina has joined. The concern here is that the proposed reform would render illegal the behavior of those who distribute software that contains a security measure that impedes the access to a program or to data contained in a program. The problematic clause improperly neglects to distinguish between legal and illegal use of such devices, a distinction that is made by the WIPO Treaties (as well as by the Council of Europe's Convention on Cybercrime).

Digital television: Argentina announced that it will adopt and implement a digital terrestrial TV system. MPA again calls attention to the need to select a method which will include specifications for protection against the unauthorized redistribution of digital broadcast signals, as this is critical to guaranteeing the future viability of this medium.

Government software legalization: With respect to market legalization efforts, the industry continues to support efforts by the Argentine government (in particular, the *Subsecretaría de la Gestión Pública*—the Undersecretariat for Public Administration) to issue an executive decree that would require government legalization of current business software programs on computers and improve procurement practices. While several "standards" have been issued by the *Subsecretaría*, the Argentine government has not shown any recent interest in formally legalizing its software inventories.

Withholding taxes and royalties: There is a recent disturbing problem regarding the withholding that local licensees must perform when wiring royalties to foreign licensors. The local tax collection authority, AFIP, refuses to apply the special rules that the Income Tax Law provides for "authors rights" international transfers. AFIP contends that the legal nomenclature "author" is limited to physical persons, and that a legal person (e.g. a corporation) cannot be an author and, as a result, cannot hold these "authors rights." Only two cases so far have been presented to courts: in one case, the Court agreed with AFIP, and in the other, the Court rejected AFIP's position. This creates much uncertainty, and could create high economic liability for taxpayers if the AFIP position prevails. This problem could be solved by amending the Income Tax Act to establish a concrete withholding rate for software license payments, similar to what was done for music and motion pictures several years ago.

or programs, whichever the support in which they are contained, during a process of electronic communication may be sentenced to prison for a term of one month to two years. *The same sanction will be applied to those who sold, distributed or in any way disclosed or introduced in an IT system any program destined to cause damage like the ones described in the previous paragraph, in the computing programs or in the data contained in any kind of IT and telecommunications system.*" (emphasis added).

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2008 SPECIAL 301 REPORT

CANADA

Special 301 Recommendation: IIPA recommends that Canada be elevated to the Special 301 Priority Watch List in 2008.

EXECUTIVE SUMMARY

Almost alone among developed economies in the OECD, Canada has taken no meaningful steps toward modernizing its copyright law to meet the new global minimum standards of the WIPO Internet Treaties, which Canada signed more than a decade ago. Its enforcement record also falls far short of what should be expected of our neighbor and largest trading partner, with ineffective border controls, insufficient enforcement resources, inadequate enforcement policies, and a seeming unwillingness to impose deterrent penalties on pirates. In 2007, parliamentary leadership and even the government itself, at the highest levels, acknowledged many of these deficiencies, and the government listed copyright reform among its top legislative priorities. But by the end of the year, these encouraging statements produced almost nothing; apart from the welcome enactment and enforcement of a federal criminal law against unauthorized camcording, the piracy picture in Canada is as bleak as it was a year ago. Only two of America's top 10 trading partners (China and South Korea) surpass Canada's record of appearing continuously on a Special 301 list every year since 1995.¹ To underscore U.S. insistence that Canada finally take action to address the serious piracy problem it has allowed to develop just across our border, and that it bring its outmoded laws up to contemporary international standards, IIPA recommends that Canada be elevated to the Priority Watch List in 2008.

Actions Which the Canadian Government Should Take in 2008:

Copyright Law Reform

- Enact legislation bringing Canada into full compliance with the WIPO "Internet" Treaties (WIPO Copyright Treaty [WCT] and WIPO Performances and Phonograms Treaty [WPPT])
- Create strong legal incentives for Internet Service Providers (ISPs) to cooperate with copyright owners in combating online piracy
- Amend the Copyright Act to clarify the scope of the private copying exception for sound recordings
- Amend the Copyright Act to clarify liability for those who knowingly facilitate, encourage or contribute to infringement (such as illicit file-sharing services)

Enforcement

- Make legislative, regulatory or administrative changes necessary to empower customs officials to make *ex officio* seizures of counterfeit and pirate product at the border without a court order
- Increase resources devoted to anti-piracy enforcement both at the border and within Canada
- Direct the Royal Canadian Mounted Police (RCMP), Canadian Border Services Agency (CBSA), and Crown prosecutors to give high priority to intellectual property rights enforcement, including

¹ Dismissive Parliamentary testimony by a senior representative of the Department of Foreign Affairs and International Trade may help explain why. "Canada does not recognize the 301 Watch List process," the DFAIT officer told the Standing Committee on Public Safety and National Security on March 27, 2007. "It's lacking reliable and objective analysis, basically. It's driven entirely by U.S. industry.If you aren't on the watch list in some way, shape or form, you may not be anyone of importance. Most countries with significant commercial dealings are on the watch list." House of Commons, Standing Committee on Public Safety and National Security, No. 35, 1st Session, 39th Parliament (March 27, 2007), at 1150 (testimony of Nancy Segal).

against retail piracy and imports of pirated products, and to seek deterrent penalties against those convicted of these crimes

COPYRIGHT LEGAL REFORM AND RELATED ISSUES

What IIPA reported in last year's Special 301 report remains, disappointingly, true today: "Canada remains far behind virtually all its peers in the industrialized world with respect to its efforts to bring its copyright laws up to date with the realities of the global digital networked environment. Indeed, even most of the major developing countries have progressed further and faster than Canada in meeting this challenge." With the notable exception of outlawing unauthorized camcording of motion pictures, the Canadian government has scarcely begun to tackle the main items on its copyright and enforcement legislative agenda: bringing its laws into full compliance with the globally accepted benchmarks for modern copyright legislation (the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT)); making the necessary legislative changes to empower customs officials to make ex officio seizures of counterfeit and pirate product at the border; and dedicating sufficient resources and establishing adequate policies to ensure effective copyright enforcement efforts within the country.

Several developments during 2007 gave rise to hopes that the Canadian government would finally begin to translate into reality its oft-stated commitment to modernization of its copyright laws and border controls:

- In May 2007, the Standing Committee on Public Safety and National Security of Canada's House of Commons issued a report entitled "Counterfeit Goods in Canada – A Threat To Public Safety," in which the committee concluded that "the legislative framework for trademarks and copyrights has serious weaknesses," and agreed with most of the witnesses before it that "amendments to the Copyright Act are needed to give public authorities and intellectual property owners the powers and resources needed to stem the tide of counterfeiting and piracy."²
- In June, 2007, another parliamentary standing committee – on Industry, Science and Technology – issued a report entitled simply "Counterfeiting and Piracy are Theft," which contained detailed recommendations for amendments to enable more effective enforcement against piracy, as well as calling for Canadian ratification of the WCT and WPPT.³
- On October 16, 2007, the Government's Speech from the Throne, laying out its top legislative priorities, promised to "improve the protection of cultural and intellectual property rights, including copyright reform."
- Two days later, in parallel responses to the two parliamentary reports noted above, the government asserted that it "is committed to the importance of providing a robust framework for intellectual property rights, not only to address the risks posed by counterfeit goods to consumer health and safety, but to foster an environment conducive to innovation, in an effort to attract further investment and high paying jobs to this country's growing knowledge-based economy." The government response laid out a four-point "IPR Strategy" that includes "strengthen[ing] and moderniz[ing] Canada's enforcement regime," and "bringing Canada's copyright regime into conformity with the WIPO Internet Treaties."⁴

² See <http://cmte.parl.gc.ca/Content/HOC/committee/391/secu/reports/rp2985081/securep10/securep10-e.pdf>.

³ See <http://cmte.parl.gc.ca/cmte/CommitteePublication.aspx?COM=10476&Lang=1&SourceId=213200>.

⁴ See <http://cmte.parl.gc.ca/cmte/CommitteePublication.aspx?COM=10476&Lang=1&SourceId=215779>. Enactment of anti-camcording legislation (see below) was the first point of the government's IPR strategy as set out in its responses to the parliamentary committee reports. Points 2 and 3 are referenced in the text above. The fourth point was for the government to "demonstrate its commitment to addressing counterfeiting and piracy at the international level," citing declarations joined by Canada in the G8 and NAFTA Security and Prosperity Partnership contexts. To this might be added Canada's participation in the anti-counterfeiting trade agreement (ACTA) negotiations. Such initiatives, while important, are no substitute for bringing Canada's own laws and enforcement practices up to minimum international standards.

Building on these explicit public commitments, the government was widely expected to unveil its specific legislative initiatives before Parliament rose in mid-December for its winter recess. Sadly, all the hopes raised by these encouraging developments were dashed. Nothing happened: no legislation was tabled and no result was announced by the Interdepartmental Working Group tasked to address enforcement shortfalls. Although Canada's Parliament, and its government at the highest levels, have pledged to bring its copyright law and enforcement regime into the 21st century, the ministries responsible for fulfilling this pledge seem somehow unable to deliver.

Thus, as we enter the twelfth year following negotiation of the WIPO Internet Treaties, in which Canada played an important and positive role, Canada not only remains entirely out of compliance with the global minimum world standards embodied in the Treaties, but still has not even issued a legislative proposal to bridge this gap.⁵ Similarly, 2008 opens as yet another year in which Canadian law enforcement officials are denied the legal tools and the resources needed to secure Canada's borders against pirate imports and to crack down effectively on infringing activities being carried out by organized criminal groups within its borders.

There was one exception to this bleak picture of Canadian policy failure in 2007: the enactment (with support from all political parties) of Bill C-59, which makes unauthorized camcording of theatrically exhibited motion pictures a federal criminal offense. IIPA commends Canada for this achievement, which (as discussed below) is already beginning to have an impact. We can only hope that this is a positive sign that there may be a broad political consensus in 2008 for Canada to finally tackle its broader copyright law and enforcement shortcomings that continued to fester in 2007. Some of the key shortcomings include:

Technological Protection Measures: When Canada signed the WCT and WPPT more than a decade ago, it pledged support for treaties that were designed to respond to what were then new technologies. Notably, as a crucial element to foster the healthy development of e-commerce in copyrighted materials, these treaties obligated adhering countries to enact effective legal regimes to protect technological measures used by copyright owners to control access to and copying of their works. While nearly every other OECD country either has met this obligation or is well on the way to doing so, Canadian law remains hopelessly outdated in this area. IIPA urges Canada to fulfill its pledge by enacting laws that deal with technological protection measures (TPMs) in a manner that fully complies with the WCT and WPPT. This means legislation that:

- comprehensively protects TPMs, both in so far as they manage access to copyright works and in their use to prevent unauthorized copying and the exercise of other exclusive rights;
- outlaws trafficking in devices aimed at circumventing TPMs, or providing circumvention services, and defines violations without imposing onerous intent requirements;
- defines exceptions or defenses with care, so as to avoid the creation of a market for circumvention devices or services; and
- provides strong civil and criminal remedies for violations.

Canada's failure to provide legal protection for TPMs is not a mere theoretical lapse: it has already had concrete consequences. In the absence of strong prohibitions to the contrary, Canada now finds itself one of the world's epicenters for the distribution and export of several categories of tools aimed at circumventing TPMs – so-called "modification chips" and similar devices that enable pirated and counterfeit video games to be played on videogame consoles. Highly organized international crime groups have rushed into the gap left by Canada's outmoded copyright law and now use the country as a

⁵The previous government unveiled legislation (Bill C-60) in 2005 that, while positive in some respects, fell far short of meeting the WCT and WPPT benchmarks. While we continue to urge the current government to jettison the approach taken by Bill C-60, in favor of legislation more consistent with international norms for nations that have already implemented these treaties, the direction Canadian copyright reform will take remains unknown.

springboard from which to undermine legitimate markets in the United States, the United Kingdom, Australia and elsewhere, through the export of circumvention devices. It is long past time for Canada to put into place the legal tools that will enable it to put a stop to this increasing pollution of the markets of its trading partners.

Online Piracy: Copyright reform legislation in Canada is also needed to counter the growing problem of Internet piracy. It can best do so by conditioning liability limitations for Internet Service Providers (ISPs) on affirmative cooperation with copyright owners in combating online infringements. In a 2004 decision (*SOCAN v. CAIP*), the Supreme Court of Canada observed that the “effective remedy ... would be enactment by Parliament of a statutory ‘notice and take down’ procedure as has been done in the European Community and the United States.”⁶ Accordingly, legislation should also provide a true “notice and takedown” system that offers an expeditious means of shutting off access to infringing online activity, rather than confining itself to the mere “notice and notice” regime proposed by previous Canadian governments. While an obligation for an ISP to forward notices from copyright owners to end-users would be a useful supplement to a system that gives ISPs strong incentives to “take down” infringing materials—particularly if coupled with an obligation to terminate the accounts of repeat or serious infringers—it is no substitute for it.⁷

New legislation should also clarify liability under Canadian law for those (such as peer-to-peer (p2p) service providers and distributors of file sharing software) who in the Internet context knowingly facilitate massive infringements. In contrast to the international trend, exemplified by successful lawsuits in Australia, Korea, Taiwan and the U.S. against p2p services that were facilitating massive worldwide infringement, recent Canadian case law on liability for authorizing infringement raises questions as to whether a comparable enterprise would be found liable under Canadian law. The Copyright Act should be amended to enable rights holders to obtain effective remedies against those who in the Internet context knowingly facilitate infringements (such as p2p service providers and distributors of file sharing software who offer services or software knowing that their actions will likely result in infringement), or who encourage, induce or materially contribute to the infringement. Clear rules on this topic would allow copyright infringement to be dealt with at the source instead of at the point of consumption, thus facilitating the avoidance of litigation against users of illicit p2p services as direct infringers (the topic of much public discussion in Canada).

Other Copyright Issues: New legislation must also address the scope of the private copying exception for sound recordings. While IIPA hopes that further judicial interpretation of Canada's current law will more clearly establish that the private copying exception applies only to individuals who make copies for their own use, a legislative amendment is also required to clarify that the exception applies only to copies of non-infringing recordings owned by the person who makes the copies. Any broader application of the private copy exception would raise serious questions about Canadian compliance with its WTO TRIPS obligations.

Bill C-60, proposed by the previous government in 2005, contained several positive features, notably the specification of an exclusive right of “making available,” and a new section banning dissemination or public performance of a copy of a sound recording made under the private copying exception. These should be brought forward in new copyright reform legislation. On the other hand, Bill C-60 also included flawed proposals in the area of educational and library exceptions, such as an ill-defined

⁶ *Society of Composers, Authors and Music Publishers of Canada v. Canadian Assn. of Internet Providers*, [2004] 2 S.C.R. 427, 2004 SCC 45, available at <http://scc.lexum.umontreal.ca/en/2004/2004scc45/2004scc45.html>.

⁷ The previous government's Bill C-60 failed to address this problem, and would in fact have exacerbated it, because it would have provided sweeping safe harbors to network service providers without creating any incentives for them to cooperate with copyright owners to deal with copyright infringements that take place in the digital network environment. In particular, it would have immunized service providers against liability even when they had actual knowledge of infringement and the power to restrict or prevent it, until an independent court order was obtained; would also have sheltered p2p file sharing services that contribute to massive infringement; and would have prevented rights holders from even obtaining injunctions against service providers whose services are used to facilitate infringement. Such an approach failed to comply with the mandate of the WIPO Internet Treaties that national law “permit effective action against any act of infringement of rights covered by this Treaty.”

new exception for use of a work in a "lesson, text or examination" in educational settings, and a provision authorizing interlibrary distribution of digital copies, that would have had a significant detrimental impact on publishers of scientific, technical and medical materials in particular. These should be carefully re-examined. The Canadian government should ensure that any legislative proposals it makes on educational and library exceptions to copyright can pass muster with its existing and anticipated international obligations, and that they provide ample room for market solutions.

Enforcement provisions: Finally, along with reform of Canada's substantive copyright law, legislative changes are necessary, though not alone sufficient, for Canada to begin to remedy its serious deficits in copyright enforcement (discussed in more detail in the next section). Among other critical changes, the Canadian Border Services Agency (CBSA) must be given the independent authority it currently lacks to act *ex officio* against any suspected pirate or counterfeit imports. Furthermore, both the parliamentary committees that issued reports in 2007 on the problems of counterfeiting and piracy recommended other essential changes, including allowing seizure of income and property derived from copyright piracy; providing the Royal Canadian Mounted Police (RCMP) and the Department of Justice with adequate resources for enforcement against piracy; establishing a copyright enforcement policy that effectively targets piracy and counterfeiting; and increasing damages and penalties. These recommendations should be acted upon promptly, to provide the legal framework necessary for effectively addressing piracy.

COPYRIGHT PIRACY AND ENFORCEMENT

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

In 2007, the Entertainment Software Association's investigations uncovered numerous piracy operations in Alberta, British Columbia, and Ontario. Pirates openly advertised these operations on the internet through their own websites and/or online classifieds such as Craigslist. Many pirates also operated stores full of pirated materials, often found in malls. During a raid of a mall-store in Richmond, British Columbia, several stores within the vicinity of the target closed within minutes of the RCMP entering the mall, leading the RCMP and ESA to believe that this mall housed a network of stores selling pirated goods that trade and communicate with each other. The ESA also discovered a network of individuals involved in selling pirated video games across the Lower Mainland region of British Columbia. Popular pirated materials sold by these operations included burned optical discs (authorities often seized several hundred discs) and circumvention or modification devices. Each pirate typically owned at least one personal computer containing thousands of pirated software titles that he could easily burn onto optical discs. One operation in Ontario that the ESA confronted on June 23, 2007, possessed over 2,000 burned games on optical discs for various gaming systems, six optical disc burners, thirty-five modification chips and tools for soldering these chips to game consoles, and three personal computers with multiple hard drives containing the operation's business records. Only a few criminal cases have been brought in Toronto, Edmonton and Richmond against vendors of pirated entertainment software.

The estimated 2006 piracy rate for business software in Canada of 33% far exceeds that of the U.S. or of many Western European countries. Servers at universities continue to act as digital storage facilities for large quantities of pirate intellectual property, including games, music and movies.

Internet piracy appears to be on the increase in Canada, aided by the uncertain legal environment and serious shortfalls in enforcement. These factors contribute to the formidable propensity of Canadians to patronize illegal online sources of copyright material, thus stunting the growth of legal alternatives. For instance, although channels such as digital downloads, online subscription services and delivery of music to mobile devices account for nearly 30 % of the legitimate U.S. market for recorded music, the comparable figure for Canada is only 12%; and the estimated number of unauthorized

downloads (1.3 billion) swamps the number of legitimate downloads (20 million) by a factor of 65:1.⁸ These statistics bear out the OECD's 2005 conclusion that Canada has the highest per capita incidence of unauthorized file-swapping in the world.⁹

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

A key anti-piracy battlefield where Canadian government inaction has effectively handcuffed its law enforcement agencies is at the border. Canadian customs officers in the CBSA lack statutory authority to seize even obviously counterfeit products as they enter Canada. Unless a court order has been previously obtained¹⁰, only the RCMP can carry out an *ex officio* seizure, and coordination between the two agencies is generally not effective. As a result, virtually no seizures at the border have occurred, and Canada's borders are effectively wide open to imports of pirate CDs, DVDs or videogames and other infringing materials. CBSA must be given independent authority to act against any suspected pirate or counterfeit imports. Although the Canadian government has acknowledged this deficiency and has been studying the issue for years, it has failed to introduce the necessary legislative changes. Perhaps the parliament's Committee on Public Safety and National Security was correct when it identified "a lack of strong leadership" as a major "obstacle to the development of an effective Canadian strategy to fight counterfeiting and piracy." Whatever the explanation for Canada's years of policy paralysis in this area, it is long past time for the Canadian government to identify which statutes, regulations or policies must be amended in order to confer meaningful *ex officio* authority on border enforcement agencies, and to act promptly to institute the needed changes.¹¹

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

However, not all enforcement problems in Canada can be traced to deficiencies in the law. Even when pirate activity is clearly illegal, Canada's response to it all too often falls short. While Canadian

⁸ "Nielsen SoundScan Figures Confirm Canada's Weak Digital Music Market and the Sharp, Ongoing Decline in Overall recorded Music Sales," Jan. 4, 2008, at http://www.cria.ca/news/08-01-08_n.php.

⁹ Organization for Economic Cooperation and Development, "Digital Broadband Content: Music," Dec. 13, 2005, p. 75, <http://www.oecd.org/dataoecd/13/2/34995041.pdf>.

¹⁰ 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.

¹¹ Both parliamentary committees that studied this topic in 2007 called explicitly for such amendments to be enacted.

authorities may say that combating copyright piracy is an important objective, some of their actions – in terms of priority setting, resources, training, and the outcome of prosecutions – suggest the contrary. Piracy is a serious problem in Canada, but the evidence is that the Canadian government is not taking it seriously.

In its Special 301 announcement last April, USTR called for more anti-piracy resources and training to be provided both to CBSA and to domestic law enforcement officials. This has not happened. Both CBSA and RCMP remain short of dedicated resources – including manpower and data and intelligence management – to address Canada’s growing piracy problems. Nor is there progress to report on interagency cooperation, another problem flagged by USTR last year. The existing arrangement under which CBSA can refer cases to the RCMP through designated RCMP liaison officers is unwieldy and impractical.¹²

The continued prevalence of pirate product in Canada’s retail market indicates another enforcement shortcoming: the RCMP’s long-standing reluctance to target retail piracy. While this may be attributable to the Canadian government’s failure to provide RCMP with adequate enforcement resources, its record of cooperation with right holders to attack piracy remains spotty. Examples of unwillingness to share information, reluctance to disclose the inventory of pirate entertainment software product seized, and insistence on formalities such as Canadian copyright registration are all too common. Although the RCMP has now listed intellectual property crimes among its top stated priorities, its actions too often do not fulfill this commitment. Under the Justice/RCMP Copyright Enforcement Policy, RCMP still will rarely take action against retail outlets engaged in piracy. The Enforcement Policy does not account for the reality that as technology constantly advances, the “retailers” now use ordinary computer equipment to become mass manufacturers, producing literally hundreds of thousands of pirated DVDs, CDs, software and video games.¹³

Not surprisingly, the retail piracy problem in communities such as Vancouver, Montreal, Edmonton, Calgary and Greater Toronto continues to worsen. Various local authorities have chosen not to pursue at least ten major piracy operations uncovered in 2007,¹⁴ even after confiscating the pirated materials. When government authorities refuse to pursue criminal investigations against retail pirates, copyright owners are left with only civil remedies to pursue, and pirates are not deterred. While there have been some important successes – for instance, RCMP criminal actions have been critical in the near-total suppression of the pirate retail videogame market in Quebec City – on the whole the Canadian law enforcement commitment to enforcement against retail piracy is inconsistent and generally under-resourced.¹⁵

The same problems extend to prosecutors and courts in Canada. Few resources are dedicated to prosecutions of piracy cases; prosecutors generally lack specialized training; and too many judges seem to deprecate the seriousness of copyright piracy. The result is that those few pirates who are criminally prosecuted generally escape any meaningful punishment.¹⁶ An illustrative example is the story of Chui Lau, a well known owner/operator of a pirate retail store in Richmond, British Columbia, who pled guilty to over eighty counts of criminal copyright infringement over a three year period beginning in 2003, as a result of a series of raids in which equipment for manufacturing counterfeit DVDs was seized, along with a

¹² 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.

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

¹⁴ This includes the June 2007 ESA-led operation against an Ontario pirate described above.

¹⁵ 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.

¹⁶ While calling for increased statutory penalties for 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.

large quantity of pirate product. Despite being charged on three separate occasions, the total punishment Mr. Lau received for his repeat offenses was a fine of C\$11,000 (US\$9400) and an order to remain in his residence from 11pm to 7am for 12 months. Even the RCMP acknowledges that the penalties for engaging in copyright piracy in Canada – usually insignificant fines – remain simply insufficient to deter people from engaging in this highly profitable and relatively risk-free crime.

The light penalties also encourage recidivism. As the RCMP told a parliamentary committee in 2007, “[t]he current criminal penalties imposed by courts pose little deterrence. It is not unusual to charge the same groups multiple times for IPR crimes, as they see the fines simply as the cost of doing business.”¹⁷ For example, despite the fact that a vendor of pirated entertainment software products was charged by the Richmond RCMP, pled guilty to twenty-six fraud-related charges, and was fined C\$25,000, he resumed selling pirated materials just weeks after his sentencing.

USTR should press the Canadian government to initiate and adequately fund a coordinated federal law enforcement effort against copyright piracy. This should include a nationwide program to crack down on the importation of pirate goods at all major Canadian points of entry. Raids and seizures against retail targets, as well as against the manufacturers of pirate products, must be stepped up. Since the availability of pirated products will not be reduced without criminal prosecutions against infringers and the imposition of deterrent sentences, Crown counsel should be encouraged to take on more copyright infringement cases, and be provided with the training and other support needed to fully prosecute them. Canadian courts should be looked to for more consistent deterrent sentences, including jail time for piracy cases. Canadian authorities should be encouraged to accord a high priority – in practice, not just in rhetoric – to the serious piracy problems within their country, and to devote adequate resources to the investigation and prosecution of these cases.¹⁸

On a positive note, IIPA is pleased to observe that the new federal criminal law against unauthorized camcording has already had a constructive impact, both as a deterrent and as an effective means to catch movie thieves. Since Law C-59 was enacted last June, Montreal, previously a leading global source of camcorded masters for DVD piracy, has been supplanted by other, non-Canadian cities in the vanguard of this illicit business. People caught camcording in theaters have already been arrested in both Montreal and Calgary.¹⁹ IIPA commends Canadian authorities for their work thus far and encourages them to keep up vigorous enforcement of the new law.

¹⁷ See Public Safety and National Security Committee report, at 12. RCMP has been saying this consistently in policy assessments going back at least 8 years. See RCMP, “An Assessment of Commercial Scale Criminal Copyright Piracy and Trade-mark Counterfeiting in Canada”, 2000 (“minimal sentences and low fines offer little incentive for law enforcement to pursue this issue more vigorously, and every incentive for criminals to continue pirating copyrighted goods”); see also, RCMP, “A strategic intelligence assessment of Intellectual Property Crime in Canada”, 2004; RCMP, “Intellectual Property Crime in Canada – Hazardous and Costly,” 2005.

¹⁸ Numerous recommendations of the parliamentary committees echo these concerns.

¹⁹ Meilleur, Philippe. “Montreal se retait une virginiete,” *Journal de Montreal*, January 24, 2008. Bill Kaufman, “Crackdown on pirating; Calgary called hotspot for illegal movie copying,” *The Calgary Sun*, January 18, 2008.

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2008 SPECIAL 301 REPORT

CHILE

Special 301 Recommendation: IIPA recommends that Chile remain on the Special 301 Priority Watch List in 2008.

EXECUTIVE SUMMARY

The copyright industries in the IIPA have very little positive news to report on copyright legislative developments as well as piracy and enforcement issues during 2007. Chile was the first U.S. trading partner in the Americas to sign a Free Trade Agreement (FTA), which provides high level copyright and enforcement obligations. Although this FTA entered into force on January 1, 2004, many copyright- and enforcement-related obligations were subject to transition periods, many of which were due to be implemented by January 1, 2008. A copyright/enforcement legislative package introduced in 2007 contains numerous objectionable provisions, including many that violate Chile's FTA IPR obligations. This bill passed the Chamber of Deputies and is now pending before the Senate. An FTA-compatible bill is far preferable to rushed, inadequate legislation. Copyright piracy levels remain high, and Internet piracy and border enforcement are worsening. Although Industry cooperation with Chilean criminal enforcement authorities improved last year, the system breaks down as few prosecutions are pursued and deterrent sentencing simply does not occur. The Chilean government needs to significantly elevate national attention to copyright enforcement and develop specific actions to halt piracy within its borders (both hard goods and online) and at the borders.

PRIORITY ACTIONS IN 2008

Fully implement its FTA copyright legislative-related obligations to:

- (1) Amend the copyright enforcement bill pending before the Senate to fully satisfy FTA IPR obligations. This would include addressing the industries' longstanding calls to implement key issues such as:
 - * Establishing ISP liability provisions in concert with the FTA obligations, including notice and take down procedures;
 - * Increasing the level of deterrent civil and criminal sanctions for copyright infringement;
 - * Providing an effective civil *ex parte* search remedy;
 - * Establishing statutory damages;
 - * Providing protection of encrypted program-carrying satellite signals;
 - * Affording express protection of temporary copies;
 - * Providing only narrow exceptions/limitations to copyright protection.
- (2) Take immediate steps to complete and fully implement its 2001 government software legalization decree, and adopt appropriate provisions to regulate the acquisition and management of software by government agencies.
- (3) Generate new legislation to implement the FTA provisions regarding technological protection measures (TPMs) and the enforcement (both criminal and civil) against their circumvention. Rightsholders should be informed of progress on any legislative initiative and be able to provide the input, based on their considerable expertise on this issue.

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

- The police (*carabineros*) should be instructed to give priority to copyright anti-piracy actions, especially in the cities of Santiago, Iquique, Concepción, and Valparaíso;
- The police should place more emphasis on investigating pirate manufacturing and distribution centers and operations;
- The civil police and administrative authorities should also act to prohibit the sale of pirated materials in the streets;
- More criminal actions against illegal downloaders of music, movies, and software should be initiated;
- The police should coordinate their investigations and actions with customs officials at international airports, seaports and border areas, as well as with Finance Ministry officials;
- More prosecutions should be pursued and the courts need to impose deterrent-level criminal sentences;
- More raids should also be initiated using organized crime legislation.

Improve civil remedies: The speed of civil copyright infringement litigation must be improved and an effective civil *ex parte* search remedy must be afforded in law (without TRIPS-incompatible procedures) and in-practice.

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

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

COPYRIGHT LAW ISSUES IN CHILE

The U.S.-Chile FTA:¹ IIPA and its members continue to urge Chile to fully and promptly comply with its FTA and international obligations. While Chile did amend its law year ago to implement some of the FTA's substantive copyright obligations, additional amendments are necessary for Chile to meet its bilateral and multilateral obligations. The Chile FTA IPR chapter contains extended transition periods (ranging from two to five years) which delayed the significant benefits that immediate implementation of the two WIPO Treaties' obligations (WCT & WPPT) would have brought to the copyright industry and to both the U.S. and Chilean economies. Under the FTA, Chile has a transition period to provide protection to temporary copies, establish effective technological protection measures (TPM), grant comprehensive public performance rights and non-interactive digital transmission rights, and adopt ISP liability and notice and takedown provisions. On the enforcement side, the FTA contains a four-year transition period to implement the enforcement obligations (by January 1, 2008), and a five-year transition period to implement Chile's already existing WCT & WPPT obligations regarding protection against circumvention of technological protection measures (by January 1, 2009).

The copyright enforcement bill pending in the Senate in 2008: In 2007, the Administration proposed legislation aimed at implementing the remaining copyright- and enforcement-related obligations

¹ The U.S.-Chile Free Trade Agreement is posted on USTR's website at [http://www.ustr.gov/Trade Agreements/Bilateral/Chile_FTA/Final_Texts/Section_Index.html](http://www.ustr.gov/Trade%20Agreements/Bilateral/Chile_FTA/Final_Texts/Section_Index.html). For more details on Chile's Special 301 history, see IIPA's appendices, specifically, Appendix D (History) at (<http://www.iipa.com/pdf/2008SPEC301USTRHISTORY.pdf>), Appendix E (List of 301 placements) at (<http://www.iipa.com/pdf/2008SPEC301HISTORICALSUMMARY.pdf>), as well as previous years' country reports, at <http://www.iipa.com/countryreports.html>. For IIPA's more detailed analysis of the strengths (and weaknesses) in the U.S.-Chile FTA IPR Chapter, see IIPA's Submission to the U.S. International Trade Commission on the U.S.-Chile Free Trade Agreement, May 8, 2003, available at http://www.iipa.com/rbi/2003_May8_ChileFTA_ITC.pdf.

undertaken by Chile in the FTA IPR chapter (not including TPMs). This package, Bill No. 5012-03, was drafted primarily by the Ministry of Culture, and introduced in Congress by the Administration in May 2007. Despite concerns raised with Chilean officials and Members of Congress by local copyright industry colleagues and by IIPA members through the U.S. Government, this bill passed the Chamber of Deputies on October 10, 2007. It then moved to the Senate, where it was voted out of the Education Commission on December 5, 2007 and forwarded to the Economic Commission on December 11. Additional hearings are expected on this legislation after the Congress returns in March 2008.

Significant revisions are needed for this bill to satisfy the explicit FTA IPR obligations. Below is a summary of the most problematic issues:

(a) Provisions regarding the **liability of Internet Service Providers**, which are essential to ensure the distribution and enforcement of legitimate content over the Internet, fail in many respects to track the FTA. These provisions, as drafted, would effectively create incentives for Internet service providers (ISPs) to refuse to cooperate with copyright owners rather than achieve the kind of cooperation and flexibility that is demanded by the current strains on copyright protection. For example, the entire section contains troubling language, especially on notice and takedown procedures. The most glaring problem is that the bill requires rightsholders to request and obtain a court order to remove the infringing content, a process totally out-of-step with international practice. Rightsholders would have to petition a civil court, which then has 48 hours to issue an order for the ISP to withdraw or block the infringing content. This section appears to afford a huge liability loophole for ISPs, not a limitation on liability. Voluntary cooperation from the ISPs is limited only to hosted content, which is no longer the predominant way in which pirates distribute content and would not cover actions needed in peer-to-peer piracy (P2P) situations.

(b) Many of the **proposed exceptions to copyright protection**, especially for libraries in the digital environment and those involving computer software, are incompatible with the FTA. For example, provisions on reversed engineering are far too broad; the proposed exception is not limited to the circumvention of TPMs, does not cover research and development activities within that exception, and does not restrict such to achieve interoperability (which is the FTA standard). The exceptions involving libraries are also far too broad; they would potentially allow libraries to reproduce entire works in digital form without any restrictions on further use, reproduction or distribution. In addition, the tri-partite language in the FTA must appear as a chapeau for the entire new chapter on limitations/exceptions, thereby clearly applying to all the enumerated exceptions.

(c) While the overall restructuring of the **civil and criminal sanctions** section appears to reflect some improvement, several provisions omit key FTA language which would ensure appropriate criminal remedies for copyright infringement. Proposed provisions on statutory damages and actual damages require clearer drafting. The bill does not increase the minimum sanctions for infringements; as a result, industry fears that most judges, who usually apply only the lower limits, will continue to apply these low levels of sanctions and there will be no improved deterrence applied in copyright cases. Provisions regarding the destruction of infringing copies should be expanded to include the instruments and other equipment used to commit the infringements. Sanctions should clearly apply in cases involving Internet piracy, especially involving those who upload protected copyrighted materials.

Finally, the current bill does not include any provisions on technological protection measures and we are interested in the government's plans to draft these amendments before the FTA transition deadline at the end of 2008.

Legislation combating illegal commerce: Separate legislation has been introduced into the Chamber of Deputies (Bill No. 5069-03) which would provide stiff penalties to persons who sell or supply any kind of illegal goods, including pirated DVDs, on the streets. The bill enjoys the support of the publishing industry, music, film, software and collection societies. This bill is still in the Congress, but has been displaced by the comprehensive reform package.

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

2005 laws affecting judicial processes: The Chilean Congress passed legislation aimed at streamlining judicial processes by changing the criminal procedure code and was related exclusive to the Industrial Property law. It increased fines for offenders and cleared the way for civil actions to be taken against infringers. It also gave judges greater freedom to order preventive incarceration, and also gave the police the authority to search locations without a warrant in the case of a flagrant crime. In essence, this a more agile relationship between prosecutors and judges. Although it gives judges greater freedom and police the right to search locations without a warrant in certain cases, it appears that, in general, the police prefer to act with a written court order when conducting raids of labs and copyright facilities. The new code is very narrow and creates vulnerabilities that more easily permit defendants to seek a reversal of seizures. The Motion Picture Association (MPA) has addressed this by filing specific complaints before the police based on the "public action" nature of this crime. As a result, police can request search orders from prosecutors.

CHILE Estimated Trade Losses Due to Copyright Piracy (in millions of U.S. dollars) and Levels of Piracy: 2003-2007 ²										
INDUSTRY	2007		2006		2005		2004		2003	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Sound Recordings & Musical Compositions ³	29.6	44%	29.6	44%	22.7	51%	24.8	50%	21.1	40%
Business Software ⁴	98.0	67%	82.0	68%	55.0	66%	49.0	64%	42.0	63%
Motion Pictures ⁵	NA	NA	NA	NA	10.0	35%	2.0	40%	2.0	40%
Entertainment Software ⁶	NA	NA	NA	20%	NA	NA	37.9	70%	NA	NA
Books	NA	NA	1.0	NA	1.0	NA	1.0	NA	1.1	NA
TOTALS	127.6		112.6		88.7		114.7		66.2	

"P-4" Negotiation: On February 4, 2008, USTR announced that the United States would join negotiations on two sectoral areas (investment and financial services) in March 2008 among Singapore, Chile, New Zealand, and Brunei, known as the "P-4" group of countries. The United States also announced that it would "begin a detailed exploratory process to determine whether it should participate in the full Trans-Pacific Strategic Economic Partnership." If it does so, opportunities will arise to introduce intellectual property

² The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2007 Special 301 submission at www.iipa.com/pdf/2008spec301methodology.pdf.

³ Estimates for the recording industry in 2006 were based on a third-party survey in order to improve the accuracy of the statistics. The loss increase in 2006 is due to the inclusion of pirate DVDs in the calculation that are sold at a higher price.

⁴ BSA's 2007 statistics are preliminary. They represent the U.S. software publishers' share of software piracy losses in Chile, and follow the methodology compiled in the Fourth Annual BSA and IDC Global Software Piracy Study (May 2007), available at <http://w3.bsa.org/globalstudy/>. These figures cover, in addition to business applications software, computer applications such as operating systems, consumer applications such as PC gaming, personal finance, and reference software. BSA's 2006 piracy statistics were preliminary at the time of IIPA's February 12, 2007 Special 301 filing and were finalized in June 2007 (see <http://www.iipa.com/statistics.html>) as reflected above.

⁵ MPAA's trade losses and piracy levels for 2006 and 2007 are not available. MPAA did provide 2005 estimates for a select group of countries, using a new methodology that analyzed both physical/"hard goods" and internet piracy. Details regarding MPAA's methodology for 2005 and prior years are found in Appendix B of this IIPA submission.

⁶ ESA's reported dollar figures reflect the value of pirate product present in the marketplace as distinguished from definitive industry "losses." The methodology used by the ESA is further described in Appendix B.

standards similar to those included in the various free trade agreements (FTAs) entered into between the United States and several trading partners, including Singapore and Chile. IIPA supports this process, and hopes that the government of Brunei (as well as that of New Zealand) will be prepared to negotiate FTA standards on intellectual property (similar to those in force in Singapore and Chile). IIPA expects that the IPR texts in these agreements will follow the high standards already in place in the FTAs negotiated to date.

COPYRIGHT PIRACY IN CHILE

Internet piracy is growing: Chile has one of the highest broadband penetrations in the region, and as a result, is ripe for the real threats posed by Internet piracy. There are approximately 1.3 million broadband subscribers, according to MPA. Reports indicate that over the last year Internet piracy, particularly P2P piracy, has worsened in Chile. Limewire appears to be the preferred software for P2P exchange in Chile. The music industry's national group (IFPI CHILE) estimates that more than 400 million illegal music files are downloaded every year in Chile, a 43% from the 280 million estimated back in 2006. Pirated copies on the Internet are readily available for download and are also used as source materials to burn CDs/DVDs for distribution in the streets.

The local recording industry estimates that over 400 million songs of local and international repertoire are now being downloaded annually in Chile (this is a sharp increase from the 220 million reported in this 301 report in 2007). The industry estimates that about 25% of all downloading and burning is done in Internet cafés. The local recording industry association is addressing this problem by working with local cyber-crime units to raid Internet cafés contributing to illegal downloads; it is also considering alternative actions against individual uploaders. The business software industry believes that the Internet-based piracy will grow in the future because of the expansion of broadband Internet connections.

Importation of blank CDs: Chile continues to play a major role as a port of entry for blank optical disc media coming from Asia. A large amount of these goods are re-exported to border countries, such as Peru, Bolivia and Argentina, and in some cases, Paraguay and Brazil. Some products are imported through the Port of Iquique, falsely identified and re-exported to other countries. To address this problem, the government should establish a customs policy whereby all blank CD shipments must pass through "red light" proceedings. This procedure would require that every shipment of optical media be inspected for price and classification accuracy as well as legitimacy of exporters and importers. To simplify such an operation, Chilean Customs may want to consider limiting the number of ports of entry for blank optical media, as have programs already implemented in Mexico and Paraguay. In addition, the creation of an importers' register will also improve disclosure; such a system should also involve rightsholders. There was no progress on establishing any such register in 2007.

Rampant street piracy: Widespread "street piracy" continued unabated during 2007. These vendors ("ambulantes") cover their pirate wares with big towels printed with the cover image of movies, games, music or software. The buyer asks for the product, the seller makes a phone call, and in a few minutes a runner appears with the pirated product. Police actions against the street vendors are frequent but do not produce permanent changes in the street piracy situation. MPA reports that it has received cooperation with local police who have run some street raids, especially in Santiago, and that, as part of the "Plan for a Safe Santiago" fines against vendors range between US\$60 and US\$200. Both the film and the business software industries report another kind of piracy, called "in-house piracy." People who work in companies, offices and educational institutions are asked to sell pirated materials (usually CDs with films, games, software). These in-house vendors use catalogues distributed by email or in paper, receive the requests, fulfil the order and then receive payment from the distributor.

Business software piracy: The Business Software Alliance (BSA) reports that piracy accomplished mostly by burning machines (and not via Internet distribution) has become its most pressing problem in Chile. Commercial piracy conducted by integrators (such as OEMs) and by the hardware and software retailers is serious, and anti-piracy campaigns by BSA and its Chilean colleagues (ADS) have not reduced these problems. The unauthorized use and copying of software by small to medium-sized businesses (multiple installations of a single-product license and other under-licensing or license misuse) remains the most

economically harmful form of piracy for the business software industry in Chile. Adopting appropriate provisions to regulate the acquisition and management of software by government agencies.⁷

Piracy of music and sound recordings: Piracy of music and sound recordings, primarily in the form of pirate CD-Rs, continues to wreak havoc in the Chilean market. CD-R and DVD-R piracy is the predominant form of piracy. Blank CD-Rs enter Chile (as contraband, undervalued items or even legally), but the problem comes when the unauthorized reproduction of music takes place locally using CD-R burners. Only one record store chain survives in Chile (Feria del Disco), along with a few independent retail stores. Larger department stores basically stopped selling music CDs in 2007 because legal copies were not being purchased by customers. Approximately 50% of the total music market is taken by piracy.

Audiovisual piracy: The black market and the growing number of street vendors remain problematic. These unregulated distribution points, which are nearly 100% pirate, represent direct competition to the potential legitimate video market. Five years ago, there were 1,200 video stores operating in Chile; today, this amount has shrunk to 300. Nearly 3,000 jobs have been lost as a consequence of piracy in this sector. The audiovisual industry is also concerned about signal piracy (this usually involves the creation of mini-head ends that receive pirate programs that are then provided to particular buildings, condominium associations and small towns). A recent development adversely affecting the home video/DVD business is the commercial importation of Zone 1 discs (Zone 1 is for U.S., not markets in South America), and unfortunately there is no legal remedy for this activity.

Book piracy: Use of photocopies of textbooks and reference books continues to concern the book publishing industry, primarily at the university level. Private copy shops are conveniently located near universities, and university-run photocopy facilities on campuses also produce unauthorized copies. Commercial piracy affects some translations of U.S. best sellers, but mainly trade books from local, Spanish-language authors.

COPYRIGHT ENFORCEMENT IN CHILE

Industry cooperation with Chilean criminal authorities improved during 2007. Unfortunately, the overall results are far from effective. The national police and prosecutors are understaffed and overwhelmed by the scope of the piracy problem. Because of low penalties in the current law, judges do not issue deterrent sentences in those few cases that reach sentencing. There seems to be two major problems in getting criminal enforcement in Chile. First, the police (Carabineros), Prosecutor's Office and Judicial Police suffer from a lack of sufficient human resources. To combat the serious piracy problem, more dedicated personnel is needed. Second, Chilean copyright law – whether in its current form or as it would be amended by the legislative package under discussion in Congress – provides relatively low penalties (the mandatory minimum range of sanctions is very low) and, as a result, judges do not impose higher sanctions in-practice.

Industry confirms that the Carabineros (national police) continue to be a major support for its anti-piracy actions in Chile. The organized crime investigations department in the Carabineros is the most active unit investigating important cases and executing raids following prosecutor's instructions. The relation with the Economic Crime Prosecutors is excellent. In 2007, the recording industry anti-piracy group (APDIF Chile) assisted police in identifying pirate locations and carrying out about 100 raids during the year, resulting in seizures of approximately 168,000 recorded CD-Rs and DVD-Rs as well as 545 burners. The recording industry reports that raids continue to be focused in Santiago and Valparaiso. Most raids are requested by the industry; the local authorities rarely initiate any type of actions. Flea markets such as Bio-Bio in the outskirts of Santiago are still plagued with pirate product. The motion picture industry reports that it worked with the police to complete 257 raids in 2007.

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

In January 2008, a unit dedicated to the investigation of IP offenses was created within the Judicial Police. IIPA welcomes this as a step forward, but warns that this unit's effectiveness will depend on the authority given to it by the copyright legislation currently being discussed, as well as by the government.

Internet piracy and cybercrime cases: Chile's Judicial Police created a specialized, dedicated force to investigate Internet crimes, which has generally performed well. The Cyber Crime Brigade has been very active and helpful on Internet anti-piracy actions. Over the course of 2007, the recording industry anti-piracy team was able to take down 238 web pages offering illegal downloads, 598 offers of physical products on virtual auction sites and over 23 thousand cyberlinks. In 2007, the recording industry ran an operation against Internet cafés that covered 30 locations, mainly in Santiago, where authorities seized 51 computers and approximately 40,000 optical discs. MPA worked with officials to take down eight websites in 2007.

Civil ex parte actions and slow civil cases: Chile's civil courts are relatively slow in issuing relief to copyright holders, with civil copyright infringement cases taking two or more years until judgment in cases of first instance. Civil *ex parte* actions are a particularly important remedy for the business software community because BSA conducts only civil (no criminal) actions in Chile. BSA reports that during 2007, Chilean judges improved their response to civil complaints and accepted more BSA requests for *ex parte* raids, and this is a commendable achievement. During 2007, BSA notes that the courts approved two-thirds of its requests, an increase of 20%. Most of BSA's actions were filed in Santiago.

However, despite this progress, BSA is still struggling with a very difficult provision of Chilean law regarding *inaudita altera parte* (*ex parte*) proceedings in civil cases. When *ex parte* search requests are filed, they are registered in a public electronic register and are available to the public. Target companies may check the register to find out whether an *ex parte* search request has been filed against them before the inspection takes place. This notice violates TRIPS Article 50, and it also undercuts the effectiveness of the remedy because it affords a defendant the opportunity to remove/erase all traces of piracy or to take other steps to protect him/herself from the inspection.

Criminal prosecutions are few and sentences are not deterrent: Only a small number of criminal copyright prosecutions are brought in Chile. Although the distribution of pirated material is theoretically punishable by incarceration of up to 540 days (a low term compared to the rest of the region), it is difficult to secure prosecutions, convictions or adequate sentencing. In the few cases that do reach judgment, sentences are suspended for an undetermined period. Legislative reform is needed and the sanctions in the pending copyright bill must be placed at a deterrent level (especially by requiring higher mandatory minimum sentences, missing from the current bill). The recording industry reports 29 sentences issued in 2007 with at least one person that will serve about four years in person.

Inadequate border enforcement: Chile (primarily Iquique) continues to play a major role as an entry point for blank optical disc media that is coming from Southeast Asia with a final destination of Paraguay and/or Bolivia. The Chilean Government has not organized any type of border program to track the importation of blank optical discs. MPA took five border actions in 2007, seizing approximately 4,500 DVDs. The recording industry reports that in two major operations with intelligence provided by the local anti-piracy team, authorities seized over 1.8 million blank CD-Rs and DVD-Rs.

IPR TRAINING AND PUBLIC AWARENESS

In 2007, MPA offered training to: the Police Crime Lab of the Uniformed Police of Santiago, Valparaíso and Iquique; the Police Crime Lab of the Civil Police of Santiago; and, La Serena Customs Office of Valparaíso. These sessions teach prosecutors how to determine the origin of seized goods and provide the latest information on digital piracy. MPA also offered a course on combating digital piracy to the Cyber Crime Unit of the Chilean Civil Police. The recording industry held six seminars, including one for the Cyber Crime Brigade, and five for police and tax officials (carabineros, judicial police, prosecutors and Internal Revenue Service (SII)). BSA is regularly involved in briefing authorities on their specific civil cases.

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2008 SPECIAL 301 REPORT

COSTA RICA

Special 301 Recommendation: IIPA recommends that Costa Rica be elevated to the Priority Watch List in 2008.

EXECUTIVE SUMMARY

IIPA and its members congratulate Costa Rica on its affirmation of the Dominican Republic-Central America-U.S. Free Trade Agreement (DR-CAFTA), and look forward to the prompt and proper implementation of the CAFTA-DR IPR Chapter, both in terms of legislative reform of its enforcement and copyright laws as well as effective deterrence against piracy. Proper legislative implementation must correct the long standing deficiencies in important criminal enforcement procedures and available sanctions.

The most pressing problem which continues to brew in Costa Rica is the complete lack of effective criminal copyright enforcement taken by Costa Rican authorities for the past three years. Most disturbingly, there has been no prosecutorial interest in pursuing criminal copyright cases and this problem rests at high levels of the Costa Rican government. For the recording industry, no criminal prosecutions are moving forward at all, due to a 2005 order issued by the Attorney General to halt all music piracy cases. For the software industry, the possibility of prosecutions remains low as prosecutors use the standards in the current law to decline to take cases forward. If any case were actually to reach sentencing, judges would impose only minor sanctions because the law considers copyright infringement minor offenses. Street piracy remains pervasive and Internet piracy appears to be on the rise in major cities as well as rural areas. IIPA members understand that the Attorney General is not a member of the Executive Branch, and appreciate the interests of the Executive Branch to effectively protect copyright. However, this should not obscure the fact that it remains the responsibility of all branches of the Republic of Costa Rica to effectively protect and enforce copyright. Costa Rica merits elevation to the Priority Watch List this year primarily because of the continuing difficulties at the political level in getting a green-light from the Attorney General to permit criminal copyright prosecutions. Even if the DR-CAFTA legislation is implemented perfectly (and some concerns remain on this legislation), under the current circumstances, effective enforcement of any copyright law seems remote. Such an untenable situation should not be tolerated from an FTA trading partner.

PRIORITY ACTIONS IN 2008

Enforcement

- The Supreme Court should require the Attorney General to instruct his prosecutors to process and expedite copyright infringement cases and promptly take action on the dozens of cases that have been submitted to his prosecutors.
- Reduce unwarranted delays in investigations and prosecutions.
- Reduce delays in sentencing in criminal copyright cases.
- Increase the level of criminal sanctions for copyright infringement in the DR-CAFTA implementation package and apply these in practice.
- Create a Public Prosecutor's Office specialized in IP matters and assign resources and personnel to the office.
- Improve training of enforcement officials and technical experts in Costa Rican agencies.

- Implement in practice, the software asset management practices in government agencies called for in the 2002 Decree.
- Engage state and municipal governments in the anti-piracy campaign through the cancellation of operating licenses for any locale selling pirate product.

Legislation

- Work on pending CAFTA Implementing legislation (Bill No. 16,117) to ensure that its provisions fully and properly implement Costa Rica's IPR obligations.
- Create and fund a Specialized IP Prosecutor Office.

IIPA and its members support the DR-CAFTA,¹ as it contains high levels of IPR protection and enforcement.² On October 7, 2007, Costa Rican voters supported DR-CAFTA in a constitutional referendum, and President Arias signed it on November 22, 2007. Costa Rica must pass legislation to bring its national laws in line with DR-CAFTA by February 29, 2008, at which time it will become the final country to have this regional agreement enter into force. Costa Rica is currently a beneficiary country of several U.S. trade programs which contain obligations to provide adequate and effective IPR protection and enforcement, such as the Generalized System of Preferences (GSP) and the Caribbean Basin Initiative.³ Once DR-CAFTA is in force in Costa Rica, these bilateral trade benefits will be phased out.

COSTA RICA										
Estimated Trade Losses Due to Copyright Piracy										
(in millions of U.S. dollars)										
and Levels of Piracy: 2003-2007⁴										
INDUSTRY	2007		2006		2005		2004		2003	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Sound Recordings & Musical Compositions	14.5	60%	15.1	60%	18.3	60%	NA	NA	7.2	56%
Business Software ⁵	17.0	63%	15.0	64%	10.0	66%	9.0	67%	10.0	68%
Motion Pictures ⁶	NA	NA	NA	NA	2.0	100%	2.0	40%	2.0	35%
Books	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA
Entertainment Software	NA	NA	15.1	60%	NA	NA	NA	NA	NA	NA
TOTALS	31.5		30.1		30.3		11.0		19.2	

¹ IIPA Press Release, "IIPA applauds the signing of the U.S.-Central American-Dominican Republic FTA," Aug. 2, 2005, at <http://www.iipa.com/pdf/IIPA%20CAFTA%20DR%20Signing%20by%20Pres%20Bush%20FINAL%2008022005.pdf>.

² The final text of the CAFTA-DR IPR Chapter is posted on USTR's website at http://www.ustr.gov/Trade_Agreements/Bilateral/CAFTA/CAFTA-DR_Final_Texts/Section_Index.html.

³ During the first 11 months of 2007, the following quantities of imports under preferential trade programs entered the U.S. from Costa Rica: \$290 million under the CBTPA, \$1.03 billion under the CBI and \$71.9 million under GSP, all of which represent decreases from the same time period in 2006.

⁴ The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2007 Special 301 submission at www.iipa.com/pdf/2008spec301methodology.pdf. For information on the history of Costa Rica under Special 301 review, see Appendix D at (<http://www.iipa.com/pdf/2008SPEC301USTRHISTORY.pdf>) and Appendix E at (<http://www.iipa.com/pdf/2008SPEC301HISTORICALSUMMARY.pdf>) of this submission.

⁵ BSA's 2007 statistics are preliminary. They represent the U.S. software publishers' share of software piracy losses in Costa Rica, and follow the methodology compiled in the Fourth Annual BSA and IDC Global Software Piracy Study (May 2007), available at <http://w3.bsa.org/globalstudy/>. These figures cover, in addition to business applications software, computer applications such as operating systems, consumer applications such as PC gaming, personal finance, and reference software. BSA's 2006 piracy statistics were preliminary at the time of IIPA's February 12, 2007 Special 301 filing and were finalized in June 2007 (see <http://www.iipa.com/statistics.html>), as reflected above.

⁶ MPAA's trade losses and piracy levels for 2006 and 2007 are not available. MPAA did provide 2005 estimates for a select group of countries, using a new methodology that analyzed both physical/"hard goods" and internet piracy. Details regarding MPAA's methodology for 2005 and prior years are found in Appendix B of this IIPA submission.

COPYRIGHT PIRACY AND ENFORCEMENT IN COSTA RICA

IIPA and its members in recent years have identified numerous copyright enforcement deficiencies in the Costa Rican legal and enforcement system.⁷ Incredibly, no progress at all was made in addressing these problems in 2007.

Internet piracy: Internet piracy, as everywhere else in the region, is a growing problem despite the low penetration of broadband. There are about 922,000 internet users, about 20% of the population (according to internetworldstats.com). However, due to low broadband penetration and the high cost of the services, Internet cafés have become an important means to download files containing unauthorized copies of copyrighted materials. These cafés have increased in number not only in the main cities, but also rural ones. The police are not taking any actions against Internet cafés.

Piracy remains widespread in 2007: The recording industry reports that piracy of sound recordings and music continues to be rampant in Costa Rica, remaining a consistently high level with the market composed of over 50% of pirate products. CD-R burning is the most prevalent form of music piracy. The capital of San José is the main center of pirate activity, followed by the state of Heredia. There have been no major changes in the distribution channels. Retail sales are concentrated in just two major chains. Several groups are involved in the importation of blank media and equipment, but the local recording industry has not been able to develop a case yet. Due to the lack of action of the prosecutors in San Jose's metropolitan area, anti piracy efforts have been diverted to other areas such as Alajuela and Heredia where some police units and local governments are more receptive to industry complaints.

The business software industry reports that the most devastating form of piracy in Costa Rica continues to be the use of infringing or unlicensed software by legitimate businesses and Government agencies. Access to broadband Internet services constitutes a new medium for users to obtain unauthorized software from websites that offer low-priced pirate software for download.

Enforcement remained ineffective in 2007: The main impediments to effective criminal enforcement are simple. First, there remains a very negative attitude by the prosecutors in accepting and pursuing copyright cases. Second, there is general problem with lack of adequate resources in the government agencies necessary to conduct any kind of effective anti-piracy campaigns.

This industry's relations with municipal police units remain positive; raids are taking place and infringing materials are being seized (these raids just do not go forward for prosecution). The local anti-piracy team did carry out some actions in markets and warehouses with the support of municipal police forces. There were 87 music piracy raids carried out in 2007, resulting in the seizure of 1.3 million units.

However, the recording industry reports that there have been no major prosecutions conducted or convictions issued in the last three years. Moreover, the Attorney General's Office continues to boycott any music piracy cases. Recall that in early 2005, many pending cases (including 12 major piracy cases) were dropped by local prosecutors, as directed by the Attorney General. The recording industry's relations with this Office remain strained, despite the industry approaching the office numerous times to try to discuss the no-prosecution policy. The Office of the Attorney General is the main obstacle to this industry's anti-piracy efforts. This problem with the Attorney General, coupled with the lack of *ex officio* provisions in the current law, make any kind of anti-piracy campaign extremely difficult.

Other copyright actions also have not been pursued by prosecutors. Prosecutors are applying the "non-significant-case" provision in the current Law on Enforcement to every IPR case, which allows them to avoid moving cases forward per instructions from the Attorney General. The business software industry also reports increased problems with enforcement due to the extremely low priority placed on copyright enforcement by the Attorney General's office.

⁷ For more details on the history of bilateral engagement on copyright issues with Costa Rica, see Appendix D of this filing at <http://www.iipa.com/pdf/2008SPEC301USTRHISTORY.pdf> and Appendix E at <http://www.iipa.com/pdf/2008SPEC301HISTORICALSUMMARY.pdf>.

Delays in criminal cases: Delays have recently turned into “no action,” given the Attorney General’s mandate to prosecutors not to bring IP cases. Historically, long delays in copyright enforcement cases continue to be a serious problem, since it normally takes several months between the filing of a complaint, the day a raid or inspection takes place, and the issuance of an official inspection report. During this time, there is little incentive for the infringer to resolve the problem. Moreover, there are significant delays between the time an official inspection report is issued in a particular case and the time a sentence is handed down in the same case. Procedural delays in criminal cases could be avoided if prosecutors were to request and judges were to order *ex parte* raids based exclusively on sufficient evidence offered by private plaintiffs (“*querellantes*”), as allowed by the Criminal Procedural Code.

Need for special IPR prosecutors: The industries still support the creation of a specialized prosecutor’s office with nationwide jurisdiction so that criminal IP cases could move forward more swiftly. Given the significant delays and lack of proficiency observed by prosecutors, judges and the OIJ, the creation of this office remains a priority. More than five years ago, the Costa Rican General Prosecutor announced in 2002 that 12 specialized “link” prosecutors, one for each public prosecutor’s office in the country, were going to be appointed to handle, “with priority,” intellectual property cases. Unfortunately such specialized IP prosecutors were not appointed, already existing prosecutors were given IP duties. The creation of a specialized prosecutor’s office is extremely necessary because something is sorely needed to correct the current unacceptable situation with prosecutors. Legislation is needed, however, to authorize budgetary funding for such an office, and pending legislation to accomplish that has fallen off the docket.

Inadequate civil remedies: BSA reports that civil procedures are very slow and onerous. In order to get a preliminary injunction, the *Ley de Observancia* (Law 8039) requires the rights holder to (a) prove it is the legitimate owner and (b) to deposit a bond to protect the target in case the action is found to have no legal basis. The law does not state the rate or the percentage to be used in setting the amount of the bond. Therefore, the judge has discretion in setting the bond. Usually, the minimum rate that is used is 25% of the amount of damages claimed (this 25% figure comes from the preventive embargo figure, a civil procedure.) Another problem is that the judge may, prior to the injunction, inform the defendant of the proposed action, so he can oppose the action and request that a higher bond be set. BSA did not bring any civil cases in 2007 in Costa Rica.

Querellantes and problems with prosecutors and judges in software cases: Despite the fact that private plaintiffs in criminal actions (“*querellantes*”) are parties to the criminal action and thus have standing to participate in all proceedings, public prosecutors and judges normally do not allow private plaintiffs to actively participate during software piracy raids. Apart from violating procedural due process rights accorded to private plaintiffs (“*igualdad procesal del acusador particular*”), this practice hampers the effectiveness of the prosecutors and jeopardizes the success of the action, since it prevents the plaintiffs and their experts from providing the much needed technical and licensing assistance that the prosecutors need to determine whether an infringement has occurred. Criminal judges should accept the information and evidence offered by private plaintiffs, and order the raid if such information and evidence is sufficient, without requesting prior investigation reports from the Judicial Investigation Office (OIJ); this procedure is consistent with Costa Rican legislation.

COPYRIGHT AND LEGAL ISSUES IN COSTA RICA

Given the higher standards of copyright obligations and enforcement measures contemplated in the FTA, Costa Rica will have to make additional reforms to its copyright- and enforcement-related laws in order to comply fully. The copyright industries desire legislation that is CAFTA-compatible and addresses several outstanding problems which have hindered effective criminal enforcement in Costa Rica for years, including the following:

- The minimum penalty for criminal copyright infringement should be increased from the current one year in jail to three years. This three-year term is needed in order to ensure the possibility of jail time (anything less than three years is a minor offense and judges can release the defendant).

- Any fine imposed for infringements should be in addition to the prison sentence, and not in the alternative.
- Public officials, not only injured parties, must be able to file criminal actions for IP violations ("*acción pública de instancia pública*"). This includes providing *ex officio* authority for police.
- Businesses engaged in piracy operations should be closed.
- Destruction of equipment used in the infringement must be permitted.
- The objectionable "insignificance principle" ("*principio de lesividad e insignificancia*") should be removed from the Criminal Procedural Code so that it does not apply to intellectual property infringements.
- The unauthorized "use" of copyrighted materials should be made a criminal offense.

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

The Law on Enforcement (*Ley de Observancia*): For years, the copyright industries have been working to amend enforcement procedures in Costa Rica. In October 2000, Costa Rica passed the *Ley de Procedimientos de Observancia de los Derechos de Propiedad Intelectual*, with the objective of complying with the TRIPS Agreement. Unfortunately, the industry found numerous provisions not in compliance with TRIPS and an impediment to effective enforcement.⁸ Efforts to amend the bill continued over the years, with industry developing several proposals. Now that CAFTA implementation is needed, more legislative proposals have been developed to improve the enforcement-related mechanisms (see CAFTA implementation, next).

CAFTA-DR Implementation (Bill No. 16.117): In February 2006, Costa Rica developed legislation to implement the IPR provisions of DR-CAFTA. COMEX (the Ministry of External Commerce) introduced a new bill to comply with DR-CAFTA that is being evaluated by the Legislative Assembly, and this bill, for the most part, has support from the local copyright industry. Bill No. 16.117 would amend the Law on Enforcement, including making a positive amendment to quantify civil damages in absence of an expert study. It also contains proposals affecting liability and sanctions for the circumvention of technological protection measures (TPMs) and rights management information, and the reception and distribution of program-carrying satellite signals. This bill increases criminal penalties for piracy to a minimum of four years. Unfortunately, it does not establish the much-needed *ex officio* action because it still requires complaints (*denuncias*) by the rights holders. There are several other problems with the bill, and apparently efforts are being made to address these issues before final adoption.⁹

⁸ Years ago the copyright industries identified four major deficiencies in the 2000 Law on Enforcement: (1) a lack of criminal *ex officio* authority, the ability to take action without the need for a complaint by a private party; (2) the need for deterrent-level penalties. The law only gave a maximum penalty of three (3) years of imprisonment for copyright violations, and sentences for crimes having a maximum penalty of three years of imprisonment can be commuted (suspended); (3) the law provides that the "minor" ("*insignificante*") and "without profit" ("*gratuito*") use and reproduction of illegal products will not be penalized. This is probably the most harmful provision of the law because these terms are undefined and it was easy for pirates to avoid liability by simply reproducing and selling illegal software in small amounts, using a variety of CD burners and retail outlets; (4) the failure to provide for statutory, or pre-established, damages.

⁹ Specifically, the original version of Bill No. 16.177 contained provisions on technological protection measures that failed to satisfy the DR-CAFTA in several respects (e.g. no coverage of services, no provisions for access controls, no coverage of components, overly broad exceptions to criminal liability, failure to clearly afford civil liability for circumvention, no definitions for what is a TPM). Second, while the bill would add statutory damages, they were too low to be deterrent. The bill offers 1-50 times the minimum wage of unskilled workers (one wage is about US\$195, so the range would be US\$195-\$9,750). Third, proposed criminal penalties are too low to be deterrent; the bill proposes only a minimum one-year penalty, which makes it impossible to ever imprison any defendants. Fourth, another provision makes a general (and disturbing) statement about ISP liability, with reference to regulations which apparently have not been developed. Costa Rica does have a permitted 30-month transition period to implement the ISP liability provision; if the Government decides to implement it now, then the legislation must track the DR-CAFTA requirements.

Industry also is concerned that this bill may generate opposition despite the fact that the government's party has a majority in the Assembly. In addition, reports indicate that a flurry of legislation aimed at complicating and slowing down the CAFTA implementation has been introduced. In particular, a troubling bill introduced in January 2008 would exempt public establishments such as restaurants, hotels and bars from paying performance rights fees. This amendment would establish a extremely detrimental precedent for sound recordings and audiovisual rights holders in this region, if enacted.

Government software asset management: In February 2002 the then-President of Costa Rica, Miguel Angel Rodriguez, issued a Government Software Legalization Decree. Its aim was twofold: ensuring that all software in use in the federal government was duly licensed, and establishing and implementing sound and effective software procurement and software asset management policies. President Pacheco then reiterated his administration's intention to fully implement that decree. Both the issuance of the decree and President Pacheco's reiteration of it were important steps towards demonstrating the Government of Costa Rica's increasing awareness of the value of managing their software assets. Unfortunately, to date there has been no further action taken to implement the decree. Active implementation of this decree is needed. BSA has recently been informed by First Vice President and Minister of Justice Chinchilla that the National Registry's Copyright Office is currently receiving data from other Government agencies about their software inventories. BSA was also told that next year's budget would include a special item for software licenses. Through both of these projects, BSA and its members look forward to working with the Government of Costa Rica towards the legalization of software used by all Costa Rican government agencies.

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2008 SPECIAL 301 REPORT

EGYPT

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

EXECUTIVE SUMMARY

The copyright community has for several years held out hope that the government of Egypt would come to recognize that a strong copyright system is in its interests. Unfortunately, the enforcement infrastructure remains under-funded and staffed by some who are less than enthusiastic about taking the steps necessary to eliminate piracy and foster legitimate growth of the copyright industries.¹ Worse yet is the lack of enthusiasm exhibited by the Ministry of Culture which simply does not make combating piracy a priority, and instead appears content to protect those engaged in illegal distribution of foreign copyright materials. Problems in the enforcement system abound, from the highest levels of key government agencies, to courts which do not view copyright piracy as a commercial crime, to the police who are reluctant to take actions against commercial piracy and permit pirates to thrive. On top of the piracy woes, market access barriers in Egypt make it one of the most restrictive and uninviting markets in the world to legal copyright businesses. With the growth of Internet connectivity in Egypt, IIPA hopes that the government will move to foster opportunities in the creative industries rather than douse their forward progress.

PRIORITY ACTIONS REQUESTED IN 2008

- **Ensure That ITIDA Takes Full Responsibility for Entertainment Software Issues, That Government Licenses Based on False Documentation Are Revoked, and That Those Operating Under Previously Issued Government Licenses Are Brought to Justice:** According to Ministry of Justice Decree No. 3286/2006, the Intellectual Property Unit at the Information Technology Industry Development Agency (ITIDA) is the enforcement authority which is empowered to take immediate action in case of software copyright infringements, including entertainment software as well as business software. While the Business Software Alliance (BSA) is pleased with ITIDA's activities to date, there remains some uncertainty as to the enforcement authority of ITIDA over entertainment software versus that of the Ministry of Culture. IIPA hopes this uncertainty is finally clarified in 2008, and that ITIDA can expand its resources and activities, with such efforts to include increased involvement in initial investigations of IPR infringement cases.
- **Tackle Book and Journal Piracy Effectively:** Book and journal publishers continue to struggle in Egypt, with print piracy and illegal photocopying creating a difficult climate for legitimate sales. English language higher-education textbooks, and books in translation fall prey to pirates routinely. The Egyptian Ministry of Information must take sustained enforcement actions against book piracy, and the Egyptian Ministries of Education and Higher Education must get involved to instruct universities to use only legal copies of publications.
- **Allow Right Holders to Participate in Investigation of Piracy:** IIPA understands that even after successful raids, the Ministry of Culture is essentially thwarting enforcement efforts by ruling that products which are so obviously pirated are nevertheless, in their view, "genuine" (though such determinations appear to have been based on false licenses). The failure to include right holders'

¹ At the same time, it is ironic that some within Egypt wish to impose a kind of super copyright protection on ancient Egyptian antiquities. See Egypt to attempt to copyright Pharaonic antiquities, International Herald Tribune, December 27, 2007, at <http://www.iht.com/articles/ap/2007/12/27/africa/ME-GEN-Egypt-Copyright-Antiquities.php>.

experts in identifying pirated product is the cause of this problem, although there is evidence suggesting undue influence as well.

- **Increase Deterrence at Court:** The Egyptian courts are notoriously slow and bureaucratic. They also mete out penalties that utterly fail to deter copyright piracy, instead slapping pirates on the wrist with fines that do not even amount to the cost of doing business. The Minister of Justice should step in to introduce judicial reforms in the copyright area, through training and through the assignment of specialized IP judges to copyright cases. By doing so, the Minister could increase the ease with which *ex parte* orders and injunctions are issued in piracy cases and ensure that courts are meting out deterrent penalties, including high fines and jail sentences in piracy cases.
- **Ease Onerous Market Access Restrictions:** The Egyptian market is one of the most closed in the world to foreign right holders, imposing an incredible array of market access barriers. Pirates and counterfeiters do not have to contend with such restrictions, so legitimate right holders are further disadvantaged in the market. They include: *ad valorem* duties upon import into Egypt of films, and *ad valorem* duties on sound recordings and entertainment software, sales tax on imported goods (10% of value of imported films and sound recordings); a censorship certificate release fee imposed on foreign films only; a 20% box office tax for theatrical motion pictures; a requirement that all song lyrics on locally manufactured releases be translated into Arabic; no trading rights (i.e., the requirement that an import entity be 100% Egyptian-owned); a discriminatory and GATT-inconsistent entertainment tax on foreign films (20% box office tax on non-Arabic language films; the tax for Arabic-language films is only 5%); and a cap of five film prints that may be imported into Egypt for any major U.S. title. These market access barriers should be lifted, and at least some of these violate Egypt's current international obligations.
- **Amend Copyright Law (and to the Extent Necessary, the new Implementing Decree) to Cure TRIPS Deficiencies, and Implement and Accede to the WIPO Internet Treaties.**

For more details on Egypt's Special 301 history, see IIPA's "History" appendix to this filing at <http://www.iipa.com/pdf/2008SPEC301HISTORICALSUMMARY.pdf>. Please also see previous years' reports at <http://www.iipa.com/countryreports.html>.

EGYPT ESTIMATED TRADE LOSSES DUE TO COPYRIGHT PIRACY (IN MILLIONS OF U.S. DOLLARS) AND LEVELS OF PIRACY: 2002-2006 ²										
INDUSTRY	2007		2006		2005		2004		2003	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Business Software ³	49.0	60%	49.0	63%	45.0	64%	28.0	65%	34.0	69%
Books	32.0	NA	31.0	NA	30.0	NA	30.0	NA	25.0	NA
Entertainment Software ⁴	NA	NA	NA	NA	14.3	85%	NA	90%	NA	90%
Records & Music ⁵	15.0	75%	12.0	70%	9.0	60%	7.5	40%	8.0	45%
Motion Pictures	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA
TOTALS	96.0		92.0		98.3		65.5		67.0	

² The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2008 Special 301 submission at www.iipa.com/pdf/2008spec301methodology.pdf.

³ BSA's 2007 statistics are preliminary. They represent the U.S. software publishers' share of software piracy losses in Egypt, and follow the methodology compiled in the Fourth Annual BSA and IDC Global Software Piracy Study (May 2007), available at <http://w3.bsa.org/globalstudy/>. These figures cover, in addition to business applications software, computer applications such as operating systems, consumer applications such as PC gaming, personal finance, and reference software. BSA's 2006 piracy statistics were preliminary at the time of IIPA's February 12, 2007 Special 301 filing and were finalized in June 2007 (see <http://www.iipa.com/statistics.html>) as reflected above.

⁴ ESA's reported dollar figures reflect the value of pirate product present in the marketplace as distinguished from definitive industry "losses." The methodology used by the ESA is further described in Appendix B of this report.

⁵ The piracy level for sound recordings reflects not only physical piracy but also the growing effect of Internet piracy – still at 95% – and its increasingly devastating impact on the recording industry in Egypt.

PIRACY AND ENFORCEMENT UPDATE

Entertainment Software Piracy – Still No ITIDA Engagement: Pirate entertainment software dominates the domestic market in Egypt, due to lack of effective enforcement and border controls, and due to the existence of government licenses previously issued by the Ministry of Culture to known pirate distributors based on false documentation.

With the transfer of jurisdiction for enforcement of copyright in software to the Intellectual Property Unit at the Information Technology Industry Development Agency (ITIDA) of the Ministry of Communication and Information Technology, IIPA hopes that more vigorous enforcement against piracy of video game products will commence and that government sales licenses will no longer be issued based upon false documentation.⁶ However, there remain problems with sales licenses previously issued by the Ministry of Culture (MOC). As MOC still has not issued written confirmation that these fraudulently procured licenses were wrongly issued and that, in any event, such licenses do not establish the authenticity of pirated product, pirates continue to rely on those licenses to legitimize their activities. Indeed, the MOC itself has issued findings that pirated product is genuine based solely on the sales licenses it issued and the underlying false documentation.

A case initiated by an ESA member in 2005 is at an impasse for this very reason. Unfortunately, the Egyptian company at issue in that case continues to engage in the sale and distribution of pirated video game product, seemingly immune from prosecution. While the MOC has indicated that sales licenses are no longer being issued to this company,⁷ it remains reluctant to clearly state that the documents used to secure the prior licenses are fraudulent. It appears that the prosecutor in this matter has again sought MOC's expert opinion on the authenticity of the products involved in this action and the licensing documents on which the defendant relies to establish legitimacy. However, there is no indication that MOC will make different determinations than it has in the past. This matter has proceeded in this most circuitous fashion for a number of years and does a great disservice to legitimate publishers and Egypt's legal regime.

With respect to future enforcement efforts, ITIDA should take immediate jurisdiction over anti-piracy enforcement actions for entertainment software as mandated by a 2006 government decree.⁸ The lack of clarity in this area is detrimental to the industry's parallel efforts to improve the market situation for legitimate video game products. Furthermore, ITIDA should invite copyright owner assistance in ascertaining the legitimacy of suspect product and the authenticity of documents purporting to identify particular companies as the authorized distributor of video game products in the country.⁹

Another problem faced by the industry is the burdensome registration requirements under Articles 184 and 185 of the Copyright Law. ITIDA had previously indicated that these deposit requirements, though not necessary for copyright protection to attach, are nevertheless useful, presumably for enforcement purposes. However, the information sought under the registration/deposit procedure is too burdensome. For example, a right holder has to deposit two (2) copies of the product, a print out of the first and last ten (10) pages of the source code, a printout of the main or initial screens of the program upon boot up, a description of the program, its characteristics, programming language and operating systems necessary to run it. In addition, the right holder must also submit all contracts related to the

⁶ IIPA notes that the Information Technology Industry Development Agency (ITIDA) is now responsible for and has produced several technical reports in software and entertainment software copyrights cases before the Egyptian Courts.

⁷ The company reportedly appealed MOC's refusal to grant the sales licenses to the National Council, which is apparently a unit in the Justice Ministry, arguing it is permitted to import such products under Egypt's parallel importation rule. However, it must be made clear that this matter does not implicate parallel imports, which obviously pertain only to legitimate products. Rather, this situation clearly involves pirated video game products which cannot be the subject of legitimate commerce or trade between countries.

⁸ In 2007, ITIDA contacted one ESA member for support in a pending action involving pirated game product. The publisher provided ITIDA with supporting information and documents, including declarations, U.S. copyright registrations, product identification manuals and copies of authentic games. ITIDA later advised the publisher's representative that an official decision has been issued in regard to this case but no further details were available.

⁹ By inviting right holder support in this manner, the government can avoid situations in which a pirate distributor can continue to openly and notoriously sell counterfeit and pirated products on the basis of fraudulently obtained sales licenses.

licensing or authorization for commercial exploitation by a third party. All of this information must be submitted in Arabic. Some of the information, for example, the licensing contracts, are not particularly germane to the purpose of copyright registration. These deposit requirements seem to go beyond the required essential information to clearly identify the owner of the copyright in the work, and in seeking non-essential information, impose an unnecessary burden on right holders seeking to protect their rights in Egypt. Further, while the government insists the requirement is not a bar to copyright protection as such, to the extent failure to meet these requirements eviscerates right holders' legitimate interests, the requirements may rise to the level of a prohibited formality under the TRIPS Agreement.

Book and Journal Piracy: Egypt is one of the region's worst book and journal piracy markets and unfortunately some of Egypt's vast printing infrastructure is used for pirate means instead of bolstering the economic and legitimate industry. Pirated higher-education textbooks, reference books and professional books are sold at stalls set up near university campuses, and the institutions are all too often complicit in the process, either through lecturers who encourage illegal photocopying or through bureaucratic and nontransparent adoption processes that give pirate enterprises the perfect cover.¹⁰ The piracy level for medical books is as high as 90%, and the vast majority of the market for other professional reference books (such as engineering books) is pirate product.

Business Software Raids Commence: End-user piracy and retail piracy continue to harm the business software industry in Egypt. Retail establishments selling computers continue to offer illegal business and entertainment software unchecked. Imports of pirate software have become a serious concern, passing freely through the borders into Egypt. Egyptian Customs has not established an effective mechanism to seize such goods at the point of entry. Resellers of counterfeit software advertise these illegal products openly in trade magazines.

The Business Software Alliance notes continued good cooperation of the Copyrights & Artistic Works Investigation Unit of the Ministry of Interior in carrying out raids against retail establishments that offer pirated business software. The industry reports that MOI conducts around 150 raids each month, some based on complaints by right holders and some run on an *ex officio* basis. In 2007, industry notes that response times have improved in initiating such raids. While some improvements were noted by the BSA, IIPA members still note an overall lack of knowledge of piracy issues, and oversights in carrying out specific raids, and therefore recommend training of MOI officials in how to run a successful raid, preserve evidence for prosecution, developing prosecutors' dossiers. IIPA also recommends sessions to interact with prosecutors and judges on criminal copyright enforcement, to sensitize them to the large commercial harm caused by piracy. BSA also reports that ITIDA officers have conducted raids against software and entertainment software piracy in addition to MOI.

Music Piracy Severe, With Internet Piracy Rates Climbing: The music industry continues to experience high piracy rates, exacerbated by increasing Internet piracy. Piracy represents 97% of all digital distributions in Egypt and over 60% of physical distributions. The result is that sales volumes decreased overall in 2007 (by 50% in the physical realm), meaning record production companies decreased the number of artists they promote. Several record companies in Egypt went out of business, while of those staying in business, only 14% release new albums in 2007. As in previous years, the music industry reports sporadic enforcement actions in Egypt. IIPA knows of ten raids against music piracy in 2007, leading to ten criminal cases which are currently being adjudicated at court.

Internet Piracy and Mobile Device Piracy Hit Egypt: Internet usage in Egypt grew by 20%, to a total of 6 million users by 2007, or a 7.5% Internet penetration rate.¹¹ Broadband connections doubled,

¹⁰ There are a few exceptions, most notably the Arabic Academy of Science and Technology in Alexandria, which has achieved an outstanding record of supplying legitimate texts.

¹¹ See The World Factbook, Egypt, at <https://www.cia.gov/library/publications/the-world-factbook/geos/eg.html> (reporting 6 million Internet users as of 2006 and 5,363 separate Internet hosts as of 2007. See also Internet World Stats, at <http://www.internetworldstats.com/stats1.htm>. These statistics are up-to-date as of November 30, 2007, are based on Census Bureau data, while usage numbers come from various sources, mainly from data published by Neilsen/NetRatings, ITU, and other trustworthy sources. See also Internet World Stats, Egypt, at <http://www.internetworldstats.com/middle.htm#lb> (reporting that there were 205,500 broadband Internet connections as of September 2007, according to the International Telecommunications Union).

from 100,000 in 2005 to 205,500 as of September 2007. As a result of this increased connectivity and a significant reduction in ADSL subscription prices, Internet piracy, in the form of peer-to-peer file sharing, bulletin board or forum websites, or directly transferred between users, has become a major problem in Egypt. The music industry estimates a 70% increase in pirate downloads over the Internet year-on-year. Mobile device piracy has also become an issue, in which downloaded music (and other content) files from the Internet are transferred directly to handheld devices, like MP3 players. The music industry also reports large-scale ring-tone piracy on the Internet, where ring-tones and “ring-tunes” are illegally made available for downloading. IIPA also understands that there may be as many as 400 Internet cafés, none of which are using licensed software. IIPA believes the Egyptian authorities should conduct awareness-raising activities, license the Internet cafés and run inspections on them to combat illegal downloading therein. In what was reportedly the first lawsuit regarding Internet piracy in Egypt, a preliminary court decision was handed down in 2007 ordering the defendant to pay EGP10,000 (US\$1,800); IIPA has no further details, however.

Courts Do Not Function Effectively to Deter Piracy: A lack of deterrent penalties on the books, weakness in law enforcement, and slow litigation processes hinder judicial enforcement of copyright in Egypt. For cases that have resulted in positive judgments being awarded to right holders, the sentences are almost always non-deterrent, usually a fine of EL5,000 (US\$900).¹² Since collections also take an unreasonably long time in Egypt, pursuing civil cases becomes impractical in most instances. Lack of transparency in the court system is a major concern, as court decisions do not get published expeditiously. The transparency problem is worse in cases initiated by the government, as there is simply no means to follow the progress of such cases.

Capacity building must continue for Ministry of Interior officials, prosecutors, and even judges, in training on copyright law and basic enforcement issues such as preservation of evidence, preparing dossiers for prosecutors, and running the criminal case. IIPA suggests that programs such as those funded by U.S. government should include judicial training, targeting each phase of preparing a criminal copyright case.

MARKET ACCESS ISSUES

Egypt is one of the world's most restrictive markets when it comes to trade in copyrighted materials. Problems have included:¹³

- **Discriminatory *ad valorem* Duties:** The copyright industries regularly face discriminatory *ad valorem* duties upon import into Egypt. Egypt bases the customs' valuation of imported CD-based goods on the invoice value of the product rather than on the value of the physical medium — the widespread and favored international practice. Such *ad valorem* duties serve as a form of double taxation, since royalties are also subject to withholding, income and remittance taxes. The outcome is that legitimate sellers cannot price to the market, because they must take the additional duty into account when pricing. Pirates circumvent these duties, and thus can always undercut the legitimate price in the market. For motion pictures, the *ad valorem* duty can be as much as 46% of the value of a film, i.e., 32% for a copy of the movie, 12% on posters and 2% on the movie reel upon import into Egypt, and there are reportedly also similar *ad valorem* duties on sound recordings and entertainment software (for example, the import duty on finished music CDs has reportedly been 32% of the total value – cost according to invoice plus freight charges).
- **A 10% Sales Tax:** An additional sales tax (i.e., a tax on goods imported for sale in Egypt) has been levied since March 1992, which amounts to 10% of the value of imported films calculated as follows: for films, the cost of the print, including freight charges, customs duties and other import taxes; for

¹² IIPA understands that there may now be some sentences in which the proper fine, of EL5,000, is being meted out per work rather than as a maximum fine. If so, this would be a positive development; however, we understand that many judges and officials in Egypt still believe the EL5,000 fine is too high.

¹³ To the extent any of these problems has, in the opinion of the government of Egypt, been resolved, the government should be urged to provide proof, such as any written regulations or other measures resolving the issue raised.

music and games, an extra 10% sales tax is added to the import duty. An Egyptian official claims that the 10% sales tax was repealed two years ago, but sources indicate this is still being charged on films. There is reportedly also a 20% box office tax for theatrical motion pictures; this tax should be removed.

- **A Censorship Certificate Release Fee:** Import costs are further increased by a release tax imposed on foreign films that is not imposed on domestic films. This discriminatory tax should be removed.
- **Arabic Lyrics Requirement:** There is a requirement in Egypt that all song lyrics on locally manufactured releases be translated into Arabic, significantly reducing the number of back-catalog items that companies can release in Egypt, and lengthening the “censorship approval” process.
- **Failure to Afford Trading Rights:** The requirement that a commercial entity be 100% Egyptian-owned in order to import products into Egypt effectively holds U.S. companies hostage to the interests of Egyptian importers.
- **GATT-Inconsistent Entertainment Tax:** Egypt also maintains a discriminatory and GATT-inconsistent entertainment tax on foreign films — right holders must pay a 20% box office tax on non-Arabic language films, while the tax for Arabic-language films is only 5%.
- **Five-Print (Film) Cap:** Only five prints may be imported into Egypt for any major U.S. film title.

TRAINING

Industry continued to provide and participate in training in 2007. In 2008, industry and government, including those offered by USAID, should focus on

- raising awareness of Egyptian enforcement officials, Customs officials, prosecutors and judges of the great commercial harm caused by piracy,
- raising awareness of Internet piracy issues, the relation to cybercrime, and the WIPO Treaties, the WCT and WPPT, and
- providing technical assistance in terms of establishing specialized IP courts.

COPYRIGHT LAW AND RELATED ISSUES

Cairo Declaration against Cybercrime 2007: In late November 2007, the Council of Europe convened an Arab regional conference on cybercrime, at which 400 participants from around the region and other countries discussed using the COE Convention on Cybercrime as a model to guide the development of national legislation on cybercrime.¹⁴ One of the end-results was adoption of the Cairo Declaration on Cybercrime, dated November 27, 2007. IIPA hopes that the Declaration will result in Egypt leading the way to adopt legislation to meet the requirements of the COE Cybercrime Convention (2001).¹⁵ The Declaration includes the following among other statements:

¹⁴ The Conference was held under the auspices of HE Prof. Dr. Ahmed Fathy Sorour, Speaker of Parliament of Egypt, and opened by HE Dr. Tarek Kamel, Minister of Communication and Information Technology. It was organized by the Egyptian Association for the Prevention of Information and Internet Crimes and supported by the Information Technology Industry Development Agency (ITIDA), the Council of Europe, the United Nations Office on Drugs and Crime, Microsoft, Ain Shams University, IRIS, EASCI and other partners.

¹⁵ Article 10 of the COE Cybercrime Convention (2001) (“Offences related to infringements of copyright and related rights”) provides,

1 Each Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences under its domestic law the infringement of copyright, as defined under the law of that Party, pursuant to the obligations it has undertaken under the Paris Act of 24 July 1971 revising the Bern Convention for the Protection of Literary and Artistic Works, the Agreement on Trade-Related Aspects of Intellectual Property Rights and the WIPO Copyright Treaty, with the exception of any moral rights

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

2006 Decrees Establish ITIDA Jurisdiction Over Business and Entertainment Software:

There were two developments regarding the Intellectual Property Law No. 82/2002 in 2006. First, Prime Minister Decree No. 2202 was issued on November 26, 2006. This Decree introduced amendments to the schedule of fees related to the deposit of the works and other authorizations sought from the Ministry of Culture. Second, Decree No. 3286/2006 was issued by the Ministry of Justice on May 11, 2006, amending the powers of ITIDA. These Decrees are said to have solidified ITIDA’s jurisdiction over business and entertainment software copyright issues.¹⁶

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

2002 Law and Implementing Regulations Leave Some Gaps in Protection: The 2002 Intellectual Property Law and the 2005 Implementing Decree¹⁷ appear to provide a reasonable basis to enforce the law and uphold the rights of copyright owners against piracy, whether of domestic or foreign materials. However, the Law and the Implementing Decree left some TRIPS deficiencies and other ambiguous provisions and failed to incorporate other changes recommended by IIPA in the past in order to create a truly modern copyright regime. The following recounts some of the key deficiencies and describes, where applicable, how the Decree deals with these issues. Where there is no mention below, the Implementing Decree did not address the issue raised.

- **Criminal Remedies:** The Code contains very low criminal penalties which appear not to meet the TRIPS test of criminal penalties available that are sufficient to provide a deterrent to further infringements. Specifically, Article 181 provides a prison sentence of “not less than one month” and a fine of EL5,000 to 10,000 (US\$900 to \$1,800). The minimum sentence of “one month” imprisonment

conferred by such conventions, where such acts are committed willfully, on a commercial scale and by means of a computer system.

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

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

¹⁶ ITIDA placed an ad in the press, announcing they were responsible for software copyright, calling on businesses to register software products and work permits, and asking them to comply with copyright laws in the use of software.

¹⁷ Prime Minister Decree No. 497 for the year 2005 (effective by Issue No. 12, Official Gazette, March 29, 2005).

is welcome, but there is no set maximum jail term (as there was in the old law), potentially rendering this provision much weaker than it was previously. Fines on their face appear insufficient to provide a deterrent. IIPA understands that the fine is to be imposed “per work” or “per title,” and that in a couple of cases, this calculation method has been employed. If so, this is a positive development. Fines should be increased, and, for example, should be doubled for recidivists (as of now a recidivist receives the mandatory minimum jail term and the maximum fine).

- **Remedy as to “Materials and Implements.”** Article 179(3) in the Code is TRIPS deficient, in that it only permits the seizure of “materials” that are “serviceable” “only” for infringement. TRIPS Article 46 requires that judicial authorities shall have the authority to “order that materials and implements *the predominant use* of which has been in the creation of the infringing goods” be (seized and) disposed of, and Article 61 provides, in appropriate cases, for the seizure, forfeiture and destruction of such materials and implements.
- **Ex Parte Civil Searches.** Article 179 does not provide judicial authorities with the clear express authority to “adopt provisional measures *inaudita altera parte* (without notice to the defendant) where appropriate, in particular where any delay is likely to cause irreparable harm to the right holder, or where there is a demonstrable risk of evidence being destroyed,” as required by TRIPS Article 50. The copyright industries are examining this provision and considering a test in the courts, but in the meantime, the law should be amended to clarify the availability of this vital measure, in line with Article 50 of TRIPS.
- **Government-Sanctioned Sell-Off of Pirated Products Violates TRIPS.** Article 180 provides that “the court may support a sequester with a view to republish the [allegedly infringing] work, sound recording, broadcasting program, as well as, exploiting or offer copies of it,” and “the accrued revenue shall be deposited with the court’s treasury until the original dispute is settled.” This provision diverges from accepted practice and is out of step with TRIPS. Article 46 of TRIPS requires Egypt to give the judicial authorities “the authority to order that goods they have found to be infringing be, without compensation of any sort, disposed of outside the channels of commerce in such a manner as to avoid any harm caused to the right holder, or ... destroyed.”
- **Modern, TRIPS-Compatible Presumptions.** The law does not provide expressly for presumptions of copyright ownership (as required by TRIPS) or subsistence of copyright. Such presumptions are crucial to the ability of copyright owners to effectively exercise their rights. The law must be amended to comply with TRIPS.¹⁸
- **Requirement of Translation into Arabic.** Section 148 of the Code requires translation of all literary works into Arabic within three years of publication; if not, they are deemed to fall into the public domain. This is an extremely disturbing development. This unprecedented provision violates Egypt’s TRIPS and international obligations, is highly prejudicial to all right holders, including U.S. publishers, and it must be deleted.
- **Broad Compulsory License.** Article 170 of the IP Code contains a compulsory license for copying and translating works. It is not limited to literary works in printed form, and apparently extends to computer programs and audiovisual works. Such a compulsory license is contrary to international law and would be devastating to the copyright industries if the Egyptian government allows for such

¹⁸ The following formulation might, for example, be appropriate:

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

practices. It must be fixed or deleted altogether.¹⁹ The 2005 Implementing Decree (Articles 4 and 5) failed to resolve this issue and leaves in place a Berne- and TRIPS-incompatible compulsory license.

- **Broad Moral Rights Provision.** The moral rights provisions in the Code impinge on exclusive rights, in violation of TRIPS and Berne (TRIPS Article 9.1, Berne Articles 8 and 12). Article 142(3) provides that the author may reject “any amendment in the work, which the author considers as changing or distortion of his work,” regardless of whether the author has transferred economic rights. In this form, this provision violates Berne Article 12, as it would undermine the exclusive adaptation right. The standard for rejection of a change must be objective, as set forth in the Berne Convention, not subjective, as set forth in the Code. The Article also provides that “amendment in translation shall not be regarded as infringement, unless the translator fails to indicate points of deletion or change, or abuses the reputation and status of the author.” This would violate Berne Article 8, as it would impinge on an author’s exclusive translation right.
- **Ambiguous Protection for Pre-Existing Works/Sound Recordings.** There is no provision in the Code ensuring that pre-existing works and the objects of neighboring rights (including sound recordings) receive full retroactive protection as required under TRIPS Articles 9.1 and 14, and Berne Article 18. Even though we understand that the government of Egypt takes the position that TRIPS and Berne are self-executing in Egypt, the absence of a provision for full retroactivity for TRIPS/Berne terms of protection may lead to confusion. Therefore, it would be highly preferable for Egypt to include an express provision for full (TRIPS- and Berne-compatible) retroactivity for all subject matter under the law.²⁰
- **Border Measures as Required by TRIPS, Including Ability to Interdict and Take *Ex Officio* Actions.** The law contains no provisions on border measures (TRIPS Articles 51-59). We are unaware of whether separate customs measures exist or are being drafted to provide TRIPS-level protection in the area of border measures. IIPA understands that a new customs law is being drafted or under review.
- **Article 171 Exceptions.** The law contains exceptions to protection which are broad and may be in questionable conformity with TRIPS Article 13. Preferably, Article 171 (on exceptions to protection) should include “chapeau” language limiting excepted acts to special cases, provided that such acts “do not conflict with a normal exploitation of the work [or object of neighboring rights]” and “do not unreasonably prejudice the legitimate interests of the author [or right holder],” in line with TRIPS Article 13. The Implementing Decree (Article 10) makes an attempt to limit the computer program exception in Article 171(3).
- **Civil Remedies.** Nowhere in the Egyptian law is there provision for adequate compensatory damages, as required by Article 45 of TRIPS. Only Article 179 of the Code provides for some “cautionary measures,” including “[c]alculating the revenue of [illegally] exploiting the work or performance or sound recording or broadcast, then distraint this revenue in all cases,” although it is unclear whether this is intended to cover all civil damages. TRIPS requires the courts to have the authority to award “damages adequate to compensate for the injury the right holder has suffered because of an infringement of that person’s intellectual property right by an infringer who knowingly, or with reasonable grounds to know, engaged in infringing activity,” and in appropriate cases, suggests the availability of “recovery of profits and/or payment of pre-established damages,” even

¹⁹ The Egyptian government must confirm that, if it intended to avail itself of Articles II and III of the Berne Appendix, it has kept up its renewals of its declaration, under Article I of the Berne Appendix. Otherwise, Egypt is no longer entitled to avail itself of these provisions.

²⁰ The simplest way to fix the retroactivity void in the Egypt draft would be to add a new article as follows:

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

where the infringer did not knowingly (or with reasonable grounds to know) engage in the infringing activity. Egypt's law remains deficient on provision of adequate civil remedies.²¹

- **Restrictions on the Ability to Freely Contract.** Articles 150, 151 and 153 are restrictions on the ability to enter into freely-negotiated contracts, and should be abolished. Specifically, Articles 150 and 151 contain transfer provisions that impose undue burdens on the freedom to contract, while Article 153 is an unreasonable restriction on the ability for an author to enter into arrangements that might include future works under a private contractual agreement.
- **Performers' Moral Rights Provision.** In Article 155(1), the performer's right of attribution should permit the omission of the performer's name, if such is dictated by the manner of the use of the performance, and Article 155(2) should qualify the kinds of changes made by a right holder that would be objectionable (i.e., changes that would be prejudicial to the performers' reputation), and provide that it is not prejudicial to the performer for right holders to make modifications consistent with the normal exploitation of a performance in the course of a use authorized by the performer.
- **Compulsory License Provision for Broadcasts.** Article 169 permits broadcasting organizations to use works without seeking authorization. This compulsory license should be deleted.
- **Exclusive Rights for Producers of Audiovisual Works.** Article 177(5) clearly should not apply to sound recordings and therefore the word "audio" should be stricken from this article. Also, the panoply of exclusive rights for producers of audiovisual works is unclear. The producer is defined as "the natural or legal entity who produces the ... audiovisual work, and undertakes the responsibility of such achievement" [Article 138(11)]. Article 177(5) provides that the producer "shall be considered as representative of the authors and successors in exploiting this work, without prejudice to the rights of the author of literary or musical works, unless otherwise agreed upon in writing," and "the producer shall be considered as the publisher, and will have the rights of the publisher" Egypt should reverse this presumption, such that the producer of audiovisual works shall be presumed to have the exploitation rights unless otherwise agreed upon in writing.²² The producer of an audiovisual work should have the ability to exercise all the economic rights in that work without the further consent of the authors.

Unfortunately, the Implementing Decree creates additional problems. For example, Articles 11-16 appear to codify a registration ("recordal") and deposit requirement in Articles 184-86 of the IP Code. These requirements may not in practice interfere with the exercise of rights (since the law expressly states that registration is not a prerequisite to protection), but certainly impose burdens on right holders, since failure to register/deposit places a right holder in direct violation of the IP Code and subject to fines. Articles 184-186 should not apply to foreign right holders if Egypt is to live up to its international obligations. Article 187, dealing with registration of businesses engaged in the distribution of copyright materials, is another potentially onerous and costly burden on legitimate businesses, which has the

²¹ The following suggested text would provide a TRIPS-compliant framework for compensatory damages:

Where any of the rights conferred on the author in relation to his work under this Law [have] been infringed, the author shall be entitled to fair and adequate compensation. To qualify as adequate compensation, the infringer shall be liable for either of the following: (1) the actual damages suffered by him as a result of the infringement and any profits of the infringer that are attributable to the infringement and are not taken into account in computing the actual damages. In determining the injury to the right holder, the Court shall look to the value of the infringed-upon item, according to the suggested retail price of the legitimate product or other equivalent measure established by the right holder for valuing authorized goods; (2) an award of statutory damages, if the copyright owner elects, at any time before final judgment is rendered, to recover these instead of actual damages and profits, for all infringements involved in the action with respect to any one work for which any one infringer is liable in a sum of not less than [X] and not more than [Y], as the court considers just. In a case where the court finds that the infringement was committed willfully, the court in its discretion may increase the award of statutory damages to a sum of not more than [Z]. The amount of statutory damages awarded should be sufficiently high to deter future infringement and to compensate the copyright owner for the harm caused by the infringement.

²² The simplest formulation of the producer's rights would be as follows: "Unless otherwise agreed upon in writing, the producer shall be entitled to exercise all the economic rights in relation to the work and copies thereof."

perhaps unintended but certain consequence of further insulating pirates, who will not pay for such registrations. Article 17 of the Implementing Decree and the Table set forth an elaborate schedule of charges to legitimate businesses dealing in copyright materials.

GENERALIZED SYSTEM OF PREFERENCES

Egypt currently participates in the GSP trade program, offering duty-free imports of certain products into the U.S. from developing countries. In order to qualify for such unilaterally granted trade preferences, USTR must be satisfied that Egypt meets certain discretionary criteria, including that it provides "adequate and effective protection of intellectual property rights." During the first 11 months of 2007, \$56.9 million worth of Egyptian goods (or 3.7% of Egypt's total exports to the U.S.) entered the U.S. under the duty-free GSP code. Egypt should not continue to expect such favorable treatment at this level when it fails to meet the discretionary criteria in this U.S. law.

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2008 SPECIAL 301 REPORT

INDIA

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

EXECUTIVE SUMMARY

Effective enforcement against widespread copyright piracy, including judicial reform and legislative improvements, have been actively discussed as part of the U.S.-India Trade Policy Forum (TPF) begun in 2006 and continued in 2007. However, 2007 saw little significant progress in any of these areas, though regular meetings are continuing. Piracy rates and losses remained essentially unchanged. However, the recording industry reports some important gains, but for the remaining industries progress on the problems that IIPA and its members have raised over at least the last five years has yet to emerge.

PRIORITY ACTIONS TO BE TAKEN IN 2008

- **Establish Specialized IP Courts or IP Judges, Increase Speed of Adjudication of Criminal and Civil Cases, and Increase Deterrence:** While this topic has been a key part of the TPF, and is an essential ingredient for improvement in this area, there has been no progress to date. Piracy levels will remain essentially unchanged in India without the creation of efficient and deterrent judicial remedies. The Government of India should set up specialized IP courts, or the chiefs of the high courts should appoint special judges in all the states to:
 - ease backlogs;
 - enforce deadlines for adjudication/resolution of piracy cases;
 - encourage completion of a set number of “model” cases with deterrent penalties to deliver a message to the Indian public about piracy;
 - prevent unjustified continuances;
 - adopt case management techniques (we understand progress has been recently made on this and on instituting plea bargaining);
 - treat piracy as a serious economic crime.
- **Adopt a System of Statutory Damages; Allow Compensation to be Awarded in Criminal Cases:** Existing law casts the entire onus of proving the amount of damages suffered, on the right holder. India should introduce a system of statutory damages in civil cases to provide the right holders with an alternative to proving actual damages. This is particularly important for the business software industry, where end-user piracy in business is the primary cause of high losses in India. India should also consider awarding damages to right holders in criminal cases on the basis of per unit seized, given the ineffective civil system in India.
- **Create a National Anti-Piracy Task Force:** This continues as a major priority. The lack of national enforcement coordination (IPR enforcement in India is a “state” matter) has resulted in low priority for anti-piracy enforcement and the absence of a national policy to provide effective copyright protection. The growth of Internet penetration and Internet piracy also demands increased focus on this issue. The Home Ministry should take the lead in providing training and resources. The Home Minister should issue a strong and widely publicized condemnation of piracy and the damage it is doing to India, and urge all police forces to take immediate action to root it out.

- **Reinvigorate “IP Cells” within the State Police, Provide them with Significantly Increased Resources and Establish Specialized IP Prosecutors:** While the government announced in 2002 the creation of 19 such IP cells, few are fully functioning. Those that are functioning are woefully under-resourced and in most states they do not function effectively at all. The lack of resources and manpower make all of these cells incapable of raiding larger pirate distribution and production targets. Training and funds are desperately needed. In addition, the lack of trained prosecutors severely hinders effective enforcement. States should set up specialized prosecutorial units, trained and unhindered by existing backlogs, to prosecute piracy crimes, guided and funded by the National Anti-Piracy Task Force and the government.
- **Increase the Number of *Suo Moto* Raids:** In its 2007 report, IIPA commended the increase in the police conducting more *suo moto* (*ex officio*, e.g., without the need for a right holder complaint) raids in 2006 in most copyright sectors (book piracy being a glaring exception). In 2007, many copyright industries reported a decrease in *suo moto* raids and, with the exception of the recording industry (IMI), a seeming loss of interest in IPR enforcement for other sectors. This disappointing development should be a key focus of the 2008 meeting within the TPF context.
- **Pass Optical Disc Regulations:** India has 36 optical disc plants and known pirate production. Optical disc legislation has been pending for at least four years and, though it was expected to be adopted in 2007, nothing has happened. India should immediately adopt modern optical disc regulations to license factories, gather sample discs for forensic testing, mandate the use of SID mastering and mould codes, and provide authorities with the ability to run surprise inspections, day or night, to detect illegal production.
- **Enact Copyright Law Amendments Consistent with the WCT and WPPT:** After many years of discussion within a “core group” appointed by the Ministry of Human Resources Development (HRD), HRD finally released a draft in 2005 and sought public comment. Almost three years later, there appears to have been *no* word from the Ministry on following through with an actual bill. With the growth of Internet penetration, domestic and U.S. right holders cannot afford to wait for the Government of India to adopt the necessary amendments to the copyright law to correct deficiencies and properly implement all the obligations of the WIPO Internet Treaties (WCT and WPPT), actions that have been taken already by many of its Asian neighbors. Such legislation should include protection for temporary copies; adequate and effective protection against the circumvention of technological protection measures; and ISP liability rules that are clear, with narrow exceptions, and with an effective notice and takedown system. Even the now very old draft amendments, fall well short of these goals. The TPF process should be used to press for the release of an improved bill to be then promptly introduced into Parliament and adopted into law.
- **Legalize Use of Published Materials at Educational Institutions:** Two years ago, the Ministry of Human Resource Development (HRD) committed to issue a government order/circular (proposed by the U.S., UK and Indian publishing industries) to all educational and research institutions to combat illegal photocopying on university campuses. HRD has still not issued this circular and the problem remains acute.
- **Empower Customs to Effectuate Seizures and Destruction of Pirate Goods:** Customs should be empowered to seize, and in particular, destroy, pirated goods. Currently, many seized goods are resold to shops working with the Customs Service. This TRIPS-inconsistent practice must stop. Additionally, the customs process continues to be cumbersome. Customs should take significant action to; (a) reduce the substantial imports of pirate product; (b) stem the parallel import and rental of legitimate DVDs entering India prior to the film’s Indian theatrical run; and (c) prevent the export of pirate and low-cost India editions of textbooks, including to the U.S. Customs must develop a database of pirates and counterfeiters, link port information and conduct *suo moto* actions against infringing imports and exports, given the vast import and export problem.

- **Adopt an Anti-Camcording Criminal Provision:** A vast number of movies are stolen right off the screen by professional camcorder pirates who use video cameras to illicitly copy a movie during exhibition in a movie theatre — usually very early in its theatrical release or even prior to the film’s release (e.g., at a promotional screening). These copies are then distributed to pirate “dealers” throughout the world and over the Internet. India should take whatever legislative steps are necessary to criminalize camcording of motion pictures. This legislation should make it a criminal offence to use a video camera or other device to make a copy of a motion picture while inside a theatre. Legislation passed in the United States and other countries prohibiting “camcording” has been successful at stopping the use of these unauthorized copies for making pirate DVDs, and similar legislation in India would be a very positive step towards reducing the piracy hurting India’s motion picture industry.

For more details on India’s Special 301 history, see IIPA’s “History” appendix to filing at <http://www.iipa.com/pdf/2008SPEC301HISTORICALSUMMARY.pdf>. Please also see previous years’ reports at <http://www.iipa.com/countryreports.html>

INDIA Estimated Trade Losses Due to Copyright Piracy (in millions of U.S. dollars) and Levels of Piracy: 2003-2007¹										
INDUSTRY	2007		2006		2005		2004		2003	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Records & Music	13.8	55%	52.7	55%	56.4	57%	67.3	50%	6.0	40%
Business Software ²	732.0	69%	574.0	71%	255.0	72%	239.0	74%	187.0	73%
Motion Pictures ³	NA	NA	NA	NA	NA	NA	80.0	60%	77.0	60%
Entertainment Software ⁴	129.9	89%	85.6	86%	65.2	86%	59.5	86%	113.3	84%
Books	38.0	NA	40.0	NA	42.0	NA	38.0	NA	36.5	NA
TOTALS	913.7		752.3		418.6		483.8		419.8	

PIRACY AND ENFORCEMENT UPDATES IN INDIA

Court Failure to Conclude Cases – Criminal: The principle challenge posed by the Indian enforcement system is to make the criminal system work despite corruption, inefficient court procedures, lack of training, massively long delays, and few convictions (and even those are followed by low fines and virtually no significant jail terms). There have been few criminal convictions under the criminal copyright piracy provision of the Copyright Act (Section 63) since January 1, 2000 – reportedly six for movie piracy (including a 2007 conviction with a seven month prison sentence and a Rs. 55,000 fine (US\$1,391)), and none for software or book piracy. IIPA has reported that in the over 15 years that it has been working on Indian copyright issues, it has been able to count no more than 16 convictions for copyright piracy under Article 63, the criminal copyright piracy provision. However, the recording industry in 2007 has reported some convictions under both Article 63 and Article 52A which are not reported in this prior number. Overall, the recording industry reports that it has obtained more than 1,400 convictions since 1997 under Section 52A of the Copyright Act which criminalizes failure to use the required certificate on sound

¹ The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA’s 2008 Special 301 submission at <http://www.iipa.com/pdf/2008spec301methodology.pdf>. For information on the history of India under Special 301 review, see Appendix D at (<http://www.iipa.com/pdf/2008SPEC301USTRHISTORY.pdf>) and Appendix E at (<http://www.iipa.com/pdf/2008SPEC301HISTORICALSUMMARY.pdf>) of this submission.

² BSA’s 2007 statistics are preliminary. They represent the U.S. software publishers’ share of software piracy losses in India, and follow the methodology compiled in the Fourth Annual BSA and IDC Global Software Piracy Study (May 2007), available at <http://w3.bsa.org/globalstudy/>. These figures cover, in addition to business applications software, computer applications such as operating systems, consumer applications such as PC gaming, personal finance, and reference software. BSA’s 2006 piracy statistics were preliminary at the time of IIPA’s February 12, 2007 Special 301 filing and were finalized in June 2007 (see <http://www.iipa.com/statistics.html>) as reflected above.

³ MPAA’s trade losses and piracy levels for 2006 and 2007 are not available. MPAA did provide 2005 estimates for a select group of countries, using a new methodology that analyzed both physical/“hard goods” and Internet piracy. Details regarding MPAA’s methodology for 2005 and prior years are found in Appendix B of this IIPA submission.

⁴ ESA’s reported dollar figures reflect the value of pirate product present in the marketplace as distinguished from definitive industry “losses.” The methodology used by the ESA is further described in Appendix B of this report.

recordings (Section 52A also applies to videos and DVDs). Fines in these cases have ranged from Rs. 50 (US\$1.26) to Rs. 200,000 (US\$5,057.00) and imprisonment of one day up to the maximum permitted under the law of three years.⁵ In 2007, the recording industry reported improved enforcement and more cooperation from police, including over 3,500 raids, which is more than half of all the IP raids conducted in India. Over 1,600 OD burners were seized. The recording industry also reported increased penalties imposed under Section 52A and Section 63 in 2007, although most still involve small fines and only a few have involved jail time.⁶

MPA has over 3,100 pending criminal cases, the publishing industry 126 cases, the recording industry (mainly Section 52A cases) over 8,000, and BSA has 16 cases. Despite the few convictions for piracy, pretrial detention and permitted one year maximum detentions under the Goondas Act in Tamil Nadu continue to result in some deterrent effect.

Court Failure to Conclude Cases – Civil: The business software and motion picture industries continue to use civil cases with varying degrees of success. In 2007, the software industry took ten civil end-user actions, the most ever in one year in India. India is not viewed as a country with a damages culture; there are few such examples in the copyright area. As noted elsewhere in this report, adoption of a statutory damages regime would be most helpful.

MPA had 31 civil actions pending at the end of 2007 and has had some success over the years in using the civil system to obtain preliminary injunctions against some of the 40,000 pirate cable systems that transmit U.S. films and TV programs without authorization. These preliminary orders against entire cable networks have had some deterrent effect, even though these cases rarely, if ever, come to judgment with damages awarded. Even contempt proceedings brought for violation of such injunctions rarely, if ever, are concluded. Moreover, some networks continue to operate in contravention of the law and in violation of these specific court orders. Proceedings to enforce these injunctions are costly and time-consuming.

Court procedures are overly burdensome; courts are severely backlogged and there are massive delays in bringing criminal and civil cases to final judgment in violation of TRIPS Articles 41, 41(2), 42 and 61. India must adopt meaningful court reform to decrease burdens, costs, and delays, and to ensure that cases are concluded promptly with deterrent penalties and damages, including, in particular, setting up IP courts with both civil and criminal jurisdiction.

The Use of *Suo Moto* Raids Has Decreased in 2007: In a very disappointing development, most IIPA members are reporting a significant decrease in *suo moto* raids in 2007. As reported in IIPA's 2007 submission, *suo moto* raids had been on the increase in 2005 and 2006. The recording industry, however, continues to report that it is still getting *suo moto* raids in many parts of the country, especially Kerala, Tamil Nadu, Gujarat, Bihar, and West Bengal. *Suo moto* raids have been one of the only positive indicia of even small improvements in enforcement in India. Now even this gain appears to be receding.

Internet Piracy: There were 60 million Internet users as of December 2007. Broadband subscribers are estimated at 2.5 million, still low by Asian standards, but growing.⁷ The recording industry has experienced growing P2P filesharing and has reported shutting down up to 600 pirate websites in the last few years. Many pirate sites outside India have also harmed legitimate sales. As a result, Internet revenues remain low. However, mobile cell phone technology is making possible steadily increasing revenues from legal downloads of recorded music and ringtones. India is expected to become second to South Korea in developing a major market for cell phone downloads.⁸ IMI has conducted more than 150

⁵ Unlike Article 63 which carries minimum fines and jail terms, (Rs. 50,000 (US\$1,264 and six months), Article 52A offenses bear no minimum fine or minimum jail term and historically fines under Article 52A have been notoriously low and non-deterrent.

⁶ The recording industry reports that in five of its 200 convictions in 2007, jail terms were imposed. It is unclear whether probation was granted in these cases and the jail terms were actually served

⁷ <http://www.internetworldstats.com/stats3.htm>.

⁸ Karthik Subramaniam, "Music Business Bounces Back, Thanks to Mobile Phones," The Hindu, March 25, 2007.

raids against people involved in mobile chip piracy and was the first to conduct such actions. P2P file sharing and other Internet piracy has also affected the motion picture industry. Actions against such piracy were taken in 2007 against approximately 10 such sites including rapidshare.com, rapidshare.de, badongo.com, filefactory.com, gigeshare.com, mediafire.com, oxdion.com, putfile.com, sendspace.com and speedshare.com. Approximately 10,000 infringing movie files were taken down from these servers. An ESA member company also reports that vendors of pirated PC game products continue to sell through their Ebay India virtual stores.

The Business Software Alliance (BSA) reports that online infringements of its members' software increased significantly from about 6,700 in 2006 to over 40,000 in 2007. Pirates appear on auction sites and a few of them have now created their own websites selling pirated software. Actions have been taken against sites that took orders through email, but the problem continues to grow by leaps and bounds. BSA sent out an average of 1,682 notice and takedown letters per month in 2007, and reports that it has not been possible to accurately determine the compliance rate.

There is still no formal notice and takedown system in the Indian Copyright Law (though this was the chief enforcement tool against download sites) and, as described further below, the copyright law has still not been updated to cover WIPO Treaties obligations. It is crucial that India take urgent steps to shore up its legal infrastructure and put a workable notice and takedown and enforcement strategy in place, or Internet piracy will quickly become a major threat to legitimate right holders in India.

Optical Disc Piracy — Some Factory Production and Many Burned Pirate Discs: There were a reported 36 OD factories in India in 2007. In 2005, the Ministry of Information & Broadcasting (MIB) tasked FICCI (the Indian Chamber of Commerce) with drafting an optical disc law. A draft law was made public in 2007 but continues to be held up within MIB. A dispute over the licensing of factories that make blank disks and whether SID codes should be mandated appears to be a factor in the hold up. We understand a draft will surface again in March 2008. A good optical disk law covering recordable media should be adopted in 2008.

Notwithstanding evidence of pirate factory production and reports of some imports of pirate disks from Malaysia, the predominant form of optical disc piracy in Indian markets today, consists of burned recordable discs, with content including music compilations in MP3 formats, pre-release music (lots of Indian titles and some international repertoire),⁹ motion pictures on VCDs, DVDs, and CD-Rs (most of which are available in major cities well before the local theatrical release of the title), business software, and books/reference materials. Publishers report, for example, cases where 200-250 best-selling medical and technical textbooks are being loaded onto CD-ROMs and being sold for US\$5 or less.

In 2007, entertainment software publishers began formalizing their enforcement efforts in India. A survey of the market for pirated PC games found that the bulk of the pirated product was limited to informal markets and kiosks, and not found in larger retail stores or chains. Vendors of pirated PC games continue to use E-bay India for pirate sales. Pirated PC game product is typically burned CD/DVD product, cheaply finished with handwritten titles, in a clear plastic sleeve with a badly photocopied cover slipped in with the disc. The pirated PC game products available in the market appear to be copied from pirated versions produced in Southeast Asia. Pirated console games, on the other hand, appear to largely be in pressed CD format. Industry investigators are still in the process of identifying the source of pirated and burned entertainment software products. In addition, most console hardware in the market appears to have been circumvented to facilitate the play of pirated games. The markets are replete with a large selection of game titles, both old and new, and the vendors sell them quite openly, making no attempt to conceal the products or keep them off-site.

A video game publisher began enforcement operations in the country in 2007, focusing early efforts in the cities of Mumbai, Delhi, Kolkata, Chennai, Hyderabad, and Bangalore. There were 24 raids

⁹ Since pirates do not pay taxes, the local Indian music industry association, IMI, has written letters to the Income tax and sales tax departments to take action against pirates.

successfully conducted, with early signs showing that the raids had had an impact on pirates, resulting in a modest increase in legitimate retail sales immediately following the raids. The materials seized included pirated video games (a total of 16,317 discs), a few CD stampers and CD-writers, blank CDs, and inlay cards. A number of the vendors were arrested and some remanded for a 15-day period under judicial custody.

Signal Theft and Public Performance Piracy: Piracy of cable and satellite broadcasting signals remains rampant, mainly through significant under-declaration of subscribers to content owners. It is estimated that India's cable companies declare only 20% of their subscribers and that the piracy level in this market is at 80% with significant losses. Small video parlors in small and medium sized cities often show pirated film product. These parlors are often licensed by the state governments and compete with legitimate theaters. The recording industry has also undertaken a training campaign with police to deal with public performance piracy and had good enforcement results in December 2007 in Goa.

Piracy of Business Software Continue to Causes Huge Losses to the Software Industry: Corporate end-user piracy (unauthorized use of business software in a business setting) continues unabated in both large and small Indian companies, while piracy at the retail and wholesale level is also prevalent, including hard disk loading and the outright sale of pirate software in many of the famous pirate markets throughout India. Losses increased significantly in 2007, to US\$732 million, while the piracy rate fell slightly from 70% to 69%, which is still much higher than the regional average in Asia. A few significant damage awards were granted in civil cases in 2007 and BSA reports good support from the High Court in New Delhi. However, criminal enforcement does not work. There is a high rate of pending cases, complainants must always appear at any hearing, and cases are rarely concluded. There were no software piracy convictions in 2007 — in fact, there has never been a successful criminal conviction for software piracy in India.

Book Piracy—Pirate Printing and Photocopying Remain Severe Problems: Rampant piracy of trade books, textbooks, professional books (scientific, technical and medical), and scholarly journals continues to plague the publishing industry. At the many pirated retail establishments and outdoor markets, all varieties of pirate books, from poor quality cover-to-cover photocopies and obviously pirated cheap reprints, to hardbound copies of medical reference volumes and high quality offsets, remain readily available. Efforts in 2007 have resulted in mild progress. For instance, the number of pirate manufacturing facilities has decreased in Bangalore, and pirate retail establishments have lessened in number in Mumbai. Piracy at traffic centers in New Delhi continues virtually unabated. Publishers lose vast portions of their market to pirates, despite the fact that prices for legitimate titles in India are among the lowest in the world.

Photocopying remains a severe problem at educational institutions, and is on the rise with regard to medical texts.¹⁰ A growing problem also in the educational context is unauthorized compilations in the form of coursepacks, or “self instructional material” (SIM). This increasingly frequent copying among India's educational institutions is costing educational publishers substantial revenue, also threatening the reputation of India's institutions and scholars.¹¹

The publishing industry continued to be active in addressing all forms of book piracy in 2007. However, the industry is still suffering from a lack of political will among local enforcement units. Most inconsistent are the police units in Mumbai and Kolkata, but the Delhi police are erratic in their

¹⁰ Raids on the All-India Institute of Medical Sciences in Delhi, India's pioneer medical education institution, and noted in IIPA's 2007 submission, revealed that the originals used for making photocopies by the pirates were issued by that institution's library. In another action in Kanpur in the State of Uttar Pradesh, the copy shop raided by the police was found to be owned by an assistant librarian of Kanpur Medical College.

¹¹ Reports of unauthorized compilations by the distance learning departments of universities such as Maharishi Dayanand University, Rohtak and the Institute of Management Technology, Ghaziabad, abound.

cooperation as well. To add insult to injury, *suo moto* raids are rare to nonexistent.¹² Publishers have still not obtained a single conviction for book piracy.

The early 2006 commitment from HRD to issue a circular to universities in India concerning illegal reproduction of academic materials by students and lecturers on campuses has still not resulted in action. Failure to implement this promise has been a huge disappointment, and action on this circular is sorely needed.

Unauthorized Rental of Motion Pictures: Piracy via unauthorized rental has again returned to a rampant path despite some success against it in 2006 by bringing civil and criminal actions against these rental shops, resulting in obtaining preliminary injunctions and citations for contempt for violation of those orders. However, this has had minimal impact and pirate rental libraries exist all over India and there is virtually no rental market in India.

Pre-Trial Procedural Burdens, Leaks, Hurdles, Costs and Delays: Exacerbating the overall non-deterrent effect of criminal actions taken in India, are the continuing procedural barriers erected in the path of a legitimate right holder. For example, obstruction of the raiding process is all too common, such as leaks to the pirates before raids occur. Once the raid has been completed, the process is often further hampered by lack of follow-up, excessive delays in case preparation, and delays in commencement of prosecution. For example, following a raid, police often take up to a year to prepare the charge sheet on a defendant. Instead of investigating the links to pirates higher up in the supply chain, investigations are often cursory, with no attempt, for example, to follow the source of supply through to the source of pirate production. Because criminal cases proceed so slowly, the investigative officers are often transferred to remote locations by the time of trial, which only further delays the trial. By the time of trial, evidence is often missing or unusable.

A promising development has been the engagement of the courts in a judicial reform process, which has brought some progress in civil cases through alternative dispute resolution and reports, are the plea bargaining is now or will soon be available in some criminal courts. The latter should help clear some dockets and expedite the criminal process.

COPYRIGHT LAWS AND RELATED ISSUES

Proposed Copyright Amendments Finally Released for Public Comment; Many Proposals Are Deficient: India generally has a good copyright law. IIPA detailed the positive and negative provisions in that law in its 2003 submission.¹³

IIPA has reviewed the new draft copyright amendments placed on the Copyright Office's website in 2005.¹⁴ These had been in preparation for the last eight or more years. In prior submissions, IIPA had indicated its grave concern that this amendment process was being conducted in secret and that foreign right holders and the U.S. Government were not permitted to participate. IIPA was pleased when the Copyright Office in HRD announced that it had completed its work and was finally opening up the process for full public comment. However, since that time, there has been absolutely no word of further developments and the draft seems completely stalled within HRD. A number of IIPA members have filed comments on the draft.

¹² Publishers report a recent willingness of some authorities in Bangalore to register a case without a complaint, but even in these cases publishers must do virtually all the work thereafter, including paying for the storage of seized books.

¹³ See IIPA's 2003 Special 301 country report on India, pages 122-124, available at <http://www.iipa.com/rbc/2003/2003SPEC301INDIA.pdf>.

¹⁴ The proposed amendments are posted at <http://www.education.nic.in/copyright/cprsec/Material%20for-View%20Comments.htm>

IIPA reviewed the draft in its 2007 submission and noted that there are many positive amendments. However, there are other proposals which raise grave concern, particularly certain provisions, which are intended to implement the provisions of the WIPO “Internet” Treaties (WCT and WPPT). Because of the importance of revising this draft to fully implement those treaties, we repeat our analysis again this year.

The proposed amendments also make major revisions to the exceptions to protection provisions in the Copyright Act, which appear dangerously overbroad, particularly in the context of Internet transmissions (uploading and downloading of copyrighted works), which are not authorized by the right holders of those works. Below we highlight again the most important of these concerns:

- **Unclear Protection for Temporary Copies:** The provisions defining the scope of the reproduction right, seek to protect copies “stored” in a computer. However, the provisions are ambiguous with respect to whether temporary and transient copies made in the RAM of a computer are reproductions as required by the Berne Convention, the TRIPS Agreement, and the WCT and WPPT. While there are provisions later in the proposed amendments deeming that certain transient and temporary copies are not infringing copies, implying that such temporary copies fall under the reproduction right, the drafting should be much clearer and cover all copies whether they are permanently stored in a computer or merely temporary and transient in computer RAM.
- **Inadequate Protection for Technological Protection Measures Against Unlawful Circumvention:** The proposed amendments seek to implement the anti-circumvention provisions (regarding technological protection measures (TPMs) of the WCT and WPPT). The proposed provision is seriously deficient, and if enacted in its present form would be incompatible with the WCT and WPPT. The provision (Article 65A): (a) does not cover access controls and is limited only to TPMs protecting the exercise of exclusive rights; (b) covers only the “act” of circumvention and does not also cover trafficking in circumvention devices or services; (c) does not define an “effective technological measure”; (d) contains an exception which would appear to permit circumvention for any purpose that would not amount to infringement under the act (thereby almost completely eviscerating any protection); (e) creates other overbroad exceptions; and (f) provides for only criminal and not civil remedies.
- **Overly Broad Exceptions:** The proposed changes to Article 52 would create a number of new and overbroad exceptions to protection, some of which are particularly dangerous in the networked environment. These include: (a) a broad “private copying” exception;¹⁵ (b) overbroad exceptions for copying of computer programs, including a provision allowing such copying for any “noncommercial personal use” beyond the usual making of a back-up copy; (c) an exception for making transient or temporary copies that goes far beyond what would be permitted, for example, in the EU Copyright Directive, a provision which IIPA considers overbroad in itself; (d) an overbroad exception permitting the performance of films in educational contexts and in “clubs”; (e) an overbroad exception with respect to reproduction of books by libraries; (f) an overbroad exception with respect to making reproductions of books not available for sale in India; and (g) a change in the scope of the rental

¹⁵ The motion picture industry is concerned that this exception in Section 52(1)(a)(1) can also be interpreted to permit the making of camcorder copies in theaters under the pretext of the copies being for private and personal use. It appears that the HRD has attempted to alleviate industry concerns that the exception for private use could be read to permit video recording or camcording in theatres by further limiting the exception for private use to “private and personal use.. However, this does not alleviate the foreseeable difficulties with such an exception as a broad exemption can completely undermine the anti piracy efforts currently being undertaken by the film industry to stop camcording in theatres. A private use exception, even one further limited to “private and personal use” is covered under the three–step test in the Berne Convention and TRIPS. Since India must adhere to *minimum* international standards of copyright protection and its treaty obligations and for clarity in application, MPA strongly urges the HRD to further revise this Section to explicitly incorporate the three - step test into the law and remove any potential for camcording in theatres as permitted personal use.

right.¹⁶ These and certain other exception would violate India's obligations under the Berne Convention and the TRIPS Agreement.

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

India Should Adopt an Anti-Camcording Criminal Provision: A vast number of movies are stolen right off the screen by professional camcorder pirates, who use video cameras to illicitly copy a movie during exhibition in a movie theatre — usually very early in its theatrical release or even prior to the film's release (e.g., at a promotional screening). These copies are then distributed to pirate "dealers" throughout the world and over the Internet. India should take whatever legislative steps are necessary to criminalize camcording of motion pictures. The MPA strongly supports legislation, in addition to copyright law amendments, that specifically make it a criminal offence to use a video camera or other device to make a copy of a motion picture while inside a theatre. Legislation passed in the U.S. and other countries prohibiting "camcording" has been successful at stopping the use of these unauthorized copies for making pirate DVDs, and similar legislation in India would be a very positive step towards reducing the piracy hurting India's motion picture industry.

GENERALIZED SYSTEM OF PREFERENCES

India currently participates in the Generalized System of Preferences (GSP) program, a U.S. trade program that offers preferential trade benefits to eligible beneficiary countries. One of the discretionary criteria of this program is that the country provides "adequate and effective" copyright protection. In the first 11 months of 2007, \$4.4 billion worth of Indian goods entered the U.S. under the duty-free GSP program, representing a 13.6% decrease from the same period in 2006.

MARKET ACCESS

Many market access barriers in 2007 continue to hinder copyright owners' abilities to participate fully in the market in India. For the motion picture industry, entertainment taxes vary widely among Indian States, ranging from 15 - 40% in some key markets, 40 - 70% in other states, and in a small number of states, 100% or more of the admission price. The average tax rate, computed on a country-wide basis, is reasonably estimated to be 35 - 40%, and constitutes a significant disincentive to the much-needed cinema construction in India. Additionally, at the request of their local state film industries, a few states now follow a differential tax regime under which the local state language films are charged nil or lower tax rates while the non-state language films are charged higher rates.

Entertainment software publishers' experience with the Indian market is one hindered by the existence of high tariffs on PC game products (with the applied duty rate currently at 30 percent), console game products (tariffs also as high as 30 percent), and game console hardware. Information from companies active in the market suggests that these rates are actually closer to 35 percent, and break down as follows: (a) basic excise duty at 10 percent of the landed cost; (b) countervailing duty (CVD) at 16 percent of landed cost (+ BED); (c) an additional assessment (cess) on CVD of 3 percent; (d) a further assessment on the total duty (essentially the sum of a+b+c above) of 3 percent; and (e) an additional duty of 4 percent on the sum of a+b+c+d and the landed cost. Additional taxes compound to create an environment where legitimate commerce in game consoles is virtually non-existent, and where

¹⁶ The proposed amendment in Section 14(d), which in particular includes substitution of the word "hire" with the words "commercial rental" and the further explanation that "commercial rental" will not include rental for nonprofit purposes by a nonprofit library will only enable the pirate libraries to circumvent the law.

penetration rates of unauthorized (grey market) consoles are only a fraction of what they would be under less restrictive market conditions. For instance, India imposes both a sales tax, including a CST at 3%, VAT at 4.4% and octroi (or local tax) in some states at 3 percent. There is also excise duty assessed on PC and other locally replicated products. The current duty rate is at 8.24 percent of the wholesale price, or about 5 percent of the MRP. With tariff rates at this level, the ability of legitimate publishers to compete in the market and establish legitimate distribution channels will continue to be severely hampered.

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

MPA is particularly concerned by a 2006 decision of the Ministry of Information & Broadcasting which notified broadcasters that only "U" rated films could be broadcast on TV channels. Censor Board resources have not been increased and all this has introduced uncertainty and disruption in the marketplace. These guidelines place significant disincentives on foreign investment via their tax implications for foreign broadcasters, who now must be registered in India and their requirement that all sport events be shared with the local Indian public broadcaster. Additionally, a Bombay High Court order specifying that all films must be rated for universal viewing, is of concern to foreign broadcast channels. While local broadcasters can have their films re-certified for such universal viewing, foreign broadcasters will not find it as easy or cost effective to incur this obligation, particularly bearing in mind those channels broadcast into India from foreign feeds.

The Telecom Regulatory Authority of India had introduced regulations, which prohibit broadcasters from granting exclusive contracts to distributors. This regulation went into effect in January 2007. These provisions eliminate all potential for competition and incentive to develop programming or to buy "rights." MPA opposed these provisions as inconsistent with a free and competitive market. Its entreaties were rejected. The Direct to Home (DTH) Guidelines were also amended to prohibit DTH operators from entering into exclusive contracts with any broadcaster, and from carrying the signals of any broadcaster that has entered into any exclusive contracts. This also severely limits competition in the marketplace.

The U.S. motion picture industry faces numerous other market access barriers, including foreign ownership restrictions and customs valuation practices that include projected royalties, not just the value of the medium.

TRAINING

IIPA member associations continued to conduct training in 2007.

MPA conducted 37 trainings in 2007 of both police and prosecutors. It launched a Hindi language anti-piracy movie trailer in Mumbai that is being dubbed into many local languages. It produced a 23-minute documentary on creativity and copyright, which was distributed to students in the law school in Hyderabad and organized a seminar at Delhi University at which the documentary was also shown.

The local recording industry association (IMI) conducted in 2007 more than 38 training programs in India in various states for the police, judiciary and public prosecutors and in law colleges. It also participated in four conference dealing with mobile chip piracy and five programs on public performance licensing issues.

CONCLUSION

India is becoming a serious market for the copyright industries and revenues are beginning to increase. However, piracy continues at very high levels and the Indian enforcement system remains ill-equipped to deal with the problem. Until the significant reforms recommended at the beginning of this submission are put into effect, the Indian market will continue to be hobbled.

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2008 SPECIAL 301 REPORT

MEXICO

Special 301 Recommendation: IIPA recommends that Mexico be elevated to the Priority Watch List in 2008.

EXECUTIVE SUMMARY

The sheer dimension of the piracy problem in the Mexican market remains severe and unchanged in the past year. Piracy involving hard goods, CD/DVD burning, piracy on the Internet, unauthorized camcording in theaters, street piracy, and unauthorized photocopying at universities continued at high levels in 2007. Again, the efforts of various Mexican enforcement agencies differed greatly in terms of cooperation and results. Overall, the federal government performed strongly again last year. Both the criminal authorities (PGR) and administrative agencies (IMPI) worked well with rightsholders and took significant actions last year. However, performance by the state governments remains unsatisfactory, with only a handful of state governments interested in combating illegal trade and piracy; interest by municipal governments is even less. Despite serious piracy and many raids taken by police, prosecutions remain very few as prosecutors are reluctant to push cases through the system and judges are quick to dismiss cases.

The Mexican Government must not only increase the resources allocated to its enforcement agencies, but it must also significantly enhance its coordination with state and municipal authorities. Industry is working with several government agencies on public awareness programs regarding the nature and repercussions of rampant piracy, but more work led by the national government is needed. Judicial training must be intensified. Border measures need to be strengthened. There remains a long legislative agenda of which several critical bills (for example, amending the criminal code to grant *ex officio* authority) need to be addressed in 2008. In short, the macro view of Mexico remains unchanged: despite commendable enforcement efforts, piracy remains high, there is no deterrent effect in curtailing this pervasive economic crime.

PRIORITY ACTIONS IN 2008

Enforcement

- Develop a national campaign that addresses the well-known street markets (San Juan de Dios in Guadalajara) and distribution centers (such as Tepito and Plaza Meave in the Federal District) where vast quantities of pirated goods are sold in broad daylight;
 - Significantly improve investigations and raids against pirates involved in commercial distribution and street piracy;
 - Insist that PROFECO use its *ex officio* powers to stop piracy in street markets;
 - Insist that state and municipal governments take a proactive role and be held accountable for fighting piracy at the street level.
- Work with copyright industries on Internet piracy-related investigations.
- Stop illegal photocopying by copyshops on or near major university campuses.
- Improve police coordination between federal, state and municipal enforcement authorities, as well as coordination among the various federal agencies tasked with intellectual property protection and enforcement.

- Require the PGR's Organized Crime Division to work closely with the copyright industry and carry out systematic and effective investigations and actions against major pirate organizations involved with organized crime and have strongholds in piracy havens such as Tepito, Plaza Meave, and San Juan de Dios. In addition, this same group should also develop an intense enforcement plan against the Tepito market.
- Require police officials to proactively identify and arrest individuals who are responsible for the large-scale distribution and importation of pirated goods.
- Encourage police officials to authorize and conduct daytime raids in retail areas with high piracy rates as doing so will lead to larger seizures, increased arrests, and greater deterrence.
- Encourage prosecutors to act swiftly on complaints and recommend maximum sentences, including jail time, to the courts in order to improve deterrence.
- Involve the tax authorities (SAT) in sustained anti-piracy actions.
- Create specialized units to tackle online copyright infringements.
- Improve administrative enforcement by the Mexican Industrial Property Institute (IMPI), for example: (a) IMPI agents should be accompanied by police with the authority to gain entry into the targeted premises during inspections; and (b) impose higher sanctions on door-closings (i.e., refusals to admit inspectors during a governmental audit or raid), such as applying a presumption of IPR infringement; and (c) eliminate unnecessary formalities contained in the Law of Industrial Property (e.g. presence of two witnesses for a raid to be deemed valid). Provide IMPI with additional resources (including personnel) to conduct inspections, and allow IMPI's regional officers to conduct raids in their localities.
- Encourage IMPI to expeditiously issue its decisions.
- Encourage INDAUTOR (the Copyright Office) to circulate information on the copyright law and how collective management works.
- Provide INDAUTOR with more resources and facilities to increase its mediation capabilities, particularly by providing more mediators and mediation rooms.
- Issue mandatory sentencing guidelines, or at a minimum suggested guidelines, in the courts.
- Issue deterrent sentences for criminal copyright infringement, including jail time.
- Encourage judges to act expeditiously on applications for search warrants.
- Continue to provide, and expand on, IPR trainings for law enforcement officials, prosecutors and judges.
- Create specialized IP courts, and make intellectual property protection a priority.
- Urge Mexican customs to implement stricter inspection of blank media in order to reduce the importations of blank optical media products aimed at the pirate market. For example, over the past year, the PGR has been leading a working group where industries, along with Mexican, customs, tax and economy authorities work to develop strategies to fight the imports/smuggling of blank discs.
- Enact and enforce decrees to ensure the procurement and use of legal computer software in governmental agencies, especially at the state and municipal levels.
- Organize a campaign to combat copyright infringement on the Internet.
- Improve exchange of intelligence between Mexican and U.S. Customs on suspect shipments of blank optical media.

Legislation

- Support passage of four bills which would amend the criminal code to: (a) give *ex officio* authority for police; (b) impose criminal sanctions for the unauthorized circumvention of technological protection measures; (c) impose sanctions for the piracy of open TV signals; and (d) impose penalties for the unauthorized camcording of films in theaters.
- Support the passage of a bill to amend the Copyright Law to provide technological protection measures for works and sound recordings (amendments here should track developments made on the criminal code, above).
- Support removal of IP infringements from the Federal Law of Administrative Procedure in order to speed up processes.
- Work with the copyright industries in 2008 on developing copyright legislation which would fully implement Mexico's WIPO Treaties' obligations as well as correct some longstanding inadequacies in the current law.

- Improve legislative and regulatory schemes to fill gaps in administrative enforcement measures and to equalize treatment of copyrights with trademarks.
- Implement legislation that raises penalties, establishes minimum penalties for specific actions like door-closing and evidence-concealment, sets parameters or guidelines for imposing sanctions, sets guidelines or procedures for expeditious criminal investigations, and grants robust powers to federal inspectors.
- Pass amendments to the Film Law to prevent parallel imports of films.

MEXICO Estimated Trade Losses Due to Copyright Piracy (in millions of U.S. dollars) and Levels of Piracy: 2003-2007¹										
INDUSTRY	2007		2006		2005		2004		2003	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Sound Recordings & Musical Compositions ²	527.0	71%	486.6	67%	376.5	65%	326.0	60%	360.0	61%
Entertainment Software ³	273.0	88%	182.0	85%	137.7	75%	132.2	76%	136.9	66%
Business Software ⁴	425.0	61%	374.0	63%	263.0	65%	222.0	65%	220.0	63%
Motion Pictures ⁵	NA	NA	NA	NA	483.0	62%	140.0	70%	50.0	45%
Books	41.0	NA	41.0	NA	42.0	NA	42.0	NA	40.0	NA
TOTALS	1,266.0		1,083.6		1,302.2		862.2		806.9	

Other Trade Initiatives

Security and Partnership for Prosperity in North America (SPP): The copyright industries appreciate the attention the Mexican government has given to this trilateral initiative between the U.S., Mexico and Canada. Since the March 2005 launch of the SPP, various working groups on various issues have been established. An IPR “action strategy” was compiled and presented at the April 2007 SPP Summit in Mexico.⁶ Three broad action items were identified: (1) detecting and deterring trade in pirated and counterfeit goods; (2) undertaking public awareness and outreach to the business communities, and (3) measuring piracy and counterfeiting.

Anti-Counterfeiting Trade Agreement (ACTA): Mexico has been a supporter of another multilateral IPR initiative. On October 23, 2007, the United States and some of its key trading partners, including Mexico,

¹ The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA’s 2008 Special 301 submission at www.iipa.com/pdf/2008spec301methodology.pdf. For information on the history of Mexico under Special 301 review, see Appendix D at (<http://www.iipa.com/pdf/2008SPEC301USTRHISTORY.pdf>) and Appendix E at (<http://www.iipa.com/pdf/2008SPEC301HISTORICALSUMMARY.pdf>) of this submission.

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

³ ESA’s reported dollar figures reflect the value of pirate product present in the marketplace as distinguished from definitive industry “losses.” The methodology used by the ESA is further described in Appendix B of this report.

⁴ BSA’s 2007 statistics are preliminary. They represent the U.S. software publishers’ share of software piracy losses in Mexico, and follow the methodology compiled in the Fourth Annual BSA and IDC Global Software Piracy Study (May 2007), available at <http://w3.bsa.org/globalstudy/>. These figures cover, in addition to business applications software, computer applications such as operating systems, consumer applications such as PC gaming, personal finance, and reference software. BSA’s 2006 piracy statistics were preliminary at the time of IIPA’s February 12, 2007 Special 301 filing and were finalized in June 2007 (see <http://www.iipa.com/statistics.html>), as reflected above.

⁵ MPAA’s trade losses and piracy levels for 2006 and 2007 are not available. MPAA did provide 2005 estimates for a select group of countries, using a new methodology that analyzed both physical/“hard goods” and Internet piracy. Details regarding MPAA’s methodology for 2005 and prior years are found in Appendix B of this IIPA submission.

⁶ SPP IPR Action Strategy, April 2007, posted at http://www.spp.gov/pdf/spp_ip_strat_final.pdf. For more information on the SPP generally, visit the SPP website at <http://www.spp.gov/>.

announced that they will seek to negotiate an Anti-Counterfeiting Trade Agreement (ACTA).⁷ This effort will not involve any changes to the TRIPS Agreement. Instead, the objective is to set a higher benchmark for enforcement. Countries can join such an agreement on a voluntary basis.

COPYRIGHT PIRACY IN MEXICO

There was continued good cooperation between industry and the police as well as with the IMPI in 2007. This cooperation, however, did not result in effective anti-piracy results in the criminal sphere. Piracy remains entrenched, with 2007 reflecting, yet again, no significant improvement. To bring down Mexico's piracy levels, it is essential to attack manufacture, distribution, sale and importation. Notwithstanding the immense piracy problem and despite many, many raids taken by police, prosecutions remained very few.

Street piracy: A major problem throughout Mexico involves widespread, and well-entrenched, street piracy. The main distribution centers for optical disc piracy are well known to law enforcement authorities: Tepito, Plaza Meave, Eje Central, Plaza de la Computación, Lomas Verdes in Mexico City, CAPFU in Puebla, Las Pulgas in Monterrey and San Juan de Dios in Guadalajara. Although Tepito and San Juan de Dios remain dominant sources for the manufacture and commercialization for different types of illegal products, Plaza de la Computación and Plaza Meave are growing. There remain at least 80 very large, very well-known, "black markets" in Mexico, many of which are well organized and continue to be politically protected. By some estimates, there are an estimated 50,000 points of sale involved with distributing infringing copyrighted materials. Raids in Tepito and other large pirate markets are only conducted at night, as it is unsafe for law enforcement to run actions during the day. Such raids are largely ineffective as the same shops reopen and simply continue their business. While the safety of law enforcement personnel is extremely important, there must be a fundamental shift in the manner in which these raids are conducted. Otherwise, it will remain an unending cycle of raids and seizures with no real impact on the prevalence of piracy in the market. There must be a counterweight to the unimpeded growth of these markets. The street markets should be subject to better local control, both at the municipal and state levels. It is very important for the Mexican government to design a high intensity enforcement plan for Tepito to systematically identify and prosecute criminal organizations operating in that market.

Optical media exports: Mexico imports much of its blank media from Southeast Asia (China, Taiwan). It is estimated that Mexico imported approximately 800 million blank media units in 2006, most of which are used to create pirated product. Industry does not yet have final 2007 statistics, but it is estimated that approximately 1 billion units of blank CD-Rs and DVD-Rs were imported by Mexico. Most of the product comes from Taiwan and the main ports of entrance are in Manzanillo, Matamoros, Reynosa, and Laredo. Interestingly, much of this media enters Mexico via the US to benefit from the NAFTA and to avoid taxes. In addition, Mexico is an exporter of pirated products to some Central American countries, especially Guatemala.

Organized Crime: The street markets (above) are very well structured, with discrete distribution chains, indicating in many cases that organized criminal syndicates are involved. The recording industry, led by AMPROFON (IFPI's national group) has devoted a lot of its resources to research the organized mafia behind the importation, distributions and recording of burned CD-Rs. One major case has been delivered to the Attorney General. The case involves a complex investigation initiated against a network of companies and individuals responsible for the importation of about 80% of the CD-Rs/DVD-Rs in the Mexican market.

Internet Piracy: The number of Internet users in Mexico increased by 17.5% in 2007, from 20.2 million in 2006 up to 23.7 million in 2007.⁸ The recording industry estimates that some 2.6 billion songs were illegally downloaded in Mexico last year. Approximately 20% of those songs were downloaded and burned in cybercafes. The industry is working with IMPI and PGR to reduce this activity which led to a number of raids against infringing cybercafés. In addition, the local industry group (Amprofon) launched a posters campaign to raise awareness of the problem among cybercafes' owners and customers in the hope it will lead to less piracy.

⁷ USTR, "Ambassador Schwab Announces U.S. Will Seek New Trade Agreement to Fight Fakes," October 23, 2007, at http://www.ustr.gov/Document_Library/Press_Releases/2007/October/Ambassador_Schwab_Announces_US_Will_Seek_New_Trade_Agreement_to_Fight_Fakes.html?ht=.

⁸ Source: Mexican Internet Association/Asociación Mexicana de Internet (AMIPCI) at www.amipci.org.mx

Internet downloading in Mexico is not yet a big problem due to the low broadband penetration, but it is growing rapidly. Nevertheless, Internet poses two major challenges: (1) the sales of counterfeit hard goods and (2) the use of Internet for distribution of new releases, subtitles, covers and dubbed versions.

Audiovisual piracy: The Motion Picture Association (MPA) reports that the main piracy problem in Mexico for its members remains the huge hard goods distribution in the black markets and street vendors, and their association with organized crime; that piracy rate is estimated around 90%. Despite such severe piracy, the home entertainment and theatrical markets were stable in 2007, but at levels far below their real potential rates. Mexico has the most prolific camcord piracy problem in Latin America. Since 2005, 26 of MPA members' films have been stolen from Mexican theaters. Copies of these films are quickly distributed on the Internet and reproduced into illegal DVDs for worldwide consumption. Due to its proximity to the U.S. and the importance of Mexico's theatrical market (which is the fifth largest worldwide), the major blockbuster release dates are approaching those in the U.S. Therefore, Mexico has become a potential primary source of Spanish-dubbed or subtitled copies for other Spanish-speaking countries. Internet piracy is also a growing concern and notably at Internet cafes where many proprietors are aware of illegal activity and encourage it by offering blank discs to users to burn copies of motion pictures and television programs.

Piracy of sound recordings and musical compositions: The recording industry reports that burned CD-Rs and DVD-Rs continue to be the format of choice for almost all pirates in Mexico. Recording and music piracy in Mexico represents \$527 million in losses, with an overall piracy rate of 71%. Tepito has continued to be a major problem for the recording industry for far too many years; it accounts for approximately 65% of the pirate music product manufactured and distributed in the country. Physical piracy is estimated at 71% of the market, which represents an increase of four percentage points compared to previous year. Approximately 120 million copies of pirate CD-Rs are sold every year, mainly via street piracy. Internet piracy has become a pressing problem, too. A recent survey conducted by IPSOS-BIMSA concluded that 2.6 billion songs were illegally downloaded in Mexico between October 2006 and October 2007. Recording industry estimates the increase of Internet piracy in 2007 at 67% compared to the previous year. P2P piracy is dominant in this sector, with ARES and LIMEWIRE as the preferred choice of file-sharing software. Another form of digital piracy involves cyber lockers where "Rapidshare" and "Megaupload" are the dominant players. The combined effect of physical and Internet piracy has caused another major decrease in the market. Sales in local currency dropped by 23% and 22% in units. In the last two years, piracy caused the market to shrink by 33% in value and 41% in units.

Business software piracy: The Business Software Alliance (BSA) reports that its legitimate market for business software applications in Mexico has been affected by under-licensing, street markets, illegal resellers and Internet piracy. Local software creators are facing a considerable difficulty in commercializing their products, as the illegal market is gaining market share and power. Additionally, local resellers find it difficult to reach their business goals, since a majority of the consumers are buying and using illegal copies. This industry also reports problems with Tepito and San Juan de Dios, which serve as manufacturing (burning labs) and selling points for pirated software. According to a 2008 report issued by BSA-IDC, the information technology sector's contribution to the Mexican economy could be even bigger if Mexico's PC software piracy rate were lowered by 10 percentage points over the next four years. This would create an additional 3,500 jobs, \$1.5 billion in local industry revenues and \$159 million in additional tax revenues for federal, regional, and local governments.⁹ Last year, BSA partnered with IMPI, achieving unprecedented results, a record number of inspections and wider geographical coverage. Teaming up with INDAUTOR has produced a high volume of conciliations, with good results, quantitatively and qualitatively. Additional staffing in both governmental agencies is necessary (particularly inspectors and, at INDAUTOR, mediators and mediation rooms). Government officers need to be more empowered to conduct investigations and raids, to issue resolutions and impose sanctions whenever applicable. BSA reports that preliminary estimated trade losses due to business software piracy in Mexico were to \$425 million in 2007, with an estimated piracy level of 61%. BSA believes that its active anti-piracy operations and good cooperation with Mexican administrative authorities has helped keep business software piracy in-check in this market.

⁹ The Economic Benefits of Reducing PC Software Piracy, commissioned by BSA and conducted independently by International Data Corporation (IDC), released January 22, 2008, looks at the bottom-line economic benefits of reducing piracy in 42 countries that together account for more than 90 percent of global IT spending in 2007. It is available online at <http://www.bsa.org/idcstudy>.

Entertainment software piracy: Entertainment software piracy on all platforms remains at a very high level, remaining unchanged from previous years, despite the industry undertaking increased enforcement efforts in the country. Many of the well known markets, such as Tepito and Plaza Meave in Mexico City, are also notorious production points and wholesale distribution centers of pirated games. The most damaging form of piracy is hard-goods, as evidenced by the enormous quantities of burned optical discs and counterfeit cartridges that are present in the market. The industry's enforcement work has revealed that large pirate operations are manufacturing optical discs locally through the use of CD and DVD burners and distributing them to a vast network of retailers through a variety of means, including Mexican courier companies. Local CD-burning is common for console and PC games. Counterfeit cartridges continue to be imported from Asia, often in components which are then assembled in Mexico. In 2007, there were multiple customs seizures in the U.S. and Belgium of counterfeit Nintendo components intended for shipment into the country. Despite the flood of such counterfeits, there have been few seizures at the border due to the Customs agency's limitations in inspecting suspect shipments and its inability to take *ex officio* action against pirated and counterfeit entertainment software products. It has also been difficult to take action against Mexican importers as the shipped goods are typically accompanied by fraudulent documents, containing false information. Customs brokers appear to be involved in suspect shipments, shielding pirates from detection by law enforcement authorities. Such brokers should be held accountable for their role in facilitating the shipment of suspect goods. Another significant problem is circumvention activity, which involves the bypassing of technological protection measures that the industry uses to protect its copyrighted games. This is often done by the installation of "modification chips" in consoles, which enables them to play pirated games. This activity occurs openly in many markets, alongside the sale of pirated games. The entertainment software industry is unable to bring enforcement actions against individuals and businesses that engage in circumvention activity, given that Mexican criminal law does not clearly prohibit the distribution and sale of circumvention devices and software. The Entertainment Software Association (ESA) estimates that the value of pirated videogame product in the Mexican marketplace was \$273 million in 2007, with an 88% piracy rate.

Book and journal piracy: Illegal photocopying of academic materials remained a significant problem for the book and journal publishing industry in 2007. On-campus photocopy facilities, both commercial and noncommercial, are regularly used to make photocopies far exceeding permissible levels even under the deficient provisions of the copyright law. Copy shops in and around most major universities routinely undercut the market for legitimate texts. Universities too often condone, either directly or indirectly, infringing activity on campus. In some cases, materials taken from U.S. books are posted on the institution's intranet for classroom use, without permission and without payment to the publishers. Both enforcement officials and education/university officials should take a more active role in fighting this unauthorized reproduction, especially activity occurring on campus or using campus facilities. Universities should implement policies discouraging this activity, complete with consequences for those who engage in it. The local reprographic rights organization (RRO), CEMPRO (*Centro Mexicano de Protección y Fomento a los Derechos de Autor*), established in mid-1998, started collecting small amounts of licensing royalties in 2001. These payments remain voluntary, and are thus not a reliable source of revenue for legitimate companies, though some publishers report that payments have improved a bit. IIPA estimates that book piracy losses in Mexico were \$41 million in 2007.

COPYRIGHT ENFORCEMENT IN MEXICO

The copyright industries believe it is very important to acknowledge those Mexican agencies which have been performing well on the anti-piracy front. The federal agencies, with some exceptions, have been taking actions and working with rightsholders. Work done by the PGR and IMPI is improving. However, the same accolades cannot be shared with the courts; a very serious problem at the federal level remains civil and criminal judges' lack of knowledge about copyright. Mexico is overdue on establishing a real training program for its judges and other judicial system officials.

Furthermore, anti-piracy actions taken by the States continued to be weak in 2007. Only four of the 32 State governments appear to be interested in combating illegal trade and piracy: the State of Mexico, the Federal District, Jalisco and Puebla. Enforcement at the municipal government level is even worse. Mexico has 2,400 municipal governments, and about 190 of them have populations of over 100,000 inhabitants. Each one of these municipalities has regulations related to commercial establishments, markets and street vendors. However, even with regulations in place and inspectors to enforce them, local anti-piracy actions have not been

taken. Unfortunately, many of these local governments deflect their responsibility entirely, insisting that enforcement should be done only by the PGR.

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

Criminal enforcement and work with the police and PGR: A major structural impediment to enforcement remains in that piracy is still a “private” offense and a complaint (*querrela*) must be prepared by the rightsholders and filed with the PGR before they consider conducting a raid. Mexican law does not provide for *ex officio* action which forces copyright owners to incur high legal costs in pursuing any piracy case. For years, the industries have been supporting amendments to the criminal code which would permit *ex officio* actions.

The industries all continue to report generally good cooperation with federal police in various jurisdictions around Mexico. The PGR interacts directly with industry through its anti-piracy coordinating committees, especially at the state level. These committees have proved effective in several states, including Nuevo Leon, Morelos and Puebla, in allowing the private sector both to communicate and to direct some PGR action against street piracy. By order of the Assistant Attorney General for Regional Offices, each state PGR office has specific anti-piracy goals for the year (investigations, seizures, but notably, not arrests or indictments), including monthly meetings with the local private sector affected by piracy.

Another PGR unit, PGR-SEIDF (the “Subprocuraduría” Specialized in Investigation of Federal Crimes), has worked with industries and achieved significant results. SIEDF includes the Specialized Piracy Unit, with which has achieved results against piracy in the main black markets such as Tepito, San Juan of God, Simitrio, Capu, etc. However, this unit does not have sufficient personnel nor the capacity to dismantle the main networks of organized crime, which are closely associated with the black markets. In 2004, the PGR empowered its Organized Crime Investigative Division, PGR-SIEDO, to investigate piracy and develop systematic coordination with the private sector. This division has some of the PGR’s best investigators and attorneys and has resources that the other divisions do not have, such as paid informants, wire-tapping authority and witness-protection programs.

The recording industry reports some positive news. During 2007 the Mexican authorities responded to more requests for raids, increasing their work on these matters by 15%, up to about 3,300 operations. However, the amount of seized product decreased slightly by 20% from 43 million units in 2006 to 34 million units in 2007. The number of convictions in recording piracy cases also dropped sharply last year, from 23 people in 2006 to just 5 in 2007. With respect to Internet enforcement, in early January 2008, a judge in Cuernavaca placed under arrest an alleged pirate who was posting infringing music, movies, television programs and software. Seizures in this operation included over 3,000 recorded CD-Rs, 400 blank CD-Rs, 153 DVD reproducers plus other equipment.

This industry calls attention to three key problems with Mexico’s approach to anti-piracy: (1) the police and PGR have insufficient resources to conduct operations; (2) there are no organized anti-piracy campaigns by state and municipal governments; and (3) nothing long-lasting and effective has been done to eliminate the 50,000 points of sale offering illegal music. The industry does appreciate the many coordinated actions and raids taken against the embedded street piracy problem, yet the goal should be deterrence and shutting down these street operations. One recent action took place on February 1-5, 2008; as part of a coordinated multi-task force operation, Mexican authorities executed several major raids in two of Mexico City’s most contentious pirate markets, namely the “Bazar Pericoapa” and “Bazar Lomas Verdes.” These raids were significant in that aside from a voluminous amount of seized pirate movies and music seized, 29 commercial establishments were judicially closed by the PGR, and will remain closed for the entire length of the judicial process. With assistance from our local anti-piracy group, a total of 175 law-enforcement personnel participated in these raids that included elements from the PGR, the Investigation Agency (AFIS), the Federal Preventive Police (PFP), as well as local and state police. One person was arrested during this operation.

The motion picture industry also reports that its relationship with the PGR is excellent. Although piracy is not yet an *ex officio* crime, PGR has carried out several raids on movie piracy without a formal complaint filed by MPA, which was later done with powers of attorneys from the local distributor Distrimax. Some very impressive raids were conducted in Tepito and La Cuchilla, the largest pirate markets. PGR seized more than 7,500 burners. Another interesting initiative carried out by the Municipality of Mexico City is the "expropriation" of downtown venues used by pirates; this effort aims to transform the old pirate markets into legal product distribution centers. Due to administrative changes at MPA's Mexico program, formal statistics on its raids in 2007 are not available. The PGR has developed an anti-piracy advertising spot, which provides a toll free number for anonymous tips.

The ESA's anti-piracy enforcement program had several noteworthy actions in 2007 and early 2008. In May and October 2007, the PGR and ESA's local representative raided Bazaar Pericoapa, seizing close to 17,000 pirated burned game discs, and several hundred pieces of piracy paraphernalia (such as burners, blank CDs, video game catalogues, TV sets, computer screens, consoles, and blank CD-Rs). Two raids were conducted in November 2007 in the Plaze Meave area, one at the market and the second at warehouses in the vicinity. The first raid was cut short as vendors, hearing word of the raid, descended on the site and became violent. The two raids resulted in the seizure of almost 140,000 pirated games. PGR has also been undertaking a series of street raids for a number of industries, including entertainment software. Two such street raids in Mexico City, near Metro La Raza, resulted in the seizure of large quantities of pirated and counterfeit products (between 26,000-32,000, half of which were video games). Earlier this year, PGR, with the assistance of ESA's local representative, again Bazaar Pericoapa, seizing about 4,000 items including pirated PC and console games, two computers/DVD burners used to manufacture pirated games, catalogs and blank discs. The PGR initiative against street vendors resulted in a raid on Lazaro Cardena Avenue (in early January 2008), and the more immediate estimates available put the seizure total for pirated and counterfeit video games at about 13,750 (among the 55,000 pieces of other counterfeit and pirated products seized). In addition, PGR seized nearly 3,000 burned Xbox games in two separate shipments to the same individual at a Mexico courier service's distribution center in Manzanillo. The shipping information suggests that an organized crime syndicate in Mexico is using courier services to distribute pirated games within the country.

BSA has achieved a closer collaboration with the State Authorities, especially in Jalisco. There are plans to expand these campaigns to Nuevo León and the State of Mexico. BSA, however, is not taking criminal actions at the municipal level. In 2007, BSA member companies brought more than 75 criminal actions, including street sweeps, system builder channel actions, warehouses and labs.

SHCP and Customs: Historically these entities have not been involved in domestic actions. Cracking down on tax evasion is a motivation in fighting street vendors, and that would suggest a motivation for SHCP to get more involved. In early January 2008, Customs authorities at the Mexico City International Airport detained hundreds of individually shipped boxes suspected of containing pirated and counterfeit game software and hardware that was sent through a courier company. The shipments do not appear to be related as the boxes had different shippers and importers. Upon inspection, it was determined that the boxes contained pirated and counterfeit Xbox 360 and GBA titles. The seized products remain with the Customs authorities, though the industry has requested exemplars and shipment documentation for further analysis to determine whether they will yield investigative leads with respect to the consignee, the shipper and perhaps the manufacturers.

PROFECO: The Attorney General of Consumer Affairs (PROFECO) has the authority to take *ex officio* actions against black and informal markets, including the powers to seize product, close markets, and issue sanctions. PROFECO has been instrumental in identifying pirate product for the municipal authorities to take action on the license revocation programs in four key municipalities making up metropolitan Guadalajara. PROFECO should get much more actively involved in fighting piracy at the street markets, especially in Mexico City, Puebla, Guadalajara and Monterrey. PROFECO's *ex officio* powers could be used to address widespread street piracy; however, the lack of concrete actions leads to the conclusion that PROFECO does not have political will to adopt effective measures against piracy.

Anti-piracy efforts at the State level: In January 2007, Metro authorities resumed internal operations against piracy. With nearly 200 stations and 4 million daily users, the metro system is occupied by between 6,000–

8,000 pirate vendors. Thanks to the support of the Metro police, a large volume of pirate products have been seized and five important leaders of thirteen organizations that sell piracy have been arrested.

Few prosecutions and fewer convictions: Although the PGR increased its commitment to seize pirate product from street markets, effective case preparation, indictments and prosecutions are still far below the needed commitment to have any significant effect. The obvious problem remains -- few criminal prosecutions are brought by the PGR.

As the recording industry reported (above), the number of convictions in their cases dropped sharply, from 20 people in 2006 to just 4 in 2007. BSA only obtained one conviction (3 years in prison). Several years ago, the one measure under the revised penal code that represented some positive traction was that the possibility of bail has been removed for those indicted for criminal copyright infringement. Unfortunately, the copyright industries continue to report that the Mexican judiciary continues to view copyright infringement as a minor offense, and issues very few deterrent sentences. Mexico should consider adoption of mandatory sentencing regulations, or the Supreme Court itself should set out recommended guidelines.

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

Business software sector: BSA reports that 2007 continued to reflect excellent cooperation with IMPI. The business software industry appreciate the coordination and assistance of IMPI that resulted in an unprecedented volume and quality of cases. The volume of actions increased dramatically in 2007. BSA reports that for 2007, IMPI took approximately 1,095 *ex officio* raids and another 119 full raids. IMPI is conducting more than 200 *ex officio* visits monthly on software matters.

Another area of enforcement improvement involved fewer door closures in 2007. Over two years ago, there was a favorable court case that enhanced IMPI's enforcement ability. In the case of AOS SOLUTIONS, the court held that the authorities can presume an infringement in the event that the defendant closes its door and does not allow said authorities to conduct an inspection. IMPI subsequently implemented this criterion, and in 2007, BSA noted tangible results in IMPI's ability to enter target premises. IMPI has begun to impose fines on door closers, shortly after the raid. The amount of the fines is also increasing considerably. The imposition of immediate, exemplary fines on door closers is a positive development. In fact, codifying the AOS Solutions ruling (the presumption of validity of complainant's accusations in the event of door closing) in the law would be of great assistance. In addition, BSA would like to see legislative amendments made so that IMPI officers are able to amend the address and other identification information of the alleged infringer, at the time and site of the inspection. The two witness requirement should also be eliminated.

BSA also worked with IMPI on diverse anti-piracy campaigns, including the audit of the software used by the Government of Jalisco. The title of this campaign was "The example begins at home." During this campaign, 3,750 of a total of 6,000 computers were audited. Additionally, IMPI conducted its own independent audit and the results were delivered to the Governor of Jalisco during a press conference in December 2007. BSA also has been working with IMPI and the American Chamber of Commerce in creating a National Survey regarding consumer piracy. IMPI and BSA have implemented diverse anti-piracy campaigns for youth of ages 15 to 25 years (Digital Animation Campaign: It All Starts With An Idea, And It Could Be Yours), as well as for kids between 6 and 12 years old (IMPI's IP kid inspectors campaign).

Sound recording sector: The recording industry reports that the level of cooperation from IMPI is excellent, especially in the area of "cyber-cafes" offering illegal downloads via P2P networks. AMPROFON and IMPI recently signed an agreement to conduct 80 administrative procedures every month against the illegal downloading on cyber-cafes, mainly in the capital city area.

Entertainment software sector: ESA continues to have a positive level of cooperation with IMPI, though given the nature of the industry's piracy problem in the country, much of the action in 2007 was focused on efforts through PGR. The ESA participated in IMPI's IP inspectors campaign and supported the Digital Animation Campaign: It all Starts With An Idea, And It Could Be Yours, which also involved BSA and IMPI.

Motion picture sector: Due to administrative changes within the MPA program in Mexico, there have not yet been any significant joint efforts with IMPI or INDAUTOR. However, in 2007, IMPI conducted some educational pilot projects with the full engagement of MPA representatives in Mexico. Also, MPA is working with IMPI to bring punitive administrative actions against businesses that import Zone 1 DVDs from the U.S. and sell them in Mexico before their established release dates. This practice is damaging to the local distributors of member company product. Moreover, MPA would welcome the opportunity to collaborate with the Government of Mexico on an anti-camcording campaign, which would benefit both Mexican and U.S. filmmakers, as well as Mexican theater owners. Finally, MPA plans to work closer with IMPI during 2008, not only on administrative actions, but with educational efforts, including possible anti-camcording initiatives.

INDAUTOR--conciliations in software end user cases: During 2007, BSA worked with INDAUTOR and held approximately 192 conciliation meetings (*Juntas de Avenencias*) with end users. These actions are an alternative to litigation, and parties are given the opportunity to talk about a specific infringement situation and reach an amicable solution. With respect to improving its activities in this realm, INDAUTOR should consider:

- Creating a new Center to handle arbitrations, mediations and negotiations, both physically and electronically.
- INDAUTOR needs more conciliation rooms (*salas de avenencia*), and more mediators.

INDAUTOR other operations: It is important that INDAUTOR continue to train, and receive training for, its staff on key copyright matters. With respect to public awareness initiatives, it should consider the following:

- Conduct seminars to clarify copyright legislation to civil and criminal judges.
- Issue general information to the public about copyright and collective management of rights.

INDAUTOR is also responsible for supervising the collecting societies in Mexico. In this regard, INDAUTOR continues to be a source of concern for the recording industry. For example, INDAUTOR has not yet issued rates for the exploitation of sound recordings in TV and radio stations, and this overdue action has contributed to confusion in the market. INDAUTOR should be encouraged to:

- Issue the tariff rates for the performance of sound recordings by TV and radio stations in Mexico, rates requested a long time ago by SOMEXFON, the society representing record producers.
- Provide information to companies and individuals currently exploiting sound recordings in Mexico without a license.

Border efforts to track blank optical grade media: Given the growth of optical disc (OD) piracy in Mexico, it is important to track imports of blank ODs. The recording industry negotiated an agreement in 2002 with the Mexican finance ministry (which includes Customs) to address the problem of pirate CD-Rs. This agreement called for reducing the number of ports of entry for CD-R and CD burners, to 15 (down from 52) as well as providing training and assistance to Customs authorities. The recording industry reports that this agreement, along with additional support from IMPI actions with Mexican Customs, have contributed very positively to the seizures of large shipments of blank CD-R products (IMPI coordinates actions with Customs under the Industrial Property Law, and Customs conducts the actual confiscations). Most of the seizures are due to fraudulent invoices, undervalued product and/or NAFTA violations. (Prior to 2006, NAFTA was being used by blank optical media importers to avoid import duties claiming that the optical disc shipments entered Mexico as an unfinished product which needed assembly. The alleged assembly consisted of placing the blank optical disc in a clear plastic jewel boxes with a label. A portion of these products were re-exported back the U.S., but some worked its way to the pirate markets.)

PGR is leading a task force consisting of Customs, the Ministry of the Economy and private sector representatives (music and film), to monitor and develop intelligence on blank media imports. Also, it is important that U.S. and Mexican customs start to work together not only to prevent Mexican exports of pirate movies to the U.S. Latin Market, but also to put a control of blank media exports from Southeast Asia that passes through the U.S. to avoid tax burdens.

Improve border enforcement generally: Formal requirements to initiate actions are onerous. Customs does not seize infringing product entering the country without an official order from IMPI; this is true even in cases where the product is clearly infringing. Because IMPI does not issue immediate authorizations to seize products

which have been identified by Customs as infringing, the suspect merchandise is usually allowed to enter the country because Customs does not have authority to detain the shipment for more than a few hours. There must be greater cooperation between these two agencies in order to improve border enforcement, and to expedite the procedures by which Customs may make immediate seizures of clearly infringing products.

COPYRIGHT AND RELATED LAWS IN MEXICO

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

Current Legislation

Federal Law on Copyright (1996, as amended) and its regulations: Amendments to Mexico's 1996 copyright law entered into force on July 24, 2003. The copyright industries worked diligently to shape some of the more troubling parts of this legislation. Two bright notes in those 2003 amendments included the extension of the terms of protection for works and objects of related rights, and the deletion of a deleterious proposed private copying levy. Regulations to implement the 2003 amendments were issued two years later, in September 2005. Mexico acceded to both the WIPO Treaties (the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty) in 2002.

Mexican government officials have indicated that that it is possible that they might consider initiating a long-term process to revise the Mexican Federal Copyright Law. The 2003 copyright law amendments failed, however, to address the comprehensive reform needed by Mexico to: (1) effectively implement the obligations of the WIPO Treaties (of which Mexico is a member), and (2) correct existing deficiencies in the law with respect to Mexico's obligations under the NAFTA Intellectual Property Chapter and the WTO TRIPS Agreement. Any reform should include ISP liability and create notice and takedown procedures, a comprehensive making available right, and civil and criminal sanctions on the circumvention of technological protection measures and removal or alteration of electronic rights management information. The copyright industries request that any such initiative involve public comments and that the process be as transparent as possible.

Organized crime law (amended in 2004): On December 3, 2002, the Mexican Chamber of Deputies approved legislation to amend the Mexican organized crime legislation to include copyright piracy. The law (which appears in Article 424*bis* of the Federal Penal Code) was finally signed on April 4, 2004, entering into effect on May 12, 2004. This means more power and local resources to fight copyright piracy. Copyright pirates could face 20-40 years in jail, in addition to the penalty for the underlying IP crimes, if organized crime elements in piratical behavior are proved; this would represent an increase from the prior 12-year maximum (note: the maximum imprisonment penalty for software piracy is 10 years). This reform also gave Mexican police three new enforcement tools: holding suspects under house arrest for up to 30 days, tapping phones, and protecting witnesses (without the suspect/defendant knowing the witness's identity).

Pending Legislation

Bill to amend the criminal code to provide for *ex officio* copyright actions: A bill to amend the criminal code to increase criminal penalties for copyright infringement and to give *ex officio* authority to the police to pursue copyright infringement actions was presented to the Mexican House in 2004. This bill is extremely necessary for the copyright because rightsholders will not have to file criminal complaints for every case of infringement. Such authority will also have the benefit of expanding anti-piracy nationwide. Since its introduction, it has finally received approval by the House of Deputies, and after that, was sent to the Senate where further changes were made. The bill was returned to the House and is presently at the Commission of Justice in the House.

Bill to amend the criminal code to establish sanctions for anti-circumvention: A bill to amend the Mexican criminal code to establish criminal sanctions for the circumvention of technological protection measures (TPMs) was introduced in 2004, approved in the House in 2005, and is still pending in the Senate. Further work

was needed on this bill to better reflect the scope of what the industries view as an effective anti-circumvention bill. Additional amendments were then proposed to better capture the kinds of acts which could circumvent TPMs, including devices, components and services. (The current Mexican copyright law does provide some civil anti-circumvention measures but these are only applicable to computer software, not other copyrightable subject matter; this is why further amendments to the criminal code as well as to the copyright law are required for full WIPO Treaties' implementation.)

Bill to amend the criminal code to provide protection against unauthorized camcording in theaters: MPA is sponsoring a bill which amends the Criminal Code to punish with a prison term from 3 to 10 years and fines the unauthorized cam-cording of films in theaters; the respective legal action would be *ex officio*. The bill was approved by the House of Deputies and has stalled in Chamber's Justice Committee.

Bill to amend the copyright law regarding technological protection measures (TPMs): Already approved by the Chamber of Deputies, a bill has been proposed to amend the copyright law to grant the right to authors, performers and record producers the ability to apply technological protection measures to their works, performances and sound recordings. However, much more work is needed on this bill to better reflect the scope of what the industries view as an effective anti-circumvention bill, including sanctions against the circumvention of TPMs, and removal and alteration of electronic rights management information. This bill should be treated simultaneously with the initiative to establish criminal sanctions for circumvention activities (discussed above).

Bill to exempting IP matters from the Federal Law of Administrative Procedure: A bill that would exempt IP matters from the Federal Law of Administrative Proceeding has been approved by one Chamber. Removing IP from the scope of this law would reduce the time required to prosecute IP infringements. Reportedly IMPI also supports this bill.

ISP liability initiative: It is important to clarify the liability of ISPs when they have actual knowledge of specific infringements and they refuse to respond appropriately to stop the illicit activities. There is an initiative (a project, not yet a formal bill) that is ongoing before the Communications Commission in the Senate that will be evaluating this issue.

Bill to amend the Law of Industrial Property: The current Law of Industrial Property does not expressly allow complainants to be present during raids, requires two witnesses in order for the raid to be valid, and is complex when it comes to amending the address and other identification information of the alleged infringers. BSA is working on a bill to raise penalties, establish guidelines, minimum penalties and standards for issuing administrative fines. Special fines should be imposed on individuals and establishment who deny entry (close their doors) and conceal evidence during administrative inspections. IMPI inspectors should have more robust powers to conduct raids, actions, issue decisions and impose higher fines.

Bill to remove the private copy levy and the "lucro" (for profit) requirement in the copyright law: In 2006, an amendment to the Copyright Law was presented before the House of Deputies which would remove Article 40 (which establishes a private copy levy) as well as the onerous "lucro" (for profit) requirement (a high standard required in order to bring an infringement action) from the current law. At last report, this initiative, supported by the copyright industries, is still pending before the Education Commission of the House of Deputies, but does not seem to have any momentum. .

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

Software legalization decree in government ministries: The Mexican federal government is among the most “legal” in all of Latin America with respect to its software licensing efforts. However, Mexico has never issued a government legalization decree. Mexican states and municipalities should make further progress on legal software use, following the example of the Government of Jalisco. Self audits, which organizations can perform with Software Asset Management (SAM) tools, not only help governments operate more efficiently, but set an example for the public and private sectors.

IPR TRAINING AND PUBLIC AWARENESS

Copyright industry associations and companies regularly conduct training and informational seminars for Mexican enforcement authorities. BSA offered specialized training seminars for IMPI and INDAUTOR officers regarding technical and legal aspects of software programs, servers, licensing models, and new developments in the software area. MPA organizes training sessions frequently, from occasional large general sessions to frequent small, practical training sessions for identification of pirate product for seizure purposes; MPA trained about 100 people last year. The recording industry also carried out seminars for judges, trade officials and personnel from IMPI, the PGR and PROFECO. The entertainment software industry conducted numerous training sessions for Customs and PGR on the various forms of game piracy and methods of detecting pirated games and circumvention devices.

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2008 SPECIAL 301 REPORT

PEOPLE'S REPUBLIC OF CHINA (PRC)

Special 301 Recommendation: IIPA recommends that USTR maintain China on the Priority Watch List in 2008.

PRIORITY ACTIONS TO BE TAKEN IN 2008

- **Bringing a Significant Number of Criminal Prosecutions, Both for Online and Hard Goods Piracy of U.S. Works:** China's unwillingness to bring a significant number of deterrent criminal cases continued in 2007. If any meaningful change is to occur, China must refer many more cases for criminal prosecution and prosecute them aggressively. This is becoming particularly critical in the area of Internet piracy which continues to grow at alarming rates. Only through these actions can China meet its 2004 JCCT commitment to "significantly reduce IPR infringements" (and its TRIPS obligations) in the near term. In particular, criminal cases must be brought in the following areas:
- **Significantly Increasing the Criminal Prosecution of Infringements on the Internet and Mobile Services:** Stemming Internet piracy¹ in China has become the number one priority for most of the copyright industries. Such piracy is growing and must be significantly reduced, not only by administrative enforcement by the National Copyright Administration of China (NCAC), but also through the vigorous prosecution of criminal infringements. However, without proof of infringement satisfying China's still high threshold requirements, law enforcement agencies are unwilling to take actions against alleged Internet infringers. This problem is further exacerbated by the lack of power on the part of rights holders to investigate the content or to seize the servers of alleged infringers to preserve the evidence. There is an urgent need for a new and separate Judicial Interpretation to deal with guidelines for criminal cases involving the Internet. China is obligated under TRIPS to use its criminal law against "copyright piracy on a commercial scale." While a few criminal cases have been brought and convictions obtained, the dearth of prosecutions continues unremedied. Cases should be brought against Internet café owners — notorious centers for piracy of music, games and movies -- and against websites, FTP sites, UGC sites, search engines inducing infringement, and major P2P services, including P2P streaming sites, and those who are major uploaders to those services.
- **Criminalizing and Prosecuting Software End-User Piracy:** China continues to insist that use of unauthorized software in a commercial business environment is not a crime. The Criminal Law need not be interpreted so narrowly and the SPC should clarify that such unauthorized uses involve unauthorized reproduction or distribution in violation of Article 217 of the Criminal Law and that prosecutions should proceed since virtually all instances of this kind of piracy are "on a commercial scale."
- **Bringing Many More Prosecutions Against OD Plant Owners Engaging in Unauthorized Production and Export of Pirate ODs:** Despite asserted administrative inspections (which, in any case, lack deterrence), OD piracy by China's factories continues unabated, despite significant and

¹ The term "Internet piracy" refers to all piracy on the Internet or through mobile communications platforms or similar technologies.

meaningful evidence presented by industry to Chinese authorities and China's claim that it inspects all licensed factories. The Chinese government should take effective and well-publicized action against factories pirating U.S. product to convey a strong message to the Chinese society and to pirate producers that illegal production will not be tolerated. China's tepid current enforcement efforts such as temporarily closing plants without any further action, as China did in March 2006, and its failure to commence factory criminal cases brought to it by some IIPA members, will not deter China's pirates. The authorities must seize and destroy the offending equipment and prosecute those responsible. Investigations must commence based on "reasonable suspicion" that a crime has been committed and prosecutions, convictions and deterrent penalties should ensue. China has forensic "footprints" of OD product produced by each licensed plant, as does industry. China has rejected, without explanation, proposals from industry and the U.S. government to cooperate in using this information to track down pirate producers. Such data should be made available; it would be of immense use in prosecuting and thus deterring OD factory piracy.

- **Significantly Increasing the Manpower and Financial Resources Available to the NCAC and to Local Copyright Bureaus to Improve Administrative Copyright Enforcement Against Piracy on the Internet as Well as Hard Goods Piracy:** Industry reports and surveys indicate, and the Chinese government has acknowledged,² that the 2006-2007 government campaign against hard goods and Internet piracy, though involving thousands of actions, raids and seizures, had only a minimal and temporary impact in the marketplace. NCAC's and the local copyright bureaus' resources (some with no more than five employees) are woefully inadequate to fight these types of piracy in China, and administrative enforcement must not be left solely to inspections by other agencies (such as the Ministry of Culture) for licensing violations. More Internet infringement training and investigations are critical. In particular, deterrent administrative penalties should be imposed upon ISPs when they do not expeditiously take down infringing materials upon notice from rights holders. Given the extent of piracy in China and the damage to the local as well as international creative industries, the underfunding and understaffing of NCAC is inexplicable and unfortunately leads to many failures.
- **Enhancing Pre-Release Administrative Enforcement for Motion Pictures and Sound Recordings, and Include Other Works as Well:** China promised to "regularly instruct enforcement authorities nationwide that copies of films and audio-visual products still under censorship or import review or otherwise not yet authorized for distribution that are found in the marketplace are deemed pirated and subject to enhanced enforcement." This should apply to all other subject matter including sound recordings and videogames, as an increasing number of pre-releases (before legitimate worldwide release) have been found to be distributed online from servers, websites, blogs, and forums operated in China. MPA reports moderate success in reducing pre-release piracy but this critical problem needs to receive even more focused attention and must be extended to other products. The recording industry reports that the sale of legitimate products is severely affected by the problem of pre-release piracy.
- **Clarifying Its New Internet Regulations to Ensure their Effectiveness and Implement them Aggressively with both Administrative and Criminal Enforcement:** The promulgation of the Internet regulations in July 2006 was a positive step. However, Chinese authorities should further clarify how they will be implemented and then implement them aggressively. The recent SPP "Guidelines" still leave many questions unanswered. The Chinese High Court properly interpreted these regulations when it upheld the civil judgment that Yahoo China was an infringer by deeplinking to infringing music files, although the damages awarded were woefully low and the scope of injunctive relief far too limited. But the authorities should clarify that services that permit conversion of infringing files (e.g. MP3s to ring tones, or ring back tones) are banned. It should clarify publicly with all ISPs that right holder notices of infringement may be served on ISPs by e-mail, and extend notices to telephone communication in cases of pre-release materials or in other exigent

² See http://www.chinadaily.com.cn/china/2008-01/18/content_6402839.htm.

circumstances. It should publicly clarify that “expeditious” in the Regulations means that ISPs must remove infringing content, or block access to it, in no more than 24 hours after receiving a notice. It should clarify that ISPs must restrict access to their systems or terminate the accounts of repeat infringers. Finally, it is critical that MII and NCAC maintain an accurate database of the many ISPs in China to ensure that notices can be filed in a timely manner.

- **Ensuring Use of Legal Software by Government, SOEs and other Enterprises:** China promised in the 2006 JCCT to begin the process of legalization of software in private and state-owned enterprises. China must implement this commitment fully. Today, the overwhelming majority of China’s state-owned enterprises continue to use pirated software. The government’s compliance mechanisms are at present weak and non-transparent. The basis upon which SOEs have been declared legal or “model” enterprises is unclear. Statements by officials urging SOEs to purchase domestic software contravene specific WTO commitments China made regarding non-discrimination in commercial purchasing of its state-owned enterprises. It is essential that enterprises and the government itself purchase the software being used, and use the software that is purchased, rather than using pirated software. Legalization within the government itself produced increased sales in past years, but that momentum has slowed dramatically. Compliance remains non-transparent and budgeting insufficient. Industry is prepared to partner with both enterprises and government to ensure Chinese entities realize the full value of legally licensed software. Certification based on effective software asset management programs should be part of effective compliance and legalization programs, as well as effective management programs. Legalization is by necessity an on-going process with no fixed end-point. Much work remains.
- **Legitimizing Book Distribution Practices on University Campuses:** In 2007, the General Administration of Press and Publication (GAPP) and the NCAC, in cooperation with local copyright bureaus and law enforcement authorities, continued to make forward strides in addressing the problem of illegal copying by university textbook centers. This cooperation should continue in 2008, with timely issuance of administrative decisions following raids, and with efforts to ensure that fines are deterrent. Furthermore, the Ministry of Education (MOE) should re-engage, in partnership with GAPP and NCAC, in the implementation of the August, September and November 2006 notices about illegal reproduction of textbooks, and enforcement actions should continue against universities that fail to fully implement the notices.
- **Amending the Criminal Law to Bring It into Compliance with TRIPS:** China must criminalize all copyright piracy “on a commercial scale,” including piracy involving acts not currently cognizable under China’s Criminal Law. The “for-profit” criterion for establishing a criminal offense should also be eliminated. An amended law should eliminate all thresholds or, at a minimum, ensure that they are low enough to criminalize all “copyright piracy on a commercial scale” as required by the TRIPS Agreement. China is the only country in the world that calculates a threshold for bringing criminal cases based on pirate profits and business volume at pirate prices; these criteria should be eliminated.
- **Allowing Investigations by Foreign Right Holder Associations:** Foreign rights holders cannot reasonably be expected to fully avail themselves of the Chinese legal system unless they can investigate suspected infringements. Regulations limiting activities (and number of employees) of the trade associations representing U.S. and other foreign rights holders should be, and can be, easily amended to permit them to fully cooperate with the government in fighting piracy.
- **Eliminating Burdensome Evidentiary Requirements:** Evidence rules (including for establishing subsistence and ownership of copyright) for administrative and criminal actions must be reformed and made less expensive and onerous, and more transparent and logical. For example, documentation required from right holders, particularly for foreign parties, is onerous, cumbersome and expensive. All documents need to be notarized and legalized, even though in most cases, the identity of the right holder and the subsistence of copyright are not challenged. The evidentiary

requirements are onerous. For Internet piracy cases, every infringing track must be downloaded in the presence of a Chinese notary public. These burdensome requirements and financial resource constraints limit the number of tracks that can be presented as evidence. This problem is further exacerbated by the practice of Chinese courts to award damages only for the tracks specifically identified in the complaint. Furthermore, damage awards even for this limited number of tracks are also very low. In sum, the entire range of such problems results in remedies that are not effective.

- **Bringing Significant Transparency to the Enforcement Process through NCAC Reporting on Cases Involving Foreign Works and the SPC Extending its Reporting from Civil to Criminal Cases at All Levels:** NCAC and local copyright bureaus need to share information on administrative copyright cases with right holders; a request which has to date too often been refused. Though the NCAC conducted three nationwide crackdowns on online piracy, there remains no improvement in transparency or the sharing of information on the final outcome of investigations and cases filed. The SPC now regularly reports the results of significant civil cases on its website. This reporting should be extended to criminal cases as well.
- **Assigning Specialized IPR Judges to Hear Criminal Cases, and Move Cases to the Intermediate Courts:** The record of China's development of a cadre of well trained IPR judges to sit on specialized IPR tribunals at the Intermediate level courts in China to hear civil cases has been a success. Now China should implement similar reforms in the criminal justice system to enhance deterrent enforcement against copyright piracy.
- **Providing Effective Market Access for All Copyright Materials:** China must fully implement its minimum WTO market access commitments (particularly in the area of trading and distribution rights and national treatment). In addition, the Chinese government, if it wishes to address rampant piracy in the country and foster the growth of creative industries, must significantly liberalize market access for all copyright industries, looking beyond the bare minimum of WTO obligations toward a fairer and more open market for all. Such reforms would include (i) greatly increasing transparency; (ii) eliminating the film quota; (iii) permitting full publishing and distribution activities within China; (iv) eliminating discriminatory or unreasonable investment restrictions; (v) eliminating the ban on video game consoles; and (vi) eliminating delays and discrimination (against foreign right holders) in reviewing content under its censorship regime to ensure that legitimate products get to the market before pirate products. Censorship processes that merely slow the ability of legitimate enterprises to distribute products, whether in the physical market or through digital transmissions, but which are ignored by piratical or unauthorized enterprises, do not advance China's social or cultural concerns, and greatly prejudice the interests of U.S. rights holders by providing further market advantages to pirate operations.

For more details on China's Special 301 history, see IIPA's "History" Appendix to this filing at <http://www.iipa.com/pdf/2008SPEC301HISTORICALSUMMARY.pdf>, as well as the previous years' country reports, at <http://www.iipa.com/countryreports.html>.

PEOPLE'S REPUBLIC OF CHINA
Estimated Trade Losses Due to Copyright Piracy
(in millions of U.S. dollars)
and Levels of Piracy: 2003-2007³

INDUSTRY	2007		2006		2005		2004		2003	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Motion Pictures ⁴	NA	NA	NA	NA	244.0	93%	280.0	95%	178.0	95%
Records & Music ⁵	451.2	90%	206.0	85%	204.0	85%	202.9	85%	286.0	90%
Business Software ⁶	2472.0	80%	2172.0	82%	1554.0	86%	1488.0	90%	1787.0	92%
Entertainment Software ⁷	NA	95%	NA	NA	589.9	92%	510.0	90%	568.2	96%
Books	52.0	NA	52.0	NA	52.0	NA	50.0	NA	40.0	NA
TOTALS	2975.2		2430.0		2643.9		2530.9		2859.2	

PIRACY AND ENFORCEMENT UPDATES IN CHINA

Internet and Mobile Piracy Continue to Worsen and Has Become a Major Impediment to the Development of the Legitimate Digital Marketplace and Commerce in China: Securing proper enforcement against Internet piracy in China is one of IIPA's top global priorities. Internet piracy is progressively worsening as the number of Internet users and broadband penetration increases in China. China has become one of the world's largest potential markets in terms of Internet and mobile delivery of copyright content, and unfortunately, one of the world's largest emerging digital piracy problems. China saw continued rapid expansion in 2007 in terms of the number of Internet and mobile users and number of broadband lines. The number of Internet users in China grew to 210 million at the end of 2007, up from 137 million in 2006 — an increase of 53% and almost as many users as there are in the United States. Internet penetration went from 10.5% of the total population at the end of 2006 to 16% at the end of 2007. According to recent reports, broadband users were estimated at 210 million at the end of 2007, with mobile phone users reported to be a staggering 480 million.⁸ There are reportedly 110,000 licensed Internet cafés, and approximately the same number, which are unlicensed. Unauthorized transmission and downloading of video product is particularly prevalent at Internet cafés,⁹ as is the problem of the use of unauthorized video game software. Typically, the same copy of a game is installed on the numerous machines in the café. In addition, pirate servers, which divert play of online

³ The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2008 Special 301 submission at www.iipa.com/pdf/2008spec301methodology.pdf. For information on the history of China under Special 301 review, see Appendix D at (<http://www.iipa.com/pdf/2008SPEC301USTRHISTORY.pdf>) and Appendix E at (<http://www.iipa.com/pdf/2008SPEC301HISTORICALSUMMARY.pdf>) of this submission.

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

⁵ The estimated losses to the sound recording/music industry due to domestic piracy are US\$451.2 million for 2007, and exclude any losses on sales of exported discs. This number is also based on a "displaced sales" methodology.

⁶ BSA's 2007 statistics are preliminary. They represent the U.S. software publishers' share of software piracy losses in China, and follow the methodology compiled in the Fourth Annual BSA and IDC Global Software Piracy Study (May 2007), available at <http://w3.bsa.org/globalstudy/>. These figures cover, in addition to business applications software, computer applications such as operating systems, consumer applications such as PC gaming, personal finance, and reference software. BSA's 2006 piracy statistics were preliminary at the time of IIPA's February 12, 2007 Special 301 filing and were finalized in June 2007 (see <http://www.iipa.com/statistics.html>) as reflected above.

⁷ ESA's reported dollar figures reflect the value of pirate product present in the marketplace as distinguished from definitive industry "losses." The methodology used by the ESA is further described in Appendix B of this report.

⁸ Sources include: [China Internet Network Information Center](http://www.chinamobiletd.com/images/present/20070816/pp02.html); <http://www.chinamobiletd.com/images/present/20070816/pp02.html>; http://www.macaudailytimesnews.com/index.php?option=com_content&task=view&id=6570&Itemid=35; The Economist, February 2, 2008.

⁹For example, in 2005 it was reported that 76% of Internet café users visit to watch movies. See http://www.media.ccidnet.com/art/2619/20050814/310051_1.html

videogames from the legal to a pirate site, continue to plague legitimate online game publishers in the market.

There is little effective enforcement in China against Internet piracy and, as a result, China is one of the biggest sources of illegal downloads in the world, where the online piracy rate exceeds 99%, choking the legitimate music market, for example, to only \$74 million in 2007, less than 1% of global sales.¹⁰

There are a reported 1.5 million websites now operating in China, up 78% from the previous year.¹¹ Many of these websites offer streams, downloads, or links to unauthorized files of copyrighted materials (music, films, software, books and journals). The recording industry reports that seven or more "MP3 search engines" offer "deep links" to thousands of infringing song files and derive significant advertising revenue from doing so. These services account for the majority of online piracy in China. The largest of these is Baidu, which was sued in 2005 by the international record companies for its deep linking activities. The Beijing Intermediate Court sided with Baidu in a decision, which was appealed to the High Court, which rendered a decision on December 20, 2007 upholding the lower court's decision. However, this decision was based on the state of the law prior to the issuance of the 2006 Internet Regulations and the same High Court upheld the lower court's decision on the same day finding infringement in the Yahoo China case brought in 2006. It is believed that the Yahoo case reflects the law in China at this time, which is a major victory for right holders and is a significant legal step forward for the Internet environment in China as well as for the Chinese judicial system.¹² On February 4, 2008, the recording industry filed new civil suits against Baidu and Sohu/Sogou for their music deeplinking services. Legal proceedings were also filed against Yahoo China to enforce the court order of December 20, 2007 with which Yahoo failed to comply.

There are also over a dozen Chinese based P2P services engaging in widespread illegal file sharing activities. The most widely known are Muper, Kugoo, Xunlei and eMule. It was reported on February 3, 2008 that Xunlei lost a civil case to a Shanghai company and was ordered to pay damages of 150,000 Yuan (USD\$20,862) for assisting in the copyright infringement. Most of these are advertising-driven sites (though some are subscription based), given the lack of development in China of credit card or similar payment mechanisms. There are two eMule/eDonkey servers currently hosted in China and there are still many Bit-Torrent sites based in China. Further, there are growing numbers of video locker sites, like Tudou, which are also advertising-driven "User Generated Content (UGC)" sites providing infringing streaming of movies, music videos and the like.

The book and journal publishing industry reports a marked surge in Internet infringements over the past year, affecting academic books and commercial bestsellers or trade books scanned and traded or offered for download in PDF form. Perhaps more disturbing, electronic copies of journals are being shared with commercial entities in violation of site licenses. The commercial enterprises then sell the journals at a significant profit in direct competition with legitimate companies.

With the adoption of the Internet Regulations in July 2006 and the coming into force in China of the WIPO "Internet" Treaties on June 9, 2007, the legal infrastructure for effective protection of content on the Internet in principle was significantly enhanced, providing the major elements of an effective regime for combating online piracy. Notwithstanding this effort, further clarification and amendment of

¹⁰ The mobile market is less problematic than the online market, given the more closed nature of mobile networks. As a result, over 70% of these legitimate sales occur in the mobile market.

¹¹ Source: IFPI.

¹² However, the Yahoo injunction only extended to a few songs and the resulting damages were extremely low. Neither Baidu nor Yahoo is complying with the law as set out in the Yahoo case. This demonstrates the deficiencies that still are present in many areas of the Chinese legal system. IIPA had noted, in its February 2007 report, that, in a meeting between IIPA and the State Council Legislative Affairs Office (SCLAO) in November 2006, the official responsible for drafting the *Regulations on the Protection of the Right of Communication through Information Networks* ("Internet Regulations") that became effective on July 1, 2006 stated that under Article 23 of those regulations, ISPs were liable for these kind of linking activities. This conclusion was clearly correct given the recent judgment of the Beijing High Court in the Yahoo China case.

the 2006 Internet Regulations is warranted. Furthermore, full and aggressive implementation of the existing regulations is a necessary step in beginning to address online piracy. It is worth noting that a Chinese official also acknowledges that further amendments to the copyright law are needed¹³ to bring China fully into compliance with those treaties.

The following key clarifications are needed in the Regulations:

First, it should be publicly clarified that email notices are permitted under the new Internet regulations and that takedowns following notice must be within 24 hours.¹⁴

Second, ISPs that fail to immediately take down sites following compliant notices from right holders are infringers and have violated the Internet regulations and the Copyright Law (by losing the “safe harbor” established under the regulations). As such, they should be subject to the same administrative fines as any other infringer. Until these fines are imposed and announced publicly, it will remain extremely difficult for NCAC and the local copyright bureaus to deter Internet piracy, given the difficulties of identifying and bringing administrative actions against the website or the like.

Third, the agency should clarify and reform the evidentiary requirements necessary to provide a compliant notice and to ensure that an administrative fine can be imposed. Unfortunately, Article 14 of the Internet Regulations appears to require detailed evidence and, if so, that Article should be amended.

On June 24, 2007, NCAC released a final version of an unhelpful “recommended” “standard form” to be used when filing takedown requests. This form calls for the provision of detailed information and documents including

- Proof of identity and addresses of each and every copyright owner, with business registration;
- A letter of authorization of the representative for each notice;
- Detailed proof of each and every infringement;
- Affixation of the company stamp (chop) of the copyright owner — which implies also that the notice cannot be sent by email or even fax.

ISPs have used these “recommended” requirements as an excuse to refuse or fail to take down infringing material, purportedly because the notices do not conform to the requirements. NCAC should substantially revise these guidelines, to the full extent possible under Article 14, to permit the equivalent of an emailed takedown request attesting to the right holder owning the copyright in question, with the person subject to penalties if any material information provided is incorrect and the person has failed to exercise due care in providing it. Effective takedown systems are structured in this fashion elsewhere, including in the U.S.

Fourth, since NCAC is obligated to transfer cases involving criminal infringement to the PSB and SPP, as set forth in the March 2006 Criminal Transfer Regulations,¹⁵ it must be clarified exactly how the thresholds established in the 2004 and 2007 JIs apply in the Internet environment and such clarifications should be widely circulated throughout all the agencies responsible for enforcement.¹⁶ NCAC must

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

¹⁴ While an official of the SCLAO has told IIPA that in his view email notices are acceptable, this interpretation has not been effectively communicated to the ISP community. In a November 2006 meeting with IIPA in Beijing, NCAC officials stated that takedowns should occur in no more than 48 hours. Unfortunately, this also appears *not* to have been communicated officially to all ISPs in China; prompt takedowns remain spotty in China.

¹⁵ *Opinions on the Timely Transfer of Suspected Criminal Cases Encountered in the Course of Administrative Law Enforcement* (Issued by the Supreme People’s Procuratorate, the National Office of Rectification and Standardization of Market Economic Order, the Ministry of Public Security and the Ministry of Supervision, March 2, 2006.) (“Criminal Transfer Regulations”).

¹⁶ In November 2007, the SPP issued “Guidelines” to prosecutors on how to apply the 2007 SPC SPP Judicial Interpretations which, among other things, lowered the copy threshold under Article 217 to 500 copies for the less serious piracy offense.

reach out to industry to create an effective notice, takedown, and administrative enforcement system to combat Internet piracy.

Finally, given that there are more than 1000 local ISPs throughout China, another reform that is critically necessary is for the MII and NCAC to provide stringent rules for ISPs to maintain accurate, up-to-date contact information, residing on the MII and NCAC websites, so that notices may be timely served to the right entity. This is still not the case today and such a list is urgently needed.

In April 2007, China issued its 2007 IPR Action Plan, which contained a number of initiatives to address Internet (and hard goods) piracy.¹⁷ The Plan called for campaigns against such piracy to go on throughout the year. NCAC reported in January 2008 that, since August 2007, it had investigated 1,001 online infringements. It had closed down 339 websites, seized 127 pirate servers and meted out RMB 870,000 (US\$121,000) in administrative fines.¹⁸ This is a substantially better record than NCAC reported for 2006. However, the lack of manpower, training and a low non-deterrent fine system available to NCAC severely hampers the fight against Internet piracy. Of these cases, it is reported that 31 were referred by NCAC for criminal prosecution, but we have no reports of how many of these cases were actually prosecuted and/or concluded.

One Internet case now being investigated by the PSB is, according to Gao Feng, Vice Director of the Economic Crimes Division of the PSB, the largest Internet case in China to date. The Jin Hu Dong case involved the defendant's licensing of film rights for over 1000 films, including over 600 titles owned by the major U.S. studios, for Internet use. Reportedly, illegal profits of RMB 10 million (US\$1.4 million) easily meeting the criminal threshold, were found. MPA initially filed a complaint in this case in December 2005 with NCAC but a raid by the Beijing PSB was not run until October 2007. Jin Hu Dong and two of his senior managers were originally charged with the crime of copyright infringement,¹⁹ but we understand the two senior managers have since been released.

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

Four hundred and thirteen administrative complaints were filed by the recording industry with the Chinese government in 2007 — 124 with NCAC, 221 with NAPP and 68 with MOC — against websites, etc. offering illegal downloads. Only 77 of the 413 sites have been taken down thus far. This compares with 44 such complaints filed by the recording industry in 2006—all with NCAC—that were eventually combined by NCAC into 33 cases. Twenty-seven of these 33 sites were taken down by NCAC.

The motion picture industry sent 74 takedown notices to ISPs in 2007 and the compliance rate was estimated to be around 67%. Of the 66 websites it is monitoring, three websites have shut down, 18 sites have removed infringing content, two were redirected and the rest were found to constantly switch servers from one city to another. During the NCAC's 2007 national campaign against internet piracy, the MPA filed 40 complaints. To date, all those 40 websites remain unchanged. MPA also filed 14 complaints with the piracy hotline in Beijing, Shanghai, Chongqing, Jiangsu, and Guangdong between June and October 2007. So far, only two positive responses were received in Beijing and Shanghai.

Unfortunately, the SPP did not take up IIPA's urging, made to an SPP official in October 2007, to use these guidelines to clarify the application of the thresholds in the online environment. "Guidelines" on file at IIPA.

¹⁷ http://english.ipr.gov.cn/ipr/en/info/Article.jsp?a_no=67391&col_no=925&dir=200704.

¹⁸ http://english.ipr.gov.cn/ipr/en/info/Article.jsp?a_no=169292&col_no=925&dir=200801.

¹⁹ Source: MPA and NCAC. http://english.ipr.gov.cn/ipr/en/info/Article.jsp?a_no=169292&col_no=925&dir=200801.

Below are statistics provided by the record industry on Internet takedown actions in China through 2007.

Record Industry Takedown Rate of Suspected Infringing Websites in China			
	Number of notices	Number of sites	Takedown rate
2003	1320	2509	29%
2004	2632	7170	61%
2005	1778	4711	61%
2006	1495	1205	58% ²⁰
2007	6787	4618	71% ²¹

Internet piracy in China is also infecting neighboring markets. For example, Baidu has launched an unauthorized deep-linking service for video search in Japan. Baidu MP3 search in Hong Kong and Taiwan provided redirection of search results to Baidu's unauthorized deep-linking service in China.

In a welcome development, the licensee (Shandha) of the Korean entertainment software developer of the "Legend of Mir" videogame, was successful in obtaining at least two criminal convictions against pirate servers dealing in the game. The division of the PSB that deals with Internet offenses has reported that in 2006 there were 48 Internet criminal cases, either pending or already concluded. IIPA has been unable to find out anything further about these cases but they are a most welcome development, particularly if they result in publicized convictions with deterrent penalties.

NCAC Vice Minister Yan Xiaohong, in a recent development presaged in the 2007 IPR Action Plan, announced on January 17, 2008 the launching of what is being called a "monitoring platform." The "monitoring platform," to be finished in May 2008, appears to be a filtering technology that will use web crawlers to identify pirate audio, video, software and literary product and involves entering the legitimate product into a database to be created as part of this program. If this technology is robust and is used at the ISP level, it could have a significant impact on Internet piracy. The industries, at this point, await further information about this new development, and hope that the Chinese Government will effectively implement such a program in an open, efficient and transparent manner.

Piracy of "Hard Goods" Continues at the 85%-95% Level. While the piracy rate for business software (primarily unauthorized use of software in government, SOE's and enterprises) is now 80% of the market, down 12% since 2003 (and 2% since 2006) the piracy levels for video, audio and entertainment software continues to range between 90%-95% of the market. IIPA reported in its 2007 submission that the 2006 "100 Day Campaign," directed primarily at retail piracy, did not achieve the results touted by the Chinese authorities. While seizure statistics were very high,²² reports and outside surveys commissioned by industry noted that pirate product remained available throughout the campaign in virtually the same quantities as before the campaign commenced. In some cases, however,

²⁰ Although a number of sites were taken down by ISPs/ICPs after receiving a takedown notice, some of the sites very quickly reappeared on the same ISP/ICP offering different repertoire.

²¹ Although a number of sites were taken down by ISPs after receiving a takedown notice, some sites very quickly reappeared on the same ISP/ICP offering different repertoire.

²² What purported to be final statistics were reported widely in the Chinese press: "Since [the beginning of the campaign], China has destroyed nearly 13 million pirated CDs, DVDs and computer software products. Over the past two months, police and copyright officials have investigated more than 537,000 publication markets, shops, street vendors and distribution companies, and closed down 8,907 shops and street vendors, 481 publishing companies and 942 illegal websites." Xinhua, China Daily, September 29, 2006. In its 2006 submission IIPA reported on China's 15-month national anti-piracy campaign involving thousand of raids and the seizure of millions of units of pirate product. IIPA members also reported then that there was "no meaningful decrease in the widespread availability of pirate products" (<http://www.iipa.com/rbc/2006/2006SPEC301PRC.pdf>). In an IIPA meeting with GAPP/NAPP/NCAC in November 2006, Mr. Li Baozhong gave the statistics for the "100 Day Campaign" from his information: 10,000 cases, 7,634 of which involved copyright infringement (the rest were presumably pornography but this was not clarified). A total of 270 cases were referred to the PSB and 63 of these cases were concluded involving 140 defendants. Industry still has not been given any further information on these cases, what penalties were imposed, whether U.S. works were involved etc.

pirate product became less visible in retail establishments and was made available clandestinely from catalogues and stocks hidden at the rear of stores or down back alleyways.

Despite the repeat of campaigns like this in 2007, industry still cannot report any meaningful improvement in the marketplace, which actually seemed to worsen during the course of the year. OD piracy at the manufacturing/factory level (discussed below) continues as a major problem. Furthermore, raids and seizures at the wholesale/warehouse/distribution level continue to turn up massive quantities of pirate product. The authorities reported 15,444 cases involving audio-visual products in which over 104 million articles were seized. The continued lack of criminal prosecutions and the lack of deterrence in administrative enforcement in China has prevented improvements in the market and ensures that piracy rates of physical copyrighted products continue to be among the highest in the world.

IIPA reported, in its 2007 submission, on the campaign against hard disk loading of business software, which accompanied the 2006 decision on loading legal operating systems and the “100 Day Campaign” against other retail piracy. While BSA commended this action, it urged that enforcement in this area be significantly enhanced.

Criminal Actions to Deter High Levels of Piracy in Licensed and Underground OD Factories Continue to be Rare, Including Actions Against Exports: In IIPA’s 2007 submission, we reported that there were approximately 92 optical disc plants in China, with 1,482 total lines, which brought total disc capacity, based on IIPA’s conservative methodology, to a staggering 5.187 billion discs per year. We have no new updates since then. Most of the production lines are interchangeable, switching easily between audio CD, VCD, DVD, CD-R or DVD-R production. With minor expense, pirate high definition DVDs can also be produced. A considerable amount of very high quality pirate Chinese OD production continues to be exported. Infringing product from China was found in nearly every major market in the world, as it was in 2006.

A separate problem is the increasing export of so-called “parallel” or gray-market products, especially sound recordings, which continues to disrupt and undermine legitimate commerce in nearly every Asia-Pacific market, especially in Australia and Singapore. There is also a growing trend in which high quality and difficult-to-distinguish pirated products are mixed in with these parallel exports, making detection and identification much more difficult.

A considerable effort was made during 2006 and in early 2007 by the recording and motion picture industries, and the U.S government in bilateral meetings, to persuade the Chinese government to cooperate effectively with industry to identify forensically infringing CDs and DVDs produced by Chinese OD factories. They specifically proposed that Chinese authorities collect and maintain “exemplars,” (e.g. samples), from each production line and make them available to these two industries for use in forensic analysis of pirated product as is done by many governments around the world. In exchange, these industries would also, at the request of the Chinese government, use their international exemplar database to help the Chinese government determine the source of infringing product that the Chinese government has reason to believe was manufactured outside of China. This should facilitate greater regional and global cooperation in the fight against piracy. Despite China’s call in the 2007 IPR Action Plan for greater international cooperation to fight piracy, the Chinese government has been unwilling to cooperate with right holders or governments in such an endeavor.

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

When it became apparent that criminal actions would not be commenced in these cases, industry brought evidence of piracy exceeding the then existing thresholds with respect to 17 OD plants directly to the PSB and formally requested, in writing, criminal prosecutions against them. Industry has also asked the PSB to bring criminal actions against three other plants among the original 14 identified by the Chinese government, for a total of 20 requested criminal cases. IIPA members are unaware of any criminal prosecutions having been commenced against any of these plants for which formal complaints were made to the proper authorities. The PSB gave various reasons for not bringing such actions. They said that the cases had to be brought initially to administrative authorities, or that the evidence presented, which industry believed clearly raised a strong, virtually irrefutable, inference that piracy meeting the thresholds was occurring, did not “prove” that the thresholds were met. In the first case, Chinese law expressly permits citizens and right holders to bring criminal cases *directly* to the PSB²³ and in the second case, China stands alone in the world in apparently requiring more than “reasonable suspicion” in a crime before commencing an investigation. IIPA understands the “reasonable suspicion” criterion is under study but no formal change has yet occurred. Until China criminally prosecutes factory owners engaged in pirate production, there is little hope that levels of piracy can be significantly reduced.

China must Significantly Increase Criminal Prosecutions for Copyright Piracy to Create Deterrence in its Enforcement System: Despite statements by Chinese leaders that criminal enforcement is a necessary component of its enforcement system, the reality remains that copyright piracy is still viewed by most government policy-makers as a problem to be dealt with through administrative rather than criminal means.²⁴ China has not met its promises in the JCCT to increase the number of criminal prosecutions for copyright piracy. IIPA has continued its effort, begun in 2006, through news reports released in China and through its own investigations, to identify criminal cases brought for copyright piracy under Articles 217 and 218 of the Criminal Law. China does not separately break out criminal cases involving copyright. IIPA and its members remain aware of only six criminal cases involving U.S. works brought by China since it joined the WTO in 2001 (all six in 2005-2006) and a few more cases involving the works of other WTO members.²⁵

Without significant increases in criminal prosecutions resulting in deterrent penalties and a willingness (a) to devote the resources to such prosecutions, (b) to seek assistance from right holders with respect to training etc., and (c) to announce publicly throughout China that criminal prosecutions for piracy will be a primary feature of its enforcement system, we do not believe that China can make a

²³ Taking cases through the administrative machinery slows the case down, risks that evidence will not be preserved and under applicable criminal rules is not necessary. Indeed the PSB is obligated to take cases directly where criminal conduct is demonstrated. See Article 84 of the *Criminal Procedure Law of the People's Republic of China* (adopted at the Second Session of the Fifth National People's Congress on July 1, 1979, and revised in accordance with the *Decision on Amendments of the Criminal Procedure Law of the People's Republic of China*, adopted at the Fourth Session of the Eighth National People's Congress on March 17, 1996). See also, Article 18 of the *Rules of Public Security Authority on the Procedure of Handling Criminal Cases* (promulgated by the Ministry of Public Security under Decree No.35 on May 14, 1998).

²⁴ On January 11, 2007, the SPC released to all lower courts in China, the *Opinions on Strengthening All Respective Work on Intellectual Property Trials to Provide Judicial Safeguard for Building An Innovation-oriented State*. Just one of the 26 sections of this document dealt with criminal enforcement and urged the lower courts to treat criminal piracy as an important crime. The 2007 IPR Action Plan specifically refers to the need to bring criminal cases, but the number of copyright criminal cases actually commenced appears to be minimal.

²⁵ IIPA has been able to identify 82 cases since 2001 which it believes were brought under the piracy provisions of the Criminal Law, namely Articles 217 and 218. The vast majority of these involve only Chinese works, or IIPA has been unable to ascertain if foreign works were involved. China does bring criminal cases for “illegal business operations” under Article 225 of the Criminal Law and these cases can involve acts of piracy and most often prosecutions for manufacturing or dealing in pornography. Known Article 217-218 cases involving U.S. product include *In re SHEN Jiuchun* (沈久春) (December 20, 2006, People's Court of Shijingshan District, Beijing) (pirated Chinese version of book on Jiang Zemin); *In re CHEN Fuqiang* (陈富强), *WU Jun* (吴军) and *WU Xiaojun* (吴小军) (date decided unknown, possibly December 2006, People's Court of Beichen District, Tianjin) (MS SQL 2000); *In re HUANG Yilong* (黄毅龙) & *CHEN Zengcai* (陈赠才) (September 17, 2006, People's Court of Huli District, Xiamen) (online U.S. music and sound recordings); *In re TONG Yaxi* (People's Court of Yuzhong District, Chongqing, August 12, 2005), (U.S. motion picture product); *In re Randolph Hobson GUTHRIE III*, *Abram Cody THRUSH*, *WU Dong* and *WU Shibiao* (Shanghai No. 2 Intermediate Court, April 19, 2005) (U.S. motion pictures on DVD); and *In re CHEN Fuqiang* (陈富强) (date decided unknown but probably early 2005; People's Court of Haidian District, Beijing)(U.S. software).

meaningful dent in piracy levels. Other countries/territories that have significantly reduced piracy levels have done so, only through the aggressive use of deterrent criminal prosecutions.²⁶ China must do the same.

China Must Implement Deterrent Measures in Fighting Piracy of Books and Journals: U.S. book and journal publishers continue to suffer from piracy in three key forms: illegal printing of academic books and commercial bestsellers, unauthorized commercial-scale photocopying and Internet piracy encompassing online academic and professional journals and sites offering scanned books for download. Although well-known university presses suffer from trademark infringement as well, with university names and seals reproduced on content bearing no relation to the university and sold at mainstream bookstores, there was some progress toward bringing bookstores into compliance during 2007.

Throughout 2007, the publishing industry continued to work with GAPP, NCAC and several local copyright bureaus to deal with illegal reproduction of textbooks in “textbook centers” on university campuses.²⁷ In its 2007 submission, IIPA applauded the unprecedented administrative actions taken by GAPP, NCAC and local authorities in the second half of 2006 on this issue, many of which resulted in administrative fines.

At industry request, administrative actions continued in March/April 2007 when authorities raided university textbook centers at two universities in Wuhan (Hubei Province) and a university in Chengdu (Sichuan Province). In April 2007, Sichuan authorities penalized the University of Electronic Science and Technology in Chengdu with a fine of RMB50,000 (US\$6,954) and an order to seize the infringing items. This was followed by a November 2007 decision by Hubei authorities to fine repeat offender Wuhan University RMB50,000 (US\$6,954) and order the destruction of nearly 6000 seized pirate copies. Wuhan Huazhong University received a smaller fine of RMB5000 (US\$695) on October 28, 2007. Meanwhile, actions continued at the start of the school term in October. Shaan’xi provincial authorities conducted a raid at Jiaotong University in Xi’an, issuing a fine of RMB30,000 (US\$4,172) just a few weeks later and destroying nearly 2,000 pirate books. All of the universities were ordered to cease further infringements.

IIPA applauds this continued engagement by the local authorities and the coordination by GAPP and NCAC. The timing issues that plagued the authorities’ inspections early on have been remedied, and authorities are generally responsive to complaints in a timely manner. Given the narrow window of opportunity available for action in each case, this is an extremely positive development.²⁸ IIPA hopes this good cooperation continues into the high seasons (February/March and September/October) of 2008.

One concern that has emerged is the timing of issuance of administrative decisions. While some local authorities issue their decisions quite quickly (witness the Shaan’xi authorities following the October 2007 raid), others are taking quite a while to announce fines and terms. This delay takes away from the good work the enforcement authorities are doing and sends a message to universities that swift consequences are not likely to ensue from infringing activity. IIPA hopes that GAPP and NCAC can play a role in ensuring timely issuance of administrative decisions following raids, which only enhances the deterrent effects of the raids themselves.

²⁶ South Korea, Singapore, Taiwan and Hong Kong are examples of countries where criminal enforcement has been able to significantly reduce piracy levels.

²⁷ IIPA notes that this problem plagues Chinese publishers as well, with locally-produced Chinese books found in every raid conducted to date.

²⁸ The pertinent periods for enforcement against university textbook centers—or any type of copying of academic materials—surround the start of university terms. These most often begin in September and March. Several of the government investigations in response to right holder complaints in previous years were conducted outside of these time periods. For example, the first 2006 investigations took place in June and July, when universities were out of session. Low seizures and low fines are bound to result. However, this problem seems to have subsided, with timely raids over the past year.

IIPA remains convinced that partnership of the Ministry of Education (MOE) with GAPP, NCAC and local authorities is essential to tackling the ongoing on-campus infringement issues, especially given the large number and wide geographic spread of universities engaged in these practices. Unfortunately, 2007 saw a waning of MOE willingness to engage on this issue, with no open dialogue with right holders, and no apparent progress in implementing the notices issued by the Ministry in late 2006.²⁹ These notices instructed universities that, among other things, they were to ensure that textbook centers were free of infringing activity by December 31, 2006. Unfortunately, over one year later, right holders have been told of no plan for implementing these notices. IIPA considers it imperative that an action plan be developed to ensure that the notices don't become just ink on paper.

In addition to the unauthorized reproduction of books on campuses, copy shops outside universities continue with illegal photocopying. Furthermore, English language teaching programs often use the prospect of high-quality, color materials to lure students to their after-school programs, but then make and distribute unauthorized photocopies of those materials instead of the originals.

Illegal printing of books continues to plague publishers in China outside the university context as well. High level foreign technical or medical books marketed to professionals and bestsellers tend to be vulnerable to this type of piracy, as are commercial bestsellers, undermining the legitimate market for foreign and Chinese publishers alike. These books are sold widely by street vendors and in large book markets throughout China.

As noted earlier, Internet piracy also affects the publishing sector, most notably with respect to sites offering free or pay downloads of academic and trade titles, as well as academic and professional journals. Publishing industry groups have recently brought two complaints to NCAC and local authorities about this problem. NCAC should continue work, along with the MII and local and regional copyright bureaus, to ensure immediate and effective action against such sites.³⁰

Business Software End-User Piracy: Unauthorized use of software within enterprises and government offices in China causes the majority of piracy losses faced by the business software industry.³¹ China made a commitment in the JCCT to complete legalization within all government agencies, including provincial and local level government offices, by the end of 2005 and announced completion of its effort at the end of 2006. While progress appears to have been made, more needs to be done and multi-year implementation plans should be put into place. This must include budgeting for the purchase of legal software.

In the 2005 JCCT and again in 2006, China committed to the legalization program for state-owned enterprises and private business and to discuss software asset management. An implementation plan was issued in April 2006 but, unfortunately, the responsibility for compliance and oversight seems to lie on each agency and not on any central authority to enforce the commitment. Software asset management is still under discussion and no permanent plan is in place. Toward the end of 2007, NCAC announced a list of model enterprises for software legalization. However, it does not appear that the selected enterprises had complete software asset management programs in place or had undergone a review of the software license history. The business software industry also has not seen any material change in enforcement activity against corporate end user piracy that would serve as an impetus for enterprises to legalize. Plans for a "blacklist" of enterprises have been announced but not yet implemented. In addition, steps have not been taken to ensure that all companies bidding on government contracts certify the software they use is legally licensed, subject to audit. In short, while

²⁹ MOE joined GAPP and NCAC at the end of 2006 in issuing notices to regional education bureaus and regional copyright bureaus that copying of books at universities was not to be tolerated.

³⁰ The industry reports that its complaint against www.fixdown.com and related sites received good attention from NCAC and the Guangdong copyright authorities, and the site was taken down soon after it was listed as one of China's "Top 50" Internet priorities. Another pending complaint against a rather notorious and commercially sophisticated site offering journals for download has been awaiting action for quite some time. IIPA urges the authorities to take immediate action against this site.

³¹ The business software industry also loses revenue due to retail hard-disk loading (discussed earlier), and the production in China (generally for export) of high-quality counterfeit software packages.

overall there has been gradual progress on enterprise legalization, much remains to be done on this issue.

Among the most notable and far reaching commitment emanating from the 2006 JCCT was the commitment to prohibit sale of computers both manufactured in China and imported without legal operating systems. Implementation of this commitment has resulted in a significant increase in sales but the compliance rate to date is estimated by industry to be less than 50%. In a rapidly-growing market for PCs — now the second largest in the world — IIPA and BSA urge the Chinese authorities to expand the current reporting requirement for computer makers to cover the 10 largest system builders at the national level and in each province. The government itself committed to procure computers with legally licensed operating system software pre-installed, and to provide adequate budget resources for compliance. We are not aware of a reporting or compliance mechanism for this decree, and getting adequate budget resources to agencies appears to be a problem. The government needs to institute an effective compliance mechanism that focuses primarily on pre-installation sales to government agencies and enterprises.

NCAC is woefully understaffed and while it has run end-user raids upon request, it cannot, even with the best of intentions, undertake truly meaningful and deterrent enforcement in this critical area without significantly more manpower. BSA requested 41 end user actions with local enforcement authorities in 2007, and has achieved 21 settlements with targets (including 10 from cases filed in 2006), four administrative fines (including a record high fine of RMB 800,000 (US\$111,266)) have been issued (two more than in 2006). However, deterrence remains insufficient. In addition to adding significant staff and resources at NCAC, many more deterrent administrative fines must be issued. Failure to confiscate equipment in many cases is also a problem.

Broadcast, Cable and Public Performance Piracy of Motion Pictures; Failure to Pay U.S. Right Holders for the Public Performance of Musical Compositions: The unauthorized public performance of U.S. motion pictures continues mostly unchecked in hotels, clubs, mini-theaters and even government facilities. Television piracy, particularly at the provincial and local levels, and cable piracy (over 1,500 registered systems which routinely pirate U.S. product) continue to harm the U.S. and Chinese film industries.

U.S. owners of musical compositions (songwriters and music publishers) are receiving virtually nothing out of China for the public performance of their music by government broadcasters, bars, and other public establishments. This is a fundamental TRIPS/Berne right and IIPA is not aware of any efforts by the Chinese PRO, MCSC, to take legal action to enforce its rights on behalf of the U.S. and Chinese right holders it represents. Not only should these actions be brought, but royalties must be collected and actually paid to U.S. right holders (if done properly, very substantial sums would be involved). The Chinese authorities should ensure that these royalties are paid during pending litigation or at least into escrow during that period.

Piracy of Entertainment Software Products: Piracy levels for hard goods products (both optical disc and cartridge-based formats) remain extremely high. Chinese enforcement authorities continue to fail to impose deterrent administrative penalties or initiate criminal prosecutions against infringers. During 2007, acting on the complaints filed by Nintendo, 69 raids were conducted against factories, warehouses or workshops mainly in Guangdong Province, resulting in the seizure of over one million infringing Nintendo products. Despite these actions, and the fact that many of the enterprises raided are engaged in willful commercial-scale infringement, not a single action was initiated or prosecuted by the Chinese criminal enforcement authorities. China remains the primary source of counterfeit Nintendo cartridge-based video games, with shipments of China-sourced pirated and counterfeit games being seized in 13 countries around the world.³² Unfortunately, Chinese customs

³² For example, in April 2007, customs officials in Montevideo, Uruguay, seized approximately 160,000 counterfeit Nintendo video games. The shipment originated in China and was ultimately destined for Paraguay. Similarly, customs seizures of *Wii* game

authorities have not done much to stem the flow of pirated and counterfeit cartridges, and China has now also become a significant source of pirated *Wii* game discs.

Civil Cases Brought, Including Against Internet Pirates: The copyright industries have fared somewhat better in the civil courts in China, though not in a manner yielding deterrence.³³ Unfortunately, the average awards do not come close to compensating right holders for the injury suffered as a result of the infringement, though improvements are slowly being made. For example, the average damages awarded in the recording industry's cases were about RMB3,500 (US\$487) per title, which usually does not even cover legal fees and expenses, much less compensate the rights holder for its loss. This paltry sum has fallen further to an average of about RMB2,000 (US\$278) per title in 2006. Damages awarded in the December 2007 Yahoo case are also very low and non-deterrent. US\$25,000 in damages was awarded for 229 tracks infringed, and average of about US\$50 per title. Documentation requirements to prove copyright ownership and status of the plaintiff are overly burdensome in China, and, in the Internet environment, ascertaining information regarding defendants sufficient to succeed in these actions is difficult, as the domain name or other registration information for these Internet operators is usually inaccurate or incomplete. Additional burdens are imposed by the Chinese court's requirement on who may act as the "legal representative" of a party. Under these provisions, courts have on occasion even required the chief executives of major multinational corporations to appear in person to prove, for example, copyright ownership and subsistence.

The civil system should be reformed to provide clear evidentiary and procedural rules, such as (a) providing for statutory damages and reasonable compensation for legal fees and expenses; (b) introducing a presumption of subsistence and ownership of copyright; and (c) allowing organizations that are authorized by right holders to conduct anti-piracy cases on their behalf to sue in their own name.

MARKET ACCESS AND RELATED ISSUES

IIPA has consistently stressed the direct, symbiotic relationship between the fight against piracy and the need for liberalized market access to supply legitimate product to Chinese consumers. It has been more than six years since China joined the World Trade Organization, and the copyright industries are still waiting for China to comply with a number of commitments it made in that agreement to open its market. China's failure to meet these commitments significantly harms U.S. rights holders who would like to more effectively and efficiently provide their products to Chinese consumers.³⁴

discs as well as Nintendo game cartridges were conducted in the Czech Republic, Luxembourg, Taiwan (where in a six-week period, close to 10,000 pirated *Wii* game discs were seized), the United Kingdom and the United States.

³³ In 2006, the record industry began to shift the focus of its civil cases to Internet piracy, filing at least 105 civil cases against Internet infringers since 2003. As of January 2006, 96 cases have been concluded, 79 successfully, while another 10 cases remain pending, 7 of which were filed in February 2008. In 2007, the motion picture industry filed more than twenty complaints against retail outlets, all of which received favourable judgments, and six complaints against an entertainment content provider which remain pending.

³⁴ It is worth noting that as a result of these deficiencies, on April 10, 2007, the U.S. government, supported by the China Copyright Alliance, filed a WTO dispute settlement case asserting that China has failed to afford trading rights and certain distribution rights for some copyright industries. See http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds363_e.htm. The U.S. requested the establishment of a WTO dispute settlement panel on October 11, 2007. The market access measures that the U.S. government alleged to be WTO-incompatible include: (1) claims involving the failure to afford trading rights (the right to freely import without going through a government monopoly) to imported films for theatrical release, audiovisual home entertainment product, sound recordings and book and journal publications; (2) measures that restrict market access for, or discriminate against, foreign suppliers of audiovisual services (including distribution services) for audiovisual home entertainment product and that discriminate against foreign suppliers of distribution services for publications; (3) measures that provide less favorable distribution opportunities for foreign films for theatrical release than for domestic films; and (4) measures that provide less favorable opportunities for foreign suppliers of sound recording distribution services and for the distribution of foreign sound recordings than are provided to like service suppliers or like products.

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

Ownership/Investment Restrictions: The Chinese government allows foreign book and journal publishers, sound recording producers, motion picture companies (for theatrical and home video, DVD, etc., distribution), or entertainment software publishers, at best, to enter the Chinese market as a partner in a minority-share (up to 49%) joint venture with a Chinese company.³⁵ These limitations should be eliminated. In many instances, China does not permit any foreign ownership at all.

The Censorship System: Chinese censorship restrictions delay or prevent copyright owners from providing legitimate product to the market in a timely fashion. For example, Chinese government censors are required to review any sound recording containing foreign repertoire before its release, while domestically produced Chinese repertoire is only recorded, not censored (and, of course, pirate product is uncensored). China should terminate this discriminatory practice, which violates the basic tenet of national treatment that foreign goods will be treated on equal footing with domestic goods.

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

Entertainment software companies continue to face lengthy delays in the censorship approval process, wiping out the market window for legitimate distribution of an entertainment software product (this window is often shorter for entertainment software titles than for other works). Each entertainment software title must go through an approval process at the GAPP, which takes several weeks to several months.³⁶ As has been committed for other industries, and consistent with the JCCT outcome, the Chinese government should rid the market of pirated game titles that are still under GAPP review, effecting an immediate seizure of the unauthorized titles. Pirates should not be given free reign of the market while legitimate publishers comply in good faith with China's content review process. Another serious concern involves another approval process with the Ministry of Culture for online versions of games.³⁷ The review function should be lodged with only one agency, either the GAPP or the MOC. As more entertainment software products distributed on physical optical disc media increasingly have an online component, such games become subject to two separate content review processes before two different agencies. The need to comply with two review procedures before two different agencies exacerbates the delay in getting new releases to market, and is overly burdensome to publishers.

³⁵ In what was considered a positive development in IIPA's 2006 submission, ownership restrictions on cinemas had been lifted slightly, allowing up to 75% foreign ownership in Beijing, Shanghai, Guangzhou, Chengdu, Xi'an, Wuhan and Nanjing, compared to 49% elsewhere. However, these regulations were rescinded later in 2006 and after investments had been made under the new rules, returned to the 49% rule. As a consequence, one U.S. company simply left the market. Moreover, foreign-owned companies may not operate those cinemas in China. In the television sector, wholly or jointly foreign-owned companies are strictly prohibited from investing in the broadcast industry.

³⁶ An ESA member company reports that one of its titles was under review for a period of 18 months (the longest such review period known thus far), and subjected to several layers of reviews before several different bodies. Despite the length of the review, the process remained opaque with the criteria for review still unknown to the publisher.

³⁷ IIPA notes as a general trend that inconsistencies in the laws and regulations in China are beginning to appear (and have detrimental market effects) in the handling of copyright material in traditional media versus content on the Internet. The State Council was long ago charged with creating Internet policy, but several agencies have gotten into the fray (e.g., the State Secrecy Bureau's announcement in January 2000 that all websites in China were to be strictly controlled and censored). Ministry of Culture Regulations (including the new Opinion discussed above and below in the text) require that providers of Internet-based content (with any broadly defined "cultural" attributes) receive MOC approval prior to distribution in China. SARFT also claims some censorship role on the Internet and has recently issued new regulations covering the Internet. In addition, from a technological standpoint, China maintains firewalls between China and foreign Internet sites to keep foreign media sites out of China, and regularly filters and closes down Chinese sites that are seen as potentially subversive.

Finally, transparency in the review process and in the criteria employed in these reviews are likewise sorely needed.

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

Restrictions on Trade Association Staff and on Anti-Piracy Investigations: Also affecting the ability of the copyright industries to do business in China are the severe restrictions maintained on the ability of copyright industries’ trade associations in China from engaging in investigations in the anti-piracy area as well as limiting the number of employees that such “representative offices” may employ. Companies that invest in China are not subject to these same restrictions. Because copyright-based companies in certain sectors conduct virtually all their global anti-piracy operations through their designated trade associations, and given the restrictions on becoming a foreign invested company in China, these rules hamper the fight against piracy in China.

There are also many industry-specific market access restrictions:

Recording Industry: Record companies are prevented from developing talent in China and from getting legitimate product quickly to market. The fact that U.S. record companies cannot distribute a recording in physical format except through a minority joint venture with a Chinese company (and may not “publish” a recording at all—a stage in the process of bringing materials to the market left entirely to state-owned companies), artificially segments China’s market, making it extraordinarily difficult for legitimate companies to participate effectively. U.S. record companies are skilled at and desirous of developing, creating, producing, distributing, and promoting sound recordings worldwide.³⁸ The universal experience of nations in which the international record companies do business is that local artists have expanded opportunities to have their music recorded and distributed widely. The in-country presence of U.S. companies also has brought jobs and expertise in a wide variety of areas. China should permit U.S. (and other foreign) sound recording producers to engage in:

- the integrated production, publishing and marketing of sound recordings.
- production, publication and marketing their own recordings in China and direct importation of finished products (at present, a U.S. company must: (1) license a Chinese company to produce the recordings in China or (2) import finished sound recording carriers (CDs) through the China National Publications Import and Export Control (CNPIEC)).

Similarly, the *Opinion on Development and Regulation of Internet Music*, along with earlier regulations, significantly stifles the development of legitimate online music commerce in China, including both Internet-based music services and the fast-growing mobile phone delivery of music content. It

³⁸ The work of these companies encompasses a wide range of activities, including developing and investing in state-of-the-art recording, mastering and engineering facilities; identifying and training talented singers, songwriters, composers, and musicians; promoting and advertising acts and recordings; establishing efficient and competitive distribution systems to take products from recording studio to replicator to wholesalers to retailer; and using global arrangements and distribution services to release products in markets outside the local market. U.S. record companies have long sought to bring these skills to China to develop and record Chinese artists for the Chinese market and for export.

imposes a complete prohibition on foreign ownership of online and mobile music services and, as noted above, burdensome, discriminatory and unnecessary censorship requirements. Foreign record companies should be able to service Chinese consumers as part of these online music services and be able to import and deliver music content without restriction.

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

- **Trading Rights:** Foreign companies are prohibited from importing material into China. Importation is limited to 38 State-owned trading companies, through which all imports must be channeled. Under the terms of China's WTO accession, foreign-invested and foreign-owned companies should be permitted to engage in direct importation of their products.
- **Distribution:** Foreign-invested and foreign-owned companies should be permitted to engage in wholesale and retail distribution of all product (locally produced or imported) in the Chinese market without any limitations.
- **Publishing:** Liberalizations to core publishing activities would allow foreign companies to better tailor a product to the Chinese market. Activities such as obtaining Chinese International Standard Book and Serial Numbers (ISBNs or ISSN), editorial and manufacturing work, and printing for the Chinese market remain off-limits to foreign companies. Restrictions on these activities result in greater expense to publishers and consumers alike, and discourage development of materials most appropriate for Chinese users. These restrictions also create delays and a lack of transparency in the dissemination of legitimate product in the Chinese market, opening the door for pirate supply.
- **Online content:** High fees related to access to foreign servers by users of the China Education and Research Network (CERNET) result in high costs to publishers of electronic materials (such as academic and professional journals) in making their products available in China, resulting in fewer options available to Chinese scholars and students.

Motion Picture Industry: There has been no change in the current severe restrictions on market access for motion pictures. These include the following:

- **Onerous and Indefensible Import Quota for Theatrical Release of Films:** Under the terms of China's WTO commitment, China agreed to allow 20 revenue sharing films (theatrical release) into the country each year. However, China has stated that 20 is a "maximum," not a "minimum." The monopoly import structure (described below) and the censorship mechanism go hand-in-hand with the way this quota is imposed and enforced. Demonstrably unfair and adhesive contractual conditions (under the so-called "Master Contract") still prevail for theatrical-release motion pictures in China, ensuring that the film distributor/studio gets only a small proportion of the box office. In the rest of the world the convention is to split the box office 50-50 between studios and distributor. This creates a completely non-competitive environment for film importation and distribution in China.
- **Cutting the Screen Quota for Foreign Films:** SARFT regulations require that foreign films occupy less than one-third of the total screen time in cinemas. Even where foreign blockbusters are allowed into China under the film quota system, the screen quota then mandates that the distributor restrict the number of prints available to cinemas.
- **Monopoly on Film Imports and Film Distribution:** China Film continues to be one of the entities holding a state-enforced monopoly on the import of foreign films, in violation of China's WTO trading rights commitments. China Film held the sole monopoly on the distribution of foreign films until Huaxia Distribution was authorized by SARFT to be a second distributor of imported films in August 2002.³⁹ Like China Film, Huaxia is beholden to SARFT and its operations are virtually transparent to

³⁹ Huaxia is a stock corporation with investment from over 20 shareholders, the largest of which is SARFT with over 20% ownership, then China Film, Shanghai Film Group and Changchun Film Group, each with about 10% ownership.

China Film, which it effectively controls, thwarting any real competition between the two. Foreign studios or other distributors cannot directly distribute revenue-sharing foreign films.

- **Restricted Market Access for Foreign Satellite Signals:** Foreign satellite channels may only be shown in three-star hotels and above and in foreign institutions. Moreover, foreign satellite channels beaming into China are required to uplink from a government-owned satellite for a fee of US\$100,000, placing a significant and unnecessary financial burden on satellite channel providers. Further, foreign satellite channels are not allowed carriage on local cable networks without government approval or landing permits. Offending news items on sensitive subjects in China are still routinely blacked out by officials who monitor all broadcasts over the national satellite system. Only a handful of foreign channels have been granted approval, and carriage is currently limited to Guangdong province.
- **Broadcast Quotas, Content Restrictions, and Restrictive License Practices for Satellite Channels:** SARFT's "Regulations on the Import and Broadcasting of Foreign TV Programming" effective October 23, 2004, sets severe quotas on the broadcast of foreign content (e.g., no more than 25% of all content broadcast can be foreign films or television dramas, with a 0% allowance during prime time).⁴⁰ The China TV Program Agency under CCTV must approve all importation of foreign programming under the guidance of SARFT. China has also issued regulations restricting who can invest and what kinds of programs can be produced in China, again with the aim of severely restricting foreigners' ability to operate in China, and restricting the kinds of content to be permitted (of course, this belies the fact that pirate content comes in unfettered, unregulated, and uncensored).⁴¹
- **Black-Out Periods:** The Chinese government has on various occasions, including a complete ban imposed in December 2007, decreed "black-out periods" (during which no new revenue sharing blockbuster foreign films may be released) in an effort to restrict competition with Chinese films being released in the same period. This ban artificially drives down foreign right holders' theatrical revenues and contributes to increased piracy, as pirates meet immediate consumer demand for major foreign titles by offering illegal downloads through the Internet, pirate optical discs, and pirate video-on-demand channels.
- **Local Print Production Requirement:** China Film continues to require that film prints be made in local laboratories, reducing rights holders' abilities to control the quality of a film copy and potentially resulting in increased costs.
- **Import Duties Should be Based on the Value of Physical Media:** Import duties on theatrical and home video products may be assessed on the potential royalty generation of an imported film, a method of assessment, which is excessive and inconsistent with international practice of assessing these duties on the value of the underlying imported physical media.

Entertainment Software Industry: In mid-January 2008, news reports surfaced that the GAPP had put in place measures that would restrict the ability of foreign online game publishers to enter the market.⁴² Under these regulations, the GAPP could postpone the examination, approval and licensing of products from foreign publishers if the foreign company was the subject of a suit or an arbitration proceeding initiated by a Chinese online game company. It appears that the GAPP will simply halt consideration of the product subject of its review upon the mere initiation of a suit by a Chinese company. Product consideration will not be resumed until the complaint is resolved. The industry has yet

⁴⁰ Broadcast of foreign film and television dramas may not comprise more than 25% of total air time each day and 0% during prime time (17:00-20:00) on any channel other than pay television, without SARFT approval. Other foreign programming (news, documentaries, talk shows, travel shows, etc.) is restricted to no more than 15% of total air time each day. Foreign animation programming may not exceed 30% of daily animation programming delivered by animation and youth and children channels, and during prime time, foreign animation and programming is banned. To further complicate matters, only producers of domestic animation programming can import foreign animation programming and no more than an equal share of what they produce.

⁴¹ The "Interim Management Regulations on Sino-Foreign Joint Ventures and Sino-Foreign Cooperative Television Program Production Enterprises," effective November 28, 2004, sets out the 49% minority joint-venture restriction for "production ventures"; investment requirements of foreigners; licensure requirements; requirements that foreign partners must be "specialized radio or TV ventures"; restrictions on access to non-media investors; and, perhaps most important from a content perspective, requirements for use of "Chinese themes" in two-thirds of the programming.

⁴² See <http://virtuallyblind.com/2008/01/17/china-regulates-foreign-game-companies/>, last viewed on January 23, 2008.

to obtain the regulations for review and thus cannot yet comment as to whether the regulations contain guidelines as to the nature of the dispute that may trigger GAPP's refusal to act or whether there are measures in place to guard against frivolous complaints aimed only at impeding a foreign publisher's access to the burgeoning Chinese online games market.

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

COPYRIGHT LAW AND RELATED ISSUES

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

Administrative-Criminal Transfer Regulations: It was hoped that the amended Criminal Transfer Regulation would lead to more and easier referrals from administrative agencies to the PSB. However, as IIPA has noted in its 2007 submission, it was left unclear whether transfers were required upon "reasonable suspicion" that the criminal thresholds had been met. There appears to be no uniform practice among administrative agencies and PSB offices on this critical question and further clarification as to what would facilitate such "reasonable suspicion" transfers is necessary. Reports in the Chinese press routinely note such referrals occurring (though in a very limited number of cases, likely given that the thresholds are too high) but it is never, or very rarely, reported what happens to the case after that event. In general, however, the adoption of these regulations does not appear to have led to an increase in transfers or any further clarity on when they are required.

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

- **Coverage of Temporary Copies:** The SCLAO, which had ultimate responsibility, following a drafting and vetting process in NCAC, for the final regulations decided not to clarify coverage for temporary copies. While there is support in many quarters for an additional regulation clarifying this issue and extending the scope of the regulations to *all* the rights implicated by reproducing and transmitting content online, Director General Zhang of the SCLAO indicated to IIPA at its November meetings that this issue remains controversial. IIPA noted that over 100 countries around the world extend, or have committed to extend, such protection.
- **Coverage of the Regulation Generally:** IIPA had voiced concern in its series of comments that the regulations were limited only to the right of communication to the public. Director General Zhang responded that he believed that all other rights were covered directly by Article 47 of the Copyright Law. This would appear to result in the conclusion that Article 47 also mandates the coverage of

devices and services with respect to copy controls. We indicated that further regulations would be highly desirable to remove any ambiguity in coverage. He did not close the door to this possibility.

- **Technological Protection Measures:** The treatment of technological protection measures was substantially improved in the final regulations. Both devices and services are now covered by the prohibition as are “acts.” Access controls are also covered, as they affect the right of communication to the public. The test of what constitutes a circumvention device still remains unsatisfactory. Exceptions were significantly narrowed, though remain overbroad in some areas.
- **Service Provider Liability and Exceptions:** The final regulation is a substantial improvement over earlier drafts and generally tracks the DMCA and EU E-Commerce Directive provisions. The “safe harbors” provide limitations only for liability from damages, not injunctive relief, and ISPs are liable if they know or should have known that the material was infringing even absent express notifications (and of course there is no safe harbor unless the ISP takes down the infringing material after compliant notice). As described above, what constitutes a compliant notice must be publicly clarified. Exceptions still cause some concern with Director General Zhang confirming that the Article 9 statutory license will apply to foreign works which are owned by a Chinese legal entity. This would violate the Berne Convention and TRIPS. Director General Zhang also confirmed that Article 8, which affects publishers, would not apply to foreign works. Director General Zhang also said that ISPs are liable for linking activities under Article 23, which we believe is the correct reading as affirmed in the Yahoo China decision of the Beijing High Court. Furthermore, the Beijing Higher People’s Court in the Yahoo appeal case clarified that the Article 14 notice is not a pre-requisite to invoke joint liability under Article 23 of the Internet Regulations.
- **Exemptions for Libraries, Educational Bodies and “Similar Institutions”:** IIPA remains concerned about certain aspects of Articles 6, 7 and 8. A representative list of potential issues includes: (a) overbroad language applying to teachers, researchers and government organs in Article 6, (b) Article 7’s reference to “similar institutions,” which may open up the scope of exemptions far beyond organizations that perform the traditional functions leading to these exemptions, (c) failure to limit Article 7 to “nonprofit” entities, and (d) failure to clarify that Article 8 does not apply to foreign works.⁴³

The Criminal Law Should be Amended to Cover All “Commercial Scale” Piracy: Articles 217 and 218, the criminal piracy articles of the Criminal Law of the People’s Republic of China (1997), fail to cover all possible commercial scale piracy, and as such, these provisions violate TRIPS Article 61. Examples of omissions include the exhibition and broadcast right, the translation right and others, the infringement of which do not constitute crimes even if done “on a commercial scale.” In addition, China is one of the only countries in the world that requires proof that the act in question was undertaken with the “purpose of reaping profits,” and is the only country we know of that has a threshold (“gains a fairly large amount” or “when the amount of the illicit income is huge”) for criminal liability calculated based on pirate profits or income.⁴⁴ China should remove the “purpose of reaping profits” standard since commercial scale piracy can be, and in the digital age often is, engaged in without any purpose of reaping profit (e.g., on a P2P Internet site where no money is exchanged, or in the case of hard-disk loading where the software might be characterized as a “gift”). The criminal provisions also need an update to take into account the WCT and WPPT (WIPO Internet Treaties), which, as discussed above, China has joined. The most important update would be to criminalize the circumvention of TPMs. Thus, we propose that Article 217 be amended to achieve the following, among other things: (1) expressly criminalize end-user piracy, (2) add the TRIPS-required reference to all the exclusive rights now provided in the law (and include the interactive public communication right), (3) criminalize violations of the anti-circumvention and rights management information provisions, (4) remove “purpose of reaping profits” to criminalize offenses that are without profit motive but that have a “commercial scale” impact

⁴³ Director General Zhang of the SCLAO confirmed to IIPA that Article 8 did not apply to foreign works but this should be confirmed in writing and a notice made widely available .

⁴⁴ As noted below, the new IIs set forth what “other serious circumstances” and “other particularly serious circumstances” are, but nevertheless, since the alternative thresholds (such as the per copy thresholds) may be difficult to meet even where commercial scale piracy exists, China should instead choose to modernize its criminal provisions by removal of these vague standards or by significantly lowering the thresholds.

on right holders, and (5) increase the level of penalties overall. China must also make good on its promise to criminalize fully the importation and exportation of pirate product (under the JIs such acts are actionable under “accomplice” liability, but the penalties available are much lower and generally non-deterrent).⁴⁵ We also note that the JI provisions on repeat offenders, while included in the 1998 JIs, were not included in the 2004 JIs; we seek confirmation that the recidivist provision in the 1998 JIs remains intact, since it is not inconsistent with the 2004 JIs.⁴⁶

Criminal Thresholds Should be Further Lowered or Abolished Entirely: The SPC’s 2004 and 2007 JIs still leave thresholds too high. The U.S. government has challenged, in the WTO, the maintenance of these thresholds as incompatible with China’s TRIPS obligations.⁴⁷ The 2004 JIs made only minimal decreases in the monetary thresholds and leave in place calculation of “gain” or “illicit income” at pirate prices. Further, to date, copyright owners have not found that the copy thresholds (1,000 for individuals, 3,000 for “units,” and 5,000 copies (for the more severe penalties) and since July 1, 2007 under the 2007 amended JIs, 500 for the less serious, and 2,500 for the more serious, penalties) have proven helpful in generating new criminal prosecutions, although copy thresholds could be helpful if lowered significantly (in 2004, IIPA proposed 50 copies of software or books and 100 copies of recorded music or motion pictures for criminal liability, and twice this number for more serious offenses; the Supreme People’s Court adopted a number 30 to 60 times higher than what IIPA proposed).

A new challenge is how to meet the threshold in the case of Internet infringement. The new SPP “guidelines” do not deal with this issue.⁴⁸ The severity of Internet piracy clearly calls for adjustments to the thresholds in the JIs so that Internet piracy, when on a commercial scale, is actionable with clear copy thresholds and even if pirate profit or “illegal business volume” is not proved.

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

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

⁴⁵ In the JCCT, the Chinese government committed that the Chinese Ministry of Public Security and the General Administration of Customs would issue regulations “to ensure the timely transfer of cases [involving pirate exports] for criminal investigation.” The JCCT outcomes indicate that the “goal of the regulations is to reduce exports of infringing goods by increasing criminal prosecution.”

⁴⁶ According to Article 17 of the 2004 JI, “[i]n case of any discrepancy between the present Interpretations and any of those issued previously concerning the crimes of intellectual property infringements, the previous ones shall become inapplicable as of the date when the present Interpretations come into effect.”

⁴⁷ http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds362_e.htm

⁴⁸ See footnote 17.

China Should Adopt an Anti-Camcording Criminal Provision: A vast number of movies are stolen right off the screen by professional camcorder pirates, who use video cameras to illicitly copy a movie during exhibition in a movie theatre, usually very early in its theatrical release or even prior to the film's release (e.g., at a promotional screening). These copies are then distributed to bootleg "dealers" throughout the world and over the Internet. China should take whatever legislative steps necessary to criminalize camcording of motion pictures.

TRAINING AND PUBLIC AWARENESS

MPA, IFPI and BSA undertook many training and awareness programs throughout China in 2007. The trainings have involved police, prosecutors, judges, customs officials, and administrative agency enforcement personnel. Training and awareness has always been a high priority for the copyright industries in China.

In 2007, MPA sponsored and co-organized 15 trainings/seminars for 1,159 enforcement officials, IPR judges, representatives from ISPs and ICPs, local copyright industries, with topics covering new trends in piracy worldwide, MPA's anti-piracy strategy, impact of piracy on the film industry, strategic civil litigation against piracy, IPR cases in U.S. courts, investigative techniques against Internet piracy, identification of pirate optical disks, etc.

- In January 2007, MPA conducted an enforcement training for officials from Beijing Press & Publication Bureau, Cultural Committee, the Police, Administration of Industry & Commerce, City Management Task Force at the district level.
- MPA conducted another enforcement training in January for Internet police and officials from the Guangzhou Culture Bureau and Copyright Bureau.
- In March 2007, MPA conducted an enforcement training for officials from the Shenzhen Culture Task Force.
- In April 2007, MPA conducted three trainings: 1) an Internet anti-piracy training for NCAC officials nationwide and Internet Police of the Ministry of Public Security; 2) an Internet seminar for major ISPs & ICPs in China, officials from NCAC & MII, IPR judges in Beijing; and 3) a symposium for IPR judges nationwide, focusing on civil litigation for IPR enforcement in China and intellectual property cases in U.S. court
- In May 2007, MPA conducted an enforcement training for MOC officials nationwide, as well as an Internet seminar for officials from the Shenzhen Intellectual Property Office, the Shenzhen Copyright Bureau, the Internet police of Shenzhen PSB and representatives from copyright industries in Shenzhen and Hong Kong. Also in May 2007, an enforcement training was conducted for officials from the Municipal Culture Task Force, AIC, the Police, and Customs in Zhuhai, Guangdong Province.
- In August 2007, MPA provided Internet anti-piracy training for MOC officials nationwide.
- In September 2007, MPA conducted an enforcement training for cultural market enforcement officials in Shandong Province.
- In November 2007, MPA conducted an Internet anti-piracy training for NCAC officials nationwide.
- In December 2007, MPA conducted three trainings: 1) for top officials of NAPP's local offices nationwide, focusing on awareness of piracy's impact on the movie industry; and 2) two trainings on enforcement for copyright enforcement officials and cultural market enforcement officials in Shenzhen and Guangzhou.

The record industry provided the following trainings:

- In June 2007, a training for Guangdong Province Customs officials on pirate product identification.
- In June 2007 and December 2007, an Internet anti-piracy training for NAPP officials nationwide.

- In August 2007, an Internet anti-piracy training for MOC officials nationwide.
- In September 2007, an Internet anti-piracy training for MOC officials in Shandong.
- In November 2007, an Internet anti-piracy training for NCAC officials nationwide.

The business software industry (BSA) provided the following trainings:

- In June 2007, an enforcement training for 100 enforcement officials in Chongqing, focusing on evidence gathering during an end-user raid.
- In December 2007, an end-user enforcement training for the Beijing Culture Law Enforcement Agency.
- Both these trainings were followed by end-user piracy actions taken in these two cities.
- As of the end of November 2007, BSA had conducted 39 software asset management trainings in 12 major cities, either with local government agencies or Ministries of the State Council. Altogether more than 4,000 enterprises have participated in these trainings.

CONCLUSION

The scope of the physical piracy problem faced by the copyright industries in China has not fundamentally changed in the last 20 years—and incredibly, the online and mobile piracy problem threatens to overtake the issues in the physical realm. The piracy levels then — among the world’s highest — continue at only minimally reduced levels today. In the 1990s, China adopted reasonably good laws and regulations (consistent with the international obligations they assumed) and has done fairly well at keeping them up to date. However, over this entire period China has relied on a flawed administrative enforcement system to enforce these laws and regulations that has been, and remains, wholly inadequate to the task of ensuring compliance and provides very little deterrence against the various forms of copyright piracy that have plagued China for so long.

With rare exception, China has chosen to avoid using deterrent criminal enforcement as a tool to address commercial copyright piracy. (IIPA estimates that, since China joined the WTO, it has brought only six criminal cases involving U.S. works). This problem is exacerbated by China’s failure to open its market in any meaningful way to legitimate copyright products, allowing pirates largely free reign to reap massive profits. China’s joining the WTO in 2001 has had almost no impact on addressing these manifold problems.

The same massive copyright piracy and market access problems have now infected the online marketplace, where the potential benefits for U.S. (and for that matter Chinese) creative industries are simply enormous but will likely go unrealized if the Chinese government persists with applying these flawed policies in the online environment.

The solutions for China’s IPR and market access problems is fairly straightforward. They are highlighted earlier in this submission in the list of “priority actions” we recommend the government take. We look forward to the Chinese government taking a new look at these issues and working with our industries and the U.S. government to finally solve them.

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2008 SPECIAL 301 REPORT

PERU

Special 301 Recommendation: IIPA recommends that Peru be elevated to the Priority Watch List in 2008.

EXECUTIVE SUMMARY

In the year leading up to the approval of the U.S.-Peru Trade Promotion Agreement (TPA) was approved, the copyright industries had hoped that 2007 meant that Peruvian agencies were taking strong actions to enforce its current copyright laws to combat widespread piracy. Sadly, that was not, and is not, the case. 2007 presented numerous disturbing enforcement-related developments that undermined the current potential for any effective criminal, administrative and even civil copyright enforcement in Peru. To say 2007 was a very difficult year to obtain effective enforcement would be an understatement. Because of the severity of these problems, Peru should be elevated in the Special 301 process to the Priority Watch List.

In addition, piracy in the Peruvian marketplace continues to be a significant business obstacle. Optical disc piracy and street piracy remain basically uncontained. The government has chosen to issue a fourth postponement in the implement of its program to legalize software within government agencies. Illegal photocopying on university campuses continues. Border control remains weak. More police actions are needed, prosecutors should pursue piracy cases, and judges should impose the deterrent-level sentences permitted in the criminal code. Furthermore, administrative enforcement by INDECOPI (El Instituto Nacional de Defensa de la Competencia y de la Protección de la Propiedad Intelectual) has deteriorated, and both its court and a constitutional court have issued alarming interpretations that will threaten the viability of effective enforcement, especially for the business software sector that relies on *ex parte* inspections.

IIPA supports free trade agreements and is pleased that both nations have ratified the U.S.-Peru TPA. True, Peru will need to amend its laws to bring its already good copyright laws up to the higher standards of the TPA. Yet the larger test will be whether Peru will take the actions needed--across the board (raids, prosecutions, civil actions, judicial sentencing and review)--to provide adequate and effective copyright enforcement. Actions speak louder than words.

PRIORITY ACTIONS IN 2008

Legislation

- Work with the U.S. Government and copyright industries to prepare and introduce legislation that will fully and properly implement the Trade Promotion Agreement's IPR obligations, including clear notice and take down procedures and ISP liability in cases of internet piracy.

Enforcement

- Conduct regular and concerted anti-piracy actions at the black markets in Lima (specifically, Mesa Redonda, Avenida Wilson, Galerías Garcilaso de la Vega, el Hueco, Polvos Azules and Polvos Rosados) with enhanced support of the National Police (which should provide more policemen when requested by the Prosecutor) as well as on the streets of high-traffic areas, with particular attention given to Miraflores, San Isidro, and other middle class neighborhoods as well as other targeted cities in the rest of the country.
- Continue to work with local municipalities to revoke licenses granted to vendors selling pirate product and close black-market businesses.

- Perform in-depth investigations directed at closing down illegal replication facilities and warehouses of hard-goods piracy.
- Pursue prosecutions and impose expeditious and deterrent sentences in piracy cases.
- Continue the training efforts to the judges in the new four specialized IPR courts and new appeal court in Lima.
- Increase the involvement of the tax authorities (SUNAT) in all anti-piracy actions, including software end-user and retailer actions, and coordinating with INDECOPI on border measures.
- Support more administrative enforcement efforts by INDECOPI against piracy of business software, motion pictures (DVD and cable), books, entertainment software and music.
- Instruct the Intellectual Property Chamber of INDECOPI to render deterrent sanctions. The issuance of simple warnings and forgiveness of “due copyrights”, both inadequate remedies, should be stopped.
- Involve INDECOPI, local and regional governments, the National Library and the Ministry of Education to take actions to halt unauthorized photocopying at universities.
- Enforce the 2004 software legalization regulation (which has been extended four times, now until December 31, 2008) against those public agencies that have not complied with the business software inventory requirements and the licensing of such software.
- Improve border enforcement to seize suspicious copyrighted products as well as raw materials (e.g., blank optical media) used in making those products.
- Implement the Importation Register for importers of blank media and recording devices and equipment.
- Dedicate significantly more resources to criminal IPR enforcement (e.g., budget reallocation, adding at least one additional special prosecutor, supporting the special IPR unit of the Fiscal Police, as well as enhancing financial resources for INDECOPI).

The Trade Promotion Agreement

The U.S. and Peru began free trade agreement negotiations in May 2004. On June 25, 2007, both nations reached agreement on amendments to the TPA to reflect the bipartisan trade agreement between the U.S. Administration and Congressional leadership on May 10, 2007. On December 14, 2007, the Peruvian Congress delegated the power to legislate and issue regulations to implement the TPA to its Executive, and the Peruvian Congress will set up a Committee to review the Executive’s legislative proposals.

With respect to intellectual property, the TPA offers a vital tool for encouraging compliance with other evolving international trends in copyright standards (such as fully implementing WIPO Treaties’ obligations and extending copyright terms of protection beyond the minimum levels guaranteed by TRIPS) as well as outlining specific enforcement provisions.¹ For the time being, Peru remains a beneficiary country of several U.S. trade programs which contain high IPR standards.²

¹ The final text of the U.S.-Peru TPA IPR Chapter is posted on USTR’s website at http://www.ustr.gov/Trade_Agreements/Bilateral/Peru_TPA/Final_Texts/Section_Index.html. Peru also signed four IPR-related Side Letters, including one on ISP liability and another on retransmission issues.

² During the first 11 months of 2007, the following quantities of imports under the Andean preferential trade programs entered the U.S. from Peru: \$1.35 billion under ATPA, \$1.43 billion under ATPDEA and \$223.6 million under GSP. The U.S. Congress is considering extending ATPA benefits which are due to expire February 28, 2008. Last year, IIPA filed comments with the Trade Policy Staff Committee regarding its request as to whether the eligible Andean Trade Preference Act countries (such as Peru) were meeting the trade program’s criteria, see IIPA, Letter to TPSC, March 5, 2007, posted at <http://www.iipa.com/pdf/IIPAAndeanATPACommentsToUSTRdueMarch503052007.pdf>.

PERU
Estimated Trade Losses Due to Copyright Piracy
(in millions of U.S. dollars)
and Levels of Piracy: 2003-2007³

INDUSTRY	2007		2006		2005		2004		2003	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Sound Recordings & Musical Compositions ⁴	58.5	98%	53.5	98%	66.0	98%	68.0	98%	87.0	98%
Business Software ⁵	40.0	73%	32.0	71%	22.0	73%	22.0	73%	19.0	68%
Motion Pictures ⁶	NA	NA	NA	NA	12.0	63%	4.0	75%	4.0	45%
Entertainment Software	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA
Books	NA	NA	NA	NA	9.0	NA	8.5	NA	8.5	NA
TOTALS	98.5		85.5		109.0		102.5		118.5	

COPYRIGHT PIRACY IN PERU

Optical disc piracy and street piracy: Optical disc piracy is a major problem in Peru, harming the markets of almost all the copyright industries. Large numbers of blank media (e.g., CDs, DVDs) are imported into Peru, and these serve as the basis for local pirates' burning copyrighted content. Unchanged are the entrenched black markets such as Polvos Azules, Polvos Rosados, Hueco and Mesa Redonda (which is located one block away from the police and Public Ministry's headquarters) where pirates operate flagrantly during daylight hours.

It is estimated that only 12% of the optical discs entering Peru are destined for the legitimate market. It is no longer possible to reach conclusions on the dimension of piracy based simply on the volume of optical disc imports. According to MPA analysis of data provided by SUNAT (Customs Service), the legal importation of blank discs has dropped in recent years, with 2007 imports being less than 15% of the level of 2005's imports.

Year	Units Imported (Millions)
2005	127,831,010
2006	26,845,050
2007 (up to November)	15,237,665

Another possible reason for the decline in blank media imports might be due to the implementation of the private copy levy placed on optical media. Another interesting effect of this downturn is that the number of blank media units by the leading brand most often used to produce pirate discs locally also fell dramatically.

³ The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2008 Special 301 submission at www.iipa.com/pdf/2008spec301methodology.pdf. For information on the history of Peru under Special 301 review, see Appendix D at (<http://www.iipa.com/pdf/2008SPEC301USTRHISTORY.pdf>) and Appendix E at (<http://www.iipa.com/pdf/2008SPEC301HISTORICALSUMMARY.pdf>) of this submission. IIPA's prior country reports on Peru are posted on the IIPA website at <http://www.iipa.com/countryreports.html>.

⁴ The lower recording industry loss estimate in 2004 was due to the fact that the average sale price per legitimate CD was lower; the number of pirate units remained unchanged between 2003 and 2004.

⁵ BSA's 2007 statistics are preliminary. They represent the U.S. software publishers' share of software piracy losses in Peru, and follow the methodology compiled in the Fourth Annual BSA and IDC Global Software Piracy Study (May 2007), available at <http://w3.bsa.org/globalstudy/>. These figures cover, in addition to business applications software, computer applications such as operating systems, consumer applications such as PC gaming, personal finance, and reference software. BSA's 2006 piracy statistics were preliminary at the time of IIPA's February 12, 2007 Special 301 filing and were finalized in June 2007 (see <http://www.iipa.com/statistics.html>), as reflected above.

⁶ MPAA's trade losses and piracy levels for 2006 and 2007 are not available. MPAA did provide 2005 estimates for a select group of countries, using a new methodology that analyzed both physical/"hard goods" and internet piracy. Details regarding MPAA's methodology for 2005 and prior years are found in Appendix B of this IIPA submission.

A very recent development is that the country source for blank media changed in 2007. India has now replaced Taiwan as the main source of legal blank disc imports to Peru, according to SUNAT data.

	2005	2006	2007
Taiwan	54,996,553	11,731,692	2,383,924
China	4,653,438	1,952,409	1,245,586
India	354,276	3,223,228	5,428,566
Malaysia	631,064	1,900	268,660
Japan	379,450	1,647,958	1,314,522
Others	3	565,702	3,000
TOTALS	61,014,784	19,122,889	10,644,258

Of course, none of the above figures account for blank media that entered the county undeclared, falsely declared, or as contraband (smuggled). Thousands of blank tapes and CD-Rs are smuggled into the country each week and then distributed for illegal duplication around the country. Informal calculations indicate that CD-R contraband import increased by 50% during 2007.

With respect to optical media enforcement, an individual believed to be one of the main importers and distributors of blank CDs in Peru, was finally indicted. INDECOPI identified this defendant as the head of an organized group with international connections, including owning businesses and properties in Chile and Bolivia. Also, this defendant reportedly has investments of about US\$300 million, according to tax authorities. For four years, efforts were made to issue indictments against this defendant for IPR infringement and smuggling, but the cases never moved forward. At last, in February 2007, a prosecutor in Lima charged the defendant with money laundering, which is punishable with up to 20 years' imprisonment. So far, the trial has been delayed because the defendant has refused to appear in the court. It is essential for the Peruvian Government to prosecute this case actively and fully.

Internet piracy: The software and film industry reports that Internet-based piracy is not yet widespread in Peru. However, for the music industry it is already a severe problem that is slowly overtaking physical piracy as the most detrimental activity against its companies. Several auction sites (such as Mercado Libre and De remate) do offer infringing copies of films, software and music. In addition, internet cafes serve as important locations for downloading and burning of illegal files. The local music industry reports that internet piracy is becoming a habit for the middle class which were the few consumers buying legitimate physical product. Although current Peruvian legislation has the tools to sanction such unlawful behavior on the Internet, further refinements are needed to clearly specify that the sharing of information between peer-to-peer (P2P) networks and other similar networks constitutes unlawful actions.⁷

Business software piracy: The business software industry reports no major changes in the piracy situation for its products in Peru in 2007. The Business Software Alliance (BSA) confirms that its triad of problems remains: (a) the illegal duplication of business software mostly within small- and medium-sized private sector companies, (b) piracy within government agencies, and (c) high levels of optical disc piracy on the streets and in bazaars. Peruvian government officials indicate that the official rate of piracy among its agencies is below 42%, but BSA estimates it to be almost twice as high, at approximately 80%. The government published these piracy figures in April 2006, but has not provided access to its methodology, nor does it explain which agencies were included, or what kinds of software programs were included in the survey. If the report was based on agency self-reporting, it seems likely that underreporting would occur because officials could be subject to administrative and/or criminal liability. To make matters worse, the government has again delayed the implementation of the Executive Decree first issued in 2004 which required government agencies' legalization of software. The new deadline for implementation is now December 31, 2008 (Supreme Decree N° 002-2007-PCM). Preliminary estimated U.S. trade losses due to business software piracy in Peru for 2007 rose to \$40 million, with an estimated piracy level rising to 73%.

⁷ In particular, Section 48 of the Peruvian Copyright Law should be amended in order to exclude the possibility of considering sharing and use of information as private copy, specifically stipulating that this is not considered a private copy.

Record and music piracy: Over the last few years, the legitimate recording industry in Peru has nearly disappeared because of the high levels of piracy. Piracy of music and sound recordings still remains at one of the highest levels in the world, at approximately 98%. Estimated trade losses due to music and recording piracy in Peru rose to \$58.5 million in 2007. Recorded CD-Rs (imported mainly from Taiwan and burned locally) are the most predominant form of piracy in Peru. Industry estimates that more than 95 million pirate copies recorded CD-Rs are sold every year. No official information is available about the number of MP3 players entering the country, but many local stores offer to sell digital recording devices. Only two retail stores (Phantom and IEMPSA) dedicated to sell legitimate CDs remain in Lima. The rest are some department stores with a small section for CDs. Even the price for the pirate product has been declining over the past year, like because of the massive import of contraband CD-Rs. For example, one set of a dozen of recorded CD-Rs with international repertoire that is sold in El Hueco, Mesa Redonda and other major flea markets can be purchased for US\$3.15. The recording industry's team in Lima started a special lobby campaign to convince municipal authorities around the capital city to revoke licenses to pirate stands and stores. In addition, another municipality (San Juan de Miraflores) agreed to implement a revocation program; three business licenses were revoked in the first raid conducted there. Other municipalities (Santiago de Surco, San Borja, San Miguel and Magdalena) will be included in this effort during 2008.

Audiovisual piracy: The Motion Picture Association (MPA) reports that optical disc piracy of audiovisual content continued to grow in 2007. Pirate optical discs are available even prior to theatrical release in Peru and are distributed via street markets, home delivery, newspaper stands and black market distribution centers. The legitimate home entertainment market has been decreasing dramatically, due to both piracy and the closing of several stores of a major rental chain. The sale of pirate product is further driven by the low prices of image receivers (televisions and DVD players); these items have decreased in price due to tariff reductions, an undervalued dollar, and has facilitated credit terms for lower income consumers. Piracy in the home video/DVD industry has resulted in local distributors significantly reducing their profit margins. Interestingly, the theatrical market in Peru has increased despite the piracy problem. Continuing a four-year trend, both the theatrical and the home entertainment sectors have reported positive results during 2007 as compared to 2006. Exhibitors have made significant investments in new multiplexes both in Lima and in other cities; two new complexes opened in 2007, representing a 7.14% rise in the number of screens over 2006. Despite more screens, piracy has adversely affected the theatrical market as the levels of theater/screen occupancy are on average 25%, which is a low percentage for Peru.

Book piracy: The book and journal publishing industry reports little change in the piracy situation in Peru for 2007. Large-scale photocopying (the most damaging form of piracy) remains at high levels, and unauthorized translations continue as a problem as well. Book fairs (*campos feriales*), including two large ones in Lima, reportedly permit the sale of pirated books. Such widespread piracy over the last decade has devastated the local book industry, causing bookstores to close and interfering with the ability of legitimate publishers to continue doing business; such embedded piracy also sends the wrong signal about the importance of cultural development. This commercial devastation also contradicts the government's declaration about the importance of publishing, as found in the Law of the Book (Law 28086 of 2003), which recognizes the important public need to create and protect books and editorial products.

COPYRIGHT ENFORCEMENT IN PERU

Industry sectors report generally good cooperation with many (not all) Peruvian IPR agencies, but the main problem remains that results (lower piracy and effective deterrence) did not occur in 2007. The National Committee for Fight against Contraband (*Comisión Nacional de Lucha contra el Contrabando y la Piratería*) was formed in 2004, includes 22 members from both the public and private sector. Its authority, which was to have expired at the end of 2007, was extended indefinitely by Law No. 29013 (enacted on May 6, 2007). Unfortunately, the operations unit of this Committee has not yet scheduled or coordinated any enforcement actions. Furthermore, the participation of affected copyright holders as members of the National Committee to Fight against Contraband and Piracy (*Comisión Nacional de Lucha contra el Contrabando y la Piratería*) has been severely limited. Endemic problems with criminal enforcement, rising problems with administrative enforcement and appeals at INDECOPI and weak border enforcement are detailed below.

A. Criminal Enforcement

Police actions and prosecutions: The copyright industries agree that there is a continued need to allocate more public resources to support the special IPR unit of the Fiscal Police (*Division de Investigacion de Delitos contra los Derechos Intelectuales*) in order to conduct effective anti-piracy investigations and to support the National Police (7th Region) providing troops when large raids are to be conducted in the black markets. For example, the National Police lacks resources to carry out intelligence activities prior to and following raids, and it performs neither intelligence nor follow-up activities. The National Police and the Prosecutor's Office lack adequate warehouses to safely store seized goods. The National Police does not have sufficient personnel to perform counts and prepare findings of their activities, which results in dismissal of cases at the prosecutorial or judicial level. Municipalities and their police forces (Serenazgo) do not assist in raids carried out in their jurisdiction.

Both the recording and film industries have excellent relationships with the Fiscal Police as well as with the specialized prosecutors' offices in Lima. The recording industry confirms that the Fiscal Police conducts 70% of all music raids in Lima. A major deficiency is the lack of raids in the interior of the country because of budget and logistic problems. In fact, the amount of product seized over the last year has decreased by about 75% from a total of 8.6 million units in blank and recorded units to about 2.1 million in 2007. Indictments and convictions also decreased significantly last year. Only 8 people were indicted in 2007, compared to 95 in 2006. There also was a huge drop in the number of raids by two-thirds, from over 3,000 raids in 2006 down to 1,000 in 2007.

MPA reports that the Anti-piracy Crusade has supported intelligence activities and provided logistics for raids carried out by the Fiscal Police. A total of 47 operations were conducted: 29 by the Fiscal Police (DIRPOFIS), 17 by SUNAT and 1 by INDECOPI. MPA indicates that some of its raids during 2007 failed or were called off due to suspicions that raid targets had been notified by the police or others of the impending operations. In 2008, MPA will be reaching out to start work with the prosecutor's offices in the port of Callao.

Actions by the tax authorities: Industries' experience with SUNAT (the tax and customs authority) last year remain mixed. Prior to 2007, all copyright sectors indicated that it had been difficult to get SUNAT actively involved in anti-piracy operations. In 2007, SUNAT created a special group to tackle the street piracy problem. In November 2007, SUNAT conducted a major street raid and seized about 200,000 recorded pirate music CDs and 70,000 blank CD-Rs. Charges for contraband were filed by SUNAT in view of the absence of importation documents. After this raid, the level of cooperation with SUNAT and the music industry has been excellent. All operations conducted by SUNAT were coordinated directly with INDECOPI. In comparison, BSA notes that the SUNAT has been reluctant to consider software piracy a major problem, and as a result has not taken any action against it.

Insufficient criminal prosecutions: Peru has four IPR prosecutors who work with INDECOPI when requested to do so. Unfortunately, these IPR prosecutors have restrictions on their jurisdiction, and the filing of the complaint can take four to six months after the raid has occurred in cases where the infringer was not imprisoned.

There have been two recent cases of interest (in addition to the OD importer charged for money laundering, discussed above). First, MPA reports that on July 28, 2007, two cases of camcording during exhibition of the movie *The Simpsons* were detected. The theater manager set in motion the alert system that the *Asociación de Distribuidores de Cine y Video* (Film and Video Distributors Association) (ADCV) had pre-established for these cases. The camera involved in this case has not yet been analyzed by the police. Depending on the results of this analysis, police will send the results to prosecutors for their action. MPA hopes prosecutions will move forward. Second, an alleged mafia group engaged in the printing of covers for movies, music and other goods has been identified, and is associated with a defendant who is current facing other criminal charges; these defendants are being criminally prosecuted.

Non-deterrent results in the criminal courts: Few criminal cases reach the Peruvian judiciary, and if they do, judges do not impose deterrent sentences. What happens in practice is that the Peruvian Criminal Procedure Code permits sentences of four years or less to be suspended. This sad practice continued even after several positive amendments to the criminal code, including: (a) the 2004 amendments which provided an increase of minimum sentencing to four or more years for copyright infringements;⁸ the creation of four special courts and one special appeal court with national jurisdiction on IPR crimes in November 2006; and (c) amendments made in November 2006 to penalize recidivist offenders with stronger sanctions and establish additional penalties for more crimes.

MPA reports that the level of sanctions ordered by criminal courts is insignificant. Judges tend to be lenient in their sentencing and most sentences of less than four years are suspended. The average 2007 sentence was a three-year suspended sentence and the average 2007 fine was S/1000 (nuevo soles, approximately US\$300). Courts do not order the destruction of goods seized until the conclusion of the proceeding and the destruction of infringing product cannot occur until a designated expert witnesses determines that the goods concerned are infringing. Further, MPA has not been able to reverse court decisions ordering dismissal of proceedings. On a brighter note, provisional imprisonment during the pending state of a criminal IPR action was achieved in one MPA case. However, MPA's request to the expert for permission to destroy infringing product before the trial was denied; MPA made this request to minimize the risk of infringing product finding its way back to the streets.

B. INDECOPi and Administrative Enforcement and Review

INDECOPi's administrative enforcement efforts are ineffective: Many of the copyright sectors continue to experience difficulties in achieving results. Poor results are not caused entirely by limited resources, though the latter is a problem. INDECOPi is supposed to be self-funding from the income it gets from patent and trademark registrations and from the fines that its administrative bodies are permitted to impose. However, significant fiscal restrictions have adversely affected *ex officio* enforcement activities. Additional resources should be allocated to support INDECOPi's enforcement efforts.

BSA notes that, although INDECOPi has been cooperative in hearing the software industry's concerns, this cooperation has not translated into the imposition of deterrent sanctions. Non-deterrent decisions and the failure to collect the fines issued against infringers means no effective deterrence. During 2007, BSA's campaign experienced a high rate of rejections to INDECOPi inspections to gather the evidence of software infringement simply because the targets (end users) simply denied INDECOPi to enter their premises (this happened in about 20% of the BSA cases filed). When this occurs, BSA has to request a second inspection with a search warrant issued by the courts. Getting this second inspection can take a month or more, and in the meantime, the target infringer purchases or deletes the missing or pirated software so when BSA and INDECOPi returns, the evidence is gone. The infringer gets off scot-free and the legal copyright owners do not receive damages or remuneration for illegal software use. Several months later (between three and six months in the Copyright Bureau, plus another six months at INDECOPi's IP Trial Court), INDECOPi may issue a fine for not allowing the inspection, but the fine is so low that the infringer always prefers to close the door rather than allow the inspection. As a result, piracy continues and there is no effective law enforcement.

MPA also reports that its enforcement efforts with INDECOPi were not good at all in 2007. It sees INDECOPi as placing more emphasis on training and education programs, which is important, but not the extent of not taking administrative enforcement actions.

The book publishing industry believes it is critical that, in addition to criminal efforts, the administrative agencies of INDECOPi and the Copyright Office initiate investigations and punish those individuals and businesses involved in book piracy. INDECOPi should also work jointly with local and regional governments, as well as with the National Library and the Ministry of Education.

⁸ An ESA member company reports that several of its cases remain stagnant within the court system, with some dating back to 2000.

Problems with INDECOPi and its judicial review: BSA reports that difficulties with the Intellectual Property Chamber of INDECOPi's Trial Court are its primary source of difficulties with administrative enforcement. First, all fines for software infringement decisions rendered by the Copyright Bureau (the first step in the administrative procedures) have been reduced by the Intellectual Property Chamber of INDECOPi's Trial at a rate of 66%. Second, the fines that are imposed are too low. This is because they are not calculated correctly. They are calculated to be twice the "market average price of the original software", but this "market average price" is 30% of the actual market price. This is due to a wrong interpretation of the law (Law Decree 822, Article 194). Third, INDECOPi fixes "due copyrights," so-called "*remuneraciones o derechos devengados*," that must be paid by software infringers as part of their penalty. Such due copyrights are some kind of indemnity for the legal holder of the copyright. The problem is that INDECOPi fixes such due copyrights following the same wrong criteria used to fix the fines.

BSA also was surprised by the Intellectual Property Chamber of INDECOPi's Trial Court, which has issued several clearly erroneous decisions removing sanctions that contradict its own case law. In a recent case, the INDECOPi Trial Court has forgiven the infringer the amount of the "due copyrights" that according to the law must be imposed jointly with the fine for the copyright infringement (Decision N° 1700-2006-TPI-INDECOPi dated November 2, 2006). The Court decided to "forgive" the due copyrights because the infringer purchased a legal copy of the software in question after the raid had taken place. However, the applicable case law is clear that, once the evidence of the infraction has been obtained (through the raid), the infringement is considered proven and therefore the Court must require collection of the due copyrights. In the same ruling, INDECOPi did impose the fine: that is a clear contradiction because they can forgive a fine but not the due copyright, which belongs to the copyright holder. In another unexpected decision, the Intellectual Property Chamber of INDECOPi's Trial Court departed from established Peruvian copyright case law, in only admonishing the software infringer (Decision N° 1601-2007-TPI-INDECOPi, dated August 14, 2007). The Court decided to give a simple "warning" because the infringer had allegedly shown "repentance". BSA believes that such rulings by the Intellectual Property Chamber of INDECOPi's Trial Court severely harm copyright enforcement in Peru, and send the wrong message to consumers. If these decisions were followed by others, they would in effect encourage infringers to wait two years for the process at INDECOPi to wind its course, show "repentance" and buy the software before the Court issues its decision, and INDECOPi would issue a warning and withhold the damages due to the copyright holder. Meanwhile the rights holders will have wasted time and resources trying to bring ineffective enforcement actions.

Collections: The recording industry acknowledges that INDECOPi is playing an important role for the consolidation of the industry's collective society (UNIMPRO), and is supporting initiatives for the collection of royalties for performance rights. The recording industry did not file any anti-piracy actions in 2007 with INDECOPi; instead they work with the special IPR prosecutor.

Incorrect interpretation affecting administrative/civil inspections: BSA reports that another recent problem coming out of a decision issued by the Constitutional Trial Court. There has been a sudden increase in the requirements to obtain an inspection in a software end-user case. Before the Court's new interpretation, inspections were issued immediately based on the evidence that the software company had issued a Cease and Desist Letter to the target end user and there was no reply. This method complied with TRIPS Article 43 which states that the copyright owner should present reasonable available evidence sufficient to support his claim, considering the substantial evidence of the infringement is in the hands of the infringer. But the interpretation made by the Constitutional Trial Court, and followed by INDECOPi's Trial Court, now considers such inspections to be "provisional measures." According to Peruvian law, Courts can only order provisional measures if there is evidence that the copyrights are currently being infringed, that the infringement is imminent, and that any delay in issuing the provisional measure could cause an irreparable harm to the copyright owner. BSA's local counsel indicates that it is nearly impossible to satisfy these three requirements because the rightsholder does not have access to such information unless the inspection occurs in the first place. Inspections should not be considered "provisional measures", but rather a legitimate tool to gather evidence.

This new interpretation has caused the nullification of several requests for inspections made by copyright owners as well as the nullification of at least four procedures that did not meet the new standard. It

also has caused severe difficulties getting an inspection mandate due to the new requirements imposed by INDECOPI following the Constitutional Trial Court decision.

C. Border Enforcement

There were no known border raids in 2007, to the best of industry knowledge. According to SUNAT, contraband of optical discs, mostly which enter from Iquique across the border with Chile, amount to over 100 million units per year. At the 8th Annual Peru-Chile Conference in October of 2007, Peruvian authorities discussed with their Chilean counterparts the creation of mechanisms for intelligence exchange. The Chilean Iquique Free Zone borders Peru, making such cooperation on matters of smuggling and piracy essential.

The copyright industries have recommended (in our 2007 301 report and again here) that several steps could be taken to improve this situation:

- Peruvian customs, by an internal directive or some regulatory means, should impose strict controls to check the legitimacy of IP goods entering and leaving Peru (e.g., music CDs, videos, business software, videogame software on all platforms, including CD-ROMs, personal computer CD-ROMs and multimedia entertainment products). Customs can consult with industry associations and local representatives about suspect shipments. Many of the copyright industries have participated in training aimed at Peruvian customs officials.
- Customs should pay special attention to the value of the goods that are used as raw materials for the production of copyrighted products, such as recordable CDs, blank tapes, blank videos, etc., that enter Peru with what appear to be under-declared values. By a November 2005 resolution, the Customs Authority included blank media in a special regime (withholding of VAT) by which every importer shall pay in advance the VAT of the reseller of such merchandise, in addition to its own VAT.
- SUNAT should implement its obligation under the 2004 criminal code amendment to create an Importation Registry where persons or companies importing, producing, or distributing duplicating equipment or blank optical media discs must register.
- INDECOPI and SUNAT signed an agreement of mutual cooperation and support on August 18, 2004. Both agencies agreed to coordinate actions to enable customs authorities to identify infringing products more efficiently and to prepare joint anti-piracy media campaigns. MPA reports that that customs does report to INDECOPI all import operations related to optical discs and other goods that could be used in piracy. INDECOPI has an inspector working with Customs, who is in charge of checking the importation of blank media. That inspector reports to INDECOPI's director any irregular operations, and as necessary, INDECOPI takes administrative action or denounces the irregular activity to the IPR prosecutors.

COPYRIGHT LAW AND RELATED ISSUES IN PERU

1996 Copyright Law and TPA implementation: Peru's copyright law (Legislative Decree No. 822) entered into force on May 24, 1996. This comprehensive legislation raised the level of protection toward the standards of both TRIPS and the Andean Community Decision 351 (1993). The Peruvian law contains a broad scope of economic rights, as well as some of the highest levels of criminal penalties in Latin America. Peru already has deposited its instruments of accession to both the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT).

Given the higher standards of copyright obligations and enforcement measures in the Trade Promotion Agreement, Peru will have to make additional reforms to its copyright law in order to fully comply (the TPA does contain transitional periods). Additional reforms to the copyright law will have to include providing: comprehensive protection against the circumvention of technological protection measures and rights management information, statutory damages (ideally in both the courts and before INDECOPI), presumption of ownership, ISP liability and notice and takedown provisions, *ex officio* border measures, and *ex parte* seizure

of infringing products. Problems with the higher standard for INDECOPi inspections in Article 177 of the Copyright Act need to be resolved and clarification regarding private copies need to be rectified.

Government software asset management delayed again: BSA urges the Government to implement the long delayed software guide and the decree as swiftly as possible. The Government should enforce this regulation by punishing public servants that did not comply with the business software inventory requirements and the licensing of such software used in the respective public entity. On February 13, 2003, the Peruvian Government published the Government Software Legalization Decree (Decreto Supremo No. 013-2003-PCM).⁹ INDECOPi published the government guide for software management in 2004. The Government then issued Supreme Decree 037-2005-PCM in May 2005, postponing the enforceability of the agencies' obligations to provide an inventory of their software and to erase all illegal software by December 2006. Then, on January 11, 2007, the Government issued Supreme Decree 002-2007-PCM, postponing the enforceability of Decree 013-2003-PCM until July 31, 2008.

National Committee for Fight against Customs and Piracy Crimes: Law No. 29013 was enacted May 4, 2007 to amend the composition of the *Comisión Nacional de Lucha Contra los Delitos Aduaneros y la Piratería*. Participation of CONTRACOPIA was reduced from 16 members to only 3. This has resulted in the exclusion of the copyright industries and thus in the weakening of the *Comisión*.

Administrative Resolution No. 223-2007-CE-PJ (November 9, 2007): This resolution requires that when tax, customs and intellectual property-related crimes are particularly serious and particularly complex, they are to be heard by Supraprovincial Courts. This development could represent a serious setback in proceedings currently pending before Supraprovincial Courts. These courts, which already existed to hear cases involving terrorism and human rights abuses, were charged with hearing IP cases, when their workload declined with the decline of terror-related acts in Peru. However, it was determined that these courts would only hear IP cases that involved organized crime. It is often difficult to convince the court that a case which seems to involve "small players" actually involves links to much larger groups. There is the risk that many important cases will be turned back to the regular courts. MPA has been involved in training the Supraprovincial Courts' judges so that they will be better prepared to hear IP cases. Judges in these courts are inclined to hand out harsher sentences, due to the other cases that they have heard. There are not specialized IP penal judges in Peru, even in these special courts. Therefore, the training of these judges is very important.

Ordinance No. 217-MSI (November 16, 2007): This ordinance was issued by the Municipality of San Isidro (Lima). It provides for a number of actions against pirate including fines, loss of operating license and penalties the seizure of counterfeit products or products whose sale has been prohibited by law. The most important part of this ordinance is that it clearly prohibits the sale of pirate product.

2004 criminal code amendments increased sanctions: Peru's criminal code was amended in 2004 by Law No. 28,289 which increased criminal sanctions to a minimum of four years of prison and a maximum of eight years of prison for those who commit copyright infringement. The law also restricts judges' powers to suspend criminal sentences.

2006 criminal code amendments (Law No. 28,726 and No. 28,730): These amendments to the Criminal Code penalize recidivist offenders with stronger sanctions and established additional penalties for more crimes.

⁹ The decree states that all public entities should use legal software and, to that end, these entities must establish effective controls to ensure legal use of software. The decree specifies that government agencies must budget sufficient funds for the procurement of legal software, and set a deadline of March 31, 2005 for government agencies to provide an inventory of their software and to erase all illegal software. The decree also delineates clear lines of responsibility and mechanisms for ensuring compliance with its provisions: the chief technology officer or other designated official must certify compliance. The decree also provides for education campaigns aimed at public employees to inform them about licensing provisions and the content of the Legalization Decree, and further requires INDECOPi to publish a guide to ensure efficient software administration in the public sector.

Customs and the 2004 criminal code: The 2004 criminal code amendments also included several provisions to address customs crimes and piracy. The law created a permanent commission to fight customs crimes and piracy, designating SUNAT as the secretary of this commission. The law requires Customs officials to give INDECOPI all necessary support to help it fulfill its mission. It also created an Importation Registry where persons or companies importing, producing, or distributing duplicating equipment or blank optical media discs must register. The registry is supposed to be administered by SUNAT, however SUNAT did not activate such registry during 2006.

New IPR courts in Lima: New Federal Ordinance No. 122/2006 gave federal jurisdiction to some courts to analyze customs and tax crimes against intellectual property. This law also created the four new courts and one special appeals court with national jurisdiction on IPR crimes.

Levy on imported blank media: SUNAT Ordinance No. 224/2005 created a levy ranging from US\$ 0.03 to 0.06 per unit of blank optical media imported. The industries have attempted to collect this levy but with major difficulties. Equipment and blank media Importers have been unwilling to pay. The industries see an apparent increase in contraband to avoid this levy as well as importation related VAT's. The only way to prevent this situation and the loss of tariffs and levies is for Custom agents to take a more aggressive approach to the importation or smuggling of blank media.

Law of the Book 2003: The Law of Democratization of the Book and the Development of Reading (Law No. 28086) was enacted in October 2003, with the goals of protecting the creation and distribution of books and similar editorial products. The law also has goals of improving access to books, promoting the national library system, and promoting the conditions necessary for the legal production of the books, among others. The law created an entity known as PROMOLIBRO (*el Consejo Nacional de Democratización del Libro y de Fomento de la Lectura*), within the Ministry of Education.

Digital terrestrial television: In 2006, Peru announced that will adopt and implement a digital terrestrial TV system. Peru has not yet announced which standard it will adopt. MPA calls attention to the need to select a method of protection against unauthorized re-distribution of digital broadcast signals over the Internet, as critical to guaranteeing the future viability of this sector.

MARKET ACCESS DEVELOPMENTS

Duties on Optical Discs: Import duties on optical discs were reduced from 12% to 0%.

Duties on Computers: Computers play a key role in the duplication of pirate discs. The Peruvian government took steps in 2006 and 2007, through legislation, to lower the costs of PCs and laptops. In July 2006, Congress passed Law 28827 which exempted processors, hard drives and PC memory devices from the 19% General Sales Tax. Supreme Decree 211 of 2006, which took effect on January 1, 2007, established a 0% import duty on these items.

Duties on Video Players: Import duties on DVD players have been reduced from 12% to 9%, putting these items within the reach of more consumers, and potential more consumers of pirate products.

Tax on Theatre Tickets: Legislative Decree No. 776P is a Municipal Tax that unduly levies a 10% tax on theater tickets. MPA recommends that this tax be lowered.

IPR TRAINING AND PUBLIC AWARENESS

BSA and MPA participated and/or held several training programs in 2007. BSA sponsored a training seminar in software intellectual property rights for the judiciary on September 17-18, 2007. Speakers from Argentina and Colombia came to share information about international case law and law interpretation. BSA

also collaborated on several training seminars for the Public Prosecutor Bureau and the newly appointed Intellectual Property Rights Judges, to provide them with information about how to recognize a pirated and counterfeit products; these took place on May 8 and October 3, 2007. Another training seminar for the police was held with the co-sponsorship of the Asociación Peruana de Autores y Compositores (APDAYC) on October 15-16, 2007.

MPA also participated in several programs. First, INDECOPI organized two training programs for judges and prosecutors, with participation of the MPA, for criminal judges and prosecutors. Second, MPA representatives were invited by the U.S. Department of Homeland Security, Immigration and Customs Enforcement (ICE) to participate as speakers in the IPR Training Course of the International Law Enforcement Academy (ILEA) that was organized in Lima in July 2007. In addition, the American Embassy held a special program where they invited public prosecutors to visit the U.S. Patent and Trademark Office to understand better practices on intellectual property law enforcement.

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2008 SPECIAL 301 REPORT

RUSSIAN FEDERATION

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

EXECUTIVE SUMMARY

Russia is at a critical juncture in the development of its IPR regime. On November 19, 2006, the Governments of Russia and the United States entered into a IPR Bilateral Agreement (“IPR Agreement”) in the context of Russia’s efforts to accede to the World Trade Organization (WTO).² The IPR Agreement reflects Russia’s acknowledgment of the numerous legal reforms and enforcement steps it needs to undertake to modernize and improve its copyright system for the benefit of Russian and foreign authors, performers and producers. The U.S. Government has consistently reiterated its position that Russia must provide protection and enforcement of IPR consistent with the requirements of the IPR Agreement before the U.S. would support Russia’s entry into the WTO. Russia’s full compliance with the IPR Agreement’s obligations is essential, and should be considered in the Special 301 context, as well as during its review under the General System of Preferences (GSP) program.

Clearly, the priority for IIPA members in Russia is to step up enforcement activity well beyond current levels, including the imposition of deterrent criminal penalties as well as improving criminal investigations and prosecutions. By certain measures, Russia is undertaking more enforcement actions than in prior years and there are particular areas where improvements have been accomplished, especially pertaining to business software. Nonetheless, much remains to be done to achieve adequate protection in Russia and to secure compliance with the IPR Agreement, particularly with regard to optical disc (“OD”) and Internet piracy.

Compliance with the IPR Agreement will help to significantly reduce piracy, which harms all creators, U.S. and Russian alike. Improvements in Russia’s IPR regime will aid in the development of a flourishing market and a creative community in Russia.

It is with great sadness that IIPA notes the recent assassination of the head of one of the few legitimate collecting societies in Russia. In mid-January 2008, the managing director (Vadim Botnaruk) of the Russian Phonographic Association (RPA) was brutally attacked outside his apartment and died shortly thereafter (this was the second attack against him in three months). While his death is still being investigated, it comes as various collecting societies are seeking to be certified by the Russian Government as authorized societies under a provision of Part IV of the Civil Code that went into effect on January 1, 2008. Clear support from the Russian Government for the rule of law and the rights of legitimate rightholders should be demonstrated by immediate action to investigate and prosecute the criminals behind this particular action, and to cultivate an environment in which intellectual property rights

¹ For more details on Russia’s Special 301 history, see IIPA’s “History” appendix to filing at <http://www.iipa.com/pdf/2008SPECIAL301HISTORICALSUMMARY.pdf>. Please also see previous years’ reports at <http://www.iipa.com/countryreports.html>.

² The IPR Agreement (the details of which are contained in an “IPR Side Letter”) was signed by Russian Minister Gref and Ambassador Schwab. It is known formally as the U.S.-Russia Bilateral Market Access Agreement on Intellectual Property Rights and is at http://www.ustr.gov/Trade_Sectors/Intellectual_Property/Russia/Section_Index.html.

are vigorously defended by the state, and where rightholders are not exposed to intimidation and violence.

COPYRIGHT ENFORCEMENT IN RUSSIA

Criminal Enforcement in General

Russian criminal enforcement is the priority for IIPA and its members. In 2007, the Russian Government conducted some significant raids and seizures and the Russian police stepped up enforcement against copyright infringers, particularly with respect to street vendor piracy and companies involved in the installation and use of pirated software.

Russian Ministry of the Interior statistics illustrate an increase in police activity in the number of IPR (copyright and trademark) criminal cases opened – close to a tripling in the past three years: in 2005, the Ministry recorded a total of 2,924 crimes under Article 146 of the Criminal Code of Russia (for copyright infringement); in 2006, this figure doubled to 7,423 recorded crimes. In the first eleven months of 2007, 7,578 such crimes were recorded.

In addition, some deterrent sentences and prison terms have been applied by Russian courts, including a handful (albeit too few), aimed at serious repeat offenders. One case of note involved a sentence imposed against two individuals in Rostov-on-Don for duplicating DVD-Rs and selling the discs in their kiosks. Some IIPA members further report an increase in the number of administrative and criminal penalties imposed against vendors.

There is evidence that these enforcement activities are improving the conditions for certain businesses in Russia. The business software industry reports an increase in the number of civil actions commenced by rightholders that have had a deterrent effect on illegal activities to the benefit of legitimate software distributors. The motion picture industry reports that stepped up enforcement activity in combination with market changes has led to an increase of legitimate DVDs sold in Russia over the last three years. DVD sales for Russian and Motion Picture Association of America (MPAA) members' titles have increased from 24 million in 2005 to 67 million in 2007.

The music industry emphasizes the need for criminal, rather than civil, enforcement directed at optical disc piracy – namely against the criminal enterprises dedicated to the manufacture, distribution and sale of pirate materials, as well as against Internet piracy in which Russia holds the dubious distinction of being a world leader. Addressing commercial-scale piracy through criminal measures is identified as an obligation of WTO members for a reason — it is only nation states that have the capacity to deal with these problems. Civil measures are intended for “civil” actions — better understood as disagreements between parties. Massive and organized criminal activity is most fundamentally not in the nature of a disagreement, and civil measures are not capable of delivering the requisite level of deterrence.

The problems of civil actions are further exacerbated by the very limited scope of available relief. Civil enforcement inadequacies include: remedies generally limited to the seizure of repertoire 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; and, inadequate contributory liability. Physical piracy enforcement is also hampered by the requirement that exemplars be collected only by state officials (or jointly with rightholders), and an unnecessary reliance on government expert reports, which both cause trial delays.

In general the copyright industries report that deterrent criminal penalties are not being imposed against optical disc plant owners or, with few exceptions, against plant operators and owners of commercial Internet operations. In fact, in the years since the adoption of the criminal penalties (Article 146), we are not aware of a single plant owner who has been convicted, and only a handful of plant

operators (i.e., plant managers) have served jail time or been given suspended sentences. Far fewer criminal cases were initiated against optical disc plants in 2007 than in 2006, and, many cases have languished for a long time.

Importantly, the copyright industries report that although more criminal cases have been commenced than in prior years, most cases do not result in deterrent penalties as a final disposition. There have been some notable and important exceptions: in April, in a raid in Krasnodarsky Kray a jail sentence was imposed; and in May, in St. Petersburg, the first-ever jail sentence was imposed against a DVD/software shop owner (an 8-month sentence). Unfortunately, these examples remain the exception to the general practice of non-deterrent sentencing. Examples of plant operators who received suspended sentences include UVK Stimul, ROFF, Simplex, DataMedia, Disc Press MSK, and Atya plants. The exception is the operator of the Mediasystem plant who was convicted and received a 3-year suspended sentence in December 2005 and is currently in prison awaiting the conclusion of a second criminal; investigation. The longest prison sentence imposed to date for copyright infringement is four and a half years against two DVD-R replicators in Rostov-on-Don (the case cited above).

Piracy rates continue to be very high. Thus, improved criminal enforcement is a necessary and important step to establishing legitimate markets for the benefit of Russian and foreign rightholders. In sum, IIPA recommends that the Government of Russia improve its IPR criminal enforcement by including rightholder cooperation in its enforcement and OD (surprise) plant inspection operations, and by the central coordination of law enforcement. This should include a high-level announcement by the government that IPR enforcement – including Internet piracy – is a priority. IIPA recommends that prosecutors: (a) coordinate their efforts with the police (as should the investigative departments of the Ministry of Interior (MOI), the Federal Security Service of the Russian Federation (FSB), and Customs now that they all can initiate criminal cases); (b) bring more IPR cases; and (c) conduct expeditious investigations. The development of instructions by the MOI and the General Prosecutor's Office with an updated and detailed methodology for investigations of copyright infringements would help to increase the quality and effectiveness of IPR enforcement activities. Another recommended measure is the appointment of IPR special prosecution investigators and police officers at both the federal and regional levels throughout Russia. On September 7, 2007, the reform and reorganization of the General Prosecutor's Office and all prosecutorial bodies was completed: prosecutorial bodies are now divided into prosecution offices and investigative committees. The appointment of specialized IPR prosecutorial investigators could, if utilized correctly, significantly increase the efficiency of IPR criminal investigations.

An intensification of criminal investigations and criminal convictions against principals of organized commercial pirates is sorely needed, especially directed at Internet and optical disc operations. There needs to be a focus on criminal enforcement targeted against organized crime syndicates. Regarding Internet piracy, although the notorious allop3m.com is not currently in operation, other similar (in fact, nearly identical) sites are operating, and must be closed, along with the commencement of criminal investigations against the site operators. The ability of wrongdoers to simply modify their Internet sites and continue to operate in violation of the law manifests a clear need for reform. More and improved criminal proceedings in general, along with speedier investigations and trials are needed. Last, we recommend that the General Prosecutor's Office needs to appoint a government liaison with IP rightholders to more effectively bring criminal investigations and trials to successful a conclusion.

In a widely reported story, Russia's 2008 presidential contender, Dmitry Medvedev, even told a Moscow City forum of non-governmental organizations (on January 22, 2008) that "disregard for the law" must be stopped, and that a national program to combat IPR piracy was needed. We hope that this ambition will soon be realized.

Raids Against Optical Disc Plants

Raids have been undertaken at some optical disc plants, including two at the end of 2006 and seven plants in 2007. Six of the 2007 raids were of licensed plants: Victoria (twice), U-2, Poliplast and Mukhametdinova, and Vostok-D; three were of unlicensed plants: Gamma (three times) and Laser LTD.

However, the optical disc enforcement regime continues to lack effectiveness evidenced by the continued operation of all the raided plants. For example, the Poliplast plant was raided in February and its license was not suspended. The Victoria plant, raided in March and again in August, is back in operation and its license has not been suspended. The Mukhametdinova plant in Tatarstan was raided in October; the raid netted three DVD and four CD lines, together with about 610,000 pirate discs in the connected warehouse, but the license for the plant was not suspended. The Laser LTD plant, located on a former government defense plant site, was raided in October; the raid netted two CD/DVD lines, together with about 60,000 pirate discs, 165 stampers and close to 50 tons of polycarbonate (used for CD/DVD production). The Moscow Vostok-D plant was raided in November and netted two DVD lines, one of which is capable of replicating HD DVDs, together with about 100,000 pirate discs. The Vostok-D lines belonged to a formerly-licensed plant named Atya located near Moscow, which was raided in 2005. The Atya plant director received a 2-year suspended sentence and the plant owners changed their name with the licensing authority. They then voluntarily asked for the cancellation of Atya's plant license, and began operations as Vostok-D. The Gamma plant, raided in March, September, and November, remains in operation despite two criminal prosecutions. Worse, after each successive raid at the Gamma plant, fewer operational lines were discovered – nine in March, five in September and only two in November – indicating that the lines were being dismantled and moved to another location. This highlights both the ineffectiveness of the optical disc enforcement regime in ceasing production at offending plants, and also the role of corruption, as the lines were never properly secured by the police as is required after a raid.

These cases highlight the weaknesses that must be addressed if Russia is to meet the IPR Agreement's obligations for effective optical media regulation. With an estimated 50 plants in operation, raids at a handful of plants, and surprise inspections at very few, IIPA believes there is ample evidence that additional effective enforcement is needed to deter illegal activities, and that such enforcement needs to be called for from the highest levels within the Russian Government.

Raids Against Businesses Using Pirate Products

The Business Software Alliance (BSA) reports the overall quantity of end-user raids against businesses remained high, but that the number and quality of the raids was uneven nationwide. There were improvements in 2007 (589 raids up, from 550 in 2006), but enforcement of IPR is inconsistent throughout Russia. In some regions, such as, Saratov, Voronezh, Krasnoyarsk, Lipetsk, Kursk, Krasnodar, Orenburg, Barnaul, and Izhevsk, there was a marked increase in the number of regular police raids. In other regions, such as, Novosibirsk, the police commenced end-user raids, and in St. Petersburg regular retail piracy store (so-called "channel piracy") raids were undertaken – until 2007, these two locations were largely ignored by the police. The continued inconsistency in the number and quality of raids stems from the lack of a uniform methodology promulgated by the Ministry of Interior (MOI) and the General Prosecutor's Office in relation to implementation of Article 146 of the Criminal Code. In 2007, the police ran more raids against chain retail stores (621, up from 572 in 2006), and increased warehouse inspections. Also, in 2007, the police increased their initiation of criminal cases against end-user pirates (200 cases, up from 114 in 2006) and, for the first time, raided some larger companies. There were a total of 83 end-user court verdicts in 2007, up from 50 in 2006. There were 378 criminal cases initiated against channel pirates, up from 288 in 2006; there were 216 court verdicts compared with just 131 in 2006.

However, in general, the police continue to be reluctant to conduct raids against many medium and large-scale targets; when raids are conducted, the police tend to seize fewer than 10 personal computers ("PCs") on average. This problem is related to the experts' inability to examine large quantities of PCs, a problem connected to the fact that the MOI has not issued an internal order instructing the MOI Expert-Criminal Centers on how to properly conduct software examinations (although some of these centers do prepare expert examinations, this is not their official function). These problems highlight the lack of effective enforcement coordination between prosecutors, police, and rightholders.

Raids at Storage Facilities and Piracy at Retail Outlets

Several copyright industries continue to report that raids, while undertaken, are not ultimately successful in stopping criminal activity because of: (a) the absence of criminal liability for legal entities; (b) the failure of the police to comply with the Criminal Procedure Code; and (c) the general reluctance of prosecutors to initiate criminal cases.

Raids against pirate warehouses increased in 2007 and there were a number of large seizures of copyrighted materials at these warehouses including a huge stamper warehouse. Major raids were conducted in April, May, June, August, October and November. The Russian government reported that in 2007, it raided a total of 28 warehouses, seizing 7 million illegal optical discs.

The motion picture industry (MPAA) reports that on August 7, the Moscow Organized Crime Police raided a warehouse located in the premises of a clothing manufacturer situated in a special production zone in Moscow. A total of 2 million optical discs on spindles were seized. This is the largest seizure ever from one single warehouse. A criminal case was initiated. On November 1, close to fifty officers of the FSB, accompanied by Russian-Anti Piracy Organization (RAPO), raided seven retail shops and warehouses located in the Krasnodar region. The raid resulted in the seizure of 160,000 pirated music and audiovisual discs, as well as the arrest of the two owners of the company (Nikitin). According to the FSB, the crime syndicate involved in these activities had been in operation for five years and a former head of the local police was behind the syndicate. FSB's activities had diminished in recent years and IIPA members hope that this raid indicates increased FSB engagement. There are reports it is now difficult to find pirate DVDs in this region of Russia as a result of the raid. Even after the initial raid, additional action by the FSB resulted in the seizure of 800,000 more pirated discs. The forensic analysis conducted by RAPO's own lab, housed at the Ministry of Culture's Federal Press and Mass Media Agency (Rospechat), showed that the discs seized matched exemplars from the U-2 optical disc plant in Krasnodar. These forensic examinations have been forwarded by RAPO to the FSB and to the newly established "Federal Service for the supervision of mass communication and the protection of cultural legacy" (Rossviazokhrankultura) in order to have the company's license suspended.

In the third quarter of 2007, RAPO took part in a week-long, nationwide series of actions against music and movie pirates coordinated by the MOI. The operation ('Operation Counterfeit') targeted the production, storage, distribution and retail outlets of pirate CD and DVD pirates throughout the Russian Federation. All divisions and sub-divisions of the Economic Crime Police participated in the actions. These raids formed part of the largest-ever such operation by the Russian authorities. According to the MOI, a total of 29,670 premises were visited and the authorities seized 3.7 million pirate discs containing film and music repertoire of both international and Russian origin. The MOI estimates that the retail value of the recovered product was 147 million rubles (US\$5,993,394). In total, 73 criminal and 39 administrative cases were initiated on behalf of RAPO/MPA member companies. The Fall campaign was widely covered by the national media.

While these raids are positive, the Russian courts have not imposed deterrent sentences against the owners or operators of warehouses, falling short of its IPR Agreement obligation to criminally prosecute in cases of piracy on a commercial scale.

According to the Entertainment Software Association (ESA), video game piracy remains significant in Russia. While raids at the retail level are being undertaken by the law enforcement, there are far too few prosecutions occurring following such raids. While there has been some improvement in the Moscow-city area, the piracy situation in outlying areas and other Russian cities remains problematic.

The book and journal publishing industry continues to report concerns about hard-copy piracy, although online infringement was the primary concern in 2007, and remains so in 2008 (as noted in the section on Internet piracy, below). Popular target works include reference works, textbooks and commercial bestsellers. Illegal commercial photocopying of academic materials is also a problem, necessitating vigilance by universities and schools in monitoring use of legitimate materials on campuses.

Internet Piracy Enforcement

The IPR Agreement obligates Russia to combat the growing threat of Internet piracy “with the objective of shutting down websites that permit illegal distribution of content protected by copyright or related rights” (and especially for websites whose servers are situated in Russia). The Russian Government reports that it has identified 166 offending sites and closed 72 of them. In June 2007, the most notorious website, allofmp3.com, was taken down, and has not resurfaced at that Internet address. However, a nearly identical site, apparently owned and operated by the same company has sprouted up in its place, and the illegal distribution of copyrighted material continues there, as well as on many other sites.

Publishers report continuing problems with Internet piracy affecting academic and professional textbooks and reference books. In particular, a family of sites – including <http://ebook-mega-store.com>, <http://download-ebook.org>, <http://download-ebook.in> and <http://www.ebooknetstore.com> – continues to decimate the market for academic and professional materials. Takedown notices have gone unheeded. IIPA urges immediate action against the operators of these sites. Commercial bestsellers are also widely available for download on multiple websites.

Few, if any, criminal cases have been pursued against illegal website operators, or against those who, in furtherance of a criminal conspiracy, purportedly license such sites having no authorization to do so. Russian authorities must step up efforts to investigate Internet piracy of business and entertainment software, books, music, and film material, by a variety of technical means, and there needs to be an increase in the number and disposition of effective criminal investigators.

Given the growing threat of Internet piracy, Russian authorities are allocating far too few resources to fight it. IIPA members report that IP crime is a very low priority for the Ministry of Interior’s Department K (the department with responsibility for combating technological crimes). Although Department K has equipment and expertise, there is not a single person in the department assigned to the sole task of combating IP crime. For many years, rightholders have recommended the establishment of a sub-unit within Department K to deal exclusively with IP Internet cases, and to ensure it is properly staffed, equipped, and trained with detailed methodologies to combat these copyright crimes, especially for the maintenance of evidence.

Administrative Enforcement

The business software industry (BSA) reported 40 administrative court decisions were resolved in 2007 – 35 against end-users, 5 against channel pirates (compared with 38 and zero, respectively, in 2006). There were also a total of 48 end-user settlements and 22 channel piracy settlements. Over the past few years, the average administrative fine imposed has been about 3,680 to 4,906 rubles (US\$150 to \$200) per case.

Software Legalization

BSA reports that the Russian Government has responded seriously to the strong market demand for legal software in the Russian education system. Important steps were undertaken in 2007 to implement a school (kindergarten to 12th grade) desktop legalization program that should eliminate piracy in this important sector. The Russian Government is also taking steps to work with BSA member companies to make technology more relevant, accessible and affordable for Russian schools and pupils. BSA anticipates that these programs will yield noticeable reductions in software piracy in 2008.

Optical Disc Plant Licensing and Inspections

The lack of clear authority for optical disc licensing and inspections in 2007 was a significant setback in the enforcement of optical disc production and distribution in Russia. The transition period

between the old licensing authority (Roshrankultura) and the newly established “Federal Service for the supervision of mass communication and the protection of cultural legacy” (Rossviazokhrankultura) is over. Rossviazokhrankultura has not yet commenced regular inspection of plants or the suspension of raided licensed plants.

The lack of regular surprise inspections of all the production facilities exacerbates Russia’s optical disc piracy problem, and is in contravention of Russia’s IPR Agreement obligations. Instead, according to IIPA’s information, in 2007, Russian authorities inspected only three (out of about 42) licensed, and three unlicensed manufacturing facilities. Only one of the plants operating without a license was closed.

Now that both the optical disc plant licensing authority (Rosokhrankultura, now Rossviazokhrankultura) and the Economic Crime Department of the Ministry of Interior have completed their reorganizations, we hope that they will address their present lack of adequate staffing and be able to engage in the kind of monitoring contemplated by the IPR Agreement. More training and more resources need to be available to conduct the promised effective enforcement. In addition, the problem of optical disc piracy in Russia has moved from major production facilities to smaller “burning” operations which require more flexible enforcement mechanisms and resources. The Russian Government is also not prosecuting the “persons and enterprises” involved in the manufacturing, storage and/or distribution of optical discs as required by the IPR Agreement. Nor is the Russian Government initiating investigations to determine and prosecute the owners, distributors and manufacturers of these optical disc products as required by the IPR Agreement.

On a positive note, the Russian Government has taken steps to address the problem of the Russian State owned Restricted Access Regime Enterprises (“RARE”) that house or run optical disc plants. The Russian Government reported in the Fall of 2007 that there were ten of these RARE plants, that is, OD plants on government controlled military-industrial sites, and that it was taking steps against nine of the ten such plants to cancel their leases. This is a positive step. IIPA continues to recommend that, in addition to lease cancellations, any plant engaged in the production of illegal optical disc material should also be the subject of a criminal investigation, closure, and the prosecution of those involved. IIPA members report that at year’s end, there were seven such RARE plants still in operation.

There are key legislative reforms still needed to improve optical disc enforcement. Russia has not yet enacted a sound optical disc licensing, revocation, and recordkeeping regime as described in the IPR Agreement. This essential IPR Agreement obligation had a June 1, 2007, deadline and is key to addressing many of the current OD piracy problems – both the manufacturing and distribution of pirate material. Rosokhrankultura, to its credit, tried to apply such measures in a *de facto* manner during the reorganization in 2007, but the absence of clear statutory authority limited its success. IIPA is concerned that there is no known timetable in the Russian Government to meet this obligation. The current combination of the federal law on (optical disc) licensing, the Administrative Code, and government regulations on the licensing of the reproduction of discs (including audiovisual works), does not allow the regulatory body to suspend (or revoke) a license at all. Russia should include the monitoring of high-grade polycarbonate material used to manufacture optical discs in its OD enforcement regime, especially its border enforcement. In 2007, Russian manufactured pirate ODs, which were forensically matched to 13 individual replication plants, were found in the following countries: Ukraine, Hungary, Lithuania, Moldova, Poland, Germany, Latvia, Serbia and New Zealand, and pirate optical discs suspected to be of Russian origin were found in a variety of additional countries, including the United States.

Implementation of the IPR Agreement

The IPR Agreement has the status of an international agreement under U.S. and Russian law. In addition to the optical disc issues and obligations discussed above, the IPR Agreement (in the Side Letter) also requires the Russian Government to:

1. Address the need for effective criminal enforcement, focusing in particular on piracy “committed for purposes of commercial advantage or private financial gain” by referring “to the Supreme

Court of the Russian Federation a proposal for it to pass a resolution of the Plenum of the Supreme Court” to clarify for the courts their practices so that they impose stiff penalties for IPR violations, and requiring that judges “take into account the high degree of public harm from such infringement.”

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

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

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

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

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

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

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

The IIPA continues to recommend several additional measures to improve enforcement in Russia. These include:

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

2. Announcing from the office of the President, that fighting copyright piracy is a priority for the country and law enforcement authorities and instructing the Inter-Ministerial Commission, headed by the First Deputy Prime Minister, to deliver reports every three months to the President on what steps have been taken to address the problem. Also, it is imperative to establish a central coordinating body for law enforcement authorities with wide powers, derived directly from the President, to combine the efforts of the Economic Crime Police, Department K (the New Technologies Police), and the Police of Street Order.

3. Amending the relevant code(s) so that legal entities can be subject to criminal liability (a bill to do so was considered, but never adopted by the Duma in 2007).

4. Using the existing authority to take down websites offering infringing copyright materials of films, music, business and entertainment software and books, and to criminally prosecute those responsible, including unauthorized collecting societies (such as ROMS, FAIR, ROUPI and FOSP) that purport to grant licenses for rights that they do not possess, as well as introducing clear provisions to establish liability in civil and criminal cases for ISPs that fail to operate in a responsible manner, and for services that effectively promote, contribute or otherwise induce infringement.

5. Using the improved border enforcement authority to stop the import of optical grade polycarbonate used to produce illegal product, in addition to the export of shipments of product abroad.

6. Initiating investigations into and criminal prosecutions of organized criminal syndicates that control piracy operations in Russia (including operations that export pirate material to markets outside Russia).

7. Encouraging the Economic Police (including the Anti-Fraud Department) to substantially increase the number of anti-piracy raids, especially against large-scale targets, and to extend their actions to the distribution networks supplying illegal street sellers as well as to bring more cases to the prosecutors.

8. Taking action to undo the situation in St. Petersburg, where legitimate video and DVD markets have been effectively lost due to the activities of a collective management organization known as the Association of Collective Management of Authors' Rights which falsely claims to represent MPA member companies and which, incredibly, enjoys the support and protection of local officials, and requires (in violation of federal law) the application of a pirate hologram on all products sold with its license. Similar organizations have proliferated in Russia, including MAS (Interregional Authors Partnership), ROSA, and MO UIPKO (Interregional Union for Collective Management of Rights). The recording industry (Recording Industry Association of America, RIAA, and International Federation of the Phonographic Industry, IFPI) reports that the only legitimate market for selling international repertoire (and most Russian music) is in Moscow. Elsewhere in the country – for example, in St. Petersburg, Novgorod, Yekaterinberg, Rostov-on-Don, and the Krasnodar region – the market is flooded with pirated music. In St. Petersburg, musical disc distribution is controlled by an unauthorized organization (OKO) that requires retailers to pay “membership fees” in order to sell optical discs in that city.

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

The IPR Agreement Obligations: Status Report

As noted, since the signing of the IPR Agreement in November 2006, some steps have been undertaken, but much remains to be done. One notable “positive” step that simultaneously illustrates the weakness of the Russian legal/enforcement system is the closure of the notorious website allofmp3.com and the surprising acquittal of the former CEO Denis Kvasov. Although IIPA and its member are obviously pleased that allofmp3.com was itself taken down, we note that a nearly identical site is now in operation that is apparently owned and operated by the same or related parties – illustrating the need for corporate criminal liability and the criminal sentencing of principals of pirate operations, as well as the need for better information about and the investigation of these juridical entities. As noted, Russian enforcement authorities have undertaken plant and warehouse raids, and seized large quantities of illegal material. Russia has been meeting quarterly with the U.S. through the U.S.-Russia Working Group, which is also a positive step toward ensuring that dialog and work to implement the IPR Agreement continue.

IIPA is disappointed that the June 1, 2007, deadlines were not met, with Russia still needing to: (1) address the problem of illegal optical disc manufacturing; (2) effectively enforce criminal laws with deterrent penalties for IPR violations (especially focusing on larger enterprises – and whether committed for purposes of commercial advantage, private financial gain, or resulting in substantial economic harm); (3) combat Internet piracy; (4) implement international IPR agreements, up to the WTO-TRIPs levels; (5) enact legislation (Article 393 of the Customs Code) to provide Customs officials with the authority to take actions *ex officio*; and (6) implement and ratify the WIPO “digital” treaties (the WCT and the WPPT).

DEFICIENCIES IN THE RUSSIAN LEGAL REGIME

Overview of Legal Reforms

Effective enforcement is itself predicated upon the existence of a comprehensive and modern IPR legal regime, elements of which continue to be absent in Russia. Russia has made progress on legal reforms. Here are some of the recent highlights:

- The Criminal Procedure Code was amended in 2006 to allow Russian police, in addition to prosecutors, to initiate criminal investigations.
- The Criminal Code was amended in January 2007 (in force April 9, 2007) to increase IPR penalties from 5 to 6 years imprisonment and to reclassify “grave crimes.” This latter change allows prosecutors and enforcement authorities to use investigative measures far exceeding those under the prior “medium gravity” threshold.
- The Supreme Court, on April 26, 2007, adopted a resolution detailing IPR (Articles 146 and 180) enforcement practices. This directive was aimed at the lower courts to provide guidance to them for IPR enforcement (along with a similar June 2006 resolution directed at civil IPR cases).
- Amendments to the Administrative Code were adopted on April 9, 2007, with a new Article 14.33 on unfair competition. This change means that the introduction of illegal goods into markets can result in fines on either individuals or legal entities (as an administrative liability). Article 14.33 provides for additional sanctions only after the facts of copyright infringement have been established. This is why this provision does not pertain to or require the seizure or forfeit of pirate product. The Administrative Code was positively amended in late 2006 by revising the timetable for administrative investigations which now permits up to two months (the old provision, was two days), and, the statute of limitations was extended to a year. There were also penalty increases, with further revisions in July 2007 (changing the sanctions from multiples of the minimum monthly wage to ruble equivalents) which now provide sanctions of 30,000 to 40,000 rubles (US\$1,225 to \$1,634).
- Amendments to the Code of Administrative Misdemeanors were adopted in 2005 and entered into force in January 2006. These amendments add administrative liability for copyright infringements and the confiscation of such products.
- Amendments to the Civil Code (in force, January 1, 2008) provide as a remedy for infringement, the “liquidation of a legal enterprise” – if used effectively against illegal companies (including optical disc producers) this should improve enforcement.
- Administrative amendments (Resolution #185, March 27, 2007) extended the existing street sale ban – applicable to street vendors and kiosks – from music and audiovisual material, to software and database materials as well.

These legal reforms are a step in the right direction toward meeting the IPR Agreement obligations, and other essential steps are pending government review or Duma adoption. But, there are many other essential legal reforms, some required by the IPR Agreement, that have yet to be adopted.

Most important are the long-promised optical disc regulations which would: properly regulate the licensing of plants and their equipment and raw material used in production; provide for the surprise inspection of plants; and, provide for closure of illegal plants and the imposition of sanctions – including criminal penalties – for violations. Russia plans to address this problem with one legislative amendment:

to deny licenses to plants and individuals whose business license was previously revoked, as well as with regulatory amendments to the Prime Minister's Decree of April 2006.

In fact, from March 2007 until June 2007, no Russian organization or agency had the authority to inspect OD plants while the Federal Service with such authority was abolished as part of the government reorganization. The newly established Rossviazokhrankultura now has the authority to inspect OD plants, but, as discussed above, has not commenced action against the plants while awaiting further regulatory authority and more resources. In lieu of clear authority, many questions and inadequacies remain. Amendments to the 2002 Reproduction Regulatory Regulations were adopted on October 2, 2007 (further amending the April 2006 regulations). The regulations allow for unannounced inspections of replication plants and for the suspension, as well as the initiation of the cancellation, of operating licenses of facilities found to be in breach of the regulations (Article 13). Thus, Rossviazokhrankultura can issue and check licenses, and it can suspend a license, but it cannot close a plant. The regulations foresee only one regular (planned) visit every five years to each plant, absent information about piracy at a plant. The current regulations seem only to have resulted in further confusion about the ability of Rossviazokhrankultura to suspend a plant license without a court order. In addition, there are no provisions for properly seizing evidentiary material under the administrative procedures (which time-out after two months). And further, the Federal Service was not granted such authority under the Administrative Code after the reorganization, thus denying administrative remedies. Overall, this is not what the IPR Agreement calls for to effectively enforce optical media production and distribution, and criminal (and other remedial) relief for infractions. Rather, there needs to be clear authority in regulations (or legislation) to license optical disc production, suspend (without court order) licenses of violators, and to permanently close illegal plants, as well as to commence criminal and other enforcement actions. Thus, although IIPA members welcome the fact that the new Federal Service is in operation, we are concerned that it is still operating under the existing, inadequate, plant licensing and inspection regime, without the needed and promised comprehensive and more effective regime.

One other legislative recommendation made in 2007 would mark a step backward if adopted. The proposal, if enacted, would require copyright product labels (or stickers) as individual identifiers on all legitimate product sold in Russia. This proposal, made in the past by the Moscow City government and others in the federal government (with purported new proposals for 2008), however well intentioned, will have the practical effect of hampering the dissemination of legal product, while illegal product, with counterfeit labels, is freely distributed.

Other priority legal reforms that need to be adopted and that are IPR Agreement obligations include: (1) the Criminal Code which needs to be amended to make legal entities liable for IPR crimes; (2) the Customs Code which must be amended to add *ex officio* authority (amendments were introduced in the Duma but never enacted in 2007); and (3) the complete and proper implementation (in the Civil Code) and ratification of both digital treaties – the WCT and the WPPT.

One particular concern, pertaining to ensuring that collecting societies can only operate within the scope of the mandate that they receive from rightholders, was presumably corrected in Part IV of the Civil Code and went into force on January 1, 2008. We look forward to effective implementation of this critical provision. Since its adoption, IIPA and its members have commented on two major overarching concerns with the new Civil Code: first, that there are many unclear provisions (including legal terms and definitions) whose context and relation to other provisions in the Civil Code lacks clarity. One example is Article 1326 which does not explicitly clarify that the making available right (Article 1324(2)(4)), or any other interactive use, is covered by the statutory license in Article 1326(a). These ambiguities may cause challenges to enforcement efforts. Second, there are administrative law principles throughout the Civil Code that likely cannot be enforced by civil or criminal procedures.

In 2007, IIPA made several recommendations to address some of these problems and to improve enforcement generally. These included a recommendation for the introduction into the Civil Code of a clear definition of "Internet Service Provider" ("ISP") and confirmation of clear third party liability in civil and criminal law for facilitating Internet piracy, as well as a duty to provide all necessary information to law enforcement agencies in Internet piracy cases. In addition, to stem the rise in Internet piracy that is

harming many of the copyright industries – including the book, business and entertainment software, movie and music industries – Russia should undertake steps to address and implement notice and takedown procedures for websites hosting illegal material.

As part of our comments earlier in the year, IIPA recommended that, in order to comply with TRIPs and the WIPO digital treaties, Russia should amend the Civil Code, Part IV by addressing the following:

- Article 1229, the Civil Code's "three-part" (fair use) test is far too broad and must be narrowed. It does not currently comply with Article 9(2) of the Berne Convention, Article 13 of WTO/TRIPs and Articles 10 and 16 of the WCT and the WPPT, respectively. The "three-part" test must be re-stated in its entirety in Article 1229. Further, in Article 1274(3), any taking of a work for the purposes of parody, should be limited to that portion of the work necessary for this purpose (one suggestion is to delete paragraph 3, if it is not so limited in scope, and allowing the three-part test to govern this use).
- Articles 1273 and 1306 in the Civil Code contain an overly broad exception for copying for "personal needs" (or alternatively, translated as "personal purposes"). IIPA recommends that the best way to "fix" this exception would be to clearly apply the "three-part" test to narrow the scope of the exception as well as to apply it only to specific instances (and to clearly, as it does now, exclude some activities from these personal use exceptions, such as camcording and telecine copying).
- Article 1280(4) of the Civil Code violates the "three-part" test for permissible exceptions, and needs to be significantly narrowed.
- Articles 1299 and 1309, respectively for works and objects of neighboring rights in the Civil Code fail to provide WCT (Article 11) and WPPT (Article 18) compliant levels of protection – because they are too narrow, and do not provide adequate remedies for technological protection measures (TPMs).
- Articles 1270(2)(1), 1317(2)(4) and (6), 1324(2)(5) and (6), and 1330(2)(2) contain definitions of "reproduction" that fail to adequately cover the creation of temporary copies because they explicitly state that temporary copies that constitute "integral and essential" parts of processes conducted with the sole purpose of lawfully using or bringing works or objects of neighboring rights to the public do not qualify as reproductions.
- Articles 1232-38, 1240, 1286, and 1307-08 over-regulate contractual relations in connection with copyright and neighboring rights (including the application of general rules on assignments and licensing of exclusive rights).
- Articles 1281, 1282, 1318, and 1324 fail to clarify that the Civil Code provisions apply equally to pre-existing works. (By one reading – a cross-reference to Articles 5 and 6 with Articles 1281 and 1282 – the Civil Code does apply to pre-existing works – but this should be clarified).
- Article 1231 fails to clarify whether non-Russian works and objects of neighboring rights receive national treatment (i.e., that foreign works are protected the same as Russian works).
- Article 1231 mixes copyright, patents, trademarks and other IP together, where it should be differentiated; separately, the right of remuneration needs clarification.
- Steps need to be taken to make certain that essential – treaty required – remedies for IPR infringements found in the Criminal Code, the Criminal Procedure Code, the Administrative Code and the Customs Code will continue to apply in light of the adoption of the new Civil Code and the repeal of the copyright law.

- The Civil Code fails to clearly provide for third party liability for civil and criminal facilitation of Internet piracy, as well as a duty to provide all necessary information to law enforcement agencies in Internet piracy cases.
- Article 1244 needs to be corrected so that the Civil Code further limits the current abusive practices of collecting societies in Russia. This includes amending Articles 1244(4) and 1326, so that rightholders can freely exclude their works and phonograms from the accredited societies' repertoires and can in lieu authorize their own collective societies (by direct contract).
- Article 1326(1) should be clarified so that the making available right applicable for objects of neighboring rights is not limited by the statutory license in that provision.
- Article 1334(2) should be clarified so that any use of a protected work or object of neighboring rights incorporated into a database is clearly subject to the rightholder's exclusive rights (as otherwise limited by the general narrow exceptions of the Code).
- Article 1239 of the Civil Code provides procedures for granting compulsory licenses without specifying conditions. This type of licensing is applicable only to patents and should be so stated.

There are several positive features of the Civil Code that deserve mention, as well. These features include:

- Article 1242 which clarifies that collective administration organizations can only operate within the mandates they receive from rightholders.
- Article 1253 which adds civil (but, unfortunately, not criminal) liability for legal entities.
- Articles 1252 and 1302 which adds remedies for the seizure and destruction of materials and equipment used in infringements. However, this could be further improved by deleting the exception for the sale of materials by the state for "income," and by parallel changes in the respective procedural codes.
- Article 1261 which adds clear protection for computer programs as "literary works."
- Article 1240 and 1263 which provides proper rights of ownership and exploitation of audiovisual works.
- Article 1270(11) which provides a clear making available right consistent with the digital treaties; and, Article 1245 which provides a private (personal purpose) levy.
- Article 1301 which provides statutory damages (ranging from 10,000 to 5 million rubles).

GENERALIZED SYSTEM OF PREFERENCES PROGRAM

In the first ten months of 2007, Russia benefited from almost \$404 million in unilateral, duty free benefits to the U.S. market. In 2006, Russia benefited from \$512 million in duty free Generalized System of Preferences (“GSP”) imports into the United States. In contrast, U.S. companies suffered losses in the billions of dollars due to copyright piracy in Russia.

The IIPA first filed its GSP Country Practice Petition seven years ago. Again, in 2007, IIPA testified on this petition – for the fourth time since the original petition was filed and six years after the petition was accepted by the U.S. Government.³ The Government of Russia is not complying with the eligibility requirements for GSP benefits. The GSP Subcommittee should terminate this investigation with such a finding and should remove Russia’s eligibility to participate until such time as it has achieved “adequate and effective protection” of intellectual property rights as contemplated under the GSP statute.

RUSSIAN FEDERATION										
Estimated Trade Losses Due to Copyright Piracy										
(in millions of U.S. dollars)										
and Levels of Piracy: 2003-2007⁴										
INDUSTRY	2007		2006		2005		2004		2003	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Motion Pictures ⁵	NA	NA	NA	NA	266.0	81%	275.0	80%	275.0	75%
Sound Recordings & Musical Compositions ⁶	313.0	58%	423.0	65%	475.9	67%	411.9	66%	405.0	64%
Business Software ⁷	1075.0	75%	1208.0	80%	894.0	83%	800.0	87%	704.0	87%
Entertainment Software ⁸	NA	79%	282.1	72%	223.9	82%	255.8	73%	NA	80%
Books	42.0	NA	42.0	NA	42.0	NA	42.0	NA	40.0	NA
TOTALS	1430.0		1955.1		1901.8		1784.7		1424.0	

³ See IIPA filing in regard to the Generalized System of Preferences (“GSP”): Notice Regarding the Acceptance of Product and Country Practice Petitions for the 2007 Annual Review, 72 Fed. Reg. 51,264 (Sept. 6, 2007).

⁴ The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described on the IIPA website at www.iipa.com/pdf/2008spec301methodology.pdf.

⁵ MPAA’s trade losses and piracy levels for 2006 and 2007 are not available.

⁶ RIAA’s piracy rate is estimated for physical product only and does not take into account the very serious problems connected to Internet piracy, a problem that is particularly important in Russia given the role of illegal pay-per-download sites that are virtually non-existent outside of Russia. The piracy loss decrease is the result of some decrease in the physical piracy rate – from an estimated 65% in 2006 to 58% in 2007, along with a decrease in market share for American content due to greater increased investment in, and production of, Russian repertoire.

⁷ BSA’s 2007 statistics are preliminary. They represent the U.S. software publishers’ share of software piracy losses in Russia, and follow the methodology compiled in the Fourth Annual BSA and IDC Global Software Piracy Study (May 2007), available at <http://www.bsa.org/globalstudy/>. These figures cover, in addition to business applications software, computer applications such as operating systems, consumer applications such as PC gaming, personal finance, and reference software. BSA’s 2006 piracy statistics were preliminary at the time of IIPA’s February 12, 2007 Special 301 filing and were finalized in June 2007 (see <http://www.iipa.com/statistics.html>) as reflected above.

⁸ ESA’s estimated piracy level for 2007 reflects a weighted average of three forms of piracy: PC piracy, console piracy and handheld piracy. See Appendix B of this report.

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2008 SPECIAL 301 REPORT

SAUDI ARABIA

Special 301 Recommendation: Saudi Arabia should be elevated to the Priority Watch List in 2008.

EXECUTIVE SUMMARY

Saudi Arabia is generally viewed as having the worst enforcement regime and, for most copyright industries, the highest piracy levels in the Middle East. Despite its close economic ties with the U.S., the Saudi government continues to rebuff the copyright industries' efforts to enforce their rights. In 2007, piracy losses continued to grow and the enforcement climate continued to deteriorate. IIPA recommended that the Kingdom be placed on the Priority Watch List both in the fall of 2006 in its out of cycle review submission¹ and in its full 2007 Special 301 submission in February 2007.² It has been fully two years since the Saudi government told IIPA and its members that it would (a) make its enforcement system transparent; (b) begin imposing deterrent penalties, including prison sentences, on pirates (including enforcement against corporate end users of unlicensed software); (c) ensure the systematic involvement of the police; and (d) legalize use of business software in government ministries. These commitments have simply not been fulfilled.

Industry frustration at this woeful lack of progress is at its highest point and IIPA strongly urges USTR to move the Kingdom from the Watch List to the Priority Watch List in 2008.

PRIORITY ACTIONS TO BE TAKEN IN 2008

Transparency

- The IPR Committee and the Ministry of Culture and Information (MOCI) must open up the MOCI enforcement process by having it provide full reports on the details of each case it commences following a raid to the relevant right holder(s) so that the right holder(s) (or their representatives) can follow up with appeals and related actions. Transparency, for right holders and the general public, throughout the enforcement process, including imposed sanctions, is a critical element to bringing deterrence into the Saudi enforcement system.
- Right holders must be allowed to participate in the MOCI enforcement process through directly appearing before the Breach Committee (or as it is sometimes known, the Violations Review Committee (VRC)), including seeking compensation as required by TRIPS.
- MOCI transparency will allow right holders to appeal, at their discretion, inadequate, non-deterrent sentences to the Board of Grievances.

Deterrent Enforcement

- The Governor of Riyadh, Prince Salman, should fulfill his January 2006 commitment to activate a new Special Committee on enforcement which would establish a new regime for imposing increased

¹ See USTR's 2006 Special 301 report at http://www.ustr.gov/assets/Document_Library/Reports_Publications/2006/2006_Special_301_Review/asset_upload_file473_9336.pdf; see also IIPA's letter to USTR on the 2006 out of cycle review of Saudi Arabia, posted at <http://www.iipa.com/pdf/IIPA%20Saudi%20Arabia%20301%20OCR%20submission%20FINAL%20%20100206.pdf>

² See IIPA's Special 301 2007 report on Saudi Arabia, February 12, 2007, available online at <http://www.iipa.com/rbc/2007/2007SPEC301SAUDIAARABIA.pdf>.

penalties including imprisonment and securing the creation of a special police task force to work with the MOCI. Deterrent penalties and transparency are TRIPS requirements.

- The IPR Committee, headed by M. Al-Aiyash of the Ministry of Commerce, should work actively with industry to secure increased penalties and a more transparent process at MOCI.
- The Breach Committee (or VRC) in the MOCI must issue significant fines up to the maximum allowable in the copyright law.
- Right holders must be able, as TRIPS requires, to appeal any Breach Committee-imposed fine which is considered inadequate to the Board of Grievances, which must impose imprisonment in appropriate cases, and significantly increase fines.
- The police must become systematically involved in copyright enforcement against both street vendors and those up the supply chain (warehouses, etc.), and against corporate end-users of unauthorized software, including those initiated through a request from the MOCI, or directly by right holders. It is essential that police-led raids also result in criminal charges against copyright violations.
- A special cyber crime and IPR unit should be created by the police authorities.³
- Inspections and raids on retail establishments, storage areas, distribution hubs, and duplication sites, must be sustained and enforcement run “up the chain” toward the sources of production (i.e., importers, distributors, duplication sites), including against corporate end-users of unauthorized software.
- Street vendor piracy must be completely cleaned up and offenders should be subjected to deterrent penalties, not just deportation, which has proven to be an ineffective deterrent.
- Actions against retail establishments must result in the application of criminal charges. Unfortunately, raids effected against street vendors, distribution centers and duplication sites are not resulting in criminal charges unless a retail outlet is clearly identified with that same establishment.
- Prince Salman, through the Special Committee, or through other means, must inform the management in compounds that they must pay license fees for the redistribution of TV signals and raid the compounds if they fail to comply.
- The customs system must be reformed to establish an IPR Task Force and customs officers must be provided with *ex officio* authority to suspend the import of pirate product into the Kingdom.
- The Communication and Information Technology Commission (CITC) must be more responsive to Internet piracy; it now only responds when pornographic materials are involved.

Ensure Legal Use of Copyrighted Materials

- The IPR Committee (and the Special Committee, if activated) must secure and implement a mandate for government ministries to fully legalize their software use, in accordance with the existing software decrees, to set an example for the private sector.
- Universities must be ordered to regulate procurement practices to ensure purchase of authorized copies of books (and other copyrighted materials), following up where necessary to ensure that those universities comply with the law.
- Tougher enforcement actions must be taken against enterprise end-users of unauthorized software.

Copyright Law Reform

- The promised internal “study” of the WIPO Internet Treaties must be completed as soon as possible and action taken to ratify and implement their obligations in the copyright law .
- Maximum penalties in the Copyright Law must be increased to deter organized criminal activity that is rife throughout the Kingdom.

For more details on Saudi Arabia’s Special 301 history, see IIPA’s “History” Appendix to this filing.⁴ Please see also previous years’ reports.⁵

³ Such unit could be based on the model in place in Lebanon.

⁴ <http://www.iipa.com/pdf/2006SPECIAL301HISTORICALSUMMARY.pdf>.

⁵ <http://www.iipa.com/countryreports.html>.

SAUDI ARABIA
Estimated Trade Losses Due to Copyright Piracy
(in millions of U.S. dollars)
and Levels of Piracy: 2003-2007⁶

INDUSTRY	2007		2006		2005		2004		2003	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Records & Music	25.0	60%	20.0	50%	20.0	50%	15.0	35%	16.0	40%
Business Software ⁷	120.0	51%	115.0	52%	105.0	52%	73.0	52%	76.0	54%
Motion Pictures ⁸	NA	NA	NA	NA	95.0	95%	20.0	40%	20.0	40%
Entertainment Software ⁹	NA	NA	NA	NA	NA	95%	NA	68%	64.0	83%
Books	NA	NA	8.0	NA	10.0	NA	14.0	NA	14.0	NA
TOTALS	145.0		143.0		135.0		122.0		190.0	

PIRACY AND ENFORCEMENT UPDATES IN SAUDI ARABIA

For two years now, the piracy situation has steadily worsened in Saudi Arabia across most copyright sectors active in the Kingdom. Several forms of piracy are at an all time high due to lack of deterrent penalties actually meted out (despite the maximum penalties available under the new Copyright Law) and lack of transparency. Some copyright industry groups report that the legitimate market is actually contracting, with many retail stores closing down due to high piracy rates. Industry anti-piracy efforts in 2007 continued to be substantial. Many raids, including large raids against warehouses, were run but achieved no deterrence in the market.

In 2005-6, the organization representing most U.S. right holders in the Kingdom, the Arabian Anti-Piracy Alliance (AAA), conducted a “fear factor” survey, which showed that the deterrent impact of the then current enforcement and penalty system was virtually non-existent. This resulted in increased awareness of the problem of piracy in the markets. This survey clearly demonstrated that 75% of persons in the movie retail market indicated that a pirate will never be imprisoned; 89% felt that the owner would never be imprisoned; 70% felt that the retail establishment would never be closed; and 85% felt that a pirate would never be deported.

The industry has continued to hold many meetings and engaged in many consultations with the Saudi government, but due to the intransigent attitude of the MOCI and others, no progress has been made. The President of IIPA even visited Saudi Arabia in January 2006 to address these many issues, and while promises to provide greater transparency were made at the highest levels, fully two years later, we have yet to see concrete results.

⁶ The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA’s 2008 Special 301 submission at www.iipa.com/pdf/2008spec301methodology.pdf. For information on the history of Saudi Arabia under Special 301 review, see Appendix D at (<http://www.iipa.com/pdf/2008SPEC301USTRHISTORY.pdf>) and Appendix E at (<http://www.iipa.com/pdf/2008SPEC301HISTORICALSUMMARY.pdf>) of this submission.

⁷ BSA’s 2007 statistics are preliminary. They represent the U.S. software publishers’ share of software piracy losses in Saudi Arabia, and follow the methodology compiled in the Fourth Annual BSA and IDC Global Software Piracy Study (May 2007), available at <http://w3.bsa.org/globalstudy/>. These figures cover, in addition to business applications software, computer applications such as operating systems, consumer applications such as PC gaming, personal finance, and reference software. BSA’s 2006 piracy statistics were preliminary at the time of IIPA’s February 12, 2007 Special 301 filing and were finalized in June 2007 (see <http://www.iipa.com/statistics.html>) as reflected above.

⁸ MPAA’s trade loss estimates and piracy levels for 2006 and 2007 are not available. MPAA did provide 2005 estimates for a select group of countries, using a new methodology that analyzed both physical/“hard goods” and Internet piracy. Details regarding MPAA’s methodology for 2005 and prior years are found in Appendix B of this IIPA submission.

⁹ ESA’s reported dollar figures reflect the value of pirate product present in the marketplace as distinguished from definitive industry “losses.” The methodology used by the ESA is further described in Appendix B of this report.

Optical Disc and Internet Piracy: Optical disc piracy remains the major hard goods piracy problem in the Kingdom. Both factory produced discs (some locally made, but most imported) and “burned” discs continue to flood the markets. Street vendor piracy remains rampant throughout the Kingdom, and has gotten worse in the last year. Pirates sell pirate optical discs, including locally produced CD-Rs and DVD-Rs and imported pirate DVDs, predominately imported from the Asia Pacific Region (Malaysia, China, etc.) into commercial hubs. The Internet penetration rate in the Kingdom is growing with resulting growth in Internet piracy. Fortunately, the Kingdom’s enforcement authorities have succeeded in taking down many pirate websites, upon request of right holders, but only under its censorship regime and usually where pornographic material is also involved. IIPA urges the Kingdom’s enforcement agencies, including the Communication and Information Technology Commission (CITC), to use their authority in piracy-only cases.

Organized Crime: Piracy in the Kingdom has also been linked with organized crime elements in Saudi Arabia. For example, in mid-December 2007, the authorities conducted a raid against four warehouses in Riyadh. In addition to the seizure of close to 500,000 units of pirated music and video cassettes, VCDs and DVDs, the police found a large cache of explosives and weapons. Fifteen individuals were arrested.¹⁰

Signal Theft and Piracy in the Compounds: Signal piracy on compounds remains a very serious problem in Saudi Arabia. The compounds may have upwards of hundreds/ thousands of homes under one management/premise/security wall. Pay TV channels are usually centrally controlled and operated by the management of a given compound. The compounds utilize a smart card, installing it in their centralized head end and then redistributing Pay TV channels to thousands of homes.

Despite a continuous dialogue extending over years from the pay-TV industry and a number of raids, awareness campaigns and letters from the MOI, we still have yet to witness any significant change in the compounds. Part of the reason is that the owners of the compounds are very influential. Due to heightened security in entering compounds, affecting successful raids is next to impossible, since by the time the raid team finally gets to the head end, following delays navigating the multiple security checks, the evidence of piracy has conveniently disappeared.

IIPA itself raised the rampant theft of pay-TV signals and of audiovisual programming in the Kingdom’s compounds in its January 2006 visit and again with the Saudi delegation in September 2006. While the MOCI indicated that it can be involved in raiding such compounds, it explained that the raids must be done with the police and that police participation must be authorized by each city’s Governor’s office. In the January meeting in Riyadh, IIPA raised this issue with Prince Salman, the Governor of Riyadh. Unfortunately, industry has received no reports that raids have been conducted on these compounds since these meetings.

Piracy of Business Software: While the piracy rates for business software continue to be roughly constant, dollar losses to the software industry have gone up each of the last two years, due primarily to enterprise use of unlicensed software. Losses increased to \$120 million in 2007 with a piracy level of 51% of the market. On the retail side, BSA, in contrast to past years, reports that the police have been receiving its complaints and in 2007 raids were run against 48 resellers and street vendors dealing in pirate or counterfeit software. Most pirate software is sold in open commercial markets but it has proved extraordinarily difficult to interest the police in these blatant, open air activities. But even this retail raiding activity has proved difficult for the business software industry.

In past years, this retail piracy was conducted primarily by non-Saudi immigrants who were then threatened with deportation when caught. This proved hardly a deterrent; there were always new

¹⁰ IIPA reported that early in 2005, for example, Prince Salman ordered a series of raids in the Al Batha area of Riyadh against hard core criminal activities, which unearthed many criminal operations that were involved with prostitution and narcotics. The police also encountered and seized millions of pirate DVDs, showing that piracy is providing easy funds to sustain other hard core criminal operations.

immigrants to take their place. In 2007, because the business is so lucrative and with minimal risk, BSA has seen the influx of more and more Saudi citizens involved in this illegal retail trade.

Over the years, there have been only a few raids on enterprise end users of unlicensed business software. This type of piracy causes the greatest losses to the software industry. Enforcement must be done by the MOCI which has been notoriously difficult. The Breach Committee has been extremely reluctant and has thrown up all kinds of procedural hurdles, including blaming the industry for faulty complaints (but without providing clear guidance on what they want). Many complaints from industry are rejected on formalistic grounds (e.g., power of attorney, signatures, etc.) In 2007, only 19 end user raids were run by MOCI, and often the MOCI inspectors were prevented by the raid target from entering the premises, and no further action was taken by the MOCI. If the MOCI is to be truly effective in combating end user and other forms of piracy, it must invest in increasing the number of anti-piracy inspectors to well beyond the present 10-20 full-time employees and use these resources to conduct proactive, *ex officio* raids.

Book Piracy: Saudi Arabia's publishing market continues to experience some piracy of academic materials at certain universities. Pirate commercial offset prints as well as illegally photocopied books, especially textbooks and English language teaching (ELT) materials, continue to be available. Some universities have regulated purchase practices (i.e., they "buy centrally," which means that all the adoptions within a university are collated by its purchasing department, which runs an on-campus bookshop). IIPA hopes to see more universities legalizing their acquisition processes by buying centrally and encourages the remaining universities to follow suit. Failing to do so invites an overrunning of the market by pirate copies, supplanting legal purchases.

Entertainment Software Piracy: Piracy of videogames in the Kingdom is probably the most rampant of all with pirate games available openly in retail shops in many markets as well as through street vendors.¹¹ Recent hot-selling games are being imported from countries like Malaysia and are openly sold in stores and malls (whereas DVDs and music CDs tend to be made available through in-store catalogues with "runners" being dispatched off-site to obtain the selected product).

Saudi Government Promises: Following IIPA's visit to the Kingdom in January 2006, King Abdullah issued a "circular" that directed that transparency and deterrent penalties should be established in the Kingdom and that government ministries should legalize their software use. Despite this clear message from the King and promises to the IIPA delegation (and further USG and industry meetings in September 2006), 2007 saw no progress whatsoever in implementing any of these reforms. To date, transparency in the administrative enforcement process at the MOCI has not been established and the Breach Committee (VRC), has failed to issue deterrent fines.

Lack of Transparency: IIPA members' local representatives report that the MOCI has yet to provide any right holder with information as to the results of the Breach Committee's (VRC) administrative actions, including whether fines had been imposed and at what level, despite continuing requests for such information. At the September 2006 meetings in Washington DC, IIPA presented the delegation with a detailed list of issues that might be understood by MOCI to stand in the way of offering full transparency (e.g., a list of possible information that MOCI would demand from right holders as a condition to transparency). Despite indications that a response to this list would be given to the USG and IIPA before the delegation departed, the KSA government has still not (some sixteen months later) provided a response to these issues. The MOCI also let it be known that it would create a web portal and place Breach Committee decisions and other information about MOCI actions on this site. No word about what has happened with these promised plans has been provided either to the USG or to IIPA.

¹¹ There appeared to be a further increase in the number of street vendors selling pirate videogames in areas like Olaya in Riyadh.

Under paragraph 266 of the WTO Working Party Report on Saudi Arabia's accession,¹² the Saudi government stated that right holders would have the opportunity to appeal any imposition of a fine by the Breach Committee to the Board of Grievances if the right holder felt that the fine was too low to act as a deterrent, as required by TRIPS. Paragraph 266 is binding on the KSA and such appeal right must be afforded under TRIPS and the KSA's Accession commitment. Without the promised transparency in that process, however, and despite the promise made in January 2006 and the King's circular, right holders have not been provided any information about, and have therefore been unable to appeal, any decision imposing fines.

As noted above, efforts to ascertain the MOCI's requirements for right holders to receive such transparency have so far been unavailing.¹³

MOCI has regularly argued that any transparency for right holders must be based on the filing of formal complaints to it by right holders. Yet, for example, according to BSA, *no* raid has been run by the MOCI *without* BSA having filed a complaint, which it does on a regular basis¹⁴ and no information on case results or fines have ever been provided. One of the problems that contributes to the ineffectiveness of the KSA government's enforcement system is that the MOCI rarely takes proactive (*ex officio*) raid action but instead waits for right holders to complain, despite open and widespread piracy in the shops and in the markets, visible to all. As described above, the openness of pirate activity has even increased in 2007.

In addition to affording transparency to right holders, the Saudi authorities, if they are to be successful in reducing piracy levels, must also publicize their actions within the country and undertake a major public relations campaign about those actions and that piracy is not only illegal, but is a criminal act, in the Kingdom.

Lack of Deterrent Penalties: In its February 2006 and 2007 Special 301 submissions, IIPA reported that the average fine issued by the Breach Committee (VRC) for an act of piracy was reportedly 10,000 riyals (US\$2,674) and the highest fine ever imposed, apparently in only one case, a mere 50,000 riyals (US\$13,368). A recent case provides a good example of the complete lack of deterrence caused by almost trivial penalties: the Breach Committee (VRC) has imposed a fine of 37,000 riyals (US\$9,893) on the infringer, Video Jawarwah, after seizing a staggering 2,276,900 pirate units, one of the largest seizures ever in the Kingdom.¹⁵ As is evident from the size of the seizures in the cases we have reported over the years,¹⁶ the imposition of these paltry fines will never act as a deterrent to the levels of piracy that have become routine throughout the Kingdom.

The Saudi authorities themselves have acknowledged that no criminal case for piracy has ever proceeded or been concluded in the Kingdom. No pirate has ever served a jail term. Until this situation changes, piracy levels will remain consistently high and the KSA will continue to fail to meet its TRIPS enforcement obligations. As of February 2008, nothing has changed!

IIPA has continued to commend the Kingdom for its raiding activity. This is about the only positive element in the Saudi system, however, and must be tempered, as discussed earlier, with the reality that

¹² Report of the Working Party on the Accession of the Kingdom of Saudi Arabia to the World Trade Organization, WT/ACC/SAU/61, January 11, 2005

¹³ In most countries, of course, such transparency is a matter of routine. The press routinely reports on decisions of administrative agencies and of courts and court decisions are publicly available or published.

¹⁴ During the September meetings, an MOI official stated that right holders have not provided powers of attorney (POAs) and implied that this was at a minimum a necessary condition to receive the transparency promised. Later in the discussions, it became less clear whether POAs were needed at all, but, in any event, BSA (for its members active in Saudi Arabia) and the enforcement agency representing the Motion Picture Association (MPA), the Arabian Anti-Piracy Alliance (AAA), has provided POAs for all the MPA member studios to the MOI.

¹⁵ The raid in this case was run in May 2005 in Dammam.

¹⁶ While the amount of seized product is known by right holders who accompany the authorities on the raid, no additional information is known about what happened in any of these cases, whether the infringer was declared to be an infringer, or what penalty or other action (such as temporary shop closure) was taken.

such raids are not only not self-initiated but fines are very low, without deterrence, and right holders are never officially made aware of them, except in the aggregate. Until the MOCI and the police begin to initiate actions on their own and the Breach Committee (VRC) and Board of Grievances begin to exact deterrent fines, piracy levels will continue to remain high.

Another deficiency is the low maximum fine that can be imposed by the Breach Committee (VRC). Most of the cases we have reported over the years demand penalties that exceed the Breach Committee's jurisdictional limit/maximum fine of 100,000 riyals (US\$26,738) and need, therefore, to be referred by the Breach Committee (VRC) to the Board of Grievances which has the authority to levy higher fines and to impose terms of imprisonment.¹⁷ IIPA has no report of any copyright piracy case that has ever been referred from the Breach Committee (VRC) to the Board of Grievances. If right holders were afforded the transparency that the Kingdom is obligated to provide, they could petition the Breach Committee (VRC), or the Board of Grievances, to move such cases to the Board for the imposition of penalties necessary to deter the kind of piracy reflected in these lists.

Government Legalization of Software Use: The software industry has estimated that the piracy rate in 2007 in government ministries was 75%. IIPA and BSA have asked that government ministries specifically budget for the purchase of legitimate software and that ministries set up software asset management (SAM) systems to monitor software use and full licensing. These two proposals must now be implemented by the government as part of meeting the King's prescriptions against unlicensed software use in government. This should include an additional circular with a specific deadline and a requirement for each ministry to report back to the King on the results of the software audits they should conduct with SAM tools.

COPYRIGHT AND RELATED LAWS

Amendments to Adopt Key WIPO Internet Treaties' Requirements and to Allow Saudi Arabia to Join the WCT and WPPT: While virtually all the deficiencies in the Saudi Copyright Law have been remedied in the new implementing regulations adopted in 2005,¹⁸ IIPA has continually impressed upon Kingdom officials the importance of developing the legal infrastructure for electronic commerce by ratifying and fully implementing the WCT and WPPT. The initial reception to this suggestion was gratifying and industry and the U.S. government should work closely with the responsible agencies (including MOCI) to assist with advice and training. During the 2006 meetings in Washington, DC, the Saudi government representatives indicated that they had commenced a review of the WIPO Internet Treaties issues and that the next step was to seek WIPO's advice on how best to proceed with implementing legislation. Since then we have not heard of any further progress.

Optical Disc Legislation: Reports are that there is at least one, and likely as many as four, known OD plants in the Kingdom. The authorities should adopt optical disc regulations to ensure that new optical disc production facilities only engage in legitimate licensed production. Saudi Arabia should join its neighbors that have adopted or are in the process of adopting a regulation to control the production of optical discs, i.e., a legislative framework to meet the challenge of optical disc piracy. Essential provisions for an effective optical disc regulatory scheme include:

- The establishment of a competent licensing authority to grant licenses to optical disc production facilities as well as to deny, suspend, or revoke a license if that should become necessary. In addition, commercial CD-R/DVD-R "burning" (i.e., for the purpose of sale, distribution, or other commercial dealing) of copyrighted materials onto recordable optical discs undertaken by traditional

¹⁷ Members of the Board of Grievances with whom IIPA met in January 2006 (and in meetings in Washington DC since that time) assured the IIPA delegation that if a case were brought to them, either directly by the Breach Committee or as the result of an appeal by a right holder, they would impose deterrent penalties.

¹⁸ Two deficiencies appear to remain, however. The law appears not to mandate destruction of infringing goods and does not require the award of costs and attorney's fees as required by TRIPS. Furthermore, statutory prison sentences remain very low. MOCI Acting Minister Al-Akkas indicated a willingness to propose raising these terms in the near future.

optical disc manufacturing plants or outside of such plants (the latter which is fast becoming a major problem) should be subject to registration to ensure that unregistered commercial conduct is punishable.

- The requirement to use SID Codes to trace pirate discs to their source of production.
- The establishment of licensee record-keeping requirements in the application process and after a license is granted, to provide governments with the means to judge whether an applicant qualifies for a license, and to provide maximum transparency after a license is granted (e.g., exemplars will be provided from each plant for every disc produced, allowing for transparent accounting of licensed production and forensic evidence should such be needed). CD-R burning registration should also entail record-keeping of orders.
- The ability to inspect plants (in addition to traditional search and seizure) and burning facilities, including nighttime inspections, to ensure that plants/facilities are engaging in legal activities.
- Government record-keeping of all plants/facilities and all actions taken with respect to them (e.g., inspections, searches).
- The establishment of adequate penalties for violations of a license (or burning without registering) including criminal penalties and possibility of plant/burning facility closure.
- Establish controls to track the export of discs, and export and import of equipment and raw materials, including the masters or stampers which are the key components for producing pre-recorded content (an automatic license is one common approach).

MARKET ACCESS

Ban on Cinemas: All public exhibition of films is prohibited by law in Saudi Arabia. Despite the fact that in October 2005, the government allowed a trial of one cinema to screen cartoons to women and children only, there appears to be no further removal of prohibition of a theatrical market in Saudi Arabia. This total ban is not only unfair and market-closing, it also opens the door wide to pirate operators who simply do not follow the law and bring in movies that the Saudi government has never had an opportunity to review for content or had any say in its distribution.

Video Outlet License Requirements: Video outlets must be licensed by the Ministry of Culture and Information. That Ministry has, however, demonstrated great reluctance in allowing general retail stores, such as supermarkets and toy stores, to obtain licenses. Such licensing requirements limit the ability of video distributors to reach important market segments.

Restrictions on Home Video Distribution: Foreign companies are prohibited from importing or distributing home video product in Saudi Arabia. Only Saudi nationals or Saudi-owned companies have this right. Such restrictions should be removed to encourage growth of the video market.

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2008 SPECIAL 301 REPORT

THAILAND

Special 301 Recommendation: Thailand should remain on the Priority Watch List, with an out-of-cycle review (OCR) to determine whether Thailand has made or continues to make sufficient progress with respect to the Priority Actions identified below to warrant it moving to the Watch List.

EXECUTIVE SUMMARY

In 2007, copyright owners experienced mixed results in copyright protection and enforcement in Thailand. On the one hand, the government took a series of vigorous actions against piracy, especially during the first three quarters of the year, in major retail piracy hotspots. The record industry in particular highlights the high level of cooperation and support that it has received from law enforcement authorities. Enforcement raids, indictments and criminal convictions were all sharply up. On the other hand, all copyright industries continue to suffer due to piracy in the marketplace and for some, pirate production for export. The book publishing industry, in particular, reports a disturbing surge of exports of high quality academic and professional books. Domestically, piracy of business software has seriously compromised the businesses of resellers and distributors of genuine software for years. Finally, there are several copyright-related pieces of legislation pending before Parliament, some of which would prove beneficial, such as cable licensing legislation and revisions to the Customs Act, but others of which, like the bill mandating collective management, have copyright owners deeply concerned.

PRIORITY ACTIONS REQUESTED IN 2008

- **Continue Raids and Prosecutions in a Sustained, Coordinated Manner, with Deterrent Sentences Imposed and Publicized:** The Royal Thai government should continue taking raids and seeking prosecutions in copyright cases, focusing in 2008 on owners of manufacturing plants and burner labs, key pirate warehouses, distribution hubs, and retailers (of all kinds of pirate materials), end-user software pirates (the rate of software piracy still remains too high), cable pirates, and pirate book producers. Publicizing key results, especially higher fines and imprisonment sentences actually served, will send the right message and ultimately lead to deterrence.
- **Close Notorious Piracy Markets and Hold Mall Owners Accountable:** In 2008, the government's campaign against "Red Zone" and "Yellow Zone" targets¹ should focus not only on seizures but on closures and accountability of those who control the malls or otherwise facilitate infringement.
- **Effectively Curtail Pirate Imports and Exports:** The industries continue to report increasing imports into Thailand from China and elsewhere in Southeast Asia and pirate exports from and transshipments through Thailand. New worrisome developments indicate a substantial and sophisticated book piracy syndicate operating in the country and exporting high quality pirated academic books to the U.S. Royal Thai Customs should increase efforts at curtailing the importation of pirated products in 2008 and augment its efforts to stop infringing product from leaving the country.

¹ Red Zones include: in Bangkok – Klong Thom, Sapan Lek and Baan Mor shopping areas, Patpong and Silom shopping areas, Mah Boon Krong (MBK) Center, Sukhumvit area (Soi 3 – 19), Panthip Plaza; Chiangmai Province; Phuket Province; Koh Samui District in Surattani Province; Pattaya in Chonburi Province; Haad Yai District in Songkla Province; Ao Nang area in Krabi Province; Hua-Hin in Prajuabkirkiran Province. Yellow Zones include: in Bangkok – Nom Chit shopping area, Lad Prao, Pata Pin Klao shopping area, Fortune shopping area, Taladmai Don Muang shopping area, Tawanna shopping area, Pratanam shopping area, Jae Leng shopping area, Kao San Road shopping area, Sapan Bhud shopping area; Patumtani Province; Nonthaburi Province; Nakornrachasrima Province; Konkan Province; and Ratchaburi Province.

Customs should also work with express mail carriers to establish mechanisms to inspect express shipments for contraband.

- Investigate Key Book Pirate Exporters and Otherwise Legitimize Usage of Published Materials:** As noted, the past year has seen a disturbing development in the fight against book piracy in Thailand. Highly sophisticated syndicates have been producing high-quality pirated academic and professional books for export. This well-developed web of pirate activity must be stopped, and IIPA requests the cooperation of both the investigative and Customs authorities in ferreting out and arresting those responsible for this activity. Other forms of book piracy, including illegal photocopying for the domestic market and print piracy for export, continue to thrive in Thailand. Exceptions in the copyright law regarding educational uses of copyright works, which have been interpreted by courts in a TRIPS-incompatible way, must be amended or clarified. IIPA applauds actions by the Royal Thai government to enhance understanding about the harms of piracy of published materials in schools, including 2007's "Stop Book Piracy" campaign. These efforts should continue and should be enhanced to address the core misunderstandings about "fair use" in the educational context. Furthermore, universities need to take a role in ensuring legitimate uses of textbooks and other published materials in schools and universities.
- Modernize Copyright and Related Laws and Join WCT and WPPT:** IIPA is disappointed that legislation to implement the WIPO Treaties, the WCT and WPPT, has fallen behind in the queue to other legislation. Instead, the government is close to passage of Copyright Act amendments which would weaken criminal penalties overall by removing minimum sentences and would impose mandatory collective management in a potentially broad brush manner that is likely ultimately to damage the copyright marketplace. IIPA strongly urges that the Bill be postponed for future consideration, since it is industry's view that collective management of the sort called for in the bill must be voluntary. The Royal Thai government should, however, pass the Customs Act amendment Bill, and should also enact laws intended to address book piracy, signal theft (cable and satellite piracy), and illegal camcording of movies.
- Address Corrupt Practices:** The industries have long known or suspected, and in 2007, the Royal Thai government made representations suggesting they agree, that corrupt practices have had a diminishing effect on intellectual property rights protection and enforcement in Thailand. IIPA commends those who have brought such corrupt practices to light and encourages the government to support courageous officials who are interested in upholding the rule of law.

THAILAND										
Estimated Trade Losses Due to Copyright Piracy										
(in millions of U.S. dollars)										
and Levels of Piracy: 2003-2007²										
INDUSTRY	2007		2006		2005		2004		2003	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Records & Music	21.7	50%	20.7	50%	21.9	45%	24.9	45%	26.8	41%
Business Software³	211.0	79%	253.0	80%	155.0	80%	100.0	78%	84.0	80%
Entertainment Software⁴	91.4	77%	NA	82%	NA	75%	NA	76%	NA	82%
Books	37.0	NA	35.0	NA	30.0	NA	30.0	NA	28.0	NA
Motion Pictures	NA	NA	NA	NA	149.0	62%	30.0	60%	28.0	60%
TOTALS	361.1		308.7⁵		355.9		184.9		166.8	

² The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2007 Special 301 submission at www.iipa.com/pdf/2007spec301methodology.pdf. For more details on Thailand's Special 301 history, see IIPA's "History" Appendix to this filing at <http://www.iipa.com/pdf/2008SPEC301HISTORICALSUMMARY.pdf>, as well as the previous years' country reports, at <http://www.iipa.com/countryreports.html>.

³ BSA's 2007 statistics are preliminary. They represent the U.S. software publishers' share of software piracy losses in Thailand, and follow the methodology compiled in the Fourth Annual BSA and IDC Global Software Piracy Study (May 2007), available at <http://w3.bsa.org/globalstudy/>. These figures cover, in addition to business applications software, computer applications such as operating systems, consumer applications such as PC gaming, personal finance, and reference software. BSA's 2006 piracy statistics were preliminary at the time of IIPA's February 12, 2007 Special 301 filing and were finalized in June 2007 (see <http://www.iipa.com/statistics.html>) as reflected above.

⁴ ESA's reported dollar figures reflect the value of pirated product present in the marketplace as distinguished from definitive industry "losses." The methodology used by the ESA is further described in Appendix B of this report.

PIRACY UPDATES IN THAILAND

Notwithstanding the recent efforts of the Thai Government, high levels of piracy persist and continue to claim victims. The largest music store in Thailand, known as “CD Warehouse,” closed its doors, in large part because of piracy. Sales of international music products dropped 13% (19% across the board) in 2007 (compared with 2006). Physical music sales continue to decline while Internet sales have not picked up enough of the slack in Thailand. The story is the same for other industries, for retail sales as well as video rental shops. Anecdotal estimates indicate that approximately 10% of rental shops in Thailand (which also offer sell through products) went out of business in 2007.⁶ In March 2007, local and international industry representatives joined together to protest the government’s lack of action against piracy and to remind them that local interests are at stake. At that time, a group of 1,000 IP right owners including those from recording companies, film makers, software developers, and trademark right owners presented a letter to the Chief Commissioner of the Police Bureau, Police General Sereepisut Temeeyavej, urging him to declare war against piracy. This protest likely contributed to the Royal Thai government’s more aggressive anti-piracy actions over much of 2007. The Royal Thai Police’s Economic and Technological Crime Suppression Division, Central Investigation Bureau (ECOTEC), has been particularly helpful, running many raids on an *ex officio* basis.

Optical Disc Pirate Production (Factory and Burned): Optical disc piracy (CDs, VCDs, DVDs, CD-ROMs) remains widespread in Thailand, with a marked move in 2007 away from factory-pressed discs to burned discs produced in local “burning” facilities. There are now 38 registered plants in Thailand (see Appendix A). Thai authorities conducted plant visits and began collecting exemplars in 2006, whereby plants provide samples from molds used to produce discs, which can be used for forensic matching to the injection mold machine in the plant and can be matched with any discs found in the market made on that mold machine as well.⁷ In 2007, the plant visit program continued, with 19 plant visits between February 8 and 27, 2007. Visits to the other 19 registered plants were to have been scheduled by the end of 2007, but due to the national elections, the visit program was postponed until 2008. Pirate optical discs manufactured in Thailand were exported in 2006 to the United Kingdom, Belgium, South Africa, Taiwan, Sweden, and other parts in the EU, the U.S., and countries in Latin America, and in 2007 exported discs showed up in Europe and South America.

Retail Piracy in Thailand: Despite stepped up enforcement actions by the Royal Thai government in 2007, retail piracy in Thailand remains rampant, whether in otherwise legitimate malls, malls catering to those looking for pirated materials (and/or counterfeits), or established or makeshift street stalls or at night markets.⁸ The concept of “Red Zones” and “Yellow Zones,” which includes whole

⁵ Without factoring in the motion picture losses for 2005, the piracy losses actually went up in 2006, from \$206.9 million to \$219.7 million.

⁶ *Pirates Destroying Local Trade*, The Nation, May 9, 2007. This article reported that 80% of sales of VCDs and DVDs annually, or Bt40 billion (approximately US\$1.3 billion) is lost due to piracy, essentially costing the Royal Thai government Bt5 billion (approximately US\$160 million) in tax revenues. It also reported that “major retailers of VCDs and DVDs, who have been severely hurt by unabated piracy, have begun shutting down branches that fail to make profits so that they can improve their bottom lines and maintain their fight against the illegal industry.” The Mangpong retail chain started closing outlets in early 2006, dropping from 370 outlets in 2006 to about 200 outlets in 2007. Another chain, Tsutaya, shut down 10 of 260 stores, and recorded a 12% decrease in gross sales, and the Senior VP indicated “the impact of worsening piracy had driven the company’s sales down by almost 28 per cent in the first quarter of [2007].” It has shut down about 10 outlets over recent months. He also said that between 85% and 90% of local rental stores have pirated products. Rose Video Vice President Jirath Pavaravadhana indicated declines of 20% in sales and said that “In some provinces, we’ve found outlets selling pirated products in front of police stations and even schools,” noting also increased downloading of illegal content from the Internet, and that consumers often chose pirated product since it was not subject to the authorities’ strict censorship of legal copyright programs. Rose Video has about 120 retail outlets around the country.

⁷ In preparation for the establishment of the Optical Disc forensic laboratory in Thailand, which was deployed in late 2006, the plant visit and exemplar collection program was launched, to gather necessary information on manufacturing from all plants visited as well as to collect samples of optical discs produced from those visited plants. The result was successful with a total of 38 plants visited and exemplars collected from all the plants except one (Verko, which refused to provide an exemplar, claiming its machines had been “down”).

⁸ In the July 2007 edition of *Lookeast Magazine* (which claims to be “Thailand’s Leading Travel Publication for 36 Years”), at least two out of the “12 Things to do in Bangkok” involve shopping for pirated and counterfeit merchandise. The number 1 thing to do in Bangkok (as listed) is to shop at Chatachuk Weekend Market:

provinces targeted for enforcement activity due to piracy, indicates the commercial and geographic scope of the problem. All kinds of pirated product, from optical discs, (increasingly those “burned” onto recordable discs and mobile devices), containing movies, music, entertainment software,⁹ business software, or published materials, cartridge-based videogames, and books can all be found at retail. Pirate DVDs often contain movies still in the theaters in Thailand or not yet released (and hence, uncensored). A recent phenomenon is the “4-in-1” or even “6-in-1” DVD containing multiple titles. Pirate music CDs in Thailand often contain the entire repertoire of a particular artist (e.g., the Beatles, Peter Gabriel) and can be found for Bt40-60 (US\$1.35 to \$2). Pirate game cartridges containing 50 games on one cartridge are not uncommon, and sell for Bt 299 (US\$9), as do many of the latest games, all in pirate versions. The color packaging including fake holographs with the brand can only fool the trained eye. Worse yet, piracy of local Thai music and other copyright material can be found anywhere, and compilations of hundreds of songs will sell at retail or at street stalls for a mere Bt40-60 (US\$1.35 to \$2).

Book Piracy: Over the past year, Thailand has unfortunately become one of the few pirate book exporters in the world. Massive shipments of high-quality pirated versions of academic and professional books from Thailand have been seized in what has been perhaps the most disturbing global book piracy development in several years. Evidence indicates that the production operations are highly sophisticated, networked and difficult to detect. The book publishing industry needs the earnest and immediate cooperation of the Department of Special Investigation and Royal Thai Customs in detecting these operators and bringing them to justice.

Domestically, illegal photocopying joins with unauthorized translations, adaptations and compilations to inflict significant damage on the educational market. Unauthorized photocopies abound in and around university campuses.¹⁰ Photocopy shops routinely make copies without question or consideration of copyright laws. Lecturers are unfortunately culpable, too, compiling “course packs” of works without permission from publishers and even translating works and marketing them as their own publications.

On top of a climate already rife with commercial photocopying and misunderstandings about how fair use applies in an educational context, some decisions by the Thai courts seem to endorse the outright copying – even by commercial enterprises – of complete books or substantial portions thereof under a faulty interpretation of the Thai copyright law.¹¹ If Thai law continues to permit what these judges say it

“Sweat it out at the world’s biggest weekend market ... Chatachuk Weekend Market ... Chatachuk is overflowing with ... fake merchandise. ... Be prepared to bargain with the best of them and you’ll be rewarded with some unbeatable deals. This shopper’s paradise is a MUST for anyone in Bangkok who has shopping on their agenda. ...”

The number 9 activity listed is to shop at Patpong’s night market:

“Shop after dark at Patpong’s night market ... You’ll find everything on Patpong including ... knock-off designer bags, the latest pirated DVDs, counterfeit watches. ...”

⁹ Pirated video games on optical discs are primarily either locally burned (now the predominant form of pirated video games in the market) or factory replicated imports from either China or Malaysia (often imprinted with Chinese characters or in Bahasa).

¹⁰ Photocopying, especially of English language teaching materials, plays a significant role in primary and secondary schools as well.

¹¹ See, e.g., *Prentice Hall Inc. v. Kanokchai Petchdawong*, Black Case No. Or. 326/2542, Red Case No. Or. 784/2542 (Cent. Int. Prop. Int. Trade Court, July 23, 1999) (unofficial translation) (on file with IIPA) (plaintiff claimed copyright infringement by a copy shop owner who was copying entire textbooks; court indicated strongly that receipts showing copies made on behalf of students would likely entitle defendant to avail himself of fair use defense under Article 32, setting no limit on scope of permissible copying under the Thai interpretation of the Berne three-part test). Article 32(6) of the Copyright Law provides, in relevant part:

An act against a copyright work under this Act of another person which does not conflict with normal exploitation of the copyright work by the owner of copyright and does not unreasonably prejudice the legitimate rights of the owner of copyright shall not be deemed an infringement of copyright. Subject to the provision in the first paragraph, the following acts in relation to a copyright work shall not be deemed an infringement of copyright

(1) *research or study of the work which is not for commercial profit;*

...

(6) *reproduction, adaptation, exhibition or display by an instructor for the benefit of own instruction which is not for commercial profit;*

does, Thailand will remain in violation of its international obligations under the Berne Convention and the TRIPS Agreement. The Department of Intellectual Property (DIP) has taken notice of this issue, and states in its latest report, *Thailand's Implementation on Intellectual Property Rights (May-October 2007)*,¹² that "the Supreme Court has also made decision in 2001 which specifies that the copying of text books by photocopy services for sale without authorization is a copyright infringement." IIPA would like to review the case mentioned by the DIP and to understand whether it overrules the *Kanokchai Petchdawong* case. If so, there is every reason to expect the Royal Thai government to take effective action against unauthorized photocopying of entire books in Thailand.

IIPA applauds several recent moves by DIP to try to improve the book piracy situation, including the launch of a seminar on November 2, 2007, the "Stop Book Piracy" initiative (including public and private agencies, a leading university, a writer's association and related business entities), and a training program "in order to raise the levels of understanding and responsibility of photocopy services providers on copyright infringement." The DIP also mentions a publication ("Fair Use Guidelines for Education" issued by the Copyright Committee) on "the scope of the fair use of copyrights that covers both copyrighted books and software," which it says was distributed to students, professors, and the general public in early November 2007, noting that "the Department was informed by the Association of American Publishers that most of violations take place during the beginning of an academic year." IIPA and the publishers are open to these initiatives to the extent they can achieve a reduction in the level of piracy and thus an increase in publishers' opportunities to enjoy a legal market for U.S. books in Thailand, but would like to have had input prior to its issuance, given the important interests at stake for copyright owners in general and publishers in particular.

Entertainment Software Piracy: Piracy of entertainment software remains prevalent in Thailand, whether through sales of optical discs (factory or "burned") or cartridge-based games, use of Internet game rooms (IGR) or cafés,¹³ or use of consoles modified to play pirate games.¹⁴ Malls serve as the primary retail channel for pirated entertainment software products, both pirate video game discs and counterfeit video game cartridges. Vendors typically only have binders of game covers or empty boxes in their stands (unlike their prior practice of hiding a stash of pirated products in a closet or an adjacent store).¹⁵ ESA member companies continue to conduct "mall sweeps" in cooperation with local law enforcement, with raids against some 300 vendors in 2007. As vendors typically keep little pirate products on hand, most seizures involved less than 100 discs (although there have been a couple of raids in which several thousand discs were found). Also, even where a raid reveals several hundred pirate discs at one location, police only seize the products of those right holders who are involved in the raid, leaving behind large stacks of pirate product. It is also rather unfortunate such mall sweeps are only undertaken at the behest of the right holder. The police should be encouraged to undertake these actions on their own initiative. ESA members report some convictions for copyright piracy but note that in the main, penalties and fines are rarely imposed. Fines are typically only imposed in cases where 100 or more discs are seized (which, given the above described police practice of leaving behind pirated product) is extremely difficult to achieve). In some cases, community service is the only penalty, and in others, not even that.

Signal Piracy (Cable and Satellite) and Unauthorized Public Performances of Audiovisual Works: Piracy of cable and satellite broadcasting signals in Thailand (the unauthorized transmission of

(7) reproduction, partial adaptation of work, abridgement or making a summary by an instructor or an academic institution for the purpose of distributing or selling to the attendants in the class or in the institution which is not for commercial profit;
(8) use of the work in questioning and answering in an examination.

¹² Department of Intellectual Property, Ministry of Commerce, Thailand, *Thailand's Implementation on Intellectual Property Rights (May-October 2007)*.

¹³ Over the years, ESA member companies have had some success in turning IGRs into legitimate operations through licensing arrangements with the café owners. The support of law enforcement remains critical to ensure continued improvement in this market.

¹⁴ In this unique form of console piracy, in several locations throughout Thailand, a modified console (rendered capable of playing pirated video games by the insertion of a circumvention device) is housed inside an arcade-type shell and is operated by depositing tokens or coins into the machine.

¹⁵ When a customer, after browsing the shop "catalogues," requests a specific title, a runner is sent to meet a backpacker (whose function is to roam the mall carrying a number of pirated discs in a bag) to retrieve the requested product.

U.S. programming over systems from original cable or satellite transmissions)¹⁶ remains rampant, causing revenue losses estimated at US\$180 million (the second highest losses in the Asia-Pacific region),¹⁷ notwithstanding that legal connections increased in 2007 to 662,000. Illegal decoder boxes and smart cards are widely available in Thailand. The cable industry notes that as of mid-2007, there were over 1.32 million pirate cable hook-ups, compared with 662,000 legitimate subscribers to the major pay television operators in Thailand. Unfortunately, as discussed below, the Royal Thai government, while taking more actions in 2007 against pirate cable operations, has yet to establish a truly effective regulatory system to license and regulate broadcast and cablecasting facilities, including the authority to revoke licenses and take other actions that will deter illegal broadcasters.

A new problem emerged in Thailand in 2007, involving individuals who apply for a legitimate pay television subscription service, and then use the Internet to share the smart card with others, collecting a monthly fee from users of the pirate service. This new dangerous piracy phenomenon is not confined to individuals, but is at times conducted by full-scale pirate enterprises, which use Internet servers to distribute the codes to a large number of users. Thus, Internet card-sharing could have serious repercussions for the legitimate industry as well as direct-to-home pay television services. DIP reports that the Royal Thai Police's Economic and Technological Crime Suppression Division, Central Investigation Bureau (ECOTEC) arrested one violator and filed a case against him, and also reports that it is in the process of expanding the investigation so as to monitor the usage of related devices. This is a positive development, and IIPA encourages the government to address this problem immediately and effectively. Another development is the inclusion in the new Broadcasting Act (Section 70) of a provision that punishes manufacturers, importers, sellers and those who service pirate decoders aimed at decrypting Thai-licensed services. While IIPA hopes that this change will stimulate the police to launch additional cases when the new Act comes into effect, we are disappointed that the international industry's recommendation to the Council of State that the legislation be broadened to encompass pirate decoders of international program providers' signals was not accepted.

Public Performance Piracy: Public performance piracy continues to damage copyright owners, especially the motion picture industry. In particular, hotels screen videos over in-house movie systems, most bars in tourist areas openly exhibit videos without authorization, and a growing number of bars and restaurants have also added "private" rooms to illegally screen U.S. motion pictures. The copyright law, but also business license laws, should be employed to ensure that public spaces are not being used to abuse copyright in motion pictures, other audiovisual works, or other copyright materials.

End-User Piracy of Business Software/Government Legalization: The greatest source of losses to the business software industry is the use of unlicensed or pirate software in the workplace. The rate of unauthorized uses of business software in business settings remains unacceptably high, and revenue losses continue to increase year-on-year. While the business software industry has been able to get full cooperation from enforcement authorities in conducting end-user raids and retail raids (see discussion below), these raids do not seem to be having a significant deterrent effect on the overall piracy rate in Thailand. IIPA notes that the Royal Thai government's latest report indicates that a manual on "the fair use of copyrighted software for computer programs ... so as to enhance the knowledge and understanding on the method and scope to use computer program without violating software copyright" has been posted on DIP's website, and "has also been disseminated to students, academic institutions, and related private agencies in order to gain greater access to target groups." While IIPA has not reviewed the manual, to the extent it sets forth that unauthorized use of software in a business setting is subject to civil and criminal remedies and should be reported by private citizens, we would view that as a positive development. To the extent it does not, it should be amended to do so.

¹⁶ Cable piracy and signal theft in Thailand involves not only major channels, but also the feed by many unlicensed cable operators, particularly in provincial areas outside of Bangkok, of continuous, unauthorized motion pictures on dedicated movie channels operating on their systems.

¹⁷ 2007 revenue loss estimate were taken from The Cable & Satellite Broadcasting Association of Asia (CASBAA), *The Cost of Piracy: Asia-Pacific Pay-TV Industry Study*, October 2007 (prepared by Standard Chartered).

In addition, regarding government legalization of software usage, IIPA is pleased that, according to the Royal Thai government's latest report, it has requested the cooperation of all government sectors to abide by the decision of the Cabinet in 1999, which stipulates that all government sectors are to strictly use legitimate software.

Internet Piracy Has Grown: Thailand now boasts almost 8.5 million Internet users, representing a 13% penetration rate, and 105,000 broadband subscribers, or a 1.6% broadband penetration rate, and an astounding 974,000 separate Internet web hosts.¹⁸ Given this growth compared with previous years (e.g., in 2006, IIPA reported 7 million Internet users overall), it is not surprising that Internet piracy is a growing phenomenon in Thailand. The Business Software Alliance (BSA) noted a huge increase in the number of software infringements in Thailand, from 358 per month in 2006, to 949 per month in 2007. In addition, recent statistics suggest that mobile Internet penetration in Thailand is extremely high, at well over 50%.¹⁹ The industries report that, although there is no legislation related to the liability of Internet service providers (ISPs) for copyright infringements occurring over their services (see discussion below), ISPs in Thailand have thus far been cooperative in taking illegal websites down.

Mobile Device Piracy: Illegally "ripping" music and storing music on mobile devices, on thumb drives, or on MP3 players, has become a more prevalent piracy phenomenon in Thailand in 2007. The proliferation of cheap MP3 storage and playback devices is spawning this rapidly growing form of music piracy in Thailand, especially among youth. In addition, many mobile phones are now being sold with a feature to store music files. As a result, former retailers of pirate CDs are now offering digital download services to consumers on to these devices. These operators maintain an in-store hard drive containing literally thousands of audio files which can be purchased and then loaded onto any device with an MP3 storage and playback capability. Industry anticipates that this form of piracy will continue growing significantly in 2008.²⁰ The file transfers, done as a service by sellers, clearly constitute copyright infringement, and industry's surveys reveal that mobile shops in the Red and Yellow Zone areas, i.e. Pantip Plaza, Klongtom and Saphan Lek, Koa Sarn Road, Fortune Center and Sear Department Store, all offer "pre-downloaded" music files to customers on such devices as a service.

Camcorder Piracy:²¹ In 2006 there were six reported cases of illegal copying of movies on camcorders in Thai cinemas. An essential element in the fight against camcorder piracy is the enactment of legislation to prevent the unauthorized operation of audiovisual recording equipment in motion picture theaters while a motion picture is being exhibited. Although in Thailand this may already amount to a violation of the copyright law, there is no specific provision on the subject, and the penalties would be extremely limited absent proof of a "commercial purpose." We urge the Royal Thai government to take whatever steps are necessary to ensure that adequate protection against camcording piracy is reflected in its national legislation.

¹⁸ See The World Factbook, Thailand, at <https://www.cia.gov/library/publications/the-world-factbook/geos/th.html>. See also Internet World Stats, at <http://www.internetworldstats.com/stats3.htm>. These statistics are up-to-date as of November 30, 2007, are based on Census Bureau data, while usage numbers come from various sources, mainly from data published by Nielsen/NetRatings, ITU, and other trustworthy sources. See also Internet World Stats, Thailand, at <http://www.internetworldstats.com/asia.htm#th> (reporting that there were 8,465,800 Internet users as of September 2007, representing a 13% penetration rate, according to the International Telecommunications Union; and 105,000 broadband subscribers as of September 30, 2007, according to the International Telecommunications Union).

¹⁹ According to <http://www.budde.com.au/publications/annual/asia/asia.html?r=51>, the mobile Internet penetration rate in Thailand stood at 57% in 2006.

²⁰ IFPI and the local recording industry association TECA undertook market surveys of MP3 devices in several retail outlets where investigators were able to purchase players with infringing pre-loaded tracks or received offers from shop staff to load extra tracks upon purchase of the devices. This practice is widespread and growing, and affects other industries as well. For instance, book and journal publishers report downloading of reference books and dictionaries in similar manner.

²¹ The vast majority of movies are stolen right off the screen by professional camcorder pirates, who use video cameras to illicitly copy a movie during exhibition in a movie theatre – usually very early in its theatrical release or even prior to the film's release (e.g., at a promotional screening). Camcorder pirates are often sophisticated criminals and typically sell the master recordings to illicit "source labs" where they are illegally duplicated, packaged and prepared for sale on the black market, then distributed to bootleg "dealers" throughout the world. As a result of camcorder piracy, many motion pictures become available over the Internet – on peer-to-peer networks, file transfer protocol (FTP) sites, Internet Relay Chat (IRC) rooms, or auction sites – as well as on street corners and night markets around the world during the U.S. theatrical release and well before their international debuts.

Organized Crime in Piracy – Link: Evidence of organized crime involvement in piracy in Thailand continued to mount in 2007. Threats to right holders and their representatives are commonplace, and right holder representatives were physically attacked and injured on several occasions in 2006.²² In 2007, a number of articles in major local newspapers investigated the links between the factories and retailers. In October 2007, at the Tanwanna shopping mall, a scene between two rival gangs involved in pirate optical disc businesses erupted in violence, resulting in one death and another serious injury. It is clear that the piracy business in Thailand remains a dangerous one. Another enforcement action in May 2007 involved two pirate optical disc manufacturing and distribution facilities in central Bangkok suspected of belonging to a single organized crime group.

ENFORCEMENT UPDATES IN THAILAND

Notwithstanding the difficult and politically dynamic political environment in Thailand in 2007,²³ it is encouraging that the responsible agencies of the Royal Thai government managed to keep copyright enforcement as a front-burner issue and make some incremental progress in some areas. The bright spots in 2007 included some significant raids against optical disc factories, pirate “burning” operations, pirate warehouses, and some major pirate retail markets, resulting in significant seizures and arrests of pirate operators. Other bright spots included the increased numbers of criminal raids against end-user piracy of business software.

It is particularly noteworthy that some key officials in the government have not only recognized the severity of the piracy problems in Thailand, and called out their colleagues for not doing more. For example, the Royal Thai Police’s Economic and Technological Crime Suppression Division, Central Investigation Bureau (ECOTEC) Head, General Wisuth Wanichabutra held a press conference on November 18, 2007, at which he told the press that, since starting in February 2007, his unit seized more than 4 million illegal discs, but that he believes there are still more than 10 million pirated discs available in the market. Such candor is welcome and we believe is a first sign that the Royal Thai government is rightly taking responsibility for the piracy problem it faces in country.

DIP Statistics: The Royal Thai government’s Department of Intellectual Property report, *Thailand’s Implementation on Intellectual Property Rights (May-October 2007)* (DIP Report),²⁴ indicates that the government is taking “an integrative approach” to intellectual property rights enforcement, including the necessary involvement of the Royal Thai Police and its Economic and Technological Crime Suppression Division, Central Investigation Bureau (ECOTEC), the Department of Special Investigation in the Ministry of Justice, the Customs Department, the Office of the Attorney General, the Central Intellectual Property and International Trade Court, the Government Public Relations Department in the Ministry of the Prime Minister, and the Office of the Council of State. The DIP’s latest statistics on enforcement claim 4,360 raids from January through November 2007 under the Copyright Act B.E. 2537, resulting in seizures of over 2.1 million infringing items.²⁵ The statistics also indicate that since January 2007, 247 illegal warehouses and manufacturing facilities have been shut down with 1,878,715 seized items.

The DIP Report also notes a remarkable number of criminal copyright cases brought anew or ongoing – over 2,000 criminal copyright cases – with over 1,800 of those cases resulting in court

²² An industry representative who worked on an anti-piracy team was shot and killed in Nakorn Pratom Province on October 14, 2006. The gunman was caught within a few days. Other industry representatives have been known to be threatened or attacked by armed criminals in Thailand. A staff person of a third party outsource company was also attacked during a raid in Open Market in Nonthaburi Province on December 21, 2006.

²³ In particular, after the September 2006 coup d’état which resulted in the overthrow of Prime Minister Thaksin Shinawatra, on December 23, 2007, a little more than a year later, Parliamentary elections resulted in the People’s Power Party (PPP) regaining a majority of the lower house. Thailand’s newly-elected Parliament convened on January 21, 2008 for the first time.

²⁴ See *supra* note 12.

²⁵ Department of Intellectual Property, The Office of Prevention and Suppression of Intellectual Property Rights Violation, *Statistics on Suppression of Intellectual Property Rights Violation*, November 30, 2007. The report also indicates that an additional 35 raids under the Act Controlling the Cassette Business and Television Devices B.E. 2530 resulted in seizure of almost 35,000 illegal items.

verdicts.²⁶ If nothing else, this indicates that the Royal Thai government, and DIP, have recognized that criminal procedures and remedies are key in the battle against piracy in the country. Regarding border enforcement, the government reported 592 cases between January and November 2007, resulting in seizure of almost 1.3 million goods, although there is no breakout by copyright or trademark so it is unclear to what extent copyright infringing goods were seized at the border.²⁷ The government also reported the results of Mobile Task Forces, established under the cooperation of DIP and made up of Royal Thai Police and right holders, included a total 135 cases involving 131 suspects between January and November 2007, resulting in seizure of almost 47,000 pirate items.²⁸

Key Indicators and U.S. Industry Anecdotes: Of course, not all of the cases highlighted above (and certainly not all the Customs statistics) relate to the U.S. copyright industries, but many important actions for the U.S. industries from the year are reflected in those statistics. They include actions on optical disc factories, with seizures of pirate discs being produced therein and equipment being used to manufacture those discs, actions on pirate “burning” operations,²⁹ and business software end-user piracy raids and seizures (although they report only four retail raids and no *ex officio* raids).³⁰ Industry also indicates that of the criminal convictions cited by DIP, the Central Intellectual Property and International Trade Court (CIPIT) issued 15 sentences which included jail terms not suspended, although industry notes a general lack of deterrent sentencing in other cases.³¹

Industry worked with enforcement authorities throughout 2007 in effectuating some significant raids on both CD-R/DVD-R production, as well as major pirate distribution channels, retail locations and warehouses in 2007.³² In one raid, on April 25, 2007, officers from ECOTEC with MPA assistance raided an optical disc manufacturing facility and two distribution warehouses in the Bangkok suburb of Nondhaburi, arresting 11 suspects and seizing 140 DVD-R burners (the burners were capable of producing 7.5 million discs a year) and 213,000 pirated movie DVD-Rs. ECOTEC also seized artwork for

²⁶ DIP reports that, while there were no criminal cases from 2006 or 2007 under Sections 27-30 of the Thai Copyright Act (dealing with exclusive rights of works, audiovisual, cinematographic, sound recordings, computer programs), there were a huge number of cases brought under the prohibition against sale or possession for sale of infringing products prescribed in Sections 27-30 (pursuant to Section 31). The report indicates there were 209 criminal copyright cases carried over from 2006, and 1,859 new cases, for a total of 2,070 criminal copyright cases in 2006-07. Of these, 89 related to computer programs; 109 to literary works; 756 to cinematographic works; 40 to sound recordings; 256 to artistic works; 597 to musical works; and 12 to audiovisual works. An additional 2 cases relate to performer’s rights under Section 69. DIP does not discuss or break down the verdicts in these cases, or sentences imposed. DIP also reports that during the period January to August, 2007, there were a total of 66 civil copyright infringement cases, with 53 ongoing from 2006 and 13 new cases; of those DIP reported that 16 cases reached judicial decision. As with the criminal statistics, there is no discussion of breakout of the court decisions and damages awarded, although DIP does report that the total claims involved in these cases is Bt201,552,454.62 (approximately US\$6.4 million). See *supra* note 12.

²⁷ Department of Intellectual Property, The Office of Prevention and Suppression of Intellectual Property Rights Violation, *Statistics on Border Enforcement of Intellectual Property Rights Violation*, November 30, 2007.

²⁸ *Id.* The Mobile Task Force was most active from July through October 2007, when 105 out of the 135 cases were taken. By contrast, there were only 5 total Mobile Task Force copyright raids between February and May 2007, and only 3 copyright raids between November and December 2007.

²⁹ In the aggregate, in 2007, the motion picture industry representatives participated with Thai authorities on 11 cases resulting in the seizure of 1,282 CD “burners.”

³⁰ According to the Business Software Alliance, enforcement statistics from February to September 2007 show that the use of illegal software in the workplace permeates through all categories of industry, as a total of 88 corporations have been caught running 3,737 counterfeit software programs on 1,568 personal computers, with a value of more than Bt187 million (approximately US\$6 million), which is an increase of 50 per cent from last year. Before the end of the year, ECOTEC planned to conduct raids all over Thailand and over 40 companies had already been short-listed for such raids. See Business Software Alliance, *Economic and Technological Crime Suppression Division Showcases 50% Increase in Successful Crackdown on Illegal Software*, January 4, 2008, at http://w3.bsa.org/thailand/press/newsreleases/ECOTEC_showcases_successful_crackdown.cfm. The business software industry group principally works with the Royal Thai Police’s Economic and Technological Crime Suppression Division, Central Investigation Bureau (ECOTEC) for business software end-user piracy raids, and with ECOTEC and the Bangkok Metropolitan Police for retail raids.

³¹ For example, the Motion Picture Association reported that in 2007, twelve cases resulted in distributors and retailers being sentenced to jail (without suspension) for up to two years and to fines of up to US\$22,000. In one case, possession of as little as 78 infringing CD-Rs resulted in a three-month jail sentence. This new spate of convictions is unprecedented, as previously, the Central Intellectual Property and International Trade Court of Thailand had only sentenced a Taiwanese national to jail for two years for owning a factory that produced pirated discs. However, it must still be pointed out that the deterrent effect of these cases is limited by the fact that they are only a few out of the hundreds of cases in which U.S. copyright owners are involved (for example, MPA is involved in over 200 cases). See Motion Picture Association, *Piracy Carries Threat Of Jail In Thailand*, November 1, 2007.

³² These include actions carried out as part of the Motion Picture Association’s “Operation Tripod,” a regional enforcement sweep from April to June 2007, as well as actions carried out by the recording industry group TECA.

more than one million discs.³³ In another raid and an example both of the organized nature of piracy operations in Thailand, but also of the brazen nature of the pirates' activities, on May 23, 2007 officers from the Royal Thai Police, assisted by MPA representatives, raided two optical disc manufacturing and distribution facilities in central Bangkok suspected of belonging to a single organized crime group. The raids yielded 180 CD-R burners, 10,000 pirated CD-Rs, 10,000 blank CD-Rs and 250,000 printed sleeves for pirated optical discs. Two men were arrested.³⁴ Remarkably, seizures included large quantities of pirated copies of the Thai film *King Naresuan*, a percentage of the proceeds of which were being donated to a charity associated with Thailand's King Bhumibol Adulyadej. Such brazen piratical activity involving this film was apparently unexpected by Royal Thai authorities. The burners seized in the two raids were capable of producing well more than nine million pirated CD-Rs in one year. The facilities were found to be a feeder for pirated discs to retail outlets in Bangkok's Klongtom and Patpong districts. A vehicle containing thousands of pirated CD-Rs, including more than 1,000 copies of *Spiderman 3*, was also intercepted leaving one of the facilities and was seized by the police. These and other key raids are noted in Appendix B.

Retail Piracy – Progress Made But Challenges Remain to Sustain Results: Industry noted a reduction in retail piracy levels³⁵ due to significant raiding of the retail malls, especially the so-called “Red Zone” areas in Bangkok,³⁶ and the instruction of General-Commissioner Police General Sereepisuth Taameeyaves to his subordinates to impose disciplinary punishment if piracy was found in their responsible areas. The enforcement was largely spearheaded by the Head of ECOTEC, General Wisuth Wanichabutra who took his post in February 2007. Unfortunately, the piracy situation in markets such as Klongtom, Baan Mor and Saphan Lek worsened in the fourth quarter 2007, due in large part to inactivity among local Police; this inactivity, fueled by charges of local police corruption and bribery, led to protests by hundreds of Thai actors and artists on November 17, 2007, demanding that the Head of the Plablachai Local Police Station act against piracy or resign from his post.

The DIP Report indicates that the Royal Thai government would like to commence criminal prosecutions against piracy through proof of mere displaying of the cover pictures or artwork. The reason they desire this authority is that in many instances, the authorities find pirates hawking pirate CDs through displaying only the covers, and then retrieving discs from a different location or “burning” discs to order. In such cases, there is no proof of illegal copying (or selling) of the discs themselves. Industry agrees with this approach and is prepared to assist the authorities in such cases; however, it should be noted that in many instances, such underground practices as displaying only covers should lead authorities to investigate up the distribution chain to locate pirate warehouses, distribution hubs, and production sites.

Border Enforcement: Pirated video game products continue to be imported into the country but entertainment software publishers are not aware of any game seizures effected by Royal Thai Customs authorities in 2007. It appears, however, that the bulk of pirated products are now entering the country through couriers and perhaps no longer primarily through shipping containers. An ESA member company reports that budget flights between China and Malaysia have made it economical for pirate suppliers and vendors to fly to the source country and return to Thailand with their luggage full of pirate products. As Customs officers at airports appear to be inspecting only a limited percentage of inbound passengers, pirate products enter the country unimpeded.

Enforcement Results Against Optical Disc Production Facilities: The Royal Thai government reports that since September 2005, it has undertaken inspections of all 38 of the registered optical disc plants, is requiring SID Code in all plants, and has either closed down some of the suspected pirate plants or those plants have leased out their equipment to others.³⁷ In 2007, industry and government

³³ See Motion Picture Association, *Thai Police Seize 140 DVD-R Burners In Massive Bangkok Movie Piracy Haul*, April 26, 2007.

³⁴ See Motion Picture Association, *Thai Police Seize 180 CD-R Burners, Thousands Of Pirated Discs In Bangkok Piracy Raids*, May 25, 2007.

³⁵ Many shops and stalls closed down in the Red and Yellow Zones in Bangkok, and at least one industry group, TECA, reported a temporary 70% reduction in piracy.

³⁶ See *supra* note 1.

³⁷ Thailand Country Report, The ASEAN+3 Copyright Seminar, “APEC Anti-Counterfeiting and Piracy Initiative” and “New Trends in Copyright Related Cultural Industries,” March 1-3, 2006, Tokyo, Japan (on file with IIPA).

reports seem to indicate that several optical disc factories were the subjects of investigations in 2007. Industry also confirms that optical disc production machines smuggled into Thailand were intercepted and seized in Chiang-Rai Province (which borders Myanmar and Laos); the total value of the seized machines was Bt10 million (approximately US\$319,000).

The local copyright industry association TECA reports three specific optical disc plant actions:

- **Cyber Planet:** On April 10, 2007, ECOTEC aided by industry raided Cyber Planet Disc Company Limited in Bangkok, having 1 DVD line and 1 VCD line along with 1 printing machine. The plant was charged with violating the Thai optical disc statute for not informing DIP about production.
- **Unregistered Plant:** On October 19, 2007, Central Investigation Bureau police raided a property in North Bangkok, revealing two optical disc lines and one printing machine disassembled, packed and ready to be transported. The unusually high electric bill suggests the machines were being shipped out (after being used) as opposed to being shipped in. Illegal discs were discovered in a nearby house on the same property, lending support to this theory. The police charged the property keeper for not registering his property as an optical disc plant under the Optical Disc Law, and copyright charges were filed against the home owner and two employees, nationals of China and Myanmar. The DIP reported that officials seized two optical disc production machines from this unregistered plant.
- **307 Plant (Now “Million Silver Gold”):** The Royal Thai Police’s ECOTEC with industry assistance executed a search warrant on June 20, 2007 against the licensed optical disc plant “307.” The inspection revealed a single production line operating in the middle of the night which was producing pornographic discs. Two local Thai males believed to be operators of the plants were arrested, and further inspection led to the discovery of approximately 13 stampers and about 5,000 pressed discs consisting of pornography, as well as local and international movies and music. In an office opposite the plant an additional 120 stampers and various documents were found and subsequently seized. The mastering source identification code (LBR code) on the pornographic discs discovered at “307” were identified and matched to Chai Rung Enterprise Co. Ltd., a licensed mastering plant that was situated right above the 307 plant. As a result, Chai Rung Enterprise’s operations and plant were sealed pending further investigation. Industry understands from the Public Prosecutor that all the infringers including the Managing Director and the Company (Million Silver Gold, the former 307) are being prosecuted under the copyright law and the Optical Disc Manufacturing Act, with testimony scheduled to be heard by the IP&IT Court on November 20-23, 2008. Unfortunately, despite the link in the mastering code to Chai Rung, the Chief Public Prosecutor decided not to file charges against Chai Rung, determining that there was no concrete evidence to support an accusation of unauthorized copying.

As was reported last year, on August 7, 2006 in a ceremony between the United States Embassy and the Royal Thai Police Office (organized by the motion picture and record industries), the U.S. government handed over a full set of forensic equipment to the Royal Thai government for its enforcement activities related to optical disc piracy in Thailand. The Royal Thai government has indicated that, since that time, 41 lots of pirated optical disc have been sent for testing by the Royal Thai Police, and 57 lots have been sent for testing by the Department of Special Investigation, Ministry of Justice. The results of these tests led to further investigation against three production plants involved in such pirated activities, and legal actions have been brought against two of the three.

Additional Enforcement Problems to be Addressed in 2008: Copyright owners still face a number of major challenges and hurdles in seeking to enforce their rights in Thailand. For example,

- **Investigative Irregularities:** Investigative irregularities, including substitution of low-level defendants for major ones after raids, delays in post-raid inquiries, and leniency of police officers during raids, all prevent deterrent enforcement results.

- **Corruption and Cronyism:** In November, copyright owners protested the stoppage of enforcement by the Plubplachai Local Police Station and its head unit – the Metropolitan Police Division 6. Information regarding possible payments from pirates to the police surfaced and were supported by ECOTEC in public. On top of possible or alleged corruption, some who are closely related to authorities, high ranking officers and politicians have been known to get involved in piracy.³⁸ There are some other obvious connections between piracy and politics, one involving an ex member of Parliament and an optical disc plant which forensics has indicated is providing pirated discs to street stalls.
- **Mall Piracy:** During the third quarter of 2006, the Memorandum of Understanding on “Prevention and Suppression of the Distribution of IPR Infringing Products” was signed between government representatives, industry, and shopping mall owners. Yet, to date, the piracy situation in malls remains serious, and mall owners skate by without any liability. The Royal Thai government should take steps to hold mall owners accountable for piracy occurring in their malls, to force the issue and clean up the piracy hot spots in Thailand.
- **Untenable Enforcement Approach to Cable Piracy and Signal Theft:** While IIPA expressed satisfaction with action taken in 2006 against cable piracy in some regions,³⁹ the Royal Thai government’s approach to the problem of signal theft has been anything but comprehensive or effective. The DIP Report mentions a “Short-term Approach”:

For the 77 licensed operators, the Government Public Relations Department will adopt the Ministerial Regulation Number 14 (B.E. 2537) under the Radio and Television Broadcast Act B.E. 2498 that empowered the Government Public Relation Department to control broadcast programs and to terminate programs which are inappropriate. Public and private agencies have worked closely on the suppression of unauthorized broadcasting. Under the cooperation, from January – October, 2007, the Royal Thai Police conducted 81 raids on the infringement of copyright by unauthorized broadcasting. Six of the cases were brought to the court where they were fined 50,000 Baht each. The other cases have been settled out of the court since the broadcasting operators agreed to execute broadcasting agreements with the copyright owners.

The DIP’s “Long Term Approach” is as follows:

The Department of Intellectual Property and related agencies have agreed that the present Draft Broadcasting Act, B.E..., which contains important provisions relating to the authorization and the regulation on radio and television broadcast can be adapted so as to increase the efficiency in combating intellectual property violation on radio and television broadcast. The Council of State has amended the draft legislation proposed by the Government Public Relation Department by specifying in Article 78(3) that the National Broadcasting and Telecommunication Commission may consider to temporary or permanently suspend or revoke the license of the operator with the final judicial decision that it has conducted the infringement of copyright by unauthorized broadcasting as stipulated under the Copyright Act. The

³⁸ Industry reports that piracy levels are generally increased during general elections as means to generate campaign funds.

³⁹IIPA noted in the 2007 Special 2301 report on Thailand, “Industry is pleased at action taken in April 2006 in which 25 officers from Thailand’s Central Investigation Bureau, led by General Eakarot Meepracha and accompanied by industry representatives, raided four cable operators suspected of illegally broadcasting MPA member company movies.” IIPA also noted,

The raids resulted in the STF sealing off broadcasting equipment and shutting down the unauthorized channels. Operators were charged with the unauthorized broadcasting of copyright content, a violation under Thailand’s Copyright Act, and face possible imprisonment for up to four years, fines of up to US\$20,000, as well as the potential of forfeiture of their companies’ equipment. The suspects may also be liable and subject to criminal penalties for unauthorized broadcasting (including up to one year in prison) under Thailand’s Telecommunication Act. A second raid in November 2006 resulted in one arrest, seizure of equipment used for pirate cable operation, and the shutdown of three pirate cable operators.

fact that the final judicial decision of the court is needed before a license can be suspended or revoked is to prevent wrongful incrimination and trivial complaints with the intent to reach a compromise between the two parties. In this regard, once the license has been revoked, the operator will not be able to apply for a new license for a period of 3 years thereafter.

Unfortunately, to date, under the “short-term approach,” there has been no effort to control the status of even the licensed cable companies by the Royal Thai government. Second, IIPA notes that DIP left out the 400 unlicensed (pirate) broadcasters. In fact, the record reflects that administrative sanctions have not been imposed, including in the case of 10 operators convicted of piracy by the intellectual property courts last year. As suggested by the raiding activity in 2007 and the commencement of cases against signal theft operations, IIPA contends that more can be done to eradicate cable piracy, both licensed and unlicensed, even in the short term.

The long term approach suffers from major flaws. First, by requiring a “final judicial decision that it has conducted the infringement of copyright by unauthorized broadcasting” to “prevent wrongful incrimination and trivial complaints with the intent to reach a compromise between the two parties,” the government takes a weak approach to this issue, which is contrary to the approach taken in other markets where respect for IP is a precondition to obtaining a license.⁴⁰ Even then, upon a final judicial decision, there is no mandatory suspension (“may consider”). The DIP Report somewhat conveniently omits Section 64, which provides, “[t]he order suspending the license ... shall not be more than thirty days for each suspension.” The approach and the presumptions of DIP in this case are wrong, and therefore the solutions proposed are also wrong. IIPA encourages DIP to sit down with right holders and affected parties to work out a more effective strategy to beat back what is becoming a massive signal theft problem in Thailand.

- **Obtaining Search Warrants:** For some industries, obtaining search warrants from the IP&IT court has become problematic, with some judges rejecting search warrant applications from copyright owners without reason. There have even been cases in which the criminal judge has rejected a search warrant arguing that the right holder should take a civil action against the infringer rather than request a warrant. Difficulties in obtaining search warrants seriously undermine copyright owners’ abilities to enforce their rights in Thailand.⁴¹ Industry has tried to address the problem of arbitrarily refusing to issue warrants by engaging in dialogue with the judges through formal meetings and seminars.

TRAINING, TECHNICAL ASSISTANCE, PUBLIC AWARENESS

Numerous Industry and Government Trainings in 2007: Copyright owners once again organized and engaged in numerous trainings and public awareness activities in 2007 to assist the Royal Thai government to achieve its mission of eradicating piracy.⁴² The chart in Appendix C highlights some of the key trainings IIPA has been made aware of, either by the Royal Thai government or industry.

COPYRIGHT LAW AND RELATED ISSUES

Troubling Copyright Law Revision Should be Set Aside and Reconsidered: In Thailand, copyright protection is governed chiefly under the Copyright Act, B.E. 2537 (A.D. 1994), which was last revised in 1995. The Royal Thai government has examined several times over the past few years appropriate ways to improve the law, and the latest comprehensive amendments appeared in 2005.

⁴⁰ For example, in Korea, a cable operator has to show legitimate supply contracts before it can obtain a license.

⁴¹ The motion picture industry, by contrast, reports no difficulties in obtaining warrants.

⁴² The Royal Thai government’s Department of Intellectual Property reports that it organized nine seminars from May to October, 2007, with a total number of 1,180 college professors, researchers, business operators, OTOP producers (“One Town One Product” producers of local traditional products), SMEs, and community enterprises in the Central and regional provinces, to raise understanding and awareness on the importance of intellectual property rights.

Those draft amendments would have made some important improvements to copyright protection in Thailand.⁴³ Included in them were provisions to strengthen civil remedies by allowing courts to award compensatory and punitive damages and lost profits, make it an offense for a photocopy shop to provide infringing copies of works, clarify that temporary copies are covered as reproductions under the Thai Act, distinguish between “disposal” (sale or other transfer), rental, and “communication to the public,” attempt to deal with the WIPO treaties’ requirements to prohibit the circumvention of technological protection measures (TPMs), and prohibit the unlawful tampering with rights management information (RMI), strengthen criminal penalties in certain respects, and establish voluntary collective management of copyright. While by no means perfect, the 2005 draft amendments were a step in the right direction toward bringing the copyright law in Thailand up-to-date with some of the latest international standards and trends.

The Royal Thai government has chosen a different path and proposed a draft Copyright Law amendment which would generally take Thailand in a less favorable direction, among other things, by weakening criminal penalties and imposing an unclear mandatory collective management regime in Thailand. While the Copyright Law amendment Bill may have been drafted with good intentions, to curtail what is perceived to be over-zealous collection by some local right holders (essentially, karaoke and bar owners in Thailand have complained of both double-dipping and harassment by local performers), the Bill does so by establishing mandatory collective management at least for performers, but which is unclear in its scope.

The Bill would require those wanting to collect royalties for performers to incorporate their businesses into a limited company known as “collecting company[ies]” and to seek a permit for such operation from a regulatory committee set up under the Bill. Those who collect royalties without complying with procedures under the new law would, if the Bill passes, be subject to criminal penalties, including a maximum jail term of two years or a fine of Bt800,000 (US\$25,500), or both. Even more troubling is the Bill’s vague and ambiguous scope which may snare other copyright owners, other works, and give rise to mandatory collective management of rights other than the public performance right. In part due to its vague nature, and also because collecting royalties should be left to voluntary arrangements, IIPA is opposed to the Bill as drafted.⁴⁴ If adopted as drafted, this provision could cause marketplace chaos, and present opportunities for abuse, in part by users who could presume unfettered use of copyright works for a *de minimus* collective management payment.

The translation IIPA has obtained of the Bill suggests that all copyright owners and all copyright works and rights of a performer are covered. Section 53/1 of the Bill defines “Owner of Right” as “the owner of copyright or rights of a performer.” Section 53/2 stipulates,

Any copyrighted work or rights of performer for which the fee collection of such work type must be licensed under this Agreement and as determined by the ministerial regulation.

Section 53/3 then provides,

The collection of fees for any type of copyrighted work or rights of performer as stipulated by the ministerial regulation pursuant to Section 53/2 shall be allowed only in form of a limited company in accordance with the Civil and Commercial Code whereas it must be licensed by the Registrar under an approval of the Regulatory Board.

This circuitous set of provisions leaves it ambiguous as to which right holders are affected, and which works are affected. Even if the Bill is aimed only at performers, it seems clear that multiple rights, including public performance, would be administered by a “collecting company” under a strict reading of this Bill. Exclusive rights of public performance are best left to the control of individual copyright owners –

⁴³ A fuller description of the improvements and problems with previous drafts has appeared in previous IIPA Special 301 country reports on Thailand, which can be found at <http://www.iipa.com/countryreports.html>.

⁴⁴ Local performers who administer their own rights and the local Thai record companies that collect for themselves are vehemently opposed to the Bill.

who may still opt for a voluntary collective management approach – and, within modern legal frameworks, only public performance of music is typically subject to mandatory collective management requirements. To the extent rights other than public performance are included, possibly inadvertently, the drafters should rework the language to narrow its scope. A further problem with the Bill involves the makeup of the Collecting Society Board. The Bill would bar representation by copyright owners on the Board but would allow “users” to serve on the Board.

IIPA also objects to the removal of all minimum fines and minimum imprisonment (in cases where infringement was done “by way of trade”), replacing the current penalty structure with only maximum fines.⁴⁵ Since there would be no mandatory minimum penalties, judges would have discretion to award no fine whatsoever in any cases.

Regarding the status of the Bill, IIPA understands that the Bill was approved by the Cabinet and submitted to the National Assembly on November 21, 2007. The Bill then moved to a hearing process of an Ad-hoc Committee chaired by the Secretary-General of the Office of the Narcotics Control Board (Mr. Kittti Limchaikij), and one report indicated the hearings had been completed on December 18, 2007.⁴⁶ IIPA is ascertaining the schedule for consideration of the Bill, but in any event, IIPA recommends that the Bill be set aside and reconsidered.

Customs Act Revision Should be Enacted: According to the DIP Report, “the Customs Department, which is the lead agency on import and export control of Thailand, is in the process of amending the Customs Act.” The amendment would, according to DIP, “empower customs officers with the authority to inspect and confiscate goods entering the country for transit and transshipment.” IIPA understands the draft legislation is awaiting Cabinet approval prior to being sent to the Council of State for consideration. IIPA fully supports these changes to the Customs Act and hopes they will increase the effectiveness of customs officials in tracking and preventing copyright infringements.

Organized Crime Prevention Legislation: IP violations still have not been included in various organized crime statutes, such as the Money Laundering Prevention and Suppression Act B.E 2542 (MLPSA).⁴⁷ Unfortunately, while the government had intended to include copyright piracy as a predicate offense in a draft bill to amend the MLPSA in 2004, the Law Drafting Committee of the Council of State concluded that copyright should be removed as a predicate offense.⁴⁸ The decision remains up to the Cabinet, and IIPA in the strongest terms urges the Cabinet to add copyright piracy back as a predicate offense for the enforcement of the MLPSA. The Royal Thai government should address the issue of organized criminal syndicate involvement in piracy and counterfeiting operations, by adopting anti-

⁴⁵ Current Section 69 reads,

Any person who infringes copyright or performers' rights under Section 27, 29, 30 or 52 shall be liable to a fine of between 20,000 baht and 200,000 baht. If the offense referred to in the first paragraph is committed by way of trade, the offender shall be liable to imprisonment of between six months and four years or a fine of between 100,000 baht and 800,000 baht or both imprisonment and fine.

Under the Bill, Section 69 would be replaced by,

Any person who infringes the copyright according to Section 27(1) or (2), Section 28(1) or (2), Section 29(1), (2) or (3), Section 30(1) or (2), Section 31(2) or infringes the rights of performer pursuant to Section 52 shall be liable to a fine not exceeding four hundred thousand Baht.”

New Section 70/1 would result in increased maximum penalties but again, no minimum penalties:

... the offender shall be liable to imprisonment for a term up to four years or to a fine not exceeding one million and six hundred thousand Baht, or to both.

⁴⁶ Sinfah Tunsarawuth, Thailand Moves To Amend Copyright Law To Regulate Royalties, Intellectual Property Watch, December 19, 2007, at <http://www.ip-watch.org/weblog/index.php?p=876>.

⁴⁷ Under the MLPSA, generally it is a crime to transfer, convert or receive the transfer of funds or property arising from certain criminal acts including hiding or concealing the source of funds. Violators are liable to imprisonment of a maximum of ten years and a fine of up to 200,000 baht (about US\$6,400).

⁴⁸ Nont Horayangura and Say Sujintaya, *Committee Rejects IP Offences on Public Interest Grounds*, September 28 2004, at <http://www.worldcopyrightlawreport.com/Article/?r=435&c=3003050>.

organized crime legislation, and legislation on asset freezing, which would include intellectual property rights violations as predicate offenses.

Computer Crime Act of 2007: The Computer Crime Act B.E. 2550 (2007) was passed in 2007, and went into effect on July 18, 2007. The law, while essentially an anti-cybercrime statute, could be used to protect copyright in limited circumstances. For example, Section 14 of the Act makes it a crime to use a computer system to disseminate illegal, fraudulent or obscene data. The law also covers limited cases of circumvention, i.e., it makes it illegal to circumvent an access control measure to avail oneself of a specific computer system, or to “uncover” or disclose a circumvention method. The law places potential liability on ISPs for contributing to such computer crimes as well.

Optical Disc Act Being Implemented Slowly, But Problems in the Statute Remain: In 2005, a long-awaited Optical Disc Act was passed into law, published in the Royal Gazette on May 31, 2005, and went into effect on August 29, 2005.⁴⁹ While the Act is by no means ideal legislation, it does provide a basis for enforcement against licensed facilities. The DIP Report also mentions other laws under which optical disc production factories are governed, for example, the operator of an optical disc plants must hold a factory license under the Factory Law, must prepare a separate accounting for the production of optical discs under the Revenue Code and must register its businesses at the Department of Business Development under the Commercial Registration Law.

IIPA is pleased to learn from the DIP Report that the Royal Thai government is considering amendments to the Optical Disc Production Act B.E. 2548 to make it even more effective. They reportedly plan to open the process for comments from all sectors. In IIPA’s view, the law is missing some essential tools necessary for a first-class law:

- **“Copyright Code” May Inadvertently Create Burden on Right Holders: Unclear Whether Identification Code Must be Applied to Stampers/Masters:** The Optical Disc Act requires three types of Codes to be engraved or affixed on every disc produced in optical disc plants. They are 1) SID Code (mold code), 2) SID Code (mastering code or LBR code); and 3) copyright owner’s code. The first two codes are applied by optical disc factories. The “copyright owner’s code” is problematic in that it requires copyright owners, if they wish to produce their copyrighted work in an optical media format, to apply for the copyright owner’s code prior to the production. For some industry members this creates an onerous burden on the ability of legitimate copyright owners to do business in Thailand. By requiring an application for and affixation of a code to all legitimate discs, Thailand may have inadvertently created a formality that runs afoul of Thailand’s international obligations.⁵⁰
- **No License Regime:** The Act requires only “notification,” not approval, for a plant to begin producing optical discs. There is no provision governing the term for which a plant may produce discs, nor for a renewal process. There is no means by which one’s ability to produce can be revoked, however the penalties for producing optical discs without notifying the authorities is a fine of not more than Baht 200,000 (US\$6,400) and/or a jail term of not more than one year.
- **No Timely Monitoring of Export of ODs and Imports/Exports of Machines, Stampers/Masters and Raw Materials:** The Act contains after-the-fact “notification” requirements (with lengthy grace periods), and there is no provision for monitoring transfers of stampers/masters. However, it is noted that under the Thai Import & Export Law a permit is required from the Ministry of Commerce before one is authorized to import optical disc machinery.
- **No Express Seizure, Forfeiture, and/or Destruction of ODs, Stampers/Masters, and Machinery:** The Act fails to provide expressly for seizure, forfeiture, and/or destruction of discs, stampers/masters,

⁴⁹ Act of the Production of OD Products, B.E. 2548 (2005, effective August 29, 2005).

⁵⁰ This kind of copyright owners’ code application process is a flaw that could, if it was used in a way to interfere with the exercise of copyright, might call into question compliance with the Berne Convention’s “no formality” clause. At least some industries find the code burdensome and problematic and call for its deletion from the law.

or machinery found as a result of an inspection to be in violation of the statute or found to be infringing copyright or trademark. Regulations should be enacted to provide for this.

- **No Mandatory Minimum Criminal Penalties:** The Act contains no mandatory minimum fines and no mandatory imprisonment.

ISP Liability: One important legal question involves the extent to which Internet service providers can be held liable for infringing activities occurring over their services. A law dealing with ISPs in Thailand, the Act on Organizations Allocating Frequency Waves and Supervising Radio/Television Broadcasting and Telecommunication Business B.E. 2543 (2000), went into force in early 2000, but the National Telecommunication Business Commission (NTBC), responsible for implementing the provisions of that law, still has not been established after more than seven years. Currently, ISPs operate their business under agreements made with the Communications Authority of Thailand (CAT). ISPs must comply with contractual agreements with CAT, requiring the ISPs to control, verify, or warn their customers not to use their services in ways that contradict any laws. It does not appear that ISPs are at present obligated to immediately remove or take down an infringing website, but police and copyright owners may request an ISP to remove an infringing website from its system when there is evidence of infringement. The police may also request ISPs to provide information regarding the identity of the persons operating a website when such information is required for investigation or when there is evidence of infringement.

DIP/Chulalongkorn University Study: IIPA is aware that the Department of Intellectual Property commissioned a study on competition policy and intellectual property rights. IIPA member organizations have considerable expertise in this area, and we hope that DIP will honor the requests of those organizations for participation in the process if DIP decides to take the study's recommendations forward. Of course, it is IIPA's expectation that nothing will be done that would be detrimental to local or foreign innovators and creators doing business in Thailand. Any such move would of course create a serious risk of putting Thailand out of step with its international obligations at a time when piracy-related challenges in the country remain severe.

Fair Use Guidelines: The DIP has issued three guidelines on fair use, 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 in its Report that these guidelines are intended to serve as manuals for users of copyright works, e.g., the education guidelines are intended "to reduce risk of copyright infringement in books and other copyright works." IIPA appreciates the good intent of DIP, and only requests that the affected stakeholders, such as the publishers and software industry, be permitted to weigh in in the formation of such guidelines, given their experiences in creating similar rules for the road in other countries.

Camcording Legislation: IIPA and the motion picture industry are very interested in formulating anti-camcording legislation. Such legislation would prohibit the unauthorized operation of audiovisual recording equipment in motion picture theaters while a motion picture is being exhibited. We urge the Royal Thai government to take whatever steps necessary as a matter of urgency to ensure that adequate protection against camcording piracy is reflected in its national legislation.

Legislation to Address Cable Piracy: A law dealing with cable piracy would be a welcome addition to the anti-piracy laws. The DIP Report indicates that a Television and Broadcasting Draft law was proposed so as to provide framework for radio and television broadcasting business operations with or without the use of frequencies, as well as the qualifications of licensed operators and the duties and functions of the National Broadcasting and Telecommunication Commission. The DIP Report indicates that this draft law is intended to enable the authorities to effectively control illegal broadcasting of copyrighted works and prevent copyright violations on cable television. As discussed in the report above, government proposals should empower the commission with the authority to temporarily or permanently suspend or revoke the licenses of the operators involved in unauthorized broadcasting, without requiring a final judicial decision. The law must also not impose undue restrictions on the ability of legitimate broadcasters and content owners to freely contract, i.e., it must not force them to negotiate with the cable pirates or grant those previously engaged in cable piracy with non-exclusive licenses.

MARKET ACCESS ISSUES IN THAILAND

Thailand currently imposes some restrictions on market entry that, in addition to piracy, form barriers to entry of legitimate business and unduly prejudice foreign right holders. The Royal Thai government should take steps in 2007 to eliminate or reduce such restrictions, while resisting the urge to impose new restrictions.

Proposed Screen Quota Should be Scrapped: The Ministry of Culture and Ministry of Tourist and Sport recently proposed amendments to the Film Act, Section 9(4) of which would allow the Film Board to establish a ratio between local and foreign film, i.e., quotas. The Bill reportedly passed a first reading and is now under the consideration of an Ad-hoc Committee within the Parliament. IIPA is ascertaining the schedule for passage, but urges that the Bill be set aside and reconsidered.

Investment Bans in Broadcasting: Foreign investment in terrestrial broadcast networks is prohibited. A draft broadcasting law (“Act on Broadcasting and Television Business Operations”) would allow foreign investment in free and pay television but would limit such investment to a 25% equity share.

Television Advertising Restrictions: Advertising is currently prohibited on pay television systems under the 1992 amendments to the Radio Communications Act of 1955. The draft “Act on Broadcasting and Television Business Operations” contemplates the establishment of criteria within which business operators may seek advertising income, but would require that 5% of received advertising income be deposited in a proposed National Broadcasting Business and Television Business Commission. In October 2005, the Royal Thai government allowed original advertising carried on foreign satellite channels to ‘pass through’ on local pay-TV networks – a very positive sign.

Censorship: The Tape and Video Cassette Law puts heavy burdens on the motion picture and recording industries. Since the transfer of authority for administering this law moved from the Police Bureau to the Ministry of Culture, the process to obtain approval and a “censorship code” for music videos and live performances is lengthy – ranging from 2 to 30 days. In addition, strict censorship guidelines in home video products have an adverse effect on the importation of DVDs, due to the costly nature of having to delete such scenes from the DVD master simply for the Thai market.

GENERALIZED SYSTEM OF PREFERENCES

Thailand currently participates in the Generalized System of Preferences (GSP) program, a U.S. trade program that offers preferential trade benefits to eligible beneficiary countries. One of the discretionary criteria of this program is that the country provides “adequate and effective protection of intellectual property rights.” During the first 11 months of 2007, \$3.55 billion worth of Thai goods (or 17.1% of Thailand’s total exports to the U.S. from January to November 2007) entered the U.S. under the duty-free GSP code.

APPENDIX A: List of Registered Plants in Thailand

	Name of Plant	Location of Plant
1.	307 Group Co., Ltd.	Bangkok
2.	Bayer Thai Co., Ltd.	Muang Rayong Province
3.	C.D. Square Co., Ltd.	Nonthaburi Province
4.	Chai Rung Enterprise Co., Ltd.	Bangkok
5.	Crystal Disc Industries Co., Ltd.	Nonthaburi Province
6.	Cyber Planet Disk Co., Ltd.	Bangkok
7.	Delta Disc Co., Ltd.	Ayutthaya Province
8.	Diamond Mastering Disc Co., Ltd.	Nonthaburi Province
9.	Digital P.V. Co., Ltd.	Bangkok
10.	Disc Com Co., Ltd.	Nonthaburi province
11.	Dyntec Disc Production Co., Ltd.	Nakornpathom Province
12.	E.V.S. Entertainment Co., Ltd.	Samutsakorn Province
13.	General Record International Industry Co., Ltd.	Nonthaburi Province
14.	G.M. InterGroup Co.Ltd	Bangkok
15.	Inter Magnetics (Thailand) Co., Ltd.	Bangkok
16.	June Plaspack Co., Ltd.	Chacheungsao Province
17.	K. Master Co., Ltd.	Patoomthanee Province
18.	L.L.I. technology Co., Ltd.	Samutprakarn Province
19.	M.G.A. Co., Ltd.	Bangkok
20.	Micron Storage Media Co., Ltd.	Chonburi Province
21.	M.P.O Asia Co., Ltd.	Chacheangsao Province
22.	Nontakit Co., Ltd.	Nonthaburi Province
23.	Onpa Co., Ltd.	Bangkok
24.	Optical Disc Technology Co.,Ltd	Nakornnayok Province
25.	Pailin Laser Metal Co., Ltd.	Bangkok
26.	Plan Star Electronics Co., Ltd.	Samutsakorn Province
27.	Rota Group Co. Ltd.	Bangkok
28.	Siam Seiko Enterprise Ltd., Part.	Chachoengsao Province
29.	Supphaisan International Co Ltd	Nakornpathom Province
30.	T.L.(1992) Co., Ltd.	Bangkok
31.	Thai Media Industries Co., Ltd.	Bangkok
32.	Thai Polycarbonate Co., Ltd.	Rayong Province
33.	T.T.N.M Co., Ltd.	Samutprakarn Province
34.	Two Dimension Manufacturing Co., Ltd.	Nonthaburi Province
35.	UD.Compact Disc.Co.Ltd	Nonthaburi Province
36.	Universal Mastering Co., Ltd.	Nakornpathom Province
37.	Van World International Group Co., Ltd.	Bangkok
38.	Verko (Thailand) Co., Ltd.	Nonthaburi Province

APPENDIX B: Anecdotal Account of Certain Key Industry Enforcement Actions in 2007			
Date of Action	Location	Enforcement Authority	Key Seizures/Arrests
April 25, 2007	Bangkok suburb of Nondhaburi	ECOTEC	Officers from ECOTEC with MPA assistance raided an optical disc manufacturing facility and two distribution warehouses in the Bangkok suburb of Nondhaburi, arresting 11 suspects and seizing 140 DVD-R burners (the burners were capable of producing 7.5 million discs a year) and 213,000 pirated movie DVD-Rs. ECOTEC also seized artwork for more than one million discs. ⁵¹
April 25, 2007	Tambon Wat Chalor and Tambon Bang Kruay	ECOTEC	ECOTEC led simultaneous raids on three houses located in nearby locations, arresting four suspects at the first house (in Tambon Wat Chalor) and seizing 100 CD-R burners and 20,000 pirate CDs; arresting three more suspects and seizing 500,000 pirate CDs at the second house (also in Tambon Wat Chalor), and arresting another four suspects and seizing 1,000,000 pirate CD covers in the third house (in Tambon Bang Kruay). The seized pirate CDs included music records and movies from Thai and foreign companies and a number of pornographic films. Several others were arrested, since no one would come forward to identify the owners of the houses, and all claimed to be mere "employees."
May 10, 2007	Bangkok suburb of Nondhaburi	Royal Thai Police	Officers from the Royal Thai Police with MPA assistance raided an optical disc manufacturing and distribution facility in the Bangkok suburb of Nondhaburi, arresting one suspect and seizing 126 CD-R burners and approximately 20,000 blank CD-Rs. ⁵²
May 12, 2007	Klongtom area in Bangkok	Royal Thai Police	Officers from the Royal Thai Police with MPA assistance raided a pirate optical disc manufacturing and distribution facility in Nondhaburi, seizing 42 CD-R burners and an estimated 20,000 pirated optical discs, and arresting one suspect. The facility was suspected of distributing pirate discs to retail outlets in Bangkok's notorious Klongtom area. The burners seized in the May 10 and May 12 raids were capable of producing as many as nine million pirated CD-Rs in one year. ⁵³
May 23, 2007	central Bangkok	Royal Thai Police	Officers from the Royal Thai Police, assisted by MPA representatives, raided two optical disc manufacturing and distribution facilities in central Bangkok suspected of belonging to a single organized crime group. The raids yielded 180 CD-R burners, 10,000 pirated CD-Rs, 10,000 blank CD-Rs and 250,000 printed sleeves for pirated optical discs. Two men were arrested. ⁵⁴ Remarkably, seizures included large quantities of pirated copies of the Thai film <i>King Naresuan</i> , a percentage of the proceeds of which were being donated to a charity associated with Thailand's King Bhumibol Adulyadej. Such brazen piratical activity involving this film was apparently unexpected by Royal Thai authorities. The burners seized in the two raids were capable of producing well more than nine million pirated CD-Rs in one year. The facilities were found to be a feeder for pirated discs to retail outlets in Bangkok's Klongtom and Patpong districts. A vehicle containing thousands of pirated CD-Rs, including more than 1,000 copies of <i>Spiderman 3</i> , was also intercepted leaving one of the facilities and was seized by the police.

⁵¹ See Motion Picture Association, *Thai Police Seize 140 DVD-R Burners In Massive Bangkok Movie Piracy Haul*, April 26, 2007.

⁵² See Motion Picture Association, *Thai Police Seize 168 CD-R Burners In Pair Of Movie Piracy Raids In Bangkok Suburb*, May 16, 2007.

⁵³ *Id.*

⁵⁴ See Motion Picture Association, *Thai Police Seize 180 CD-R Burners, Thousands Of Pirated Discs In Bangkok Piracy Raids*, May 25, 2007.

APPENDIX B: Anecdotal Account of Certain Key Industry Enforcement Actions in 2007			
Date of Action	Location	Enforcement Authority	Key Seizures/Arrests
July 15, 2007	Klongtom Market in Bangkok	ECOTEC	ECOTEC conducted an <i>ex officio</i> raid in Klongtom Market in Bangkok, arresting four suspects and seizing a total (according to ECOTEC) of one million discs worth Bt10 million (approximately US\$319,000). The stalls in the areas had apparently been raided more than 30 times in the previous five months.
July 16, 2007	Nonthaburi Province	ECOTEC	ECOTEC conducted an <i>ex officio</i> raid at a private home in Nonthaburi Province, seizing 50,000 pirate discs and three sets of DVD-R writers (30 drawers in total) worth Bt5 million (approximately US\$480,000). The suspect who owned the house confessed that he reproduced pirated discs for sale through mail order and through the Internet.
August 8, 2007	Nonthaburi Province	Royal Thai Police	Police conducted an <i>ex officio</i> action at an apartment at Nonthaburi Province, seizing 60,000 pirate discs and 12 sets of CD-R writers (98 drawers in total). Five suspects were arrested and charged with violating the copyright law, and two cars loaded with pirate products were also seized.
August 14, 2007	Bangkok	ECOTEC	ECOTEC raided a condominium in Bangkok, seizing 70,000 pirate discs found inside the room, almost all of which was pirate international music repertoire (sound recordings), and arresting two suspects. The stock was being supplied to pirate shops in the Patpong and Lumpini areas.
November 18, 2007	Klongtom Market in Bangkok	ECOTEC	ECOTEC held a press conference to announce the arrest of two suspects for allegedly selling pirated discs at Klongtom Market in Bangkok, and the arrest led to a raid the same day on a warehouse stocking 80,000 pirate discs found inside the 7 stockpile locations. The discs were worth more than Bt16 million (approximately US\$510,000).
January 7, 2008	Banmor area in Bangkok	ECOTEC	A team of 22 officers from ECOTEC headed by Commander General Wisuth Wanichabutra as well as MPA representatives raided two distribution centers and eleven retail outlets located in the Banmor area in Bangkok. ⁵⁵ During the raid, over 25,000 optical discs were seized. Of these, 6,000 infringing MPA member company titles were seized, including "Alien vs. Predator 2," "American Gangster," and "I am Legend." Five arrests were made, but unfortunately, more suspects escaped when lookouts blew whistles to warn pirate operators, while others blocked the police from moving forward in this crowded area renowned for being a haven of pirates dealing in all sorts of pirated products.

⁵⁵ See Motion Picture Association, *New Year Clean Up By Thai Police Nets Five Arrests And 25,000 Pirated Discs*, January 10, 2008 (the raids were part of The police raids were part of the MPA's "Operation Blackout" that ran through the holiday season until the end of January 2008).

Appendix C: Thailand Representative List of Training in 2007			
Topic	Date	Organized by	Participants/Purpose
Seminar on the Protection of IP and Suppression of Violations	January 19, 2007	Department of Intellectual Property	200 inspectors of the Provincial Police, Region 5 attended/provided training on relevant IPR legislation and regulations as well as training on IPR violations and illegal activities. An MPA representative participated/presented.
Innovation and Copyright Content Management	January 25, 2007	TECA and Innovation College of Thammasart University	Mr. Yanyong Paungraj, Deputy Permanent Secretary-General of Ministry of Commerce, GMM Grammy, TECA and others.
Importance of Copyright in the Digital Age	February 8, 2007	Department of Intellectual Property and Chulalongkorn University	Guest Speaker from WIPO spoke on the topic of copyright in the digital age.
How to Identify Pirated Products	February 15, 2007	Metropolitan Police Office	TECA representative gave presentation for around 50 police officers.
WIPO Training	February 28, 2007	The World Intellectual Property Organization (WIPO) and the Government of Sweden, at Chulalongkorn University	TECA representative gave a presentation on "piracy" to participants attending the training. There were around 30 participants from 15 countries.
CD Plant Visits	April 4, 2007	TECA	TECA representative led Mr. Yongyoot Srisattayachon, the Director of Bureau of Intellectual Property Crime and 15 high-ranking officers from DSI to visit the Dyntec Disc CD plant in Nakorn Patom Province.
Encouraging Creativity Roundtable	April 26, 2007	The United States Patent and Trademark Office and the Commercial Section of the Embassy of the United States of America	Speakers from DIP and private sector sharing knowledge and information on IPR issues. There were around 60 invited participants to the Roundtable including TECA representative.
IP in FTA: a Chance for Thai Entrepreneur	May 3, 2007	Department of Intellectual Property and copyright owners such as MPA, TECA and many music labels	TECA representative presented as a guest speaker on "IP in FTA: a Chance for Thai Entrepreneur" Seminar in Chonburi Province.
Distance Learning General Course on Intellectual Property	May 3, 2007	Department of Intellectual Property, in coordination with the World Intellectual Property Organization	387 students, of which 169 persons took the examination (142 passed). The curriculum is based on the course DL-101 in Thai, which has the same standard as the course DL-101 offered by the World Intellectual Property Organization. The second class is currently open for enrollment.
"IP in FTA: a Chance for Thai Entrepreneur I" On the topic of "FTA and the development of IP Culture".	May 18, 2007	Department of Intellectual Property	TECA representative was a guest speaker on "IP in FTA: a Chance for Thai Entrepreneur" Seminar in Chonburi Province
Seminar on the Protection of IP and Suppression of Violations	May 18, 2007	Department of Intellectual Property	200 inspectors of the Provincial Police, Region 7 attended/provided training on relevant IPR legislation and regulations as well as training on IPR violations and illegal activities. An MPA representative participated/presented.
The Importance of Rule of Law in Economic Freedom	May 21, 2007	The Friedrich Naumann Foundation, the Economic Freedom Network Asia	This seminar looked at the role of Rule of Law in safeguarding the proper and efficient functioning of market economics. Approximately 200 people attended.
Inauguration of the Korean Copyright Commission	May 29, 2007	The Korean Copyright Commission	TECA representative was invited to witness the inauguration of the Korean Copyright Commission in Bangkok along with other special guests from the DIP and the universities.
IP Judicial Summit	June 1-3, 2007	Central Intellectual Property and International Trade Court and MPA	40 judges attended this summit to update the current status of IP violations in Thailand, provide a legislation update on IP laws in Thailand and the Asia Pacific region, and identify common obstacles and problems that judges encounter when hearing IP cases. MPA and BSA representatives gave presentations as well. BSA's presentation was entitled "Trends in Software Piracy."

Appendix C: Thailand Representative List of Training in 2007			
Topic	Date	Organized by	Participants/Purpose
Seminar on Digital Piracy	June 6, 2007	TECA and the Department of Special Investigation (DSI)	Around 20 DSI Officers attend the seminar. The Seminar aimed to raise awareness of Internet piracy as well as to strengthen cooperation between TECA and DSI.
"Innovation Forum Thailand 2007"	June 8, 2007	The Ministry of Commerce, The Ministry of Science and Technology in cooperation with Microsoft Thailand.	TECA representative attend this seminar which gathered experts from governmental and private sector to exchange views, information and researches on innovative advancement.
IP in FTA: a Chance for Thai Entrepreneur III On the topic of "FTA and the development of IP Culture".	July 16, 2007	Department of Intellectual Property	TECA representative was invited to be a guest speaker in "IP in FTA: a Chance for Thai Entrepreneur III" Seminar in Khonkaen Province.
ASEAN-USPTO "Workshop on Digital Copyright and Copyright"	July 16-19, 2007	The US Embassy and USPTO	Guest speakers included IFPI, London, TECA, and IIPA. Attendees included copyright officials from nearly all ASEAN member countries.
Panel Discussion on Horror Show: How piracy Kills the Movie Industry/Bangkok International Film Festival	July 26, 2007	Tourist Authority of Thailand	This seminar will exchange ideas of preventing film piracy with the experts. About 100 people attended.
Reception on "IP Rights and the Future of Film"	August 6, 2007	The Motion Picture Association, 20 th Century Fox studio and the US Embassy	TECA representative was invited to attend a reception on "IP Rights and the Future of Film." The purpose of this reception was to raise awareness on IP protection in foreign and domestic film industry in Thailand.
Seminar "Computer Crime and Preparation for New Law"	August 8, 2007	National Electronics and Computer Technology (NECTEC), National Science and Technology Development Center and the Ministry of Science and Technology	TECA representatives attended a seminar on Computer Crime and Preparation for New Law. This seminar purpose was to educate the public on new law and proper practice concerning this law.
No IP Infringement Campaign	August 24, 2007	Department of Intellectual Property and IP Copyright Owners, to name it – TECA, MPA, BSA and Local recording labels.	TECA representative attended the "No IP Infringement Campaign 2007" at Chokkalaynukul School, Chonburi Province. There were activities, such as a lyric-writing and music-composition competitions.
Copyright Enforcement Training Program	August 28, 2007	IP & IT Court	TECA representative, on behalf of TECA, was invited to be a guest speaker in this seminar on the topic of "Copyright Enforcement: Problem, Solving Obstacles by the Private Sector"
Seminar on "IP in FTA: Opportunity for Thai Entrepreneur IV" On the topic of "FTA and the development of IP Culture"	September 7, 2007	Department of Intellectual Property	TECA representative was a guest speaker in the seminar "IP in FTA: Opportunity for Thai Entrepreneur" at Chiangmai Province.
Project SILK seminar	September 10-13, 2007	The Thai-Italian Chamber of Commerce	This seminar presented the results of Project SILK-Strengthening EU-Thai fight against counterfeiting and focused on the strategies and practices that both public institutions and private organizations should implement in order to fight back against IPRs violations. MPA representative spoke on the topics of "Improving public-private cooperation in Thailand" and "IPRs infringement case from Motion Picture Association." TECA representative spoke as well.
Public Forum on "Participate in the Treaty on Preservation on the Intangible Cultural Heritage"	September 20, 2007	The Ministry of Culture	TECA representative was invited to attend a public discussion forum on "Participate in the treaty on Preservation of the Intangible Cultural Heritage." This forum purpose was to discuss on the possibility of Thailand to ratify the UNESCO treaty and the effect to Thai national law.

Appendix C: Thailand Representative List of Training in 2007

Topic	Date	Organized by	Participants/Purpose
Study Visit on IP Enforcement	September 24-25, 2007	CIP&IT Court and the EC-ASEAN Intellectual Property Rights Co-Operation Programme (ECAP II)	Objective was to disseminate and share knowledge about intellectual property of Thailand to Asian judges. Topics included establishing a special IP court, litigation units and enforcement units on IPR. The attendees were judges from Thailand, Cambodia and Laos, approximately 35 people in all. MPA representative gave a presentation on IPR Enforcement in Thailand.
Seminar on "Who is the copyright owner: Writer, Translator, Publishing"	October 26, 2007	Department of Intellectual Property	The objective of this seminar was to disseminate the knowledge of the copyright law including to understand the importance, worth and benefit of copyrighted works, making license contracts and using the copyrighted work legitimately. Approximately 100 people attended.
Seminar on Audiovisual Services and Concerned Business	October 26, 2007	NECTEC	Approximately 200 experts attended a government-led seminar intended to set strategy for free trade on audiovisual services and concerned businesses and accept advice from experts on opening free trade for audiovisual services and concerned business.
Technical Training on Software Piracy and Systems Check	October 2007	BSA	Training for ECOTEC police officers including a presentation on software piracy and its various forms and software systems check. The agents were taught how to identify software installed in computers and how to capture product keys.
IP Talk Seminar	November 16-17, 2007	MPA	50 prosecutors of IP&IT Litigation Department participated in/provided information on overviews on piracy, optical disc piracy, illegal drug trafficking and organized crime, and motion picture piracy. MPA representative gave a presentation for this event.
Seminar on Audiovisual services and concerned business (2 nd)	November 23, 2007	NECTEC	Approximately 200 experts attended a government-led seminar intended to set strategy for free trade on audiovisual services and concerned businesses and accept advice from experts on opening free trade for audiovisual services and concerned business.
Symposium on Intellectual Property and International Trade Laws in the Next Decade	November 29-30, 2007	Central Intellectual Property and International Trade Court, JETRO, BSA	300 lawyers, academics, prosecutor, judges, customs, police, law enforcement, and other officials attended this symposium to exchange and update each other on information on the administration of justice, the enforcement and the advancement of IP and international trade law and technology. Foreign and Thai experts were invited to speak.
Seminar on "Who is the copyright owner: Writer, Translator, Publishing"	October 26, 2007	Department of Intellectual Property	The objective of this seminar was to disseminate the knowledge of the copyright law including to understand the importance, worth and benefit of copyrighted works, making license contracts and using the copyrighted work legitimately. Approximately 100 people attended.
Initiative on Building Copyright Conscience 2007	Year-round 2007	Commission for Basic Education	The Initiative was intended to raise awareness of high-school students on the importance of intellectual property rights, especially copyright. The aim of this initiative was also to induce students to think about creating intellectual works, refrain from intellectual property rights violations, as well as campaign to build conscience in not purchasing, selling, or using infringing products. The activities under this initiative included a song contest, mini concerts, question and answer games, and exhibitions. Over 2,000 students participated in this initiative, with over 230 works submitted for the contests.

Appendix C: Thailand Representative List of Training in 2007

Topic	Date	Organized by	Participants/Purpose
Capacity Building for Enforcement Agencies	Year-round 2007	Department of Intellectual Property, together with the Royal Thai Police	<p>Various training seminars on the prevention and suppression of intellectual property violations were carried out by DIP in conjunction with the Royal Thai Police. These trainings targeted police officers at the level of inspector and deputy inspector, who are responsible for intellectual property enforcement nationwide. Five training seminars were held in 2007:</p> <ul style="list-style-type: none"> • for officers in Provincial Police Region 1, in Bangkok; • for officers in Provincial Police Region 2, in Pattaya, Chonburi; • for officers in Provincial Police Region 5, in Chiang Mai; • for officers in Provincial Police Region 7, Nakornprathom; and • for officers in Provincial Police Region 8, in Suratthani. <p>In total, around 1,000 police officers participated in the seminars in 2007. The purpose of the training seminar is not only to enhance the knowledge and understanding of police officers on the laws and regulations relating to intellectual property but also to increase their capacity to investigate cases of intellectual property violations as well as their ability to identify authentic goods from pirate goods.</p>

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2008 SPECIAL 301 REPORT

UKRAINE

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

EXECUTIVE SUMMARY¹

The lack of effective enforcement in Ukraine continues to allow piracy to persist, and is still thwarting the development of a healthy legitimate market. Illegal copies of recorded music, films, games and software are readily available at the markets and shops throughout the country. Plus, the ever-increasing problem posed by Internet piracy is not being properly addressed by Ukrainian officials. Ukraine's Copyright Act remains in serious need of improvement, and government attempts to change the law have been far from reassuring to rightholders.

Ukraine needs to take several critical steps to improve enforcement and to substantially improve its copyright law.

First, it has to address the serious marketplace piracy at markets throughout Ukraine. This will require top-level clear and public pronouncements from the government that such piracy will not be tolerated, and then undertaking serious (that is, daily) effective raids against these markets and, in particular, the many warehouses that supply them. The law enforcement authorities need to – using search warrants – enter sales premises and suspected warehouses to seize illegal material, even if such premises/warehouses are closed. The lack of regular and repeated police raids, the failure to close down pirate selling points, and the absence of criminal convictions, are some of the reasons why these problems persist in Ukraine. Stores, kiosks or warehouses found with illegal material should be closed down, and after initial raids against these establishments, follow-up raids should continue with regular unannounced checks to clear these venues of illegal material.

Second, Ukraine's hologram system should be substantially improved or repealed. The system as it is implemented today lacks transparency, has serious loopholes, is not properly enforced and suffers from the wide-spread presence of counterfeit holograms. The Government of Ukraine should urgently revamp, in close cooperation with rightholders, the existing hologram system and allow rightholders to play a key role in its administration and implementation, or it should eliminate the system entirely.

Third, the Government of Ukraine must undertake criminal (not administrative) prosecutions, and impose deterrent penalties against those involved in retail piracy and other types of commercial piracy – that is, against stall owners and operators, suppliers, and other large-scale distributors of pirate product. Unfortunately, in lieu of deterrent criminal sanctions, large-scale pirates and repeat offenders continue to be treated lightly by the courts, and despite the fact that this issue has been raised frequently and discussed in bilateral meetings, the Government of Ukraine has to date otherwise relied heavily on non-deterrent administrative penalties.

Fourth, the Government of Ukraine must ensure that Article 176 of the Criminal Code is amended to apply to all forms of piracy – including Internet and illegal software use – not just the illegal manufacturing and distribution of hard-copy works and sound recordings.

¹ For more details on Ukraine's Special 301 history, see IIPA's "History" appendix to this filing at <http://www.iipa.com/pdf/2008SPEC301HISTORICALSUMMARY.pdf>. Please also see previous years' reports at <http://www.iipa.com/countryreports.html>.

In addition, the government must move effectively against the growing threat of Internet piracy. Considering the scale of Internet piracy in Ukraine, this should not be an after-thought, but rather a top priority for Ukraine's law enforcement agencies, prosecutors and courts.

COPYRIGHT ENFORCEMENT

The Nature of Piracy in Ukraine in 2007

In 2005, Ukraine adopted significant improvements to its optical disc laws, which was, at the time, the top priority for copyright enforcement in Ukraine. At the same time, the Ukraine Government agreed to participate cooperatively with the copyright industries on enforcement — including the commencement of joint surprise plant inspections, and the implementation of stronger criminal enforcement.

The adoption of amendments to the optical disc law (effective August 2, 2005) was a crucial step toward Ukraine's implementation of the 2000 Joint Action Plan signed by the Governments of Ukraine and the United States. As a result of optical disc regulations, and mostly good cooperation between recording industry (IFPI/UAMI) inspectors and state inspectors (from the State Department of Intellectual Property, SDIP), there has been no new evidence of illegal production at the licensed optical disc plants in 2007. However, there is one exception. The Rostok plant, which was sued by rightholders in 2006, continues to refuse to permit inspections by IFPI/UAMI inspectors, so its production cannot be properly monitored.

While large-scale illegal industrial optical disc production has diminished significantly from its peak in 2000, large quantities of illegal optical disc material are still being imported. Most of this material is produced in Russia, including a lot of pre-release CDs and DVDs, which is estimated to be 70-80% of all pirated optical discs in Ukraine. In addition, underground CD-R burning operations continue to swamp the market with illegal product. This material is found throughout Ukraine.

Especially troubling is that both the smuggling operations and the CD-R production are being undertaken by organized criminal syndicates, which are flourishing in the absence of a deterrent criminal enforcement regime. The production, smuggling and distribution, for example of CDs and DVDs is well organized and orchestrated by criminal gangs. The U.S. and Ukraine rightholders report that, for example, there are 50 stalls and kiosks at the notorious Petrovka markets owned by three individuals. The stalls/kiosks are regularly (weekly) re-stocked, and are especially and reliably supplied with pre-release CDs and DVDs. Rightholder groups also report a steady supply of material from Russia, through Ukraine, into the countries of the European Union, and thus the need for better border enforcement by Ukrainian authorities.

An ever growing concern in Ukraine is Internet piracy. Websites offering pirate material are thriving in Ukraine, with the support of local Internet service providers. The only reason the problem is not more severe is the relatively low level of Internet service penetration among Ukrainians. More criminal enforcement against Internet piracy is needed. As one example, the Ukrainian recording industry brought a successful case in 2007 against a Ukrainian illegal website (www.mp3.ua). But, even though the case was successful in court, the website continues to operate. The Government of Ukraine (Ministry of Interior) needs to commence a criminal proceeding against the website operator and any other Internet service provider hosting pirate sites. In addition to criminal enforcement, Internet service providers should be civilly liable for allowing illegal material to reside on their servers, or for inducing the distribution of illegal materials by third parties, and they must act to block rampant Internet piracy. In late 2006, cooperative efforts between ISPs, rightholders and the police, were effective in taking down some websites. But in 2007, ISPs were less cooperative and took the position that they were immune from liability under current law, thus they have, for the most part, ignored rightholders' notice and takedown letters. It should also be stressed that none of the complaints rightholders submitted to the Ministry of the Interior resulted in the taking down of any illegal Internet site, let alone, the prosecution of any of the site owners.

In addition to downloading piracy, another common type of Internet piracy is via mail order – with orders placed on-line and delivered by mail. The Business Software Alliance (BSA) continues to report on the troubling increase in Internet-based piracy of business software. One common example involves the reselling of software in violation of licensing agreements, for example, software obtained using privileged licenses for a finite set of users which is then resold to the public on the Internet.

Another key concern is the lack of progress on the legalization of software by the Government of Ukraine. After taking steps in 2003 and 2004 to adopt legalization reforms, implementation of the program by the government, the largest consumer of illegal software in Ukraine, has been slow. According to official information from the SDIP (www.sdip.gov.ua/ukr/help/statti/pcweek/), the current software piracy rate in state agencies exceeds 70% (noting that the rate is coming down at less than 5% a year). Illegal software usage by government agencies (including IPR enforcement entities) sends the wrong signal to the business community and Ukrainian citizens about the value and protection of intellectual property. It also diminishes the efforts by rightholders to enforce and publicly educate Ukrainian society about intellectual property rights. Overall, the BSA reports in 2007 (based on its preliminary figures) piracy rates are at 84% and losses at \$213 million.

The adoption in 2000 of the Hologram Sticker law, was a step backward for effective enforcement. The seven-year history of this law shows that its inconsistent and haphazard implementation (administration) by the government has seriously harmed the interests of legitimate copyright owners. At the same time, it has permitted suspect companies to receive thousands of holograms for foreign releases (music, film, and entertainment software) for which they have no licenses despite objections from the legitimate licensees. Most often, the holograms are issued on the basis of false contracts and licenses which are rarely verified. In such instances, pirate products are *de facto* authorized by the state for distribution and cannot be seized by law enforcement officials. Practice shows that one out of every two products seized is labeled with a false hologram (either counterfeit or with a reprinted title). The copyright industries are trying to compete against the pirates, even pricing their products lower (\$5 to \$7 per CD, for example; \$20 for DVDs, compared to the pirate price of \$4) and printing materials in Cyrillic for local distribution. However, rightholders cannot compete against the pirates without effective enforcement by the Ukraine Government to address the piracy problem, and to stop the misuse of the hologram system. The hologram system should be completely revised (or repealed) and properly enforced, with input from rightholders.

Entertainment software publishers (Entertainment Software Association, ESA) report that the hologram sticker program is their primary enforcement problem in Ukraine. The hologram program is implemented in a haphazard manner because SDIP grants holograms for generic game titles. One ESA member company had success in obtaining an agreement with SDIP to stop issuing holograms for its titles. However, the pirates simply modified and altered the game titles, or used generic descriptors (e.g., "Racing"), and otherwise successfully obtained holograms for their pirated games. One video game publisher is undertaking numerous civil cases to challenge the grants of "generic" title holograms.

The BSA continues to report that the hologram sticker system acts as a hurdle to legitimate business and allows the pirates to continue their operations. In 2003 the Ukrainian Ministry of Education and Science passed an "order" requiring the SDIP to organize a voluntary registry for software manufacturers and distributors in Ukraine. This registry was intended to contain the names of software manufacturers and distributors, data about their registration, location, and contact details as well as information about management, type of business activity and a short description of all software products manufactured and/or distributed. Under the order, all software manufacturers/distributors can obtain a certificate to verify their registration. For a fee, the SDIP will provide users with information from this registry about a particular software manufacturer/distributor. The registry was intended to improve a level of copyright protection for computer programs and databases, as well as to provide information to the public regarding software manufacturers, distributors and licensing information. However, the BSA reports that the registry, to date, has not fulfilled its intended function to distinguish legal software manufacturers/distributors from illegal ones.

The major piracy problem for the motion picture industry, (Motion Picture Association of America, MPAA) is hard-copy piracy of DVDs sold at retail stores and kiosks, which are regularly stocked with new and pre-release material. Recent seizures of pirate product and market monitoring reveal a disturbing increase in the number of pirate DVDs containing up to twenty film titles each. This type of piracy is not limited to Kiev, but is found nationwide, and threatens the survival of legitimate distributors. Broadcast television piracy also remains a major problem for the motion picture industry especially with regard to regional broadcasts. There are a large number of cable operators who transmit pirate and other product without authorization.

In 2007, the recording industry continued to suffer from pirate optical disc (including CD-R) distribution with estimated piracy levels at around 60% for international repertoire, and losses estimated at \$35 million (including losses from Internet piracy and mobile phone piracy in Ukraine). In addition, the music industry reports that only about 5% to 7% of the market is properly paying performance royalties, including thousands of large and small public venues and hundreds of broadcasters, including the largest state-owned broadcasters who operate without paying any copyright or related rights licenses.

For entertainment software publishers a continuing concern is piracy at Internet cafés or “game rooms,” where pirated and unlicensed versions of video game software is in wide use. Video game publishers estimate that there are some 200 cafés installing pirate copies of game software on café machines without appropriate licenses. Unfortunately, due to the absence of a large industry presence in the country, and the failure of the police to take enforcement actions without rightholder initiation, there has been little to address this problem and the even-larger problem of optical disc production (especially of CD-Rs), and distribution in Ukraine. ESA estimates that piracy levels in Ukraine were 80% in 2007 (which is a piracy level reflecting a weighted average of three forms of piracy: PC piracy, console piracy and handheld piracy).

Factory-replicated pirated entertainment software products on optical disc continue to be locally produced (and, with the flawed hologram system “legalized”) for sale in the market. Pirated products are generally available at large outdoor markets and through street vendors, though there are instances where pirated product is available through retail establishments who simply claim that the products are, to their knowledge, legitimate as they bear the holograms.

Effective Criminal Enforcement is Needed as a Follow-up to the Legal Reforms

The major “missing” component of the Ukraine enforcement regime has been the absence of effective criminal prosecutions and deterrent sentencing. This, coupled with ineffective border enforcement, has allowed wide-scale commercial piracy to continue in Ukraine. In some cases, commercial piracy operations act in concert with operations in neighboring countries, such as Russia. Effective criminal enforcement is necessary for Ukraine to fully comply with the TRIPS obligations of the World Trade Organization.

Six Recommended Actions for the Government of Ukraine

IIPA makes six recommendations that would improve enforcement in Ukraine:

First, the Government of Ukraine should act against retail piracy in the big outdoor markets like Petrovka and Radiolubitel in Kiev, Maya in Donetsk, Knyzhka and Sedmoy in Odessa, and Pivdenny in Lviv, and other sales occurring in the streets – and with long-term, not temporary, closures of illegal businesses. As has been noted before, there is evidence that this step is a matter of political willpower. This was demonstrated in May 2005 during the Eurovision event in Kiev, when the government did effectively (but alas, only temporarily), crack down against street and kiosk piracy.

Second, the Government of Ukraine should follow raids and seizures, as well as Internet website takedowns, with criminal prosecutions and convictions against illegal retail or production operators, and others involved in commercial piracy.

Third, the Government of Ukraine should properly implement the Customs Code amendments adopted in November 2006 (in force February 10, 2007) which provided customs officers with *ex officio* authority. The adoption of these provisions was a positive step. Now the government needs to expand the specialized intellectual property rights unit within the customs service with sufficient resources to effectively stop illegal material at the border since much of it is coming, at present, from Russia by train, car, and courier. The Government of Ukraine should move away from relying on yet another bureaucratic entity at the central headquarters, and instead devote more resources and willingness to effectively enforce intellectual property rights crimes at the border with specialized customs units.

Fourth, the Government of Ukraine should move more aggressively against on-line public performance, broadcasting and other Internet piracy.

Fifth, the Government of Ukraine should continue improvements in its optical disc media enforcement, most importantly, with the imposition of criminal penalties against producers of optical disc media at plants or CD-burner operations.

Sixth, the Government of Ukraine should amend Article 176 of the Criminal Code to ensure that criminal liability applies to any type of illegal use of copyrighted materials. The current version of this article is often interpreted by the law enforcement authorities as applying only to manufacturers and distributors of illegal copies.

Optical Disc Piracy and Enforcement

Although there is currently no evidence of large-scale industrial production of pirate optical discs in Ukraine – at least not of music and film material – other forms of optical disc piracy involving CD-R and DVD material, in particular, have increased. The June 2000 Joint Action Plan not only detailed plant licensing and inspection requirements, but also the adoption and implementation of criminal and administrative penalties, which could and should be used effectively against all forms of pirated product.

The optical disc law amendments (in force, August 2, 2005) and related enforcement legislation included many critical elements to secure better enforcement of illegal product including: (1) clear mandates for surprise inspections; (2) the licensing of the production of matrices (two mandatory copies of each production run/order for the licensing authorities) used to produce optical discs; (3) improved criminal sanctions for violations; and (4) the abolishment of a requirement for SID (source identification) coding for imported finished product (discs being imported into Ukraine).

However, a few elements of the optical disc regime still need to be properly implemented. These include: (a) regular surprise inspections of existing and new optical disc plants with copyright rightholder participation (and that, during an inspection, when machinery is claimed to be temporarily inoperable, a subsequent surprise inspection is undertaken to obtain exemplars from that plant); (b) disclosure and openness with rightholders of the “evidence repository” sample copies of all production runs of master stampers and finished disc produced in Ukraine, including unconditional access (i.e., without the need for a court order) for rightholder’s representatives to the exemplars and the database (which should detail the equipment used in each plant); (c) closure of plants that have been found to be involved in illegal production (in breach of the licensing rules and/or the copyright law); (d) seizure and destruction of illegal material, including the materials and equipment used in the course of illegal production (plus the spare parts and pieces of equipment), as well as the destruction of pirate discs carried out with the involvement of rightholders; (e) proper monitoring of the importation of raw materials (optical-grade polycarbonate) used in the production of optical disc media; and (f) proper licensing of new plants and/or lines at existing plants (for example, the Rostok plant which received new lines without proper review), including requiring the adoption of SID codes. These SID codes should only be provided upon proper verification at the time of issuance (with comprehensive and in-depth follow-up inspections and maintenance of codes on all

equipment, molds and mirror blocks). Last, there needs to be monitoring of equipment used at the plants to make certain that the SID codes are in fact properly engraved on all molds, matrices, and other relevant equipment used for the production of optical discs (including reserve molds and equipment).

The Ukrainian Ministry of Science and Education issued instructions to the licensing body to automatically suspend an operating license and seal the relevant production facilities if and when it is presented with forensic evidence of breach by a given optical disc plant of the licensing rules (including copyright infringement). However, this is not being fully and unconditionally implemented. IIPA recommends that any suspension should endure for at least the duration of an in-depth investigation into infringing behavior, and the possible subsequent criminal or administrative investigation, even if this evidence is presented by a private sector representative organization.

One positive step, which IIPA noted in the past, was the government's establishment of a specialized unit for intellectual property rights crimes within the Economic Crime Division in the Ministry of the Interior (this unit has the exclusive authority to deal with intellectual property rights crimes). Rightholders report good cooperation from and with this unit. Another previously noted positive step was the General Prosecutor's decision to reconstitute economic crime status to criminal violations of author's and neighboring rights.

Complaints by rightholders against the Rostok plant and CD Master plant in 2004 and 2005 were mishandled by the Ukrainian authorities and remain unresolved. The plants have been allowed to continue their operations despite detailed complaints from the recording industry (IFPI) due to the lack of decisive action by SDIP and its state inspectors. Plus, neither the plants nor their owners/managers have faced criminal investigation, let alone prosecution. In the absence of any action against Rostok, the recording industry was forced to take civil (copyright infringement) action against this plant. The case is still before the court and the plant continues its operations unabated. An ongoing series of procedural hurdles and obstacles shows that civil infringement proceedings are not an alternative to criminal prosecution.

The entertainment software publishers report that secure identification (SID) markings on pirate video game discs purchased through Internet sales in Asia, the U.S., and the United Kingdom, indicates that the discs originated in Ukraine, and probably from the Rostok plant.

One significant enforcement problem has been Ministry of the Interior experts, who have been very slow to issue their expert examination reports. In addition, these experts have missed pre-arranged meetings to conduct court-ordered examinations, refused access to premises, substituted the services of ill-prepared junior examiners, lost evidence and/or produced incomplete and inaccurate reports. There have been many reports by these experts that have issued and have been generally helpful to rightholders (i.e., plaintiffs). One needed follow-up measure is for discs in separate cases to be compared to provide forensic links.

Regulation and control of the plants that does exist is still not effective, especially for industry sectors not present or unable to provide sufficient resources in Ukraine and thereby unable to assist the authorities with inspections. For example, pirated entertainment software (game) discs are manufactured in Ukraine, without licenses and absent any royalty payments to rightful owners, and enforcement actions are limited. In addition, as noted above, key enforcement tools (the use of production samples) that could aid in the detective work for uncovering illegal activity have been held back by the relevant agency.

There are, at present, eight optical media disc plants (producing CDs, DVDs or both) in operation in Ukraine – a total of 18 CD/DVD lines. It is estimated by the recording industry (the International Federation of the Phonographic Industry, IFPI) that the current total production capacity of these plants is around 90 million units per year, which far exceeds the estimated demand for legitimate CDs and DVDs in Ukraine.

Raids, Seizures and Other Enforcement Action in 2007

The overall number of seizures of illegal materials increased in 2007. The number of seizures by the Ministry of the Interior increased by about 10%, and those by SDIP's IP inspectors by about 45%. However, the Customs Service of Ukraine did not increase its seizures, which is surprising in light of the ongoing large-scale problem of the importation of pirated optical discs from neighboring Russia. It is estimated that, in total, over 2.2 million illegal copies were seized in 2007.

Overall, there have been an increasing number of raids and seizures over the past several years, but unfortunately, not enough action has been directed at large-scale commercial piracy. As a part of the 2005 amendments, Article 203-1 of the Criminal Code was modified to permit the police to initiate their own criminal actions without rightholder complaints. This positive step however, has not led to the type of effective enforcement envisioned. That's because of a combination of poor border and ineffective criminal enforcement (especially against criminal syndicates). So even with an upsurge in seizures and investigations, this has not had a marked impact on the piracy problem in Ukraine. Similarly, although there were more administrative actions undertaken against stores, kiosks and other street piracy than in recent years, these actions were not frequent enough nor were they coupled with severe enough penalties to deter these crimes. As in years past, almost all of the actions were directed against sellers and small-scale distributors, with the criminal gangs involved in organized large-scale piracy remaining largely unscathed.

Thus, the actions need to be directed at retail stalls at or around underground stations, near local shops and supermarkets, as well as against retail stores that now regularly sell illegal product. The failing hologram stickering system is making matters worse. What is needed (beyond repealing the hologram law) are sustained actions at higher operational levels (i.e., not just kiosks, but at warehouses, wholesale centers, major distribution points), and by regular, not periodic, raids and seizures, followed by criminal prosecutions that result in deterrent sentences.

In 2006, amendments to the Criminal Code Article 176 significantly lowered the previously too-high threshold for criminal prosecution (which had resulted in more administrative, in lieu of criminal, actions). But, the hoped for criminal, rather than administrative proceedings, have not yet materialized. In 2007, the Ministry of Interior commenced more cases (479) in the first half of 2007, than in all of 2006. However, for the same period only 102 court decisions were rendered, and any penalties imposed were not severe enough to be considered deterrent. In addition, IPR-related offenses continue to be hampered by procedural problems such as the use of expert evidence. There needs to be clear sets of rules guiding procedure.

Provisions do exist in the Ukrainian Criminal Code (e.g., Article 28) to prosecute organized groups or criminal organizations, including those engaged in IPR offenses, but to date they have not been used for this purpose. Criminal sanctions (added effective March 2006) created additional penalties (of up to 7 years imprisonment) for organized crime syndicates. These new sanctions must be utilized.

The motion picture industry reports that over the last several years, there have been some encouraging signs of increased and geographically wider police activity, both in Kiev and elsewhere, against the retail sale and distribution of pirate products. In the last year with reported statistics (2006), more than 650 criminal cases concerning IP crimes were initiated in Ukraine, with administrative sanctions applied against 3300 individuals. That year, a total of 1 million optical discs and 100,000 VHS tapes were seized by the police, almost all of which were copies without hologram stickers.

In 2007, IFPI reported a total of 1,027 raids on pirate retail outlets in Kiev. In those raids it was reported that the Ministry of the Interior officers seized 25,000 videotapes, 20,000 audiocassettes, and 1,354,000 pirated optical discs. It was further reported that 74 pirate warehouses and underground replication facilities were uncovered, and 12 distribution channels were stopped as a result of the raids. SDIP's IP inspectors carried out inspections of 814 people and business entities, and commenced 380 administrative cases for IP infringements; they seized a total of 439,406 pirated materials.

One ESA member reported that in 2007, there were 20 cases involving its pirated video game products. These cases involved the seizures of illegal games -- ranging from 5 to 800 copies of the company's titles (noting that the total number of materials seized was likely higher as it included products from other publishers). Unfortunately, of the 20 cases initiated in 2007, 14 are still pending with a prosecutor; two cases were initially dismissed, but on a court appeal were remanded to a prosecutor's office for further investigation.

The copyright industries provided the following examples of raids, seizures and criminal investigations undertaken in 2007.

In April 2007, State Department of Service for Economic Crime (SDSEC) officers raided and shut down a clandestine factory situated in an apartment in Kiev. The owner of the apartment was found to be copying and storing exemplars of phonograms and audiovisual works on CDs and DVDs on computers with CD-RW and DVD-RW drives, and then distributing these copies throughout Kiev. During the raid, the investigators seized a computer, two CD-RW ROMs and four DVD-RW ROMs, one full-color printer, 12,000 CDs and 4000 DVDs, and about 10,000 inlay cards. Further investigation led to the arrest of another person from Kiev, who is accused of acting as an accomplice (delivering the CDs in his car).

On 10 May, SDIP officers raided an illicit distribution network and warehouse in a private residential area near Kiev; one individual was caught illegally storing and distributing, in bulk, counterfeit exemplars of audio and audiovisual works throughout Kiev and other regions of Ukraine. A total of 10,000 DVDs, 1000 CDs, a computer containing the CD wholesale statistics and seven DVD-RW ROMs for multiplying the counterfeit products were seized by the police. A further police investigation uncovered several accomplices and over 40,000 DVDs and as well as artwork.

In another action, a warehouse was raided and closed near Kiev and over 10,000 DVDs and CDs, approximately 20,000 inlay cards, more than 3000 jewel cases and a computer with information on the criminal enterprise were seized.

From March through May 2007, the Ministry of Interior undertook a series of raids on markets and retail outlets in Kiev, accompanied by special operational teams of police and rightholder representatives. The raids uncovered 275 acts of distribution, seized 250,000 illegal CDs, and resulted in 29 criminal cases being brought to court (23 individuals were indicted). The seized products were destroyed, amid wide television and radio coverage.

In October, the police raided the notorious Petrovka market -- two major CD distributors were targeted. The raided netted 3,851 DVDs and 1,679 CDs (worth a total of 115,000 UAH). In late December 2007 (during the holidays), following a high-level complaint by IFPI, Ukrainian Police and SDIP inspectors conducted a wave of raids on various open air markets and street vendors within Ukraine. The largest number of raids took place in Kiev. At the Knyzhkovyi market (part of the Petrovka market) in Kiev, seven stalls were raided and 4,461 pirate DVDs and 2,524 CDs seized. In addition, police officers raided several street vendors elsewhere in Kiev, seizing 2,944 pirate DVDs and 1,425 CDs. As a result of these raids, 95 administrative sanctions were commenced, and a criminal case was initiated against several of the pirate street vendors. Also in December 2007, raids were carried out in other parts of Ukraine, including Zhitomir, Kirovograd, Chernigov, Lvov, Dnepropetrovsk and Odessa. During those raids 14,380 pirate optical discs were seized. The raids also resulted in the identification of several warehouses and CD-R, DVD-R burning facilities (suppliers of pirated discs to distributors throughout Ukraine). Unfortunately, as is common even after successful raids, subsequent prosecutions and convictions, if any, are not nearly strong enough to serve as deterrents. Often, when an action is dismissed by a prosecutor, the seized goods are simply handed back to the infringers.

Last, it was reported that in 2007, 417 criminal cases were initiated in accordance with Article 176 of the Criminal Code. In addition, 549 cases were initiated in accordance with Article 203 of the Criminal Code. It was also reported that 7,118 administrative actions were undertaken against IPR infringers in 2007.

Internet Piracy

In addition to enforcement against hard copy piracy, Ukraine enforcement officials must also begin actions against online piracy. It is estimated that there are over 400 ISPs in Ukraine and that over 150 of these support sites offering pirate DVDs (for, on average, US\$10). The late-2006 actions against ISPs, with cease and desist letters, showed that it is possible to act against Internet piracy. In fact, those actions resulted in three of the largest infringing sites being taken down (at least temporarily). However, the police noted a procedural problem undertaking these operations, namely, that unless an individual files a claim for damages for Internet piracy, they would not initiate further criminal action. This appears to be contrary to government claims that *ex officio* police authority exists at present.

Ineffective Border Enforcement

Ukraine has also failed to properly police its borders, which has resulted in wide-scale shipment from and transshipment of pirated materials through Ukraine, to other countries in Eastern and Central Europe — including Poland, Hungary, Lithuania, Romania and Slovakia, and other countries such as Israel. Poor border enforcement allows large-scale smuggling operations to move pirate product into Ukraine for the local market or for shipment to other countries. There have been some minor seizures by customs authorities of CDs and other materials over the past several years, but cooperation has been spotty and activity has not been nearly enough to stem the flow. In fact, the recording industry (IFPI/UAMI) reports that since a majority (70% to 80%) of all illegal material in Ukraine is of foreign origin, and customs authorities report average border seizures of 1,500 to 2,000 CDs per month, millions of illegal copies of music are entering Ukraine each year without interference.

Some of the copyright industries report customs cooperation at the border. But, overall, much more needs to be done to improve border enforcement to the extent needed to have a real impact on cross-border trade in pirated goods. The Ukraine Government must devote more resources and show more willingness to enforce IPR crimes at the border. The motion picture industry (MPA), for example, continues to report that piracy persists as a result of poor border enforcement allowing an influx of pirated DVDs from Russia.

Customs officials were granted *ex officio* authority to properly conduct enforcement investigations (in amendments to the Customs Code in 2004 and 2006). With this *ex officio* authority customs officials can seize illegal material at the border without a court order. The police and other enforcement officials also have equivalent *ex officio* authority (for example, under Article 203-1 of the Criminal Code to act against optical discs offered without hologram stickers). But, in practice they still depend on rightholder complaints to commence investigations (and do so as well, under Article 176 of the Criminal Code) — this disparity needs to be corrected. Without proper implementation of this authority by police and border officials, and without proper confiscation of pirate materials (which IIPA understands can only constitutionally be undertaken by the courts), the problems will continue to worsen. Waiting for rightholders to file complaints in each instance given the widespread scope of the illegal activity is a recipe for failure. Some of the copyright industries report that *ex officio* authority has not resulted in improved customs enforcement because of the successful smuggling of CDs and DVDs across borders, without passing through inspections and official declarations.

GSP Benefits

In 2006, \$23.8 million worth of Ukrainian goods benefited from the GSP program. In the first 11 months of 2007, that figure was \$44.5 million.

LEGAL REFORMS

A history of the key legal reforms made by Ukraine in the past few years is available on the IIPA website at <http://www.iipa.com>.

The key missing legal reforms needed for effective enforcement (and full TRIPS compliance given that Ukraine is very likely joining the World Trade Organization in 2008) are: (1) amendments to the Criminal Procedure Code to give the police proper authority to commence investigations *ex officio*; (2) amendments to the Customs Code (which was revised in November 2006 to give clear *ex officio* authority) to repeal the restrictive “commercial purpose” threshold and the onerous registration and fee requirements for IP-related materials; (3) the addition of key administrative remedies; and (4) the major overhaul or abolition of the hologram stickering program. The law of 2003 included in the Civil Procedure and Commercial Procedure Codes *ex parte* search provisions necessary for effective end-user (software) piracy actions. In 2004, the Highest Commercial Court of Ukraine adopted recommendations to implement these procedures. However, practical difficulties remain, most critically, the inability of the authorized enforcement agency (the state executive service) to actually undertake *ex parte* searches in spite of the revised Civil Procedure Code (since the Civil Code does not apply to administrative remedies).

Copyright Law: The Copyright Law of 2001 fixed several major deficiencies, but some problems remain, such as Article 43.3; this provision permits the over-regulation and consolidation of power into government collecting rights societies. The Ukrainian Cabinet of Ministers has, under this provision, adopted fixed tariffs for the broadcasting of sound recordings, which totally undermines the right of phonogram producers to freely negotiate their fees with users. Article 43.3 of the Copyright Act should be deleted and the tariff decision by the Council of Ministers should be withdrawn. Collective management should be a private, not a government, enterprise; legal entities and foreign rightholders should be permitted to be members on their own in Ukrainian collecting rights societies. In addition, as noted below, Ukraine must further revise the Copyright Law to fully comply with the digital treaties in order to properly protect the production and dissemination of materials on digital networks.

The Government of Ukraine has, for the past several years, considered major copyright law reform. A March 2007 draft bill, which contained a number of highly objectionable provisions, was never adopted. The Government of Ukraine has now pledged that it will give rightholders and U.S. Government experts, at an early stage of the next consideration of the draft bill, an opportunity to comment. We commend this procedure as it will help to ensure that any new law is compatible with international norms and business practices.

Criminal Code and Criminal Procedure Code: The Criminal Code was completely revised in the past several years, including amendments in 2007 (May 31, 2007). The 2006 amendments lowered the threshold for criminal responsibility under Article 176 to one-tenth their former level. This was a very positive step. The criminal code provisions sanction both copyright and neighboring rights violations. The 2007 amendments (to Articles 176 and 203-1) require the compulsory destruction of seized pirated material, as well as production equipment, in criminal cases. This was another positive step.

There are several key provisions that still need to be added. First, Article 176 of the Criminal Code does not clearly apply to many forms of piracy (i.e., on the Internet), but only (clearly) to hard-copy piracy – this must be fixed urgently. Article 176 is often interpreted by law enforcement authorities as only applying to the manufacturers and distributors of illegal copies, but not to businesses which regularly use illegally copied software. In addition, a provision for “administrative recidivism” must be revised so that a repeat infringement (within 12 months) would automatically lead to a criminal, not administrative, prosecution.

Another missing element in the criminal code (or copyright law) is a provision that makes possession for a commercial purpose (of illegal copies of works or sound recordings) a criminal offense; the Government of Ukraine should introduce and push for the passage of such a provision.

The Criminal Procedure Code must also be fixed in law and practice so that police can act *ex officio* to initiate criminal intellectual property cases. Ukrainian criminal procedures in practice (although not required by the code) currently require rightholders to file complaints to initiate actions. This acts as a bottleneck to successful enforcement. The Criminal Procedure Code should be changed so that police initiate intellectual property criminal cases and investigations for submission to the court; it must also be clear that the police (as they sometimes do in software cases) have the authority to hold confiscated products and equipment for use at trial.

WIPO Digital Treaties: In 2001, Ukraine acceded to the two digital treaties — the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonogram Treaty (WPPT), in force in March and May 2002, respectively. The Copyright Law of 2001 included amendments intended to implement these treaties. Unfortunately, the amendments fell short of complete and effective implementation, especially with regard to technological protection measures (requiring proof of “intentional” circumvention, which could prove a major impediment to protection). Ukraine needs to fully implement the treaties with amendments to its copyright law. The 2007 draft bill contained many deficiencies to full treaty implementation. IIPA continues to urge the Government of Ukraine to work with rightholders on any future copyright amendments and, at an early stage in the drafting process (certainly before submission to the Verkhkhovna RADA).

Administrative Remedies: As part of the Joint Action Plan in 2000, Ukraine agreed to adopt and implement appropriate administrative remedies to deter piracy as well as to enact criminal penalties. The proper remedies do now exist, but they are not being used effectively to remove the business licenses of infringing retail stores, kiosks, and other smaller scale pirates. Administrative remedies must be properly implemented alongside available and properly implemented criminal penalties at levels sufficient to deter piracy. Further amendments have been proposed, but never adopted, to increase the maximum fines from the current 2,538 UAH (US\$500) to close to 5,076 UAH (US\$1000) – IIPA urges the passage of this law to create stiffer administrative penalties. Another provision that needs amendment is the two-month deadline for administrative cases to be processed or terminated (Article 38); a more realistic and extended deadline should be provided, or the deadline eliminated altogether. Administrative courts should be able to hear infringement cases even in the absence of the infringer – such delays, and the deadlines, lead to many unnecessary case dismissals.

Customs Code: The Customs Code of Ukraine entered into force on January 1, 2004; it was again amended in 2006 (effective March 2, 2007). It provides clear *ex officio* authority (Art. 257) to customs officials to seize suspected illegal material at the border. The threshold remains at about 1,319 UAH (US\$260) (Art. 250(1), part 2; Art. 252 (1), part 2). For optical discs, a maximum of 20 discs can be imported or exported for personal use under the Optical Disc Law. The 2004 Customs Code narrowed the applicable sanctions to acts meeting a “commercial purpose” threshold; this limits the effectiveness of the 2004 code. The 2006 amendments introduced new criteria replacing the “commercial purpose” criteria; the sanctions now apply to “goods destined for manufacturing or other business activity.” In addition, the notification and registration requirements, and the fees, were not repealed by the 2006 amendments. They were, however, amended: the current fee is 2,032 UAH (US\$400) for the first application; 1,015 UAH (US\$200) for all others; and per Art. 256, it is no longer necessary to register specific items and titles, rather record labels and/or trademarks may be registered in lieu. This is an improvement, but the abolishment of the registration system altogether with its unnecessary maze of regulations would be an even better improvement as it interferes with effective border enforcement.

Civil Code: Effective January 1, 2004, a new Civil Code came into force. Chapter IV of the Civil Code (Intellectual Property Rights) contains 90 articles in total – 15 pertaining to copyright, and 8 pertaining to neighboring rights. Most of the copyright and neighboring rights provisions duplicate provisions in the Copyright Law of 2001 which ultimately may confuse judges who have to rule on IPR enforcement matters. Ukrainian officials have assured U.S. Government and IIPA members that the Civil Code will not weaken implementation or enforcement of the copyright law. In this regard, IIPA urges the enforcement

agencies and the judiciary in Ukraine to rely on the copyright law, not the Civil Code Chapter IV, for effective enforcement.

Dubbing Law: On December 20, 2007, Ukraine's Constitutional Court issued a ruling interpreting Article 14 of the Law on Cinematography (Law of January 13, 1998) relating to the dubbing/subtitling of foreign films distributed in Ukraine. This ruling means that foreign films cannot be distributed in Ukraine if they are not dubbed, subtitled or have added soundtracks in the national language (i.e., Ukrainian). This ruling will significantly increase the cost of distribution in Ukraine for foreign distributors, and impede the development of the legitimate audiovisual market.

Government Software Asset Management: In 2003, the Cabinet of Ministers of the Ukrainian Government passed a regulation establishing procedures for the use of software in government agencies. It provided for government institutions to use properly licensed and legally held software, and prohibited public servants from installing, using, or copying software without prior consultation with a responsible system administrator. In 2004, the government issued a new regulation to implement legalization. It assigned all procurement authority for software products to a single entity, SDIP, in order to try to eliminate the use of pirated software products in the public sector. Unfortunately, the Government of Ukraine has been slow to enact this program.

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2008 SPECIAL 301 REPORT

BANGLADESH

Special 301 Recommendation: IIPA recommended that Bangladesh be placed on the Watch List in 2008. The situation has not improved, and IIPA therefore once again requests placement of Bangladesh on the Watch List.¹

EXECUTIVE SUMMARY

In its 2007 Special 301 Report, the United States Trade Representative noted,

[C]ountries still need to adopt and implement legislation or improve existing measures to combat pirate optical disc production, including Bangladesh ... which have not made sufficient progress in this area. The United States continues to urge its trading partners who face pirate optical media production within their borders to pass effective legislation and aggressively enforce existing laws and regulations.

Bangladesh hosts six (6) optical disc factories, most of which migrated from Pakistan. The production capacity for these plants far exceeds any rational legitimate demand. Industry continues to see exports to India and perhaps Europe, as well as saturation of the local market with pirate product. Other piracy problems abound, including unchecked book piracy in the form of print piracy and illegal commercial photocopying, stolen theatrical motion picture prints which are illegally contracted for exhibition in Bangladesh, and broadcast/cable piracy (i.e., unauthorized showing of international and Hindi movies on channels without authorization), which should be addressed as well. CD-R “burning” piracy remains a problem, from large-scale “burning” in the plants to small-scale burning. The use of pirate music cassettes continues to dominate the music market in Bangladesh and the music cassette piracy rate is 90% for domestic, Indian and international repertoire.

The harm from piracy in Bangladesh is not only to U.S. and other foreign right holders but is felt keenly by Bangladeshi nationals.² Recently, Bangladeshi record/music producers have taken it upon themselves to seek to enforce their own rights, calling it “a matter of life and death” for their local Bangladeshi companies, and noting that “[i]n the last four years alone, as many as 10 big and respected companies have had to close because of piracy.”³ Likewise, booksellers are fighting for their livelihoods amidst rampant book piracy. The government’s response has been inadequate, both in terms of the results from enforcement actions taken and from the standpoint of publicizing results of actions in order to create necessary deterrence.⁴

¹ Curiously, one press article suggests that the Bangladesh government believes it is already on the Watch List. See *B'desh on US Watch List for IPR Violation: Report*, Organisation of Asia-Pacific News Agencies, September 30, 2007 (reporting out of Dhaka that “Bangladesh has been put on the United States’ watch list of countries that allow production of pirated versions of multi-media compact disks (CDs) and digital video disks (DVDs) in violation of intellectual property rights”; the Star newspaper also indicated that “the National Security Intelligence, on the request of U.S. authorities, carried out an investigation and found that two companies owned by Pakistani citizens, AKA World Com and Sonic Enterprise Bangladesh Limited, were owned by two Pakistanis, one of whom set up a Tk 2 crore [approximately US\$300,000] plant which can produce 50,000 discs a day”).

² The local music companies regularly complain about growing piracy problems, especially the piracy of music albums of the leading Bangladeshi music labels in the outskirts of key urban areas.

³ See *Bangladesh Music Producers Take Law Into Own Hands To Fight Piracy*, August 17, 2006, at <http://www.channelnewsasia.com/stories/entertainment/view/225343/1/html>.

⁴ In Bangladesh’s Trade Policy Review at the World Trade Organization in September 2006 (minutes released in November 2006), the government of Bangladesh essentially indicated that it does not keep regular copyright enforcement statistics, but that “efforts are being made for collecting such data,” that the records/data in relation to seizure or confiscation are maintained by Bangladeshi Customs manually in a register, but that there are other enforcement agencies like BDR (Bangladesh Rifles), Coast Guard and Police who are also responsible for enforcement of copyright regulations within their respective jurisdictions, and can supply such information “when available and [when] a request is received.” In addition, the government noted that “since several agencies are involved in enforcement of copyright, no consolidated information [on raids, prosecutions, convictions, etc.] is available right now.”

PRIORITY ACTIONS REQUESTED IN 2008

- Inspect Optical Disc Plants, Closing Down Those Found to be Engaged in Piracy and Prosecuting Owners of Pirate Plants
- Pass and Implement an Effective Optical Disc Regulation, With Plant Visits/Mandatory Exemplars and Mandatory Use of SID Master (LBR) and Mold Code, Among Other Things
- Establish an Anti-Piracy Force and Take Actions (Including *Ex Officio*) Against CD-R “Burning,” Book Piracy (Photocopy Shops and Print Piracy), Theft of Theatrical Prints, Stolen Theatrical Motion Picture Prints, and Broadcast/Cable Piracy
- Establish IPR Cell Within Bangladesh Customs

For more details on Bangladesh’s Special 301 history, see IIPA’s “History” Appendix to this filing at <http://www.iipa.com/pdf/2008SPEC301HISTORICALSUMMARY.pdf>, as well as the previous years’ country reports, at <http://www.iipa.com/countryreports.html>.

BANGLADESH Estimated Trade Losses Due to Copyright Piracy (in millions of U.S. dollars) and Levels of Piracy: 2005-2007⁵						
INDUSTRY	2007		2006		2005	
	Loss	Level	Loss	Level	Loss	Level
Motion Pictures	NA	NA	NA	NA	NA	NA
Records & Music	NA	NA	40.0	70%	NA	NA
Business Software	NA	NA	NA	NA	NA	NA
Entertainment Software	NA	NA	NA	NA	NA	NA
Books	NA	NA	8.0	NA	6.0	NA
TOTALS	NA		48.0		6.0	

PIRACY AND ENFORCEMENT IN BANGLADESH

As can be seen from the descriptions below, rampant piracy essentially closes the domestic market to legitimate copyright owners, and evidence of export piracy of optical discs makes matters worse. No single law enforcement agency in Bangladesh has been tasked with engaging in anti-piracy activities. Enforcement agencies in Bangladesh simply do not have piracy on their agendas. In addition, due to frequent transfers of enforcement officers, it is difficult to develop effective working relations between industry and government. One helpful step would be the establishment of an IPR unit within the Police. Police would then need to be trained for the unit, and hopefully, other problems such as corruption within local Police units, can be resolved (some industries have reported difficulties with confidentiality when it comes to operational information).

Optical Disc Production in Bangladesh: There are currently six (6) optical disc plants in Bangladesh (lines for the sixth plant have recently been imported from Singapore but it is unclear whether this plant is operational yet), while only one plant has given industry access to the plant. With a total of at least 14 production lines (including four dedicated DVD lines),⁶ and a production capacity of 49 million

With respect to optical disc plants and piracy, the government indicated that it took note of the concerns expressed in the report regarding optical disc manufacture in Bangladesh and would place the matter “under investigation.” See World Trade Organization, Trade Policy Review Body, 13 and 15 September 2006, WT/TPR/M/168/Add.1 (published November 10, 2006).

⁵ The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA’s 2008 Special 301 submission at www.iipa.com/pdf/2008spec301methodology.pdf.

⁶ Four of the plants are in Dhaka (including one in Uttara and one in Kodamtali), one of the plants is in Konobari, Gazipur, and one is in the Kajpur area. There are four dedicated DVD lines (three DVD-9 and one DVD-5 line). In addition, there are as many as 10 CD lines. In some of the plants, it is confirmed that the best technology available is being used. For example, molding and finishing lines from one plant are a combination of Swedish and Dutch technology, under the banner of TOOLEX and ODME respectively, while printing is done using German technology, KAMMANN Machines.

discs, and four mastering facilities (i.e., the ability to use a “clean room” and produce the glass master that is then converted into the metal stamper used on the mold), the optical disc production problem must be addressed with immediacy. It is confirmed that at least some of these plants are owned by Pakistani nationals who ran plants in Pakistan prior to that government’s crackdown over the past two years.

All of these plants are involved in large-scale piracy operations, and at least four of the six are engaged in production of pirate international music, software, and U.S. movies. The main market for these pirate products is Bangladesh,⁷ although some of the pirated discs are being smuggled into India and Europe. Relatively small shipments of 900 to 1,000 discs are apparently being “smuggled” out of the country via parcel shipments using the main post office in Dhaka. Apparently the export shipments are focusing on the Indian and European market, but also Sri Lanka. However, industry has few details regarding the content and exact quantities of pirate exports. As an example of the efficiency and modernization of these plants, one plant with three lines can deliver orders in as little as seven days and can produce about 40,000-50,000 discs per day (all formats). Industry knows where these plants are located and has informed the government of Bangladesh.

The massive pirate production has destroyed any domestic market (even local music, for example, is 60% pirate, while international and Indian repertoire is virtually 100% pirate). Industry has met with government representatives about the OD piracy and other problems.⁸

“Burning” on Recordable Discs: The problem of CD-R burning of content onto recordable discs has become increasingly severe in Bangladesh. It is estimated that the Bangla market for audio and video CDs is catered by the CD-R facilities and that there are as many as 60 CD-R duplicating facilities operational in Bangladesh. They range from sophisticated European standalone duplicators to PC workstation duplicators. It has also been confirmed by different sources that Bangladesh is importing approximately one million blank CD-Rs from China and Taiwan per month. The price of a blank CD-R is approximately US\$0.10 or less.

Importation of Pirate Optical Discs: It appears there is some pirate importation of optical discs (indications are that discs are coming in from Malaysia), but the Bangladesh Board of Film Censors is working with industry to investigate suspected rights verification documents proffered by questionable importers.

Book Piracy: The book publishing industry grapples with significant illegal commercial photocopying and print piracy affecting a wide range of products—from academic textbooks to English language teaching (ELT) materials, medical and other professional reference books, computer and technical books, dictionaries and commercial bestsellers. Any book with significant sales potential is subject to appallingly high rates of piracy.

Neelkhet Market in Dhaka is famous for pirate sales, and other book markets in cities such as Dhaka, Chittagong, Rajshahic and Khulna, teem with illegal “local reprints” as well. This is a disturbing trend in a region in which legitimate local reprints are offered for sale at a very low cost. This not only decimates the market for foreign publishers; it also curbs potential business for Bangladesh’s booksellers and local producers, who are starting to take steps to defend their fledgling but foundering market. Several bookseller-initiated raids of pirate enterprises in places like Neelkhet and Banglabazar have produced some success. The government should work with local companies affected by piracy, and encourage their efforts.

⁷ The overall piracy situation in Bangladesh has worsened with the increase of sales of pirate CDs and DVDs in urban cities and especially Dhaka. CD and DVD players are becoming increasingly popular and cheap and demand for pirate CDs, VCDs and DVDs has increased as a result. The growing usage of computers in households is also contributing to consumer purchases of pirate CD-ROMs and other optical discs.

⁸ For example, in February 2006, record industry representatives met with officials from the National Board of Revenue, Dhaka, Commissioner of Customs, Dhaka Airport, and U.S. officials. Through the meetings, the members of Customs welcomed support and assistance from industry and indicated limitations in the detection process of pirated products and shortage of equipment to detect pirated products.

Government taxes on imported books drive up prices on all imports, including those from neighbor India, a hub of regional publishing production. Taking advantage, many so-called “importers” have taken up piracy, themselves, using fairly sophisticated technologies to reproduce and distribute pirate copies of books instead of importing legitimate copies.

Illegal commercial scale photocopying of textbooks and ELT materials abounds in and around Bangladesh’s universities and schools. Photocopies of textbooks sell for approximately US\$2.00 apiece. This is a more decentralized practice but is open and blatant. Educational authorities and universities should take proactive measures to curb piracy of academic materials, and a very select few universities have started this process. More needs to be done, however, including fostering representation of the publishing industry in setting priorities for the National Education Policy, increasing awareness programs for users of academic materials, including in schools and universities, and, above all, encouraging integrity and transparency in the “tender system” that governs purchases of books for government institutions.

Theatrical Print Piracy: The motion picture industry has experienced repeated instances of stolen prints fraudulently cleared through Customs and the Board of Film Censors and then contracted for exhibition in Bangladesh. Right holders are often unaware of the presence of these pirated theatrical prints until they are notified by legitimate distributors in the affected territories.

Cable Piracy: Several cable television distributors in Bangladesh are showing international and Hindi movies on their channels without authorization. The Ministry of Information is including provisions in a new anti-piracy law to take action against such theft.

TRAINING

Training on copyright and copyright enforcement has been offered to the government of Bangladesh several times, but the government has not responded to such offers to date.

COPYRIGHT LAW AND RELATED ISSUES

Copyright protection is afforded under the Copyright Act, 2000,⁹ as amended in 2005.¹⁰ The law prior to amendment was adequate for basic anti-piracy purposes, although it did not implement the WIPO “Internet” Treaties.¹¹ We are still ascertaining the effect of the changes from the 2005 amendments (which we have not been provided for review), but we understand that the Bangladesh government is well aware of the TRIPS issues involved, although claims the 2013 transition period,¹² and there was concern that pirate producers lobbied the government for exceptions that would have the effect of permitting pirate exports to neighboring markets such as India. Notwithstanding the 2013 transition, we note that Bangladesh is a member of the Berne Convention (since May 4, 1999) and thus must adhere to the rules

⁹ Act No. 28 of 2000, Act for the Amendment and Assimilation of Copy Right Act, Bangladesh National Parliament Dhaka, 18 July, 2000/3 Shrabon, 1407.

¹⁰ The Bangladeshi government, in a recent WTO review, indicated that the Copyright Amendment, 2005 is currently only in Bengali, but is being translated into English. See *supra* note 4. In the WTO review, the government of Bangladesh reported that it had amended its Copyrights Act (2000) in May 2005 to reduce piracy “in the domains of computer software, motion pictures, pharmaceutical products, CDs/DVDs, and audio- and videocassettes.” The government indicated it had publicized the law widely throughout Bangladesh, sending it “to all district offices and requested them to take necessary measures to enforce the law,” and noted, “[t]he Government has also taken initiatives to amend the Copyright Rules, 1967 to make it consistent with the Copyright Act, 2005.”

¹¹ See *id.*, in which the government of Bangladesh indicated “Bangladesh has not yet made any decision about joining WIPO Internet treaties.”

¹² See *id.* The WTO Secretariat Report noted that work was under way to bring Bangladesh intellectual property rights laws into line with the WTO TRIPS Agreement, and noted that “Bangladesh benefits from an extended time limit (until July 2013) for the full implementation of the Agreement.” The government of Bangladesh indicated that “considering the extended transition period to implement TRIPS Agreement until 1 July 2013 the Government of Bangladesh is examining the whole gamut of issues relating to patent, trademark and copyright protection.” Thus, while we had previous information that the government was considering an anti-piracy statute, that process may have been overtaken by events.

and principles set forth in that Convention, including abiding by the three-part test for exceptions. IIPA looks forward to reviewing the amendments and providing comments.

In Bangladesh's recent WTO review, the government was called upon to explain the various protections and remedies available under the current law. While this may not comport with actual practice on the ground for right holders, it is useful that the government's explanations of civil,¹³ administrative/border,¹⁴ criminal,¹⁵ and provisional¹⁶ remedies have been set out in writing.

¹³ See *id.* The government indicated the following as to civil remedies under the current law:

Civil suits provide remedy for claiming compensation for infringement of copyright and loss of profits as well. The owner of the copyright can bring civil action in which relief's such as Search order injunction, Accounts and damages can be sought. A suit or other civil proceedings relating to infringement of copyright is to be filed in the court of district judge within whose jurisdiction the plaintiff resides or carries on business or where the cause of action arose irrespective of the place of residence or place of business of the defendant.

The government also said the following about compensatory damages:

The court determines the types and extent of compensatory damages considering the claims of the complainant and the circumstances. The existing laws on trade marks and patents give the authority to the court to determine the types and extent of compensatory damages, while the Copyright Act, 2000 gives the same authority to the court as well as copyright Board constituted there under.

¹⁴ See *id.* The government indicated the following about administrative/border measures:

Administrative remedies consists of moving to the Registrar of copyright to ban the import of infringing copies into Bangladesh, when the infringement is by way of such importation and the delivery of the confiscated infringing copies to the owner of the copyright. ... [T]hey can destroy counterfeit/pirated goods, if the act of infringement is proved by the court of Law.

¹⁵ See *id.* The government indicated the following as to criminal remedies under the current law:

Criminal remedies provides for the imprisonment of the accused or imposition of fine or both, seizure of infringing copies. Criminal proceedings are available in order to punish the persons who have violated the copyright law. The infringement of copyright is a cognizable offence and is punishable with imprisonment for a period extending form six months to four years and a fine ranging from TK 50,000 (US\$725) to TK 200,000 (US\$2900). The Act also provides for seizure of infringing copies and confiscation of all duplicating equipments used for manufacturing counterfeit copies. However if the court is satisfies that infringement is committed without having an intention for profit or non-commercial purpose the court may give lesser punishment which may be imprisonment for less than 6 months and fine for less than TK 50,000. However, in case of piracy of computer programs the amount of fine is extended by an amendment to the Copyright Act, which is now minimum TK 100,000 (US\$1450) and maximum TK 400,000 (US\$5800) if it is committed for commercial purpose. In case of mere use of infringing copy or if the court is satisfied that it is committed for non-commercial purpose, the court may impose lesser punishment and lesser fine as well... For a second conviction of infringement, imprisonment could extend to three years, with or without a fine; and for copyrights imprisonment may extend to a maximum of four years (up to five years for the film sector) with a fine of TK 200,000 (TK 100,000 to TK 500,000 for films).

Helpfully, the government clarified the following regarding the criminal threshold for prosecutions:

A case is initiated after taking into cognizance by the court on receipt of a written complaint from an aggrieved party in case of willful trademark counterfeit/copyright piracy on a commercial scale. There is no pre-determined threshold to initiate a criminal action against someone who makes or sells counterfeit/pirated goods.

¹⁶ See *id.* The government indicated the following as to provisional measures under the current law:

As a temporary measure, court can issue injunction prohibiting sale, distribution and marketing of the goods on which an order has been sought. The court can also issue an order for seizure and temporary restraint. The court can also seize counterfeit/pirated goods before litigation in order to preserve evidence. Decision on infringing goods is taken by the court, and it differs from case to case.

GENERALIZED SYSTEM OF PREFERENCES

Bangladesh participates in the Generalized System of Preferences (GSP) program which includes, as one of its criteria of eligibility, that a country provides “adequate and effective” copyright protection. During the first 11 months of 2007, \$22.37 million worth of goods from Bangladesh (or 0.7% of Bangladesh’s total exports to the U.S. from January to November) entered the U.S. under the duty-free GSP code.

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2008 SPECIAL 301 REPORT

BELARUS

Special 301 Recommendation: IIPA recommends that Belarus remain on the Watch List in 2008.

EXECUTIVE SUMMARY

In January and February 1993, Belarus and the United States exchanged letters to implement a bilateral Trade Agreement which detailed mutual obligations to improve the protection and enforcement of intellectual property rights. That agreement entered into force on February 16, 1993. Belarus has never fully implemented the IPR obligations in that agreement.

In 2007, the U.S. Trade Representative – while retaining Belarus on the Watch List – noted that the U.S. remained “concerned about Belarus’ delayed implementation of its intellectual property commitments under the [1993] U.S.-Belarus Trade Agreement.” Further, USTR noted that Belarus had “made no significant progress” the year before “to strengthen its IPR laws, reduce piracy levels or increase IPR enforcement efforts.” The USTR detailed in its Special 301 announcement, the numerous legal reforms necessary for Belarus to undertake in order to meet its Trade Agreement obligations. There were no reports of any relevant or significant legal reforms or enforcement successes in Belarus in 2007.

Belarus is a member of all of the relevant IPR treaties, including the Berne Convention (1997), the WIPO Copyright Treaty (WCT) (2002), the WIPO Performances and Phonograms Treaty (WPPT) (2002), and the Geneva Phonograms Convention (2003). The long delay (until 2002) in joining a neighboring rights treaty (Geneva and WPPT) allowed a large back-catalog of unprotected sound recordings to flourish in the marketplace, making enforcement that much more difficult, even today.

IIPA and USTR have reported in the recent past on the troubling problem of optical media production facilities migrating into (and out of) Belarus from neighboring countries. We have no reports of any recent such cases. However, the failure of the Government of Belarus to properly police their borders, and to investigate and prosecute one such case (the Armita plant), only underscores the need for more effective regulation of optical media production and distribution, including criminal sanctions for violations.

IIPA continues to urge the Government of Belarus to improve its border enforcement — to prevent plants or equipment from Russia (or other neighboring countries) to relocate in Belarus, as well as to stop the importing and exporting of illegal optical media discs (CDs, DVDs, CD-ROMs, CD-Rs, etc.). IIPA is aware of one optical disc plant (opened in October 2004) in Belarus. The Vignoplast optical disc replication plant is operating near Minsk; it has two lines and an estimated plant capacity of 7 million discs a year. We understand that it was assigned a source identification (SID) code.

Legal Reform Deficiencies

In 1996 (in force, June 18, 1996), Belarus enacted a new law on copyright and neighboring rights; amendments were adopted in 1998. The 1998 amendments were intended to, among other things, partially implement the WIPO digital treaties (WCT and WPPT). To our knowledge, no further amendments have been adopted. The 1998 amendments to the Copyright Law added provisions relating to anti-circumvention devices and services, and the removal or alteration of rights management information (Article 39.5). The remedies for anti-circumvention and rights management information protection include injunctive relief, monetary damages, and seizure of devices. Criminal Code provisions

were adopted in 2000. The provisions (Article 201) include sanctions for up to five years imprisonment for repeat offenders of copyright and neighboring rights violations.

There are, however, a number of serious legal deficiencies that are preventing effective enforcement in Belarus. The IIPA recommends the following changes to the Belarusian legal regime:

- 1) Amendments to the Criminal Code to provide criminal penalties for first-time IPR violations. Currently, criminal penalties only apply for IPR violations after there has been an administrative violation and an exhaustion of administrative remedies.
- 2) Amendments to the Criminal Code to: (a) adopt a “significant amount of use criteria” calculated on the basis of the price of legitimate product, instead of the existing too high threshold based on “large-scale damage” for IPR crimes; and, (b) lowering the actual amount of the current threshold (in Art. 158) to commence liability, which is now BR12.1 million (US\$5,618).
- 3) Amendments to the Criminal Code (or Criminal Procedure Code) to permit the confiscation and destruction of manufacturing equipment used to produce pirated material.
- 4) Amendments to the Criminal Procedures Code to provide the proper *ex officio* authority for police officials to initiate copyright criminal cases and investigations.
- 5) Amendments to the Administrative Code to provide *ex officio* authority to administrative authorities to commence investigations and cases. At present, a statement from a rightholder is required to commence an administrative case. The administrative remedies are applicable for violations of copyright and neighboring rights, including acts of illegal retail sale and distribution.
- 6) Amendments to the Customs Code to grant the proper *ex officio* authority to border officials to seize illegal material and to commence their own investigations and criminal cases.
- 7) Amendments to the Civil Code to provide the proper *ex parte* search provisions for effective enforcement against end-user pirates.
- 8) Amendments to the Copyright Law (1998) to provide clear protection for pre-existing works and sound recordings. Belarusian officials have insisted that this protection already exists, at least for works (Article 42 of the 1996 law and Article 3 of the 1998 law make international treaties such as the Berne Convention self-executing in Belarus). While this may be a correct reading of the law, it should be clarified by statutory amendment or decree to avoid any confusion on the part of police, prosecutors, and judges tasked with enforcement of these rights.
- 9) Amendments to the Copyright Law (1998) to fully implement the WIPO digital treaties (WCT and WPPT). The current anti-circumvention and copyright management information provisions are not fully compatible with the WIPO digital treaties. In particular, the law needs to cover prohibitions on the manufacture, importation, sale, distribution, or other trafficking in devices or services that are aimed at circumventing technological protection measures, as well as outlawing acts of circumvention. In addition, rightholders need to be able to protect “copyright management information” that is attached to or accompanies a work or sound recording. Such provisions should protect against the alteration, removal or falsification of this information.

Enforcement

Under the Copyright Law (Article 40), civil penalties for copyright or neighboring rights violations include injunctive relief, damages (including lost profits), seizure and impoundment of infringing copies, as well as statutory penalties of between 10 and 50,000 times the minimum wage. Belarusian officials also point to the Civil Code (1999) as providing additional remedies for IPR violations.

In general, levels of piracy remain extremely high, and enforcement remains virtually nonexistent in Belarus. Several years ago, Belarusian officials reported that the Council of Ministers (an Inter-Ministerial Committee) had adopted a program for IPR protection focusing on legislative reforms (including copyright, patent and trademark laws), but there have been no further reports of any activity by this Committee. The government must adopt the numerous reforms recommended. In addition, the Government of Belarus needs to focus on enforcement: running raids and seizures, commencing criminal cases against commercial pirates, and using administrative remedies to curtail street piracy.

As Belarus moves to accede to the World Trade Organization, it must bring its laws into full compliance with the WTO TRIPS obligations by adopting the revisions noted above and by improving on-the-ground enforcement. IIPA continues to urge the government to take action against any known production facilities (reports persist of cassette piracy facilities) and to monitor optical disc production in particular (at the one known plant), using the criminal law remedies.

There are no comprehensive enforcement statistics for 2007; in 2004, the last year for which the government supplied statistics there were a reported 141 raids undertaken by local enforcement agencies. In recent years, the industries have reported a trend of an increase in the total number of raids, but unfortunately, the vast majority of these raids aimed only at small-scale retailers of illegal material. While these are helpful, they have little deterrent effect on the overall piracy problem. Plus, the administrative fines that are imposed, even against these retailers, are generally insignificant. We have no reports of the number of criminal cases initiated, or sentences imposed, if any, nor were there any statistics provided by the government (or industry) in 2007 of the number of border seizures or investigations.

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2008 SPECIAL 301 REPORT

BRAZIL

Special 301 Recommendation: IIPA recommends that Brazil remain on the Watch List in 2008.

EXECUTIVE SUMMARY

Brazil is one of the most important markets for the U.S. copyright industries, but its tremendous market potential is undermined by one of the highest piracy rates in the region. The copyright industries' overarching goals in Brazil, one of the largest commercial markets for copyrighted materials, remain: (1) reducing copyright piracy and (2) generating effective criminal enforcement. Achieving these twin goals will increase the sales of legitimate product and significantly increase the output of Brazil's cultural, educational and technical products.

Notwithstanding greatly enhanced government efforts and a continuing high level of cooperation between the government and rights holders, piracy for copyrighted materials remains very serious. This can be attributed to the problems of unsuccessful prosecution and the difficulty of concluding criminal copyright infringement cases. While IIPA and its members can report that Brazilian authorities have conducted a significant number of raids with accompanying seizures of pirated products, there has not been a corresponding drop in the availability of pirated goods in the Brazilian market. Although the copyright industries enjoy excellent relations within the National Council to Combat Piracy and Intellectual Property (CNCP), this entity was mostly dormant in 2007, holding only one meeting in August 2007 to seat new members. IIPA and its members have witnessed increasing cooperation between federal and state authorities, although the authorities should encourage states to coordinate more closely on operational matters. With respect to legislative matters, the Minister of Culture announced a series of conferences and hearings in the months ahead to discuss possible revisions of the 1998 copyright law, alleging that the current law offers uneven protection to artists and to those who commercialize their works. Incredibly, copyright rightsholders were not invited to participate in the first of these encounters, held in December 2007. It is imperative that rightsholders be able to participate and provide input in a transparent manner in any contemplated legislative review process.

PRIORITY ACTIONS IN 2008

Enforcement

- Achieve concrete results in the seven areas identified in the Bilateral Consultative Mechanism process, including: (1) increase anti-piracy raids in well-known marketplaces, (2) encourage the establishment and formation of joint state and municipal anti-piracy intellectual property rights (IPR) task forces which focus on priority locations, (3) take enforcement actions on the Brazil-Paraguay border, both on-land and on-water, (4) enhance deterrence through criminal prosecutions and the application of deterrent penalties, (5) continue work to implement the action items in the national plan developed by the CNCP, (6) pursue educational and media anti-piracy campaigns sponsored by the federal government, working with the private sector to raise public awareness of the anti-piracy fight, and (7) continue working with the industry through the CNCP.
- Establish more IP task forces, both at the state level and via the CNCP.
- Improve actions against Internet piracy. Include conducting *ex officio* actions on facilities that knowingly offer public access to unauthorized peer-to-peer programs and in particular with respect to those locations that facilitate or enable unauthorized transactions by providing the materials required for copying downloads—e.g. blank CD-Rs.
- Conduct effective enforcement against copyshops, located both inside and outside university campuses that make illegal copies of books and related teachers' notes that go beyond the bounds of the law. Also, engage university administrations in efforts to encourage the use of legitimate materials on campuses.

- Continue to encourage the establishment and formation of joint state and municipal anti-piracy IPR task forces, which focus on priority locations.
- Encourage authorities to take more prosecutions, including and especially, against recidivists.
- Create specialized IPR courts with copyright jurisdiction.
- Establish a reference price for imported blank media.
- Establish a national program to train judges, prosecutors, and police officers on IPR.

Legislation

- Work to develop and introduce comprehensive legislation aimed at providing and enhancing the tools and measures necessary to conduct effective copyright enforcement.
- Work with the State of São Paulo University to reverse its administrative rule, which allows widespread reprographic copying of portions of books by commercial, for-profit copy centers.
- Remove market access barriers, including high tariffs and taxes placed on entertainment software and consoles. Impose no new barriers (such as a theatrical window) on films.
- Adopt legislation to make unauthorized camcording of motion pictures in theatres a criminal offense.

BRAZIL										
Estimated Trade Losses Due to Copyright Piracy										
(in millions of U.S. dollars)										
and Levels of Piracy: 2003-2007¹										
INDUSTRY	2007		2006		2005		2004		2003	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Sound Recordings & Music Compositions	151.6	48%	176.5	40%	334.5	52%	343.5	52%	338.7	52%
Business Software ²	680.0	59%	574.0	60%	383.0	64%	359.0	64%	309.0	61%
Motion Pictures ³	NA	NA	NA	NA	101.0	22%	120.0	30%	120.0	30%
Entertainment Software ⁴	NA	91%	159.3	88%	120.8	77%	120.4	74%	125.7	56%
Books	18.0	NA	18.0	NA	18.0	NA	18.0	NA	14.0	NA
TOTALS	849.6		927.8		957.3		960.9		907.4	

On April 30, 2007, the U.S. Trade Representative (USTR) placed Brazil on the Special 301 Watch List, a laudable action which IIPA had requested in its 2007 301 filing. USTR also added an out-of-cycle-review for Brazil. IIPA provided comments to USTR in October 2007, recommending that Brazil remain on the Watch List.⁵ So far, no announcement regarding the results of that review has been issued by USTR. Brazil continues to be a beneficiary country under the U.S. trade program, the Generalized System of Preferences (GSP). According to data from the

¹ The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in Appendix B of in IIPA's 2008 Special 301 submission at www.iipa.com/pdf/2008spec301methodology.pdf. For more information regarding the history of Brazil under USTR's Special 301 review, see Appendix D at (<http://www.iipa.com/pdf/2008SPEC301USTRHISTORY.pdf>) and Appendix E at (<http://www.iipa.com/pdf/2008SPEC301HISTORICALSUMMARY.pdf>) of this submission.

² BSA's 2007 statistics are preliminary. They represent the U.S. software publishers' share of software piracy losses in Brazil, and follow the methodology compiled in the Fourth Annual BSA and IDC Global Software Piracy Study (May 2007), available at <http://w3.bsa.org/globalstudy/>. These figures cover, in addition to business applications software, computer applications such as operating systems, consumer applications such as PC gaming, personal finance, and reference software. BSA's 2006 piracy statistics were preliminary at the time of IIPA's February 12, 2007 Special 301 filing and were finalized in June 2007 (see <http://www.iipa.com/statistics.html>) as reflected above.

³ MPAA's trade losses and piracy levels for 2006 and 2007 are not available. MPAA did provide 2005 estimates for a select group of countries, using a new methodology that analyzed both physical/"hard goods" and Internet piracy. Details regarding MPAA's methodology for 2005 and prior years are found in Appendix B of this IIPA submission.

⁴ ESA's reported dollar figures reflect the value of pirate product present in the marketplace as distinguished from definitive industry "losses." See Appendix B.

⁵ See IIPA, Letter to USTR on the 2007 Special 301 Out-of-cycle Review of Brazil, October 15, 2007, available at <http://www.iipa.com/pdf/IIPABrazilIOCRCommentsFinal10152007.pdf>.

U.S. International Trade Commission, some \$3.1 billion in goods entered the U.S. under the GSP preferential duty code during the first eleven months of 2007.

THE BILATERAL CONSULTATIVE MECHANISM

The Brazilian and U.S. Governments have identified seven areas of action to be reviewed in the context of the Bilateral Consultative Mechanism. Many of the seven items are already included in the CNCP action plan, and all seven have the support of the copyright-based industries. IIPA and its members developed a collective view on the seven BCM measures on copyright and enforcement, which we repeat, in updated form, below:

(1) Increase anti-piracy raids in well-known marketplaces.

- IIPA and its members have shared (and published in prior 301 reports) lists of locations of well-known marketplaces, all of which require no investigation by the authorities. In fact, a national list with specific locations has been established and raids are conducted regularly, at least in São Paulo. The problem is that authorities need to identify recidivist violators and find a way to shut them down, either by using municipal codes against piracy or following the tax evasion route. IIPA members appreciated that several major piracy retail locations were shutdown in the past months. These included several locations on Paulista Avenue, one of the city's most important avenues, as well as "Stand Center", which was closed at the end of 2007 (in a coordinated action of the City of São Paulo, Civil Police, Municipal Police and Receita Federal) using municipal codes and tax evasion. These operations received substantial media coverage. Such efforts must be systematized, to curb retail piracy. This should include efforts to arrest street or "blanket" hawkers, and seize the tools of their trade (their stands, speakers, and other accessories).
- Raids should be done more frequently on weekends and between the hours of 5:00-7:00 pm daily, when the pedestrian traffic increases in the pirate markets.
- The underground metro in São Paulo, over the past year, has become a more attractive selling point since police rarely disturb the pirates at these locations.
- The Military Police should be involved in anti-piracy operations and patrols. There is no known mandate from the Military Police Hierarchy to the street patrolman to disband or chase away pirates.
- Target major flea markets also known as *camelodromos* whether outside the city of São Paulo (e.g. Campinas and Riberão Preto) or inside (e.g. Pinheiros.). Anti-piracy actions should also address warehouses and distributions sites.
- Expand the campaign to cover the growing Internet piracy problem affecting the recording and audio-visual industries. This part of the campaign should address illegal downloads by individuals, websites, and cybercafés.

(2) Encourage the establishment and formation of joint state and municipal anti-piracy IPR task forces which focus on priority locations.

- The industries are not aware of any visibly active IPR task forces that include state and local officials. In contrast, the federal authorities do work together with Receita Federal (Federal Revenue Service), the National Federal police and the Federal highway patrol.
- The federal authorities are hesitant to exchange information with state and local enforcement officials.

(3) Take enforcement actions at the Brazil-Paraguay border.

- Several raids have taken place, but more focus is needed on the *sacoleiro* traffic getting around the Federal Highway Police dragnet by utilizing state roads off the interstate BR-277.
- Receita Federal (Federal Revenue Service) has become more aggressive but they lack sufficient personnel in contentious areas such as Foz de Iguaçu. This same observation applies to the Federal Police in Foz.
- Dry land crossing between Paraguay and Brazil needs 24 hour-a-day/7 day-a-week coverage.
- There is a need to establish links between Financiers in major cities and *sacoleiro* networks in order to dismantle the organized crime organizations.
- The "dirty money" from the banking institutions and money exchange houses in the tri-border area, needs to be tracked. The Brazilian Federal Police and Receita Federal have this capability.
- There is a need to conduct river operations involving at least enough boats and personnel to discourage smuggling across the Parana River.

(4) Enhance deterrence through criminal prosecutions and the application of deterrent penalties.

- More long term investigations are needed utilizing the "Quadrilha" (organized crime) concept of prosecution of organizations by utilizing collateral statutes such as tax evasion, money laundering, fraud, and customs violations.

- Pursue major recidivists establishing a Priority Prosecution List or Priority Targeting list.

(5) Continue work to complete the action items in the national plan developed by the National Council to Combat Piracy and Intellectual Property Crimes (CNCP).

- It must be clarified specifically that the Brazilian Federal Police take the lead in multi-jurisdictional IPR investigations.
- CNCP should also begin to address the problem of Internet piracy

(6) Pursue educational and media anti-piracy campaigns sponsored by the federal government, working with the private sector to raise public awareness of the anti-piracy fight.

- The copyright industries have participated and supported this public awareness effort.
- Include education on intellectual property and the harms that intellectual property crimes cause authors and other creators of school curricula, particularly for younger school-aged children.

(7) Continue working with the industry through the CNCP.

- The copyright industries believe that strong leadership of the CNCP is necessary in order to continue and improve on concerted and concrete actions which are aimed at deterring piracy in Brazil.
- CNCP should establish timetables for the implementation of different actions under the action plan, as well as specific objectives to measure the impact and effectiveness of these actions on the level of piracy.

COPYRIGHT PIRACY IN BRAZIL

In addition to more traditional forms of piracy, which the copyright industries have been fighting for decades, piracy involving the Internet and other digital media presents more enforcement challenges that need to be addressed in order to expand opportunities for creators, whether Brazilian or foreign.

Internet Piracy in Brazil: There are an estimated 43.6 million Internet users in Brazil, about 24% of the country's population (according to Internetworldstats.com). Peer-to-peer (P2P) downloading at either homes or Internet cafés accounts for much of the piracy as does online auction listings. There are more than 1,200 Internet service providers (ISPs) competing for the consumer market. The latest survey done for the recording industry shows that 20% of all downloading is taking place in Internet cafés. The recording industry reports that Internet piracy, according to the IPSOS' survey, has grown from 1.1 billion units in 2006 to 1.7 billion units in 2007. This growth is consistent with the expansion of broadband connections in Brazil, which by mid-year 2007 had reached almost 7 million users. The recording industry reports that the Brazilian ISPs have not taken any action to curb P2P piracy despite requests for assistance. However, the ISPs do take down sites hosted on their servers that offer illegal files. This industry's first attempt to take action against major individual uploaders met a negative ruling. The judge, considering the recording industry's request to ISPs to identify the uploaders, decided that such an action would violate the individuals' privacy rights; the case is under appeal. With respect to videogames, the domestic enforcement program of the Entertainment Software Association (ESA) reports success in their actions against local websites and auction listings. During 2007, over 29,000 on-line announcements of pirated software products were removed from the Internet. ESA, working with the local software association ABES, reports that the level of cooperation between websites' ISPs and the game software industry is around 80%, while cooperation with auction sites' ISPs is 100% (more discussion on Internet enforcement appears below).

Optical Media Piracy: Replication of pirate optical discs in Brazil, whether on a large- or small-scale, such as the many CD burner operations scattered throughout Brazil, generally cuts across all the copyright industries. An estimated 600 million blank media discs (CD-Rs and DVD-Rs) enter Brazil each year from ports throughout the country. Paraguay continues to be a major source of these imports. Commerce along the tri-border area with Paraguay and Argentina is controlled by Arab and Chinese gangs, with the first controlling the distribution of piracy and the latter the importation of blank media. Also in São Paulo, several raids link Chinese groups to piracy activities.

Reports indicate that Brazil has as many as 13 optical disc plants, with 84 production lines and an output capacity of close to 300 million units. Most of these plants are believed to be operating legitimately and are not a significant source of pirated optical disc product. Many of the smaller duplicating facilities have been emboldened by the fact that even when the authorities have caught large-scale replication facilities in the act of pirating content on optical discs, there have been no meaningful prosecutions or actions. A related problem is the large-scale

distribution networks in Brazil. Whether these involve thousands of street vendors and established facilities (such as gas stations), which blanket the major highways in Brazil, or the non-established facilities in *camelodromos* or on the streets.

Entertainment software piracy: The Entertainment Software Association (ESA) and its members report that there are a multitude of sources for pirated game product in Brazil. Small local disc-burning operations source their “masters” (from which they burn copies) either from counterfeit imports or more frequently from downloads of versions of pirated games on the Internet. These labs are then plugged into distribution networks that channel the illegal product into the major shopping centers and the street vendors that populate many of the major cities in Brazil. Pirated CDs have been increasing in quantity in São Paulo, especially in the open flea markets. Despite the focus on border enforcement, there is still Asian-manufactured product flowing into Brazil from abroad, particularly Nintendo cartridges, and high-end counterfeit game discs. Online auction sites are increasingly becoming a source of local product for consumers, especially as broadband penetration in Brazil continues to grow. Better enforcement against purveyors of circumvention devices and services is also necessary. Piracy levels are at 91%, and for Nintendo products, piracy levels increased from 75% to 85%.

Business software piracy: The Business Software Alliance (BSA) reports no significant improvement in the business software piracy situation in Brazil last year; rather the success was keeping the piracy level constant. Piracy continues to include the following: illegal reproduction and duplication of software programs (both for commercial and non-commercial ends), illegal use by end-users, hard-disk loading of illegal software by computer resellers, and the manufacture and/or sale of counterfeit software products. One of the most alarming trends in recent years has been the increasing utilization of the Internet as a means of advertising illegal software to a large audience, and for the unauthorized electronic distribution of illegal software. BSA reports that preliminary estimated trade losses due to software piracy rose to \$680 million in 2007, with an estimated piracy rate remaining steady at approximately 59%. In 2006, the Brazilian Government significantly decreased taxes on computers, and as a result the local price of computer hardware dropped. This created a larger base of hardware that needed software applications. So although the overall level of piracy did not increase in the Brazilian market, estimated losses rose because there were more computers in the market. According to a 2008 report issued by BSA-IDC, the information technology sector’s contribution to the Brazilian economy could be even bigger if Brazil’s PC software piracy rate were to be lowered 10% over the next four years. This would create an additional 11,500 jobs, \$2.9 billion in local industry revenues, and \$389 million in additional tax revenues for federal, regional, and local governments.⁶

Piracy of sound recordings and musical compositions: Brazil is the second largest music market in the region. The industry has been working hard to combat Internet piracy, which is damaging new business development and keeping consumers out of record stores. In terms of physical piracy, most of the pirated audio products are locally burned CD-Rs. According to third party surveys requested by the local music industry group, the amount of physical pirate product being offered in the streets of Brazil has remained more or less steady at about 50 million units of burned CD-Rs and DVD-Rs. Piracy of music and sound recordings represents over 40% of all CD sales in Brazil; four of every ten music recordings sold in Brazil are pirate. The latest piracy survey shows a total number of 28 million pirated CDs being duplicated, which translates to trade losses that exceed \$151 million with an overall piracy rate of 48%. This represents a higher percentage of total units sold in the market because legitimate units suffered a drop of almost 35%. In addition, the official market statistics for the first 6 months of 2007 show a decrease of 50% compared to 2006; the legitimate market is likely to end up about one-third down for the full year 2007.

Audiovisual piracy: The Motion Picture Association (MPA) reports several forms of piracy harming its commercial businesses in Brazil: (1) optical disc piracy, (2) Internet piracy, (3) retail piracy, and (4) inadequate border measures to halt imports of infringing digital product. Although Internet piracy increased sharply last year, the most harmful form of piracy, audiovisual product piracy, still remains and continues to grow. The supply of infringing DVDs in streets/markets has increased, primarily because the pirate distribution channels formerly dedicated to the distribution and sale of CDs have shifted to DVDs due to the larger profit margins to be gained from selling pirate films. Most of the pirate audiovisual products are burned CD-Rs or DVD-Rs. As with CD-Rs, the vast majority of pirated DVD-Rs are locally reproduced in hundreds of facilities of varying sizes throughout the

⁶ The Economic Benefits of Reducing PC Software Piracy, commissioned by BSA and conducted independently by International Data Corporation (IDC), released January 22, 2008, looks at the bottom-line economic benefits of reducing piracy in 42 countries that together account for more than 90 percent of global IT spending in 2007. It is available online at <http://www.bsa.org/idcstudy>.

country. Internet hard good sales of pirated optical discs are increasing more rapidly as well, via two types of Internet-based piracy: (1) auction sites, with which the film industry enjoys cooperative relationships, resulting in the decrease of pirate DVDs supply through that channel and (2) download sites (such as cyber lockers, rapid share). The Brazilian home entertainment market is reaching maturity and the theatrical market has suffered because of piracy. The rental market decreased by 40% in 2007, mostly due to piracy. The Brazilian Video Union estimates that as many as 15,000 jobs may have been lost from the rental sector, due to the closure of some 3,000 rental stores in 2007. Of the nearly 10,000 video rental stores in Brazil, only 6,000 buy movies from MPA member companies. Unlike many other countries, there have been no incidents of camcording reported to date in Brazil, but the lag time in releasing movies in Brazil may lead to camcording becoming a problem in the near future.

Unauthorized photocopying and book piracy: The publishing industry reports that very little about the book piracy situation in Brazil changed in 2007. Unauthorized photocopying of entire textbooks, individual chapters, lessons and study materials continues to be the major form of book piracy. The Association of American Publishers (AAP) estimates losses to its members of \$18 million in 2007, and those losses are exponentially higher for local Brazilian publishers. Many universities tacitly or actively condone copying of *apostilas* (teachers' notes or folders), and anthologies made up of chapters from various books copied illegally, both in English and Portuguese. Some estimate that the annual number of unauthorized photocopies ranges from 3 to 5 billion pages. The Ministry of Education and the administrative bodies of universities and colleges should work with the enforcement authorities to make sure that a clear message is sent to those engaged in illegal photocopying, both on and off campus, that this activity will not be tolerated. The Associação Brasileira de Direitos Reprograficos (ABDR) has been working with authorities to conduct enforcement actions and plan for future endeavors.

Perhaps of greatest concern to academic publishers in Brazil is the continued influence of Resolution No. 5213/2005, an administrative rule implemented by the State of São Paulo University (USP) almost three years ago. This rule allows (1) reprographic copying of portions of books by commercial, for-profit copy centers and (2) copying of foreign works that are "not available in the Brazilian market" without a license. It appears that "not available" means in practice, that if a book is not written in Portuguese and is not for sale in the nearest bookstore, it qualifies under this resolution. The latter provision applies even to the copying of 100% of a work. This ruling presents several problems under international norms and must be revoked. For-profit entities should not be given *carte blanche* to copy works outside the normal bounds of international fair use. Furthermore, "not available in the Brazilian market" has not been defined, and industry reports that in practice this provision is being used to copy en masse all foreign works. State and national authorities (including the Ministry of Education) should step in to revoke this rule, or at a minimum revise it to comport with Brazil's international obligations under the WTO TRIPS Agreement. ABDR presented a formal request for revocation of this rule to USP, receiving a refusal on the basis that the rule is "constitutional" and grants access to education and knowledge. That is an unacceptable response and creates an increasingly untenable situation.

COPYRIGHT ENFORCEMENT IN BRAZIL

The copyright industries note that tangible progress continues to be made on improving copyright enforcement in Brazil. The Brazilian government has conducted numerous enforcement operations, through the federal, state and military police, especially at Foz de Iguacu, on the border between Brazil and Paraguay. Police raids have been relatively successful (depending on the jurisdiction). Conducting raids merely to confiscate products, without further prosecution, is not enough to deter piracy. Last year there was an uptick in the number of prosecutions that reached sentencing, but sadly these are still just a drop in a very big piracy bucket.

CNCP and industry cooperation: Copyright industry cooperation with the CNCP is excellent. The CNCP recently renewed, on August 21, 2007, the composition of its Council, including the participation of the private sector representatives. Because the leadership in the CNCP changed last year, there was a transitional period in which industry groups were concerned that there may have been a lack of direction by CNCP leadership. However, with the re-authorization of the CNCP members, the industries' concerns have been alleviated and it is expected that the CNCP will continue an aggressive anti-piracy program in 2008. However, recent CNCP meetings seem to be focusing primarily on educational and public awareness program planning. While such programs are indeed an important element of any national strategy, continued operational coordination, concrete actions, and leadership in legal reform, are needed.

Last year, the sound recording and motion picture industries combined their anti-piracy operations in the newly named APCM (*Associação Anti-pirateria de Cinema e Musica*). APCM's relationship with the federal authorities is very good. Enforcement results and cooperation vary at the state level by jurisdiction, but compared to 2006, the sound recording and film industries report improvement at the state level in 2007. State and local officials do conduct *ex officio* actions on a regular basis especially in São Paulo and Rio, but more actions are needed elsewhere. Federal authorities conduct border operations and more complex investigations. One thing that is still needed are more Specialized IPR units at both the state and local level. The current problems identified by APCM include: (a) the need for more high-level investigations against organized crime syndicates, (b) piracy is still regarded as a crime with "minor offensive potential" so that deterrence is missing, (c) the lack of coordination between federal and state authorities, pointing to the need to set up joint task forces, (d) the need for more enforcement personnel focused on the Paraná-Iguaçu river along the tri-border area, and (e) the need for federal authorities to establish a dedicated IPR section in the Federal Police and in Customs.

ABES, the local software association that represents the interests of both the business and entertainment software sectors, also has developed good relationships with the CNCP and local enforcement authorities. With respect to entertainment software piracy, ESA and ABES undertook a number of efforts to support anti-piracy actions and public awareness of entertainment game piracy in Brazil. These actions include: (a) supporting police search and seizure operations against retail centers, open-air markets and street sellers, (b) monitoring the Internet and requesting removal of announcements containing pirated products or websites that offer free illegal downloads, (c) conducting investigations targeting burning labs, importers, warehouses, or factory/replication facilities, (d) monitoring newspaper advertisements involving pirated products, (e) following-up and supporting issues and requests made by police, (f) preparing reports with all results related to the above actions, (g) participating in anti-piracy training programs directed to public agents from the Civil Police, Federal Police, Military Police, Experts, Municipal Guard, Federal and State Revenue, Road Federal Police, and the Municipal and Statewide Public Finance agents of each region, and (h) supporting the development of public awareness, training activities, and campaigns. Regarding business software piracy, BSA and ABES team up for mostly civil actions in the end-user arena and support *ex officio* criminal actions involving business software applications in retail actions. ABES, BSA and MPA also teamed up with American Chamber of Commerce in "Projeto Escola," an awareness-raising projects in schools started in 2007 and is expanding to more schools in 2008.

Police actions and investigations: The level of police attention to piracy varies throughout the country, but it is accurate to say that many raids are being conducted. There is still a lack of clear and specific instructions from the highest levels that would direct the various enforcement authorities (such as Receita Federal, Policia Federal, Policia Civil, Policia Militar, Policia Fazendaria, Alfandega) to act in cases of copyright infringement. Law enforcement must also be encouraged to undertake more in-depth investigations, including conducting surveillance on known pirate sites and in this manner, generate leads that could lead to the identification of the sources of infringing product. The police should also be encouraged to bring cases to prosecutors as raids and seizures are rarely followed by criminal prosecutions.

APCM reports that the following actions were taken in the January-December 19, 2007 timeframe on behalf of the sound recording and film industries: (a) 1,776 raids against labs, warehouses, and street operations, (b) the seizure of 2.9 million CD-Rs and 1.7 million DVDs, (c) the seizure of 14 million units of blank CD-Rs and DVD-Rs, and (d) the seizure of 7,900 CDR/DVD-R burners. Raids and seizures have significantly increased, and the authorities take *ex officio* actions. APCM reports 152 convictions were obtained last year in music and film cases. Federal officials have stepped up enforcement in the tri-border area but more enforcement is needed in the interior of the country. APCM notes that in terms of local efforts, it is concentrating more on getting federal officials to take a more pro-active role in IPR enforcement. Another tool APCM is considering using is civil actions against commercial landlords that allow piracy to continue in areas that are high volume pedestrian malls such as the "Stand Center" in São Paulo. APCM initiated a "Zero Tolerance Program" against piracy in the state of Santa Catarina with excellent results and obtained a commitment from both law enforcement and local politicians to maintain a sustained campaign in this area.

Major actions last year included raids in Londrina, the launch of the project "Blumenau–Piracy Free City", and the Nave IT case (the largest intelligence-driven case in Brazil against a major importer of blank discs operating in the tri-border area). To provide an illustration of the kinds of activities undertaken, in October 2007, Brazilian authorities conducted three major operations on behalf of the recording and audiovisual industries. (1) In October 2007, authorities in the city of Farroupilha, in the state of Rio Grande do Sul, seized approximately 1

million blank optical units, 200 burners and approximately US\$500,000 worth of computer notebooks destined to the various pirates markets of Brazil. The seized goods came from the border town of Rivera in Uruguay. Intelligence indicated that for the past year the Duty Free Markets located in Rivera have become the new wholesale outlet for suspected blank optical media and burners. Most of these goods are sent to Ciudad del Este in Paraguay. The Uruguayan Customs Service believes that so far this year approximately 35 million blank optical units have arrived at the Duty Free Markets in Rivera utilizing fraudulent documentation. (2) On October 15, Brazilian authorities intercepted three so-called tourist buses, coming from Ciudad de Este in Paraguay, on a major highway used for shipping pirated goods into the Tri-border area. They seized a total of 210,000 CD-Rs and DVD-Rs containing pirated music and movies, along with 185 burners and over 300,000 dollars in computer notebooks, and detained three people. APCM and IFPI (International Federation of the Phonographic Industry) Special Project operations in the tri-border area provided key information to conduct the operation. (3) On October 18, the Military Police executed 18 search warrants in the well known pirate market of Galeria Pagé, which is located in the heart of the city of São Paulo's major commercial district. A total of 105,000 DVDs and 18,300 CDRs were seized with illegal film and music products. This marks the third time in a year that Galeria Pagé was raided and APCM is researching the possibility of pursuing civil action against the owners of the market for permitting ongoing pirating activities.

With respect to Internet enforcement, APCM was able to persuade the federal authorities to take actions against cybercafes or LAN houses in an operation known as "I-Commerce." APCM also obtained a Memorandum of Understanding for the placement of DIGITAL FILE software (provided by IFPI that allows computer's users to identify illegal files stored on their own hard drives) from a major Cybercafe operator in São Paulo known as "Yesnet" after one successful raid. Yesnet has 32 franchises (31 in São Paulo, and one in Brasília, with plans to open nine more stores), over 59,000 clients per month, and some 700 computers. In addition, there have been two big Internet piracy operations in Brazil. (1) During the week of January 10-12, 2008, the Civil Police of the State of São Paulo conducted more than 335 raids on Internet cafés, also known locally as LAN Houses, throughout the state of São Paulo. APCM provided significant intelligence to make these raids successful. The continuation of these raids is a key element in the general anti-piracy campaign. These raids resulted in the seizure of 2,339 computers containing more than a million illegal music files. One arrest was made. A total of 600 police officers from 93 districts of the Special Operations division participated in the raids. (2) In October 2007, one of the most popular online destinations for pirated music had all its illegal links shutdown almost in tandem with the Argentine HUB as the Brazilian Internet Anti-piracy Unit (IAPU) managed to shutdown the illegitimate online music links on www.Opus666.com. This was one of the sites with the most links to illegitimate free music in Brazil, and was considered one of the most popular sites amongst Brazilian users. The Opus666 network of links accounted for approximately 4,500 links to illegal music, and provided access to approximately 2,000 full albums and pre-release content. Prior to being shut down, Opus666 was the tenth most popular site on Brazilian Google's search results for users seeking to download music. From now on, and as a result of the efforts of the Brazilian Industry and its Internet Anti-Piracy division, Opus666 will offer links exclusively to legitimate websites.

ABES reports that for the software industry, it conducted a total of 718 police search and seizure operations during 2007, and provided logistic support for law enforcement all over the country. As a result of these operations, more than 2.2 million units of pirated CDs/DVDs were seized. Additionally, ABES and ESA followed more than 600 criminal police actions and requests all over Brazil. Around 300 of these actions were taken by authorities *ex officio* and three people received sentences. With respect to online enforcement, ABES reports that over 29,200 on-line announcements of software pirate products were removed from the Internet. Also, 239 websites that offered pirated software products or pirated software files for download, were taken down.

ESA and ABES report the following 2007 positive actions involving game piracy: (1) On October 1, 2007 during a search and seizure operation accomplished with ABES logistic support, the Police Chief from the Specialized Delegateship requested an Expert from the Criminal Institute of São Paulo to follow the operation in order to certify the illegality of the software CDs during the raid. This action resulted in the imprisonment of the suspects. (2) Three notorious locations for retail piracy in the state of São Paulo were closed in December 2007 by a joint action of the Federal Police, Federal Revenue, Municipal Public Finance agents, and Military Police. "Stand Center", "Promocenter", and "Shopping Inter Paulista", all located on Paulista Avenue in São Paulo, have been closed since this action. (3) Cities are getting more involved in anti-piracy activities. Positive examples include the campaign in Blumenau city, located in Santa Catarina State. Also, municipal laws have been approved in São Paulo and Porto Alegre, and a Specialized IP Police Station was established in Recife in Pernambuco State.

Actions at the State and local levels: The relationships with State civil and military police vary, as does the level of local attention to anti-piracy efforts. The copyright industry strongly supports efforts by the CNCP and other government agencies to create task forces to focus on copyright anti-piracy efforts.

- The State of Rio de Janeiro created a special anti-piracy task force in mid-2002, and its Special Anti-Piracy precinct has been quite active. Nevertheless, this task force (which notably is state-funded and not a federal effort) is a small operation with personnel and financial resources far below what is required by the private sector, both copyright and trademark.
- The Governor of the State of São Paulo signed a decree in January 2006 creating an inter-secretarial committee to fight piracy.
- A few years ago, the state government of São Paulo created a specialized police unit for piracy cases, the DEIC, which is part of the Organized Crime Office. Unfortunately, DEIC's participation in anti-piracy actions has been far below the level expected by the industries, mainly because the DEIC has no capacity to conduct its own investigations and relies exclusively on the information provided by the private sector. While the Special IP units in the DEIC have been more cooperative recently, compared to prior years, these units still lack human and financial resources to be efficient and proactive.
- With the support of the APCM, which enlisted the support of police (civilian and military), the private sector, and local authorities, the municipality of Blumenau, in the state of Santa Catarina, declared itself "piracy free," and the mayor subsequently announced the creation of a municipal anti-piracy council to lead enforcement and educational initiatives to fight piracy.
- The municipality of Porto Alegre in Rio Grande do Sul has established a municipal anti-piracy entity.
- Other state-level anti-piracy efforts have arisen on an *ad hoc* basis, including police task forces in Goiás, Pernambuco, and Minas Gerais. The task force in Pernambuco has done some raids.
- The industries have identified the need to have anti-piracy task forces in additional cities/states such as Belo Horizonte, Salvador, Fortaleza, and Curitiba.

Very few criminal prosecutions are pursued: Prosecutorial attention to copyright offenses remains inconsistent, especially in the provinces. Copyright prosecution actions tend to concentrate in Rio de Janeiro and São Paulo, where there are specialized IP units. Enforcement efforts sometimes fail due to the lack of sufficiently skilled government agents to investigate violations and due to technical deficiencies in the handling and examination of evidence.

Non-deterrent penalties: APCM reports that convictions have increased more than 500% (criminal), obtaining 152 convictions for audiovisual and music piracy. Most convictions have been handed down in the states of São Paulo and Rio. To place this number in its proper context, it is important to realize that more than 80% of the convictions result in the minimum 2-year sentence, and that these sentences are usually suspended, and pirates rarely if ever serve time in prison. Brazilian legislation allows suspended sentences for first-time offenders, and the definition of first-time offender is so broad that only defendants whose cases have reached final judgment are termed repeat offenders. In other words, the Brazilian system remains far from achieving the necessary level of deterrent sentencing that would operate to significantly decrease the level of piracy in the market and to discourage criminals from engaging in these profitable criminal enterprises.

Civil actions, damages, delays and high bonds: BSA reports that its local work also involves good cooperation with the local enforcement authorities. With respect to end users, BSA has concentrated most of its efforts on bringing civil enforcement actions against companies. In 2007, BSA started 95 civil actions. However, there still exists a considerable business segment in Brazil that does not use legitimate or licensed business software. In civil infringement cases, where the business software industry has achieved some success, Brazilian courts continue to require extremely high expert fees and bond requirements, and there are lengthy delays. BSA continues to engage in civil judicial actions (search and seizure) against end-users promoted by the local industry association, ABES (note: ABES did pursue some criminal actions against distributors, but not end-users). The courts appoint experts who search premises and seize eventual illegal material. BSA focuses its anti-piracy activities in the following states: Rio Grande do Sul, Santa Catarina, Paraná, São Paulo, Rio de Janeiro, Minas Gerais, Espírito Santo, Bahia, Pernambuco, Ceará, Goiás, Mato Grosso do Sul, and the Distrito Federal (Brasília).

BSA reports that the main problem in civil actions remains the big backlog of cases in the judicial system and the several possibilities of appeal during a legal action, which result in actions taking up to 12 years to reach a

final decision.⁷ Cases usually take from 18 months to 4 years to come to trial. Due in large part to these unacceptable delays and the lack of attention of judges to copyright protection. However, these civil cases remain unresolved for long periods of time, as long as up to 12 years.

The Brazilian copyright law contains a pre-established damage provision, which is among the highest in the Americas. In recent years, the level of damages awarded in these software cases is unprecedented worldwide with respect to software copyright infringement suits. For example, in November 2007, the 3rd Civil Court of São Caetano do Sul (State of São Paulo) ordered the defendant to pay 100 times the price of the 42 illegal copies seized. This decision is still subject to appeals. Also, Brazilian courts continued in 2007 to require extremely high expert fees and bond requirements. In some BSA cases, bonds of US\$50,000 to US\$100,000 have been required and BSA had no option but to terminate the cases. On average, BSA has paid up to US\$5,000 for experts' fees and up to US\$25,000 as bonds. This situation has remained unchanged since 2005.

Delays in criminal cases: It still takes three to four years for a criminal case in Brazil to reach the sentencing phase. There has been no significant improvement in this situation during 2007. The police often keep the case files in their offices for seven or eight months before sending them to the prosecutor's office to file the criminal case. One major problem has been the lack of manpower and resources in the police expert facilities, which must examine the illegal products seized in raids and verify the illegality of the seized product before the case can advance. As most pirated products in Brazil are low-quality copies, the process of identifying and verifying the vast majority of these seized products as illegal, is not difficult and does not require highly trained experts. Thus, a fairly low cost solution in increasing the manpower of these facilities would do much to clear out this bottleneck. Delays in criminal copyright infringement cases can extend as long as two to three years in the courts of first instance, and usually longer.

One major problem in the anti-piracy actions in Brazil, is that police authorities have no dateline by which to complete their investigations and deliver the results to the prosecutor. The result is that cases can languish in police precincts for years. This leads to a tremendous backlog of cases in the Brazilian courts. One solution often proposed to address the problem has been the creation of a specialized court for copyright matters (see discussion, below). Two possible solutions may alleviate the situation: (a) The appointment of specialized IPR experts at the "Instituto de Criminalística" (CSI Institute of Brazil) that can dedicate full time to the piracy cases; and (b) an amendment to the penal procedures code to establish a term for the police investigations.

Border enforcement: The Brazilian Government improved its efforts to combat the importation of piratical and counterfeit materials. Customs authorities have been very active not only at the border of Paraguay where the seizures of blank optical discs increased significantly, but also in ports like Santos and Paranaguá. Various agencies have been involved in intercepting and seizing shipments full of pirated and counterfeit product. For years, the copyright industries have recommended that controls at the major transshipment points be strengthened, and we are pleased that improvement continues. Border enforcement will continue to be enhanced if Brazilian authorities can better coordinate with their Paraguayan counterparts in exchanging intelligence and coordinating enforcement efforts. The nature of enforcement measures employed by the border authorities need much improvement so as to better address the influx of pirated products, particularly at the Paraguay border. Although much of the music and audiovisual piracy has turned to domestic production, infringing copies of entertainment software (both in silver disc and cartridge format) and misdeclared and infringing blank CD-Rs, continue to enter as infringing imports. An estimated 600 million units of blank media entered Brazil in 2007.

There was no visible or effective improvement in the level of Customs activities to halt the flow of pirated entertainment software products, particularly of counterfeit Nintendo cartridge-based products, into the country. Customs enforcement would also be much enhanced if cases of interdiction were referred to the appropriate authorities for criminal prosecution.

⁷ BSA reports that the Brazilian Government enacted three pieces of legislation since the broader judicial reform project was approved in December 2004. It is hoped that these new efforts will help make the judicial process more efficient. The three changes included: (1) Binding Superior Decisions (Súmula Vinculante) – the Supreme Federal Court will organize the activity and put an end to thousands of identical actions. Courts will no longer discuss issues that were previously and repeatedly examined and decided; (2) Extraordinary appeals (*recursos extraordinários*) will be filtered in order to allow only cases which are considered important to the development of the country. The system currently has approximately 100,000 extraordinary appeals per year, causing a huge backlog of cases for the Supreme Federal Court to analyze; and (3) Electronic courts – bureaucracy is a big bottleneck in Brazilian litigation. The target is to abolish paper and physical files, which should be available for consultation by all interested parties. It is still early to see if this trio of systemic reforms will reduce the courts' backlog.

The software industry continues to be concerned about the increasing illegal importation of computer hardware parts and components, which are then assembled into computers and frequently loaded by system builders and assemblers with illegal software. Much of this contraband hardware arrives in Paraguay, and then enters into Brazil, Argentina, and Uruguay. Stronger border measures and much better border enforcement are necessary to combat this practice.

COPYRIGHT LAW IN BRAZIL

The Brazilian government held a conference on December 5, 2007, to launch its National Forum on Copyright. There, government officials outlined several key actions anticipated for 2008, and the Minister of Culture highlighted two initiatives: (1) The creation of a National Copyright Agency, and (2) a revision of the 1998 Copyright Law, specifically a proposal to present an entirely new bill to Congress later in 2008 or in 2009. During this year, the Ministry will hold six seminars (five national and one international) to discuss issues in order to prepare the text of possible new copyright legislation. As noted above, transparency is key and if such a legislative initiative is undertaken, the content industries must be able to participate.

Current Legislation

1998 Copyright Law and 1998 Software Law: The Brazilian Government unfortunately continues to refuse to ratify the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT), despite the fact that its copyright law is quite comprehensive and the Brazilian creative community relies on copyright protection to reach the global market.⁸ As a statutory matter, Brazil has already implemented its substantive copyright obligations compliant with, and even beyond, those required by the TRIPS Agreement. These include protection for temporary copies, and pre-established statutory damages. Brazil already affords a term of life plus 70 years for works and 70 years following first publication for sound recordings and audiovisual works. Gaps do remain in the current law, however. For example, although the act provides remedies against the removal or alteration of technical devices incorporated into works to protect against copying, there is currently no prohibition against circumvention devices or trafficking in such devices or circumvention services. Additional measures are needed to clarify the liability of ISPs in the online environment.

Tax Evasion in Software Law: A “fiscal crime” provision was inserted into the 1998 Software Law, with the approval of the software industry. Under that law, tax evasion that frequently characterizes acts of software piracy can be pursued by the tax authorities as a public action, independent of BSA’s civil actions against software piracy. BSA was hopeful that this type of tax evasion case would have a significant impact on lowering software piracy in Brazil, especially by medium-sized and large companies. No improvements were reported in 2007. It seems clear that the Receita Federal and the respective state tax authorities are not dedicating any resources to pursuing these tax evasion cases.

Gaps in the Criminal Code (2003): On July 1, 2003, the Brazilian criminal code was amended to increase criminal sanctions for copyright infringement and amend certain procedures. Effective August 1, 2003, Law 10695 amended Article 184 of the Criminal Code by raising the minimum penalty from one year to two years in prison for persons convicted of illegally reproducing, distributing, renting, selling, acquiring, smuggling into the country, or storing protected copyright works with the intent to profit from reproductions. A fine will also apply in addition to the prison sentence.⁹ This is significant because penalties of one year or less of jail time, at the state level, could be commuted to a fine, or a judge could suspend a case indefinitely (Law 9099.95). The maximum penalty of four years’ imprisonment will apply if the violation involves supplying unauthorized works to the public via cable, optic fiber, satellite, airwaves or any other method of transmission for a profit. Those persons infringing copyright without intent to profit, are subject to a detention of three months to one year or a fine. The amendment affecting experts’

⁸ Brazil also has implemented at least some of the provisions of the two WIPO Internet treaties, such as civil sanctions against circumvention of technological protection measures and removal or alteration of electronic rights management information. On the other hand, Brazilian law does not establish ISP liability and notice and takedown procedures, and criminal sanctions for circumvention of technological protection measures and removal or alteration of electronic rights management information. The Copyright Law also needs to be amended to provide a comprehensive right of “making available.”

⁹ The law changes the “unit” of fines and bonds from “daily salary” units to “monthly minimum wage” units. In other words, the minimum fine or bond is now 240 Reais (US\$114) instead of 1/30th of that amount. The judge sets the fine/bond, not the law. The maximum penalty continues to be four years in jail.

determinations is also positive in that it allows a single private party with technical knowledge to make a determination; such a determination, therefore, could be made by an industry expert.¹⁰ The 2003 amendments also codify procedures to seize and destroy contraband and provide judges the authority to dispose of seized equipment in a way that ensures it will not be used for commercial purposes. However, effectiveness of the amendment in practice has been diluted because defendants always gets alternative sanctions such as community service and minor fines instead of jail-time convictions.

The business and entertainment software industries remain very concerned, however, because these 2003 criminal code amendments fail to increase sanctions for the infringement of computer programs. The one-year sanction for computer software infringement, still appears in the separate 1998 Software Law, unchanged by the amendments to the criminal code. This means that the procedural provisions regarding the expert reports and the custodial aspects of evidence in the criminal code can be used by the software industry. However, because the minimum penalty of the separate software law (one year) has remained unchanged, criminal infringement cases brought by the software industry will still be subject to automatic suspension under Law 9099.95, hence the need to amend the legislative to raise penalties.

Proposed Legislation

CNCP package: In early 2006, the CNCP's Legislative Working Group prepared a legislative package that aimed at incorporating many of the then-pending anti-piracy bills as well as proposing some new amendments to strengthen IP protection in Brazil. This legislative package was introduced into the Senate in 2006 but did not progress, and was removed from the docket in January 2007.

Ministry of Education proposal: A second legislative package, developed by a Brazilian IP group (ABDI), has been presented to the Ministry of Education. A public hearing was held on the bill in September 2007, but there has not been further movement and the bill has not yet been formally presented to the full Senate. Local reports indicate that its contents are very similar to those proposed in the now defunct CNCP bill (above). Proposals would amend various laws, including the criminal code, and addresses the following issues. For example, it would:

- Increase the minimum sentences so as to prevent alternative sentencing;
- Permit the preparation of technical reports to accompany pirate samples;
- Permit *ex officio* measures to extend to all copyright infringements;
- Penalize the provision of raw materials in furtherance of infringing activities;
- Empower judges to order the destruction of infringing products before a final decision;
- Establish minimum statutory damages equivalent to the value in the market of 3,000 legitimate copies in copyright piracy cases.

APCM (the recording and audiovisual industry group) have proposed the addition of several additional tools: (a) an anti-camcording provision, (b) the elimination of the requirement that a profit be realized in order for the act to constitute a crime, (c) sanctions for the circumvention of technological protection measures and rights management information, and (d) criminal penalties for television signals

BSA also recommends that additional elements (which appeared in proposed legislation in prior years which has fallen off the dockets¹¹) should be included in any comprehensive package, such as: (a) increasing the minimum sentencing for software infringements in the Software Law, (b) easing forensic review of all suspected infringing products seized so as to permit sampling, (c) permitting rights holders the ability to serve as depository to

¹⁰ The 2003 amendment was helpful in three additional ways: (1) It requires the judge to assign custody of the evidence to the injured party—in the past, judges have turned evidence over to suspects who have in turn altered the evidence in ways prejudicial to copyright owners' cases; (2) police are more inclined to view piracy as a serious crime worth their time; and (3) suspects apprehended by police are now held until released by a judge, costing the suspect at least time, a bond and perhaps attorney fees.

¹¹ Two bills which were particularly important to the software industry fell off the legislative docket in 2007: (1) Bill Number 3964/2004 proposed to amend Articles 184 and 186 of the Criminal Code (as well as corresponding provisions to the Criminal Procedure Code) and the first and third paragraphs of the Software Law, in order to increase imposable sentences for piracy, and also some provisions of the criminal procedure code which would increase sentencing from a minimum of two years, to two years and two months. This change was significant because the higher jail time sanction will remove alternative and lesser sanctions such as community service. (2) Bill Number 3965/2004 proposed to increase the penalties in the Software Law from confinement from one to four years and fine to confinement from two years and two months to four years and a fine. It also detailed additional actions involving computer programs which would subject defendants to sanctions.

warehouse/store seized materials, pending litigation/prosecution, and (d) simplifying the documents that record seizures (current documents are unnecessarily complex and detailed).

Due to procedural impediments unrelated to the content of the draft bill, no sponsor has yet been named but this will likely occur in 2008. As noted above, additional elements should be inserted so as to correct legislative gaps and strengthen existing measures.

Anti-Camcording Legislation: This legislation is necessary to facilitate enforcement and prosecution of unauthorized camcording, an amendment to the Penal Code is needed to include an anti-camcording provision. Camcording should be considered a felony, with jail sentences, preferably up to a year or longer for the first offense, and a higher penalty for any subsequent offense. Unfortunately, the CNCP has proven unable to provide political support for including this element in its comprehensive package

Copyright bill regarding student copying: Bill No. 131/06 was presented in the Senate and would establish that a copy of any work by a student has to be limited to 25% of that work. Upon last information, the bill was under review by the Constitutional Commission of the Senate. Separately, Bill No. 5046/2005 would modify Article 46 of the Copyright Law. This bill, which seems to grant overbroad privileges to university students to make copies of entire works as long as those copies are not directly for commercial use, was under review by the Constitutional Commission of the House of Representatives. IIPA has not received up-to-date information on the status of these bills, but they should be monitored, as any move to take them forward no doubt place Brazil in violation of international copyright mandates.

Specialized IPR courts with copyright jurisdiction: Informal reports suggest that the CNCP has been holding meetings with judges to discuss the creation of specialized IP courts. The Industrial Property Law (Law No. 9279, which entered into effect in May 1997) authorized the judiciary to create specialized IPR courts. The copyright industries and other interested parties are working with appropriate judicial officials to prepare for the formation of these courts, which would significantly improve intellectual property rights enforcement. However, no specific action has yet been taken to create these courts. Consideration of this remedy to help ameliorate the sorry state of anti-piracy enforcement, would be welcomed.

ADDITIONAL ISSUES

Declared prices on blank media: To make it easier to intercept mislabeled blank media imports—a key raw material for the manufacture of pirate products—it is critical that the Brazilian Government adopt a minimum declared price for blank media that corresponds to its real market price. Despite many efforts by the recording industry that include providing reference prices from other countries including Paraguay, which has adopted a minimum declared price for blank media, and minimum manufacturing costs for CD-Rs, Brazilian authorities have not yet established such a minimum price. This issue is not included in the CNCP Action Plan and should be.

Government software asset management: The Brazilian Government should be encouraged to continue its efforts to implement effective software asset management practices in its public ministries and agencies. This will allow it to not only ensure all of its software is licensed, but also help it make the most of its investments in information technology. Good software asset management practices can best be achieved through active public-private sector partnership. The Government should work closely with the private sector in this regard.

High tariffs and barriers on entertainment software: High tariffs and taxes plague the entertainment software industry and serve as a significant barrier to market entry as these additional costs translate to higher prices for legitimate goods in the market. For the entertainment software industry, the major tax problem relates to internal taxation within Brazil.¹² First, the state of São Paulo (which represents about 50% of the Brazilian market for this product) treats entertainment software as merchandise, which has a higher tax rate and raises the price of the

¹² ESA indicates that its members report that tariffs range from 17.5% to 20% on video game products and video game software. Additional taxes are also imposed on entertainment software products, and include: (1) a federal industrial products tax of 50% of the value (i.e., cost, insurance and freight [CFI]) of the article; (2) a miscellaneous tax of 1%; (3) so-called social security taxes at a combined percentage of 9.25%; and 4) a value-added tax of 17% or 18% imposed by state governments. These tariffs and taxes are imposed cumulatively, and as such, the actual cost to the consumer for a legitimate entertainment software product is three times the cost of a counterfeit product. Obviously, these costs are not borne by pirate operations that smuggle counterfeit and pirated products into the country.

legitimate product drastically. Second, entertainment consoles have a very high tax rate (about 50% of the value of the product), which poses quite a market access barrier. Brazil's taxes on videogame products are the highest in the hemisphere, and serve as an impediment to the ability of legitimate companies to develop a market presence and provide consumers with reasonably priced legitimate products, and thereby be able to compete against pirates. The high tariffs and taxes have contributed to the slow entry of console manufacturers into the market, and also contribute to the flood of grey market, pre-modified consoles and pirated software into Brazil. This matter needs to be adequately addressed by the Brazilian Government so that the purveyors of pirated products do not continue to thrive at the expense of legitimate businesses.

Digital TV: Administration officials send ambiguous messages on the government's commitment to addressing piracy. In 2006, Brazil chose the ISDB-T standard for the Brazilian digital terrestrial TV system. However, Brazil has not yet announced which system it will adopt to protect digital TV content. The Administration is currently split over whether to include copy protection mechanisms in the specifications for digital TV broadcasts. The decision is expected to be made by President Lula da Silva, perhaps after the digital TV transmission roll-out date of December 2007.

Possible legislative release of theatrical "windows": ANCINE (National Film Agency) has stated that it will likely issue regulations on release windows, specifically on the period of time between theatrical and home entertainment releases. MPA strongly opposes this measure which, if implemented, would limit the ability of audiovisual businesses, including MPA member companies, to make business decisions based on market conditions.

Foreign ownership restriction bills on audiovisual sector: Five bills were presented in the Lower House and in the Senate and seek limitations on foreign capital participation, in varying proportions, in Brazilian companies that produce national audiovisual content, in pay-TV programmers and operators, and in Internet service providers and telecoms which distribute local content. MPA is actively involved in an attempt to defeat these initiatives with industry partners. These bills would not only harm foreign entities, but also impair the continued growth of the Brazilian audiovisual industry as a whole. All are in the early stages of consideration, but the threat for passage by year's end has been reassessed as moderate to high. This is an important issue that MPA, along with sector allies, is engaged in opposing.

IPR TRAINING AND PUBLIC AWARENESS

There have been extensive copyright- and enforcement-related trainings in Brazil. The copyright industries (primarily the film, music and recording, business software, entertainment software, and book publishing groups), on their own initiative as well as working with the CNCP and other business groups, conduct numerous trainings, seminars and workshops with Brazilian enforcement officials, at the national, regional, and state levels. In addition, each of these groups provide training and seminars for police and customs officers in many states. For example, in October 2007, ABES/ESA/BSA, in partnership with the CNCP and APCM started the second season of the "Road Show," a National Anti-piracy Training Program that will visit 22 cities until the end of April 2008. The trainings are directed to public agents from each region, including: Civil Police, Federal Police, Military Police, Experts, Municipal Guard, Federal and State Revenue, Road Federal Police, and the Municipal and Statewide Public Finance agents. Besides the identification of pirated material, the legal aspects of the crime of violation of copyrights are mentioned. As a consequence of these programs, the relationships between these industry associations and the local and federal enforcement authorities is quite good. The first season of the Road Show started in October 2006 and finished in May 2007.

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2008 SPECIAL 301 REPORT

BRUNEI DARUSSALAM

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

EXECUTIVE SUMMARY

While having one of the highest per capita incomes of any country in the developing world (purchasing power parity \$25,600 as of 2005),¹ piracy still dominates the small country. The music piracy rate stands at approximately 99%, while the home video piracy rate has been 90-95%, meaning almost all copyright product sold in the markets is illegal. Both factory optical discs and “burned” CD-Rs are readily available throughout the country. Of great concern, pirates in Brunei now produce discs for export, transported by road to Sarawak, Malaysia (on the island of Borneo). Brunei boasts Internet penetration of 47%, thus, the problem of Internet piracy may loom on the near horizon.

PRIORITY ACTIONS FOR 2008

- Have Commercial Crime Unit (CCU) commence sweep of the pirate retail market, including *ex officio* and *ex parte*, and develop responsive core of officers to industry concerns and complaints lodged by right holders.
- Have Attorney General’s chambers, in conjunction with CCU and Police, develop target cases for court, including targeting most commercially damaging pirate activity.
- Amend Electronic Transactions Order (2000) to provide adequate incentives for service providers to cooperate with right holders in upholding their rights in the online and digital environments, including notice-and-takedown, and preserving liability should third parties fail to cooperate with right holders or otherwise facilitate infringement.

Based on data available to industry, trade losses to the recording industry in 2007, due to copyright piracy in Brunei, are estimated at roughly US\$150,000.

PIRACY AND ENFORCEMENT UPDATES IN BRUNEI

Pirated optical discs containing music are openly offered for sale in retail outlets (46 retail outlets have previously been identified selling pirated audio products). Local (Malay) and international repertoire are widely available in the music stores in Brunei, and as a result, local record companies in Brunei report no revenue – a completely lost market due to piracy and lack of enforcement.

It is estimated that there are between 75 and 200 retail shops selling pirated optical disc media in fixed locations throughout Brunei. The largest are clustered primarily in the capital, Bandar Seri Begawan, and its metropolitan area. Pirate DVD-Rs and VCDs are locally “burned” on recordable discs. Certain titles have been offered in the same shop in three different formats: cellophane sleeved CD-Rs for B\$3 (approximately US\$1.80), boxed DVD-5s offered for B\$8 (approximately US\$4.90) and high-quality deluxe packaged DVD-9s for B\$20 (approximately US\$12). Compression technologies have resulted in two-title (2-on-1), three-title (3-on-1), or even four-title (4-on-1) DVD compilations becoming more common.

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

Brunei boasts Internet penetration of 47%, as 176,000 of its nearly 375,000 inhabitants now have Internet access (a nearly 500% growth rate over the past seven years),² and 15,347 separate Internet hosts (2007 data).³ Thus, the problem of Internet piracy may loom on the near horizon.

While Brunei has an adequate copyright law for enforcement purposes (see below), the government's resources are limited, as there have been only seven officers in the CCU for all of Brunei. There is virtually no enforcement, and little political willingness in Brunei to conduct enforcement actions, despite the fact that the Police can technically take actions *ex officio* as well as *ex parte* under the law.⁴ However, despite assurances of support, the Bruneian authorities have shown reluctance to undertake criminal enforcement actions even when complaints have been made. After extensive liaison with the Police and Attorney-General's Office throughout 2005, coordinated efforts by the motion picture and recorded music industries to undertake joint raids against identified targets were effectively compromised by unduly excessive delays and the suspected leak of information to the targets, all of whom were either closed or cleared of pirate product by the time the warrants were put into effect.

COPYRIGHT LAW AND RELATED ISSUES

Copyright Ordinance: The Emergency Copyright Ordinance (2000), modeled on the 1988 UK Act, took effect May 2000, and addresses key WCT/WPPT issues (e.g., it provides protection for temporary copies, a WIPO treaties-compatible definition of "communication to the public" including the "making available" right, and prohibitions against trafficking in circumvention devices which partially, but not fully, implements the WCT and WPPT requirements). The enforcement provisions, while not perfect, are adequate to combat copyright piracy, including civil and criminal remedies and the confiscation and destruction of infringing equipment and materials. Brunei has a content review law administered by the Board of Review which empowers the Board with *ex officio* authority to impose severe penalties against guilty offenders; however, the law is presently limited to films (and other works/performances) that are intended for public exhibition and does not presently extend to home video products.

Electronic Transactions Ordinance: Unfortunately, the Electronic Transactions Order, 2000 provides a near-total exemption from civil or criminal liability for a service provider that provides infringing materials over its services. Under Section 10 of the Order, "A network service provider shall not be subject to any civil or criminal liability under any rule of law in respect of third-party material in the form of electronic records to which he merely provides access if such liability is founded on ... the infringement of any rights subsisting in or in relation to such material." Section 10 leaves open the possibility of a contractual arrangement to take down infringing materials, or a "written law or by a court to remove, block or deny access to any material." While the Internet is still in its relative infancy in Brunei (broadband penetration in Brunei remains relatively low, with the Authority for Info-communications Technology Industry, AiTi, reporting that as of June 30, 2007, there were only 11,181 broadband Internet connections), the Order does not create adequate incentives for service providers to cooperate with right holders in upholding their digital rights. The Order should be amended to provide notice-and-takedown.

"P-4" Negotiation: On February 4, 2008, USTR announced that the United States would join negotiations on two sectoral areas (investment and financial services) in March 2008 among Singapore, Chile, New Zealand, and Brunei, known as the "P-4" group of countries. The United States also

² See Internet World Stats, at <http://www.internetworldstats.com/stats3.htm>. These statistics are up-to-date as of November 30, 2007, are based on Census Bureau data, while usage numbers come from various sources, mainly from data published by Nielsen/NetRatings, ITU, and other trustworthy sources.

³ See *supra* note 1.

⁴ There have been instances in which industry has tried but been thwarted in achieving positive enforcement action from the Bruneian authorities. Industry representatives have repeatedly been assured that raids could be taken *ex officio* and on an *ex parte* basis (without notice to the defendant), however, on certain occasions, it turned out the Police would not act without the laying of a complaint, and uncertainty expressed by authorities about whether raids can be taken on an *ex parte* basis, and delays and mistakes in warrants have led to unsuccessful actions (i.e., leaks occurred, and product had been cleared from the shelves before investigators arrived). These examples demonstrate a general lack of understanding about the laws and will on the part of Police to run successful enforcement in Brunei.

announced that it would “begin a detailed exploratory process to determine whether it should participate in the full Trans-Pacific Strategic Economic Partnership.” If it does so, opportunities will arise to introduce intellectual property standards similar to those included in the various free trade agreements (FTAs) entered into between the United States and several trading partners, including Singapore and Chile. IIPA supports this process, and hopes that the government of Brunei (as well as that of New Zealand) will be prepared to negotiate FTA standards on intellectual property (similar to those in force in Singapore and Chile). IIPA expects that the IPR texts in these agreements will follow the high standards already in place in the FTAs negotiated to date.

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2008 SPECIAL 301 REPORT

DOMINICAN REPUBLIC

Special 301 Recommendation: IIPA recommends that the Dominican Republic remain on the Watch List in 2008.

EXECUTIVE SUMMARY

IIPA applauds the March 1, 2007, entry into force in the Dominican Republic of the Central American-U.S.-Dominican Republic Free Trade Agreement (DR-CAFTA). IIPA and its members acknowledge the progress made to date in recent years on copyright legislative reform, but must call attention to the continuing difficulties involving effective enforcement in this market. Copyright piracy rates remain high across all sectors in the Dominican Republic. Piracy of recorded music on the streets is prevalent and the widespread “burning” of compact discs containing infringing copyrighted materials is reported. The criminal and administrative enforcement agencies lack the sufficient resources required to take action to enforce the law. The continued poor communication and cooperation between the administrative agency (ONDA) and the police and prosecutors on cases involving music piracy continued, and this undercut the possibility of any effective enforcement for this sector. The judicial system remains overloaded, despite criminal code reform a few years ago aimed at providing streamlined processes. On a positive note, the business software industry appreciates the adoption of a software legalization decree (as required by CAFTA-DR), and looks forward to its effective implementation.

PRIORITY ACTIONS IN 2008

Enforcement

- Have the enforcement agencies (including the *Fiscalía* (police), ONDA and INDOTEL) conduct more regular and sustained actions, followed by prompt criminal prosecutions.
- Improve interagency communication and cooperation between ONDA and the Attorney General's Office.
- Implement the new software legalization decree.
- Assign a squad of investigative law enforcement officers to follow up on the cases after ONDA or the *Fiscalía* has conducted a raid.
- Provide technical assistance and training to the IPR department in *Fiscalía* of Santo Domingo, Santiago, and the National District in order to strengthen its ability to investigate, file and prosecute IPR cases.
- Dedicate more resources and training to ONDA, including, but not limited to, more inspectors, more equipment, and expanding ONDA to include satellite offices.
- Support ONDA's use of penalties under their regulations to fine and close down retail outlets where infringing actions have been identified or infringing products seized.
- Continue regular inspections of broadcast television stations and cable systems, and follow up with criminal and administrative actions.
- Expedite prosecutions and judicial decisions in criminal cases.
- Improve training of judges, prosecutors and police on copyright matters in order to ensure proper implementation of the Criminal Procedure Code (2004), which also included *ex officio* authorizations of raids, inspections and closures of illegal activities.
- Instruct ONDA to support the efforts of music collecting societies to collect performance rights.

IIPA and its members support the IPR chapter of the DR-CAFTA,¹ and the agreement entered into force between the Dominican Republic and the U.S. on March 1, 2007.² For many years, IIPA and its members have been working in the Dominican Republic to improve on-the-ground copyright enforcement which is critical to reducing the high levels of piracy in this country.³

DOMINICAN REPUBLIC Estimated Trade Losses Due to Copyright Piracy (in millions of U.S. dollars) and Levels of Piracy: 2003-2007⁴										
INDUSTRY	2007		2006		2005		2004		2003	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Sound Recordings & Musical Compositions ⁵	NA	NA	9.9	65%	10.8	75%	10.3	75%	9.9	65%
Business Software ⁶	12.0	79%	11.0	79%	5.0	77%	2.0	77%	3.0	76%
Motion Pictures ⁷	NA	NA	NA	NA	3.0	89%	2.0	20%	2.0	20%
Entertainment Software	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA
Books	NA	NA	1.0	NA	1.0	NA	1.0	NA	1.0	NA
TOTALS	12.0		21.9		19.8		15.3		15.9	

The Dominican Republic is still a beneficiary of several U.S. trade programs which contain IPR standards, including the Generalized System of Preferences (GSP) and the Caribbean Basin Initiative.⁸ Now that the DR-CAFTA is in force, these trade benefits will be phased out in favor of the lower tariff rates established in that regional agreement.

COPYRIGHT PIRACY IN THE DOMINICAN REPUBLIC

Internet piracy: Informal industry reports indicate that Internet-based piracy appears to be growing in the Dominican Republic. The Internet is used in many ways, including the promotion and/or sales of illegal hard copies of copyrighted materials as well as the unauthorized uploading and downloading of copyrighted materials from websites. There are approximately 1.2 million Internet users in this country, representing about 16% of the population (according to internetworldstats.com).

¹ IIPA Press Release, "IIPA applauds the signing of the U.S.-Central American-Dominican Republic FTA," Aug. 2, 2005, at <http://www.iipa.com/pdf/IIPA%20CAFTA%20DR%20Signing%20by%20Pres%20Bush%20FINAL%2008022005.pdf>.

² The final text of the CAFTA-DR IPR Chapter is posted on USTR's website at http://www.ustr.gov/Trade_Agreements/Bilateral/CAFTA/CAFTA-DR_Final_Texts/Section_Index.html. The Dominican Republic also signed a Side Letter on IPR procedures.

³ For more details on the history of the Dominican Republic on IPR issues under Special 301 and other trade programs, see IIPA's summary in Appendix D (<http://www.iipa.com/pdf/2008SPEC301USTRHISTORY.pdf>) and Appendix E (<http://www.iipa.com/pdf/2008SPEC301HISTORICALSUMMARY.pdf>) of this submission.

⁴ The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2008 Special 301 submission at www.iipa.com/pdf/2008spec301methodology.pdf.

⁵ RIAA reports that in 2003, \$9.9 million represented the estimated sales displacement to the legitimate industry. In 2004, the losses to the legitimate market increased to \$10.3 million with an estimate of 1.53 million pirate CD and cassettes units available in the market.

⁶ BSA's 2007 statistics are preliminary. They represent the U.S. software publishers' share of software piracy losses in the Dominican Republic, and follow the methodology compiled in the Fourth Annual BSA and IDC Global Software Piracy Study (May 2007), available at <http://w3.bsa.org/globalstudy/>. These figures cover, in addition to business applications software, computer applications such as operating systems, consumer applications such as PC gaming, personal finance, and reference software. BSA's 2006 piracy statistics were preliminary at the time of IIPA's February 12, 2007 Special 301 filing and were finalized in June 2007 (see <http://www.iipa.com/statistics.html>) as reflected above.

⁷ MPAA's trade loss estimates and piracy levels for 2006 are not yet available. However, such numbers will become available later in the year and, as for 2005, will be based on a methodology that analyzes physical or "hard" goods and Internet piracy. For a description of the new methodology, please see Appendix B of this report. As the 2006 loss numbers and piracy levels become available, they will be posted on the IIPA website, <http://www.iipa.com>.

⁸ Here is a summary of 2007 bilateral trade. As expected, trade under GSP and CBI dropped and trade under the CAFTA-DR code increased. During the first 11 months of 2007, \$18.9 million worth of Dominican goods entered the U.S. under the duty-free GSP code, along with \$149.1 million worth under the CBI; and \$161.0 million entered under the CBTPA. Meanwhile, \$1.78 billion entered the U.S. under the CAFTA-DR in this timeframe.

At the present time, Dominican enforcement agencies do not have the resources to conduct Internet investigations. INDOTEL in coordination with the District Attorney and ONDA should have cyber authority in the Dominican Republic.

Piracy of recordings and musical compositions: Record and music piracy is escalating at an alarming rate, making it impossible for record companies to invest in the Dominican Republic. Though CD-R piracy continues to be the main source of recording medium utilized, there has been detected a growing presence of pirated, replicated CDs. The presence of high quality counterfeit CDs found in established retail outlets is seen as a direct threat to a shrinking legitimate market. Music pirates continue to increase the availability of pirated music DVDs to consumers. Street vendors continue to operate throughout popular shopping areas and in the tourist areas around the country.

The government's anti-piracy campaign has been very ineffective, resulting from lack of sufficient government support. In frustration, RIAA suspended anti-piracy operations in the Dominican Republic beginning in May, 2007. Despite nearly full funding of all music piracy enforcement actions in the Dominican Republic since 1999 by the RIAA, there has been an established pattern of declining enforcement in the country for the past three years. Increased operational costs during the same period, due largely to both a lack of assistance by ONDA and a backlogged court system, have made it difficult for the RIAA to continue executing what should be the responsibility of the government, namely music piracy prosecution. Due to the fact that RIAA has effectively withdrawn from the Dominican Republic in 2007, it is unknown to what degree trade losses due to piracy of sound recordings may have grown.

Business software piracy: The Business Software Alliance (BSA) reports that end-user piracy, including under-licensing, in conjunction with hard-disk loading are its two primary problems in this market. End-user piracy rates remain high among Dominican businesses of all sizes. With hard-disk loading, Dominican resellers load unlicensed software onto computer hardware and sell the package to consumers. Software piracy has adversely affected research and development activities of small- and medium-sized Dominican companies that are trying to expand their operations in the local market. Preliminary estimated trade losses to the business software industry were \$12 million in 2007, with a piracy level of 79%. Only the use of massive legalization campaign done by BSA in 2007 stopped piracy from getting worse, BSA believes.

On October 23, 2007, President Fernandez issued Decree No. 615-07, in which he ordered all public institutions in the Dominican Republic to acquire legal computer programs. All specified institutions have to prepare in 90-day inventories of all their installed software, including evidence of its acquisition or transfer. The decree also requires the Oficina Presidencial de Tecnologías de la Información y Comunicación (OPTIC) to establish a procedure for the registry of such inventories and to further dictate the manner public institutions should acquire and use legal software. BSA has signed an agreement with OPTIC and is working with that agency on the software inventory procedures as well as the policies to be used by the government for software licensing.

Film piracy and broadcast piracy: Broadcast, pay-TV piracy and video piracy present problems to the audiovisual industry. The broadcast/cable transmission of movies prior to release in theaters in the Dominican Republic or during their theatrical run greatly reduces legitimate business opportunities in other media by disrupting the normal release sequence to theatrical exhibitors, retail video outlets and legal cable operators. The Dominican authorities (including INDOTEL and ONDA) have been taking actions against cable operators and broadcasters. More and more street vendors are selling pirate DVDs. In the last few years, the video piracy market has shifted to DVD piracy, and this type of piracy produces market distortions as the use of pirate DVDs can harm the theatrical, home entertainment and TV markets.

COPYRIGHT ENFORCEMENT IN THE DOMINICAN REPUBLIC

Two continuing problems remained a constant in 2007. First, there is a general lack of resources for enforcement agencies. Both of the prosecutors assigned to handle IPR cases in Santo Domingo simply do not have the staff or resources to perform a heavy workload. There were three IPR prosecutors assigned in Santo Domingo -- one in the National District, one in the Eastern District, and one in the Southern District. Second,

there remains an ongoing lack of coordination by ONDA with other enforcement agencies. At no point during the last three years has ONDA attempted to communicate with the RIAA, nor have they accepted offers to collaborate on music piracy issues. In April 2007, an informal notation was received by local a RIAA representation that ONDA was allegedly being pressured from high-level government officials to actively pursue music piracy leads; nevertheless, there were no reported instances of ONDA interventions in music piracy operations

Business software reports good cooperation and satisfactory results: BSA reports continued excellent cooperation with the *Fiscalía* in 2007. The *Fiscalía* gave their full support to the legalization campaign organized by the BSA. BSA completed two end-user actions and 12 reseller actions in 2007. Dominican authorities took *ex officio* action at the border (Customs) and also in country (District Attorney). *Ex officio* actions by the District Attorney are a positive improvement; in prior years that office was not willing to take actions on their own initiative (and without a private party complaint, *denuncia*), even though such authority existed in the copyright law and the criminal procedure code.

In 2007, BSA did not take any actions with ONDA. BSA has identified three problems with ONDA and administrative enforcement: (1) the inspectors do not have the technical knowledge to conduct a software inspection, (2) lack of resources, and (3) a continuing problem of not coordinating with other agencies, such as the District Attorney.

Recording industry reports continuing difficulties in 2007: Although the recording industry enjoyed a outwardly cooperative relationship with the police department in 2007, the police did not take any self-initiated actions. The majority of criminal raids that took place in 2007 were through the industry's partnership with ADOPROFONO, the local group representing Dominican record labels. Through March 2007, RIAA's anti-piracy operations netted 42,928 pirate music CD-Rs and 40 CD-R burners used in the manufacturing of illicit product. There have been 61 people arrested during these operations. In comparison, since RIAA ceased its operations, there have only been five criminal enforcement actions that yielded the seizure of 1000 CD-Rs, 64 music DVDs, and six arrests. The number of individuals formally charged in 2007, as well as total convictions obtained in music piracy cases during 2007, are unknown.

An aggravating factor in the growing music piracy problem in the Dominican Republic is the fact that the country has become an exporter of music piracy. Anti-piracy operations in Puerto Rico and in the Northeastern region of the U.S. have led to the seizure of discs that were imported from the Dominican Republic. This indicates domestic consumption of pirated music goods in the country is saturated, resulting in the exportation of illicit sound recordings to new markets abroad.

For calendar year 2007, the RIAA documented arrests, but no record of convictions. The lack of complete records stems from the government's failure to take full advantage of the assistance the RIAA can offer in music piracy investigations and prosecutions, poor communication with ONDA concerning actions in the country, and a lack of RIAA assets in-country to cover for the government's and ONDA's timid response to the problem. We remain hopeful that changes to the criminal code made in 2004 will expedite the adjudication of pending cases. For its cases which predated the 2004 changes in the criminal code, the RIAA continues to experience great delays at the appellate level. For example, 105 criminal cases for music piracy filed between 1999 and September 2004 are still pending trial or appellate court review; we have no records to indicate that number has changed.

In addition, ONDA has not been very effective in implementing administrative actions against performance rights violators. The local performance rights society for performers and record producers, SODINPRO, has identified a number of locations where music is being exploited for commercial purposes and refer them to ONDA for inspection and verification. Unfortunately, the personnel at ONDA have not taken the appropriate actions to confirm the violation and/or apply administrative remedies.

Audiovisual actions: MPAA reports that five *ex officio* actions were taken by the *Fiscalía* and 15 by ONDA against DVD pirates. Three actions were taken against cable operators.

COPYRIGHT LAW AND RELATED ISSUES

Copyright Law (2000, as amended in 2006): Dominican Republic adopted a new copyright law in October 2000 (Law 65-00), fulfilling many years of work to replace its inadequate 1986 copyright law. While the 2000 law raised the level of copyright protection up to WTO TRIPS levels and also integrated some elements found in the two WIPO "Internet" Treaties, further reform was anticipated in order to satisfy all the obligations of the CAFTA-DR IPR Chapter. Importantly, the Dominican Republic joined both the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty (WPPT), with January 10, 2006 as the dates of entry into force.

In November 2006, the Congress of the Dominican Republic approved its CAFTA-DR implementation legislation, including IPR-related amendments (Law No. 424-06). This legislation includes several refinements affecting the copyright law and its enforcement, including (for example): extending term of protection; expressly adding statutory damages; clarifying some contractual rights provisions; clarify and expand the scope of exclusive rights for rightsholders; increasing the minimum level of criminal sanctions from three (3) months to six (6) months; clarifying the scope of judicial authority and injunctive relief; affording other enforcement measures, including border measures; and expanding the chapters on technological protection measures (TPMs), rights management information (RMI), and encrypted program carrying satellite signals.⁹

The Dominican Republic has chosen to take advantage of the permitted transition periods for certain issues (including ISP liability). IIPA and its members ask that the industry and the U.S. government be kept apprised on when legislative consideration on these important issues will be contemplated.

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

Constitutional Challenge to Copyright Law: Years have passed and a constitutional challenge to the 2000 Copyright Law is still pending before the court. A reseller defendant in a BSA case, Hard Soft, filed a constitutional challenge in the Supreme Court of Justice in Santo Domingo, alleging that portions of the 2000 Copyright Law are unconstitutional. Hard Soft argues that the copyright law protects software more stringently than other media, and is thus unconstitutional because of unequal protection, in addition to other arguments. BSA filed a brief refuting these arguments, and ONDA also filed a brief against this challenge. As of early 2008, a decision from the Supreme Court is still pending.

⁹ The 2006 law also includes several elements of concern, especially with respect to implementation. For example, the legislation changed the calculation for criminal fines from "minimum wages" to a range with an indication of the amount in Dominican Pesos. With this, it not only lowered the minimum amount to receive as damages, but also means that the level of sanctions will be diluted due to local information. The minimum-wage-index ameliorated the inflation problem. This fixed peso number was also included in the statutory damages section, although the level of sanctions there is quite high (if imposed).

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2008 SPECIAL 301 REPORT

GREECE

Special 301 Recommendation: IIPA recommends that Greece be placed on the Watch List in 2008.

EXECUTIVE SUMMARY

The level of copyright piracy in Greece remained among the worst of European Union Member States during 2007. Despite good cooperation between the copyright industries and the police, the overall intellectual property enforcement system in Greece fails to tackle the endemic and large-scale piracy problem. While Internet piracy is still at a nascent stage in Greece, a legislative problem in the data protection law poses a huge hurdle to pursuing investigations and litigation against infringers, especially in the peer-to-peer file-sharing area. The copyright industries report good cooperation from the Hellenic Copyright Office (OPI) and the Ministry of Foreign Affairs (MFA). However, much stronger leadership is needed to implement the kind of anti-piracy actions required to rid the Greek market of widespread piracy. To this end, the OPI task force in Athens, along with the Task Force in northern Greece, must be institutionalized and operate on a permanent basis, possibly with oversight by an Inter-ministerial Steering Committee.

With respect to business software piracy, in the last two years, the Government took the right decisions and has taken significant actions to fight software piracy. Actions such as having the tax police (YPEE) issue two waves of software audit letters issued to small- and medium-sized companies are having an effect and they should be systemized and further enhanced to ensure a drastic decrease in piracy. Civil software actions continue at a satisfactory pace. While some promising legal reforms were passed in 2007, the measures have faced administrative difficulties and have not been implemented. For example, the amended copyright law now provides administrative fines for certain infringing acts (including software and sound recording piracy), but the ministerial decree to impose these fines still needs to be fully implemented. Similarly, another June 2007 ministerial decree that granted authority to law enforcement to take against street vendors engaged in the distribution of pirated products has not yet been fully implemented, due also to administrative difficulties and the fact that more than one Ministry is involved in its full implementation. This stalemate is starting to have an adverse effect on the police and other officials, who want to take actions but are stymied. Furthermore, the lack of deterrent sentences handed down in-practice continues to frustrate rights holders, as most sentences are suspended. Many defendants rarely receive any sanctions, and those who do, usually receive suspended sentences. The ineffective operation of the Greek judiciary continues to frustrate efforts to enforce the copyright law in any meaningful manner.

PRIORITY ACTIONS IN 2008

Enforcement

- Announce a national anti-piracy campaign, aimed at creating specific and measurable results including more raids, more public awareness, more prosecutions, and more criminal (and non-suspended) sentencing at deterrent levels.
- Institutionalize the OPI task force in Athens, along with the Task Force in northern Greece, and create an accountable oversight body/steering committee.
- Continue good cooperation with the police on inspections, raids and other anti-piracy activities; encourage greater cooperation from the Immigration and Municipal police.
- Initiate greater involvement by the tax police (YPEE) in anti-piracy actions affecting all copyright sectors, expanding on the good work they are doing in the software sector. (1) It is important that YPEE continues the software sector project that it has begun by sending direct mails (letters) to all Greek companies with more than 50 employees. (2) YPEE should impose administrative fines for both sellers and buyers of pirate music and other pirated copyright products. (3) YPEE should continue its software audits when it does tax inspections and publicize any enforcement actions that result from such audits. In addition, YPEE should make music and sound recording audits when inspecting commercial enterprises such as bars and restaurants.

- Institutionalize a new Special Operational Department for IPR issues within YPEE.
- Give law enforcement authorities the mandate and jurisdiction to pursue investigations on university campuses where Internet and hard goods piracy flourishes without significant threat.
- Take action against copyshops making illegal photocopies of books around university campuses, especially at the University of Pireas and Deree College, and coordinate campus policies to prohibit use of illegal materials on campus.
- Encourage Government ministries and agencies to legalize business software usage in public agencies.
- Direct prosecutors to bring cases more swiftly and aim for deterrent, non-suspended penalties.
- Courts should apply all possible procedural coercive measures to guarantee the defendants' presence at court hearings.
- Instruct all courts (including appeals courts) to issue deterrent sentences, including imprisonment and fines as provided by the law, and direct them to not suspend sentences or fines in practice (suspensions of fines are not permitted under the law).
- Judges serving on the new special IP (civil) courts in Athens, Piraeus, and Thessaloniki should be directed to work only on IPR cases and be relieved of their other duties. Such an IP court should also be established in Patras. The scope of these courts' should be expanded to criminal copyright cases.
- Improve IPR training and education for police, prosecutors, judges, and customs officials.

Legislation

- Support development of amending legislation to permit ISPs to reveal identities of users identified as copyright infringers. Any action should be consistent with the recent European Court of Justice (ECJ) decision in the *Telefonica* case, including appropriate steps to facilitate the ability of right holders to obtain the necessary information to take civil actions to protect their rights.
- Develop legislation to provide Municipal Police throughout the country with the authority to arrest and prosecute street vendors for intellectual property infringements.
- Revise the 1988 law which places an administrative tax on theatrical box office revenues.
- Urgently amend the criminal procedure provisions within the Copyright Law (2121/93) in accordance with rightsholder proposals as submitted to the OPI.
- Develop legislation to make the unauthorized camcording of motion pictures in theatres a criminal offense.

GREECE						
Estimated Trade Losses Due to Copyright Piracy						
(in millions of U.S. dollars)						
and Levels of Piracy: 2005-2007¹						
INDUSTRY	2007		2006		2005	
	Loss	Level	Loss	Level	Loss	Level
Business software²	102.0	59%	93.0	61%	88.0	64%
Sound recordings & musical compositions	NA	NA	30.0	60%	26.0	60%
Motion pictures³	NA	NA	NA	NA	72.0	NA
Entertainment software⁴	NA	NA	30.2	68%	NA	NA
Books	NA	NA	NA	NA	NA	NA
TOTALS	102.0		153.2		186.0	

¹ The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in Appendix B of IIPA's 2008 Special 301 submission at www.iipa.com/pdf/2008spec301methodology.pdf. For information on the history of Greece under Special 301, see Appendix D at (<http://www.iipa.com/pdf/2008SPEC301USTRHISTORY.pdf>) and Appendix E at (<http://www.iipa.com/pdf/2008SPEC301HISTORICALSUMMARY.pdf>) of this submission.

² BSA's 2007 statistics are preliminary. They represent the U.S. software publishers' share of software piracy losses in Greece, and follow the methodology compiled in the Fourth Annual BSA and IDC Global Software Piracy Study (May 2007), available at <http://w3.bsa.org/globalstudy/>. These figures cover, in addition to business applications software, computer applications such as operating systems, consumer applications such as PC gaming, personal finance, and reference software. BSA's 2006 piracy statistics were preliminary at the time of IIPA's February 12, 2007 Special 301 filing and were finalized in June 2007 (see <http://www.iipa.com/statistics.html>).

³ MPAA's trade losses and piracy levels for 2006 and 2007 are not available. MPAA did provide 2005 estimates for a select group of countries, using a new methodology that analyzed both physical/"hard goods" and internet piracy. Details regarding MPAA's methodology for 2005 and prior years are found in Appendix B of this IIPA submission.

⁴ ESA's reported dollar figures reflect the value of pirate product present in the marketplace as distinguished from definitive industry "losses." See Appendix B of this report.

COPYRIGHT PIRACY IN GREECE

The piracy situation in Greece remained unchanged in 2007 despite excellent cooperation from the Hellenic Copyright Office, the Ministry of Foreign Affairs and the police. Hard goods piracy remains engrained in cities throughout the country, and appears to present a formidable enforcement challenge. What makes matters more difficult is that the police do not have jurisdiction to pursue IPR cases on university campuses (academic asylum) where Internet and hard goods piracy flourish.

Business software piracy: End-user piracy in Greece remains the biggest piracy threat to the business software industry. In addition, the widespread use of unlicensed software and distribution of low quality pirated CDs across the country indicate that much more work is needed to protect copyright under Greek law. The Business Software Alliance (BSA) reports that its preliminary estimates that the 2007 business software piracy rate in Greece dropped a few points, down to 59%. This drop is likely due to the active mobilization of the Tax Police (YPEE) and their sending software audit letters to small- and medium-sized businesses in Greece last year. It remains imperative that these letters are accompanied by actual enforcement action, where warranted, in order to press for legal software use. BSA's preliminary estimated 2007 losses due to piracy rose to \$102 million. According to a 2008 report issued by BSA-IDC, the information technology sector's contribution to the Greek economy could be even bigger if Greece's PC software piracy rate were to be lowered 10 percentage points over the next four years. This would create an additional 1,035 jobs, \$385 million in local industry revenues and \$130 million in additional tax revenues for federal, regional, and local governments.⁵

Music and record piracy: The recording industry continues to see its legitimate sales drop in large part due to the ongoing rampant piracy of sound recordings. Physical piracy rates have increased during the last five years: over 98% of total pirated music discs are burned CD-Rs. Instances of industrial pressed pirate CDs are rare, and those usually contain international repertoire. Meanwhile, Internet piracy has worsened considerably. Piracy of sound recordings and music in Greece represents well over 50% for both international and local repertoire. The piracy rate for U.S. repertoire is estimated to be close to 60% of the market. It appears that the majority of people involved in most of the infringing actions are immigrants. The Nigerians in particular have gradually taken control of the whole piracy chain, starting with duplication and wholesale distribution and ending retail sale. In 2007, a significant number of Pakistani nationals became active in the pirate market. These networks continue to flourish because the Greek Government does not strongly apply its immigration laws and the judicial system does not effectively deal with copyright offenses.

Audiovisual piracy: The Motion Picture Association (MPA) and its local anti-piracy organization, EPOE, report that the main piracy problem for the film industry in Greece concerns DVD-Rs, mainly by street vendors, small private labs and warehouses. The video retail market contains pirated materials, too. Piracy levels are getting worse and it appears that foreign nationals seeking political asylum are responsible for most of the duplication, production, distribution and sale of pirate product. EPOE has observed an increase in the downloading of major film titles over the past year.

Book and journal piracy: Illegal commercial-scale photocopying of academic textbooks continues in Greece, causing damage to higher education textbook publishers. Photocopy shops near university and college campuses regularly process orders for entire classes of students. Photocopy shops are making cover to cover, bound copies for distribution to students, with little or no deterrent. In fact, bulk discounts for students are common. The authorities should take notice of this issue, tackling the copyshops through effective enforcement and encouraging universities to implement policies that encourage use of legitimate materials on campus.

Internet piracy: Internet piracy is still in its early stages in Greece, unlike the more pervasive online piracy seen in other European countries. Peer-to-peer (P2P) piracy has not yet infiltrated the Greek markets. Currently there are approximately 3.8 million internet users in Greece, representing about 35% of the population (according to internetworldstats.com). There is a legislative deficiency involving Internet piracy cases that pertains to Internet Service Providers (ISPs) requiring a Court or Prosecutor's order to disclose the names of infringing

⁵ The Economic Benefits of Reducing PC Software Piracy, commissioned by BSA and conducted independently by International Data Corporation (IDC), released January 22, 2008, looks at the bottom-line economic benefits of reducing piracy in 42 countries that together account for more than 90 percent of global IT spending in 2007. It is available online at <http://www.bsa.org/idcstudy>.

subscribers. So far, rights holders have asked the Cybercrime Division of the Greek Police to obtain such orders (see further discussion below Legal Reform). The major problem in this area is Greek legislation which prevents ISPs from disclosing information about their subscribers' names or physical addresses in order for rights holders to continue investigations and pursue legal actions against suspected infringers.

COPYRIGHT ENFORCEMENT IN GREECE

While the government adopted several laws and measures in 2007 aimed at improving anti-piracy measures, they have not been fully implemented in-practice. These delays are the cause of considerable concern. In addition, despite years of private sector engagement and political pressure from the U.S. Government calling for the implementation of effective measures, longstanding problems remain in the criminal enforcement system, from prosecution to sentencing. As a result, the US copyright industry continues to lose millions of dollars in potential revenue.

Successful actions with the tax police on business software cases. BSA reports continued good cooperation with the Tax Police (YPEE). During 2007, YPEE sent two waves of software audit letters to small- and medium-sized companies. The first wave involved 1,060 letters to companies with 40-49 employees and the second included 2,303 letters to companies with 26-39 employees. YPEE, however, has not yet sent any follow-up letters and have not yet conducted any raids or audits as a result of these letters. YPEE also conducted 4 software raids. BSA appreciates the work done by YPEE, and looks forward to continuing efforts in 2008. BSA expects that YPEE will continue to send software audit letters, and more importantly, YPEE will follow-up in the appropriate cases by: (a) initiating raids against companies, (b) incorporating software audits in the tax controls, and (c) imposing the administrative penalty when illegal copies of software are found. In addition, BSA believes the Greek Government should publicly commit to fight software piracy. Such a public pronouncement by the government (perhaps coming from the Ministry of Finance) would greatly increase public awareness regarding the risks and illegality of unlicensed software and would codify the government's commitment to protect intellectual property.

Need to implement administrative fines in software and recording cases: BSA's major current concern in Greece is the non-application of the new administrative sanctions by local authorities, including YPEE. Although the Greek Government approved an innovative law amendment in January 2007 that introduced administrative fines for software infringements, the enforcement authorities have not yet implemented this law (see further discussion in legal reform section). Neither the National Police and Tax Police (YPEE) have issued Circulars to adopt the new legal framework on administrative fines nor have they mobilized their resources to do inspections for software piracy. For the last 18 months, the only enforcement activity implemented by the government has been the YPEE's audit letters (mentioned above).

The recording industry also expresses serious concern with the lack of effective administrative enforcement. Because films are not included in this law, infringers who get caught carrying pirate DVDs do not have to pay a fine. One collateral effect reported is that suspects caught with infringing music and software refuse to pay the fine for pirated CDs (even though these are covered by the administrative fine). Pirates prefer to face a full trial, where the Judges keep punishing them with light penalties, usually suspended, even though the law foresees fines of €1,000–10,000 (US\$1,450-11,450), depending on the quantities seized. The Ministry of Culture in its effort to issue a directive adjusting procedural details did not bother to take the suggestions of the recording industry and the local collecting society for music rights (AEPI), two organizations that have a long-standing experience in fighting piracy, into consideration. As a result, the new law is so vague and full of gaps that the police are reluctant to proceed on the basis of the administrative fine procedures, afraid of falling in its many legal traps.

Civil infringement actions: BSA reports that during 2007 it experienced no significant problems related to its software cases. Search orders are granted without major difficulties and these cases are usually settled out of court. In 2007, BSA reports that 6 civil raids were executed, 73 warning letters were sent, and 42 follow-up letters were sent to the targeted companies. BSA filed 6 interim measures, obtained 7 settlements, but did not file any civil lawsuits. The one court decision that was issued was a very positive one (the Court of Appeal accepted BSA's claim for compensation was equal to two times the value of the illegal software). Another case will be watched closely this year. In early 2006, a BSA member company conducted a software audit of a Greek public

entity that is supervised by a Greek government ministry. Over several years, this Greek entity purchased this software through an annual tender process. The audit found the Greek entity had increased its number of users without purchasing additional licenses and also cancelled several tenders aimed at purchasing more licenses. Follow-up efforts by the company to collect amounts due were not productive. The software company has now filed a case in court, requesting damages; the hearing is scheduled for November 2008.

Leadership needed within the Greek government: The Joint Task Force established under the Hellenic Copyright Office (OPI) has been working for almost a year. This group includes representatives from the various Greek Departments and Ministries who attend in their official capacities. The industries believe that it is important that this Task Force be formally institutionalized sooner rather than later, along with the Task Force in northern Greece, which has been operating, informally, longer than the Task Force in Athens, but is now latent.

Over the past year, OPI organized meetings between industries and public authorities involved in anti-piracy issues. During these meetings, the participants had the opportunity to exchange experiences and discuss the problems that they face in their enforcement activities. However, no concrete results or decrease in piracy in the market have resulted from these meetings. Although the initial idea of those meetings was to create a common task force to combat piracy, there has not been any substantial progress on concrete anti-piracy actions. OPI has undertaken a variety of other initiatives (not enforcement related). For example, at the request of the copyright industries, OPI has started a process by which a Memorandum of Understanding may be reached between rightholders and ISPs regarding intellectual property issues. Another possibility would be to develop a voluntary Code of Conduct regarding IP issues with the ISPs. Furthermore OPI has taken some marketing actions with the aim to increase public awareness in copyright issues. At the beginning of 2007, OPI distributed a TV spot made by the BSA to the major TV channels and succeeded in achieving this TV spot broadcast as a public service message. OPI also has commenced cooperation with the Ministry of Education regarding a competition (to create the best copyright message or logo) in primary and secondary schools to increase copyright awareness in schools.

Police actions in the film industry: EPOE reports that the audiovisual industry's relations with the local enforcement authorities continued to improve in 2007. *Ex officio* actions are increasing and as of November 2007, the percentage of *ex officio* cases had increased 16% over last year. EPOE conducted 66 raids (with an equivalent number of criminal actions initiated). There were 94 *ex officio* also with an equivalent number of criminal actions initiated by the police. The enforcement problems remain three-fold: (1) a lack of coordination between the Municipal Police, the City Police and YPEE; (2) an abundance of criminal offenses that are considered more serious than intellectual property infringements; and (3) widespread suspension of sentences. While there has been an increase in *ex officio* police raids in some cities, there also has been a decrease in police interest to go after pirates in certain areas outside of Athens.

Contrary to other sectors, the recording industry reports a substantial drop in actions by the Hellenic Police. The total number of cases, as per police statistics, dropped from 1872 in 2006 to 972 in 2007. This is a dramatic illustration of deteriorating enforcement action against the many pirate operations in Greece.

Few prosecutions: Although this is slowly changing in major Greek cities (such as Athens, Thessaloniki and Patras), Greek prosecutors, especially at the local level, are often reluctant to pursue intellectual property cases and have largely ignored Supreme Court circulars directing them to give intellectual property cases a high priority. Consequently, EPOE has had to utilize the criminal "flagrant crimes procedure" which helps to reduce the court load when a case is postponed indefinitely, but can be invoked only where the defendant is taken into custody within 24 hours of the issuance of the complaint; otherwise the case is assigned to await its typical criminal court hearing, usually more than a year later.

Problems with the courts: In addition to problems with raids and police; another key enforcement problem in Greece rests with the Greek courts.⁶ For example, the one-year imprisonment sentence provided by

⁶ First, at the Misdemeanour (All-Day) Courts for low-scale offenders, judges hand out very light sentences, which are often suspended. This is particularly the case for the courts outside Athens. However, when appeals are filed, no bail is set to guarantee the appearance of the defendant in the higher court and the sentences handed out in first instance are suspended. In addition, the appeal courts do not impose any fines. Second, at Felony Courts for large-scale offenders, the infringers are released until trial by the prosecutors without any bail and in many cases without any limitative clauses. As a result, when the case appears in front of the Felony Court after two to three years' time, the defendant usually does not turn up. Especially in cases where the felon is an immigrant and cannot be easily located and arrested, this tactic

law usually becomes three to four months imprisonment, but suspended for three years, and the €3000 fine (US\$4,350) is simply stricken entirely. In the rare occasions of more severe penalties, the defendants file an appeal, managing to put their sentence on hold. Also, the defendants often do not appear in court on the day of their scheduled hearing. The industry is seeing similar tactics in the felony courts which deal with major piracy cases. The hearings are set two to three years after the arrest, and in the meantime, the defendants are not kept in prison awaiting their trial. This manipulation of the judicial system is in practice translated to lack of punishment and the only problem for the infringers is the loss of their confiscated discs and equipment and the time they spend in the court.

The serious bottlenecks in criminal prosecutions and logjams in the Greek courts hinder effective deterrence. Fortunately, some Courts, especially in Athens, Piraeus, and Thessaloniki, are no longer suspending fines – even when they find mitigating circumstances. The situation could be further improved if the Immigration Service and the Municipal Police, which appear either to be busy with other cases or to lack the legislative mandate to act, could be directed to assist in anti-piracy actions.

Special IP courts, which hear only civil IP cases, have been established in Athens and Piraeus. The copyright industries will continue efforts to expand such courts to Patras, and to incorporate special IP sections that will deal with the criminal aspect of IP violations in three or four major cities rather than all over Greece. Intellectual property courses have become part of the required curriculum in schools for judges. Finally, several years ago the Supreme Court issued a judicial circular to assist in disseminating the Court's view on the importance of IPR protection. This circular was addressed to all the judges nationwide, calling them to apply properly the copyright law. Unfortunately, considering the poor track record of most courts in dealing with IP crime, this judicial circular failed to have any measurable effect.

Border enforcement: An ESA member company reports that the Greek market continues to be flooded with imports of counterfeit cartridge-based games. In the past year, no seizures appear to have been made by the customs authorities. Border enforcement authorities should receive additional training so that the problem of counterfeit imports is adequately addressed in practice.

COPYRIGHT LAW REFORM AND RELATED ISSUES

Greece was the first of the EC member states to complete implementation of this Directive in its Copyright Law of 1993 (Law No. 2121/93, as amended), and the industries are pleased with that implementation. Greece also has implemented the EU Enforcement Directive. Unfortunately, several recently adopted measures still require implementation and additional work is needed.

Copyright Law amendment (2007): Law 3524/2007 amended the Copyright Law to give copyright infringers the option of paying an administrative fine in lieu of criminal prosecution. It was officially published in the Government Gazette on January 26, 2007. A decision by the Ministers of Finance and Culture was issued in September 2007 to provide the procedures of imposing the administrative sanctions, but these have not yet been implemented, due to administrative complications. The amendment provides that street vendors caught in possession of up to 500 music CDs and up to 50 software CDs will be given the opportunity to pay an administrative fine of €20 (US\$29) for each music CD and €1,000 (US\$1,400) for each software CD, but the total administrative fine will be not less than €1,000. The law applies to several, but not all, copyrighted materials; it does apply to sound recordings and business software, with the support of those industries. The MPA lobbied for the complete removal of audiovisual products from this law because of its concern that this would only exacerbate the level of audiovisual piracy because it would not be restricted to only first-time offender.

Seizure and destruction: A recent Ministerial decision issued by the Ministry of Commerce providing for the immediate confiscation and destruction of any counterfeit and pirate products sold by street vendors, is still not applied, despite numerous complaints from IP rights holders and trade organizations. There are still some final adjustments pending, which sadly is delaying the application of this highly important decision.

is equivalent to acquittal. As a result of this court policy, the recording industry reports that several offenders have been arrested and charged two to three or even five to ten times, and have returned to their music piracy business.

Immigration control: The industries were told two years ago that the Ministry of Foreign Affairs intended to introduce legislation whereby immigrant street vendors engaged in any copyright violation will be deported and that Greek Embassies worldwide will be notified so that new visa requests by copyright violators will be denied. Once again, as with so many other initiatives in this area, no step has been taken towards solving this problem, which lies at the root of the pirate retail problem in Greece. On the contrary, during a meeting at the OPI, the representative from the Immigration Control of the Headquarters of the Hellenic Police acknowledged there is no control on illegal immigrants, which make up the bulk of pirate street sellers.

Enforcement authority against street vendors not yet implemented: Ministerial Decree No K1-1178, was signed June 25, 2007, and was intended to help remove street vendors from the streets by empowering the Municipal Police, the Tax Police and the regular Police to confiscate and destroy all items protected by the current intellectual property legislation when sold in the streets by street vendors. However, as discussed above, this Ministerial Decree has not been implemented, despite extensive industry lobbying, for the two principal reasons. First, a tri-partite destruction committee must be created to implement the destruction of the seized counterfeit and pirate items, and the Greek Government has been slow to resolve internal administrative problems between the Ministries. Second, the Municipal Police, who are unarmed and have no authority to arrest people, refuse to go out without armed police escort because they are physically attacked by street vendors. The Ministerial Decree is a welcome step forward. But its successful implementation, as is the case with so many other laudable initiatives, has been unacceptably delayed to the detriment of a struggling copyright sectors. Political pressure must be increased in order to get the three Ministries involved, i.e. Internal Affairs, Public Order and Development, to considerably speed up the implementation process.

Problems with obtaining access to personal data from ISPs: A critical legal issue involves industries' efforts to amend Article 4 of Law 2225/1994 so that ISPs are required to disclose the identity of users suspected of copyright infringement. At present, courts and public prosecutors, based on data protection laws, do not permit the disclosure by ISPs of the identity of owners of internet sites or of an internet connection (IP address) who are involved in intellectual property infringements. A standing committee that was supposed to deal with the amendment of this data protection law (2225/94), which lays down the principles applying to the disclosure of personal data of violators using telecommunication systems. Copyright rights holders proposals were ignored, and as a result, there is no access to data allowing them to enforce their rights against rampant Internet piracy, in particular P2P infringers. This further exacerbates the situation in a market already to a large extent destroyed by huge physical piracy. Reportedly there another committee is reviewing a separate Greek law on electronic crimes, another area where possible engagement on this important issue might occur, but the industry has no further information on any reform/consideration of that law. Any legislative action should be consistent with the recent European Court of Justice (ECJ) decision in the *Telefonica* case, and include appropriate steps to facilitate the ability of right holders to obtain the necessary information to take civil actions to protect their rights.

Government software legalization: BSA reports no progress on government legalization efforts in 2007. The Greek Government should lead by example, stressing the importance of protecting intellectual property rights and legal software use within the Public Administration. By taking these positive steps and implementing policies that support legal software use, the government could raise significant awareness of the problem and help bring down the unacceptably high business software piracy rate.

Box Office Administrative Tax: MPA urges the revision of Law No. 1597 (implemented in February 1988) which includes a box office admission tax ranging from 4%-12% of net ticket prices, with the actual percentage determined by the size of the city in which the cinema is located. (Cinemas benefit from certain tax rebates when screening Greek films.) The tax revenues are the source of government subsidies offered to produce and promote Greek films. According to local MPA member company representatives, this tax has continued to seriously affect box office admissions due to the resulting increase in ticket prices.

IPR TRAINING AND PUBLIC AWARENESS

The copyright industries continue to offer numerous IPR-related training sessions to Greek enforcement officials. For example, during 2007 BSA organized a seminar at YPEE premises in order to train YPEE auditors on how to track illegal software and update their knowledge in software cases. Furthermore, last year was the first time that an IP seminar, aimed at trainee judges, was organized in the National School of Judges in Thessaloniki.

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2008 SPECIAL 301 REPORT

HUNGARY

Special 301 Recommendation: IIPA recommends that Hungary remain on the Watch List in 2008.

EXECUTIVE SUMMARY

The copyright industries report that there has been no significant change in the piracy situation in Hungary. Locally, the industries actively cooperate with police and customs officials, providing educational training to police, customs, prosecutors, and judges, and work with other industries to combat Internet piracy. However, longstanding problems continue to undermine the environment for copyright industries: the police are under-resourced and under-equipped to tackle Internet piracy; prosecutors and judges are reluctant to treat copyright infringements as serious crimes; the few sentences issued are not deterrent; there are cumbersome requirements to prove ownership of rights; and, requests for expert opinions on all goods seized impose a major strain on the police's limited resources. There continues to exist, both in society at large and in the courts, a perceived (not actual) conflict between constitutional rights and intellectual property enforcement. Nevertheless, some criminal cases involving Internet piracy have resulted in indictments and prosecutions will begin this year. The copyright sector is hopeful that the new national anti-piracy structure created by the Hungarian government will resolve these longstanding problems in 2008.

PRIORITY ACTIONS IN 2008

Enforcement

- Develop a national action plan against piracy through the newly restructured inter-ministerial task force known as HENT (the National Anti-Counterfeiting Body).
- Allocate more resources to police forces to fight increasing Internet piracy.
- Specify to the judiciary (including police and prosecutors) that copyright and intellectual property cases are a priority.
- Develop procedural systems to overcome judicial delays, including streamlining legal investigations.
- Take action against piracy in workplaces and educational institutions.
- Have the APEH (Tax and Fiscal Control Administration) initiate actions on online piracy cases.
- Impose stiff criminal penalties to deter piracy.
- Continue to develop and present IPR training program for judges and prosecutors.
- Monitor the Hungarian National Information Infrastructure Development (NIIF) to prevent copyright infringements on its networks.
- Encourage Internet Service Providers (ISPs) to cooperate with content industries in the fight against piracy.
- Develop, with the copyright industries, a joint IPR enforcement public awareness campaign, including instructions on the detrimental effects of Internet piracy, CD-R/DVD-R burning and commercial scale photocopying of books by/in educational institutions (schools, colleges, universities).

Legislation

- Introduce legislation to ban street sales of copyrighted products.
- Adopt optical media regulations to control optical media production and distribution and to combat pirate optical disc production.
- Find an appropriate legislative measure to specify that the private copy exception does not apply to illegal sources.

- Revise the expert opinion system to allow for sampling methodologies, and increase resources allocated to fund the requisite expert opinions.

HUNGARY										
Estimated Trade Losses Due to Copyright Piracy										
(in millions of U.S. dollars)										
and Levels of Piracy: 2003-2007¹										
INDUSTRY	2007		2006		2005		2004		2003	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Business Software ²	71.0	42%	58.0	42%	55.0	42%	65.0	44%	55.0	42%
Sound Recordings & Musical Compositions	20.0	35%	20.0	50%	12.0	30%	11.5	38%	8.0	30%
Entertainment Software ³	15.9	79%	NA	40%	NA	30%	21.5	59%	NA	NA
Motion Pictures ⁴	NA	NA	NA	NA	102.0	73%	20.0	35%	20.0	30%
Books	NA	NA	NA	NA	4.0	NA	4.0	NA	4.0	NA
TOTALS	106.9		78.0		173.0		122.0		87.0	

COPYRIGHT PIRACY IN HUNGARY

Internet piracy: Internet piracy in Hungary has become the priority problem and area of concern for many of the copyright sectors. Hungary's Internet user population is approximately 3.5 million people (internetworldstats.com) and it has the highest broadband penetration in Central and Eastern Europe. Internet penetration is approximately 29% nationally, and nearly 54% in Budapest and major cities, with over half of those being broadband connections. Competition among Internet service providers has brought about a slow decrease in prices, and mobile Internet services are on the rise. Internet piracy occurs in two basic ways: (1) marketing and distribution support for offline piracy (ordering burned CDs on the Internet, etc.); and (2) the fast-growing significance of "real" online piracy, such as FTP (File Transfer Protocol) servers, peer-to-peer (P2P) file-sharing activity, and simple uploading of files to private web pages.

- Peer-to-peer piracy: There are an estimated 600,000 P2P users in Hungary. The most commonly used P2P service is DC++, although it is losing popularity. The recording industry, led by ProArt, initiated several criminal actions against operators and major uploaders, and criminal cases against the DC++ hub operators will begin later this year. Another file-sharing program, BitTorrent, is prevailing. The recording and films industries have successfully filed complaints with police who in turn have run

¹ The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2008 Special 301 submission at www.iipa.com/pdf/2008spec301methodology.pdf. For information on the history of Hungary under Special 301 review, see Appendix D at (<http://www.iipa.com/pdf/2008SPEC301USTRHISTORY.pdf>) and Appendix E at (<http://www.iipa.com/pdf/2008SPEC301HISTORICALSUMMARY.pdf>) of this submission.

² BSA's 2007 statistics are preliminary. They represent the U.S. software publishers' share of software piracy losses in Hungary, and follow the methodology compiled in the Fourth Annual BSA and IDC Global Software Piracy Study (May 2007), available at <http://w3.bsa.org/globalstudy/>. These figures cover, in addition to business applications software, computer applications such as operating systems, consumer applications such as PC gaming, personal finance, and reference software. BSA's 2006 piracy statistics were preliminary at the time of IIPA's February 12, 2007 Special 301 filing and were finalized in June 2007 (see <http://www.iipa.com/statistics.html>), as reflected above.

³ ESA's estimated piracy level for 2007 in Hungary reflects a weighted average of three forms of piracy: PC piracy, console piracy and handheld piracy. ESA's estimated 2006 piracy rate reflects only the piracy rate for handheld products, which may differ from and often underestimate overall piracy levels in country. ESA's reported dollar figures reflect the value of pirate product present in the marketplace as distinguished from definitive industry "losses." See Appendix B of this IIPA submission.

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

several major raids against Torrent and FTP sites (discussed in more detail in the enforcement section, below).

- Although the number of FTP servers has been reduced, those remaining have more capacity and international connections.
- Video streaming sites (such as YouTube) are gaining in popularity.
- Locally-based FTP servers offering downloads for money (typically via highly priced SMS⁵) from local and foreign web-hosting sites is an ongoing problem. The FTP servers typically host content which is available for download through a “store front” website that provides information to users on how to register and pay via SMS for access to the illegal content on the servers. Though some copyright rightsholders have had success in shutting down these “store front” websites through takedown notices to ISPs, the associated FTP servers remain in operation as they are typically associated with more than just one “store front.” (The actual perpetrators are also very difficult to find in part because homeless people are often used to sign false contracts.)

It is difficult to energize police and customs officials to investigate Internet cases because Hungarian court decisions are not deterrent.

Many industries report that cooperation with local ISPs is relatively good. The Business Software Alliance (BSA) reports good ISP cooperation with its software cases, and in 2007 the ISPs usually fulfilled BSA’s notice and take down (N&T) requests without any problems. The Motion Picture Association (MPA) also reports that two large ISPs have been very cooperative, reacting immediately to MPA’s notice and take down letter, providing information to the authorities in a timely fashion, and taking action to limit illegal traffic on their systems (such as removing large volume users). ProArt sent 2,000 N&T requests, of which more than 98% were successfully resolved.

Domestic “burning” and street/stadium piracy: All the industries report problems with locally mass-produced CD-R and DVD-R pirate materials, which are common because of the relatively low local prices of CD and DVD-R burners and blank CD-Rs. CD-burning is done by private users—especially students and small retail operations, and organized syndicates, in the case of entertainment software and music products, that supply many, if not all, of the vendors at flea markets.

Street piracy seems to have declined slightly in 2007. Nevertheless, it remains a serious problem such that the industries continue to request that such street sales be banned. It is increasingly common to find musical albums stored in mp3 format on DVDs; this means that as many as 10-20 albums, even an artist’s complete collection, can be obtained on one DVD. The largest market for illegal movie DVD-Rs is the Verseny street market, where as many as 20 vendors may be found each weekend, selling illegal movie copies. In Budapest’s largest weekend flea market (Petőfi Hall), there are about a few stalls (2-3 stalls during most of the year, peaking to about 3-4 in December) where customers can place orders for pirate product after consulting lists or inlay catalogs of available titles. ProArt requested increased surveillance of flea markets specializing in burned CDs (e.g. at Petőfi Hall, Verseny street market, Gyáli-street market, Veresegyház market), and almost weekly raids now take place there. Pirate DVD-Rs are also found at other flea markets across Budapest. The special enforcement groups composed Customs, Police and Tax Authorities(APEH–Tax and Financial Control Administration), and led by APEH, will cooperate with ASVA and ProArt to conduct continuous inspections in ten regions nationwide.

Optical disc plants: Industry reports that there are three factories that produce optical discs. Capacities have not changed since 2006. There is no evidence or reason to believe any of the factories are used for illegal industrial activities. The existence of these plants, without a comprehensive licensing and inspection scheme or transparency about their operations, clearly calls for regulations on the manufacturing and distribution of optical discs. Obligatory SID (Source Identification) Codes should be a minimum requirement. For years, the copyright industries have urged the government to set up plant monitoring procedures like others in the region, to regulate the facilities and equipment where optical discs are manufactured. Two years have passed since the Anti-Piracy Coalition of the Music, Film and Software Industry

⁵ “SMS” is short message service, which is used in mobile telephone text messaging. Text messaging generates significant incomes for the mobile phone providers.

sent an extensive paper to the Hungarian Government, stressing the existing problems and need for action and including a list of key elements of an effective optical media law.

Imports of pirate OD products: Hungary remains a major destination for illegal copies of CDs, and especially, in the case of entertainment software, factory-produced CDs and DVDs as well as DVD-Rs and CD-Rs. Ukraine and Russia remain two source countries for pirated entertainment software on optical discs sold in Hungary. For example, examinations of pirated discs seized in so-called second-hand shops indicate that these discs are to a large extent produced in Russia. To compare, the motion picture industry reports that, for their products, this problem has improved and they do not experience this kind of import problem.

Piracy of sound recordings and musical compositions: Online piracy (mostly file-sharing, especially the DC++ system and BitTorrent) is now probably the number one concern for the music industry in Hungary. The number and severity of online infringements is constantly growing. Although the use of file-sharing systems is widespread, ProArt reports that the number of users has not grown in large part due to its active enforcement efforts. Even though music piracy was slowed in 2007, ProArt reports that new piratical developments have developed; there are more and more compilations of a single recording artist found in .mp3 format. The online sales of physical copies of pirated recordings continues. A relatively new development in the distribution of burned CDs is that these products are advertised on the Internet. In addition, the more traditional sale of pirate optical discs at flea markets continues. ProArt stills finds high quality pirated copies in the second-hand stores. However, some of these stores have now closed, while others seem to carry fewer copies in response to criminal cases initiated by ProArt against such second-hand stores. It should be noted, however, that neither the police, nor the judiciary have actively followed up on the well-documented complaints filed by the recording industry against these highly organized pirate shops. Cumbersome formalities and a clear lack of drive from the judiciary are slowing down the process. On the commercial side, further shrinkage in floor space dedicated to music at supermarkets occurred along with a significant drop in local releases. Overall sales volume is expected to be nearly flat compared to last year. The recording industry estimates the level of music piracy in Hungary in 2007 was 35% of the market, with estimated trade losses for the U.S. share placed at \$20 million.

Business software piracy: Business Software Alliance (BSA) reports that in 2007, Internet piracy rose while more traditional forms of software piracy stagnated or even declined. While piracy is declining among businesses, piracy by consumers may be on the rise given the rise in PC sales. BSA believes its active campaigns in Hungary have helped halt further declines in the legitimate business software market. According to a 2008 report issued by BSA-IDC, the information technology sector's contribution to the Hungarian economy could be even bigger if Hungary's PC software piracy rate was lowered 10 percentage points over the next four years. This would create an additional 1,094 jobs, \$274 million in local industry revenues and \$63 million in additional tax revenues for national, regional, and local governments.⁶ BSA estimates that the preliminary trade losses due to business software piracy in 2007 rose to \$71 million, with the estimated piracy rate remaining steady at 42%.

Audiovisual piracy: The motion picture industry also is harmed by the widespread Internet and optical disc piracy problems. The sale of locally burned pirate DVD-Rs at flea markets, by street vendors, in video retail shops as well as in corporate offices remains a concern. Approximately 10 camcording and audio-recording incidents of both Hungarian and MPA member companies' movies occurred in 2007. MPA has worked with local theaters and police to address this problem. The good news is that during 2007, film piracy caused by street piracy decreased by 10% and it appears that the level of Internet piracy was stable in 2007.

Entertainment software piracy: Online piracy, particularly file-sharing and commercial FTP servers offering pirated content, are a growing concern for the entertainment software industry. Hungary is consistently among the top ten (10) countries with the highest rates for online infringement through P2P networks (such as eDonkey and BitTorrent). In at least one case, industry monitoring indicated that illegal BitTorrent downloads in

⁶ The Economic Benefits of Reducing PC Software Piracy, commissioned by BSA and conducted independently by International Data Corporation (IDC), released January 22, 2008, looks at the bottom-line economic benefits of reducing piracy in 42 countries that together account for more than 90 percent of global IT spending in 2007. It is available online at <http://www.bsa.org/idcstudy>.

the country in the first eight (8) weeks after launch of a top game title greatly exceeded the number of legitimate sales in the country for the same period.⁷ The entertainment software industry also continues to suffer from the sale of locally burned pirated game discs in flea markets and by street vendors.

Piracy of books and journals: The book and journal publishing industry reports that the same problems persist—the unauthorized photocopying of printed materials, and of academic textbooks in particular, in and around university campuses.

NIIF: The National Information Infrastructure Development (NIIF) Program promoted by the Ministries of Education, Information and Telecommunications should be closely monitored to prevent network IP violations. The NIIF serves as a framework for the development and operation of the research network in Hungary; the Program covers the entire academic, research, and public collection community by providing them with an integrated computer networking infrastructure.

COPYRIGHT ENFORCEMENT IN HUNGARY

An overall social indifference in Hungary and a perceived conflict between constitutional rights and IP enforcement undercut effective copyright enforcement in Hungary. Police are under-resourced and ill-equipped to tackle widespread Internet piracy. Prosecutors and judges are reluctant to treat copyright infringements as serious crimes, resulting in non-deterrent sentencing. Cumbersome and unnecessary requirements to prove ownership of rights remain. Requests for expert opinions on all goods seized imposes a major strain on the limited resources of the police. This problem is compounded due to inexperienced experts.

All the industry sectors have trained enforcement officials. Over the last year, the Hungarian government has exhibited energy in gathering itself to prepare a national approach to combat piracy. In addition, a new criminal procedure code passed in July 2006 gave Customs authority to deal with IP infringements. Also, a new subdepartment of the Budapest Police was established to deal specifically with on-line infringements.

Inter-Ministerial Task Force: In June 2006, a local Anti-Piracy Coalition of the software, music and film was formed, with the cooperation of the U.S. Embassy. This Coalition identified a list of priority actions which was ultimately submitted to the Hungarian Government. In January 2007, at a U.S. Embassy-organized workshop, the government agreed to establish an Inter-Ministerial IP task force. This Task Force, the National Anti-Counterfeiting Body (HENT), is under the Ministry of Justice and Law Enforcement and coordinated by the Hungarian Patent Office and is composed of government and industry representatives. HENT's objectives will include: cooperating in developing the national strategy against piracy and counterfeiting, preparing awareness campaigns, coordinating the activities of the state bodies and non-governmental organizations, and preparing legislative proposals, among others.

Cooperation agreements between industry and law enforcement: On October 25, 2005, ASVA (the local film industry), the BSA and ProArt (together the three are known as the Alliance for Copyright Protection) signed a co-operation agreement with the Anti-Crime Division of the National Police Headquarters, confirming their intention to collaborate in a united effort to address copyright crime. These three groups also signed a similar agreement with APEH (the Tax and Financial Control Administration) aimed at assisting government efforts to crack down on the "black economy" and the losses sustained by Hungary's economy as a result of piracy. Parties to the cooperation agreements provide expert assistance, training and technical information. These industry groups foresee increased involvement by the tax authorities in 2008.

Criminal enforcement efforts continue as does cooperation with industry: The industries report good police cooperation on raids and seizures and both the police and customs authority take *ex officio* action. The problem is converting the police actions into full prosecutions leading to deterrent sentencing.

⁷ During an eight-week period following the launch of one popular PC game, monitoring found more than 22,000 downloads of this title had occurred on BitTorrent and eDonkey alone. Monitoring of other key titles indicated that downloads of those products on these two networks (BitTorrent & eDonkey) were approximately 10,000 and 6,000 (respectively) over a three-week period.

The film industry reports that its cooperation with Hungarian authorities improved in 2007 including with the National Bureau of Investigation. Special enforcement groups composed of customs, police and tax authorities, usually led by the tax officials (of APEH), generated positive results for the film industry. ASVA conducted approximately 1,000 investigations and filed over 200 criminal cases in 2007.

BSA reports that the Hungarian authorities conducted approximately 90 raids in business software cases in 2007. The authorities tend to choose the easier way and start the *ex officio* investigations against small targets, taking only very few against business users, which is the sector that causes the largest commercial harm to BSA members. BSA did refer cases against business users to the authorities, and the authorities ordered the investigations.

The recording industry reports indicate that in 2007, both police and customs initiated *ex officio* cases concerning piracy. Law enforcement officers were supplied with the Hungarian version of the IFPI/MPAA Z-Card which contains practical information for on-the-spot identification of pirate optical discs. As a result, they are handling some of the simpler cases with more efficiency. ProArt has established good working connections with investigative authorities.

The entertainment software industry (ESA) reports that its members continue to have a positive relationship with law enforcement authorities. The local police make an effort to keep the markets and retail shops clean of pirated products. The police have also been responsive to taking action in markets investigated by ESA members. However, these actions are still focused on market vendors carrying small quantities of products and little or no follow-up investigation is done to identify the source suppliers. An ESA member company reported that in 2007 it was informed of approximately 50 criminal cases initiated by the police against vendors of domestically burned copies of its products.

Internet cases: In 2007, some criminal cases involving Internet piracy moved forward. Customs officials were involved in online cases and prosecutors issued indictments (such as against DC++). Even though these cases have not yet made it to court, the industries are hopeful that the educational trainings they provided to judges will help them understand the technological and legal elements of these cases. Several key 2007 Internet actions include:

(1) “TopSite” B-52 raided. This Topsite FTP-server was used by well-organized international groups to release and distribute pirated content online. The site was operated from two servers hosted at the computer center at the University of Technology and Economics in Budapest. The servers operated at speeds reaching 1000Mbit/sec and contained multiple terabytes of movie, music, software, game and tv-title files. B-52 was one of the most well established Topsites in Eastern Europe, and served and fueled other local Topsites, all of which subsequently went down due to the raid on B52. These topsites were responsible for the dissemination of the content to the local P2P networks and the source of supply for pirate hard goods.

(2) First police action against illegal pay-for-download scheme. On April 25, 2007, Hungarian police officers of Budapest XII district and ASVA investigators conducted a raid in the premises of two local ISPs, Interware and Goldfusion, resulting in the seizure of three servers from which 8 TB of copyrighted content (movies, music, games and software) could be downloaded. Copyrighted content was available for downloading from the servers via two Internet sites. Website visitors simply had to send a highly-priced SMS (HUF 80 or US\$0.45) to obtain a code that would then enable the download of copyrighted content. The sites offered downloading access to movies such as *300*, *Meet the Robinsons*, *Casino Royale*, *Night at the Museum*, *Perfect Stranger*, etc. and ASVA’s best estimate is that the sites had 1,000 users per day. Police action against such an illegal pay-per-download distribution scheme was a first in Hungary.

(3) Most aggressive action ever taken against BitTorrent trackers. On November 8, 2007, 80 officers of the Economic Protection Department of the Budapest Police Headquarters conducted simultaneous raids against six locations located in and around Budapest, resulting in the seizure of approximately 30 major pirate servers. The operation followed a five-month joint investigation between

ASVA and Pro-Art and almost two more months of coordination with the Police and was the most aggressive action ever taken in Hungary against BitTorrent trackers. Preliminary estimates indicate that the servers contained approximately 200,000 copyrighted files (films, music, books, softwares). The servers seized in the raids included FTP-servers and torrent sites such as *Bithumen*, *BitLove*, *Moobs and GigaTorrents*, and other sites named *Bitgate*, *Cinemastores*, *Darkside*, *Majomparade*, *Pretorians* and *Savaria*. Although the raid was not specifically aimed against the warez sites, those sites stopped their activities for a few days after the raid. The overall traffic on the Budapest Internet Exchange went down dramatically from 51 GB to 32 GB as a result of these raids and experts calculated that about 17,000 downloads were cut off due to the raids. Three suspects were interrogated by the Police and forensic examination of the seized servers is underway and should permit the prosecutor to raise criminal charges against the suspects.

With respect to industry actions involving ISPs, more and more notices are being issued. For example, ProArt initiated 1,068 notice and takedown procedures in 2005, 1,600 in 2006 and nearly 2,000 in 2007.

Prosecutorial bottlenecks with expert reports: On many occasions, the expert opinions given to the police by registered experts of intellectual property are imperfect at best. There are a number of experts in the Hungarian Copyright Experts Council (appointed by the Minister of Justice and Law Enforcement and linked to the Hungarian Patent Office) who work with industry and are well versed in the nature of piracy, but it is always up to the authorities to choose the expert they wish to get the official opinion from. The practical problem is that the authorities have developed their “favorites,” who are not necessarily fully qualified. ProArt has reported difficulties in trying to convince the authorities to use only qualified experts; the good news is that there has been some improvement in this situation in 2007. In fact, the police and customs are now using better trained experts to help them with online cases, which is clear from the growing number of successful actions in that realm. Rightsholders are unable to give expert opinions, as they are considered to be interested parties; at best, rightsholders can only act as consultants in criminal cases. Ideally rightsholders should be accepted as experts in these cases.

Civil copyright cases: BSA reports that in 2007, the Hungarian civil courts issued approximately 60 judgments in software cases, mostly against targets of smaller significance.

Delays and non-deterrent penalties: Unfortunately, even given the successes with raids and seizures, prosecutorial delays, weak sentences and non-deterrent penalties (for the few criminal cases that do reach judgment) remain a serious problem. Despite generally good cooperation from the police, Hungarian prosecutors and judges remain reluctant to treat copyright infringements as serious crimes. In most instances, if the matter only involves small scale infringement and the associated damages not deemed significant, the prosecutor typically only issues a reprimand and terminates the investigation. Where an indictment is actually made, the case often languishes before the court for two to four years, with the rightsholders typically uninformed of any developments in the proceedings.

Border enforcement: The border patrol is being integrated into the police. The recording industry worked with customs in 2007 on Internet cases. The IPED (Intellectual Property Enforcement Department within Customs) consists of one dedicated IP customs officer in each of the six customs regions. ProArt and ASVA organized special trainings for these officers, and ProArt gave certificates of merit to the most successful customs officers in December 2007. Border enforcement is a longstanding concern, especially because of Hungary’s proximity to Ukraine, Slovak Republic, and Russia, which remain the primary producers and exporters of optical disc materials in the region.

COPYRIGHT LAW DEVELOPMENTS IN HUNGARY

Copyright Law: Hungary has amended its copyright law to comply with international norms and accede to the European Union and has implemented the relevant EU Directives, including the EU Information Society Directive, the EU Enforcement Directive, and the EU Resale Right Directive.

It should be made clear by appropriate legislative means that the private copying exception does not extend to the reproduction from illegal sources. The Copyright Act sets out the basic provisions relating to private copy levies and requires that levies are due on blank video and audio media. Collecting societies are left to determine the details of the levy system. An opinion specifying that the private copy exception does not apply to illegal sources was issued by the Hungarian Copyright Experts Council and was forwarded to all competent authorities.

EU Enforcement Directive implemented: Hungary implemented the EU Enforcement Directive on April 1, 2006. This legislative package provided new legal institutions and terms, such as the presumption of authorship and measures for preserving evidence and provided rightsholders and the courts with more tools during civil enforcement cases. It is still early to evaluate how these measures will be implemented in practice, but the rights holders hope that these new provisions will improve enforcement. Law XXVII of 2007 amending IP-related provisions of the Penal Code entered into force on April 20, 2007.

Needed legislation to ban street sales: A proper legislative vehicle should be found to ban the street sale of copyrighted products.

Criminal Code: A new criminal procedure code passed in July 2006 gave authority to Customs to deal with IP infringements. The customs authority now carries the entire case through so that the mobile control group seizes the products and the investigators take the case. The other change is that economic crimes are also being investigated by customs officers, who previously had no expertise in this area.

Optical media regulations: No progress has been made on optical media regulations. The Hungarian government should craft and issue optical media regulations to better regulate the manufacture of optical disc products. The global copyright community is in agreement on the key elements of an effective optical disc law that include the licensing of facilities and equipment where discs are manufactured along with the export and import of materials used. Manufacturers should be obliged to use codes to identify genuine product, and to register for certification to be genuine duplicators, and to keep accurate records. Authorities should have the right to inspect facilities and seize products and equipment where appropriate, with the power to penalize offenders under threat of revocation of license, fines, or plant closure. The copyright industries look forward to working with Hungarian authorities to draft, implement and enforce such comprehensive optical disc regulations.

MARKET ACCESS IN HUNGARY

Fair compensation for audiovisual producers' shares: Hungary imposes a levy on audio and video carriers and allocates collections among audiovisual rightsholders, including authors (scriptwriters), directors and producers. Hungarian legislation has empowered local collection society FILMJUS to collect all shares of levies payable for scriptwriter, director and producer remuneration rights. Concerns in the U.S. audiovisual sector over FILMJUS' exercise of monopoly control over levy administration remain, in particular over the distribution methodology, though FILMJUS did remunerate claims by U.S. rightsholders, including scriptwriters and directors, in 2007. In addition, FILMJUS recently signaled its intention to remit a portion of producer share levies to U.S. producers, and negotiations are expected to commence in early 2008. The society also exercises monopoly control over cable retransmission rights in Hungary. FILMJUS has remunerated producer society AGICOA for producer cable retransmission rights through 2004, and negotiation of a renewed agreement is apparently underway. Remaining concerns over FILMJUS activities may be resolved as a result of an European Commission complaint concerning those provisions of the Hungarian Copyright Law which guarantee monopoly position for collective management organizations. Preparatory work of amendments to the Copyright Law is in process in response to the complaint.

Foreign ownership restrictions on broadcasting: Section 122 of Act 1 of the new Media Law requires that a joint stock company ("a company limited by shares") licensed to provide national broadcasting services must be such that 26% of its shares (or voting rights) are held by Hungarian citizens residing in Hungary or legal entities having a registered seat in Hungary. Neither a Hungarian nor a foreign enterprise, however, may hold

shares in excess of 49% of the joint stock company's total shares. Foreign investment restrictions are discriminatory, limit competition and inhibit the potential growth of the television industry.

IPR TRAINING AND PUBLIC AWARENESS

The recording, business software and audiovisual industries, individually and collectively, provide a lot of training to Hungarian officials. For example, these three groups organized a series of training seminars for judges and prosecutors (executed by ProArt). The first IT Training Seminars for Judges was organized in March 2007, with a second in September 2007, at the invitation of the Hungarian Judicial Academy. The goal of that successful seminar was to communicate the skills needed to transform an absolute beginner to a "potential" hacker. Trainings were also held for prosecutors in Budapest in November and December 2007, and these will continue in 2008. ProArt also organized a special IP seminar for the students of Police Academy in Budapest focused on online infringement.

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2008 SPECIAL 301 REPORT

INDONESIA

Special 301 Recommendation: IIPA recommends that Indonesia remain on the Watch List.

EXECUTIVE SUMMARY

IIPA views the Special 301 process as a way to monitor and reward progress in improving IP protection and enforcement, and in that vein, in September 2006, IIPA recommended that Indonesia be lowered to the Watch List in an out-of-cycle review (OCR), in recognition of the government of Indonesia's efforts to combat optical disc piracy. Unfortunately, the situation since then has worsened for copyright owners in several respects. Piracy losses have increased and piracy levels remain some of the highest in the region, if not the world. Despite several government raids on optical disc plants, optical disc piracy remains rampant, and the sheer volume of piracy and number of pirate distributors, particularly in notorious piracy hotspots, has increased since the end of 2006. Emerging problems, such as mobile device piracy – in which copyright materials are either downloaded illegally to mobile devices, or uploaded-to-order by vendors to mobile devices – have gotten worse in Indonesia with little sign that the government is equipped to tackle the problem. Existing piracy problems have persisted or gotten worse, as well. Cable piracy (signal theft), has worsened, with pirate distributors reaching more households than ever and more pirate individual connections being established. Piracy of book and journals has stayed largely the same, despite some modest efforts by relevant officials. Enforcement efforts, while remaining strong in certain respects, including major raids on optical disc factories and CD-R and DVD-R “burning” operations, have not begun to make a dent in the overall piracy losses and levels. In fact, piracy rates and losses increased in 2007 compared to 2006. Meanwhile, enforcement resources, already limited or scarce, are being diverted to other issues. Corruption remains a serious issue in the country, beating back efforts at effective enforcement through compromises in enforcement (e.g., leaks and payments by pirates).

PRIORITY ACTIONS REQUESTED IN 2008

- **Re-Engage in Strong Enforcement Campaign Against Rampant Retail and Mall Piracy, Including Landlord Liability for Mall Owners:** Enforcement campaigns in 2006, which were so successful in curbing retail and mall piracy, waned in 2007. The government of Indonesia needs to re-energize its efforts to scale back uncontrollable piracy in the malls. While there is some evidence of arrests and prosecutions in retail piracy cases, there is no evidence that mall owners have been held liable, and even less evidence that any enforcement has had a deterrent effect.
- **Prosecute Pirate Optical Disc Plant Owners, Financiers, and Managers, with Imposition of Deterrent Sentences:** In 2007, there was little evidence that prosecutors took action against plant owners engaged in piracy (either out of the 2006 actions or the few 2007 raid actions).
- **Fix Implementation of OD Regulations:** Several aspects of implementation of the optical disc regulations are ineffective, including failure to 1) make inspections routine, unannounced and off-hours, 2) enforce against SID Code violations, including gouging off SID Codes and/or total non-use of SID Codes, 3) provide transparency in raids and results, 4) suspend and/or revoke licenses permanently as provided for by the statute, and 5) ensure DOI collects exemplars.

- **Focus on Large Businesses in End-User Software Piracy Actions:** Indonesia remains one of the world's worst software markets in terms of end-user piracy of business software. The Indonesian government added a provision to its Copyright Law criminalizing end-user piracy, and began carrying out a few raids in 2006 and 2007, but focuses on small and medium targets. The government should seek more significant targets, and seek prosecutions of the same.
- **Enact Modern Copyright Law and Ancillary Regulations:** It has been five years since the Copyright Law of Indonesia went into force. Amendments have reportedly been drawn up to modernize the law. Such amendments should 1) impose liability on landlords for copyright infringement occurring in malls, 2) provide minimum criminal penalties and maintain maximums, 3) define the act of camcording or recording in cinemas as a strict liability criminal offence, 4) establish statutory damages, 5) maintain *ex officio* powers of authorities to act upon suspicion of infringements, 6) add ISP liability provisions to include notice and takedown and address Internet piracy including P2P downloading, 7) extend term of protection to life plus 70 years and to 95 years (for motion pictures and sound recordings), 8) establish special IP courts, 9) establish appropriate IP-related cybercrime provisions (consistent with the Council on Europe Cybercrime Convention), and 10) provide appropriate IP-related border measures.
- **Take Actions Against Book Pirate Operations:** Piracy of published materials continues to plague foreign and local publishers alike. Problems include illegal photocopying, mainly on and near university campuses, print piracy, and unauthorized translations. The Indonesian government should work with rights holder groups, such as IKAPI, to tackle this problem effectively and take steps to legitimize the use of published materials at schools and universities.
- **Lift Market Access Restrictions:** Indonesia's investment bans and barriers to a foreign role in creating and distributing copyright products, leave it one of the most restricted markets in the world to copyright owners. Such bans and barriers also violate Indonesia's bilateral pledge to the U.S. that direct distribution of audiovisual product would be permitted as soon as the market was opened to the direct distribution of any other foreign goods.

For more details on Indonesia's Special 301 history, see IIPA's "History" Appendix to this filing at <http://www.iipa.com/pdf/2008SPEC301HISTORICALSUMMARY.pdf>, as well as the previous years' country reports, at <http://www.iipa.com/countryreports.html>.

INDONESIA Estimated Trade Losses Due to Copyright Piracy (in millions of U.S. dollars) and Levels of Piracy: 2003-2007 ¹										
INDUSTRY	2007		2006		2005		2004		2003	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Business Software ²	203.0	85%	191.0	85%	153.0	87%	100.0	87%	94.0	88%
Books	32.0	NA	32.0	NA	32.0	NA	32.0	NA	30.0	NA
Records & Music	20.2	92%	17.2	91%	13.8	88%	27.6	80%	44.5	87%
Motion Pictures ³	NA	NA	NA	NA	NA	87%	32.0	92%	29.0	92%
Entertainment Software	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA
TOTALS	255.2		240.2		209.5		191.6		197.5	

¹ The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2008 Special 301 submission at www.iipa.com/pdf/2008spec301methodology.pdf.

² BSA's 2007 statistics are preliminary. They represent the U.S. software publishers' share of software piracy losses in Indonesia, and follow the methodology compiled in the Fourth Annual BSA and IDC Global Software Piracy Study (May 2007), available at <http://w3.bsa.org/globalstudy/>. These figures cover, in addition to business applications software, computer applications such as operating systems, consumer applications such as PC gaming, personal finance, and reference software. BSA's 2006 piracy statistics were preliminary at the time of IIPA's February 12, 2007 Special 301 filing and were finalized in June 2007 (see <http://www.iipa.com/statistics.html>) as reflected above.

³ MPAA's trade loss estimates and piracy levels for 2006 and 2007 are not available.

PIRACY UPDATES IN INDONESIA

Retail Piracy/Mall Piracy: In 2007, piracy levels increased in terms of the number of outlets in the notorious pirate shopping malls providing optical discs of all kinds, including factory and burned-to-order CDs and DVDs, and piracy in the form of loading illegal copyrighted files onto various mobile devices or carriers (see below for further description). A survey carried out by the Motion Picture Association in July 2007, noted a 30% increase in the number of outlets in the same 28 malls surveyed in January 2007. Piracy activities have worsened once again in Ratu Plaza, where the number of pirate retailers had fallen during 2006, and in Pinangsia Plaza, a computer/electronics mall adjacent to the notorious Glodok market, which accommodates ever increasing numbers of pirate outlets and, which is full of hundreds of thousands of replicated pirate discs, many with obscured (gouged)⁴ SID codes. Police retail actions provoke immediate closure of stalls by nervous tenants, but shut-downs are generally short-lived, as the pirate grapevine is extremely efficient, and police retail actions in one location lead to temporary closures across the city of Jakarta.

Optical Disc Piracy, Both Burned and Factory-Produced: In 2007, pirate burning of content onto recordable optical discs joined factory production as a chief form of optical disc pirate production in Indonesia. Burned discs are less expensive to produce in non-industrial numbers and thus are an attractive vehicle for less technically proficient or wealthy investors to produce and sell for a lower price than factory-produced discs. Therefore, production on a massive scale has become attractive to those wishing to engage in this high profit, low risk enterprise. Many rental houses in Jakarta and other cities have been identified as “home industries” for burnings and OD piracy. In 2007, the Indonesian Police raided many locales, finding thousands of burner machines and millions of burned discs.

There also remains a massive over-supply of factory replicated, pirated discs in the Indonesian market. Disappointingly, the number of registered optical disc plants increased in 2007 from 28 to 31, and we know of one unregistered plant. Data supplied by Departamen Perindustrian (Department of Industry) and industry in 2006 revealed that there were as many as 145 licensed replicating machines operated by 28 registered OD plants, suggesting a potential production capacity in excess of one billion discs per year, while industry estimated the size of the legitimate market in 2006 to be less than 15 million discs per year. At least four registered plants in Indonesia have manufacturing facilities for the “stampers” and masters, (key production parts needed to mass-produce optical discs that contains the copyright content and therefore must be covered in the optical disc regulations, and must be subject to the SID Code requirement and seizure), although one of these factories reportedly ceased production in early December 2007. Nonetheless, during the year police seized in excess of 270 infringing stampers. Indonesia remains an export base for pirate CDs, VCDs, and DVDs. Pirate product sourced from Indonesia was found in 2007 in Australia, the Philippines, the United Kingdom and elsewhere in Europe.

One particularly serious problem has been that the vast majority of pirate ODs sampled from the market, clearly display marks of SID code removal or gouging. There is little doubt that these pirate discs are being domestically manufactured (due to other evidence amassed). Even more serious is the increasing number of discs in the market, which display neither mould codes, nor marks where the codes have been obscured or gouged. This means that finished discs are being produced in Indonesia without SID codes; several factories have been found in possession of uncoded molds, adding evidence of this phenomenon. This problem must be eradicated in 2008.

Mobile Device Piracy: The unauthorized loading or preloading of illegal copyright content onto mobile devices such as: mobile telephones, iPods, other MP3 players, and recordable media such as flash drives and memory sticks, has emerged in 2007 as a major problem for the copyright industries in Indonesia. In the ITC Roxy Mas retail mall, Blok M Plaza, and Blok M Mall, where the majority of shops

⁴ The obscuring of codes by Indonesian plants is generally carried out by the application of a water-based resin to cover the mold code etched onto the mirror block. This ensures that each disc is manufactured with the mold code already obscured, rather than having the pirates resort to obliterating the code after the disc has been molded.)

sell handheld phones and handheld phone accessories, more than 90 stalls engage in such uploading.⁵ Apparently, not linked to the shops in the mall, operators draw power from the mall supply and use stand-alone desktop computers to download the recordings/musical works by USB transfer. Similar setups are seen in many shopping malls including Mangga Dua Square, and ITC Mall Kuningan. Shop owners use the illegal loading of copyright content onto these devices as a selling point. In addition, other devices, such as karaoke devices, either in the form of microphone tools or players, are being preloaded with massive numbers of songs without authorization.

The criminal investigation division of the Indonesian Police (*Badan Reserse Kriminal* or *Bareskrim* for short) in Jakarta, after being given a detailed brief on the situation and having demonstrated to it the obvious syndication of some of the larger vendors, has taken action against the operators. Not only have the stalls been targeted by *Bareskrim*, but the branches of the operation identified by Police during their investigation. IIPA commends *Bareskrim* for their comprehensiveness, in what is believed to be the first of their kind against organized illegal digital download providers in the region.

Book Publishing Industry: Piracy of published materials remained a major issue in 2007. Significant problems included commercial-scale photocopying (mainly on and near university campuses), print piracy, and unauthorized translations. Most universities actively or tacitly condone students' photocopying activities, although a recent anti-piracy campaign by the University of Indonesia's business faculty is a welcome development. Photocopy kiosks litter the areas around major universities such as Bandung Technology Institute, Parahyangan University, and Padjajaran University. Book piracy is completely out of control in Bandung, where photocopied books not only flood the local market but are carried into Jakarta. Most copy centers provide catalogs to facilitate the very open business of copying academic texts for students. Illegal operations are also taking orders from students on campuses and distributing their wares there, even in cases where they are not actually making the copies on campus. The problem is of significant magnitude, and growing—a February 2007 raid in Pondok Gede yielded thousands of photocopies.⁶ Lecturers themselves seem to be increasingly aware of the issue, and are starting to encourage students to use legitimate materials in their classrooms. This needs to continue, and should be supported and augmented by action by educational authorities, enforcement authorities, and university and school administrations.

In addition to the university-oriented street stalls and copyshops, mainstream bookselling chains are in some cases openly stocking pirated books.⁷ The Pondok Indah mall in Jakarta is well known for featuring pirate sellers. Publishers report some increased willingness by authorities to partner in raiding pirate enterprises during 2007, and IIPA hopes this type of cooperation is significantly expanded in 2008.

Business Software End-User Piracy and Government Legalization: The willful use of unlicensed or pirate software in the workplace, continues to be the greatest source of losses to business software companies. The software piracy rate remained unacceptably high at 85% in 2007. Piracy in Indonesia has seriously compromised the business of resellers and distributors of genuine software. The Indonesian authorities have begun taking more cases involving end-user piracy of business software, including on an *ex officio* basis. For example, in December 2007, authorities referred 70 requests to the Business Software Alliance (BSA) program directors for assistance in investigations. As will be detailed below, while cooperation remains good with *Bareskrim* and the Civil Service Investigation Officers (PPNS), there remain some problems with effective enforcement against end-user software piracy in Indonesia. These problems include a lack of successful and deterrent court decisions and uncertain raid and arrest powers of the PPNS. These problems will hopefully be solved or will move toward resolution in 2008.

⁵ Recent market surveys indicate ITC Roxy Mas has 49 such stalls, Blok M Plaza has 2, and Blok M Mall has 39.

⁶ Reports from the publishers' group in Indonesia indicate that the pirate in this case received a jail term of two years and seven months.

⁷ Publishers note recent cooperation by some, however. Gramedia, in particular, has cooperated with publishers in removing pirated editions and pursuing suppliers of pirated materials.

The software industry's local representatives continue to work with the Indonesian government on the use of legal software within government ministries. On January 13, 2006, the Indonesian Ministry of Communication and Information (MOCI) and Microsoft, signed a Memorandum of Understanding (MOU) to legalize government use of its products on government computers. Implementation of the MOU will strengthen the Government and its law enforcement's credibility when conducting IP education and enforcement efforts.

Signal Theft/Pay TV Piracy: Signal theft worsened once again in 2007, with an estimated 300,000 illegal connections from pirate cable distributors (and 47,000 illegal individual connections). The total estimated losses to copyright owners and cable channels, due to signal theft in Indonesia, were US\$37.6 million in 2007. While both the Broadcast Law and the Copyright Law of 2002 provide a degree of protection for broadcast signals, enforcement to date has been virtually non-existent. There have been reports over the past couple of years that the Indonesian Broadcasting Commission (KPI) was considering the initiation of anti-piracy programs and enforcement actions in this area, but to IIPA's knowledge, no enforcement actions have been taken thus far.

Internet Piracy: Indonesia boasts 20 million Internet users (as of 2005), an 8.5% penetration rate, and almost 560,000 individual Internet hosts (as of 2007).⁸ While broadband Internet penetration remains relatively low, at an estimated 108,000 broadband connections nationwide, Internet piracy is already starting to rear its head. The publishing industry, as an example reports online trading in pirate copies of books and journals, especially those related to science and technology. Lawmakers in Indonesia need to remain vigilant to avoid Internet piracy becoming an even larger problem in years to come.

Unauthorized Public Performance (Exhibition) of Motion Pictures: IIPA is also concerned about the growth of outlets engaged in unauthorized public performance of motion pictures. Some of the outlets have expanded into franchise operations, with some even advertising themselves in national entertainment publications. IIPA encourages the Indonesian authorities to take actions against such outlets, as they have a damaging effect on the market for theatrical exhibition in Indonesia.

ENFORCEMENT UPDATES FOR INDONESIA

INDONESIA: CRIMINAL COPYRIGHT ENFORCEMENT STATISTICS 2007		
	SOUND RECORDINGS⁹	MOTION PICTURES
	2007	2007
NUMBER OF RAIDS CONDUCTED	10 (73)	110
NUMBER OF VCDs SEIZED		153,205
NUMBER OF DVDs SEIZED		334,079
NUMBER OF CD-Rs/DVD-Rs SEIZED		257,098
NUMBER OF INVESTIGATIONS		136
NUMBER OF VCD LAB/FACILITY RAIDS	3 (30)	NA
NUMBER OF CASES COMMENCED	3	109
NUMBER OF ARRESTS	21 (230)	NA
NUMBER OF DEFENDANTS CONVICTED (INCLUDING GUILTY PLEAS)		28
ACQUITTALS AND DISMISSALS		0
NUMBER OF CASES PENDING	4	

⁸ See The World Factbook, Indonesia, at <https://www.cia.gov/library/publications/the-world-factbook/geos/id.html>. See also Internet World Stats, at <http://www.internetworldstats.com/stats3.htm>. These statistics are up-to-date as of November 30, 2007, are based on Census Bureau data, while usage numbers come from various sources, mainly from data published by Nielsen/NetRatings, ITU, and other trustworthy sources. See also Internet World Stats, Indonesia, at <http://www.internetworldstats.com/asia.htm#id> (reporting that there were 20,000,000 Internet users as of May 2007, representing an 8.5% penetration rate, per Asosiasi Penyelenggara Jasa Internet Indonesia APJII; and 108,200 broadband Internet connections as of September 30, 2007, per Internet World Stats).

⁹ Recorded above are figures relating to cases initiated or supported directly by the IFPI. Figures in brackets include numbers taken from reports by police. None of these figures include raids against digital download operations conducted in the latter half of 2007. It would be helpful if the national task force would produce consolidated figures on enforcement action by the various involved agencies, most of which do not publish or circulate their statistics.

NUMBER OF FACTORY CASES PENDING	3	
TOTAL NUMBER OF CASES RESULTING IN JAIL TIME		28
SUSPENDED PRISON TERMS		
MAXIMUM 6 MONTHS		0
OVER 6 MONTHS		0
OVER 1 YEAR		0
TOTAL SUSPENDED PRISON TERMS		0
PRISON TERMS SERVED (NOT SUSPENDED)		
MAXIMUM 6 MONTHS		1
OVER 6 MONTHS		1
OVER 1 YEAR		26
TOTAL PRISON TERMS SERVED (NOT SUSPENDED)		28
NUMBER OF CASES RESULTING IN CRIMINAL FINES		NA
UP TO \$1,000		NA
\$1,000 TO \$5,000		NA
OVER \$5,000		NA
TOTAL AMOUNT OF FINES LEVIED (IN US\$)		NA

IIPA had hoped that the major enforcement actions carried out by Indonesian authorities in 2006 would be carried over into 2007, and would have had a lasting deterrent effect on piracy in the market. Unfortunately, neither appears to be the case. While some impressive raiding activity continued in the first half of 2007, including several raids against factories engaged in production of optical discs, optical disc burning labs, and mobile piracy targets,¹⁰ enforcement efforts waned in the second half of 2007. Emphasis shifted to counterfeit pharmaceuticals and away from copyright piracy in general. There are exceptions to this, as the Business Software Alliance has worked with Indonesian authorities on dozens of end-user software piracy cases initiated by the authorities. In general, IIPA calls upon the Indonesian authorities to refocus efforts on enforcement actions against large-scale pirate production or distribution targets, leading to effective prosecutions of key owners, directors, and landlords (in the case of piracy being carried out in malls), and weeding out any irregularities or corruption within the enforcement authorities. The following represents some of the high points and, unfortunately, low points in enforcement against piracy in Indonesia in 2007.

Some Actions Against Optical Disc Pirate Factory Production, Continue to Impress: During 2007, *Bareskrim* conducted three significant optical disc factory raids. The first two raids took place on July 1, 2007 and were conducted *ex officio* by an investigation team under the direction of General Hendarso, head of *Bareskrim*, with intelligence and operational support from the local record industry group. The first, against a company called PT MGS, netted over 90,000 pirate discs, and 92 infringing stampers from a concealed room inside the factory. Production records recovered indicated more than 1.5 million discs had been manufactured during June 2007, but only 45,000 legitimately licensed discs. The second, against a company called PT SCC, netted the remains of several thousand pirate discs destroyed before the police could gain entry, and about 70 infringing stampers. On previous factory inspections, neither factory had been in operation, as the staff claimed a lack of orders, but in the July raids, both factories had increased their production capacities with apparently unregistered equipment, with PT MGS adding two injection molding machines, amounting to a 60% increase in production capacity, and PT SCC adding a complete DVD line, molding machine, a DVD bonder/metallizer (“downstream”) and a printer. No legitimately licensed product was found in the production areas of either factory.

The third raid, carried out on August 16, 2007 against a company called PT MRP also revealed material discrepancies in manufacturing equipment (i.e., unregistered with the Department of Industry), as one injection molding machine had been removed while two others had been installed. Recording

¹⁰ For example, record industry statistics show that there were 10 enforcement actions in the Capital Territory of Jakarta, and 1 enforcement action in Muarabungo, Jambi, in the first half of 2007. Of these, five involved CD-R/DVD-R burning, two involved digital downloads, ringtones, or uploading to MP3 players, and four involved pirate retailers (the one in Jambi involved a retailer). Total seizures from these raids were 800,000 pirate optical discs, 789 CD-R/DVD-R burners, and 3 computers/servers. There were 143 cases according to the record industry in which industry was called upon to be an expert witness; most of those were retail cases.

industry records show that the two new lines had previously been in operation in a factory in Singapore. Well over 100 infringing stampers were located, and production records suggested output of over 100,000 discs per day. No legal discs were found inside the factory.¹¹ While these plants have had their licenses temporarily suspended, until court cases are concluded, and while some of the machines were sealed,¹² this is not enough. Under the authority of the Department of Industry, the plants' licenses should have been revoked, given the *prima facie* evidence of piratical activities occurring on the plant sites. In addition, to IIPA's knowledge, the authorities have not commenced prosecution of the plant owners or key directors of the plants.

The local record industry also reports a fourth raid conducted in March 2007, against one unlicensed optical disc factory in Sunter, North Jakarta by the local Police. Unfortunately, industry was not permitted to participate in the raid or obtain detailed information about the raid. Lack of transparency in this raid rendered it less valuable than others since industry could not assist and the raid results could not be publicized for deterrent effect. The authorities should be encouraged to make industry aware of these actions and allow industry to assist.

The Krimsus Division of the Jakarta Polda Metro Jaya Police was also prolific in the first half of 2007, targeting a significant number of CD-R/DVD-R burner operations. IIPA is aware of 22 burner raids in the Greater Jakarta area, which by the end of July netted seizure of approximately 180 DVD-R burners and 610 CD-R burners. Unfortunately, after July, little enforcement has occurred and throughout 2007, there were few reports of optical disc anti-piracy actions by subordinate police formations in 2007.

One issue occurring in late 2007 was the cessation of raids due to the Police's claim that storage room in which to store seized discs had run out. Industry representatives contacted the appropriate person in the Attorney General's office, explaining that the discs could be destroyed after sampling them for evidentiary purposes. This information led to a destruction ceremony on September 12, 2007 to destroy many of the optical discs and related machinery seized since December 2006. However, the clearing out of storage was not followed by any major actions against pirate retail or factory operations.

Optical Disc Regulatory Structure and Enforcement Problems: While the factory raids are welcome, there are some fundamental flaws in the optical disc regulatory structure and the manner in which the Department of Industry Monitoring Teams are carrying out their mandate, which must be remedied in 2008.

- First, factory visits have not been routine to ensure compliance with the implementing rules and regulations – as of late November 2007, not all registered plants had been visited. Indications are that, what are supposed to be unannounced visits are being notified to the plants. In addition, inspections are not being conducted off-hours. Instead, inspections are generally conducted during office hours from Monday to Friday, giving less-than-scrupulous factories the ability to plan down times during office hours, and to restrict illegal or questionable production runs to weekends and off-hours.
- Second, DOI has not adequately enforced against SID Code violations. These violations take two forms, 1) the placement on but then immediate obscuring or gouging of SID Code of discs produced in Indonesia, and 2) the complete non-use of SID Code on finished discs being

¹¹ Each of the factories is reportedly still sealed and pending prosecution, and the DoI have issued letters of temporary suspension of PT MRP's OD replication licenses.

¹² The Department of Industry has made use of equipment intended to seal manufacturing lines which fail to comply with legislation, and the recording industry representatives have witnessed such use on one occasion in a May 2007 DoI Plant Monitoring Team factory inspection. At that time, two machines which were obviously in use were sealed when operators said they could not be operated until repaired. Hundreds of finished CD substrates (the clear plastic disc produced by the molding machine which requires metallization and printing before completion) with obscured or gouged SID Codes were found in sacks adjacent to the machines. It is unclear whether any action was taken by DOI to address the mold code tampering issue. It is also unclear when seals may be removed, and with lack of transparency, it is unknown whether those machines sealed in that raid, or others sealed in other raids, remain out of operation or are back in use.

produced in Indonesia. As noted, several factories have been found in possession of uncoded moulds, adding evidence of this phenomenon. These problems must be eradicated in 2008.

- Third, there is an overall lack of transparency in raids being carried out. The local recording industry representatives have attended several plant visits during 2007, in which areas of non-compliance or poor anti-piracy procedures by the plants, and in some cases offenses, were disclosed. However, in other cases, the Department of Industry's responses to violations of the implementing rules and regulations have not been transparent.
- Fourth, as noted, in respect of the three registered factories raided during the year, the DOI has issued notices of temporary suspension of licenses to the licensee plants. While this is to be commended, the letters themselves suggest that the suspension is to be enforced until such time as the court cases against each of the plants are concluded. IIPA contends that, under DOI's authority, having been presented with *prima facie* evidence of pirate production, the plants' licenses should have been suspended, amended or revoked without reference to the courts.
- Fifth, DOI has collected many exemplar discs (sample discs from each factory's injection molds) and shared them with the record industry's international group (the International Federation of Phonographic Industries or IFPI) for forensic examination. However, it remains unclear whether DOI is itself building, as it should, a comprehensive library of exemplars for domestic use. Given the potential restrictions on admissibility of test purchase discs made by rights holders in criminal proceedings, this potential shortfall in data should be addressed. The recording industry has seen of a recent DOI publication regarding their activities during 2007. Much of the content relates to police actions, not those of the DOI, and raises questions about the ability of the DOI to identify such essential OD manufacturing components as stampers.

Retail and Mall Raids Also Slow in Second Half of 2007, and Effect of Enforcement Lessened by Lack of Transparency: While IIPA understands that Police retail actions continued to occur in 2007, conducted by the same Police unit, *Krimsus*, that conducted the source piracy raids mentioned above, retail outlets were relatively undeterred in part due to lack of reporting or publicizing such actions. Industry reports that their relationship with *Krimsus* remains good, but that *Krimsus* ceased providing statistical data regarding raids and stopped inviting industry to attend and record raid actions in July 2007. In addition, industry reports that after July, *Krimsus'* focus shifted to fighting counterfeit pharmaceuticals and other matters.¹³ As noted, no major retail raids have occurred in the second half of 2007.

Enforcement Against Business Software Piracy Focusing on Small Targets, Lacking Deterrence: For the business software industry, which wishes to see enforcement against large-scale unauthorized users of business software in business settings, the enforcement results in Indonesia have been mixed. On the one hand, *Bareskrim* and local Police, for example, the East Java Regional Police,¹⁴ the Jakarta Regional Police, the Riau Islands Regional Police, and others, are to be commended for initiating end-user investigations *ex officio*, leading to 70 requests as of mid-December 2007 from various police stations for assistance or experts in end-user cases. About 10 end-user cases have been heard by various district courts. On the other hand, enforcement efforts have generally been focused on illegal software usage at Internet cafés, illegal rentals of computer programs, mobile phone uploads of software, while only small to medium sized distributors of pirate software and hard disk loaders have been targeted.

¹³ IIPA is aware of a large raid against counterfeit pharmaceuticals carried out in August 2007 by Indonesian Police. While IIPA congratulates the government for taking an aggressive stance against such pharmaceuticals, there remains a need for more Police resources and staffing to be directed to copyright enforcement, and IIPA contends that copyright piracy and counterfeit pharmaceuticals could both be aggressively targeted if adequate funding and resources were provided by the government.

¹⁴ The Business Software Alliance (BSA) has signed a memorandum of understanding (MOU) on enforcement cooperation with the East Java Regional Police.

The Business Software Alliance (BSA) has established a good relationship with civil servant investigators (PPNS) at the Directorate General of IPRS, and it is hoped that the DG of IPRS will establish a new directorate of investigation in 2008, authorizing PPNS to investigate IP violations and conduct raids; it is hoped that this will also solve technical problems PPNS has faced such as lack of personnel, lack of budget, and, to date, inadequate training.

Lack of Transparency as to Judicial Processes: Lack of transparency is a problem in the judicial processes in Indonesia. Industry has received some reports from the Police regarding prosecutions involving piracy actions taken by it. For example, the Police reported in 2007 that one of the operators of a factory raided in early 2006 by *Markas Besar* (MABES) had been prosecuted and jailed. While this may be the case, industry has neither been informed of, nor located any formal record of the conviction or sentence. While it is commendable that Police report having submitted numerous prosecution files to prosecutors' offices, results have rarely been reported or made available to right holders. For example, the *Krimsus* Jakarta Police have apparently processed many cases against pirate burner operators and pirate disc retailers. It is important for right holders to receive information about these cases, so that they may assist where helpful or necessary, and receive information as to the results of these cases to fully evaluate the piracy and enforcement situation in-country.

Fighting Corrupt Practices: IIPA notes intermittent reports indicating some instances of corruption in enforcement agencies, for example, some unconfirmed reports of Police receiving money from small raid targets such as Internet cafés in exchange for not enforcing unauthorized use in such premises. To the extent this is reflective of larger societal problems in the area of undue influence of officers in Indonesia, IIPA recommends that the government explore enforcement of laws prohibiting such corrupt practices, bribery of government officials, extortion, and the like.

In March 2006, President Susilo Bambang Yudhoyono finally issued the decree establishing the "National Task Force for IPR Violation Prevention."¹⁵ IIPA members have had little contact with the IP Task Force, but are aware that the Task Force and its working groups are intended to coordinate IPR enforcement strategy among agencies as well as to conduct public awareness campaigns.

TRAINING

In 2007 as in previous years, the copyright industries conducted and participated in various training and public awareness activities in Indonesia:

- The Motion Picture Association's local program provided a program on illegal camcording in cinemas, exposing participants to the new methods/trends/technology used by pirates to record the latest movies in cinemas using camcorders. Participants were briefed on steps to take when they detect camcording piracy. There were three separate training sessions for industry representatives (for Cinema 21 staff) during June and July 2007 involving a total of 400 trainees.
- The local record industry group, Sound Recording Industry Association of Indonesia (ASIRI), employed mass media and sent speakers to several seminars or workshops.
- ASIRI has also trained Officers and others of The National Police Detective School, in February 2007 in a program entitled "Copyrights and How to Identify a Pirate Product," and in November 2007 in a program entitled "Copyright and Related Rights Seminar."
- On March 12, 2007, the Business Software Alliance (BSA) provided a general lecture at the Police Criminal Investigation Division Training Centre at Megamendung, Bogor.

¹⁵ Presidential Decree No.4/2006, March 27, 2006, On: Establishment of the National Task Force for IPR Infraction Prevention.

- On March 27, 2007, BSA hosted a capacity building meeting for all Police investigators of the East Java Regional Police.
- In May and November 2007, BSA hosted two seminars on software asset management (SAM) to increase public awareness on software copyright. The May seminar was conducted in conjunction with U.S. Commercial Services at the U.S. Embassy.
- Since November 2007, BSA has run a new program called “BSA Goes to Campuses,” where their representatives visit various universities providing general lectures on copyright for students to increase their awareness of IP matters.
- BSA is planning capacity building for PPNS under the Directorate General of IPRS and public prosecutors under the supervision of the Attorney General's office in early 2008.
- On September 7, 2007, IFPI conducted training for the provincial heads of MABES Polri, the National CID, in Jakarta, on the identification and recognition of pirate optical discs and the use of optical disc forensics in identifying the origin of pirate discs.

COPYRIGHT LAW AND RELATED ISSUES

Previous years' reports have described in detail the legal framework for copyright in Indonesia. The following is intended to provide a summary of latest developments only.

Copyright Law Implementing Regulations Still Missing: IIPA has commented on the improvements in the Law of the Republic of Indonesia, Number 19 Year 2002 Regarding Copyright (Copyright Law) (effective July 29, 2003) (Undang-Undang RI No. 19 Thn 2002 Tentang Hak Cipta) and has recommended further changes that should be made to that law. Regulations dealing with “rights management information” (RMI) were finalized in 2005,¹⁶ but implementing regulations regarding technological protection measures (TPMs) (as covered in Article 27 of the Copyright Law) are still missing and are needed to fully implement the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty.¹⁷

Copyright Law reform has been in the works, given the five year anniversary of the current law. A draft amendment to the Copyright Law has been selectively made available to some local industry representatives. IIPA encourages the government to take the opportunity, if indeed the law is being amended, to make the changes advocated in the past, to produce a truly modern copyright statute in Indonesia. IIPA also encourages the Indonesian Government to ensure that any proposed changes are open for public consultation and comment.

In addition to the issues previously discussed in IIPA submissions, key issues, which should be addressed in any amendment to the Copyright Law, include the following:

¹⁶ The 2004 proposed RMI Regulations we reviewed appeared successful at implementing the RMI provision in the Copyright Law (Article 25). The stated “purposes” of RMI in the new draft include “Maintain[ing] the access control and the using of Work” as well as “Manag[ing] every access, the using, and integration of protected Work.” Essentially, Article 4(1) of the draft Regulations identify two infringements of “The Management Information of Author Rights”: “Destroy[ing] or chang[ing] The Management Information of Author Rights without any permission from the Author”; or “Distribut[ing], import[ing] to distribut[e], announc[ing], or communicat[ing] to the society upon a certain Work, or multiplication result that the Management Information of Author Rights has been changed or eliminated without any rights.”

¹⁷ An April 2003 Report issued by the Indonesian government indicates that

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

We are unaware of any articles that deal with TPMs in the Patent Law.

- Landlord liability for copyright infringement carried out by tenants (of a retail mall, for example). The issue of landlord liability for copyright infringement (committed by tenants) remains unclear in Indonesia, and is a growing concern for industry and the enforcement authorities in Indonesia.¹⁸
- The need to provide a minimum criminal penalty clause, including for end-user piracy,¹⁹ and the maintenance of current maximum sentencing provisions. At this time, the minimum criminal penalty is stipulated in Article 72 (1) of the copyright law but this is not applied for defendants in end-user piracy cases.
- Inclusion of anti-camcording provisions. The vast majority of movies that are pirated are stolen right off the screen by professional camcorder pirates, who use video cameras to illicitly copy a movie during exhibition in a movie theatre – usually very early in its theatrical release or even prior to the film’s release (e.g., at a promotional screening).²⁰ An Anti-Camcording Law should define the act of camcording or recording in cinemas as a strict liability criminal offence, enabling Indonesian authorities to arrest and prosecute individuals who record a movie in the theaters, without needing to establish subsistence of copyright, copyright ownership, or copyright infringement.
- Establishment of statutory damages.
- Maintenance of *ex officio* powers of authorities to act upon suspicion of infringements.
- ISP liability provisions, which include a notice and takedown system, as well as means to address Internet piracy including P2P downloading. Such a system should provide appropriate incentives for ISPs to cooperate with right holders pursuing justice against online infringements or online-related infringements (such as Internet advertising sites).
- Term protection consistent with international trends and U.S. standards (e.g., life of the author plus 70 years, or in the case of works whose term is calculated based on the date of publication or for which authorship is corporate, 95 years).
- Establishment of a specialized IP court with judges that have been adequately trained to deal with IP cases.²¹

New Border Measures Enacted: Law No. 17 of 2006 amended Law No. 10 of 1995 on border and customs measures. While IIPA has not reviewed the legislation as passed, the provisions apparently represent an improvement compared with the 1995 law (the 1995 Customs Law established a judicial seizure system and allowed for *ex officio* action, but no implementing regulations ever followed passage of the law).²² The government is apparently now reviewing implementing regulation on this law, which will cover intellectual property enforcement issues; IIPA would hope to be able to review such regulations prior to their issuance.

Electronic Information and Transactions Bill: The Ministry of Communication and Informatics has proposed a law on electronic information and transactions (the latest was in the form of a “Draft of the

¹⁸ It should be confirmed that it is illegal in Indonesia to induce, facilitate or aid and abet infringement, including by distributing or providing a facility, program, device, or technology to members of the public with the object of facilitating, promoting or encouraging its use to infringe copyright.

¹⁹ IIPA understands that Article 72(3), which provides a criminal remedy against one who illegally reproduces software with “a commercial purpose,” can be interpreted to criminalize end-user piracy of business software.

²⁰ The master recordings are sold to illicit “source labs” where they are illegally duplicated, packaged and prepared for sale. As a result of camcorder piracy, many motion pictures also become available over the Internet – on peer-to-peer networks, file transfer protocol (FTP) sites, Internet Relay Chat (IRC) rooms, or auction sites – as well as on street corners and night markets around the world during the U.S. theatrical release and well before their international debuts.

²¹ Both civil and criminal IP cases are currently heard in the commercial courts.

²² In practice, seizures are occasionally made on the basis of an incorrect declaration or under-declaration.

Law of Indonesia, No. __, Year __, Regarding Electronic Information and Transaction”). Unfortunately, the draft has been pending for several years and Parliament does not seem to consider this draft law to be urgent or priority legislation. The Bill would represent an essential component of the broader vision to address ICT needs under the “Government of Indonesia’s Five-Year Action Plan to Overcome the Digital Divide for the Development and Implementation of Information and Communication Technologies (ICT) in Indonesia” of May 2001. The Bill IIPA has reviewed, focuses mainly on electronic transactions and digital signatures, but contains, in Article 24, the general provision on copyright stating that “Electronic information composed in an intellectual creation, internet website design and intellectual creation contained within, are protected as an Intellectual Property Right, based on prevailing law and legislations.” As a potentially useful tool to combat cyber crimes, a provision, which essentially implements the copyright provision of the Council of Europe Cybercrime Convention, should be added.²³ In the absence of a statute dealing with cybercrime, industry has to resort to general principles of criminal or civil law in dealing with cases involving Internet piracy or cybercrime.

OD Regulations Remain Deficient on Their Face: On October 5, 2004, outgoing Indonesian President Megawati Soekarnoputri signed the “Government Regulation Number 29 of 2004 Concerning High Technology Production Facilities for Optical Discs.” The Regulations entered into force on April 5, 2005. The successful enforcement of these regulations is crucial to reducing endemically high piracy levels in Indonesia. The Regulations allow the government to: inspect and seize suspected pirate goods and tools, implement actions against methods used to produce them, and prosecute plant owners for violation of the Regulations or other laws (e.g., the Copyright Law). Nonetheless, IIPA notes the severe shortcomings in these Regulations, several of which have already been referred to in the report above:

- The Regulations do not expressly prohibit unlawful uses/manipulation of identification code.
- There is no centralized licensing of production of prerecorded or blank optical discs.
- The Regulations require imported, pre-recorded discs to be marked with identification code, which violates GATT/WTO rules and could have other negative ramifications.
- The Regulations do not adequately cover stampers and masters, e.g., it is not clearly stated that penalties specifically apply against illegal stampers or moulds alone.
- The Regulations do not expressly cover exports of discs, equipment and raw materials.
- The Regulations do not expressly authorize forcible entry in an inspection.
- The Regulations do not require the government to keep records of “permits” and raids run.
- The Regulations do not provide for plant closure (although IIPA understands that since business licenses can be revoked, technically, factories cannot operate without the license).
- The Regulations do not expressly impose corporate liability on individuals.

²³ Article 10 of the Council on Europe Cybercrime Convention (Sept. 10, 2001) provides that a party to the Convention will “establish as criminal offences under its domestic law the infringement of copyright, as defined under the law of that Party, pursuant to the obligations it has undertaken under the Paris Act of 24 July 1971 revising the Bern Convention for the Protection of Literary and Artistic Works, the Agreement on Trade-Related Aspects of Intellectual Property Rights and the WIPO Copyright Treaty, with the exception of any moral rights conferred by such conventions, where such acts are committed wilfully, on a commercial scale and by means of a computer system.”

Two Ministerial Decrees were issued by the Minister of Trade and Industry, one relating to the importation of machinery, raw material, and optical discs,²⁴ and another on reporting by registered producers.²⁵ The former sets forth requirements as to the importation of optical disc production machinery, raw materials (optical grade polycarbonate) and, unfortunately, finished discs (in addition to blank discs). It is feared that this importation Decree will thus be used as a tool to keep legitimate copyright owners or authorized distributors from importing discs into Indonesia.

Generalized System of Preferences: Indonesia currently participates in the Generalized System of Preferences (GSP) program, a U.S. trade program, which offers preferential trade benefits to eligible beneficiary countries. One of the discretionary criteria of this program is that the country provides “adequate and effective protection for intellectual property rights.” In 2006, almost \$1.79 billion worth of Indonesian goods entered the U.S. under the duty-free GSP code, accounting for 14.6% of its total exports to the U.S. During the first 11 months of 2007, almost \$2.1 billion worth of Indonesian goods, or 15.5% of Indonesia’s total exports to the U.S. from January to November 2007, entered the U.S. under the duty-free GSP code. Indonesia needs to continue to endeavor to meet the adequate and effective test under the statute to remain eligible to continue to receive favorable treatment under the GSP program.

MARKET ACCESS BARRIERS

Indonesia remains one of the most closed markets in the world to legitimate U.S. copyright businesses. Problems remaining include the following.

Trading and Distribution Rights, and Media Investment Ban: Indonesia maintains a blanket prohibition on foreign company participation in, or even investment in, importation, direct distribution, exhibition, or retailing in most copyright products in Indonesia. Presidential Decree 118 of 2000 remains in force and stipulates that all importation and distribution of films and video product be restricted to wholly-owned Indonesian companies. An annexure to the Decree lists those media sectors that are closed to foreign investment, including:

- Radio and television broadcasting service providers, radio and television broadcasting subscription service providers, and print media information service providers;
- Film making businesses, film technical service providers, film export and import businesses, film distributors, and movie houses operators and/or film showing services.

However, the Broadcast Law allows foreign ownership up to a 20% cap. IIPA understands that the Law overrides the Presidential Decree. It is believed the draft Film Law also contains a 20% foreign ownership cap.

Broadcast Law: The “Broadcast Law”²⁶ bans the broadcast of most foreign programming in Indonesia.²⁷ The Independent Regulatory Commission (KPI) created by the new Broadcast Law has now been installed and has issued implementing regulations, but a competing set of regulations was issued by the Ministry of Communication and Information Technology (Kominfo), and the latter are being challenged

²⁴ Regulation of Minister of Trade of the Republic of Indonesia 05/M-DAG/PER/4-2005 (May 2005) (which repealed Ministerial Decree of the Minister of Trade and Industry of Republic of Indonesia, Number 645/Mpp/Kep/10/2004 (October 18, 2004), Regarding Stipulations on Importation of Machinery, Machine Equipments, Raw Material and Optical Disc.

²⁵ Ministerial Decree of the Minister of Trade and Industry of Republic of Indonesia, Number 648/Mpp/Kep/10/2004 (October 18, 2004), Regarding Reporting and Monitoring of Optical Disc Industrial Company.

²⁶ Law of the Republic of Indonesia, No. 32 Year 2002, Regarding Broadcasting (in force February 2003).

²⁷ Specifically, the law requires that private broadcasting institutions be established initially without any foreign investment. Subsequent foreign investments can then be made, but only up to a 20% ownership cap shared by a minimum of two shareholders. Additional restrictions in the draft legislation include: (1) a restriction on foreign managers, (2) cross ownership limitations, (3) a local content quota of 60% on broadcast television and 10% on pay-television, (4) a 30% dubbing quota on foreign programs, (5) advertising limits of 20% of total broadcasting time for private broadcast stations and 15% for public stations, and (6) a total ban against the establishment of foreign broadcast institutions in Indonesia.

as unconstitutional by KPI.²⁸ Support from members of Parliament for KPI's position is believed to have led to the postponement, and likely amendment, of the regulations. Even with KPI's regulations, the law is onerous and the various market access restrictions should be lifted. IIPA understands that the Koinfo regulations were scheduled to be finalized after consultation with KPI by 2006, but at the time of writing, their status was unclear.

Film Law: Separate draft Film Laws were submitted to Parliament for consideration in December 2006 by the Ministry of Tourism and the government advisory board on Film Issues, BP2N. Industry has only recently obtained translations of these drafts and has not had the chance to fully review them at the time of this report. It is hoped that earlier plans to impose screen quotas and limits on foreign participation in the film industry, among many other market access restrictions of real concern, do not come to pass.²⁹ Again, it is also highly unfortunate that neither the Ministry, nor BP2N considered the views of foreign film producers or related associations in their discussions. It is suspected that these drafts will follow the Broadcast Law and limit foreign participation in the industry. There have also been some suggestions that consideration is being given to scrapping the Film Law entirely.

²⁸ Of concern to foreign broadcasters is that the Koinfo regulations, issued on November 16, 2005, are reported to have a number of negative features, possibly including a "made in Indonesia" requirement for pay-TV advertising. Article 24(5) of Government Regulation of the Republic of Indonesia No. 52 of 2005 Regarding Broadcasting Provided by Subscriber Broadcasting Institutions requires advertising to use a "domestic resource," although it is not clear if this requires the advertising to be made in Indonesia (e.g., it may simply mean Indonesian talent or resources had to be used). Article 24(6) requires foreign advertising to be replaced by domestic advertising, and cross-media and foreign ownership restrictions.

²⁹ The draft was expected to install an Independent Film Commission made up of local members, and set import and screen quotas, higher entertainment taxes on film admissions to imported films, requirements that all prints be made locally, and possible restrictions on foreign direct investment in the film industry. In addition, under the draft, it was reported that only local Indonesian companies would be permitted to operate a "Film Business" or a "Film Professional Service." Another provision of the draft apparently provides that film businesses are "obliged to use national potential to the maximum limit while paying attention to the principles of efficiency, effectiveness and quality." The draft also apparently specifies that only national film companies would be permitted to make film commercials, that imported films are expected to be supplementary to national product and imports should be "in proportion to local production," and although the existing film law permits films approved for all ages to be dubbed into Bahasa Indonesian, the new draft would apparently prohibit any form of dubbing except for educational, research, or information purposes, and require that all films be subtitled in Bahasa Indonesian.

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2008 SPECIAL 301 REPORT

ISRAEL

Special 301 Recommendation: Israel should be on the Watch List.

EXECUTIVE SUMMARY

The Israeli government has passed a new copyright law (published November 25, 2007; in effect May 25, 2008). While introducing several positive changes, the law dramatically weakened protection in some areas (e.g., with respect to sound recordings) and may violate Israel's international commitments in other ways. It is highly unfortunate that the new law does not fully implement the WIPO Internet treaties, the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty, especially since Internet penetration is more than 70% in the country, and broadband penetration is quite high, meaning Internet piracy in Israel is here to stay and having a significant impact on legitimate right holders.

Even more disturbing are some proposed pieces of legislation or memoranda which would seriously threaten to undermine the entire copyright system if not seriously tilt the balance away from authors and right holders. Such steps as imposing mandatory joint-collection of royalties for different right holders and compulsory rate-setting under a pending Copyright Tribunal Bill are firsts for Israel. They reveal in a rather transparent manner the Israeli government's attempt (really the attempt of the often anti-proprietor Ministry of Justice) to convert the default copyright system of exclusive rights into a system comprised of mere rights of remuneration. If they succeed in this attack on copyright, it is no exaggeration to imagine an already-shrinking copyright industry in Israel becoming a shadow of itself.

Also extremely disturbing is an Electronic Commerce Bill which passed on first reading in the Knesset in mid-January 2008. Rather than creating a framework that provides incentives to Internet service providers to cooperate with right holders against abuse of their networks, this Bill – if passed in its current form – would encourage ISPs to turn a blind eye to infringements and would raise serious obstacles to anti-piracy efforts in Israel. The Bill would not provide proper mechanisms to deal effectively with Internet piracy or to stop Internet infringements, since it establishes a notice plus notice mechanism, a blanket immunity to service providers for activities such as caching or hosting content except under extremely limited circumstances, and an ISP duty of confidentiality towards its users. IIPA hopes this Bill will be reconsidered in light of the important legitimate interests at stake for authors and other right holders operating in the Internet space.

These legislative developments are all the more difficult to swallow as law enforcement in Israel, which already takes little interest in enforcing copyright, is ill-equipped to help protect digital copyrights, with inadequate manpower and funding, and little emphasis on training for those few who are assigned the copyright beat. In the meantime, pirates – many of whom are known to be part of organized criminals – carry on in their high profit, low-risk enterprise.

ACTIONS TO BE TAKEN IN 2007

- **Remove from Consideration and Revise the Draft Copyright Tribunal Law That Would Create Troubling and Unprecedented Mandatory Collective Management and Would Impose Compulsory Pre-approval of Remuneration Rates.**
- **Reconsider Memorandum on Electronic Commerce Law, So That Service Providers Have Proper Incentives to Cooperate with Right Holders to Protect Their Legitimate Rights.**

- **Fortify Special Police IPR Units:** The Special Police Units are understaffed, under-funded, uncoordinated, and refuse to take actions *ex officio*. The National Police Unit should have the authority to coordinate districts for more effective and sustained enforcement.
- **Tackle Burgeoning Internet Piracy Problem:** The police are not actively pursuing Internet piracy cases and are not willing to assist in the raiding of Internet pirates.
- **Give Copyright Piracy Cases Priority Attention:** Police attorneys and prosecutors have shown little inclination to undertake criminal enforcement against commercial pirates. Police attorneys and prosecutors should expeditiously handle incoming copyright piracy files, proceed with criminal prosecutions of pirates within shorter periods of time, and ask for substantially higher penalties.
- **Apply Deterrent Penalties:** The courts are very lenient when imposing sentences on defendants in criminal copyright infringement cases in Israel. The sentences are very short and are suspended, and fines imposed are non-deterrent.

For more details on Israel's Special 301 history, see IIPA's "History" appendix to this filing at <http://www.iipa.com/pdf/2008SPEC301HISTORICALSUMMARY.pdf>. Please also see previous years' reports at <http://www.iipa.com/countryreports.html>.

ISRAEL ESTIMATED TRADE LOSSES DUE TO COPYRIGHT PIRACY (IN MILLIONS OF U.S. DOLLARS) AND LEVELS OF PIRACY: 2003-2007 ¹										
INDUSTRY	2007		2006		2005		2004		2003	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Records & Music	NA	50%	45.0	50%	28.0	35%	34.0	40%	40.0	63%
Business Software ²	52.0	32%	47.0	32%	39.0	32%	30.0	33%	35.0	35%
Entertainment Software ³	NA	NA	11.4	84%	NA	95%	12.4	88%	NA	75%
Books	NA	NA	1.0	NA	1.0	NA	1.0	NA	1.0	NA
Motion Pictures ⁴	NA	NA	NA	NA	61.0	61%	30.0	40%	30.0	50%
TOTALS	52.0		104.4		129.0		107.4		106.0	

COPYRIGHT LAW REVISION

A new comprehensive Copyright Law was enacted by the Knesset on November 19, 2007, replacing the old set of Orders and Ordinances (which were largely based on the 1911 Copyright Act of the United Kingdom).⁵ The Law reportedly was published in the Official Gazette on November 25, 2007,

¹ The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2008 Special 301 submission at www.iipa.com/pdf/2008spec301methodology.pdf.

² BSA's 2007 statistics are preliminary. They represent the U.S. software publishers' share of software piracy losses in Israel, and follow the methodology compiled in the Fourth Annual BSA and IDC Global Software Piracy Study (May 2007), available at <http://w3.bsa.org/globalstudy/>. These figures cover, in addition to business applications software, computer applications such as operating systems, consumer applications such as PC gaming, personal finance, and reference software. BSA's 2006 piracy statistics were preliminary at the time of IIPA's February 12, 2007 Special 301 filing and were finalized in June 2007 (see <http://www.iipa.com/statistics.html>) as reflected above.

³ ESA's reported dollar figures reflect the value of pirate product present in the marketplace as distinguished from definitive industry "losses." The methodology used by the ESA is further described in Appendix B of this report. Piracy at the retail level remains problematic, though it appears to now be largely domestically burned hard goods. There has also been a substantial increase in Internet piracy, specifically the downloading of pirated materials.

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

⁵ Copyright in Israel was previously governed under the Copyright Act (1911) of the United Kingdom (made applicable to Israel by an Order), the Copyright Ordinance (1924), and the Performers and Broadcaster Rights Law (1984) providing neighboring rights to performers and broadcasters (and limited rights to an employer of a performer). Other ancillary legislation included the Copyright Order (Berne Convention) (1953) (as amended through 1981), which implemented the provisions of the Berne Convention (Brussels Act [1948] text) in Israel, and the Copyright Order (Universal Copyright Convention) (1955), which implemented the UCC in Israel. IIPA has not reviewed in all aspects the extent to which any or all of these are abolished by virtue of passage of the new law.

and will go into force on May 25, 2008. While introducing several positive changes,¹² some of the new provisions result in dramatically weakened protection (e.g., with respect to phonograms) and steps must be taken or assurances given to avoid violations of international and bilateral commitments. It is highly unfortunate that the Israeli government did not take the opportunity presented by this legislation to fully implement the WIPO Internet Treaties, the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty, by adding protection against the act of circumvention of “technological protection measures” used by creators to protect their creations, and trafficking in circumvention devices or providing circumvention services.⁶ Regrettably the Knesset also rejected other attempts to introduce modern elements of copyright protection into this law such as an extended term of protection for sound recordings.

- **Legal Protection of Foreign Phonogram Producers is Seriously Weakened:** Israel has until now protected sound recordings as if they were “musical compositions,” i.e., as “works.” In addition, Israeli sound recordings and foreign sound recordings published in Israel received equal treatment (“national treatment”) in Israel, and also received the same treatment as other works, including the full panoply of exclusive rights, which include public performance and broadcasting rights. Under the new Law, the situation will change, such that, while U.S. right holders may continue to enjoy rights that Israelis enjoy, under national treatment (and by virtue of Israel’s bilateral obligations to the U.S.),⁷ other foreign right holders in sound recordings will apparently no longer enjoy equal treatment, and will be denied rights (and therefore payments) for their sound recordings in Israel. Specifically, Section 8(c) of the new Law in effect provides that only phonograms created by Israelis enjoy the full set of exclusive rights. Other phonograms are protected if they were first or simultaneously published in the territory of Israel, but are not granted the important exclusive rights of broadcasting and public performance, unless protection is granted pursuant to a treaty. In addition, Section 10 allows Israel to single out those foreign countries which do not provide such exclusivity, and deny the rights provided to Israelis to legitimate foreign right owners in sound recordings solely on the basis of their nationality.⁸ Section 8c should be amended so as to reinstate the protection under the previous law, granting all foreign phonogram producers the full set of rights granted to Israeli nationals. In addition, Section 10 should be deleted and the principle of national treatment should be applied to all subject matter.

¹² There are many other positive aspects of the new Law and we do not list those aspects here.

⁶ There are also no provisions dealing with “rights management information” (RMI), which right holders may use to facilitate licensing. RMI protection is another feature of the WCT and WPPT that the government of Israel should take the opportunity presented by the current amendments to implement.

⁷ Israel’s obligation to afford full national treatment to sound recordings was established by the 1950 U.S.-Israel Bilateral Copyright Agreement, May 4, 1950. This exchange of notes between U.S. Secretary of State Dean Acheson and Eliahu Elath, Ambassador of Israel, provided assurances from the government of Israel that “all literary and artistic works published in the United States are accorded the same treatment as works published in Israel, including mechanical reproductions of musical compositions.” By virtue of a Decree to implement this bilateral agreement, which has been recently amended in 29 October 2007, works first published in the United States are “protected in Israel as if they were first published in Israel” and works created by United States nationals, whether published or unpublished are “protected in Israel as if they were created by an Israeli national”. The requirement for Israel to provide equal treatment in Israel for U.S. sound recordings as for Israeli sound recordings was confirmed in Israel in 2004, through the April 30, 2004 decision of the Restraints-of-Trade Tribunal in Jerusalem in the Matter of IFPI-Israel, and through another exchange of letters between the United States and Israel. The court confirmed copyright protection for U.S. and other foreign phonograms as well as the application of the 30-day simultaneous publication principle. The judge specifically held that the U.S.-Israel Bilateral obligates Israel to provide national treatment to U.S. sound recordings. The Court quoted the 1950 Bilateral exchange of letters, and stated: “we are of the opinion that sound recordings originating in the United States are protected against public performance in Israel.” In late 2004, the United States Trade Representative exchanged letters with the government of Israel, in which the Israeli government confirmed that it had instructed the Ministry of Justice staff to follow the court’s interpretation of the 1950 Bilateral Agreement, namely, that Israel will continue providing national treatment for U.S. right holders in sound recordings. The government should now issue in writing an assurance that the meaning of its commitment is that material reciprocity will never be applied in Israel.

⁸ Discrimination through the application of “material reciprocity” is exacerbated by the fact that the copyright point of attachment is not even apparently provided for foreign sound recordings except as to the rights of reproduction, making available and rental. Moreover, the omission of protection for public performance and broadcasting of foreign sound recordings has a retroactive effect, because it applies not only to future recordings, but also to existing recordings, which at the time of their creation had enjoyed the public performance and broadcasting right in Israel. These recordings were produced by their owners on the basis of the rights existing at that time, i.e. the public performance and broadcasting rights for Israel. These rights have now been omitted with respect to these existing recordings without justification.

- **Still No Clear Coverage of End-User Piracy as a Crime:** The unauthorized use of business software and other copyright materials in a commercial setting causes grave harm to legitimate right holders. To the extent that such illegal uses result in significant unjust enrichment (i.e., on a commercial scale), such activities must be criminalized in order to meet the TRIPS Article 61 requirement to criminalize piracy on a commercial scale. Unfortunately, while the Israeli government has considered this issue for many years, with some within the government advocating criminalizing end-user piracy, the Draft apparently fails to do so. Sections 48 and 51 dealing with “indirect” civil infringements do make it illegal to possess an infringing copy for “commercial purpose”, which we believe may cover certain end-user situations. However, Section 61 dealing with criminal infringements only covers possession of infringing copies of a work “for purposes of trading therein.” Since end-user piracy does not normally involve a “trade” (monetary exchange), it appears this form of piracy is left out of the criminal statute, in violation of TRIPS.⁹
- **Civil Remedies (Statutory Damages):** Section 56 to the Law sets new amounts of statutory damages without need of proving damages between 0 NIS and NIS 100,000 (US\$27,400). These statutory damages are awarded at the discretion of the court (“the court is allowed, at the claimant’s request”) rather than at the election of the claimant, which is regrettable. Also regrettable is that while the “ceiling” for maximum damages was raised from 20,000 NIS, the “floor” was lowered from 10,000 NIS to 0 NIS. The new Law further provides that multiple infringements will be deemed as a single infringement when determining statutory damages. The latter amendment decreases the likelihood that the statute will have a deterrent impact on piracy, especially in the most damaging cases, i.e., those involving many infringing copies of numerous titles. Moreover, the lack of any floor on minimum damages seriously undermines the deterrent aspect of the damages, at the expense of the copyright owners.
- **Presumption of Ownership for Sound Recordings Omitted:** Inflicting a major set-back on enforcement of rights against piracy and wide-spread infringement, the presumption available in Section 64 to the new Law for creators in enforcement proceedings regarding their title in the works in cases where their name appears on the work in the normal manner was amended to exclude sound recordings. Thereby, a new troubling discrimination was created between creators of all other works (for which the presumption will continue to apply) and sound recordings (for which the presumption was omitted). This change will impose unnecessary hardships on producers of sound recordings in establishing their rights in infringement cases for no apparent reason. This totally unwarranted change in the law should immediately be revoked and the former version of Section 64 should be reinstated.
- **Limited Right to Injunctions:** Section 53 seriously limits the ability of copyright owners to enjoin infringement of their rights, by providing that the right to an injunction in copyright infringement cases exists “unless the Court has grounds for not ordering so”. This amendment not only limits the existing wide availability of injunctions in case of infringements, but also undermines the well-rooted view under Israeli case-law that the right for an injunction in infringement of IP matters (copyright included) is not subject to exceptions and that it is the primary relief for the IP owner. This amendment raises questions about Israel’s compliance in spirit with TRIPS Article 44.
- **Destruction/Forfeiture Not Adequately Provided (Section 60):** Section 60 of the new Law provides for the possibility of destruction of infringing goods, but also gives courts the ability to order the “transfer of the ownership of the infringing copies to the claimant, if he has so requested, and the court may, if it finds that the claimant is likely to make use of those infringing copies, order the complainant to make payment to the defendant in the manner which it shall prescribe.” This provision violates Article 46 of TRIPS which mandates the disposal of infringing goods “without compensation of any sort,” in that the court may order the transfer and require payment.

⁹ A more detailed discussion of the lack of a criminal remedy against end-user piracy is in the 2003 Special 301 report for Israel, at <http://www.iipa.com/rbc/2003/2003SPEC301ISRAEL.pdf>, at 148-149.

- **Term of Protection for Sound Recordings:** Under the new Law, Israel protects sound recordings for only 50 years “from the date of its making.” There is no reason not to afford at least 70 years to the owners of sound recordings.¹⁰ The international trend is for more countries to amend their laws to provide at least 70 years for sound recordings, and the government of Israel should agree to follow this trend and provide longer term to producers of sound recordings in Israel.
- **Retroactivity and Rule of the Shorter Term (Section 44):** Section 44 of the new Law intends to impose a rule of the shorter term on works/phonograms, but apparently misapplies this rule in a way that violates Israel’s obligations under Article 7(8) and 18 of the Berne Convention. Namely, Section 44 provides, “The period of copyright in a work listed below shall not be longer than the period of copyright prescribed for such work in the law of its country of origin...” Article 18 of the Berne Convention requires that Israel protect “all works, which, at the moment of [the Berne Convention] coming into force, have not yet fallen into the public domain in the country of origin through the expiry of the term of protection.” It is well understood that this requires Israel to protect U.S. works, including those that may have fallen into the public domain due to failure to comply with a Berne-prohibited formality, or which never had a term of protection due to failure to comply with a formality. The rule of the shorter term allows that the “term shall not exceed the term fixed in the country of origin,” not the term that the creation “has” as in the Israeli provision. It is well understood that the “term fixed” means the term the work would have enjoyed had all formalities been complied with. Thus, Israel’s Section 44 may be deficient as compared with the Berne Convention and TRIPS, since there may be works or phonograms which fell into the public domain in the United States due to failure to comply with a formality, but which under the Berne Article 18 retroactivity principle, must be protected in Israel. Israel must confirm that Section 44 meets the international obligation, or must amend it so that it does so.
- **Parallel Importation:** The definition of “infringing copy” in Paragraph 1 would exclude from protection any import for which distribution in Israel is not authorized, i.e., so-called “parallel imports.” The new Law goes further and provides that goods which are considered genuine in their country of origin cannot be prevented from importation to Israel even where the copyright owner in Israel is not the copyright owner of the work in its country of origin and has not authorized the import. Parallel imports of copyright material ultimately harm local distributorships, and increase the likelihood that piratical product will be “mixed” in with shipments of parallel imports, making piracy harder to detect and enforcement more difficult. This new provision discriminates against the holders of the local copyright to prevent such imports, as they would have been considered illegal if manufactured in Israel.
- **Exceptions and Fair Use:** In light of the long list of exceptions, the Law should expressly implement the well-established Berne “three-step test” (incorporated into TRIPS), preferably by adding the test in Section 19 and making it applicable to Sections 18-32. In other words, it should be codified in Section 18 that no exception in Israel’s law (whether fair dealing, “fair use,” or a specific exception) may be applied: other than in special cases; in a way that does not conflict with a normal exploitation of the work or unreasonably prejudices the legitimate interests of the right holder. Such a provision would provide the necessary guidance to the courts obliging judges to respect international norms in their interpretation of fair dealing (and other exceptions). Some of the exceptions listed in Sections 19-32 of the Law run afoul of the Berne three-step test, especially if applied in the digital environment.
 - **New “Fair Use” Exception Without Common Law Interpretation; Unlimited Ministerial Discretion:** Section 19(a) of the new Law attempts to adopt something similar to a common law “fair use” test by stating that “Fair use of a work is permitted for purposes such as: private study, research, criticism, review, journalistic reporting, quotation, or instruction and examination by an educational institution.” Section 19(b) of the new Law includes a list of factors that are similar to

¹⁰ Indeed, since those works are measured from the date of publication (or in the case of “records” from the date it was created) it is even more imperative that, for the sake of providing proper incentives for further creation and dissemination, that an attempt be made to arrive at an equivalent number of years to “life of the author” plus seventy years. In the United States, studies were conducted to arrive at the actuarial equivalent of “life of the author” plus seventy years, which was demonstrated to be ninety-five years from publication.

those in place in the United States. Section 19(c) then provides, “[t]he Minister may make regulations prescribing conditions under which a use shall be deemed a fair use.” While IIPA would by no means disagree with the adoption of fair use as understood in the U.S., and as interpreted through decades of jurisprudence, Israel does not have that carefully-honed jurisprudence and the adoption of the “fair use” standards without it risks creating gaps in protection that would not be justified in countries having such a “fair use” tradition. Also, it is unclear whether, by virtue of this change in Israel, the many years of jurisprudence on “fair dealing” may have been thrown out. At least the provision should be amended as follows:

(b) In determining whether a use made of a work is fair within the meaning of this paragraph the factors to be considered shall include, inter alia:

(1) The purpose and character of the use, ***including whether the use is of a commercial nature or is for non-profit educational purposes***;

IIPA further expresses concern over the Knesset granting the Minister of Justice discretion in Section 19(c) to “make regulations prescribing conditions under which a use shall be deemed a fair use.” Fair use is a case-by-case fact-based inquiry. “Regulations prescribing conditions” by the Minister would not be. This discretion seemingly without standard on the part of the Minister potentially opens the door for even broader exceptions to be introduced in Israel. IIPA seeks clarification as to what the possible checks are to this seemingly unlimited discretion may be.

- **Public Performance Exception in Educational Institutions (Section 29):** This Section provides an exception for certain public performances of plays, phonograms and motion pictures, mainly in educational institutions. Although the exception was limited in the legislative process to public performances taking place in the institution in the course of its educational activities only, it is still overly broad with respect to sound recordings. As far as sound recordings are concerned, the exception should further be limited as was done with respect to motion pictures, i.e. for teaching or examination purposes only. Equally important, the Minister of Justice has been empowered in Section 31 to define which public institutions are eligible for the exception. It is important that the Minister will confine the exception to public institutions that are official schools only and not to general educational-related establishments as a whole, in order to prevent unlimited use by the public.
- **Computer Program Exceptions (Backup and Interoperability) (Section 24):** The Draft exceptions as to computer programs should be more narrowly tailored. For example, it is not clear from the language that the back-up copy exception is limited to a single copy. More potentially concerning is the exception allowing for reproduction or adaptation for purposes of interoperability and for other purposes. IIPA previously commented that a useful comparison should be made with the European Directive on the Legal Protection of Computer Programs, Articles 5 and 6¹¹ in order to appropriately narrow the exceptions.

¹¹ 31991L0250 Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs. Specifically, Article 6 of the Directive on “Decompilation” provides,

1. The authorization of the rightholder shall not be required where reproduction of the code and translation of its form ... are indispensable to obtain the information necessary to achieve the interoperability of an independently created computer program with other programs, provided that the following conditions are met:

(a) these acts are performed by the licensee or by another person having a right to use a copy of a program, or on their behalf by a person authorized to do so;

(b) the information necessary to achieve interoperability has not previously been readily available to the persons referred to in subparagraph (a); and

(c) these acts are confined to the parts of the original program which are necessary to achieve interoperability.

2. The provisions of paragraph 1 shall not permit the information obtained through its application:

(a) to be used for goals other than to achieve the interoperability of the independently created computer program;

(b) to be given to others, except when necessary for the interoperability of the independently created computer program; or

(c) to be used for the development, production or marketing of a computer program substantially similar in its expression, or for any other act which infringes copyright.

- The exception must meet the Berne Convention three-step test, and, unlike the new Law, the EU Directive does so expressly.
 - While the new Law limits the copying or adaptation to “the extent necessary to achieve” said purposes (approximating the “indispensable” language in the chapeau of Article 6 of the Directive), the new Law’s excepted copying or adaptation is not “confined to the parts of the original program which are necessary to achieve interoperability,” as in the Directive.
 - The exception in the new Law goes not only to interoperability, but also to a general security exception, i.e., copying or adaptation is permitted for the “[e]xamination of the information security in the program, correction of security breaches and protection from such breaches.”
 - Under the EU Directive, it is not permitted to invoke the exception “for the development, production or marketing of a computer program substantially similar in its expression, or for any other act which infringes copyright,” while the new Law prohibits invoking the exception where “said information is used to make a different computer program which infringes copyright in the said computer program.” The words “development” and “marketing” should be added to narrow this exception at least.
- **Rental or Lending Right Exception:** Section 17(b), which exempts from copyright protection renting out works by “a public library or a library of an educational institute.” IIPA seeks clarification on whether this is intended to be a “lending” exception. To the extent it is rental and that computer programs and phonograms are subject to the Section 17(b) exclusion, the provision would violate TRIPS; rental even under the terms of Section 17(b) would certainly impinge on the exclusive right, would conflict with a normal exploitation of the work and would unreasonably prejudice the legitimate interests of the right holder. Other laws contain minor allowances of lending a computer program for a nonprofit purpose by a nonprofit library, but only on condition that the library affix a notice regarding the rights involved to the package.
 - **Temporary Copy Exception (Section 26):** Sections 11(1) and 12(4) confirm that the temporary copies are protected in Israel. The exception in Section 26 is vague enough to cause great concern, e.g., “to enable any other lawful use of the work,” is overly broad, and is not tempered much by the language “provided the said copy does not have significant economic value in itself.” It is unfortunate that such a vague and potentially overbroad exception was adopted notwithstanding industry comments specifically directed to properly narrow the exception to avoid a clash with the Berne Convention and TRIPS standards. Here would be one way to amend the exception to make it more acceptable:

The transient copying, including such copying which is incidental, of a work, is permitted if such is an integral part of a technological process whose only purpose is to enable transmission of a work as between two parties, through a communications network, by an intermediary entity, or ***and such is made by a person authorized to enable any other by lawful use of the work, provided the reproduction is undertaken within an incidental, technologically inevitable step for performing an authorized act consequential to the transmission or to rendering the work accessible, is within the normal operation of the apparatus used, and is carried out in a manner which ensures that the copy is automatically erased and cannot be retrieved for any purpose other than that provided for in the preceding sub-sections*** said copy does not have significant economic value in itself.

3. In accordance with the provisions of the Berne Convention for the protection of Literary and Artistic Works, the provisions of this Article may not be interpreted in such a way as to allow its application to be used in a manner which unreasonably prejudices the right holder's legitimate interests or conflicts with a normal exploitation of the computer program.

- **Library/Archive Exception (Section 30):** Section 30 as written fails to meet the Berne/TRIPS standard for exceptions. Section 30(a) must be limited to a single copy, and the statute must provide assurance that the reproduction in digital format is not otherwise distributed in that format and is not made available to the public in that format outside the physical premises of the library or archives. Otherwise, it would risk violating the Berne Convention and TRIPS. Section 30(b) as drafted is too open-ended to comport with international standards. By contrast, 17 U.S.C. § 108(d) and (e) (U.S. Copyright Act) allows for limited inter-library transfer of a single copy of one article from a compilation or periodical, in limited circumstances, or of an entire work, but only where the work cannot be obtained at a fair price.
- **Point of Attachment – Need Issuance of Order to Ensure Protection:** Section 9 provides that foreign works/phonograms that do not otherwise qualify for protection (e.g., by first publication in Israel) will be protected on the basis of international treaties pursuant to a Ministry of Justice “Order.” This confirms that there is no express point of attachment for foreign creations provided in the Law. Existing Orders implementing the Berne Convention, TRIPS Agreement, Rome Convention and other international treaties signed by Israel, which correspond to provisions in the old law, will have to be amended to comply with the new law before it takes effect on May 25, 2008

OTHER COPYRIGHT-RELATED LEGISLATION

Draft Copyright Tribunal Law Would Create Troubling Mandatory Collective Management and Would Impose Compulsory Remuneration Rates: A new draft Copyright Tribunal Law was put before the Knesset in July 2006. The draft has now been allocated to the Economics Committee of the Knesset for review, and deliberations have already started. This draft represents the first attempt to establish a copyright tribunal in Israel. Although copyright tribunals have proved to be beneficial to the enforcement and administration of copyright, the new draft, substituting the 2001 draft, includes two notable problematic changes which threaten to stall royalties’ collection for broadcasting and public performance of phonograms in Israel.

First, the draft introduces a mandatory joint-royalty collecting system for public performances and broadcasting by a single umbrella organization to be selected by the Minister of Trade and Commerce. The mandatory joint collection would cover phonogram producers and all other right holders whose works are embodied in phonograms, authors, and performers. Other common law countries (e.g. the UK, Canada, Australia and Singapore) with a copyright tribunal in their copyright laws do not oblige right holders to jointly collect broadcasting and public performance royalties. In fact, this is virtually unheard of anywhere in the world (other than in very specific and limited circumstances, such as the collection of private copying levies). The restriction on independent administration will deprive producers of sound recordings of their basic property rights and stands in stark contrast to the exclusive nature of broadcasting and public performance rights granted to local and foreign creators under the new Copyright Law. The mandatory joint-collection would also overrule existing collection mechanisms which have been in operation in Israel for decades. It would disrupt existing commercial dealings with users and will likely lead to unnecessary conflicts between right owners forced to administer their rights jointly. It also constitutes a breach of the basic right to freely associate and the right to freely contract. It is difficult to see how such joint collective administration imposed by law could be of any benefit to either right holders or users.

Another major problem with the draft is a requirement for pre-approval of all tariffs collected by the joint-collection body. The draft requires that the tariffs and royalty rates for broadcasting and public performance for the entire local market be set by the tribunal as a pre-condition for their collection. In other words, royalties will not be collectable until after such tariffs are issued by the tribunal. Such task is unprecedented in other countries. It will be extremely expensive and pose an insurmountable task on the new Tribunal, when in fact such intervention is not needed in most cases because the royalties are agreed upon without legal dispute between the producers and users. In fact, there are no countries where copyright tribunals are subjected to such a task (not even in countries with established veteran copyright tribunals). Again, the amendment blatantly disregards the basic principle of freedom of association and of

the right of collecting societies to determine the economic return for their rights. It further disregards the specific characteristics of the various economic rights holder groups and runs counter the established practice in the world, particularly in the U.S. and in Europe. Israel should not adopt these highly detrimental and totally unwarranted provisions.

The combination of the two new elements the draft seeks to implement – the joint-collection and pre-approval of public performance and broadcasting tariffs – would create a serious hindrance to royalties collection in Israel. They would disrupt existing market conditions and establish a framework that threatens royalties collection altogether.

Memorandum on Electronic Commerce Law: A new E-Commerce Bill in Israel passed a first reading in the Knesset in mid-January 2008, and will now be allocated to a committee (most likely the Economics Committee). While there is no date set for deliberations, there are some major flaws in this bill which must be addressed. The local record industry group provided detailed comments on a previous version of this Bill (when it was a Memorandum) but there have been some major changes to the text since then.

Unfortunately, it is feared that the Bill would fail to properly address copyright holders' interests in cases where providers of online services are involved in illegal transactions dealing with materials protected by copyright and neighboring rights laws. If passed in its current form, it would create a completely unworkable environment for dealing with online piracy. It would prevent any possibility to remove infringing content from the internet on a prompt basis and would likely encourage service providers to turn a blind eye to infringements occurring over their networks. The following are the main problems with the Bill:

- **Unworkable and Ineffective 'Notice + Notice':** As opposed to putting into place an effective and expeditious remedy of takedown – an essential element when dealing with Internet infringement which can be propagated and cause enormous damage within short periods of time – the Israeli Bill would not obligate the service provider to expeditiously remove content. Instead, it would obligate the service provider to simply notify the user that the content will be removed within three working days unless the user challenges the notice and is willing to litigate. Such a notice + notice system is unworkable in practice and prejudices legitimate interests of right holders in effectuating protection of their rights.
- **No Possibility for Right Holders to Insist that Content be Removed:** Even more troublesome is the absence of any possibility for right holders to require ISPs to remove or block access to infringing content despite the users' willingness to litigate the issue. This creates a dangerous situation where users have a "final say" on whether allegedly infringing content remains online.
- **Provide Service Providers With Blanket Immunity:** The safe harbors built into the Bill are drafted to provide blanket immunity from civil liability to those who qualify (Sections 8-10).
- **Injunctive Relief Unclear:** While Section 12 provides for injunctive relief, it is unclear when it can be invoked. As the Bill currently reads ("in cases where the content of the information constitutes a civil wrong or where the distribution of that information infringes intellectual property rights") it appears it may apply only as a final remedy. The provision should be broadened to ensure injunctive relief is available in preliminary proceedings as well as a final remedy.
- **No Constructive Knowledge:** As drafted, it appears the Bill would only require takedown of cached material only if there is actual knowledge of an infringement (or in the case of hosting, only if there is a notice). The language "is aware of facts or circumstances from which infringing activity is apparent" or something similar, which would impose a reasonable constructive knowledge standard should be inserted.

- **Takedown Not Required in Case Alleged Infringer Cannot be Located:** Amazingly, Section 10(3)(c) of the draft provides that if the user whose content has been hosted cannot be located having taken "reasonable steps," the ISP may not take down the notified material but instead must simply notify the right holder that the ISP was unable to contact the other party.
- **No Requirement (or Possibility) of Suspension or Termination of Account of Repeat Infringers.**
- **Bill Would Preclude Voluntary Disclosure of Allegedly Infringing Users, and Would Only Require Disclosure Upon a Court Order:** The bill establishes a general duty of confidentiality that the ISP has towards its users which would prevent any possibility of voluntary disclosure. In addition, disclosure is an exception to the general confidentiality obligation and is conditioned on obtaining a court order, which may be issued where there is a "real reason to suspect" that infringement is taking place. This requirement is impractical in view of the enormous number of infringements on the internet. This should be substituted by a more flexible and simple process.

Collections for Retransmissions of Broadcast Television Signals: Notwithstanding protections accorded to retransmitted works under Israel's copyright laws and an Israel Supreme Court decision confirming that Israeli law affords such copyright protection to cable retransmissions, Israeli cable operators continue to refuse to make payment for retransmissions of any broadcast television signal. Collective management organization AGICOA filed lawsuits on behalf of its international members, including U.S. right holders, against cable operators in the District Court of Tel Aviv in 2000 only after the latter had rejected the years of efforts by AGICOA to negotiate retransmission licenses.¹² These efforts to seek redress from Israeli courts have been hindered by bankruptcy filings of certain of the cable operators from which AGICOA sought remuneration and the reluctance of the courts to provide any protection of retransmission rights.¹³ IIPA notes that the Ministry of Justice has yet to withdraw a draft law which has been pending before the Knesset since 2004, which would demote the cable and satellite retransmission right to a mere right of remuneration. The exemption, which was proposed for an interim period (of three years) has been pending at the Knesset's Economic Committee since 2004. This draft should be scrapped.

COPYRIGHT PIRACY AND ENFORCEMENT UPDATES

Piracy levels are the same or getting worse in Israel. As a result, legitimate copyright owners are being driven out of business. According to the motion picture industry's enforcement group ALIS, 300 video libraries had to shut down during the last two years, as huge damage was caused to the local theater owners and distributors. They also report that legitimate sales of the local distributors are declining. Theatrical box office has also been declining since 2001.

Retail Piracy: The main format of pirated disc found in the markets in Israel is burned CD-Rs and DVD-Rs which are made in underground laboratories which are difficult to locate as they can be set up in small rooms in domestic premises. The extent of the burning problem is increasing with time, due to increasingly easy and inexpensive access to burning equipment. Only a small percentage of pirated discs are imported from the Palestinian Authority. Many of the pirate DVD-Rs are of films downloaded from the Internet.¹⁴ Piracy is also found in fixed stores in major marketplaces, including in Tel Aviv, Haifa, Jerusalem, Rishon Le-Zion, Rosh Ha-Ayin, and Herzlia, which engage in in-store burning of major motion picture titles. Parallel imports of Zone 1 DVDs of U.S. motion pictures (DVDs programmed for playback and distribution in North America only) also remain widely available.

¹² Starting in the late 1990s, Israeli cable operators have been retransmitting U.S., European and Russian content without the authorization of right holders.

¹³ Subsequently, AGICOA claims were rejected by the bankruptcy trustee (Special Manager). These objections necessitated direct intervention by U.S. producers in the case as well as the filing of mandates for AGICOA intervention by its right holders. These claims remain pending in an endless protraction of the proceedings, lending the appearance that the courts will not enforce legitimate claims arising under copyright law, as confirmed by the Supreme Court, and that Israel rejects the obligations of relevant international treaties.

¹⁴ Dozens of websites are taking advantage of the approximately 3.5 million Internet users aged 13 and above.

Public Performances: Illegal public screenings continue to be a problem in hotels, cafes and pubs, one that has grown since the introduction of pirate DVDs and new sophisticated viewing and display equipment.

Internet Piracy: Israel now boasts at least 3.7 million Internet users, for a penetration rate of over 70%, including 671,000 separate Internet hosts. Broadband penetration is also growing rapidly.¹⁵ Along with increasing broadband penetration, it is not surprising that P2P file sharing, bulletin boards, and direct sharing of files is more prevalent in Israel. The industries report that their capability to operate against Internet piracy is constrained by the lack of appropriate Internet legislative framework and by the lack of the Police's willingness to pursue Internet pirates.

Organized Crime and Piracy: There are organized crime elements in Israel in local production and distribution of pirate products in main markets such as central bus station in Tel Aviv, the Carmel market, Haifa's main street (Ha-Azmaut st). Almost all the stalls in Israeli flea markets where counterfeit and pirated products are sold are controlled by organized criminal organizations.

Enforcement Issues: Despite the law enforcement authorities' lack of resources dedicated to IP enforcement, industry reports good relations in anti-piracy efforts. The motion picture industry enforcement group, ALIS, has reported some good results in obtaining criminal raids and civil raids, and in dismantling CD-R/DVD-R labs. In all, ALIS carried out 246 criminal cases and 77 civil cases.¹⁶ ALIS notes good cooperation with the Ministry of Home Office, Ministry of Justice, Ministry of Commerce and Employment, Ministry of Treasury, and Customs.

The record industry also continues to note some good raiding in 2007, but notes that the Special Intellectual Property Police Units created by the Israeli government in 2002 suffers from a depletion in the number of officers. There are 30 officers handling all types of intellectual property infringement and spread across four separate districts and one headquarters. The units are under-funded and they unfortunately lack coordination and structure, for example, they fail to define proper targets in advance. They do not actively pursue Internet piracy cases and are not willing to assist in the raiding of Internet pirates. The Israeli authorities also refuse to act *ex officio*.

Lack of Criminal Prosecutions for Piracy: There is still a very serious bottle neck of copyright cases at the prosecutorial level, even in the face of a growing tide of piracy, as Israeli law enforcement authorities and prosecutors have shown little inclination to undertake criminal enforcement against commercial pirates. As a result, indictments are subject to huge delays. This slows down the entire enforcement process. It is recommended that a national and independent unit be established to fight copyright and trademark infringements. This unit would be run independently and would include a

¹⁵ While not entirely up-to-date, see The World Factbook, Israel, at <https://www.cia.gov/library/publications/the-world-factbook/geos/le.html>. See also Internet World Stats, at <http://www.internetworldstats.com/stats5.htm>. These statistics are up-to-date as of November 30, 2007, are based on Census Bureau data, while usage numbers come from various sources, mainly from data published by Nielsen/NetRatings, ITU, and other trustworthy sources. See also Internet World Stats, Israel, at <http://www.internetworldstats.com/middle.htm#il> (reporting that there were 3.7 million Internet users as of July 2006, representing a 51.1% penetration rate, according to TIM, and 1,421,000 broadband Internet connections as of September 2007, according to the International Telecommunications Union; IIPA views these number as extremely conservative).

¹⁶ For example, in 2006, ALIS reports running, in conjunction with the authorities, 227 criminal raids and 50 civil raids. Moreover, ALIS reported that as of the end of November 2006, it raided 23 such labs seizing 208 CD-R burners and 183 DVD-R burners). The record industry reports a January 2006 raid on a clandestine laboratory operated by two suspects, leading to seizures of 12 CD-R towers containing between 7 and 12 burners each, 30,000 recorded CD-Rs containing music, 100,000 blank CD-Rs and approximately 500,000 printed inlay cards. Two suspects were arrested and subsequently charged with copyright offenses. On March 16, 2006, the recording industry group IFPI Israel cooperating with a special crime task force raided several premises suspected to be used in pirating music products. One house, controlled by members of a gang also suspected to control two markets in the towns of Ashdod and Askelon and known for the availability of counterfeit product, was subject to a thorough search including the employment of specially trained dogs. During the search 6 CD-R burning towers, thousands of pirate CDs and blank media were found on the property. A hand gun together with a silencer and quantity of drugs were found by the police dogs, hidden in a yard. The suspects, some of whom had previous convictions for IPR offences, drug trafficking, robbery and other offences were arrested pending a court appearance and forensic examination of the firearm. See *June 2006 IFPI Enforcement Bulletin*, at <http://www.ifpi.org/site-content/library/enforcement-bulletin-30.pdf>.

prosecutor who should concentrate mainly on cases against factories and illegal burning operations. Cases still languish too long in courts, with decisions usually taking 2 years.

TRAINING

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

MARKET ACCESS

Television Advertising Restriction Violates Israel's WTO Agreement:¹⁷ On May 9, 2002, Israel's Council for Cable and Satellite Broadcasting adopted a new provision to the existing Bezeq Law that regulates the pay television industry. The provision prohibits foreign television channels from carrying advertising aimed at the Israeli market, with the exception of foreign broadcasters transmitting to at least eight million households outside of Israel. This provision violates Israel's commitments in the World Trade Organization (WTO) Services Agreement to provide full market access and national treatment for advertising services. In addition, such restrictions impede the healthy development of the television industry in Israel.

¹⁷ IIPA generally opposes television advertising restrictions, as they lead to a reduction in advertising-based revenue, impeding the development of the television industry.

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2008 SPECIAL 301 REPORT

ITALY

Special 301 Recommendation: Italy should remain on the Special 301 Watch List, and an out-of-cycle review should be conducted later in 2008 to review progress made by the Italian government regarding matters such as: increasing enforcement activities, in both the physical and online environments; enhancing cooperation between law enforcement authorities and magistrates by holding comprehensive training sessions on IPR for magistrates; maintaining strong levels of protection and anti-piracy enforcement measures in the laws; expanding judicial training on IPR issues; and developing and funding pro-copyright public awareness and educational campaigns.

EXECUTIVE SUMMARY

Italy continued in 2007 to have one of the highest overall piracy rates in Western Europe. The Italian market faces exponential growth in online piracy and has a serious street piracy problem. Organized criminal syndicates remain deeply involved in distribution networks. CD-R and DVD-R burning is rampant and camcording in theaters and the commercial photocopying of books and journals continues to be a significant concern. Responsibility for copyright enforcement is fragmented. In addition to an almost anti-copyright (pro-piracy) attitude by consumers, legislators and courts, inadequate legislation, both in-force and likely to be proposed, will continue to make it extraordinarily difficult for right holders to protect their intellectual property and combat piracy.

Due to the fall of the government and early elections set for April 13-14, 2008, it is unclear at the time of this submission how the political situation will evolve and how it will affect the copyright industries' work in Italy. In 2007, however, the Italian Government was considering a number of proposals to reform the Copyright Law, each of which would take Italy farther away from achieving effective copyright protection. It is imperative that the government satisfy its international obligations and foster new, legal businesses. During recent years, the Italian Government's weak position on illegal peer-to-peer file sharing has severely damaged proper enforcement. In addition, Three enforcement-related criminal laws adopted in recent years have had a serious negative impact on enforcement: the first is the Pardon Law (2006) which granted amnesty to pirates with prison sentences of 3 years or less; the second is the "Cirelli Law" (2005) which reduced the statute of limitations causing many pending piracy cases to be dismissed; and the third is the "Pecorella Law" (2006) which eliminated the right of the Public Prosecutor and the aggrieved party to appeal against acquittal sentences issued at the trial level (this law was found unconstitutional in part, and some appeal powers have been restored). Italy's data protection laws also hamper effective enforcement, especially in civil cases involving online infringement.

PRIORITY ACTIONS IN 2008

Enforcement

- Improve enforcement, increasing raids and prosecutions, in both the hard goods and online environment.
- Effectively enforce the 2005 anti-P2P-related provisions to curb infringing uses and provide criminal authorities with appropriate resources and training.
- Invigorate a nationwide anti-piracy campaign which focuses on commercial scale piracy controlled by organized criminal syndicates, appropriately covers all types of Internet piracy, and also includes unauthorized commercial photocopying of academic materials.
- Effectively enforce the anti-camcording law to curb the increasing problem of theatrical camcord theft and theft of dubbed soundtracks.

- Foster sustained coordination between the DNA (National Anti-Mafia Direction) the local DIAs (Direzione Investigativa Anti-Mafia) in order to provide updated information on the existing links between counterfeit/pirate products and organized crime, with special reference to the Camorra.
- Consistent with the recent European Court of Justice (ECJ) decision in the *Telefonica* case, take appropriate steps to facilitate the ability of right holders to obtain the necessary information to take civil actions to protect their rights.
- Take action to support the development of effective codes of conducts between ISPs and right holders.
- Develop positive messaging on the value and importance of copyright, including in the on-line environment, and of intellectual property as a whole.
- Institute overall judicial reform to speed up criminal and civil proceedings.

Legislation

- Discourage legislative proposals that may undercut copyright protection.
- Repeal the 2005 Cirelli Law and the 2006 Pecorella Law.
- Eliminate the sticker requirement on software.
- Correct deficiencies in the implementing amendments to the EU E-Commerce Directive, and ensure participation of the copyright sectors in those discussions.

ITALY
Estimated Trade Losses Due to Copyright Piracy
(in millions of U.S. dollars)
and Levels of Piracy: 2003-2007¹

INDUSTRY	2007		2006		2005		2004		2003	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Business Software²	890.0	50%	729.0	51%	812.0	53%	779.0	50%	642.0	49%
Entertainment Software³	817.0	64%	647.7	40%	639.2	30%	NA	34%	168.5	47%
Sound Recordings & Musical Compositions	45.0	23%	48.0	27%	40.0	20%	45.0	23%	42.0	22%
Books	20.0	NA	20.0	NA	20.0	NA	23.0	NA	23.0	NA
Motion Pictures⁴	NA	NA	NA	NA	161.0	22%	160.0	15%	140.0	20%
TOTALS	1,772.0		1,444.7		1,672.2		1,007.0		1,015.5	

¹ The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2007 Special 301 submission at www.iipa.com/pdf/2008spec301methodology.pdf. For information on the history of Italy under Special 301 review, see Appendix D at (<http://www.iipa.com/pdf/2008SPEC301USTRHISTORY.pdf>) and Appendix E at (<http://www.iipa.com/pdf/2008SPEC301HISTORICALSUMMARY.pdf>) of this submission. For a full listing of prior IIPA Special 301 filings on Italy, visit the country page at <http://www.iipa.com/countryreports.html> and scroll to Italy.

² BSA's 2007 statistics are preliminary. They represent the U.S. software publishers' share of software piracy losses in Italy, and follow the methodology compiled in the Fourth Annual BSA and IDC Global Software Piracy Study (May 2007), available at <http://w3.bsa.org/globalstudy/>. These figures cover, in addition to business applications software, computer applications such as operating systems, consumer applications such as PC gaming, personal finance, and reference software. BSA's 2006 piracy statistics were preliminary at the time of IIPA's February 12, 2007 Special 301 filing and were finalized in June 2007 (see <http://www.iipa.com/statistics.html>), as reflected above.

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

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

COPYRIGHT PIRACY IN ITALY

Internet piracy: The biggest Internet piracy challenges are: (1) combating the common misperception that illegal downloading is not harmful to the creative community and (2) educating politicians on the need and value of protecting copyright on the Internet. There are an estimated 33.1 million Internet users in Italy, about 57% of the country's population (according to internetworldstats.com). Internet piracy (of music, sound recordings, movies, entertainment and business software and books), particularly as a means to deal in hard goods and circumvention devices, continued to present major problems in 2007. As broadband penetration expanded, so too did Internet downloading, including via peer-to-peer file-sharing systems, of pirated materials. This continued growth is fostered by the lack of cooperation by Internet service providers (ISPs) who take advantage of a loophole in the implementation of the E-Commerce Directive (see below).

Right holders contemplating legal action against Internet pirates in Italy face difficulties in identifying infringers due to restrictions imposed by the Privacy Code. Right holders may not obtain from Internet Service Providers (ISPs) the identity of an infringing end-user through a civil procedure. Such information may only be secured through the police or the courts in criminal actions, which is time consuming and cumbersome. Moreover, in September 2007, the Data Protection Authority (Garante) issued regulations prohibiting ISPs from disclosing information about their subscribers for civil or administrative purposes. If this issue is not solved, civil enforcement against online piracy may become totally impossible.

Organized crime: Organized criminal groups (mainly in southern Italy) dominate the optical disc market, from production to distribution, often using illegal immigrant networks to sell their products. The organized criminal syndicates belonging to the so-called "Alleanza di Secondigliano" have full control over counterfeiting and piracy in the southern Campania Region. Other organized groups, such as the Camorra and its affiliates, directly manage production centers, also involving a vast network of local poor families that run small private duplication facilities. The products are collected by special "postmen" and are distributed to illegal immigrants, who in turn sell the products at street and local markets. This strategy enables organized criminal groups to avoid large seizures of pirate material and to obtain the help of a large, impoverished population economically dependent on piracy. According to Italian anti-mafia prosecutors, there is evidence of the Napoli-based Camorra's growing interest in the trade in pirated goods and there are signs of their increased connections with Chinese criminal gangs.

In the summer of 2007, Italian anti-piracy police cracked an illicit distribution network operating in Catania, Sicily, in raids that uncovered a significant seizure of arms and bombs. Officers from the First GdF Operational Unit of Catania were involved in a series of seizures. During the search of one home, the police discovered eight guns, five rifles, ammunition for rifles and machine guns, two kilograms of TNT and bomb making equipment. More than 2,000 CDs and DVDs were seized during the raids as well as several stolen archaeological treasures, such as ancient Roman and Greek pottery. Police arrested two men and are investigating the connection between them and members of criminal organizations closely linked to mafia families.

Business software piracy: The Business Software Alliance (BSA) reports that there was no major change in the nature of piracy in Italy during 2007. The level of piracy of business applications software by corporate end-users—the major focus of the business software industry in Italy—remains among the highest in Europe. For example, more than 50% of companies criminally raided in 2007 used illegal software. According to a 2008 report issued by BSA-IDC, the information technology sector's contribution to the Italian economy could be even bigger if Italy's PC software piracy rate were to be lowered 10 percentage points over the next four years. This would create an additional 6,169 jobs, \$4 billion in local industry revenues, and \$1.1 billion in additional tax revenues for federal, regional, and local governments.⁵ In addition, this industry also faces the challenges associated with Internet piracy, the distribution of pirated CD-Rs of software and local "burning" of software onto optical media. The sale of counterfeit software products by street vendors continues, often

⁵ The Economic Benefits of Reducing PC Software Piracy, commissioned by BSA and conducted independently by International Data Corporation (IDC), released January 22, 2008, looks at the bottom-line economic benefits of reducing piracy in 42 countries that together account for more than 90 percent of global IT spending in 2007. It is available online at <http://www.bsa.org/idcstudy>.

involving people coming from Arab nations who are exploited by criminal organizations to market such illegal products); reports also indicated that more people of Chinese nationality are involved in this distribution process. Preliminary estimated U.S. trade losses in Italy due to business software piracy in 2007 rose to \$890 million, with a piracy level of 50%.

Entertainment software: Entertainment software publishers report that growing online piracy, due to increasing personal computer and broadband penetration, is becoming a significant threat to the industry. Italy, along with Spain and France, are consistently among the top five countries in which infringing activity occurring online (particularly through the BitTorrent and eDonkey P2P networks) is persistently high. Industry monitoring of ongoing infringing activity online found that with greater incidence of game piracy through P2P networks, there appeared to be a corresponding and dramatic decrease in legitimate sales of entertainment software for PCs (the estimated rate of decline was 20% over a 12-month period). For example, for at least one popular PC game title, the number of downloads on just the BitTorrent and eDonkey protocols appeared to have exceeded the legitimate sell-through numbers of the same title for the first eight (8) weeks after release. In a member company's monitoring of four (4) top game titles, Italy accounted for approximately 2-3 percent of all BitTorrent downloads and 6-10 percent of eDonkey downloads. A substantial percentage of the downloads are hacked versions of the localized (Italian) version of the game. Industry monitoring also indicates that a lot of this activity appears to be occurring on the networks of a number of Italian universities. ISPs in Italy are also generally unresponsive to the notices of infringement sent to them by the Entertainment Software Association (ESA).

In addition to online piracy, elevated levels of hard goods piracy also continues to be problematic. Pirated video game products continue to be widely available at flea market type venues and through street vendors, though predominantly in the Southern Region. Pirated product on optical media, now predominantly domestically burned rather than industrially produced imports, continue to be available. Counterfeit Nintendo video game products remain readily available in several cities. Circumvention devices, such as mod chips and game copiers that bypass the technological protection measures employed in console hardware, also remain prevalent. This situation is not helped by the lack of clarity in Italy's law governing the status of circumvention devices and mod chips. The recent Supreme Court decision overturning the Bolzano Court (which found that mod chips were not illegal) was a step forward; the Court found that circumvention devices are illegal under Italian law.⁶ The Entertainment Software Association (ESA) estimates that the value of pirated videogame product in the Italian marketplace for 2007 is \$817 million, with a 64% piracy rate.

Piracy of sound recordings and musical works: The recording industry reports the online distribution of music files is now the most problematic form of piracy in this market. P2P distribution is the most serious; more than 7 million Italians are now using P2P networks for illegal uploading and downloading of music files. According to research carried out in 2006 by the Fondazione Einaudi, more than 30% of the people interviewed replied they have reduced the purchase of music CDs by using P2P networks. FIMI, the local recording industry group, confirms that more than €70 million (US\$101 million) have been lost in 2006 due to P2P piracy alone. In southern Italy, physical piracy of CDs remains high. Large illegal burning centers are active all over Italy and consolidated street vendor networks run the distribution network for pirate products. Camorra gangs in Naples are very active in the production and distribution of pirate optical discs. Also, the failure to pay for broadcasting and public performance rights for music still remains unacceptably high. Music piracy still remains around 23% of the market with a drop in physical and an increase in online piracy. FIMI studies show there was a further decrease of the legitimate market of about 36% due to online piracy. With a piracy level of 23% for U.S. right holders, the estimated losses due to music piracy in Italy in 2007 were \$45 million.

Audiovisual piracy: The Motion Picture Association (MPA) also reports no major improvements in the overall piracy situation in Italy during 2007. The problem of Internet downloads and sale of pirate DVD-Rs continues. Theft of audio tracks from films being exhibited in theatres is a major problem; the Italian soundtrack

⁶ *Corte di Cassazione*, Judgment no. 1602, General Register No. 35598/2006. Unfortunately, the Court did state that this finding was based on its determination that entertainment software products were "multimedia and complex copyrighted works" and applied the criminal provisions with respect to audiovisual works, instead of a straightforward finding that mod chips are illegal. This, unfortunately, is the effect of the protections for software versus that for audiovisual works being found under different sections of the criminal code. It is hoped that the law on software will be soon be revised to give the same level of protection to technological measures whether used on software or audiovisual works.

is added to illegal copies downloaded from the Internet and distributed through P2P networks as well as through street vendors. Unauthorized public performances and local signal theft are prevalent, albeit on a decreasing scale and predominantly in the Campania region. Satellite signal theft and smart card piracy remain at low levels, due to the new Seca 2[®] encryption system.

Book and journal piracy: Unauthorized and uncompensated photocopying continued to plague academic publishers during 2007. Italy's Anti-Piracy law allows a certain amount of photocopying, but only upon payment of remuneration to a collecting society. Industry reports some success with licensing educational institutions (namely libraries), but not to copy shops which continue unauthorized activities unabated. Altogether, abuse of the law's provisions is common, costing Italian and foreign publishers alike substantial sums. Copy facilities are reportedly using increasingly sophisticated digital equipment in undertaking their activities—a growing trend that will make copying harder and harder to detect and prosecute (as files are stored for printing on demand, stockpiles will cease to exist). Authorities should work to enforce payment under the Anti-Piracy Law, and to promote use of legitimate materials on university and school campuses. Estimated losses due to book piracy in Italy were \$20 million in 2007.

COPYRIGHT ENFORCEMENT IN ITALY

There is weak political support due to a lack of understanding and fragmented responsibility for copyright within the Italian government. For example, there are 19 offices that deal with the fight against counterfeiting and piracy. The High Commissioner for Anti-Piracy is supposed to coordinate this issue with all the offices concerned but it lacks the power and authority to do so effectively.

Industry cooperation with police on both physical piracy and Internet actions remained generally good in 2007. However, the severity of the piracy problems merits much more attention. In particular, the judicial system remains in dire need of reform. Judges and magistrates must impose deterrent-level fines and significant jail time for major organized crime figures involved in copyright piracy, as well as move cases more expeditiously through the courts. In this regard, the industries believe that the passage and application of the 2005 "Cirelli Law," the 2006 "Pecorella Law" and the Pardon Law have undermined the possibility of any effective deterrence in the Italian system.

Criminal enforcement: The recording, audiovisual and business software industries all report continued good cooperation with the Italian police forces (including the Guardia di Finanza and the Polizia Postale) during 2007.

The recording industry, as represented by its local anti-piracy organization FIMI, reports that coordination with Italian enforcement agencies continued on a positive basis. The relationship with local enforcement authorities is getting better on the criminal side (a specific agreement was entered into with the Milan and Rome Municipal Police, while specific training activities have been requested and agreed with the Government Commissioner in Sicily. Some local administrations have launched public awareness campaigns, in particular in Florence and in Milan. In 2007, the number of anti-piracy raids in the music sector was 237, with the seizure of more than 1.4 million CD-Rs and more than 2,370 CD burners. The police also arrested more than 290 individuals for copyright infringement. Regarding P2P cases, 34 people were criminally prosecuted for copyright infringement in 2007, with two major operations carried out by the GdF against heavy up-loaders and file-sharing hubs. Problems continue with the courts, which tend to underestimate the seriousness of copyright violations and, in some cases, issue unclear or not well reasoned decisions which have disruptive consequences on the enforcement of rights. Criminal courts do not have any kind of specialization on IP issues. The music industry's relationship with ISPs is still developing; it is clear, however, that in many cases the ISPs could be much more cooperative than they currently are.

The motion picture industry, through its local anti-piracy group FAPAV, reports that the police are generally supportive of FAPAV's efforts. The source piracy represented by theatrical camcording (and theft of the film-dubbed audio track) is increasing and requires significant engagement by law enforcement. FAPAV took a successful anti-camcording operation in 2007 with the assistance of the GdF. FAPAV also uncovered a

corrupt law enforcement official who was dealing in counterfeit DVD distribution. In spite of a major effort to strengthen training of, and relationships with, law enforcement, this industry also remains frustrated by the poor attention given to its cases by prosecutors and the courts. The primary bottleneck is the dismissive attitude of the Italian judges towards piracy in general. In addition, ISPs are generally not cooperative although there were some positive signals from some ISPs in 2007 which many provide some hope for positive, concrete collaboration in 2008.

The business software industry also notes that positive developments with its cooperation and results achieved with the Italian authorities. Relationships with local enforcement authorities are improving with criminal officials, including the GdF. A specific agreement was entered into with the Milan Municipal Police and specific training activities have been requested and agreed with the Government Commissioner in Sicily. In 2007, BSA provided technical assistance to 229 GdF raids on companies. 126 of such raids discovered illegal software, for a total value of €3.25 million (US\$4.7 million). Other raids were carried out by police forces without BSA support or knowledge. According to the information currently available, the raids carried out in 2007 should be more than 400. In some cases the raid were carried out *ex officio*. The main problems are experienced with courts, which tend to underestimate the seriousness of software violations.

As an example of a raid that affected many industries, in October 2007, officers from the Guardia di Finanza (GdF) in Milan took part in Operation Genux which resulted in the arrest of four individuals (ages 30-45) for illegally uploading copyright infringing music onto the Internet. They had been sharing more than 120,000 files containing copyright infringing music using the DC++ peer-to-peer network. The police seized six computers, seven external hard discs and more than 2,300 CD-ROMs during the raids. The products seized included catalogue from artists such as Madonna, Vasco Rossi, U2 and Elisa, as well as copies of business application programs and videogames. In addition to pressing criminal charges, the police have imposed on uploaders an administrative fine of €12 million (US\$17.4 million), levied under Article 174bis of the Italian Copyright Act.

Problems with prosecutions: There are numerous roadblocks in the Italian criminal enforcement system, including perhaps the most pervasive problem, which is the unfortunate cultural fact that many judges, and the public, believe that piracy is not a serious offense and need not carry deterrent penalties. First, while police enforcement has significantly improved at the raiding level, it can still take months between a raid and the filing of charges to commence a criminal case in court. Second, once the case is filed, the cases often take two to three years or more before final judgment, significantly reducing the deterrent value of increased raiding activity undertaken by the police.⁷ Third, many Italian judges remain reluctant to impose deterrent sentencing on individuals charged with copyright infringement, especially where a large corporation owns the copyright. The situation was aggravated by the passage in July 2006 of the "Pardon Law" which has resulted in the dismissal of a large number of piracy-related cases.

Transparency must also be introduced into the investigative and prosecutorial process, for while the police to take *ex officio* actions against pirate entities, right holders remain uninformed about the status of the proceedings. Where information is sought by the right holder, it is difficult to obtain this information from police and prosecutors while the matter is pending.

The courts and the press: However, in another example of the lack of judicial support for anti-piracy efforts, the Court of Cassation by Sentence No. 1872 of January 9, 2007, ruled that the unauthorized downloading of copyrighted movies, music and video games is not a crime if the downloader does not obtain a financial gain from the action.⁸ The press stated that this ruling meant that "P2P is legal," a clear

⁷ An entertainment software publisher notes that it has several cases which have been pending with the courts since 2000.

⁸ As background, in April 2002, the Court of Turin sentenced two men to respectively four and five years in jail and fined them several hundred euros for using a computer (FTP) server at the Turin Polytechnic Institute to store and distribute copies of video games, films and CDs in 1999. The jail time was cut to three months on appeal. But in January 2007, a Supreme Court judge overturned the sentence completely, saying the act was not criminal because the duo saw no financial gain. This ruling was distorted in certain press accounts, adding to the already problematic misconception of the public that unauthorized downloading and file-sharing is not illegal. In a public statement, FIMI, the music industry's trade group, downplayed the Supreme Court decision, saying it would have little impact on the anti-piracy law as the two men were charged under an older, weaker law, not on the grounds of Law 128/2004, which contains stiff penalties for copyright infringement.

misrepresentation of a case which had been dismissed on the grounds that it targeted technology/systems rather than infringers/infringements. In response, the heads of the various entertainment associations (Anica, Univideo, Agis, members of FAPAV) as well as the author's society SIAE, issued public statements against the misinterpretation of the ruling by the press. In addition, FIMI and FPM sent letters to all the attorney circuits explaining the media's wrong interpretation of the case. All Italian anti-piracy associations continue to develop strategies to address this problem, including TV interviews and national press advertising. The lack of an official Government-supported awareness campaign on what is legal and what is not in the area of Internet still leaves a lot of confusion among the general public.

On a brighter note, a very good decision of the Court of Cassation issued in 2007 will help in increasing the criminal enforcement against illegal public performances of broadcasts and music.

Problems with civil enforcement against Internet piracy: Right holders considering civil internet anti-piracy actions in Italy continue to face challenges in identifying infringers due to restrictions imposed by the Privacy Code that came into effect on January 1, 2004. Right holders have not been able to obtain from Internet Service Providers, via a civil procedure, the identity of an infringing end user upon communication to the ISP of an IP address. (In comparison, right holders may, however, be able to secure such information through the police or the courts in criminal actions.) Article 16 let.(b) of Legislative Decree No. 70 of 9 April 2003, implementing the E-Commerce Directive, requires take-down procedures to be subject to a prior notice by the "relevant authorities." This referral to the intervention of an undefined judicial or administrative authority is contrary to the E-Commerce Directive and prejudicial to cross-industry agreements on take-down procedures. As a result, the industries believe that the Italian provisions of Legislative Decree No. 70 of 2003 are inconsistent with Article 14 of the EU Directive which requires a decision of the administrative or judicial authorities in order to remove the illicit contents or disable the access to them. EU legislation requires only the knowledge by the ISPs of an existing infringement committed by any third party to oblige the former to act expeditiously so to remove/disable the access to such illicit information. The anti-piracy associations continue to seek any opportunity to address and amend this deficiency in the law.

Another serious situation is that an Italian court has issued an overly restrictive interpretation of the Privacy Code, which is hampering the possibility of effective enforcement.⁹ This involves the approach taken by the Rome High Court in the Peppermint case and the Italian Data Protection Authority in relation to the processing of traffic data to carry out civil enforcement. If the issue is not resolved, civil enforcement against online piracy may become totally impossible, with extremely serious consequences in the marketplace. It is even possible that the data processing/investigation needed to support criminal cases may be at risk in the future. Some Italian courts are deciding to deny requests for end user data, in support of the hard-line position by the Garante. The Italian anti-piracy copyright associations are meeting with the Garante, with the aim of obtaining approval for specific Internet anti-piracy cooperation (similar to the authorization granted to the French ALPA by the French CNIL). Enforcement authorities themselves are not allowed to carry out certain activities (e.g. undercover online operations). A recent legislative proposal by the Anti-Piracy High Commissioner—that would address this problem—is unlikely to pass due to the weakness of the current government.

Civil searches and business software litigation: As far as civil enforcement against end users is concerned, BSA reports that the problems it encountered in 2007 were not different from prior years. Most

⁹ The Peppermint case was brought by the Germany music publisher Peppermint Jam Records GmbH, and has created a domino effect, beginning 2007, on the controversial issue of P2P networks monitoring and privacy in Italy. It started with an injunction issued by the Court of Rome (Procedure n. 81901/2006) that required Telecom Italy to disclose about 3,636 names (the letters were no more than 1,000, according to Peppermint's lawyers) of Italian Internet customers/infringers (thus overruling a previous ruling). The case was based on the use of an anti-piracy software managed by the Swiss company, Logistep, on behalf of Peppermint, and the data collected consisted essentially in IP numbers of the customers sharing copyrighted files through platforms like eMule or BitTorrent. Peppermint proceeded to send letters to some of the identified infringers with a settlement proposal of €330.00 (~US\$480), in exchange for a pledge to refrain from any further legal steps. There were a number of other similar proceedings under way involving requests of information to the ISPs brought by Peppermint as well as by a Polish company called Techland. The issue was exacerbated by anti-copyright politicians joining forces with consumer associations. The result was a wave of protest among the 'Internet people' drawing the attention of press and the Privacy Watchdog (Garante), which joined the proceedings and initiated its own investigation in anti-piracy activities and use of 'Internet monitoring' tools/software.

cases involved under-licensing in corporate contexts. In many cases, general managers do not have policies to keep software licenses under control, and employees install and use unlicensed software. While software piracy in the retail channel is still a problem, it appears to be slightly decreasing, especially in the north of the country, where enforcement tends to be more commonly and frequently applied. Media also played a very negative role in 2007, by reporting only decisions which are negative for IP enforcement, and in some cases also providing incomplete reporting. The business software industry's relationships with ISPs are still at the early stages, though clearly more cooperation from ISPs would be useful.

With respect to requests for civil *ex parte* searches, BSA reports that this procedure works relatively well in Italy. During 2007, 10 civil actions were directly commenced by BSA; 9 were granted and 8 resulted in finding of illegal software. However, there remain some difficulties. In a few cases, the competent court does not grant the order *ex parte*, thereby the possibility to enforce the measure is lost (when the other party knows of the order prior to executing it, that party can change the local situation, making the execution more risky for the plaintiff). Recently, BSA has had cases where the competent court was reluctant to grant more than one order at a time, thereby causing consistent delays in obtaining all the requested measures.

Customs enforcement: Customs authorities must be more vigilant in targeting suspected infringing goods. ESA member companies report that despite the continuing influx of counterfeit games, there was only limited seizure activity in 2007. Entertainment software publishers report that the customs seizure process presents problems for its companies; for example, even though right holders have registered their products with the Customs authorities, there have been very few actions or seizures of pirated products. It appears that despite complying with the registration process, and even though customs authorities have limited *ex officio* powers, these right holders must still obtain a final seizure order for the goods from the courts. Further training in identifying pirated and counterfeit products would also be beneficial for customs authorities.

Specialized civil IPR courts: In late 2002, a law was adopted which would create 12 specialized IPR civil courts. BSA reports that in 2007, some Specialized IP Courts do not appear to be keen on receiving software search order requests; timing to obtain the orders is longer; in at least one case the order was not granted. To date, the designated courts still have to handle non-IP cases while also assuming responsibility for IP matters without any allocation of new resources. As a consequence, IP proceedings (including urgent measures) have become very slow in some cases. For instance, urgent measures may now take up to eight to ten months (when the infringement needs the completion of a Court Expert report and the plaintiff requests an injunction or similar remedies; while search orders proceedings still remain rather quick).

COPYRIGHT LAW AND RELATED DEVELOPMENTS IN ITALY

Due to the forthcoming April 2008 elections, it is unclear how the political situation will evolve. However, in 2007, the Italian Government was considering a number of proposals to reform the copyright law and, while unlikely, it reportedly remains possible that the Culture Minister may push through certain proposals through a government decree amending the Copyright Act. There are two working groups operating within the Permanent Consultative Committee on Copyright (PCCC). Reportedly the various proposals they are considering include:

- 1- A requirement to obtain approval from a governmental body prior to applying digital rights management;
- 2- De-criminalization of P2P file sharing;
- 3- Adoption of a global license for file sharing (in effect, a form of compulsory licensing for Internet distribution);
- 4- Expansive extensions of the range of permissible exceptions and limitations of copyright protection.

It is possible that these proposals may be forwarded by the PCCC to the Parliament in the future. Both the WIPO Treaties (the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty) require member countries to provide the right of making available (which is an exclusive right not subject to compulsory licensing). Similarly, a requirement that a copyright owner obtain government approval prior to employing a

DRM is certainly not required by the Treaties' provisions on technological protection measures and anti-circumvention.

Over the past year, a number of 'anti-copyright' MPs have actively presented amendments in the context of unrelated legislation (in particular the so-called 'liberalization bill') aiming to decriminalize online infringements, weaken the legal protection for use of DRM technologies, and expand the notion of private and educational use. Although these proposals have been repeatedly defeated, thanks to pressure from right holder associations, the level of attention remains high. For example, on June 11, 2007, three "orders of the day" were approved by the Chamber, requesting the government to "repeal criminal sanctions for 'knowledge sharing,' liberalize copies for personal use, and allow reproduction solely for personal and non-lucrative purposes."

The EU Copyright Directive: Legislative Decree No. 68, which entered into force on April 29, 2003, implemented the EU Copyright Directive. For the most part, this decree properly implemented the directive. In late 2004, there was a lower court case from Bolzano, Italy, finding mod chips (that modified videogame consoles) to be legal, and that decision cast doubt on Italy's implementation of the Directive. As noted above, the Supreme Court in September 2007 overturned the Bolzano Court's ruling, and held that circumvention devices are in fact illegal under Italian law.¹⁰

The EU E-Commerce Directive: In contrast to its implementation of the Copyright Directive, Italy's implementation of the E-Commerce Directive (in Legislative Decree No. 70 of 2003) was deficient. The law requires take-down procedures to be subject to a prior notice by the 'relevant authorities.' This referral to an intervention by an undefined judicial or administrative authority is contrary to the E-Commerce Directive and prejudicial to cross-industry agreements on take-down procedures. It violates Article 14 of this Directive, and risks hampering online enforcement efforts by requiring a court order before a takedown can occur. EU legislation requires only that the ISP knows of the infringement to be obligated to takedown the infringing content. Clearly a proper notice and takedown procedure remains to be developed in Italy.

The EU Enforcement Directive: Italy's implementation of the EU Enforcement Directive provides a number of benefits for civil action against piracy, particularly obtaining information about infringers. However, Italy's data protection law is an obstacle to efficient enforcement (see detailed discussion above). Consistent with the recent European Court of Justice (ECJ) decision in the *Telefonica* case, appropriate steps should be taken to facilitate the ability of right holders to obtain the necessary information to take civil actions to protect their rights.

Internet Piracy and the Urbani Law Decree (2004) as amended (2005): In 2004, legislation criminalizing uploading on the Internet was adopted in the Urbani Law Decree. The Urbani Law Decree was first issued on March 22, 2004; it amended the Italian Copyright Act so as to criminalize certain online infringements of the copyright in cinematographic works, and specifically when the infringement is committed through file-trading networks. During subsequent parliamentary proceedings, the law was extended in scope to cover all copyright works and was confirmed by Parliament on May 22, 2004.¹¹ However, on March 23, 2005, the Italian Parliament weakened the anti-P2P provisions in the Urbani Law Decree, and these amendments entered into force on April 2, 2005. Several content industries worked hard to preserve a criminal penalty for uploaders. These 2005 amendments sadly represent a retreat from the version of the law passed in 2004, though it does offer a substantial criminal remedy against financially-motivated online infringers.

This 2005 amendment to the Urbani Law also resulted, fortunately, in the removal of the provisions troublesome to the software industries which required a kind of "virtual sticker" on all online websites. Specifically, Article 171 of the Copyright Act now creates criminal liability for any act of making a work available to the public on the Internet. Liability is imposed on anyone who without authorization "makes a copyright work

¹⁰ See discussion at footnote 6 regarding this court case.

¹¹ However, during this process the Italian Government was compelled by opponents of the law to undertake to introduce changes to prevent it from applying to domestic peer-to-peer file-sharers. This law also contained a very objectionable provision for the software industry which imposed a "virtual sticker" obligation, which would pose particular problems for business and entertainment software. Aspects of the Urbani Law Decree were opposed by the Internet service provider community, which gave rise to efforts to water it down. Hearings on amending the Decree (then known as the so-called Ascitti Bill) were held in the fall of 2004 before the Italian Senate.

or part thereof available to the public by entering it into a system of telematic networks [i.e., the Internet], through connections of any kind". The maximum penalty is a fine of €2,065 (US\$2,685). If the infringer pays a sum equal to half the maximum prior to his conviction, together with the expenses of the proceedings, the offense is expunged. Although this is a very mild penalty, it should be noted that it applies whether or not the infringement is committed for reasons of gain. It thus preserves the criminal nature of the violation, allowing for investigation by the police. Commercial Internet pirates are dealt with more harshly. Under Article 171, anyone who for financial benefit communicates a work or part thereof to the public via a "telematic network" is liable to a fine of some €15,000 (US\$19,500) and a sentence of 4 years' imprisonment. This amendment raises the threshold of liability from infringement "for gain" to one of "financial benefit," excluding the idea of the mere exchange of files as a sufficient basis for heavy sanctions.

ISP code of conduct: Unfortunately, there still has not been any concrete guidance from the Government on the ISP code of conduct process, i.e. the Sanremo Pact launched by the Innovations Ministry in cooperation with the Culture and the Communications Ministries in 2005.¹² The only outcome so far has been a unilateral publication of a self-regulatory code by the ISP groups, which almost totally ignores the concerns of copyright right holders. Following the French example in its "Olivennes Agreement," the Italian right holder associations are pressing the Italian authorities to adopt a similar initiative.

Eliminate the SIAE Sticker Requirement for Software: This problem remains a major concern for the business software industry. Specifically, Article 181*bis* of Italy's Anti-Piracy law contains an extremely burdensome requirement that could require software producers either to physically place a sticker on each work sold in Italy or to file complex "product identification declarations." Legitimate business software publishers who fail to sticker their products have found their products subject to seizure. The September 2001 regulation implementing the stickering scheme failed to resolve these problems. The Italian Government had assured business software industry representatives that software would be exempted across the board. Instead, the exemption as set out in the regulation is not unconditional and, in practice, remains onerous and unnecessary, given that there is no collective administration system for software. Ultimately, the business software industry and the Government negotiated a compromise that came into force in January 2003. The compromise did not exempt software across the board, however, and the new 2003 copyright amendments made no change to this system. Notwithstanding this 2002 understanding with the Italian Government, this stickering obligation is still in force and it does not appear that it will be eliminated anytime in the near future. In 2004, the Urbani Law Decree actually made this situation worse; fortunately, however, the 2005 amendments eliminated one of the problems, the one requiring a "virtual sticker."

Article 181*bis* of the Copyright Law providing for the stickering duty conflicts with some basic principles of the EU Treaty (such as the "free flow of goods") as well as Directives 98/34 and 98/48, the TRIPS Agreement¹³ and Italian Constitution. As a consequence, BSA urges that Article 181*bis* be revised to expressly state that all software programs containing less than 50% of audio or video materials are not to be marked or declared to SIAE. The criminal provision for software products (Article 171*bis* of the Copyright Law) was amended by Law 248/2000 to take into account the stickering duty. That rule may now be construed as applicable to original manufacturer, for the mere absence of the SIAE sticker on the products, event if such products are original. As a consequence, it is necessary to amend the provision eliminating the reference to the SIAE sticker. There was a recent decision by the EU Court of Justice (issued November 8, 2007, in case C-20/05) that had a relevant impact on the application of this rule. Italy will be under the duty to notify the rule to EU Commission. Enforcement against those who do not sticker will probably be weakened.

¹² An initiative sponsored by an inter-ministerial commission aimed at promoting cooperation among the various stakeholders (e.g., copyright owners, telecommunication companies, Internet service providers, etc.) has stalled. This so-called Vigeveno Commission, after its former Chairman, Paolo Vigeveno, was established by the Ministry for Innovation and Technology in cooperation with the Ministry of Culture and Ministry of Communications in July 2004 to "draw up proposals for the development of offer and consumption of digital content, while guaranteeing the protection of intellectual property." This commission fostered the negotiations between right holders and Internet Service Providers and telecommunications companies which led to a final compromise on the Urbani Law Decree, and also developed a "pact" between Government and Industry operators calling for the development of Codes of Conduct. The Pact was officially signed during the 2005 Italian Music "Sanremo" Festival, thus its consecration as the "Sanremo Pact."

¹³ Article 9 of TRIPS requires compliance with the provisions of the Berne Convention, including Article 5(2), which prohibits countries from subjecting the "enjoyment and the exercise" of copyright rights to any formality. Italy's stickering, associated fee and declaration requirements represent prohibited formalities. The burden imposed by the requirement makes criminal enforcement unnecessarily complicated and costly, and creates a barrier to legitimate trade, contrary to the requirements of TRIPS Article 41.

Anti-camcording legislation (2006): The illicit recording of movies at theaters (camcording) is a major source for pirate motion pictures available on the Internet, as well as on street corners and at flea markets. In March 2006, the Italian Government issued the first anti-camcording legislation in Europe (incorporated into implementation of Enforcement Directive, Legislative Decree No. 140/2006). The law adds a provision to Decree No. 733 of 18 June 1931 (law on public safety), prohibiting the use of recording equipment in a place of public entertainment. Violations are punishable with up to 3 months' imprisonment or a small fine.

Administrative fines in the Consumer Law (2005): Although not directed to deal specifically with copyright violations, a new law was adopted in the summer of 2005 which introduced new administrative fines for consumers of counterfeit and pirate goods. Law 80/2005 is aimed at protecting the products "made in Italy." According to Article 1, paragraph 7, of this law, anyone who purchases or accepts counterfeit or pirate products faces an administrative fine of up to € 10,000 (US\$13,000), or € 3,333 (US\$4,335) if paid within 60 days. Some local administrations already apply this law in order to fight the sale of pirate CDs, DVDs and trademark goods. Rome, Florence, and Venice have already implemented the provisions and sanctioned many consumers. More needs to be done in order to increase the adoption of this strategy by the more reluctant local administrations like Milan and Naples.

The 2005 "Cirielli Law": Following the decriminalization policy of the previous government and the desire to relieve the inefficiencies of the Italian judicial system (including a huge backlog of cases), a Bill (known as Ex Cirielli) was developed to reduce the duration of certain proceedings involving first offenders. All the copyright industries were concerned that its adoption could have the detrimental effect of potentially causing the dismissal of a large number of criminal copyright cases in Italy. The recording and movie industries, who have a large number of pending cases, urged Italian legislators to reconsider the approach in this Bill in order to prevent cases being dismissed en masse before they could be completed. Despite these concerns, the Italian Government adopted this law in November 2005. Recent data relating to Cirielli application is not available, but it is known that some prosecutors do tend to drop IP cases.

The 2006 "Pecorella" Law: The Pecorella Law establishes that if a defendant is found not guilty or is acquitted (e.g. due to expiration of the statute of limitations), the public prosecutor and the offended party cannot appeal the sentence but can only take the case to the Supreme Court. However, a defendant who has been found guilty retains the right to appeal and if the appeal fails, to then appeal to the Supreme Court. Finally, this law would allow the Supreme Court to review the "merits" of the case (e.g. retry the case), not just review matters of law. It should be noted, however, that the Constitutional Court has recently declared the Pecorella Law partially in violation of the Italian Constitution, which has restored to the Public Prosecutor certain powers to appeal acquittals. The copyright industries have been concerned about the possible effects of this law, including: (1) it might increase the length of time it takes for the Supreme Court to render its judgment (which is already very long); (2) it might multiply the tools available to the defendant on appeal and cause further delays to the sole benefit of the defendant, and (3) it might make the Supreme Court even more unmanageable than it already is.

The 2006 "Pardon" Law: In July 2006, a "Pardon Law" (aka 'Indulto', Law No. 241 of 2006) was issued. This is a general law providing an amnesty of all imprisonment sentences of three years or less. In other words, all those who had been sentenced to a jail term of three years or less before May 2, 2006, for almost all kind of crimes (including copyright piracy), were set free. Taking into account that IPR crimes have a maximum level of imprisonment sanctions of up to three to four years (which is furthermore rarely reached), this "Pardon Law" nullified virtually all anti-piracy criminal sentences imposed in the last few years. According to the Supreme Council of Italian Magistrates (CSM), 80% of trials between 2006 and 2010 dealing with crimes committed before May 2006 would be dismissed due to this law. Virtually all piracy cases were dismissed because most involved a potential final sentence between six months and three years. The impact of this law goes beyond the simple ending of trials and freeing of criminals. The Pardon Law decreases the perceived probability of punishment for future crimes and thereby reduced the incentive not to commit crimes. This law sadly reinforced the general perception in Italy that the probability of being actually punished for a crime is relatively low.

IPR TRAINING

The industry groups are active in training Italian officers. The Italian Federation against Music Piracy (FPM) is providing training seminars to the fiscal police on a monthly basis in cooperation with the local BSA and FAPAV. In 2007, more than 12 seminars were carried out in Italy and more than 500 police officers were trained. The local motion picture group, FAPAV, organizes roadshows, by itself and also with other IP organizations, throughout the year for local law enforcement. FAPAV also began to organize Internet piracy seminars in 2007 and plans to increase this activity in 2008, as well as adding specific training for theatrical employees in respect to anti-camcording efforts. For the last two years, BSA has an agreement in place with the GdF to provide trainings on software piracy. The agreement foresees 10 trainings in various cities. Upon request, BSA offers special further trainings. In 2007, BSA held a total of 15 trainings.

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2008 SPECIAL 301 REPORT

KAZAKHSTAN

Special 301 Recommendation: IIPA recommends that Kazakhstan be placed on the Watch List in 2008.

EXECUTIVE SUMMARY

Kazakhstan has not met all of its commitments under the 1992 U.S.-Kazakhstan Trade Agreement (in force, February 18, 1993). In particular, several deficiencies remain in its legal regime, and overall enforcement, especially criminal enforcement, is particularly weak. There have been very few convictions reported and only minimal penalties assessed according to official statistics issued by the government. Poor enforcement is the result, in part, of a high burden of proof in criminal cases, and an absence of proper resources.

In 2006, the U.S. Trade Representative noted that Kazakhstan had made “progress” by improving its enforcement regime with the adoption of several legal reforms in the preceding years. Kazakhstan did improve its IPR enforcement laws – especially in 2005 – with the adoption of a package of IPR reforms. But, it has not undertaken enough actual enforcement to date, especially against organized crime syndicates, to stem its high piracy levels, nor has it adopted all of the promised legal reforms. Development of a modern IPR regime in Kazakhstan will benefit local as well as foreign rights holders. The software and recording industries consider Kazakhstan the most promising marketplace of the C.I.S. region, behind only Russia and Ukraine.

The Copyright Law was amended in 1996, and further amended in 2004 and 2005. The 2004 amendments provided the long-sought explicit protection for pre-existing foreign works and sound recordings. Kazakhstan joined the Berne Convention (1999); the Geneva Phonograms Convention (2001) which provided a point of attachment for foreign sound recordings; and, it joined the two WIPO digital treaties, the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT), effective in 2004. In 2007, the U.S. Government and the Government of Kazakhstan held bilateral discussions on Kazakhstan’s World Trade Organization (WTO) accession. Kazakhstan’s law does not currently comply with the WTO TRIPS Agreement, and it needs to do so before Kazakhstan can be allowed to accede.

Legal Reform Deficiencies

The 2004 amendments to the Copyright Law of 1996 provide a flat 50-year window of pre-existing protection for foreign works and sound recordings. Thus, pre-1954 works and sound recordings remain in the public domain. It took over 10 years to adopt these amendments, which allowed a lot of (now illegal) back-catalog material into the marketplace. This remains a major enforcement problem that Kazakhstan has not properly addressed. Other changes made in 2004 included laws to facilitate electronic commerce and Internet technology, and to, at least partially, implement the WIPO digital treaties, as well as E.U. directives.

In 2005, (effective November 26, 2005), additional amendments to the Copyright Law of 1996 were adopted, as well as amendments to the Criminal Code, the Criminal Procedure Code, the Civil Code, and the Administrative Code. Perhaps the key amendment in 2005 was the change to Article 184 of the Criminal Code, which repealed the previously undefined “huge damage” threshold for criminal cases and replaced it with a threshold based on the harm done or value of the works or recordings exceeding 100 times the government set monthly wage (or for more serious crimes, 500 times that

amount). The 2005 amendments repealed the requirement that there be proof of “financial gain” for criminal charges to rest -- this was another major improvement. Also in 2005, changes were made in commercial and licensing laws to ban the sale of copyrighted material at street kiosks, requiring instead that this material be sold in retail stores. This was another positive step.

Several key legal reforms — notably in enforcement — remain. IIPA recommends that the Government of Kazakhstan should adopt the following changes:

- 1) In the Civil Code: provide proper *ex parte* search provisions for effective enforcement against end-user pirates.
- 2) In the Customs Code: provide *ex officio* authority for customs officials to seize illegal material and to commence their own investigations and criminal cases.
- 3) In the Criminal Code (or Criminal Procedure Code): provide for the confiscation and destruction of manufacturing equipment used to produce pirated material. Currently, there are provisions permitting the destruction of goods only upon a court order.
- 4) In the Administrative Code; provide *ex officio* authority for administrative authorities to commence investigations and cases. The Administrative Code (Article 129), as amended in 2005, lowers the threshold for bringing cases. However, only the Ministry of Justice (Copyright Office), and not the police, can bring charges for such offenses. IIPA recommends that the existing police *ex officio* authority be broadened to include administrative violations as well.
- 5) In the Copyright Law: adopt the necessary amendments to fully implement the WIPO digital treaties (WCT and WPPT). IIPA has, in the past, provided extensive comments to the government on the necessary treaty compatible amendments.
- 6) Adopt a proper regulatory scheme, including criminal penalties, for the production and distribution of optical disc material and equipment.

IIPA understands that Article 192(4) in the Criminal Code provides police with *ex officio* authority to commence criminal copyright cases, but that it is rarely used. For the past several years, IIPA has provided the government of Kazakhstan with “model” enforcement provisions. IIPA urges the Government of Kazakhstan to use the IIPA draft and to consult with local copyright industry representatives, to adopt these enforcement revisions in 2008.

Effective in 2003, the Customs Code was completely revised. However, those changes did not include the necessary *ex officio* authority to seize suspected infringing material at the border as required by the TRIPS Agreement. This needs to be corrected. The 2003 amendments also added a complicated registration system for copyright right holders seeking enforcement at the border, which further weakens the system. IIPA continues to recommend that this registration system be repealed.

Enforcement

The Government of Kazakhstan has made strides to improve its enforcement regime, both with its legislative reforms (noted above) and with stepped up police activity. However, the enforcement reports issued by the Government of Kazakhstan’s Economic Crimes agency in recent years indicate a relatively small number (for the size of the market) of police raids and seizures, and most troubling, almost no criminal convictions for IPR offenses. In fact, IIPA knows of no criminal convictions with jail sentences imposed in 2007 in the music, film, or entertainment software industries. Instead, we understand that all the copyright criminal cases resulted in either no sentence or a suspended sentence.

The Business Software Alliance (BSA) reports that in recent years “open and notorious” piracy has been reduced because those who sell software or computer equipment and devices now generally

understand that there are criminal, administrative, and civil penalties for such activities. For example, unlicensed discs of BSA member products, which used to be easily found in the marketplace, are now more difficult to find. In addition, the sale of hard-disc loaded computers with unlicensed software has been reduced. Generally, companies that sell computers sell them without any loaded software, or only with licensed software. In recent years, piracy levels for software have remained very high. Overall, the BSA reports in 2007 (based on its preliminary figures) piracy rates are at 79% and losses at \$54 million.

Enforcement is undertaken by a variety of agencies, including the Copyright Agency within the Ministry of Culture (16 departments) and various enforcement agencies. These agencies have assisted with some raids, in recent years, including against software pirates. A special IPR Department was created within the Finance Police (with national authority), but problems interpreting the law, in particular the threshold for criminal and administrative action have hampered their enforcement activities. In recent years, the copyright industries signed Memoranda of Understanding with the Government of Kazakhstan; there have also been training programs conducted throughout the country. The government has pledged to the copyright industries that it would undertake more and better enforcement. IIPA encourages the government to act, especially against criminal operations, and to improve its overall enforcement with deterrent penalties.

The copyright industries report in recent years that even though there were some cases brought to courts, the majority of pirates were not brought to justice due to administrative burdens, prosecutorial inexperience and delays, and an overall ineffective judicial system. Further they report, that even when cases do go to trial, there is no consistency in the sanctions that result (especially in the few criminal cases).

While the U.S. copyright industries have been sustaining millions of dollars in losses in Kazakhstan, the country received GSP trade benefits of over \$483.1 million in 2006, and \$377.7 million in benefits in the first 11 months of 2007. In April 2006, as a result of improvements in Kazakhstan's IPR legal regime, the U.S. Government concluded its GSP review of IIPA's petition of Kazakhstan. IIPA asks the U.S. Government to continue to closely monitor Kazakhstan's GSP obligations vis-à-vis its IPR legal and enforcement regime.

IIPA suggests that police and administrative activity can, if used correctly, be a very positive first step. IIPA recommends that stepped-up seizure and confiscation of illegal copyright materials should be undertaken, as well as the closure of shops and businesses conducting illegal business using the licensing law.

There are two known optical disc production facilities reported in Kazakhstan at present (the latter opened in August 2005). Each of the two plants has a single production line; the total plant capacity of the two plants is 11.6 million discs per year. Both plants now have IFPI-issued SID (source identification) codes (August 2002; August 2005) and have provided exemplars (examples) of discs manufactured at the plants to be used for forensics evidence. To date, there is no forensic evidence of illegal production at either optical disc plant. Still, IIPA recommends the adoption of optical disc regulations to properly monitor the production and distribution of material and equipment at these and any future plants, including tying illegal commercial production to criminal penalties. The absence of such a system, the lack of overall strong enforcement, and the infrastructure in Kazakhstan, are an invitation for plants and organized crime syndicates to move their operations into Kazakhstan from neighboring countries, such as Russia.

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2008 SPECIAL 301 REPORT

KUWAIT

Special 301 Recommendation: IIPA recommends that Kuwait remain on the Watch List.

EXECUTIVE SUMMARY

Over the past three years, copyright protection in Kuwait has improved for most but not all copyright industries due to increased cooperation with the Kuwaiti Ministry of Information (MOI), Kuwaiti Customs, and the Kuwaiti Ministry of the Interior (Police). The key developments in 2007 include increased *ex officio* raiding on behalf of the motion picture and entertainment software industries, shop closures in cases of repeat offenders, and the blocking of Internet websites offering pirate downloads, peer-to-peer file sharing, or advertising the sale of pirate physical goods. The Kuwaiti government also pursued most cases criminally, although the lack of mandatory minimal sentencing and deterrent maximum penalties by the criminal courts means defendants still do not fear the outcomes of such cases. The book publishing industry reports few piracy problems again in 2007 and commends the approaches to textbook adoption that have led to this continued success. For others in the recording and business software industries, results have proved less impressive, with fewer raids, few prosecutions, and more problems such as onerous, arbitrary and lengthy content review processes. Notwithstanding the laudable enforcement actions of the police, MOI and Customs, piracy rates remain quite high in general, underscoring the need for deterrent sentencing. The copyright law remains TRIPS deficient, including the lack of deterrent criminal penalties, and the government needs to update the law to effectively address Internet piracy.

PRIORITY ACTIONS REQUESTED IN 2008

- **Amend the Copyright Law to Provide Deterrent Fines and Mandatory Prison Sentences; Then Prosecute Piracy Cases in the Courts with Imposition of Maximum Penalties**
- **Deploy Police IPR and Cybercrime Unit (Complementing Efforts of MOI Against Movie and Game Piracy) to More Effectively Tackle Music and Software Piracy**
- **Successfully Target Pirate Internet Websites, Closing Down Web Access to Pirate Materials Expediently:** While the Ministry of Communication has expediently closed down pirate websites (e.g., movie downloads) when illegal activities other than copyright infringement occur on such sites (e.g., the site contain illegal religious material or materials that are prohibited in Kuwait), the Ministry of Information has not expediently blocked access to copyright materials on websites not containing other illegal material. The Ministry of Information must speed up its copyright infringement verification process, which now runs as long as three weeks now, to make Internet piracy enforcement more expedient and effective.
- **Amend and Modernize Copyright Law to Bring the Law Into Compliance with TRIPS and to Fully Implement the WIPO Copyright Treaty and WIPO Performances and Phonograms Treaty**
- **Apply Censorship Rules Fairly:** The Kuwaiti government should review censorship rules for sound recordings and movies and their enforcement, and should refrain from using these rules arbitrarily or randomly to block the release of movies or recordings that objectively qualify and/or have been

approved in the past.¹ The Ministry of Information censorship department now takes weeks to approve new sound recordings for the Kuwaiti market, while pirated CD-Rs of the same albums are already available in shops and through street vendors.

For more details on Kuwait's Special 301 history, see IIPA's "History" Appendix to this filing at <http://www.iipa.com/pdf/2008SPEC301HISTORICALSUMMARY.pdf>, as well as the previous years' country reports, at <http://www.iipa.com/countryreports.html>.

KUWAIT Estimated Trade Losses Due to Copyright Piracy (in millions of U.S. dollars) and Levels of Piracy: 2003-2007²										
INDUSTRY	2007		2006		2005		2004		2003	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Records & Music	10.0	75%	9.0	70%	8.5	70%	8.0	65%	3.0	55%
Business Software ³	37.0	62%	33.0	64%	35.0	66%	26.0	68%	24.0	68%
Motion Pictures ⁴	NA	NA	NA	NA	1.3	82%	12.0	95%	12.0	95%
Entertainment Software	NA	NA	NA	NA	NA	91%	NA	NA	NA	95%
Books	NA	NA	0.5	NA	0.5	NA	1.0	NA	2.5	NA
TOTALS	47.0		42.5		45.3		47.0		41.5	

PIRACY UPDATES IN KUWAIT

Optical Disc Piracy ("Burned" and Imported Factory Discs): The impressive efforts of the Ministry of Information (MOI) against optical disc piracy have had a positive net impact on piracy for some industries. Notwithstanding their efforts, optical disc piracy, both imported factory discs and home-grown "burned" CD-Rs and DVD-Rs, continues to harm copyright owners and remains the chief form of piracy found in the markets in Kuwait. Locally duplicated pirate CD-Rs with foreign music remain widely available in Kuwait. In many retail outlets the burning of such CD-Rs is "on-demand," exacerbating enforcement issues (i.e., enforcement officials sometimes find very little stock). The piracy level for foreign music is estimated at about 75%.

IIPA is now aware of one optical disc production plant in Kuwait. The plant was visited by IFPI staff in 2006 and 2007, and the plant owner fully cooperated with the plant visits. The Kuwaiti government should know about the plant and its activities.

Internet Piracy: Internet piracy is on the rise in Kuwait, with industry noting it as the second most serious concern, after rampant retail piracy. Kuwait now boasts almost 817,000 Internet users, which amounts to a 32.6% penetration rate, has 2,013 independent hosts, and 25,000 broadband users.⁵ While

¹ As an example of the arbitrary and unfair nature of these censorship reviews, the motion picture "Ratatouille" was banned because of an animated kiss.

² The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2008 Special 301 submission at www.iipa.com/pdf/2008spec301methodology.pdf.

³ BSA's 2007 statistics are preliminary. They represent the U.S. software publishers' share of software piracy losses in Kuwait, and follow the methodology compiled in the Fourth Annual BSA and IDC Global Software Piracy Study (May 2007), available at <http://w3.bsa.org/globalstudy/>. These figures cover, in addition to business applications software, computer applications such as operating systems, consumer applications such as PC gaming, personal finance, and reference software. BSA's 2006 piracy statistics were preliminary at the time of IIPA's February 12, 2007 Special 301 filing and were finalized in June 2007 (see <http://www.iipa.com/statistics.html>) as reflected above.

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

⁵ See The World Factbook, Kuwait, at <https://www.cia.gov/library/publications/the-world-factbook/geos/ku.html>. See Internet World Stats, at <http://www.internetworldstats.com/stats5.htm>. These statistics are up-to-date as of November 30, 2007, are based on Census Bureau data, while usage numbers come from various sources, mainly from data published by Nielsen/NetRatings, ITU, and other trustworthy sources. See also *Internet World Stats*, Kuwait, at <http://www.internetworldstats.com/middle.htm#kw> (reporting that there were 816,700 Internet users in Kuwait as of August 2007, representing a 32.6% penetration rate, according to International Telecommunications Union; and 25,000 broadband subscribers as of September 30, 2007, also according to International Telecommunications Union).

broadband penetration remains relatively low, the high overall rate of Internet penetration should give pause to industry and government alike as to the future of Internet usages of copyright materials in Kuwait. To avoid Kuwait becoming an Internet piracy haven, lawmakers should quickly act to pass a modern copyright statute to properly protect copyright on the Internet.

Business Software End-User Piracy: The business software industry reports no improvement in software piracy levels in 2007. Piracy continues to affect the ability of legitimate software businesses to operate in Kuwait.

Broadcast Signal Theft: The theft the satellite signals which involves altering set-top boxes to illegally receive broadcasts, and the unauthorized decryption and/or retransmission of pay television through a pirate signal to home and business “subscribers,” remain problems in Kuwait, exacerbated by the lack of deterrent minimum criminal penalties. The problem exists notwithstanding good and improving cooperation with the Kuwaiti government. In particular, the Ministry of Information has taken a very aggressive stance against cable pirates and has raided targets.

University Practices Help Keep Book Piracy Low: Kuwait retains its position as a leader in ensuring use of legitimate textbooks by students and faculty. U.S. publishers continue to report a high ratio of legitimate sales to known student adoptions and maintain that this is due to the transparent procurement/purchase practices of Kuwaiti universities. University purchasing departments tend to publicize lists of adopted textbooks and numbers of texts required, allowing booksellers to bid for the supply contracts, providing a straightforward mechanism for tracking legitimate sales by publishers. While isolated incidents of photocopying still take place in universities and require continued monitoring, the tendering system in the universities under the direction of the Ministry of Higher Education works to prevent any significant supply of pirated or illegally photocopied textbooks in Kuwait. The publishing industry commends the Kuwaiti authorities on this success again during 2007. Other countries should learn from this approach.

ENFORCEMENT UPDATES IN KUWAIT

Significant Enforcement Gains in 2007 Against Retail Piracy of Movies and Entertainment Software Through *Ex Officio* Raids: A noticeable change has occurred in overt retail piracy (fixed location, street vendors) in Kuwait of motion pictures and entertainment software due to improved operational fluency of the Ministry of Information (MOI). In 2007, MOI has stepped up its enforcement against movies and game piracy, taking many *ex officio* actions with all known cases resulting in criminal charges.⁶ Additionally, MOI has engaged in numerous closures of repeat offenders’ locations. From January to November 2007, MOI conducted 97 successful raids against movie and game piracy, resulting in the closure of 28 recidivist pirate video stores and 11 recidivist pirate interactive game stores. The MOI also heavily publicized these closures in the local media. As a result of all the raiding activity and closures, piracy levels for movies and entertainment software decreased significantly in 2007. Unfortunately, this decrease has yet to translate into increased sales due to both the lack of deterrent penalties in the law as implemented by the courts and the onerous censorship standards keeping legitimate product out of the marketplace (while piracy flourishes).

Music and Software Industries Need Greater Engagement and Enforcement in 2008: The music industry reports less positive results, due to the high rates of sound recordings that either do not clear the censorship system or are clear censors only with great delays, leaving the market wide open to a monopoly in the market place for pirate discs which, of course, are not censored. In addition, the MOI officials view music piracy as a very low priority, with virtually no *ex officio* actions against music piracy and only the rare cosmetic anti-piracy raid. The industry proposes that the Police develop and deploy a

⁶ In one instance, on April 1, 2007, MOI and Ministry of Interior, with industry support, orchestrated a 50-man raid team against a nerve of piracy, the Rehab Complex. In that raid, 50 separate shops were raided, and more than 10,000 locally burned pirate DVD-Rs of movie titles and Playstation games were confiscated. MOI and the Ministry of Interior deserve praise for taking on such a large-scale anti-piracy operation, which is unprecedented in the history of copyright enforcement in Kuwait.

special IPR cybercrime unit (inspired by the Lebanese example) to handle both physical and Internet piracy.

The software industry reports that 14 criminal actions/raids were undertaken against pirate resellers in Kuwait in 2007, and that MOI carried out raids in a more expeditious manner in 2007. Unfortunately, they also report that MOI lacks the wherewithal to act as a strong administrative enforcer. IIPA and BSA call upon the Director of the Copyright Unit of MOI to become more proactive in fighting business software piracy, apply strong administrative sanctions, and transfer such cases quickly to the public prosecutor so that software cases will end up in court. As noted below, the copyright law needs to be amended to provide for higher criminal penalties for all piracy cases, but also to confirm that end-user piracy of business software is considered a crime.

Ministry of Communication Internet Piracy Enforcement Actions Impress, While MOI Enforcement Needs to be Invigorated: The Kuwait authorities have recognized the increase in Internet piracy and have taken some steps to address the problem. Specifically, 155 websites were shut down by four key ISPs in Kuwait between January and November 2007. The Ministry of Communications spearheaded these efforts, expeditiously closing down the pirate websites (e.g., sites offering pirate movie downloads). However, MOC has acted expeditiously mainly due to other illegal activities occurring on such sites (e.g., the sites contain illegal religious material or materials that are prohibited in Kuwait). On the other hand, the Ministry of Information has not expeditiously blocked access to pirate copyright materials on websites not otherwise engaged in other illegal activity or dealing with other illegal materials. Although the MOI finally acted upon complaints, some websites remained up for more than three weeks after a complaint, despite blatant copyright infringement. The Ministry of Information officials must speed up their copyright infringement verification processes.

Court Weaknesses: All the industries agree that no matter how many raids are run, piracy levels in Kuwait will not significantly decrease until courts are empowered to administer deterrent penalties, including mandatory minimum fines and mandatory minimum prison sentences, as well as deterrent maximum fines and prison sentences. IIPA calls for the immediate passage of a new copyright law with minimal mandatory sentencing and higher maximums.

TRAINING

Some industry training efforts continued in 2007. Motion picture, entertainment and business software industry representatives have provided training to the judiciary and the enforcement authorities in Kuwait, and industry has generally participated in most U.S. government-led trainings of Kuwaiti officials. For example, the Business Software Alliance conducted a major training event on January 28, 2008, in partnership with the IPR unit of the Kuwaiti Law Society. The event was attended by representatives of the Judiciary, Public Prosecutor's Office, Ministry of Information, Law Society and Law Faculty of the University of Kuwait.

COPYRIGHT LAW AND RELATED ISSUES

Copyright protection in Kuwait is governed by Decree No. 64 (signed in 1999, effective February 9, 2000). IIPA has noted on many occasions that the 1999 law has never been interpreted through implementing regulations, nor has it been updated, and that the law fails to comply with TRIPS in certain respects and contains other problems/ambiguities.⁷

⁷ IIPA notes the following non-exhaustive list of deficiencies or ambiguities in need of explicit clarification or amendment by the Kuwaiti government:

- **Innovativeness Requirement for Works:** Article 1 of the Copyright Law provides protection to authors of "innovative" works; such an "innovativeness" requirement is inconsistent with TRIPS Article 9.1. The term "innovative" in the Copyright Law should simply be replaced by the word "original."
- **Exclusive Rights Limited to Financial Exploitation:** Under Article 4 of the Copyright Law, the right holder is given the exclusive right "to exploit his writing financially." The word "financially" should be deleted from Article 4.

In 2004, timed closely to the February 6, 2004 signing of a Trade and Investment Framework Agreement (TIFA) between the U.S. and Kuwait, the Kuwaiti government released a new draft copyright law, which would have resolved many but not all of the TRIPS deficiencies of the 1999 Decree, and would have partially implemented the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT) but not adequately in all respects. That draft was reworked after further government-to-government consultations and IIPA understands there may be a new version in the drafting process. Important issues to IIPA in the next drafting round are:

- Providing for Increased Criminal Penalties, with Mandatory Minimum Imprisonment and Fine (not and/or)
- Ensuring a WCT- and WPPT-compatible Communication to the Public and Making Available Right Both as to Works and Related Rights
- Ensuring Adequate Protection Against the Act of Circumvention of Technological Protection Measures, and Trafficking in Circumvention Devices, Including Both Civil and Criminal Remedies for Violations (and Providing Treaties-Compatible RMI Protection)
- Providing Express Temporary Reproduction Protection, With Only Limited Exceptions
- Ensuring Proper Enumeration of Other WCT/WPPT Rights Such as Distribution and Rental
- Limiting Exceptions to Protection, Avoiding Compulsory Licenses in the Copyright Area, and Avoiding Unreasonable Restrictions on the Ability of Parties to Freely Contract

-
- **Unclear Retroactive Protection:** Article 44 of the Copyright Law makes the law applicable to works that “exist on the date on which [the Copyright Law] shall enter into force,” making it unclear (since there was no copyright law in existence prior to enactment of the Decree) whether the law provides full TRIPS-compatible protection for older works.
 - **Protection for Sound Recordings:** IIPA understands that protection for sound recordings has been effectuated by protecting “audio-visual broadcasting works” in Article 2(6) of the Copyright Law.
 - **Unclear Panoply of Exclusive Rights for Producers of Audiovisual Works:** The panoply of exclusive rights for producers of audiovisual works according to Article 25 of the Copyright Law is unclear.
 - **Failure to Provide Express Point of Attachment for Performers/Broadcasters, Etc.:** Article 43 of the Kuwaiti Copyright Law fails explicitly to provide point of attachment for: 1) Kuwaiti or WTO members’ performers or broadcasters; 2) foreign unpublished works (performances or broadcasts); and 3) works of WTO members who are not members of WIPO.
 - **Inadequate Term of Protection for Computer Programs and Compilations of Data:** The Kuwaiti Copyright Law fails to provide computer programs and compilations of data with at least a TRIPS-compatible term of protection.
 - **Berne-Incompatible Compulsory License:** Article 14 of the copyright law amounts to an unacceptable compulsory license in violation of the Berne Appendix (and TRIPS Article 9.1).
 - **Moral Rights Provision Overly Broad, Possibly Impinging on Exclusive Adaptation Right:** The moral rights provisions exceed what is provided for in Article 6*bis* of the Berne Convention, and arguably nullify the exclusive right of adaptation, which would be a violation of TRIPS Article 9.1.
 - **Overly Broad Exceptions:** Several exceptions are arguably overly broad.
 - **Lack of Express Rental Right for Sound Recordings and Computer Programs:** There is no express rental right for sound recordings and computer programs; IIPA seeks clarification from the Kuwaiti Government that Article 4, clause 2, does in fact include a TRIPS-compatible rental right.
 - **Lack of Express Provision for *Ex Parte* Civil Searches:** The Kuwaiti Copyright Law does not expressly provide for civil *ex parte* search orders, as required by TRIPS Article 50.
 - **Insufficient Remedy as to “Materials and Implements,” in Violation of TRIPS Articles 61:** Article 42 of the Kuwaiti Copyright Law authorizes the Court “to confiscate all tools used for the illegal publication—if they are suitable exclusively for such publication . . . ,” making it incompatible with TRIPS Article 61, which requires criminal remedies to include “the seizure, forfeiture and destruction of . . . any materials and implements the predominant use of which has been in the commission of the offence.”
 - **Inadequate Criminal Remedies:** The criminal provisions in the Kuwaiti Copyright Law providing for a maximum fine of 500 Kuwaiti Dinars (approximately US\$1,800) or up to one year of imprisonment, or both penalties (to be raised by “not [more] than [half]” for recidivists”), may be incompatible with TRIPS Article 61, which requires remedies “sufficient to provide a deterrent,” unless such maximums are regularly meted out.
 - **Need to Penalize End-User Pirates:** The Kuwaiti Copyright Law does not expressly criminalize the intentional unauthorized use or copying of computer programs in a business setting.
 - **Border Measures:** The Kuwaiti Copyright Law contains no border measures as required by TRIPS Articles 51-59.

- Providing TRIPS-Compatible Procedures and Remedies, Including *Ex Parte* Civil Searches, Adequate Compensatory Damages and Criminal Penalties Sufficient to Deter, and Seizure/Destruction Provisions
- Providing TRIPS-Compatible Border Measures

It is also well known that the Kuwaitis have discussed with the U.S. government the possibility of negotiating a Free Trade Agreement, especially after the signing of the TIFA. It should be noted that an IPR chapter of any FTA with Kuwait would need to: (a) be TRIPS-plus; (b) include in specific terms obligations which would meet the requirements of implementing the WCT and WPPT; and (c) include modern and effective enforcement provisions, including those to respond to the threats of digital and Internet piracy, including P2P file sharing. Key issues of import to IIPA that have been part of the FTA negotiations to date, and thus should be included in any redraft of the Kuwaiti copyright law to account for developments in the law and technology, include the following:

- **Mandatory Minimum Fines, and Mandatory Minimum Fine and Prison Time for Recidivists.**
- **“Retransmission” Right:** The government of Kuwait should include an express “rebroadcast” or “retransmission” right, and protection against unauthorized retransmissions of television signals (whether terrestrial, cable, or satellite) on the Internet.
- **Criminalizing End-User Piracy of Software or Other Copyrighted Materials:** It should be clarified that the law criminalizes the unauthorized use of software or other copyrighted materials in a business setting.
- **ISP Provisions:** The Kuwait law contains nothing regarding how service providers should cooperate with right holders to address online piracy. The new draft law should include principles of liability to hold those who facilitate infringement on the Internet accountable, and could include specific provisions related to service providers, including notice and takedown (including in the P2P context).
- **Term Extension:** The Kuwaitis should follow the modern trend (more than 70 countries have greater than TRIPS minimum terms) which is to protect works for life plus 70 for works of natural authors, and 95 years from publication for audiovisual works and sound recordings.
- **Parallel Import Protection:** The Kuwaiti law should be amended to provide an exclusive right to authorize or prohibit the importation into Kuwait of copies of works, sound recordings, and performances fixed in sound recordings, even where such copies were made with the authorization of the author, performer, or producer of the phonogram (i.e., parallel import protection).
- **Government Legalization of Software and Other Copyrighted Works/Sound Recordings:** The Kuwaiti government should address the need to provide that all government agencies use legitimate software and adequately manage government software usage.
- **Protection of Encrypted Program-Carrying Satellite Signals:** The Kuwaiti law should be amended to make it a criminal offense to manufacture, assemble, modify, import, export, sell, lease or otherwise distribute a tangible or intangible device or system, knowing or having reason to know that the device or system is primarily of assistance in decoding an encrypted program-carrying satellite signal without the authorization of the lawful distributor of such signal; or willfully to receive or further distribute an encrypted program-carrying satellite signal knowing that it has been decoded without the authorization of the lawful distributor of the signal. In addition to criminal penalties, civil remedies, including compensatory damages, should be available for any person injured by these activities.
- **Presumptions of Ownership and Subsistence of Copyright:** The Berne Convention requires a presumption as to authorship of works (Berne Article 15(1)) and to cinematographic works (Berne

Article 15(2)). The Kuwaiti law should be amended to provide appropriate presumptions of ownership and should also provide for presumptions as to subsistence of copyright for works, performances and sound recordings.⁸

- **Information on Those Connected With Infringement:** The Kuwait law should include the proviso that, in civil judicial proceedings, the judicial authorities may order the infringer to provide any information that the infringer possesses regarding any person(s) or entities involved in any aspect of the infringement and regarding the means of production or the distribution channel of such products, including the identification of third parties that are involved in the production and distribution of the infringing goods or services and their channels of distribution, and to provide this information to the right holder.
- **Criminalization of Piracy for “No Direct or Indirect Motivation of Financial Gain” (“Net Act”/Not-For-Profit):** Article 61 of the TRIPS Agreement requires the criminalization of copyright piracy on a commercial scale. Since piratical acts (such as those occurring over the Internet) can cause devastating commercial harm regardless of any profit motive, it is recognized that TRIPS requires criminalization even of acts that may not have a motive of financial gain. Kuwait should therefore provide that copyright piracy involving significant willful infringements that have no direct or indirect motivation of financial gain shall be considered willful copyright piracy on a commercial scale.

MARKET ACCESS

Apply Censorship Rules Fairly: The Kuwaiti government should review censorship rules for sound recordings and movies and their enforcement, and should refrain from using these rules arbitrarily or randomly to block the release of recordings that objectively qualify and/or have been approved in the past. IIPA understands that the Ministry of Information refuses to approve content in an overly aggressive manner because National Assembly members have succeeded in sacking Ministers due to decisions to release certain products. As a result, even titles passed in Saudi Arabia are being banned in Kuwait, including films like “Ratatouille” (banned because of an animated kiss).

For the recording industry, the censorship authorities take too long in approving new albums for the Kuwaiti market, leaving uncensored pirate versions to capture the market. It has sometimes taken weeks before the censorship department approves the music album being submitted. In the meantime, shops and street vendors are selling pirate CD-Rs of the same albums! Unfortunately, other albums or single songs end up being banned in Kuwait. Yet, due to lack of enforcement against piracy, ironically, many shops that burn on demand shops have been detected selling CD-Rs with pornographic movies and/or photos.

⁸ The law should be amended to include the presumption that, in the absence of proof to the contrary, the natural person or legal entity whose name is indicated as the author, producer, performer, or publisher of the work, performance or phonogram in the usual manner, is the designated right holder in such work, performance or phonogram, and that, in the absence of proof to the contrary, the copyright or neighboring right subsists in such subject matter.

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2008 SPECIAL 301 REPORT

LEBANON

Special 301 Recommendation: Lebanon should be lowered to the Watch List.

EXECUTIVE SUMMARY

Lebanon has made some progress in combating piracy in the past couple of years for some sectors, despite serious political problems and instability. Nonetheless, copyright piracy continues to have a significant negative effect on the legitimate market for U.S. copyright owners in Lebanon. For example, legitimate record companies, and motion picture and television content companies report that copyright-based revenues were down in 2007, and the publishing, business software, and entertainment software industries continue to report mounting losses due to piracy of books and software.

On November 30, 2006, the United States and Lebanon signed a Trade and Investment Framework Agreement (TIFA),¹ which sets the stage for regularized discussions on many trade matters, including intellectual property. IIPA hopes that copyright concerns will be a permanent fixture in the TIFA agenda going forward. At the same time, a review remains ongoing by the U.S. government of Lebanon's IPR regime as part of the "Country Eligibility Practices Review" of the Generalized System of Preferences (GSP) trade program. In IIPA's Petition to launch that review, it noted three major deficiencies in Lebanon's protection of copyright, which remain largely true today: (1) deficiencies in the copyright law in Lebanon that render legal protection inadequate and ineffective; (2) the failure to enforce criminal remedies against pirate cable TV operators, making protection of U.S. audiovisual works inadequate and ineffective; and (3) enforcement efforts against piracy in Lebanon that are inadequate and ineffective.

PRIORITY ACTIONS REQUESTED IN 2008

- **Address Cable Piracy by Issuing Licensing Decree and Commencing Enforcement:** Cable piracy has long been the major piracy problem for the motion picture industry in Lebanon, as hundreds of small cable systems continue to retransmit broadcast programming without authorization and charge customers for these "pirate" pay television services. Both the Minister of Posts and Telecommunications and the head of the Lebanese Telecommunications Regulatory Authority have taken an interest in the fight against cable piracy, but despite being provided with a draft decree that would allow the Minister to regulate and legalize the cable market, no progress on the ground has been forthcoming in issuing the decree or shutting down pirate cable operators. Something needs to be done, and authorities should take their cue from the Cyber Crime and Intellectual Property Rights Bureau (CCIPRB) to answer the task of raiding and shutting down cable piracy once and for all in Lebanon.
- **Attack Pirate Imports and Exports:** The CCIPRB continued actively running raids against retail targets in 2007, but more needs to be done to target major factory-produced and "burned" to order discs, as well as book piracy, whether in photocopied or offset print formats, and whether sold domestically or produced for export. Customs authorities should step up *ex officio* actions to interdict and seize pirate product entering the country or destined for export.

¹ *United States and Lebanon Sign Trade and Investment Framework Agreement*, November 30, 2006, at http://www.ustr.gov/Document_Library/Press_Releases/2006/November/United_States_Lebanon_Sign_Trade_Investment_Framework_Agreement.html (Assistant U.S. Trade Representative for Europe and the Middle East Shaun Donnelly and Lebanese Minister of Economy and Trade Sami Haddad signed in Beirut a Trade and Investment Framework Agreement which will provide a forum for expanding and strengthening bilateral trade and investment relations between the United States and Lebanon).

- **Prosecutions with Deterrent Sentences in Lebanese Courts:** Part of the hope placed in the CCIPRB is that it will work closely with prosecutors to prepare cases for criminal proceedings. IIPA recommends training a number of prosecutors who will become expert in bringing copyright cases, creating an enforcement reporting mechanism between ministries, Lebanese Customs, and prosecutors, and improving the efficiency of the court system through assignment of specially qualified judges to hear copyright cases. IIPA also calls upon the Lebanese government to seriously consider establishing a special IP tribunal and to assign special prosecutors to become expert in IP cases.
- **Copyright Law and Implementing Key Treaties:** The Lebanese copyright law remains incompatible with major international copyright instruments (for example, the law is incompatible with the WTO TRIPS Agreement). The law should be amended to fix these deficiencies, as well as to protect copyright in the online, digital and wireless environments consistent with the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty.
- **Optical Disc Plant:** The Lebanese Government should continue to monitor the one known optical disc plant in the country for illegal activity.

For more details on Lebanon's Special 301 history, see IIPA's "History" appendix to this filing at <http://www.iipa.com/pdf/2008SPEC301HISTORICALSUMMARY.pdf>. Please also see previous years' reports at <http://www.iipa.com/countryreports.html>.

LEBANON Estimated Trade Losses Due to Copyright Piracy (in millions of U.S. dollars) and Levels of Piracy: 2003-2007²										
INDUSTRY	2007		2006		2005		2004		2003	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Records & Music	2.8	60%	2.6	60%	3.2	75%	3.0	70%	2.5	70%
Business Software ³	24.0	73%	23.0	73%	20.0	73%	15.0	75%	14.0	74%
Books	NA	NA	NA	NA	4.0	NA	3.0	NA	2.0	NA
Entertainment Software	NA	NA	NA	NA	NA	NA	NA	75%	NA	80%
Motion Pictures ⁴	NA	NA	NA	NA	1.0	1%	10.0	80%	10.0	80%
TOTALS	26.8		25.6		28.2		31.0		28.5	

PIRACY UPDATES IN LEBANON

Cable Piracy: There remain between 600 and 700 pirate cable operators serving over 80% of the Lebanese population. These operators retransmit domestic and foreign terrestrial and satellite programming without authorization to their subscribers (estimated to number about 720,000) for an average monthly fee of US\$10. Occasionally, these systems also use videocassettes or DVDs to broadcast directly to their subscribers, including the broadcasting of recent popular movies and television shows. Each cable operator retransmits about 100 different television channels, including a minimum of four movie channels that broadcast motion pictures 24 hours a day. Motion pictures are frequently retransmitted by these pirate cable operators prior to their theatrical release or legitimate broadcast by television stations in Lebanon. As a result, local broadcast television stations have cancelled long-

² The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2007 Special 301 submission at www.iipa.com/pdf/2008spec301methodology.pdf.

³ BSA's 2007 statistics are preliminary. They represent the U.S. software publishers' share of software piracy losses in Lebanon, and follow the methodology compiled in the Fourth Annual BSA and IDC Global Software Piracy Study (May 2007), available at <http://w3.bsa.org/globalstudy/>. These figures cover, in addition to business applications software, computer applications such as operating systems, consumer applications such as PC gaming, personal finance, and reference software. BSA's 2006 piracy statistics were preliminary at the time of IIPA's February 12, 2007 Special 301 filing and were finalized in June 2007 (see <http://www.iipa.com/statistics.html>) as reflected above.

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

standing licenses with copyright owners because they cannot compete with the pirates. A survey on the economic impact of cable piracy in 2000 estimated that the Lebanese government was losing approximately US\$38 million a year due to cable piracy. One legitimate cable operator, Econet, has even had a bankruptcy lawsuit filed against it because it cannot compete with pirate operators.

While many lawsuits have been brought over the years against various cable operators, there has been little deterrence against either the specific cable operator targeted or the pirate cable community.⁵ No new decisions regarding cable piracy were handed down in 2006 or 2007. As noted, both the Minister of Posts and Telecommunications⁶ and the head of the Lebanese Telecommunications Regulatory Authority⁷ have taken an interest in the fight against cable piracy, but despite being provided with a draft decree that would allow the Minister to regulate and legalize the cable market, no progress on the ground has been forthcoming in issuing the decree or shutting down pirate cable operators.

Book Piracy, Including Production for Export: Book piracy remains a major problem in Lebanon. Offset print pirate editions, especially common in the scientific, technical and medical sectors, hurt not only the domestic market, but are being produced for export to countries such as Jordan, Saudi Arabia, and the United Arab Emirates. The export of pirate books makes this problem a particularly harmful one for both local and international publishers. In addition, illegal photocopying in and around university campuses continues to plague academic publishers. Major commercial photocopying enterprises are situated near most campuses to serve students and lecturers who wish to copy books. Most universities have taken little or no action to discourage use of photocopied materials on campus.⁸ Enforcement and education officials should work together to target the massive illegal photocopying taking place in and around these institutions.

Retail Piracy: Retail piracy in Lebanon remains serious, running at well over 50%, depending on the industry sector. Although the actions of the CCIPRB have had an impact on the availability of pirated materials in street stalls and shops, retail piracy in brick-and-mortar shops remains a problem. Retail piracy involves optical discs (predominantly “burned” CD-Rs) of sound recordings, movies,⁹ entertainment and business software. Some of the “burned” CD-Rs are sourced back to Syria¹⁰ – a major transit country for pirated optical discs smuggled into Lebanon – and the Palestinian territories. Disturbingly, industry now reports that at least four (4) optical disc plants are operational in Syria, not only distributing inside Syria, but also exporting heavily to Iraq and also to Jordan and Lebanon. Several large and small-scale CD-R burning facilities are operational, while small quantities of pirated pressed discs are still imported from Asia, with some discs from China and Eastern Europe. Because of the rise of CD-R burning “to order,” it is essential that, when raids take place, the computers and all servers to which they are directly or indirectly linked be immediately seized and removed – just sealing them and leaving them at the target location is not enough.¹¹

⁵ One cable piracy case decided in 2005 demonstrates how long it can take to achieve justice: a court in Beirut handed down a decision in April 2005 for a criminal case that was filed back in June of 2000 against four cable television pirates for the unauthorized transmission of certain titles owned by U.S. motion picture companies. The court convicted the four defendants, with sentences consisting of fines of US\$4,667 for each of the pirates, and damages of US\$1,334 each awarded to each of the six plaintiff companies (a total of US\$8,004 in damages to be paid by each of the four defendants), plus confiscation of the equipment, court fees, and costs. Two criminal complaints were filed in February 2005, however, due to the assassination of Prime Minister Hariri, the investigation of those complaints was cancelled. In December 2005, a new complaint was filed with the Ministry of Economy and Trade requesting it to inspect the operations of ten pirate cable operators in Beirut. No further action has been taken in regard to this complaint.

⁶ MPT's website can be found at <http://www.mpt.gov.lb/>.

⁷ TRA's website can be found at <http://www.tra.gov.lb/>.

⁸ An illustrative list of institutions near which enforcement is overdue includes: Notre Dame University, Haigazian University, Balamand University and Lebanese University.

⁹ Pre-theatrical and pre-video release piracy sourced from camcorder copies and from pirate and parallel imported optical discs have been a widespread problem in Lebanon. Illegal copies of new U.S. cinema releases are on the market within days.

¹⁰ Syria has been used in the past as a major “transit country” for shipments of pirated discs into Lebanon from Malaysia. The pirated goods were mostly smuggled into Lebanon via “military roads” between Syria and Lebanon. There have been no real Customs checkpoints at these roads.

¹¹ In the past, some raids resulted in the police leaving computers with copyshops after the raid. These machines should be immediately seized and removed. Otherwise, pirates quickly make back-up copies via USB ports before the authorities return (often weeks or months later), when they finally have a court order to confiscate the computer.

Business Software Piracy: The business software industry continues to suffer from high rates of piracy in Lebanon, attributable to the unauthorized use of software in a business setting as well as the loading of illegal or unlicensed software onto hard drives of computers for sale.

Entertainment Software Piracy: Entertainment software publishers have reported a worsening of game piracy in recent years. Both factory replicated pirated optical disc product and CD-R burning is found in the market, and the Internet continues to serve as a medium for advertising pirated products. Pirated products are sold in retail shops and through street vendors. Lebanon is also believed to be a transshipment point of pirated video game products into Kuwait (and other countries in the region).

Optical Disc Production: There was one known optical disc production factory in Beirut, Lebanon (Skyline) that had been producing over 150,000 discs per month. While the plant is still in operation, the record industry reports that it has been able to visit the plant in 2006, as part of the "IFPI plant visit program" and reports that the plant owner fully cooperated.

Internet Piracy and Mobile Device Piracy: Notwithstanding the high cost of telecommunications, Internet piracy is on the rise in Lebanon. In the past, it consisted primarily of offers to sell hard goods (computer software, music CDs, and DVDs, and, e.g., online services offering illegal music compilations for sale in Lebanon via the Internet or e-mail), but P2P downloading has also increased due to the increase in broadband penetration. Lebanon now boasts 950,000 Internet users, or a 20.8% Internet penetration rate, 5,635 separate Internet hosts, and 170,000 broadband connections, or a 3.7% broadband penetration rate.¹² The Lebanese government has been regularly alerted to the existence of these illegal services, but has taken no action regarding these sites to date. Mobile device piracy – the unauthorized loading or preloading of illegal copyright content onto mobile devices such as mobile telephones, iPods, other MP3 players, and recordable media such as flash drives and memory sticks – can now also be found in Lebanon.

ENFORCEMENT UPDATES IN LEBANON

Special IPR Unit Continues to Make Gains in 2007, Despite Political Challenges: The early signs of success and increased cooperation regarding the fight against retail piracy in 2006 and 2007 appear to be holding up despite difficult politics and security concerns in Lebanon.¹³ The Lebanese government's special police bureau, the Cyber Crime and Intellectual Property Rights Bureau (CCIPRB), has remained available and willing to conduct and participate in retail raids.¹⁴ In 2007, the CCIPRB Unit grew from 25 officers (5 ranking officers and 20 junior officers) to 33 total officers (15 ranking officers and 18 junior officers). Like all other police units, the Unit does not have a formal budget. The Unit's police officers are generally more knowledgeable in intellectual property and cybercrime than their predecessors or other fellow officers. While *ex officio* actions are not accepted as a matter of course in Lebanon, (i.e., the police need to be instructed by the prosecutors' office in order to take action), because of the improved relationship with CCIPRB, copyright owners have been able to request raids even prior to filing a formal complaint. As a demonstration of its commitment and efforts over a period of months, the unit held a destruction ceremony on July 5, 2007, bulldozing over 100,000 pirate CDs and DVDs. The event received a great deal of press coverage.

¹² See The World Factbook, Lebanon, at <https://www.cia.gov/library/publications/the-world-factbook/geos/le.html>. See also Internet World Stats, at <http://www.internetworldstats.com/stats5.htm>. These statistics are up-to-date as of November 30, 2007, are based on Census Bureau data, while usage numbers come from various sources, mainly from data published by Nielsen/NetRatings, ITU, and other trustworthy sources. See also Internet World Stats, Lebanon, at <http://www.internetworldstats.com/middle.htm#lb> (reporting that there were 950,000 Internet users as of August 2007, representing a 20.8% penetration rate, according to the International Telecommunications Union, and 170,000 broadband Internet connections as of September 30, 2007, according to the International Telecommunications Union).

¹³ A main problem remains the political instability, resulting in an inability to target high-profile pirates (as they are linked with some of the Palestinian camps in southern Lebanon).

¹⁴ CCIPRB held a destruction ceremony at Roumieh Prison in January 2007, destroying thousands of pirate discs, and worked with the software industry to identify ten high profile targets for 2007.

In addition to the good work of the CCIPRB, there is reportedly increased cooperation with Lebanese Customs on tackling imports (especially) and with inspectors of the Ministry of Economy and Trade. IIPA recommends that U.S. government training continue to be directed at the CCIPRB Unit as well as Customs and MOET officials.

Courts Have Failed to Deter or Adequately Compensate for Piracy: A major problem in Lebanon's enforcement system remains the lack of successful civil cases and criminal prosecutions with deterrent sentences meted out in Lebanese courts. U.S. copyright industry representatives have pursued criminal complaints (e.g., against cable pirates) and civil cases have also been pursued to a limited extent. Unfortunately, these cases have not led to deterrent results.¹⁵ The Lebanese government must encourage judicial authorities to adjudicate promptly all intellectual property cases and to impose the maximum penalties allowed under Lebanese law. Inefficiency in the judicial system is a major obstacle to reducing the level of piracy in Lebanon. Postponements in court, even of urgent matters, are the norm, and criminal cases can take years to reach judgment.

Additional training for judges is crucial in our view. Judges should be trained in the basics of IP laws and the importance of deterrent sentencing. Judges should also be sensitized to the significance of IP offenses and the damage IP offenses cause to creators, as well as the impact lack of deterrence in IP cases has on Lebanon. In addition, IIPA recommends that a special IP prosecutor and a special IP court be established.

TRAINING AND TECHNICAL ASSISTANCE

Industry continues to be engaged in copyright issues in Lebanon, and providing training. Industry groups (including MPA, BSA and IFPI) organized training seminars for police officers of the Cybercrime and IPR Bureau (this took place in the UK in 2006). Another training seminar was organized in late 2007 in Australia (BSA and IFPI participated). The publishing industry has also been actively engaged over the past two years, working with the MOET to raise awareness on campuses of the importance of copyright. On September 5, 2007, IIPA and MPAA representatives sat down with the head of the Lebanese Telecommunications Regulatory Authority to discuss approaches to effectively addressing cable piracy in Lebanon.

Other specific technical assistance initiatives in 2006 and 2007 have included the following:

- IIPA members assisted the Ministry of Telecommunications with draft legislation aimed at regulating Lebanon's cable industry, although, unfortunately, that legislation has not moved toward passage.
- IIPA members assisted the U.S. expert retained by USAID to draft cable legislation for Lebanon.
- IIPA members have provided copyright law training to the Special IPR Cybercrime Unit.
- There have been several training seminars by industry for inspectors of the Ministry of Economy and Trade.

MARKET ACCESS

Censorship: The censorship rules in place in Lebanon are still a barrier to full market access for the recording industry. Although their enforcement has become more flexible over the past couple of

¹⁵ In one very disturbing development in late 2004, the Beirut Court of Appeals reversed a conviction handed down by the trial court against Jammal Trust Bank, a local bank which was adjudged, on the basis of a court-appointed expert, to be using unlicensed software. The Court of Appeals reached its decision, ruling that the use of the software by the bank did not result in any commercial benefits to the bank. This decision is very troublesome, and shows the lack of familiarity of the judge with the copyright law as well as the problem of piracy and its implications.

years, there are still numerous recordings that fail to qualify under the opaque criteria. These censorship rules should be applied with great restraint, on a non-discriminatory basis and according to transparent criteria.

COPYRIGHT LAW AND RELATED ISSUES

Copyright Law of Lebanon Should be Modernized, and TRIPS Deficiencies Fixed: The Copyright Law of Lebanon (effective June 14, 1999) provides, on its face, a sound basis to enforce against piracy of works and sound recordings,¹⁶ including stiff penalties (in theory) for copyright infringement, stiff penalties against cable pirates, confiscation of illegal products and equipment, the closure of outlets and businesses engaged in pirate activities, and a Berne-compatible evidentiary presumption of copyright ownership. The law also outlaws the trafficking in satellite or cable decoders (i.e., devices that receive, or arrange the receipt of, unauthorized transmissions of broadcasts “dedicated to a section of the public who pay a fee to receive such broadcasting”).¹⁷ The law further provides right holders with a broad communication to the public right (Article 15), but does not take other necessary steps to fully implement the WIPO Internet Treaties, the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT).¹⁸ The Lebanese government should be encouraged to fully implement these important treaties, and accede to them as soon as possible.

Unfortunately, the law remains deficient with respect to international standards in several respects,¹⁹ including:

- There is no direct point of attachment for U.S. sound recordings (however, a point of attachment for U.S. sound recordings can be achieved by simultaneous publication in the U.S. and any Rome Convention Member).
- Works and sound recordings are not explicitly given full retroactive protection in accordance with international treaties.
- Article 25, even as implemented by decision No. 16/2002 (July 2002), still does not meet the standards/requirements of the Berne Convention or the TRIPS Agreement. While many modern copyright laws include specific exceptions for the copying of computer programs under narrowly defined circumstances and/or exceptions allowing the copying of certain kinds of works for “personal use” (but almost never computer programs, except for “back-up” purposes), Article 25 sweeps far more broadly than comparable provisions of either kind, to the detriment of copyright owners. The implementing decision addresses some areas of concern raised by IIPA in the past, but not the chief area, which is that the exception is essentially a free compulsory license for students to make multiple copies of a computer program. Such an exception violates the requirements of Berne and TRIPS since it “conflicts with a normal exploitation of the work” (software aimed at the educational market)

¹⁶ Lebanon is a member of the Berne Convention (Rome [1928] Act) and the Rome Convention. Lebanon should accede to the Berne Convention (Paris 1971 Act), and should join the Geneva (phonograms) Convention in order to provide clearer protection to international sound recordings; Lebanon should also join the WIPO “Internet” Treaties, the WCT and WPPT.

¹⁷ While elements within the Lebanese government have proposed the drafting of a Cable Regulation Law, it would be more important to ensure strong public enforcement action against cable pirates through the strong provisions against cable piracy in the existing copyright law.

¹⁸ For example, the law should prohibit circumvention of technological protection measures used by copyright owners to protect their works in the digital environment from unlawful access or unlawful exercise of rights. The law should also prohibit trafficking in circumvention devices or provision of circumvention services. Finally, while broadband is still only on the horizon, legislation should provide sufficient remedies against piracy over the Internet, including notice and takedown provisions so that Internet Service Providers will cooperate with right holders.

¹⁹ A detailed discussion of deficiencies in Lebanon’s copyright law can be found in the 2003 Special 301 report, at <http://www.iipa.com/rbc/2003/2003SPEC301LEBANON.pdf>. The government of Lebanon must consider the far-reaching consequences of its failure to bring its law into compliance with international standards, including potential negative effects on its chances to quickly accede to the World Trade Organization. WTO members will expect Lebanon to achieve minimum standards of intellectual property protection as spelled out by the TRIPS agreement.

and it “unreasonably prejudices the legitimate interests of right holders” (eliminating completely the educational market for software).

- There are certain other overly broad exceptions to protection (e.g., Article 32).
- The law does not accord a right of action to exclusive licensees, which is a significant obstacle to efficient enforcement, given that the exclusive licensee in a territory is invariably the party with the strongest interest in stopping piracy and has the best information about it.
- Most significantly, deterrent penalties provided on the books are not carried out in practice. Lebanon’s legal framework at present pays only lip service to the severe problem of piracy.

Each of the issues noted would arise in context of Lebanon’s bid to join the WTO, and Lebanon must take measures to address these deficiencies.

Bill to Join the Berne Convention (Paris 1971 Text): On September 3, 2007, the Lebanese Government forwarded to the Parliament a draft law to ratify the Berne Convention (1971 Paris text). Lebanon adheres to the Rome (1928) text, so accession to the 1971 Convention would be a welcomed development. The Parliament has not acted on this draft law yet.

GENERALIZED SYSTEM OF PREFERENCES

On September 3, 2003, the United States Trade Representative “accepted for review” a Petition filed by the IIPA with the U.S. government as part of its “Country Eligibility Practices Review” of the Generalized System of Preferences (GSP) trade program. To qualify for benefits under the GSP Program, namely, duty-free imports of many of Lebanon’s key products into the United States, USTR must be satisfied that Lebanon meets certain discretionary criteria, including that it provides “adequate and effective protection of intellectual property rights.” IIPA’s Petition noted three major deficiencies in Lebanon’s protection of copyright that caused economic harm to U.S. right holders that result in Lebanon failing to meet the GSP standard of providing “adequate and effective” copyright protection in practice: (1) deficiencies in the copyright law in Lebanon that render legal protection inadequate and ineffective; (2) the failure to enforce criminal remedies against pirate cable TV operators, making protection of U.S. audiovisual works inadequate and ineffective; and (3) enforcement efforts against piracy in Lebanon that are inadequate and ineffective.

The GSP program is important to Lebanon. In 2006, Lebanon imported \$34.2 million worth of products into the United States duty-free, or 39% of its total imports into the U.S. For the period January to November 2007, Lebanon imported almost \$45.8 million worth of products into the United States duty-free. This represents both a 50.8% increase year-on-year, and a significant 46.5% of its total imports into the U.S. Thus, in addition to being the right thing to do, it is in Lebanon’s economic and political interest to take steps to maintain its eligibility.

While noting that these three deficiencies remain largely unresolved, in IIPA’s June 2007 update to the U.S. government’s GSP Subcommittee, IIPA recommended that, in light of the difficult political and security situation on the ground in Lebanon, the Committee withhold recommending that Lebanon’s eligibility to participate in the GSP Program be removed. In October 2007 written and oral testimony before the GSP Committee, IIPA again recommended that, given “some signs of improvements in enforcement by the Cybercrime and IPR Bureau, but with courts remaining ineffective and the cable piracy problem remaining largely unchecked,” the GSP Subcommittee “provide the Lebanese government with some additional time, maintain this petition in the short-term, continue to monitor progress in key problem areas, and ultimately recommend to the President that he make determine that Lebanon fails to meet the GSP standards if serious progress is not made in that short-term period.”

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2008 SPECIAL 301 REPORT

LITHUANIA

Special 301 Recommendation: IIPA recommends that Lithuania stay on the Watch List in 2008.

EXECUTIVE SUMMARY

Copyright owners in Lithuania continue to suffer from high levels of physical and Internet piracy. Lithuania remains generally ineffective when it comes to on-the-ground enforcement. Customs, police and other enforcement agencies need to engage in better and more cooperative enforcement actions. Some police forces, especially in the larger cities, have been helpful in conducting *ex officio* software actions in 2007. Much more proactive investigations are needed to combat widespread Internet piracy which adversely affects all the copyright industries. In 2007 a well-known website dealing in pirated material was taken down by the authorities. However, this case has not yet been followed by a proper criminal prosecution and sentencing of the persons involved. Worse, the site still operates and links visitors to other pirate sites which are also hosted in Lithuania. Furthermore, some government agencies still do not have rules regarding legal software use. More senior leadership and organization is needed to make copyright protection and enforcement a priority in Lithuania.

PRIORITY ACTIONS IN 2008

Enforcement

- Substantially increase action against Internet piracy, including shutting down the websites offering illegal copyrighted materials for downloading or links to other pirate sites, as well as against large-scale uploaders of illegal files and following up with prosecutions and deterrent sentencing.
- The Economic Police and especially the Intellectual Property Rights division at the Criminal Police Bureau should get more staff personnel, get more equipment, and devote more time and efforts in fighting piracy.
- Prosecutors should be instructed to inform the right holders about their rights infringements and follow up with prompt prosecutions.
- Customs officers, in particular the Customs Criminal Service, should commence actions, including *ex officio* actions to intercept pirate product smuggled into the country and often transshipped to other EU markets.
- Coordinated and cooperative strategies among enforcement authorities as well as with right holders' organizations should be developed.
- Cumbersome and complicated procedures in criminal and administrative IPR cases should be simplified and eliminated, and the onerous evidentiary burdens in criminal cases relaxed.

Legislation

- Adopt the proposed changes to Article 214(10) of Administrative Infringement Code to expand the application of administrative liability to illegal acts for non-commercial purposes.
- Review and streamline the cumbersome notice and takedown procedure for illegal content on ISPs networks as foreseen in the recently adopted Government Resolution on Provisions for Eliminating the Possibility of Access to Unlawfully Obtained, Created, Amended or Utilized Information.
- Criminal Code to provide for higher penalties for copyright crimes.
- Adopt a government order regarding the legal use of business software within state institutions to improve implementation of the 2001 government decree.
- Adopt optical media regulations to properly license and enforce the production, distribution, import and export of optical media.

LITHUANIA
Estimated Trade Losses Due to Copyright Piracy
(in millions of U.S. dollars)
and Levels of Piracy: 2003-2007 ¹

INDUSTRY	2007		2006		2005		2004		2003	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Business Software ²	20.0	56%	17.0	57%	14.0	57%	11.0	58%	10.0	58%
Sound Recordings & Musical Compositions ³	14.0	80%	13.0	85%	12.0	85%	15.0	80%	13.5	85%
Entertainment Software ⁴	NA	NA	NA	NA	1.7	88%	NA	85%	NA	90%
Motion Pictures ⁵	NA	NA	NA	NA	NA	NA	1.5	65%	NA	NA
Books	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA
TOTALS	34.0		30.0		27.7		27.5		23.5	

COPYRIGHT PIRACY AND ENFORCEMENT

Lithuania continued to be challenged by both online piracy as well as physical piracy during 2007. The three bodies responsible for IPR enforcement are the Special Internet Crime Investigation Unit, the IPR Division within the Criminal Police Investigation Bureau, and Customs.

Internet piracy: Internet piracy remains a major concern in Lithuania. There are approximately 1.4 million Internet users in Lithuania, almost 35% of the population (according to internetworldstats.com). The Business Software Alliance (BSA) reports that high amounts of unlicensed software is distributed to the public via FTP servers and warez sites. Lithuania law presently does not require Internet Service Providers (ISPs) to monitor illegal content on File Transfer Protocol (FTP) servers, as access to most FTP servers is not possible for non-subscribers to that FTP service. Nevertheless, based on BSA leads, law enforcement officials raided 4 FTP server providers in 2007. Unfortunately, no subsequent criminal cases have yet been initiated out of these raids, due to various reasons (such as, the server is outside the country, or it did not belong to the ISP, or the software programs (the evidence) was deleted).

On a positive note, one notorious pirate website (piratic.org) was taken down in February 2007, and the sharing of programs on that site was blocked by the administrator of a related website. Although IIPA and its members are obviously pleased that piratic.org was taken down, it should be noted that the same "piratic.org" domain is now redirecting users to another similar site which is currently in operation and which is also being hosted in Lithuania. Prosecution has not yet occurred. Both these developments indicate the need for more effective online enforcement mechanisms.

¹ The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2008 Special 301 submission at www.iipa.com/pdf/2008spec301methodology.pdf. For information on the history of Lithuania under Special 301 review, see Appendix D at (<http://www.iipa.com/pdf/2008SPEC301USTRHISTORY.pdf>) and Appendix E at (<http://www.iipa.com/pdf/2008SPEC301HISTORICALSUMMARY.pdf>) of this submission.

² BSA's 2007 statistics are preliminary. They represent the U.S. software publishers' share of software piracy losses in Lithuania, and follow the methodology compiled in the Fourth Annual BSA and IDC Global Software Piracy Study (May 2007), available at <http://w3.bsa.org/globalstudy/>. These figures cover, in addition to business applications software, computer applications such as operating systems, consumer applications such as PC gaming, personal finance, and reference software. BSA's 2006 piracy statistics were preliminary at the time of IIPA's February 12, 2007 Special 301 filing and were finalized in June 2007 (see <http://www.iipa.com/statistics.html>) as reflected above.

³ The music industry figures represent the piracy level of international repertoire. The losses figure increased due to the increase of consumer demand and the decrease of the U.S. dollar value.

⁴ ESA's reported dollar figures reflect the value of pirate product present in the marketplace as distinguished from definitive industry "losses." The methodology used by the ESA is further described in Appendix B of this report.

⁵ MPAA's trade losses and piracy levels for 2006 and 2007 are not available. MPAA did provide 2005 estimates for a select group of countries, using a new methodology that analyzed both physical/"hard goods" and Internet piracy. Details regarding MPAA's methodology for 2005 and prior years are found in Appendix B of this IIPA report.

Business software piracy: BSA reports that both Internet piracy and hard disk loading were the two primary problems facing the business software industry in 2007. There was more unlicensed software found by BSA in 2007 than in the prior year. It is clear that end user companies still use high amounts of unlicensed software. Reseller piracy of pirated and counterfeit hard goods in the street markets remains a problem as well. BSA's preliminary 2007 estimated U.S. trade losses due to business software piracy rose slightly to \$20 million, with an estimated piracy rate of 56%. BSA believes that there is steady improvement with regard to central government use of software, but more work is needed, including centralizing this function in a single government agency.

BSA reports that its working relationship with local authorities improved last year. In particular, work with the economic police of the capital city (Vilnius), and the Criminal Police Bureau was good, as these officials often initiated raids *ex officio*. There have only been very few software cases initiated by the economic police of other main cities (such as Šiauliai, Kaunas, Klaipėda). The level of familiarity and expertise on software and IP investigations at the local city or regional police is very low.

The primary enforcement problem BSA faced was that the police very seldom organized test purchases in hard disk loading cases and do not effectively work Internet piracy cases. Furthermore, the investigation of criminal copyright cases are taking a very long time (from 1 to 1.5 years). IPR crimes are still not considered as serious crimes. Police officers or prosecutors who are in charge of IPR cases have to investigate non-IPR cases as well. In 2007, BSA worked to initiate 10 criminal cases, 10 administrative cases and six civil cases. In terms of results, there were two criminal judgments, six administrative judgments and three civil decisions on business software in 2007.

Music and recording piracy: The recording industry reports that there were no major changes in the piracy landscape compared to the previous year. The most common form of music piracy in Lithuania is the sale of pre-recorded CDs and CD-Rs via the Internet (web pages and targeted e-mails) which contain lists of available selections continued at the same level. Hard copies are delivered by mail directly to the customer. The main form of physical piracy is the sale of factory-pressed CDs predominantly originating in Russia, and CD-Rs at open air market places. These markets burst with a combination of legitimate local releases and pirate international music, including many pre-releases. Pre-release piracy particularly hurts the recording industry. Another form of pirate trade is the door-to-door hawking of distributors visiting public places or offices to sell pirated products. Although the level of piracy in Lithuania for local repertoire was at a relatively low level of around 10% in 2007, the level of piracy for international repertoire was substantially higher, estimated at around 80%. The estimated trade losses due to recording and music piracy were \$14 million in 2007.

The recording industry continued to monitor the situation in Lithuania in 2007 and to address pirate imports into neighboring EU Member States coming through Lithuania. In addition, IFPI's Internet Anti Piracy Unit issued numerous cease and desist letters concerning illegal activity on Internet and the recording industry's litigation department continued its major court case against the optical disc manufacturing plant, Baltic Optical Disc. In the meantime, the local legitimate industry is struggling to survive commercially and has very few funds to invest in anti-piracy actions.

Audiovisual piracy: The motion picture industry (MPA) continues to report that Lithuania remains the least developed market for audiovisual works of the three Baltic nations. Pirate videocassettes and home-burned optical discs are duplicated locally using Russian-language masters. Pirate discs are sold in rental outlets and on street markets across Lithuania. Internet piracy (both downloading and hard goods) is increasing. TV and local cable piracy are also problems (often screening pirate copies of blockbuster films).

Optical media piracy: There is one known CD manufacturing plant in Lithuania, producing for the local market as well as neighboring countries. This plant has opened an affiliate factory in Estonia (aimed at the Estonian and Scandinavian markets) and their joint annual manufacturing capacity is estimated at around 10-15 million discs (CDs and DVDs). In light of past events that led to recording industry litigation against this plant, which is still ongoing, and its refusal to cooperate in a transparent manner with rightholders, Lithuania should adopt optical disc regulations.

Ineffective border enforcement: Lithuania remains a key transshipment country for pirate materials--music CDs and audiocassettes, CD-ROMs containing business software, videos, home-burned CD-Rs and DVD-Rs, DVDs, videogame cartridges and DVDs and CDs containing entertainment software--from Russia and other source countries into the EU. For example, one of the biggest markets located near Vilnius (Baltics-Gariūnai) organizes wholesale days, during which traders from Poland and Latvia come to source pirated discs for their home markets, as well as for further export to countries such as Estonia and Germany. Customs officers who have *ex officio* authority to inspect, intercept, and seize suspect shipments of pirated product entering the country are still not using that authority fully. The Customs Violation Prevention Division and the Customs Criminal Service are the two customs departments responsible for tackling the import-export of illegal optical discs and smuggling, respectively. Customs cannot, under current law, take actions inside the country, so internal investigations are left to the Economic Police. However, illegal discs both enter and leave the country in large quantities without any meaningful intervention from the Lithuanian Customs.

Continuing evidential problems: Problems associated with required expert opinions did not diminish in 2007. The reliance on government experts is unnecessary and causes delays in trials. The recording industry confirms that cumbersome expert reports are required before administrative actions can be pursued, including detailed inventories of every single CD seized by the police. This can be very burdensome and act as a block to enforcement actions when there are large seizures or seizures of numerous different titles involved. Lithuanian courts still refuse to apply a presumption of ownership for seized copyright material (such as sound recordings), which results in an additional burdensome evidentiary hurdle.⁶ Instead, an “independent specialist” must reach his/her conclusion, which is then presented as evidence. The recording industry believes that legislative reforms are necessary to establish a presumption of ownership, in order to resolve this enforcement roadblock and to expedite cases. The recording industry continues to express dismay that expert reports prepared by the software industry are accepted, while those prepared by the recording industry are not. Industry reports reflect that the previous official translation requirement has been removed, but apparently several new and burdensome formalities have been added.

COPYRIGHT LAW AND RELATED ISSUES IN LITHUANIA

Copyright law: Lithuania has enacted a number of significant copyright law reforms since adopting its 1999 copyright law (Act No. VIII-1185). Additional revisions to that law were accomplished to comply with the WTO TRIPS obligations, the WIPO Treaties, and various EU directives. In the past, the copyright industries acknowledged the positive elements in the 2003 legislation and also have expressed concerns and reservations about several amendments which were (and are) inconsistent with Lithuania’s bilateral and multilateral copyright obligations.⁷ As part of Lithuania’s accession to the European Union, additional revisions to its laws were initiated in 2005, primarily to implement both the EU Resale Right Directive and the EU Enforcement Directive. There were also proposals to increase sanctions in the Criminal Code, and amendments to the Criminal Procedure Code and Law on Operative Actions to classify intellectual property crimes as more serious crimes and apply operative measures. Below is a summary of current initiatives.

Resolution on Eliminating Unlawful Access (2007): Last fall, the Lithuanian Government issued a resolution entitled “Concerning Acceptance of a Report on Provisions for Eliminating the Possibility of Access to Unlawfully Obtained, Created, Amended or Utilized Information” (entry into force on September 5, 2007), rules that are aimed at implementing various EU Directives, including the E-Commerce Directive and the Information Society Directive. This Resolution provides for very specific procedures regarding notice and takedown by hosting providers of illegal hosted content. For example, upon receipt of a right holder’s

⁶ The BSA indicates that this issue regarding presumption of owners is not a problem for the business software industry in Lithuania because a presumption of ownership is applied for business software works. The difficulty remains for individually created copyrighted works (as in the case of sound recordings), and in the production of evidence pertaining to the retail value of those works. This is because certain acts only “qualify” as offenses when the retail value of the work exceeds a certain amount (100 times the minimum wage). In those cases “expert” evidence is required to confirm ownership in the work and retail value. Expert statements in software cases by private experts pertaining to the nature of each pirated software copy have been accepted as sufficient evidence in criminal and administrative cases. BSA therefore believes that the law is satisfactory, although not ideal (because of the continued need of detailed expert reports, albeit by private, not public, experts).

⁷ For more details about Lithuanian copyright law reform through 2003, refer to IIPA’s 2006 Special 301 country report on Lithuania, available at <http://www.iipa.com/rbc/2006/2006SPEC301LITHUANIA.pdf>.

notification, the ISP must within four working days inform the service user about the illegal information. If the ISP does not receive an answer from the service user within three days, the ISP must disable access to the illegal information within one working day. If the ISP cannot identify the service receiver, then it can disable access within four days from the receipt of notification. The rightholders also can notify the Information Society Development Committee about the suspect information, and this committee will then have to inform ISPs about this illegal activity or information.

While at first glance this Resolution seems to address ISP liability, it does so only in a limited way. First, it only goes to hosted content. Notice and takedown with respect to hosted content (content that is stored on an ISP's network), while important, represents only a slice of the solution to the problem of digital piracy. With respect to peer-to-peer (P2P) file-sharing, no content is hosted by a network, and there is no content that may be taken down. Second, the relevant "takedown" here is simply termination of the user account, not the kind of takedown by ISPs contemplated in the notice-and-takedown experience in other countries. For example, the recording industry believes that notice and takedown is better agreed upon between the right holders and the hosting services, and Article 14 of the EU E-Commerce Directive provides for the necessary framework for such a cooperation to work. In that industry's experience, where Article 14 of the E-Commerce Directive has been correctly implemented, notice and takedown in agreement with hosting providers generally works quite well and the hosting services normally take down the illegal content rather expeditiously. Third, if notice and takedown procedures are to be out in law, they must be expeditious as required by the E-Commerce Directive (see Article 14(1)(b)). The procedures in this Resolution are not expeditious, and if all the various steps and appeals were followed, there would still be excessive delays in trying to take down infringing content.

Administrative Code proposed amendment: Changes to Article 214 (10) of the Administrative Code have been proposed to establish administrative liability for the illegal reproduction, communication to the public and other illegal use of works and objects of related rights protection have been proposed and submitted to the Government. This bill has been sent to the Government for approval.

Criminal Code proposed amendment: Similarly, changes to the Criminal Code have been proposed and sent to the Government for approval. For example, the draft Article 192 aims to establish copyright crimes as more serious crimes, subject to higher penalties. A fine up to US\$10,000 or imprisonment up to four years would be applied for copyright infringements if the value of the illegal copies exceeds US\$12,500.

Government software legalization issues: There have been three Lithuanian government orders issued (in 2001, 2003 and 2004) to compel the state institutions to buy and use only licensed software programs. Since the 2001 government software management decree, funds have been allocated by the central government for licenses to procure legal software, although the extent to which this has been applied is unclear. BSA has been active over the past several years in training and raising awareness of software legalization in both the government and the private sector.

IPR trainings: It should be noted that in 2007 the Lithuanian Police Department started to implement the EU Twinning project LT/2004/JH/01 "Establishment of Infrastructure of the Investigation, Disclosure and Prevention of Crimes on Intellectual Property Rights and Cyber Crimes in the Police System." This program is aimed at developing training packages for the higher and lower levels IP investigators and officials from other institutions and facilitating the effective and efficient cooperation and exchange of information among Lithuanian IPR enforcement institutions and others. Three seminars for police officers were organized for regional police on IPR enforcement in Trakai and Giruliai in September 2007. Local counsel for the Business Software Alliance has made numerous presentations at various seminars for Lithuanian enforcement officials and other government officials during 2007. These include: an April 2007 IPR seminar with the General Prosecutors Office in Vilnius, the police seminars (mentioned above), and an October 2007 conference on risk management with municipalities in Telšiai.

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2008 SPECIAL 301 REPORT

MALAYSIA

Special 301 Recommendation: Malaysia should remain on the Watch List.

EXECUTIVE SUMMARY

The government of Malaysia has taken some significant actions to protect intellectual property rights over the past several years, specifically, against those engaged in pirate production, wholesale, retail, and distribution through new technologies such as Internet or mobile devices. The overall reduction of movie piracy in Malaysia resulted in the opening of more cinemas in 2007 and increased revenues in the form of double-digit growth for theatrical businesses, continuing an upward trend seen over the past several years. Meanwhile, for the music industry, the enforcement efforts of the Ministry of Domestic Trade and Consumer Affairs, which included warning letters and raids against pirate retailers in fixed premises, including those engaged in mobile device piracy, has resulted in over 350 dealers turning from pirate to legitimate business. Book publishers have seen some moves within MDTCA toward greater emphasis on tackling illegal photocopying, and cooperated with MDTCA on a number of successful raids near significant universities during 2007. The business software industry continues to enjoy excellent support of the authorities, leading in 2007 with 30 actions investigating end-user piracy of business software involving 53 companies. For Malaysia, this represents the greatest number of raids involving the greatest number of target companies in any year. In October 2007, the entertainment software industry launched an enforcement program with the MPA in Malaysia to address game piracy with the MDTCA in the "Operation Games Attack" initiative aimed at reducing the country's large-scale replication and global export of pirated game product. These efforts have resulted in numerous raids with dozens of arrests, and the seizure of tens of thousands of pirated games.

Notwithstanding these signs of success, more needs to be done to combat all forms of piracy, in order to encourage and reward legitimate copyright owners and foster greater creative activity in Malaysia. The negative effects of piracy in Malaysia are still keenly felt, as the home video business outside Klang Valley has suffered, and legitimate chain outlets such as Speedy in Penang closed its doors in December 2007, while Video Ezy has contemplated doing the same. For the music industry, the number and size of legitimate music retailers in physical goods remains low,¹ and while there has been some increase in legitimate dealers in mobile music, legitimate music industry staff numbers have declined. Despite efforts, book piracy in the academic sector remains a serious concern. In the enforcement area, it is regrettable that there were no enforcement actions against licensed optical disc plants in 2007.

PRIORITY ACTIONS REQUESTED IN 2008

- **Prosecute Significant Cases Against Factory Owners and Chief Architects/Financiers of Piratical Activities, Including Landlords of "Fixed Premises":** In general, there remains a significant divergence between the number of raids being carried out and the number of cases being processed through the courts. The creation of a specialized IP court is a significant achievement. However, in order to provide effective deterrence, successful prosecutions must ensue against key pirate operators such as owners of optical disc factories, those controlling large-scale distribution, and landlords of fixed premises such as shopping centers who control and benefit from piratical activities on their premises. Improvements are needed in post-raid investigations, prosecution methods, and in court efficiencies.

¹ For example, there has been a reduction in the number and size of legitimate music retailers by about 20% nationwide.

- **Curtail the Uncontrolled Piracy Activities at Fixed Premises and in the Night Markets:** Piracy at fixed premises including shopping centers, including the “burning” of illegal content onto recordable discs, and especially uncontrolled piracy activity in night markets, continues to cause immeasurable harm to copyright owners operating in Malaysia. The Ministry of Local Government and Housing, and the Kuala Lumpur City Council (DBKL) and other like local authorities, who are ultimately in charge of licensing night market vendors, have been unresponsive to industry information and leads.
- **Curb Exports of Pirate Entertainment Software and Internet Café Piracy:** While optical disc factory production, now the province of twenty-seven registered plants, and the export of pirate discs, has waned somewhat as a chief piracy concern in Malaysia, the government should place continued emphasis on curbing pirate entertainment software exports. In addition, domestically, Internet cafés continue to provide opportunities to play unauthorized games on standalone machines or even on unauthorized servers; the government has not adequately addressed the Internet café piracy issue to date.
- **Tackle “Mobile” Device Piracy:** Increasing mobile device piracy – in which infringing files are loaded onto mobile devices at fixed locations – is causing significant harm to right holders. While many fixed locations engaged in unlawful uploading/downloading have legalized their practices, many more have not yet done so.
- **Conduct Raids Against Illegal Photocopying Operations; Track Underground Operations:** Publishers remain happy with cooperation from Malaysian authorities, although illegal photocopying, mainly on or around university campuses and increasingly in “underground” facilities, continues to cause harm to the industry.
- **Adopt Anti-Camcording Legislation:** A vast number of movies are stolen right off the screen by professional camcorder pirates, who use video cameras to illicitly copy a movie during exhibition in a movie theatre – usually very early in its theatrical release or even prior to the film’s release (e.g., at a promotional screening). These copies are then distributed to pirate “dealers” throughout the world and over the Internet. While the Malaysian government and industry have worked hard to curtail this virulent form of piracy in the past year in Malaysia, the government should enact legislation to criminalize illegal camcording of motion pictures to maximize the enforcement tools available.
- **Amend/Modernize Copyright Law, Optical Disc Law (Prohibit “Gouging” of Discs, Allow Inspections Offsite, and at Any Time, Day or Night), and Join WIPO “Internet” Treaties**

For more details on Malaysia’s Special 301 history, see IIPA’s “History” appendix to this filing at <http://www.iipa.com/pdf/2008SPEC301HISTORICALSUMMARY.pdf>. Please also see previous years’ reports at <http://www.iipa.com/countryreports.html>.

MALAYSIA
Estimated Trade Losses Due to Copyright Piracy
(in millions of U.S. dollars)
and Levels of Piracy: 2003-2007²

INDUSTRY	2007		2006		2005		2004		2003	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Records & Music	16.0	45%	22.0	45%	38.8	49%	55.5	52%	40.0	45%
Business Software³	149.0	60%	159.0	60%	82.0	60%	73.0	61%	77.0	63%
Entertainment Software⁴	NA	83%	28.0	90%	23.4	91%	12.9	91%	NA	90%
Books	9.0	NA	9.0	NA	10.0	NA	10.0	NA	9.0	NA
Motion Pictures⁵	NA	NA	NA	NA	NA	91%	36.0	50%	38.0	50%
TOTALS	174.0		218.0		154.2		187.4		164.0	

PIRACY UPDATES IN MALAYSIA

Fixed Premises Piracy and Night Market Piracy: Piratical activity, including CD-R and DVD-R burning to order in “fixed premises” such as shopping centers and night markets, remains a major source of losses for copyright companies in Malaysia.⁶ The local industry, with assistance from the Ministry of Domestic Trade and Consumer Affairs (MDTCA), has taken active steps against the sale of pirated physical products in fixed premises by issuing letters and instituting five civil actions against both the landlords and tenants of the fixed premises. MDTCA has stepped up its commitment to eradicate physical piracy from fixed premises by filing the first criminal suit against a landlord for aiding and abetting in the commission of the sale of pirated products by the tenant. All of these cases have essentially been contested (the criminal case remains in the early stages of court hearings), although in a couple of cases, tenants have settled the civil claims. Landlords continue to contest the legality of whether they can be held liable for the illegal and infringing acts of their tenants.

The night markets also remain a sore point due to problematic relationships between industry and the Ministry of Local Government and Housing, the Kuala Lumpur City Council (DBKL), and other like local authorities. Since August 2007, the local record industry group, Recording Industry of Malaysia (RIM), has filed weekly submissions containing detailed complaints regarding night markets with excessive amounts of music piracy. Nonetheless, the local authorities have not taken effective measures to tackle this rampant availability of pirated music (as well as other illicit items and pornography) in the night markets. On average, the DBKL have been informed of approximately five night markets each night, with between 20 to 25 stalls, selling pirated music. Unfortunately, despite the continuous submission of such information, no actions have been taken by the DBKL enforcement officers.

Pirate Production in Licensed and Unlicensed Plants; Exports of Entertainment Software: Once again in 2007, the number of licensed optical disc plants dropped from 32 in 2006 to 27 as of December 1, 2007. There remain well over 158 production lines, with a capacity to produce 519.1 million discs per year; this does not include 57 DVD and DVD-R lines. The concerns in this area include evidence of a reduction by MDTCA in the number of raids on licensed factories in 2007 as compared to 2006, and the fact that in 2007, MDTCA, incredibly, renewed a suspended license of one manufacturer

² The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2008 Special 301 submission at www.iipa.com/pdf/2008spec301methodology.pdf.

³ BSA's 2007 statistics are preliminary. They represent the U.S. software publishers' share of software piracy losses in Malaysia, and follow the methodology compiled in the Fourth Annual BSA and IDC Global Software Piracy Study (May 2007), available at <http://w3.bsa.org/globalstudy/>. These figures cover, in addition to business applications software, computer applications such as operating systems, consumer applications such as PC gaming, personal finance, and reference software. BSA's 2006 piracy statistics were preliminary at the time of IIPA's February 12, 2007 Special 301 filing and were finalized in June 2007 (see <http://www.iipa.com/statistics.html>) as reflected above.

⁴ ESA's reported dollar figures reflect the value of pirate product present in the marketplace as distinguished from definitive industry “losses.” The methodology used by the ESA is further described in Appendix B of this report.

⁵ MPAA's trade losses and piracy levels for 2006 and 2007 are not available. MPAA did provide 2005 estimates for a select group of countries, using a new methodology that analyzed both physical/“hard goods” and Internet piracy. Details regarding MPAA's methodology for 2005 and prior years are found in Appendix B of this IIPA submission.

⁶ Some fixed location piracy operations have been pushed underground, leading in 2007 to an increase in the number of individuals selling pirated music out of hand luggage at food courts.

despite the fact that several criminal and civil actions have been filed but not concluded against this manufacturer. Other problems include the failure of the government to properly monitor blank CD-R manufacturing plants, and the failure to require such plants to apply SID Codes. Although Malaysia has addressed its export piracy problem with respect to most sectors, the export of pirate discs and pirate entertainment software still was detected as far away as Paraguay in 2007.

Mobile Device Piracy: With advances in mobile device technology through 2007, mobile device piracy – in which infringing files are loaded onto mobile devices at fixed locations – has increased dramatically in Malaysia. For example, for the music industry, piracy in the form of illegal loading of full tracks and ringtones occurs both over the air through wireless transmissions and through over-the-counter sales. The local record industry group, RIM, worked with MDTCA in 2007 to curtail fixed premises sale of over-the-counter mobile piracy. The problem continues to affect other industries, as publishers report some downloading of reference books and dictionaries onto mobile devices.

Internet Piracy – Downloading: As of 2007, Malaysia hosted almost 15 million Internet users, which represents 60% Internet penetration. Broadband penetration remained relatively low, with just over 1 million broadband subscriptions, according to industry statistics.⁷ Nonetheless, it is no surprise that Internet-based piracy is an increasing threat to legitimate copyright owners, including local Malay artists.⁸ The Business Software Alliance (BSA) noted a significant increase in number of software infringements found on the Internet by its crawler. For example, in 2006 the number of instances of software infringement detected per month was 705. This number jumped to 1,134 per month in 2007, a 61% increase. Publishers have also noted some online piracy, with sites offering scanned copies of books (in PDF form or similar) for download. Local industry reports good cooperation with ISPs and telecommunication companies in dealing with Internet piracy enforcement, with most ISPs taking down sites providing pirate music or movies within 48 hours of industry issuing the notice. The local Motion Picture Association program succeeded in shutting down 18 websites in 2007, 10 of which were terminated by ISPs following receipt of MPA complaints.

Internet Piracy – Internet Cafés: A major problem for several years in Malaysia has involved the unauthorized use of copyright materials at Internet cafés or Internet game rooms. In many cases, such premises set up standalone computers loaded with unauthorized or pirated copies of a game. In an increasing number of cases, the cafés used a “client-server” model, in which the unauthorized software is installed at the server level on-site, and the customers’ machines are granted access to the same copy on the server.

In 2007, the industry saw the development of yet a new “scheme” for providing pirate entertainment software at Internet cafés operate. This new “scheme” involves Internet café operators entering into arrangements with third parties that provide access to an off-site server housing or storing the game software. The café’s on-site server is then granted access to the game software on the off-site server (which effectively controls all activity related to the use of the game that is accessed off-site), and in turn, the café’s server permits access to the same software to the many computer machines located

⁷ See Internet World Stats, at <http://www.internetworldstats.com/stats3.htm>. These statistics are up-to-date as of November 30, 2007, are based on Census Bureau data, while usage numbers come from various sources, mainly from data published by Nielsen/NetRatings, ITU, and other trustworthy sources. See also Internet World Stats, Malaysia, at <http://www.internetworldstats.com/asia.htm#my> (reporting that there were a reported 14,904,000 Internet users as of June 2007, representing a 60.0% penetration rate, per the Malaysian Communications and Multimedia Commission; and 1,106,000 broadband subscribers as of September 30, 2007, per ITU).

⁸ Siti Syameen Md Khalili, *Mawi Versus Pirates*, New Straits Times, February 2, 2006 (describing that top-selling musical act Mawi cannot thrive in “the piracy-infested local music scene where CD copies go as low as RM10 for three pieces and free Internet downloads are easily available at a few clicks.” The article notes record sales of 170,000 copies and 120,000 copies for two of the band’s efforts, though notes that

this is only a small percentage of the real sale. The Domestic Trade and Consumer Affairs Ministry recently reported that the raids in Sarawak revealed that 95 per cent of Mawi’s albums sold throughout the State were actually pirated copies. A simple search on the Internet reveals that the whole content of Mawi’s first solo album ... are available for download. All you need is a registration with the portal and a stable Internet connection to get free Mawi tracks saved onto the hard disk.

on-site. The off-site server will typically require the on-site server to authenticate itself, and thus, if the link to the off-site server is severed, all services that may be available to the café's computers through the on-site server will be rendered inoperable. Thus, once the link is broken, the café's computers are effectively wiped of all data or evidence of infringing activity. The proliferation of such methods of evasion complicates post enforcement verification and thus emboldens those refusing to obtain appropriate licenses for video game product. The MDTCA's enforcement and investigative procedures need to adapt to enable its officers to effectively address this new infringing-facilitating technology.

Internet Piracy – Advertising Sites (Hard Goods): Another problem on the Internet in Malaysia involves the use of websites to advertise the sale and delivery of physical pirated goods. Industry notes good enforcement against such sales of hard goods by stopping and seizing Internet related shipments at the Post Center and through cooperation with the courier companies. In particular, there has been some improvement in the seizure of Internet-related shipments, parcels at entry, and exit points of courier services and the Malaysian Post Office. The number of parcels seized daily is reportedly down from 500 to 800 per day to the current 100 to 300 per day. This decrease can be attributed to close partnership efforts involving the MPA, ESA, and the MDTCA.

Book Piracy: The principal problem book publishers face in Malaysia is massive illegal photocopying in and around university campuses.⁹ Dozens of shops line each campus, and most academic buildings at universities contain shops. Despite regular cooperation between book publishers and Ministry of Domestic Trade and Consumer Affairs (MDTCA) officials, the problem persists, increasingly moving underground. Shops will often set up facilities in monitored residential areas, where a front guard can warn pirates of incoming authorities. Likewise, operators will store stock in vans, for easy delivery and difficult detection by authorities. While MDTCA officials conduct raids against commercial photocopy centers near university campuses, especially in the Klang Valley, they need training on how to track and deal with such underground operations, including consistent instructions on how to handle raids and which items to seize, especially contrivances (e.g., book binding machines, photocopying machines and such machines that are idle when raids commence), and on how to protect rights holders from being harassed by the pirates.

Significant unauthorized photocopying takes place at on-campus facilities as well.¹⁰ The universities and educational authorities (Ministry of Higher Education) should become more engaged, especially regarding these practices. While universities have, to date, cooperated with rights holders in distributing copyright protection posters and the like, industry would like to see them take a more active role in legitimizing practices on campuses. The Ministry of Higher Education should encourage universities to ensure campus-based copyshops are not engaging in infringing activity, and both the Ministry and university administrations should take measures to encourage lecturers and students to use legitimate materials.

End-User Piracy of Business Software: The willful use of unlicensed or pirate software in the workplace in Malaysia continues to cause losses to Business Software Alliance companies, seriously compromising the businesses of resellers and distributors of genuine software.

Camcorder Piracy: The vast majority of movies that are pirated are stolen right off the screen by professional camcorder pirates, who use video cameras to illicitly copy a movie during exhibition in a movie theatre – usually very early in its theatrical release or even prior to the film's release (e.g., at a promotional screening).¹¹ Such camcorder piracy has been a major issue in the past. In 2006, 13 widely

⁹ Publishing representatives are also starting to notice CD-Rs featuring reference and textbooks floating around campus for sale.

¹⁰ Not only have pirate photocopy centers infiltrated campuses, but the problem is being perpetuated through the active involvement of lecturers, who often provide sample copies they receive from publishing representatives to be used as masters for the photocopying. Institutions of higher learning should be monitored closely to ensure that these practices are not tolerated.

¹¹ The master recordings are sold to illicit "source labs" where they are illegally duplicated, packaged and prepared for sale. As a result of camcorder piracy, many motion pictures also become available over the Internet – on peer-to-peer networks, file transfer protocol (FTP) sites, Internet Relay Chat (IRC) rooms, or auction sites – as well as on street corners and night markets around the

pirated movies were sourced from Malaysian cinemas in 2006. However, due to a Malaysian government crackdown on such piracy in 2007, these instances of Malaysia-sourced piracy ceased. Specifically, from January to November 2007, there were 30 illegal camcording cases, with 32 arrests made in cinemas nationwide. IIPA commends the efforts of the Malaysian government in ensuring that this form of piracy did not cause substantial harm to the motion picture industry in 2007, but notes that continued vigilance will be required to ensure that no harm is caused in 2008. In this regard, an Anti-Camcording Law was proposed specifically to define the act of camcording or recording in cinemas as a strict liability criminal offence. This law would enable Malaysian enforcement divisions' officers to arrest and prosecute individuals who record a movie in the theaters, without needing to establish subsistence of copyright, copyright ownership, or copyright infringement. This proposal is still pending at the MDTCA, but apparently has the support of the MDTCA Minister and Deputy Prime Minister.

ENFORCEMENT UPDATES IN MALAYSIA

Industry remains pleased with the effort and resolve demonstrated by the Malaysian government in 2007 to focus and deal with certain key piracy issues, again with some significant results.¹² At the same time, lack of focus on other areas has left them vulnerable to piracy activities, and those engaged in these relatively untouched areas have continued to cause harm to local and foreign right holders. This section will report some raw enforcement data highlighting key enforcement activity in 2007, and then will highlight the areas needing attention (largely tracking the priority action list above).

CHART 1		MALAYSIA: MAJOR OPTICAL DISC FACTORY RAIDS IN 2007
DATE	RAID	SEIZURE
JANUARY 17, 2007	CLANDESTINE FACTORY SELANGOR	6 VCD REPLICATING MACHINE 2 PRINTING MACHINE 2 METALIZING MACHINE 5 POLYCARBONATE BAGS 2600 VCDS 1400 CDS (MUSIC) 1 COMPRESSOR 1 VEHICLE 1 COMPUTER 5 MOULDS
FEBRUARY 3, 2007	LASERMATIC CRYSTAL DISC KUALA LUMPUR	ONE SEALED MACHINE WAS FOUND ON THE PREMISES.
APRIL 11, 2007	CLANDESTINE FACTORY NEGERI SEMBILAN	1 DVD MACHINE
JUNE 11, 2007	CLANDESTINE FACTORY SELANGOR	1 VCD LINES 1 PRINTING MACHINES 1 METALIZING MACHINES 1 DRYER 24,000 VCDS STAMPER 1 COMPRESSOR 1 CHILLER 1 FORKLIFT
JULY 19, 2007	SELANGOR	600 DVD 1 VCD LINE 1 DVD LINE
AUGUST 3, 2007	CLANDESTINE FACTORY SELANGOR	2 DVD LINES 1 VCD LINES 1 OFFSET PRINTING 2 BONDING MACHINE

world during the U.S. theatrical release and well before their international debuts.

¹² See, e.g., *Software and Games Worth RM23m Seized*, New Straits Times, January 30, 2007 (noting a raid of the Endah Parade in Seri Petaling, in which MDTCA confiscated about 225,000 DVDs and CDs containing pirated computer games and other software worth RM23 million (approximately US\$7.1 million) from three shops located on the second floor of the Endah Parade shopping complex).

SEPTEMBER 6, 2007	CLANDESTINE FACTORY SELANGOR	1 DVD LINE 1 OFFSET PRINTER 1 BONDING MACHINE
OCTOBER 10, 2007	CLANDESTINE FACTORY SELANGOR	1 VCD/CD REPLICATING LINE 1 PRINTING MACHINE 15 STAMPERS 200 - SILK SCREEN UNIT. 1 EXPOSURE UNIT 1 DRYER UNIT. 1 COMPRESSOR UNIT. 1 CHILLER UNIT. 1 CRUSHER UNIT
NOVEMBER 20, 2007	CLANDESTINE FACTORY (ON PALM OIL PLANTATION) JOHOR	2 DVD REPLICATING LINE 2 PRINTING MACHINE 6200 DVD MOVIES 4 BAGS OF 750KG POLYCARBONATE
NOVEMBER 23, 2007	CLANDESTINE FACTORY JOHOR	2 VCD LINES 400 MUSIC DISCS 200 STAMPERS 50 SILKSCREENS
NOVEMBER 24, 2007	CLANDESTINE FACTORY JOHOR	1 VCD LINE 1 TRUCK

Enforcement Against Factory Optical Disc Production and Pirate CD-R and DVD-R “Burning” Labs: The government of Malaysia can be commended once again for making further strides in 2007 tackling pirate optical disc production and burning of pirate content onto recordable discs. The number of licensed plants is down to 27, although there remain a number of clandestine plants (and as noted, in 2007 MDTCA renewed a suspended license of one manufacturer, against whom several criminal and civil actions have been filed but not concluded). Several of the illegal unlicensed plants were raided in 2007 (see Chart 1 above). Unfortunately, all factory raids conducted in 2007 were against unlicensed factories and most of these were *ex officio* police raids. It is regrettable that no raids were conducted on licensed factories by the MDTCA during 2007.

One of the most successful operations was dubbed “Operation Double Trouble” since it involved two sniffer dogs, Lucky and Flo, that assisted the Malaysian enforcement team in March to August 2007 in Kuala Lumpur, Johor Bahru, and Penang confirming suspicious targets, identifying hidden compartments and rooms, and otherwise following their noses, leading to seizures of more than 1.6 million discs, 3 DVD replicating machines, 2 VCD replicating machines, 97 CD-R Burners and 30,000 empty CD-Rs. Twenty-six suspects were arrested in the raids. As a result of the success of the dogs, MDTCA has decided to set up its own K-9 Unit within the Enforcement Division, and the Motion Picture Association will be bringing over and donating two newly trained dogs to MDTCA. Other successful enforcement operations included Operation Blackout in which 145 raids were conducted resulting in a total seizure of 106,191 pirated optical discs, 423 DVD-R burners, and the arrest of 110 suspects.

The Motion Picture Association continued to offer a reward scheme in 2007 to encourage informants to provide information on factories.

In early 2008, MFACT orchestrated a major raid against a DVD lab operating out of a shopping mall in DNP Plaza in Johor Bahru.¹³ The enforcement action resulted in the arrest of seven (7) individuals and the seizure of 110,879 video game discs (109,666 DVDs and 1213 CDs for console platforms), and 46 DVD-R burners as well as a blank DVD-R and CD-R discs, two computers and two printers. MFACT also reported that each aspect of the piracy operation, copying/burning, packaging and storing, was carried out at a separate location.

¹³ “RM1mil worth of counterfeit goods seized;” article available at <http://thestar.com.my/news/story.asp?file=/2008/2/4/nation/20080204195049&sec=nation> (last viewed on February 5, 2008)

Enforcement Against Business Software End-User Piracy: Regarding business software end-user piracy, the Business Software Alliance (BSA), working with the MDTCA, was able to conduct a record 32 end-user actions involving 54 companies, and many more retail actions in 2007. BSA'S relationship with the local enforcement authorities, the Enforcement Division (ED) of MDTCA, has been very good with raids being conducted on request. Seizures included over RM531,000 (US\$161,000) worth of computer equipment and about RM3.8 million (US\$1.2 million) worth of suspected pirated BSA member software. The ED regularly initiates its own actions for production, distribution and retail cases, supported by BSA upon request. End-user piracy cases, on the other hand, usually originate from BSA complaints (after thorough investigation) to the ED. MDTCA also delivered warning letters to advise end-users to conduct software audits and ensure that only legal software is being used in the business environment.

Enforcement Against Entertainment Software Piracy: In October 2007, the entertainment software industry launched an anti-piracy program in Malaysia through a first-time partnership with the motion picture industry to reduce the large-scale replication and global export of pirated game product in Malaysia, which remains one of the primary sources of pirated game product in the world. The launch of the entertainment software industry's program was timed to begin with a raid campaign with the MDTCA called "Operation Games Attack." The operation was a great success due to the commitment and dedication of MDTCA, resulting in numerous raids of factories, retail shops, burner labs, and a printing facility, with nearly 35,000 pirated games seized for numerous gaming platforms, including the Nintendo DS, Nintendo Game Boy, Sony PlayStation One and PlayStation 2, Sony PSP, Nintendo Wii, Microsoft XBOX and XBOX 360, personal computers. Pirated game products, both optical discs and game cartridges, were also seized on nearly a daily basis at the Malaysian central mail facility. In addition, the entertainment software industry held numerous trainings with MDTCA to facilitate their detection of pirated game product. These actions provided a strong start to the entertainment software industry's new program and the industry looks forward to continued support from the MDTCA, with the hope that substantial steps will be taken to dismantle large-scale pirate operations through prosecutions and the imposition of deterrent penalties.

Enforcement Against Book Piracy: Following on late 2006 raids (at the beginning of the university term) near Sunway College in Shah Alam, the MDTCA Enforcement Division continued its raids on illegal photocopy facilities in 2007. In January 2007, the Sepang enforcement division raided two outlets in Cyberjaya, one located within the Malaysia Multimedia University campus. This was followed by a March 2007 blitz outside University Putra Malaysia (UPM) at Bangi, with cooperation of the Kajang enforcement division. This raid encompassed five different operations plus a van used to hide stock, and police had to be called in when the operators threatened book publishing representatives. With the start of the high season in June-August 2007 (again, due to the beginning of the academic term), MDTCA conducted raids outside University Tunku Abdul Rahman (UTAR) in Putrajaya, outside Malaysia Multimedia University in Melaka and outside Universiti Sains Malaysia in Penang, altogether seizing thousands of infringing copies and dozens of machines.

Prosecuting Commercial Pirates – Necessary Steps: Two major issues arising out of the significant enforcement work being done in Malaysia remain: 1) the failure to prosecute landlords and commercial pirate operators such as owners of optical disc factories, those controlling large-scale distribution, and landlords of fixed premises such as shopping centers who control and benefit from piratical activities on their premises and 2) lack of successful prosecutions due to inadequate investigative techniques, prosecutorial weaknesses, or lack of efficiency of the courts.

In factory enforcement, many instances have arisen in which factory owners came forward to stop a raid, but instead of arresting the owners, MDTCA arrested the factory workers. The key commercial pirate operators must be targeted to have a deterrent effect.

With regard to post-raid investigations leading to prosecution, the government should focus on three key areas in 2007 to improve results:

- Increase the staffing numbers and resources, and level of training and expertise for investigating officers, so that their investigations lead to arrests, indictments, and ultimately, prosecutions of the right defendants (this must include both consideration of links to other criminal activity and/or gang or organized crime related activity, as well as links to illegal or syndicate activity in other countries,¹⁴ i.e., investigating “up the chain”);¹⁵
- Increase the level of training and expertise of prosecutors, who receive very basic training, but lack the confidence when faced with more aggressive and experienced defense lawyers; and
- Speed up the prosecution of cases to avoid cases becoming stale, defendants absconding, and overall lack of deterrence.

IIPA is heartened that MDTCA has set up a prosecution unit comprising officers to be trained and equipped to deal with complex litigation from criminal actions brought. In December 2006, the team underwent a week long training program in the art of examination of witnesses. From November 19-23, 2007, prosecutors from the Attorney-General’s Chambers and MDTCA prosecutors underwent a training on Internet piracy, which included training in prosecutorial skills through a moot court exercise. Most recently, industry conducted trainings of 28 MDTCA prosecutors and 12 Attorney General’s Chambers Deputy Public Prosecutors. In that training, industry learned that court procedures have further been simplified, and codified in a Copyright Prosecutions Manual (approved by MDTCA and the AG’s Chambers). The local motion picture industry group distributed the Manual to 50 officers and will be distributing it to more officers nationwide once the new procedures are incorporated.

With respect to judicial efficiencies, unfortunately, industry reports that there remains a backlog of criminal cases in the courts, with some cases languishing for several years without being heard. The establishment of IP Courts nationwide to hear copyright cases, a very positive development, will hopefully lead to more deterrent sentencing (see Chart 4 below), and hopefully, speedier disposition of copyright cases, although this has yet to be seen. In addition to steps to speed the processes of the court, the Malaysian government should work to minimize delays in the prosecution process, including organizational restructuring to avoid lost documentation, minimize inconveniences due to personnel transfers, etc. Additionally, most industries advocate that the government should issue sentencing guidelines to ensure imposition of deterrent sentencing, including a minimum term of imprisonment. A further deterrent would be an amendment to the Copyright Act to provide for statutory damages in civil cases. As things stand, claimants are only able to claim losses which have been proven.

CHART 4 MALAYSIA: CRIMINAL COPYRIGHT ENFORCEMENT STATISTICS 2006-2007						
	BUSINESS SOFTWARE		SOUND RECORDINGS		MOTION PICTURES	
	2006	2007	2006	2007	2006	2007
NUMBER OF RAIDS CONDUCTED	23	32	117	67	2175	2333
NUMBER OF VCDs SEIZED	-	-	153,000	-	902632	295164
NUMBER OF DVDs SEIZED	-	-	20,965	163,000	2166441	2673314
NUMBER OF CD-Rs/DVD-Rs SEIZED	NA	-	-	14,200	146644	89116
NUMBER OF INVESTIGATIONS	47	81	117	-	375	389
NUMBER OF VCD LAB/FACTORY RAIDS	-	-	9	-	10	11
NUMBER OF CASES COMMENCED	5	5	117	-	620	748
NUMBER OF ARRESTS	3	1	38	35	780	1180

¹⁴ For example, in a raid in 2005, six Malaysian individuals were arrested in Nigeria for optical disc piracy offences, and in addition, evidence has emerged in the past few years between syndicates in Malaysia and the United Kingdom, China, South Africa, Indonesia, Pakistan, and the Philippines.

¹⁵ For example, in one raid conducted by MDTCA in Penang on behalf of an entertainment software company, only a few illegal titles were found on location of the raid target, leading to suspicion that the shop had an offsite warehouse. However, post-raid investigation into warehousing of pirate stock has yet to be accomplished. As for a second raid in Penang, the MDTCA officers found no one present, and while it has obtained the company information, no charges have been laid in that case. Further, while raids at small retail establishments do rid the market of illegal product, absent further investigation into the source of these pirated products and corresponding prosecutions, these raids ultimately prove ineffective in addressing the country’s piracy problems. In some cases, though MDTCA might have been quite willing to undertake investigations “up the chain,” they have inevitably been faced with the lack of personnel necessary to mount stakeouts at suspect locations.

NUMBER OF DEFENDANTS CONVICTED (INCLUDING GUILTY PLEAS)	3	2	15		59	101
ACQUITTALS AND DISMISSALS	0	1	20		24	9
NUMBER OF CASES PENDING	10	5	83		537	638
NUMBER OF FACTORY CASES PENDING	-	-	31		55	54
TOTAL NUMBER OF CASES RESULTING IN JAIL TIME	-	-	7		24	63
SUSPENDED PRISON TERMS	-	-	-		-	-
MAXIMUM 6 MONTHS			3		14	39
OVER 6 MONTHS			3		8	16
OVER 1 YEAR			1		2	8
TOTAL SUSPENDED PRISON TERMS			7		-	-
PRISON TERMS SERVED (NOT SUSPENDED)					24	63
MAXIMUM 6 MONTHS						
OVER 6 MONTHS						
OVER 1 YEAR						
TOTAL PRISON TERMS SERVED (NOT SUSPENDED)						
NUMBER OF CASES RESULTING IN CRIMINAL FINES	3				26	40
UP TO \$1,000			13		5	4
\$1,000 TO \$5,000	1	1	6		18	12
OVER \$5,000	2	1	1		3	24
TOTAL AMOUNT OF FINES LEVIED (IN US\$)	17,000	27,200			27853	385582

Internet Café Enforcement: As described above, unauthorized use of copyright materials – especially entertainment software – in Internet cafés has been major problem for several years in Malaysia. One major entertainment software company has engaged on this issue in 2007, running a “cease and desist” letter and warning campaign, leading to three raids on Internet cafés (two in Perak state and the third in Penang state) suspected of engaging in unauthorized use of their product in mid-2007. Charges have been filed against the three cafés raided, and while trial dates have been scheduled for two of the cases (in late January and late February 2008), the third has yet to be calendared. That company has also engaged in some informational advertising in key newspapers targeted toward educating Internet café owners that unauthorized use of entertainment software is unlawful, and informing them that software companies do offer licenses for such uses and will enforce their rights. To date, one target Internet café has placed public apologies in key newspapers.

Exemplar Program: Beginning in 2006, MDTCA engaged in two comprehensive exemplar collection rounds, with samples collected from licensed facilities (listed below in Chart 3), irrespective of format, and with industry representative participation. However, while Malaysia’s exemplar collection regime is now considered first rate, IIPA remains concerned that facilities licensed to press recordable-only formats, remain exempt under the law from mandatory SID Code. Given the instances of pirate production by recordable-only factories, SID Code standardization is considered the best practice. The following is the list of known plants from which exemplars were collected (through February 2007).

CHART 3 Optical Disc Production Plants and Locations in Malaysia (From Which Exemplars Have Been Collected as of February 2008)		
No.	Name of Plant	Location
1	Multimedia Manufacturing Sdn Bhd.	Selangor
2	Express Audio Industry Sdn Bhd.	Selangor
3	Media Manufacturing Holdings Sdn Bhd.	Kuala Lumpur
4	Digital Data Technologies Sdn Bhd.	Selangor
5	Discatech Multimedia Sdn. Bhd.	Cheras, Kuala Lumpur
6	Elite Digital Technologies Sdn Bhd.	Selangor
7	Jenama Evolusi Sdn Bhd.	Selangor
8	Polinta CD Manufacturer Sdn Bhd.	Selangor
9	Memory Tech Sdn. Bhd.	Selangor
10	GSB Summit CD Manufacture (M) Sdn Bhd.	Cheras, Kuala Lumpur
11	Pioneer Solution Sdn Bhd.	Selangor
12	Media Manufacturing Holdings Sdn Bhd.	Kuala Lumpur
13	BLG Edutainment (M) Sdn Bhd.	Selangor
14	Digital Data Technologies Sdn Bhd.	Selangor

15	Dragon Optical Media Technologies Sdn Bhd.	Selangor
16	IP SoftCom (M) Sdn Bhd.	Penang
17	Jenama Evolusi Sdn Bhd.	Selangor
18	The Phoenix Press Sdn Bhd.	Penang
19	Replitex CD industries Sdn Bhd.	Selangor
20	Union Triumph Sdn Bhd.	Johor
21	Tri-Commercial Sdn Bhd.	Selangor
22	Daxon Technology Sdn Bhd.	Pulau Pinang
23	Dragon Optical Media Technologies Sdn Bhd.	Kuala Lumpur
24	Empayar Canggih	Kuala Lumpur
25	Mutlimedia Commerce Sdn Bhd	Kuala Lumpur

Update on Basic Electronics: IIPA has previously reported a particularly vexing case involving a notorious pirate operation that is believed to span Malaysia, Thailand and Singapore. After extensive investigation and persistent urging by an Entertainment Software Association member company, in 2004, the MDTCA raided the retail store and warehouse of BASIC Electronics (M) Sdn. Bhd. where more than 880,000 pirated entertainment software discs were seized. This case languished for nearly two years, during which only one rights holder was asked to verify a small subset of the seized game product. Charges were finally entered against the defendants in October 2006, only after much urging from the rights holders and the U.S. government. Unfortunately, the charges were based on the less than 1,000 discs verified and do not accurately reflect the scope or nature of the infringing conduct or piracy operation involved. However, in a positive turn of events, Malaysian enforcement authorities in early 2007 advised that they were committed to advancing the BASIC prosecution expeditiously and invited support from additional game industry members. The members did so by completing a full inventory of the illegal game discs that had been seized so that the charges could be amended appropriately. Unfortunately, the charges have not been amended despite trial dates being set. Trial was tentatively set for April 2007, then postponed to January 21-22, 2008, then postponed again, with no future date set. Given the scale of this pirate operation, these continuous postponements are disappointing and only serve to embolden the defendants. Malaysian enforcement authorities must stay committed to the expeditious prosecution of this case and aggressively push for deterrent penalties.

Kuala Lumpur Burner Lab Raid and Investigation: With support from the content industries, including the entertainment software industry, the MDTCA raided a clandestine disc-burning lab located in a three-bedroom condominium in Kuala Lumpur on June 13, 2007, and seized 12 computers and 90 burners, nearly 50,000 pirated optical discs containing games, movie and business software, 7200 blank optical discs, a number of stampers, and various documents and other items. The condominium was vacant during the raid and therefore no arrests were made at the time. The evidence seized indicated that the burner lab may be run by the same syndicate linked to an earlier burner raid. While we understand that MDTCA plans to investigate all leads involving this possible syndicate connection with the goal of prosecution, little information has been disclosed with respect to progress on this front. We hope MDTCA is pressing forward with these efforts given the importance of curbing source-based piracy originating in Malaysia.

TRAINING AND PUBLIC AWARENESS

The copyright industries, once again, demonstrated their resolve and commitment to assist the government of Malaysia through participation, organization, and devotion of resources to various trainings and public awareness activities throughout 2007. For example, the business software, music, and motion picture industries were all engaged on a year-round basis, and the entertainment software industry engaged in similar efforts immediately upon the launch of its Malaysian anti-piracy program in October 2007. The music industry, for example, participated in government-initiated training programs, but also conducted on-going training and mock trials for MDTCA officers and prosecutors, particularly as their cases came up for hearings. The BSA engaged in a nationwide educational and enforcement campaign on corporate end-user software piracy, launched by the Minister of Domestic Trade and Consumer Affairs in July 2007. This campaign has aimed at raising awareness to the general public of the serious repercussions of using pirated software in the business environment.

Chart 5 Representative List of Copyright Industry Trainings 2007

Program Dates	Program Title (or description if no title)	Program Location	Synopsis (topic of training, number of attendees)	Program Sponsor(s)	Training Recipients
April 10, 2007	Illegal Camcording In Cinemas	GSC One Utama, Kuala Lumpur	MPA's Program Manager exposed participant to the new methods/trends/ technology used by pirates to record the latest movies in cinemas using camcorders and were briefed on steps to take when they detect camcording piracy.	MPA & GSC	30 attendees including local studio (UIP) representative, MDTCAs officers, GSC Cinema Managers and Assistant Managers nationwide including GSC General Manager and other senior management from GSC Headquarters.
March 2007	Software Piracy Issues		Enforcement and software piracy prosecution seminar with MDTCAs officers organized by a BSA member company	BSA	MDTCAs officers.
May 15, 2007	Illegal Camcording In Cinemas	Cathay Cineplexes, Cineleisure Damansara, The Curve, Kuala Lumpur	See April 10 training.	MPA & Cathay	35 attendees including local studio (UIP, Twentieth Century Fox & Buena Vista Tristar) representatives, MDTCAs officers, Cinema Managers and Assistant Managers nationwide including General Manager and other senior management from Cathay Headquarters.
June 12, 2007	Movie Piracy - Copyright Holders' Perspective: Source of Illegal Contents	Training College at Police Academy	MPA's Program Manager introduced MPA and its activities in Malaysia to the newly appointed Inspectors, Chief Inspectors and Assistant Superintendent of the Police. An introduction on the basic understanding of movie piracy with special attention given to illegal camcording in cinemas.	Police	35 Police officers from rank Inspector and above. These are the officers that the police officer at the Police Station would contact upon receiving report on illegal camcording activities.
June 28, 2007	Illegal Camcording In Cinema	TGV KLCC, Kuala Lumpur	See April 10 training.	MPA & TGV	20 attendees including local studio (Fox) representative, and TGV Cinema Managers.
October 30, 2007	ESA Training Seminar and prosecution training	Eastin Hotel, Petaling Jaya	ESA representative trained MDTCAs officers on various types of pirated games available in Malaysian market. They were also briefed on how to spot the differences between original and pirated versions of DVD games. In the afternoon, the head of prosecution from MDTCAs conducted trainings for officers on prosecutions in copyright piracy cases.	MPA & ESA	44 attendees including MDTCAs officers and MPA staff.
November 20, 2007	Intellectual Property Prosecution Course for the Deputy Public Attorney	ILKAP (the Malaysian government's legal training center), Bangi	A "Prosecution Course" was given to Deputy Public Attorneys to train them in prosecuting court cases effectively, and attended by MDTCAs officers as well. BSA was invited to speak on software and internet piracy issues. MPA helped to organize the seminar in securing speakers from Hong Kong and New Zealand. The recording industry also participated in this course.	Judicial & Legal Training Institute (ILKAP)	32 participants excluding speakers from MPA, MDTCAs, BSA and RIM. Mr. Ben Ho from HK Customs and Peter Pilley from New Zealand Police gave presentations and also facilitate most of the sessions
December 4-6, 2007	WIPO Seminar on WCT and WPPT	Kuala Lumpur	WIPO Asia-Pacific Regional Seminar on Issues Related to the Implementation of the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT).	WIPO, MyIPO	Participants from 13 Asia regional governments (the governments of Bhutan, Brunei, Cambodia, Laos, Malaysia (the host), Myanmar, Nepal, Pakistan, Korea, Sri Lanka, Thailand, and Vietnam were in attendance. In addition, Mike Keplinger and Jorgen Blomqvist of WIPO, along with the Deputy Minister of Domestic Trade and Consumer Affairs Dato' Veerasingam A/L Suppiah, led off the proceedings.
December 2007	Software Enforcement and IT Seminar		Enforcement and IT seminar with MDTCAs officers organized by a BSA member company.	BSA Member Company	

COPYRIGHT AND RELATED LAWS

Copyright Law in Need of Further Revision: Copyright protection in Malaysia is afforded under the Copyright Act of 1987, as amended through 2003. The 2003 amendments¹⁶ strengthened criminal penalties to up to five years and fined RM20,000 (approximately US\$6,200) for each infringement and generally gave enforcement authorities more ability to carry out enforcement against copyright piracy, e.g., Section 50A gives MDTCA officials the ability to carry out arrests for copyright piracy on an *ex officio* basis.¹⁷ The 2003 amendments did not make other changes necessary to meet Malaysia's international obligations and/or improve the effectiveness of the enforcement regime overall.¹⁸

IIPA has for several years recommended changes to the Malaysian Copyright Act to fully implement the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT) (including by full implementation of TPMs and expressly protecting temporary copies), and joining these treaties to provide adequate protection of copyright in the online age.¹⁹ The government should make other changes consistent with international standards or practice (e.g., term extension to "life plus 70" and 95 years from publication for films and sound recordings etc.). Legislative changes should also facilitate enforcement in the digital environment, including, *inter alia*, by extending and/or clarifying mall owners' liability for the rampant trade of pirated products that still occurs within many commercial buildings (see discussion of this issue below). Other changes should be made to Section 42 (discussed in greater detail below), and to Section 52 to clarify that evidence gathered in a criminal raid in Malaysia may be used by right holders in mounting civil cases. The law should also provide for statutory (pre-established) damages so that right holders who have difficulty proving the exact numbers of copies or the exact scope of piracy will still be able to obtain adequate damages to compensate for their losses.

IIPA understands that the government of Malaysia is in the process of preparing copyright law amendments that would aim to more fully implement the WCT and WPPT. At a seminar in December, MDTCA officials indicated that they would be taking steps to further implement the WCT and WPPT, and intend for Malaysia to join the WCT and WPPT in 2008. The intention alone does not foreclose the possibility that other agencies will not block accession legislation, but these statements give some rise for hope. Through discussions with the various government officials present, the government will principally be looking at the issues of "making available" right (and overlapping rights within the current Act) and legislating with more specificity provisions related to the prohibition on circumvention of technological protection measures. IIPA welcomes any opportunity to consult on and review the draft.

¹⁶ The Copyright (Amendment) Act 2003, Act A1195 (effective August 14, 2003).

¹⁷ These changes address in part the issue raised by IIPA in past filings about the need to deem piracy a "public crime," and while the amendments did not go quite that far, they did in a practical sense address the need for MDTCA to be able to carry out its duties *ex officio*.

¹⁸ The 2003 amendments did not make other changes which were necessary either for Malaysia to comply with international standards, or to improve the workings of the enforcement system. They did not, for example:

- Impose mandatory minimum jail sentences for piracy;
- Address deficiencies with respect to presumptions in the law as to copyright ownership or subsistence of copyright;
- Provide for stronger damages in civil copyright cases by providing for statutory damages in civil cases. Statutory damages will act as a strong deterrent to pirates who benefit greatly from infringing acts but are only required to pay a minimum sum for actual losses that the plaintiff is able to prove. Statutory damages could be staggered on a tiered system so that first time infringers pay sizeable but comparatively smaller sums as statutory damages while repeat infringers pay much larger sums.
- Permit disclosure by enforcement authorities to copyright owners of evidence;
- Deem infringing, in civil cases, the "possession and control" of infringing copies for the purpose of sale or other transfer.

Please see the 2003 Special 301 report on Malaysia, at the website <http://www.iipa.com/rbc/2003/2003SPEC301MALAYSIA.pdf> for a full discussion of needed amendments to the Malaysia Copyright Act.

¹⁹ Malaysia amended its copyright act in 1997 to partially implement the WCT and WPPT, including the recognition of a broad exclusive right of "communication to the public" including the right to make works available on demand (for instance, via the Internet). However, other treaty requirements, such as prohibiting the circumvention of technologies used by copyright owners to manage and control access to and use of their works, are not adequately addressed in the amendments. In addition, the law should be clarified as to the protection of temporary copies under the reproduction right. IIPA also suggests that provisions dealing with secondary liability be adopted, such that Internet Service Providers (ISPs) will have incentives to cooperate with right holders in defeating online piracy. At least the "aiding and abetting" standard should be adopted so that service providers do not condone piracy on their services.

IIPA understands that a law, which would ban camcording has been proposed by MDTCA to specifically define the act of camcording or recording in cinemas as a strict liability criminal offense. This law would enable Malaysian enforcement divisions' officers to arrest and prosecute individuals who record a movie in theater, without concern for establishing the subsistence of copyright, ownership or infringement of the copyrighted work being recorded. This proposal is reportedly still pending at MDTCA, but it is hoped that this bill could move independent of other copyright legislation.

Amend Section 42 to Resolve "Affidavit" Problem, and Provide Presumptions: Section 42 of the Malaysian Copyright Act has proved problematic in practice, leaving statutory declarations of ownership and subsistence vulnerable to technical challenges by defendants. Section 42 must be modified to afford rights holders with presumptions of subsistence of copyright and ownership in practice.²⁰ IIPA notes that "presumptions" of ownership are required under Malaysia's current TRIPS obligations, and "presumptions" of ownership and subsistence would be important requirements of an IPR chapter in the USMFTA. While recognizing that the "affidavit" provision of Section 42 does not fully substitute for these presumptions, if the government wishes, it can reinterpret Section 42 so that it is consistent with the presumptions; at present, the way Section 42 is interpreted and implemented in practice, calls into serious question Malaysia's compliance with its current international obligations.

Amend Section 52 to Confirm that Evidence from Criminal Raids May be Used in Civil Cases: On August 8, 2006, the Malaysian Court of Appeals dismissed the appeal by ODVD Manufacturer Sdn Bhd's against a High Court decision that allowed copyright holders to file civil actions based on information gathered during criminal anti-piracy operations conducted by law enforcement agencies.²¹ This case appears to confirm that right holders have the right to file civil actions based on information gathered in criminal cases. Section 52's non-disclosure provision has been used in the past to deny rights holders of necessary information to bring a civil case, so IIPA urges the government to amend the law to ensure that defendants or unknowing officers or officers of the court do not employ it against rights holders again.

Provide for Mall Landlord Liability: IIPA understands that a criminal action has been filed against a landlord of a fixed premises for permitting its tenant to use the premises to sell pirated music. This matter is still proceeding through the court at an early stage of the hearings. Industry understands that MDTCA is completing investigations with a view of charging another landlord for aiding and abetting pirate tenants. To the extent this case will extend or clarify mall owners' liability for the rampant trade of pirated products that occurs within many commercial buildings, IIPA believes this will reap long-term, positive benefits in the fight against piracy in Malaysia. IIPA understands that the government intends to file further mall owner actions. We support these actions, and also urge the Malaysian government to create a specific offense for a landlord to permit its premises to be used for infringement of copyright, *inter alia*, the reproduction, distribution or sale of pirated products.

Make Necessary Changes to Optical Discs Act and Ancillary Regulations: The Optical Discs Act could also be improved to address the changing situation in Malaysia, including, *inter alia*, the need to: 1) ensure that manufacturers or factory owners should not be allowed to import machinery without a

²⁰ For example, right holders have noted, among other problems, that Section 42, while not expressly requiring the maker of an affidavit (of copyright ownership or subsistence) to be present, has been applied to require presence in practice, since defendants have claimed they have a right to cross-examine the maker of the affidavit. In addition, Section 42 should not contain the wording "at the time specified therein" since it creates confusion (it should suffice to say "copyright subsisted and continues to subsist at all material times"). Finally, the "true copy" requirement is overly burdensome (e.g., a right holder in a motion picture should not be required to produce the bulky film print, or the right holder in books should not be required to produce copies of all the books involved in a particular case).

²¹ In September 2002, Malaysia's Ministry of Domestic Trade & Consumer Affairs (MDTCA) raided ODVD Manufacturer Sdn. Bhd., a licensed VCD replicating factory, and seized 1,670 suspected pirate optical discs, some of which were infringing Motion Picture Association (MPA) member company titles. Based on information obtained during the September 2002 raid, Columbia Pictures Industries, Inc., owner of the copyright of the movie *Stuart Little 2*, initiated a civil action against ODVD Manufacturer Sdn Bhd. ODVD Manufacturer Sdn. Bhd. applied to the High Court to dismiss Columbia Pictures' claim on the grounds that the civil action was initiated based on information obtained by the MDTCA during the criminal raid. ODVD Manufacturer Sdn. Bhd. argued that it was illegal for the MDTCA to have divulged information gathered during the raid. The High Court dismissed the application by ODVD Manufacturer Sdn. Bhd., and ODVD Manufacturer Sdn. Bhd. appealed to the Court of Appeal.

valid license from MDTCA, and that MDTCA should have the power to seize and remove such machines if found in unlicensed premises; 2) prohibit the gouging or other removal of SID code from discs; 3) ensure that inspection authority is available and used at any time, day or night, and in any place where optical media production activity may be occurring; 4) prohibit the unauthorized burning of content onto recordable discs; 5) specifically empower the authorities to shut down factories bases solely on positive forensic examination reports; and 6) ensure that any plants, which indicate that they are producing “recordable” discs (CD-R, DVD-R, etc.), or existing plants requesting licenses to acquire or expand production to recordable discs be fully subject to the licensing regime. Exemplars from all such plants/lines must be provided, even from recordable-only plants. See also the other important improvements sought in the free trade agreement negotiation.

Enact Organized Crime Legislation: With the involvement of organized criminal syndicates in certain piracy operations in the country, the government of Malaysia should be encouraged to adopt anti-organized crime legislation that includes copyright piracy as a predicate offense. A particularly good example of such legislation is Hong Kong’s Organized and Serious Crimes Ordinance (OSCO), which allows Hong Kong authorities: (1) to employ more extensive investigative powers into organized criminal operations involved in piracy and into the proceeds derived from this illegal activity; (2) to seize records, freeze assets and confiscate illicit proceeds; and (3) to impose higher penalties on those convicted of engaging in pirate operations. Other laws, such as those criminalizing fraud, tax evasion, false documentation or names and addresses, must all be brought to bear on the organized crime/IP nexus in Malaysia.²²

FREE TRADE AGREEMENT

While Trade Promotion Authority (TPA) – otherwise known as “fast track” authority – lapsed on June 30, 2007, the U.S. and Malaysian governments continue to negotiate with each other regarding a possible free trade agreement.²³ The U.S.-Malaysia FTA must include a robust chapter on intellectual property rights, including full implementation of the copyright law reforms that have become part of emerging global consensus minimum standards. These include, but are not limited to, those already embodied in the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT), the requirement that Malaysia upgrade its copyright enforcement practices, with the goal to ensure that copyright owners and law enforcement officials have available to them the tools necessary to impose effective, consistent, predictable and deterrent penalties on copyright pirates, including in the Internet environment, and the aim to dismantle or significantly reduce the market access barriers and discriminatory practices that keep U.S. copyright holders from full participation in the Malaysian market.

Key FTA issues include the following:

- extending term of protection to life of the author plus 70 years, or in the case of works whose term is calculated based on the date of publication or for which authorship is corporate, 95 years.
- obtaining commitment by the Malaysian government to immediately join (and implement) the WIPO Internet treaties, the WCT and WPPT.
- ensuring that use of software in the government is legalized (and that appropriate software asset management is employed), and that government networks are not being used for illegal uses of copyright materials, including over peer-to-peer file sharing (P2P) networks or services.

²² Malaysia has the Anti-Money Laundering Act of 2001(AMLA) of which infringement of copyright is a scheduled offense under the definition of “serious offenses”, and includes attempts and abetments. Unfortunately, despite having received training in the use of and prosecution under AMLA, the government has been slow to use it in copyright infringement matters.

²³ See The Office of the United States Trade Representative, United States, Malaysia Announce Intention to Negotiate Free Trade Agreement, at http://www.ustr.gov/Document_Library/Press_Releases/2006/March/United_States_Malaysia_Announce_Intention_to_Negotiate_Free_Trade_Agreement.html (on March 8, 2006, the United States announced its intention to enter into negotiations toward an FTA with the government of Malaysia).

- ensuring that the problem of Pay TV piracy – signal theft – does not become a major source of trade losses to U.S. owners of broadcast content, by including an exclusive broadcast right, the right to control against the unauthorized decryption of encrypted program-carrying signals (as well as to stop the manufacture or distribution of devices used to decrypt), and in addition, a prohibition against onward distribution of signals without authorization (re-broadcast or re-transmission).
- outlawing the use of an audiovisual recording device to transmit or make a copy of a copyright work from the performance in a motion picture exhibition facility.
- improving customs authority and border enforcement measures.
- outlawing the knowing trafficking in counterfeit labels or illicit (unauthorized) labels affixed to, enclosing, or accompanying (or designed to be affixed to, enclose, or accompany) works or sound recordings.
- outlawing false documentation/declarations in the trade, import, or export involving goods suspected of infringing intellectual property rights.
- ensuring that the optical disc regulations in force in Malaysia are fully compliant with the specific concerns outlined immediately below.

Optical Disc Side Letter: Finally, in addition to the problems noted above, there are some other specific concerns, which should be addressed by inclusion of commitments in the FTA itself or in side letters. These include ensuring that the optical disc laws are strengthened to:

- cover burning of copyrighted content of others onto recordable discs.
- outlaw gouging or scouring of discs.
- ensure that inspection authority is available and used in practice at any licensed location or other location where optical media production activity may be occurring, or where exemplars, records, stampers, masters, manufacturing equipment, or raw materials are found (e.g., in transit) or stored.
- reinstate the requirement to include SID Codes on blank optical disc media (CD-R/DVD-R etc.) and make the sale of optical discs without SID code an offense.
- ensure that samples (exemplars) are collected from every plant.
- allow right holders to participate in inspections and collect evidence.
- ensure that officers are authorized to seize discs in inspections and make arrests.
- allow right holders to participate in inspections and collect evidence.
- allow for inspections at any time, day or night.
- allow for forcible entry where entry is obstructed.
- provide for automatic revocation if a plant or agent has violated the law, including if the plant is caught illegally replicating discs (finished or recordable).

- provide that illegal discs found at any factory or licensed premises are presumed to have been replicated by the manufacturer in question.

MARKET ACCESS

Prohibition on Game Play in Internet Cafés: Ironically, while IIPA notes in this report that unauthorized use of entertainment software in Internet cafés is a growing problem, IIPA has also learned that the Ministry of Housing and Local Government issued a Circular dated October 5, 2007, which apparently instructs local municipalities to advise Internet cafés of certain restricted and prohibited activities, which may have the detrimental effect of prohibiting even licensed uses of entertainment software. While IIPA has not reviewed this Circular, contacts at the Multimedia Development Corporation (MDEC) have informed industry that several local city councils have sent letters to local Internet cafés advising them of certain restricted and prohibited activities. These include Ipoh City Council, Shah Alam City Council, and other city councils in Johor State. The city council letters are concerning because they set out purported prohibitions against offering “video games which are consoles based” and “computer games with elements of pornography and gambling” in Internet cafés. With respect to computer games, while the intent seems to be to curtail the viewing of “pornography and gambling” in the Internet cafés, and not “Video Games” in and of themselves, the letters are reportedly unclear in making the distinction and the definitions are rather vague. The result of these letters is that some Internet cafés, concerned about violating what may be viewed as a ban on all computer games in their spaces, are refusing to license all entertainment software in their establishments. However, those same Internet cafés continue to use unlicensed software. To the extent the policy as implemented is impeding efforts to license legitimate game play in Internet cafés, or to the extent the policy as implemented is keeping games out of Internet cafés altogether, IIPA views the issue as one of market access that needs to be addressed by MDEC and the local city councils with urgency.

Broadcast Quotas and Investment Restrictions Hamper Legitimate Right Holders: Broadcast stations in Malaysia are being required, through licensing agreements, to devote 70% to 80% of airtime to local Malaysian programming. Broadcast stations are also being banned from broadcasting foreign programming during “prime time” hours of 8:30 to 9:30 p.m. Foreign investment in terrestrial broadcast networks is also strictly prohibited, and through licensing agreements the government also imposes a 20% limit on foreign investment in cable and satellite operations. These restrictions are extremely damaging and highly prejudicial to U.S. copyright owners in program content, and should be eased or lifted.

Restriction on Foreign Advertising: Malaysia allows only locally-produced advertisements to be aired on terrestrial broadcast channels. Foreign advertisements must therefore be replaced with locally-made advertisements before programs can air. This restriction, which both has a protectionist underpinning, and impedes on right owners’ abilities to freely contract and pursue commercial opportunities in the Malaysian market, should be lifted.

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2008 SPECIAL 301 REPORT

NIGERIA

Special 301 Recommendation: Nigeria should be placed on the Watch List.

EXECUTIVE SUMMARY

Piracy is so bad in Nigeria that local artists and filmmakers now refuse to release their latest albums and movies into the retail market,¹ and recently, industry actually called for a total ban on the importation of music CDs.² Fifteen optical disc replication plants and four mastering plants have rapidly transformed Nigeria from a haven for pirate retailers into a haven for pirate producers. The plants are mainly owned by Southeast Asian nationals' whose companies have been displaced by enforcement against them in their home countries. Reports from neighboring countries suggest that large quantities of pirate discs are being exported from these plants in Nigeria across the region. As such, Nigeria has unfortunately earned the dubious distinction of becoming an optical disc piracy hotspot.

Fortunately, the government enacted the Copyright (Optical Disc Plants) Regulation 2006, which went into effect on December 20, 2006. The Regulation provides a very strong legal framework for regulating optical disc production, including a licensing (and revocation/renewal system), with source identification code requirements for discs, stampers, and masters, license of import of raw materials and equipment, inspection authority, and sanctions for plants violating the law. IIPA calls upon the Nigerian government to employ the Regulation to deal with the optical disc piracy problem as an urgent matter. Other piracy problems must be dealt with as well through strong enforcement by the Nigerian Copyright Commission (NCC) and Nigerian Customs. Use of publications (as well as other copyright materials) by universities and libraries must be legalized.

ACTIONS TO BE TAKEN IN 2007

- Enforcement of the Copyright (Optical Disc Plants) Regulation 2006 to regulate the 15 known optical disc plants and 4 mastering facilities to take deterrent action against any plants found to operating outside the scope of the Regulation.
- A campaign by the Nigerian Copyright Commission (NCC), including *ex officio* actions (traditionally complaints have been required), to sweep the markets clear of piracy, as well as duplicators,

¹ At a press conference announcing the enactment of the Copyright (Optical Disc Plants) Regulation 2006, Eddie Ugbomeh (OON), actor and film producer, was quoted as saying,

I no longer release videos or DVDs into the Nigerian market. What I do now with my films is premiere them and take them to select film halls and after I've made my money, I simply retire them to the shelves. The last time I released VCDs to video rental outlets across the country, they never gave me any returns. In Port Harcourt, Rivers state, these rental operators even threaten to kill me if I come for my money. Same thing at Warri, Delta state. So I've made up my mind not to release VCDs in the present circumstances.

See Miebi Senge, AAGM: NCC's Copyright Regulation 2006 Seeks to STRAP Pirates Out of Business, Vanguard (Nigeria), April 11, 2007.

² All Africa Lagos, *NARI Advocates Ban On Importation of Recorded Music*, March 13, 2006 (noting that with an 85% piracy level for music/records, the chairman of the Nigerian Association of Recording Industries (NARI), Toju Ejueyitchie, called for the ban on the importation of prerecorded music or film carriers into Nigeria). In the article, the chair of NARI also admitted to the existence of "about 15 optical disc factories, and the number increasing by the day," and posited that virtually 100% of works imported were pirated. The press conference also announced the seizure of 1.7 million CDs in Cotonou, and raids on suspected IP pirates Akina and Nassinma. The head of NARI also called for a serious purge of the Alaba International Market, which he described as a "notorious haven for pirates, and their nefarious activities."

photocopy equipment, other equipment and tools used to pirate, and to inspect businesses to ensure they are not engaged in unauthorized use of business software.

- An enforcement campaign by Nigeria Customs Service (NCS) to interdict pirate imports coming in at the ports as well as those coming to Nigeria to pick up pirate exports.
- Reinstate funding to universities and libraries to purchase books and journals.
- More prosecutorial attention to copyright cases, ensuring that cases go to trial and result in judgment with deterrent penalties actually imposed.
- Enactment of an amendment to prohibit unauthorized (parallel) and pirate imports, and to limit any exception to import of “a legal copy of a work by a physical person for his own personal purposes.”

NIGERIA ESTIMATED TRADE LOSSES DUE TO COPYRIGHT PIRACY (IN MILLIONS OF U.S. DOLLARS) AND LEVELS OF PIRACY: 2003-2007 ³										
INDUSTRY	2007		2006		2005		2004		2003	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Records & Music	55.0	95%	52.0	95%	52.0	95%	50.0	99%	NA	NA
Business Software ⁴	65.0	82%	59.0	82%	46.0	82%	30.0	84%	29.0	84%
Books	NA	NA	8.0	NA	6.0	NA	4.0	NA	NA	NA
Motion Pictures	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA
Entertainment Software	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA
TOTALS	120.0		119.0		104.0		84.0		29.0	

PIRACY UPDATES IN NIGERIA

Pirate Optical Disc Plant Production: As noted, there are a reported 15 optical disc plants that have been in operation in Nigeria, some of which have migrated to Nigeria from Southeast Asia and operate to supply Central and West Africa. The plants have 70 production lines, including at least 3 DVD compatible lines, capable of producing over 240 million discs per year (a conservative estimate). Many of the plants are not licensed to produce any kind of copyright content. Two of these plants (Akina and Nasinma) were raided in June and July 2004, and were raided again in 2006. However, to date there has been no outcome with respect to actions against these plants.⁵ The massive production overcapacity is not only used for domestic consumption but also for export (or “take out” as it is called, as people come from all over West Africa to buy pirated discs from the Alaba International Market in Lagos). Pirated product from Nigeria has been found in Algeria, Senegal, Ghana, Zambia and South Africa.

Retail Piracy: Nigeria is a very large potential market for legitimate copyright business, but the country is overrun with pirate materials domestically. Pirate CD-Rs containing copyright materials, for example, compilations of up to 300 songs by local and international artists, sell for less than the equivalent of US\$1 in the local market. Notwithstanding the increased production capacity in the market,

³ The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA’s 2008 Special 301 submission at www.iipa.com/pdf/2008spec301methodology.pdf. For information on the history of Nigeria under Special 301 review, see Appendix D at (http://www.iipa.com/pdf/2008SPEC301_USTRHISTORY.pdf) and Appendix E at (<http://www.iipa.com/pdf/2008SPEC301HISTORICALSUMMARY.pdf>) of this submission. Please also see previous years’ reports at <http://www.iipa.com/countryreports.html>.

⁴ BSA’s 2007 statistics are preliminary. They represent the U.S. software publishers’ share of software piracy losses in Nigeria, and follow the methodology compiled in the Fourth Annual BSA and IDC Global Software Piracy Study (May 2007), available at <http://w3.bsa.org/globalstudy/>. These figures cover, in addition to business applications software, computer applications such as operating systems, consumer applications such as PC gaming, personal finance, and reference software. BSA’s 2006 piracy statistics were preliminary at the time of IIPA’s February 12, 2007 Special 301 filing and were finalized in June 2007 (see <http://www.iipa.com/statistics.html>) as reflected above.

⁵ There are even unsubstantiated claims that the evidence related to the Nasinma plant has been destroyed to thwart attempts to prosecute those responsible for piracy at that plant.

an influx of imported pirate CDs from unknown locations in Asia continues to harm the market in Nigeria's main cities.

Book Piracy: Book piracy continues to be a serious problem, due in part to the Nigerian government's decision in 2003 to cut funding for university and library purchases. This decision has created a climate fostering illegal photocopying, which plagues the academic market. Furthermore, Nigeria has for years been a destination for pirate book imports, primarily from Asia (China and Malaysia). Customs authorities should increase vigilance in seizing pirate product before it has a chance to saturate the local market.

Business Software Piracy: For the business software industry, hard-disk loading of pirate software and unauthorized use of software in businesses remain significant problems. The piracy rate is unacceptably high.

Organized Crime/Violence Associated with Piracy: There are disturbing trends in terms of the level of violence associated with piratical activities in Nigeria. In June 2006, Nigerian police raided the Alaba International market in Lagos, during which pirates shot two police officers, burned a police vehicle, and threw stones and bottles, injuring the industry coordinator when he was struck on the head by a stone.⁶ Tear gas had to be used to quell the violence. Several thousand pirate CDs and VCDs were seized and four men were arrested.⁷ This raid demonstrates the serious criminal nature of pirate enterprise in Nigeria and that a coordinated approach focused on criminal enforcement must be mounted.

ENFORCEMENT UPDATES IN NIGERIA

Commencement of Optical Disc Raids: The Nigerian government, in cooperation with industry, began acting against piracy in the country in 2007. The Nigerian Copyright Commission has teamed up with the Economic and Financial Crimes Commission (EFCC), and private sector to form a collaborative campaign called the Strategic Action Against Piracy (STRAP). Two major raids were carried out targeting optical disc piracy in 2007.

- On April 13, 2007, operatives of both NCC and EFCC, along with the record and motion picture industry's representative, and a contingent of the Nigerian Police Mobile Force, launched a simultaneous anti-piracy operation on two large-scale replicating plants, namely, Magnet Integrated Ventures Company Limited, in Ajah; and Akina Music International Company Limited, in Ikeja.⁸ This was reportedly the first utilization of the Copyright (Optical Disc Plants) Regulation 2006. At the time of the raid, employees were caught in the act of producing pirate discs, including music discs, VCDs and DVDs. According to NCC, two truck loads of suspected pirated products estimated at NN32 million (US\$276,000) were impounded during the raid. The authorities arrested the Managing Director of Akina Music, and five employees of Magnet, while a search was launched for the Managing Director of Magnet Ventures.⁹ The Commission sealed the premises of Magnet pending the conclusion of post-raid investigations. Even though indictments have been brought, reportedly, Magnet unilaterally opened its premises again for operation in 2007.
- On July 25, 2007, 16 Economic and Financial Crimes Commission (EFCC) operatives and 20 armed police officers, along with assistance from the record and motion picture industry representative, raided CVL Technology Ltd., a plant with five production lines. The plant operatives were caught in the act during the night manufacturing unauthorized optical discs. The authorities seized 714 stampers, containing international music repertoire and Hollywood movies.

⁶ IFPI Enforcement Bulletin, September 2006 (on file with IIPA). Fortunately all those wounded have recovered.

⁷ The raid was led by the Director of Special Operations of the National Copyright Commission (NCC) and an industry representative. More than 100 anti-riot policemen surrounded the market while 10 armed officers took up positions on the rooftops. They supported the 12 Copyright Inspectors and 15 packers who went into the Alaba market to inspect suspect merchandise.

⁸ See NCC, *EFCC Raid Two Piracy Coys*, All Africa, April 30, 2007.

⁹ It has been reported to IIPA that two managers of Magnet were arraigned in court in February 2008 by the NCC.

Officials also found 5,000 copies of the 'Respect 2' album, by popular Nigerian Artist K1, as well as 8,000 other CDs and VCDs. The EFCC also recovered documents showing orders for and production of several local and foreign works including 'Grass 2 Grace' album from 2Face.¹⁰ The EFCC arrested the company's head of marketing and an investigation was launched.

Destruction Event: According to another press report, the Solicitor General of Nigeria, the Commissioner of Police, and the NCC Director General presided over a destruction event at the Kaduna State Trade fair complex ground involving over N150 million worth of pirate CDs, DVDs, videocassettes, books and implements used to infringe.

There is little enforcement activity in Nigeria for other industries.¹¹ The Nigerian Copyright Commission (NCC), which, by practice reports to the Ministry of Justice, has responsibility in Nigeria for anti-piracy activities, and, as noted, the Economic and Financial Crimes Commission (EFCC) has teamed up with the NCC to fight optical disc piracy. The National Customs Service (NCS), as the nation's gateway police, also has a significant role to play in anti-piracy enforcement, although NCS has never to our knowledge seized product on its own initiative. NCC's effectiveness is hampered by a lack of funding. The courts in Nigeria provide no sure relief, as bringing civil claims continues to be an expensive and risky remedy for right holders.

COPYRIGHT LAW AND RELATED ISSUES

Copyright Law: Copyright protection in Nigeria is governed by the Copyright Act (Cap 68 Laws of the Federation of Nigeria, 1990) as amended. The law, while by no means perfect, provides a solid basis for enforcing copyright and combating piracy.

Copyright (Optical Disc Plants) Regulation 2006: As the Nigerian government has come to recognize the severity of the optical disc piracy problem,¹² it is positive that the government has issued the Copyright (Optical Disc Plants) Regulation 2006. The law establishes a specific enforcement mechanism that includes:

- The establishment of a competent licensing authority to grant licenses to optical disc production facilities as well as to deny, suspend, or revoke a license if that should become necessary.
- The establishment of a registration system for commercial CD-R/DVD-R "burning" (i.e., for the purpose of sale, distribution, or other commercial dealing), i.e., burning of copyrighted materials onto recordable optical discs undertaken in back rooms of traditional optical disc manufacturing plants or outside of such plants (the latter which is fast becoming a major problem).
- The requirement to use source identification (SID) Codes to trace pirate discs to their source of production.
- The establishment of licensee record-keeping requirements in the application process and after a license is granted, to provide governments with the means to judge whether an applicant qualifies for a license, and to provide maximum transparency after a license is granted (e.g., exemplars will be provided from each plant for every disc produced, allowing for transparent accounting of licensed

¹⁰ Among the wide variety of foreign artists whose works were found were R. Kelly, Wyclef, Luther Vandross, Celine Dion, Phil Collins, Westlife, Toni Braxton, Boys II Men, 50 Cent, Backstreet Boys, Akon, 2Pac, Beyonce, Kent Village, Lucky Dube and Whitney Houston. The works were mostly titled 'Platinum' or 'Best of' indicating that they contained selected songs from each artist. The foreign films on the recovered VCDs and stampers included *Love Don't Cost*, *Blood Diamond*, *Spiderman 3*, *Desperado 3*, *Contractor*, *Black Snake*, *Naked Weapon*, *The Big Boss*, *300*, *Passion of Christ*, *Power House*, *The Marine*, *Final Contract*, and *Cyborg*.

¹¹ The port of Lagos is inadequately policed against piracy and has become a major transshipment site for pirated product to enter Nigeria and nearby countries.

¹² See Ruby Rabi, at <http://allafrica.com/stories/200611290465.html>, Daily Trust (Abuja), November 28, 2006 (reporting that NCC admitted there are "14 replicating plants in Lagos used to manufacture pirated CDs, DVDs and books," and noting that ten years ago, Nigeria had just two replicating plants). The NCC indicated that it intends to re-introduce the "hologram" as a means to determine authenticity.

production and forensic evidence should such be needed). CD-R burning registration also entails record-keeping of orders.

- The ability to inspect plants (in addition to traditional search and seizure) and burning facilities, including nighttime inspections, to ensure that plants/facilities are engaging in legal activities.
- Government record-keeping of all plants/facilities and all actions taken with respect to them (e.g., inspections, searches).
- The establishment of adequate penalties for violations of a license (or burning without registering) including criminal penalties and possibility of plant/burning facility closure.
- Controls to track the export of discs, and export and import of equipment and raw materials, including the masters or stampers which are the key components for producing pre-recorded content (an automatic license is one common approach).

The Regulation also imposes the requirement of a permit for the importation of discs into Nigeria (Section 2(1)). The U.S. copyright industries do not endorse this provision and believe that it should be removed, if for no other reason than a permit requirement on the importation of legitimate optical discs may be a GATT-incompatible restriction on trade.

GENERALIZED SYSTEM OF PREFERENCES

Nigeria currently participates in the U.S. GSP program, offering duty-free imports of certain products into the U.S. from developing countries. In order to qualify for such unilaterally granted trade preferences, USTR must be satisfied that Nigeria meets certain discretionary criteria, including whether it provides “adequate and effective protection of intellectual property rights.” During the first 11 months of 2007, \$858,000 of Nigeria’s total exports entered the U.S. under the duty-free GSP code. Nigeria should not continue to expect such favorable treatment at this level unless it can meet the discretionary criteria in this U.S. law.

TRAINING

Industry Training: On September 21, 2007, 25 participants from the Nigerian Copyright Commission, Nigerian Police, Nigerian Customs Service and Standards Organisation attended a training by the motion picture and record industry representatives to build capacity for tackling the serious problem of optical disc piracy in Nigeria. Later, the training session switched to Lagos where a further 41 officers drawn from the same four organizations attended. Participants were taken on visits to 11 optical disc replicating plants as part of the training. These plant visits enabled each participant to gain hands-on practical knowledge of what was taught in the training room.

U.S. Government Training: The Nigerian Copyright Commission (NCC) in collaboration with the United States Department of Justice (USDOJ) held a training program on “Investigative Skills for Intellectual Property Crimes,” held in Abuja from November 6 to 9, 2007. The aim of the training was to equip enforcement officers with the requisite skills to sustain the ongoing fight against piracy and counterfeiting. Participants were drawn from Nigerian government agencies with a mandate for enforcement, administration and prosecution of IP crimes.

Coordinator of the EFCC Fix Nigeria Initiative: Chido Onumah, Coordinator of the Economic and Financial Crimes Commission (EFCC) Fix Nigeria Initiative, spoke at the Nigeria International Book Fair, the International Children Book Day, World Book & Copyright Day (WBCD), and Earth Day (ED) at the Multipurpose Hall of the University of Lagos. His message was to say no to all forms of corruption and to say no to book piracy.¹³

¹³ Damieta Braide and Folake Quadree, *Waging War Against Book Piracy*, May 16, 2007, at <http://www.sunnewsonline.com/webpages/features/arts/2007/may/16/arts-16-05-2007-001.htm>.

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2008 SPECIAL 301 REPORT

PAKISTAN

Special 301 Recommendation: IIPA recommends that Pakistan remain on the Watch List.

EXECUTIVE SUMMARY

IIPA recommended in the October 2007 out-of-cycle review (OCR) process that Pakistan remain on the Watch List, due to the continued cooperation and enforcement activity of the Federal Investigation Agency (FIA) and Pakistani Customs, especially with respect to stopping factory-pressed optical disc pirate production and exports. In its recommendation, IIPA also expressed the hope that FIA would become more active against the serious ongoing problem of book piracy, and that cases against optical disc plant owners would proceed through the courts. Since that time, political uncertainty in Pakistan has tempered hopes for dramatic improvements in the short term. As the political situation hopefully normalizes over time, IIPA encourages authorities to resume the important work of seeking effective enforcement against ongoing copyright violations, including effective prosecution of copyright crimes, leading to deterrent sentences. Better copyright protection will have a positive impact on local Pakistanis and Pakistani businesses, as it is well documented that piracy negatively affects local creative industry.¹

PRIORITY ACTIONS REQUESTED IN 2008

- **Undertake significant action against retail piracy throughout Pakistan, including pirate booksellers, followed by prosecutions of cases leading to deterrent penalties:** Recently, the government appointed an official "Director" to head the IPR Unit at the Federal Investigation Agency (FIA) Islamabad-Pakistan. Some raids against optical disc targets ("burning" operations now that factory production has been by and large successfully eradicated in Pakistan) as well as music cassette piracy operations have commenced, and the Director General and senior colleagues of FIA have met with the publishing, sound recording and motion picture industries to begin collaborating. FIA's responsiveness and police officers' consistency in carrying out actions in 2008 will in large part determine whether the government can successfully combat piracy in the country. Unfortunately, some evidence of leaks within FIA in one set of raids in November 2007 shows the necessity of greater monitoring and corrective action against any irregularities in the system.
- **Ensure that the National Book Foundation ceases all activity considered infringing under international norms:** In mid-2007, it appeared (and IIPA noted in its out-of-cycle review submission) that the Ministry of Education's National Book Foundation (NBF) was prepared to cease the unauthorized reproduction of books under the guise of a royalty-free compulsory license.² The overtures of NBF were accompanied by fervent lobbying of foreign publishers and their governments to grant NBF license agreements. Such voluntary licensing is made impossible given the NBF's blatant illegal copying activities. As a start to any discussion, IIPA expects: 1) immediate cessation of all unauthorized copying of U.S. publishers' titles; and 2) a written commitment from the NBF to use legitimate product, engage in transparent business practices, and seek amendment to or revisit its

¹ Reuters News, *Pakistani Cinemas Shut Down to Protest Piracy*, March 15, 2007 (documenting a strike by the local Pakistani cinema owner association to protest against the government's failure to curb film piracy, and, e.g., noting that street piracy, cable or signal theft, and the ban on showing Bollywood films, all compound the business problems for the cinema owners; the article also notes that the number of cinemas in Pakistan has fallen from about 750 in the 1970s to about 300 by early 2007, with many having been converted into shopping malls).

² The government of Pakistan amended its copyright ordinance in 2000 to include Section 36(3) that allows a royalty-free compulsory license of books. This amendment was passed without any opportunity for publishers to comment. This royalty-free compulsory license violates the Berne Convention and TRIPS and the government of Pakistan must repeal it.

interpretation of Section 36(3) of the Copyright Ordinance (which appears to allow for a royalty-free compulsory license to reprint books).

- **Make the Intellectual Property Organization (IPO) a more meaningful and effective organization:** IIPA would like to see the IPO live up to its intended mission as a forum for dialogue and coordination between private sector representatives and government officials, and stage a comprehensive plan for tackling Pakistan's outstanding piracy issues.
- **Conclude cases against optical disc manufacturing pirates who were arrested years ago:** Court cases against the optical disc plant owners raided in 2005 are still pending, as the owners have filed a Constitutional Petition (CP) in the Pakistani High Court challenging the legislation (under which they were arrested). Decisions in these extremely important cases were expected before the end of 2007 but were not forthcoming due to the political unrest in Pakistan.
- **Take action against cable and satellite piracy:** IIPA is unaware of any actions taken against signal theft (theft of television channel broadcasts and programs therein), which causes over \$110 million in losses to legitimate channels due to illegal distribution to an estimated 4.6 million unauthorized subscribers. Similar action to that taken against the optical disc plants in 2005 must be taken to shut down pirate distributors of television signals in Pakistan.
- **Take actions against business software end-user and hard-disk loading piracy:** The rate of unauthorized use of business software in Pakistan is extremely high. Inspections should be run against businesses suspected to be engaged in the unauthorized use of software, and prosecutions brought where warranted. In addition, while many prosecutions were brought against those engaging in hard-disk loading of pirate software onto computers, the slow pace of court processes and lack of deterrent sentences has meant those engaging in this activity will not be deterred. Steps should be taken to reverse this trend.
- **Amend Copyright Law to Enhance Enforcement, Create Deterrence:** The laws in Pakistan remain a weak link, since there are no mandatory minimum sentences for committing a crime of copyright infringement. As a result, judges impose only nominal fines which have no deterrent effect, and actually embolden pirates. It is essential to strengthen laws by introducing minimum sentences, including mandatory fines and jail sentences. Also, the current copyright law provides only reproduction and rental rights for sound recordings. Revisions are necessary to protect digital content, including an exclusive communication to the public right/right of making available, and protection against the unlawful circumvention of technological protection measures or trafficking in and providing circumvention devices or services.
- **Pass Optical Disc Regulation:** As promptly as possible the Pakistani government should pass and implement an effective optical disc law to enable control over optical disc production, including licensing, inspections (including by representative organizations), closure of plants in violation, monitoring and control on imports of production equipment and raw materials (including optical grade polycarbonate), requirements to use unique source identification codes (SID mastering-LBR and mold codes) to track the location of production, etc.

For more details on Pakistan's Special 301 history, see IIPA's "History" Appendix to this filing at <http://www.iipa.com/pdf/2008SPEC301HISTORICALSUMMARY.pdf>. Please also see previous years' reports at <http://www.iipa.com/countryreports.html>.

PAKISTAN
Estimated Trade Losses Due to Copyright Piracy
(in millions of U.S. dollars)
and Levels of Piracy: 2003-2007³

INDUSTRY	2007		2006		2005		2004		2003	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Records & Music	25.0	100%	25.0	100%	25.0	100%	70.0	100%	70.0	100%
Books	55.0	NA	55.0	NA	55.0	NA	52.0	NA	44.0	NA
Business Software ⁴	76.0	85%	78.0	86%	26.0	86%	14.0	82%	9.0	83%
Entertainment Software	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA
Motion Pictures	NA	NA	NA	NA	NA	NA	12.0	NA	12.0	95%
TOTALS	156.0		158.0		106.0		148.0		135.0	

PIRACY AND ENFORCEMENT UPDATES IN PAKISTAN

Book Piracy is Getting Worse: Pakistan remains perhaps the worst book piracy haven in the world. Large-scale photocopying and print piracy make the Pakistani market virtually untenable for legitimate publishers.⁵ The Urdu Bazaars in Karachi (featuring 350 booksellers and wholesalers) and Lahore (featuring 700 sellers), are the main sources of pirated books in the country and have remained relatively untouched by raid action over the past year. All types of books are pirated – practically anything that can sell more than a few hundred copies. English language novels and other trade books are popular among pirates, and as a result, U.S. publishers of mainstream commercial fiction and non-fiction are struggling. While the quality of the pirated copies is often poor across the board, some pirates are now able to produce better quality copies that are more difficult to differentiate from the legitimate versions.

The potential market for elementary and high school materials in English is immense, given the number of families in Pakistan who are sending their children to English-medium schools. Nonetheless, the academic market in Pakistan, in addition to the professional and scientific, technical and medical markets, has been completely overrun by piracy. Elementary and high school courses taught in English routinely feature pirate versions of books. Piracy at the university levels is even worse, with rates soaring over 90%.⁶ Often, one student will purchase the required reading for a class and then organize the photocopying for the entire class, or lend the book to other students for them to copy any material they require.⁷ Unauthorized compilations in the form of course packs are on the rise as well. Some medical titles have been pirated, usually in one color, so they have misleading and inaccurate illustrations.

Due to the relative ineffectiveness of enforcement raids,⁸ the minimal number of criminal

³ The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2008 Special 301 submission at www.iipa.com/pdf/2008spec301methodology.pdf.

⁴ BSA's 2007 statistics are preliminary. They represent the U.S. software publishers' share of software piracy losses in Pakistan, and follow the methodology compiled in the Fourth Annual BSA and IDC Global Software Piracy Study (May 2007), available at <http://w3.bsa.org/globalstudy/>. These figures cover, in addition to business applications software, computer applications such as operating systems, consumer applications such as PC gaming, personal finance, and reference software. BSA's 2006 piracy statistics were preliminary at the time of IIPA's February 12, 2007 Special 301 filing and were finalized in June 2007 (see <http://www.iipa.com/statistics.html>) as reflected above.

⁵ Notwithstanding some enforcement actions in late 2005 and into 2006, the bazaars remain rife with piracy, and enforcement has been weak to nonexistent. In September 2005, publishers began conducting a series of inspections on the Urdu Bazaar in Karachi. The initial actions resulted in the seizure of around 3,000 infringing titles and four arrests by the police. The reaction by local pirate traders was strong, as they staged strikes (including hunger strikes) and demonstrations. The inspections and the following strikes/demonstrations attracted much media attention. Eventually, with the intervention of police and government officials, the strike was called off. IIPA and the publishers continue to be alarmed by incidents of violence carried out by pirate operators.

⁶ Among the worst offending universities in this respect are the College of Business Management in Karachi, Punjab College of Business Education in Lahore and NED University in Karachi.

⁷ This is further evidenced by the fact that U.S. publishers receive routine requests for free supplementary materials from professors who have apparently adopted the book, in regions where there are absolutely no legitimate sales.

⁸ A police-assisted raid in 2006 in Karachi at a book market illustrates the lack of will among some authorities in Pakistan. Pirate books were seized and some offenders were taken to the neighborhood police station. Strong reaction from those at the market and many of the booksellers lead to them surrounding the police station demanding that the police refrain from filing the "First Information Report" (FIR) against the offenders and release them immediately. The police folded under the pressure and asked for a written undertaking from the offenders that they would not engage in piracy, whereupon they released the defendants without filing an FIR.

prosecutions and the low level of fines when cases do proceed to conclusion, deterrence in the market is non-existent, and piracy levels range from 40% to over 90% of the market, depending on the title.⁹ In an encouraging move, the FIA met late last year with book and journal publishing representatives in an apparent move toward greater use of FIA resources to fight book and journal piracy. However, despite information provided by the industry, the FIA has not taken any action since the meeting, and indeed has verbally expressed an unwillingness to do so due to political sensitivities surrounding enforcement in the educational sector.

Finally, reports are increasing of pirated books, especially medical books and dictionaries, flowing into Pakistan from neighboring markets. Meanwhile, publishers report exports of pirated product flowing into nearby and regional markets as well.

“Burned” Discs Replace Factory Produced Discs: With the near eradication of factory produced discs in Pakistan after 2005 enforcement activities,¹⁰ the chief optical disc piracy problem in Pakistan involves the burning of pirate content onto recordable CD-Rs and DVD-Rs with at least one industry describing the problem as rampant (although nowhere near the levels when factory production was fully operational). Several key raids and developments in the fight against CD-R/DVD-R piracy occurred in late 2006-early 2008:

- In November 2006, the FIA Crime Circle Rawalpindi raided four CD-R burning sites at New Imperial Market Rawalpindi and seized 121 CD writers along with 3,405 pirated optical discs. Four suspects were arrested. One of the accused confessed and was convicted and sentenced to three months prison in July 2007.
- In February 2007, the FIA Crime Circle, Rawalpindi raided a retailer and wholesaler of pirate burned optical discs in Rawalpindi and seized over 169,000 pirate discs. The FIA registered a criminal case against the owner of the shop. The case is pending in the Judicial Magistrate Court, Rawalpindi. In January 2008, the accused challenged the jurisdiction of the FIA in the High Court, Rawalpindi. Hearings in this case will start in February 2008.
- The FIA Crime Circle in Rawalpindi has obtained convictions in 2007 in three cases (one of which is referred to above) commenced in 2006 against three major wholesalers of pirated optical discs on CD-R and DVD-R formats.
- In November 2007, FIA Crime Circle, Karachi raided a pirate cassette manufacturing unit and seized 2,400 pirate audio cassettes. FIA lodged a case in the court of Judicial Magistrate WEST, Karachi against the plant owner. The accused obtained interim bail from the court. It should be noted that this particular accused is already on bail in three different IPR cases. He is the owner of one of the plants which was raided by the FIA in 2005.

Small quantities of unauthorized factory DVDs remain available.¹¹ However, it appears these are imported from Southeast Asia, possibly Indonesia and/or Malaysia. Recent information reveals that Bollywood movies are being smuggled from China on pressed DVD's. Recent Customs seizures would appear to confirm this assertion, and tend to show that most pirate products in Pakistan are “burned” recordable discs. At Karachi Airport, there were 82 seizures in 2007 by Customs, in which over 11,500

⁹ By contrast, publishers report a higher rate of legitimate sales of reference materials to libraries. This is likely attributable to the high cost of producing these materials and the relatively small market over which to spread production costs, making this market unattractive to pirates looking to turn a large profit. This may also be due to the Pakistani government's “National Education Policy 1998-2010” which states in part, “School, college and university libraries shall be equipped with the latest reading materials/services.”

¹⁰ In 2005, the Pakistani government, with great leadership of the Federal Investigation Agency, took unprecedented actions in shutting down ten optical disc factories and raiding associated warehouses. The plant that remains open is producing licensed discs. Industry has not detected any pressed pirated optical discs in the market which could be traced back to Pakistan since 2005, and polycarbonate importation has decreased by roughly 90% compared to the 2004-2005 timeframe. Exports from Pakistan's two main airports, Karachi and Islamabad, have virtually dried up because of Customs' efforts.

¹¹ As of late 2005, pirate film DVDs were sold for US\$2, while pirate film DVD-Rs were sold for US\$1.35.

pirate optical discs containing music and movies were seized. Almost all of the seizures were detected in outgoing passengers' luggage.

Cable and Satellite Piracy: Piracy of cable and satellite broadcasting signals is out of control in Pakistan, with cable companies estimated to transmit without authorization 94% to 97% of the programming they provide to end users. In 2007, such piracy remained pervasive in the absence of sustained enforcement. The illegal cable piracy operations are serviced by "lead *walas*" who obtain cable feeds from a cable operator with hardware facility (head end). Unfortunately, to date, IIPA is unaware of any actions taken against these pirate cable operations. There are now an estimated 4.6 million unauthorized subscribers causing over \$110 million in losses to legitimate channels.

Mobile and Internet Piracy: Mobile piracy, whereby illegal vendors upload pirate content (ring tones, music, and published materials, etc.) onto mobile telephones, MP3 devices, flash drives, recordable optical discs, and even computer hard drives, has taken hold in Pakistan. To date, nothing has been done to combat this growing piracy phenomenon, with increasing losses to U.S. industry (not reflected in the losses reported above). Internet piracy has not hit Pakistan hard at this stage, mainly due to the relative lack of available broadband capacity. Pakistan boasts roughly 12 million Internet users, or a 7.3% total Internet penetration rate, and over 164,000 distinct Internet hosts, but only 56,600 broadband users.¹²

Business Software End-User Piracy Is Endemic: Despite significant public awareness and enforcement drives by the business software industry, the piracy situation for the business software sector remained serious in 2007. Pakistan holds the dubious distinction of having one of the highest end-user software piracy levels in the world.¹³

Enforcement Hurdles Within FIA and IPO – No *ex officio* Authority, Leaks: IIPA is pleased that FIA has met with industry and has requested industry to provide it with intelligence about raid targets, including book piracy targets, CD-R burner facilities and large warehouses. One key issue in Pakistan remains the lack of *ex officio* authority being employed by FIA or IPO. At present, a formal complaint must be lodged by a copyright owner or an authorized representative before FIA will take any action. The industries have met with the Intellectual Property Office (IPO) Pakistan through seminars and trainings and are trying to convince law enforcement authorities to take more *ex officio* actions against blatant piracy.

Another problem appears to be leaks within the enforcement units. In November 2007, after thorough investigation, the recording industry group lodged a complaint against five pirate audio cassette manufacturing factories and warehouses. FIA raided all five sites but pirated goods were found at only one site. It is believed that there have been instances such as this one described in which FIA has leaked the information before the raid.

Courts Still Do Not Effectively Deter Piracy: An endemic problem involves the failure of the Pakistani courts to mete out deterrent results in piracy cases, which cases are also marred by procedural hurdles such as excessive documentary requirements and delays.¹⁴ The maximum fine a pirate has received from a prosecution for publishing piracy was Rs15,000 (US\$251) in 2004, hardly a deterrent, and most cases involving publishers resulted in far lower fines. IIPA members report that judges routinely view piracy as a misdemeanor, thus punishments are often token fines and never deterrent.

¹² See The World Factbook, Pakistan, at <https://www.cia.gov/library/publications/the-world-factbook/geos/pk.html>. See Internet World Stats, at <http://www.internetworldstats.com/stats3.htm>. These statistics are up-to-date as of November 30, 2007, are based on Census Bureau data, while usage numbers come from various sources, mainly from data published by Nielsen/NetRatings, ITU, and other trustworthy sources. See also Internet World Stats, Pakistan, at (reporting that there were 12,000,000 Internet users as of September 2006, representing a 7.3% penetration rate, according to the Pakistan Telecommunication Authority (PTA); but only 56,600 broadband subscribers as of September 30, 2007, according to International Telecommunications Union).

¹³ In 2005, there were 28 criminal cases lodged against hard disk loaders (computer resellers that fill computers with illegal software), arising from complaints by the Business Software Alliance. However, these cases have apparently not had a deterrent effect.

¹⁴ The judicial crisis of 2007 has had, not surprisingly, a negative and delaying effect on adjudication of IP cases.

TRAINING AND PUBLIC AWARENESS

The copyright industries worked with law enforcement in 2007 to provide regular training, and also participated in IPO training programs. The recording and motion picture industries organized three independent training sessions for the authorities¹⁵ and also participated twice in training sessions organized by the U.S. Embassy and IPO. The press in Pakistan picked up on one U.S. Embassy program in Islamabad involving a week long “Intellectual Property Rights & Cyber Investigation Training Program” which had as its target audience FIA officials, provincial police, Ministry of Interior officials, members of the legal profession and professors.¹⁶ The software industry has likewise expended resources to set up upwards of 30 trainings around the country to training over 500 professionals to help reduce software piracy.¹⁷

COPYRIGHT AND RELATED LAWS

Penalties in Copyright Law Fail to Deter Piracy: Copyright protection in Pakistan is generally provided under the Copyright Ordinance, 1962 (as last amended in 2000), which provides generally strong administrative tools to fight piracy, including, for example, provisions enabling the Registrar to monitor exports, with the ability to inspect and seize pirated goods leaving Pakistan.¹⁸ Remaining problems in the ordinance include criminal fines that remain far too low to deter piracy, and in part to remedy this, the Copyright Law should be amended to provide minimum jail sentences/fines for crimes involving copyright infringement.¹⁹ In addition to the TRIPS-incompatible royalty-free compulsory license discussed above, there are other overly broad exceptions to protection, and unclear full retroactive protection for works and sound recordings as required by TRIPS.

Royalty-Free Compulsory License for Books Is Out of Step with International Standards: The government of Pakistan amended its copyright ordinance in 2000 to include a provision (Section 36(3)) that allows a royalty-free compulsory license of books. Specifically, it provides, “[t]he Federal Government or the Board may, upon an application by any government or statutory institution, in the public interest, grant a license to reprint, translate, adapt or publish any textbook on non-profit basis.” Included in “government or statutory institution” is the National Book Foundation (NBF), which, as noted, has engaged in the unauthorized reproduction of books under the guise of this license. This royalty-free compulsory license violates the Berne Convention and TRIPS and Pakistan must delete it.

Pakistan Should Implement the WCT and WPPT: Pakistan should join and further amend its laws to fully implement the WIPO Internet Treaties, the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT), which establish the framework for the protection of copyrighted works in the online environment. Pakistan should also adopt the 1971 (Paris) text of the Berne Convention and should join the Geneva [Phonograms] Convention. In particular, the Act should include broadcasting and public performance rights for phonogram producers and should be adapted to

¹⁵ The trainings were as follows:

- December 18, 2006: IFPI/MPA organized a one day training workshop in Islamabad together with IPO Pakistan in which over 100 participants took part.
- November 22, 2007: IFPI/MPA organized a training session for Islamabad Customs; and
- November 28, 2007: IFPI/MPA organized a training for Karachi Customs, FIA Officials, Police, Customs and private IPR investigations on “Identification of Pirated Optical Discs and Investigative Skills.”

¹⁶ *U.S. Embassy Launches Intellectual Property Rights & Cyber Investigation Training Program*, Pakistan Press International Information Services, August 13, 2007 (quoting U.S. Charge d’Affairs Peter Bodde and indicating the purpose of the training was to provide law enforcement officials with the knowledge and techniques to investigate and prosecute intellectual property rights related crimes, and noting the trainers include people from the U.S. Department of Justice, Microsoft, and the recording and motion picture industries).

¹⁷ *Over 500 Professionals Trained to Help Reduce Software Piracy*, March 20, 2007, <http://www.brecorder.com/index.php?id=540858&currPageNo=1&query=&search=&term=&supDate=>.

¹⁸ Please see the 2003 Special 301 report on Pakistan, at <http://www.iipa.com/rbc/2003/2003SPEC301PAKISTAN.pdf>, for a full discussion of the Pakistan Copyright Act.

¹⁹ Some industries have suggested that the minimum fine must be increased, e.g., to PKR500,000 (US\$8,240).

the specific needs of right owners in the online environment. Changes should include providing an exclusive making available right, protection of technological protection measures (TPMs) and rights management information (RMI) and providing proper incentives for service providers in the online area to cooperate with right holders trying to uphold their rights, through adequate provision of liability for P2P file sharing, adequate liability for service providers engaging in direct infringement or playing a sufficient role in facilitating such infringement, and should in addition include a robust notice and takedown system.

Motion Picture Ordinance Should Cover Home Video Products: IIPA also encourages Pakistan to amend its Motion Picture Ordinance to more clearly cover home video products, and understands that the Ministry of Culture has announced plans to do this. IIPA hopes the new government in March 2008 will be in a better position to amend this ordinance. The motion picture industry has reviewed and provided comments on drafts of the proposed amendments, which would require licensing of video shops and would include minimum penalties for infringements, all of which would be helpful in the fight against this form of piracy.

Pakistan Should Pass and Implement an Effective Law to Curtail Pirate Optical Disc Production: To ensure that optical disc pirate production does not return, the Pakistani government should introduce effective optical disc plant control measures, giving the government and right holders the ability to track the movement of optical media production equipment and parts, as well as the raw materials (including optical grade polycarbonate), and compelling plants to use unique source identifiers (SID mastering LBR and mold codes) to track location of production, in order to successfully halt the production of pirate optical discs.²⁰ Such regulations will give Pakistani authorities a needed tool to conduct spot inspections and raids on plants, seize infringing copies of product and machinery, and impose administrative and criminal penalties to deter the organized manufacturing and distribution of pirate product. IIPA understands that draft legislation remains pending as of January 2008; it is hoped that this draft will proceed to passage in early 2008.

Generalized System of Preferences: On January 24, 2005, IIPA endorsed termination of the Generalized System of Preferences (GSP) piracy investigation of Pakistan, and called on the Pakistani government to remain vigilant against book piracy.²¹ IIPA's GSP petition had been accepted in June 2004 by the United States Trade Representative to evaluate whether Pakistan remained eligible to retain its GSP trade benefits due to poor copyright protection and enforcement. As a result of termination, Pakistan continues to enjoy duty-free status for imports of certain products into the United States. During the first eleven months of 2007, \$121.8 million worth of products came into the United States duty-free from Pakistan, or 3.7% of its total imports to the U.S.

MARKET ACCESS

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

²⁰ The global copyright community has agreed on the key elements of an effective optical disc law; please see the 2003 Special 301 report on Pakistan, at <http://www.iipa.com/rbc/2003/2003SPEC301PAKISTAN.pdf>, for a full discussion of what is needed in Pakistan's optical disc regulation.

²¹ IIPA recognized the progress made in reducing the impact of optical disc piracy in Pakistan, while noting that outstanding issues such as book piracy continue to merit attention. IIPA noted,

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

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2008 SPECIAL 301 REPORT

PHILIPPINES

Special 301 Recommendation: The Philippines should remain on the Watch List, but IIPA recommends that USTR conduct an out-of-cycle review (OCR) to monitor very closely several developments of vital interest to the copyright industries:

1. Achieve Progress in Piracy Cases: IIPA expects to see progress in terms of greater numbers of criminal prosecutions against key mall operators, pirate book producers, and large-scale pirate distributors, and hopes for progress on court cases that are currently pending in the system. As an example, IIPA requests well-documented and good faith efforts to be made to locate and arrest fugitives (such as convicted medical book pirate Catherine Marquez).

2. Address Mobile Device Piracy: The government must take strong and effective enforcement actions against shops and dealerships involved in loading unauthorized copies of sound recordings and other copyright materials onto mp3 players, mobile phones and other such devices. The practice is blatant and growing rapidly.

3. Address Publishers' Concerns with Collective Licensing and Fair Use Guidelines: Any move toward establishing a collective licensing model in the Philippines must at a minimum include an open and transparent consultation process with all (foreign and domestic) affected right holders regarding the parameters for any such organization. If there is to be such a licensing society at all, its practices must conform to the criteria set forth in this filing for any such organization. The Philippine government must also engage in a transparent consultation process regarding any developments toward the adoption of fair use guidelines.

IIPA will be monitoring developments in these areas closely and will take both the processes and their results into consideration when commenting in the out of cycle review.

EXECUTIVE SUMMARY

In February 2006, the United States Trade Representative decided to lower the Philippines to the Watch List based on promises made by the Philippine government that it would improve its IPR protection. Throughout 2006 and into 2007, IIPA members noted a marked increase in raiding and seizures, accompanied by several plant closures, and focusing on physical piracy and optical discs. Some criminal copyright cases even proceeded to judgment, albeit that these cases targeted small-scale pirates.¹ The progress seen has unfortunately waned in 2007. The copyright piracy situation on the ground has gradually gotten worse, including the digital piracy phenomena such as mobile device piracy (in which pirate files are loaded onto mobile devices or memory carriers), Internet download piracy, and camcording piracy of motion pictures in the movie theaters (which has seen an alarming rise in 2007). Book piracy, CD-R/DVD-R burning retail and mall piracy, and Pay TV piracy, remain significant barriers to legitimate copyright commerce in the Philippines.

¹ The Philippine government has made some efforts to coordinate intellectual property enforcement, as highlighted most notably in its March 2007 report, *Strengthening the IP System: The Campaign Against Piracy and Counterfeiting in the Philippines (2005-2006)* (Comment of the Government of the Republic of the Philippines submitted to the United States Trade Representative's Office in relation to the 2007 Special 301: Philippines), at http://www.ipophil.gov.ph/pdf_format/GRPComment2007.pdf. Statements from the President of the Philippines also indicate a desire to make progress and see a path past an age where the market is dominated by piracy. See *id.* (reporting a Philippine Star article of March 11, 2007, at 4, in which President Gloria Macapagal-Arroyo lectured Quiapo traders who peddle pirated DVDs, VCDs and videogames, quoting the President as stating, "Piracy is a crime. It's against the law. That's why I'm offering alternative means of livelihood for you and your families").

IIPA was heartened to see the letter memorandum issued by President Gloria Macapagal Arroyo on November 16, 2006 to IP enforcement agencies in the Philippines entitled “Sustaining Our Gains In Protecting Intellectual Property Rights.” We believe this letter and its various directives strike the right tone for making real progress in the fight against piracy, and the priority actions for 2008 listed below in many respects mirror what the President has directed. Somewhat less helpful for copyright owners are the Strategic Plan (2007-2009) (published in February 2007)² and the “Philippines Intellectual Property Policy Strategy” (PIPPS) issued by the Intellectual Property Office of the Philippines (IP Philippines). The first document is disappointing in that there is not much focus on copyright, and the goals are seemingly designed with a political aim in mind (i.e., to get off the Special 301 list) rather than to be helpful to creators.³ The PIPPS lacks specificity and only two of eight objectives deal with copyright (“copyright and other creative industries” and “capacity-building and heightened IP enforcement”).

In the meantime, real enforcement problems continue to plague right holders. There remains a paucity of criminal actions against large-scale producers and distributors, who remain largely untouched. Further, irregularities like compromises in raids and leaks make deterrent enforcement impossible to achieve.⁴ Two cases, *Telmarc Cable*, in which a warrant was quashed on similar grounds to the *Solid Laguna* case in 2005 (i.e., lack of “personal knowledge” of the warrant officer of the infringement), and *Tamano*, in which the Secretary of the Department of Justice misinterpreted the law in finding no broadcast right under the Philippine Copyright Act, cast doubt on whether the Philippines remains in compliance with its current international obligations. Legislative proposals, which would raise the standards of protection in the Philippines to the highest international levels, show no signs of progressing toward passage.

PRIORITY ACTIONS REQUESTED IN 2008

- **Increase the number and magnitude of criminal prosecutions against key mall operators, pirate book producers, large-scale pirate distributors, and other key pirates (e.g., optical disc plant owners).**
- **Investigate compromises in enforcement actions and leaks or other irregularities.**
- **Employ resources to locate and arrest fugitives (such as convicted pirates like book pirate Catherine Marquez).**
- **Address book piracy through closer monitoring of key areas selling pirated books, both on and off university campuses.**
- **Re-establish an intellectual property court, and develop IP expertise in judges and prosecutors. Increase vigilance in prosecutions, moving a significant number of pending cases forward in the system.**
- **Take strong enforcement actions against mobile device piracy.**
- **Curb Pay TV (cable and satellite) piracy by shutting down some of the estimated 800 pirate cable systems, and/or through license or permit revocations/suspensions.**
- **Update/amend copyright law to ensure it is in compliance with all of the Philippines international obligations, and is modernized to deal with digital and Internet piracy.**
- **Ensure search warrants are obtainable on a reasonable basis consistent with international law.**

²Intellectual Property Office of the Philippines, *Strategic Plan: 2007-2009 Back to Basics*, February 20, 2007, at <http://ipophil.gov.ph/>.

³ One of the self-stated “performance criteria” of IP Philippines is to “lead[] the efforts on removing the Philippines from the US Special 301 Priority Watch List (downgraded to Ordinary Watch List).”

⁴ Leaks and other irregularities stymied an estimated 30% of all planned enforcement actions in 2007.

For more details on Philippine's Special 301 history, see IIPA "History" Appendix to this filing at <http://www.iipa.com/pdf/2008SPEC301HISTORICALSUMMARY.pdf>. Please also see previous years' reports on the Philippines at <http://www.iipa.com/countryreports.html>.

PHILIPPINES										
Estimated Trade Losses Due to Copyright Piracy (in millions of U.S. dollars) and Levels of Piracy: 2003-2007 ⁵										
INDUSTRY	2007		2006		2005		2004		2003	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Books	49.0	NA	49.0	NA	48.0	NA	48.0	NA	45.0	NA
Business Software ⁶	75.0	71%	71.0	71%	46.0	71%	38.0	71%	33.0	72%
Records & Music	88.3	80%	50.3	62%	21.0	40%	20.0	40%	22.2	40%
Entertainment Software	NA	NA	NA	NA	11.3	85%	NA	90%	NA	95%
Motion Pictures	NA	NA	NA	NA	NA	78%	33.0	85%	33.0	89%
TOTALS	212.3		170.3		126.3		139.0		133.2	

PIRACY UPDATES IN THE PHILIPPINES

Book and Journal Piracy: Book and journal piracy remain significant problems, affecting foreign and domestic publishers alike. Illegal commercial-scale photocopying of entire books continues, in commercial establishments surrounding universities, or in street stalls in metropolitan areas.⁷ Photocopy shops also operate on campuses,⁸ in hospitals, and in medical and nursing schools, often in highly organized fashion, selling door-to-door to doctors' offices and medical establishments. These shops avoid holding stockpiles of infringing goods by copying on a "print to order" basis, complicating investigations and enforcement actions.⁹ Increasingly, pirates burn CD-Rs sold with up to 100-200 titles burned onto each disc, or scan files available for download onto PDAs in hospitals, educational institutions, and even shopping malls (see discussion below regarding mobile device piracy).

Since much of the pirate photocopying takes place on or around university campuses, it is important for the Commission on Higher Education (CHED) to get involved in the issue.¹⁰ Recent raids at the Diliman Center at the prestigious University of the Philippines illustrate that activity on campus continues and must be addressed. U.S. publishers have encouraged CHED to provide incentives to campuses that do not tolerate illegal activity by vendors or students, and consequences (regarding evaluations or funding) for universities that fail to take measures to deter this activity.

Apart from the photocopying issue, publishers remain concerned about illegal reprints of textbooks and medical books. In the past, some booksellers relied on the "excuse" that their books were produced pursuant to Presidential Decree 1203, albeit that PD was repealed more than nine years ago. The National Book Development Board (NBDB) published a resolution in January 2006, declaring that "[t]he commercial reprinting of books without the knowledge of their copyright owners is definitely illegal

⁵ The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2008 Special 301 submission at www.iipa.com/pdf/2008spec301methodology.pdf.

⁶ BSA's 2007 statistics are preliminary. They represent the U.S. software publishers' share of software piracy losses in Philippines, and follow the methodology compiled in the Fourth Annual BSA and IDC Global Software Piracy Study (May 2007), available at <http://w3.bsa.org/globalstudy/>. These figures cover, in addition to business applications software, computer applications such as operating systems, consumer applications such as PC gaming, personal finance, and reference software. BSA's 2006 piracy statistics were preliminary at the time of IIPA's February 12, 2007 Special 301 filing and were finalized in June 2007 (see <http://www.iipa.com/statistics.html>) as reflected above.

⁷ The "university belt" in Metro Manila is especially well known, and publishers have discovered that most cities contain a street rife with photocopy shops. An example would be Lower Bonifacio Street in Baguio City, a university town in the Province of Benguet, north of Manila.

⁸ The Philippines boasts a large number of higher education and graduate students and while as a result, demand remains high for university textbooks, technical books, and professional medical and nursing books, unfortunately, pirates fulfill the demand hawking poor-quality photocopies.

⁹ It is disturbing that one set of photocopiers is in operation near the Philippine Regulations Commission, the government institution that regulates professional businesses in the country.

¹⁰ Third party vendors renting space on campuses, for instance, conduct illegal activities with impunity.

under R.A. 8295.”¹¹ This declaration was a good start, but must be reinforced by action. Prior to the issuance of this statement, the IPO had gathered the distributors of books purporting to be reproduced or left over under Presidential Decree 1203, asking them to remove the illegal stocks from their stores. While this no doubt resulted in some improvement, the industry remains concerned that the illegal stock has merely moved from the front display area to the backroom.

Mobile Device Piracy: The Philippines is experiencing rapid and very problematic growth of mobile device piracy – whereby illegal vendors set up dedicated booths and stalls within shopping malls and load pirate content (music, published materials, etc.) onto mobile telephones, MP3 devices, flash drives, recordable optical discs, and even computer hard drives. These downloads onto mobile devices occur prior to sale as an added incentive or after sale, or are offered as a service alone, as “download for a fee.”

During the last few months of 2007 and early 2008, the international recording industry group, the International Federation of Phonographic Industries, working with the local music recording industry association (PARI), conducted market surveys of this phenomenon and provoked enforcement actions against a chain of computer dealerships actively involved in direct loading to iPod music player devices at the point of sale. (A criminal case is being filed against the operators of the computer retail chain.) Test purchases were made from every branch of the chain, and in all instances staff loaded infringing musical works on the purchased devices, many hundreds of tracks being provided to the investigators in this way. Instances of this kind of activity are ubiquitous, and several electronic goods and mobile telephone outlets have been surveyed and MP3 player devices have been purchased, both pre-loaded at point of sale, or the same devices have then been further downloaded with infringing music recordings by the retailers, with payments charged for the service. The practice is so blatant that many retailers advertise the sale of musical downloads (and other copyrighted materials) on banners outside their premises. Moreover, major retail outlets in higher end shopping malls have also been canvassed and investigators have found that staff are prepared to take customers from salesrooms to nearby retail outlets who would then load the devices after completion of the sale. This phenomenon is growing at an exceptional rate and threatens to become the number one piracy problem in the Philippines. Books and journals, especially medical and nursing titles, and trade books are also being offered for download onto PDAs, either by these same for-profit entities or by vendors on medical campuses. Infringers are especially targeting medical students and practicing physicians who want easy access to reference titles. To IIPA’s knowledge, the government of the Philippines has taken no action against any type of mobile device piracy to date.

Camcorder Piracy: Of greatest concern to the motion picture industry is the alarming growth of illegal camcording, in which movies are stolen right off the screen by professional camcorder pirates, who use video cameras to illicitly copy a movie during exhibition in a movie theatre. This usually occurs very early in a movie’s theatrical release window or may even occur prior to the film’s release (e.g., at a promotional screening). Camcorder pirates typically sell the master recordings to illicit “source labs” where they are illegally duplicated, packaged and prepared for sale on the black market, then distributed to bootleg “dealers” throughout the world. As a result of camcorder piracy, many motion pictures become available over the Internet on peer-to-peer networks, file transfer protocol (FTP) sites, Internet Relay Chat (IRC) rooms, or auction sites, as well as on street corners and night markets around the world well before their international debuts. IIPA has become aware that highly organized groups in the Philippines have become a key source of high profile pirate camcording. Infringing copies of U.S. motion pictures distributed globally have been forensically linked to illegal copies made on camcorders in Philippine cinemas.

Internet Piracy: The Philippines now boasts 14 million Internet users, a 15.4% penetration rate, but still a relatively low number of broadband connections (123,000 broadband subscribers as of September 30, 2007).¹² Still, the Business Software Alliance (BSA) noted a sharp increase in monthly

¹¹ Statement by NBDB Chairman Dennis T. Gonzalez, printed in the *Manila Bulletin*, January 15, 2006.

¹² See Internet World Stats, at <http://www.internetworldstats.com/stats3.htm>. These statistics are up-to-date as of November 30, 2007, are based on Census Bureau data, while usage numbers come from various sources, mainly from data published by Nielsen/NetRatings, ITU, and other trustworthy sources. See also Internet World Stats, the Philippines, at

illegal Internet downloads, up from 271 per month in 2006 to 1,302 per month in 2007, representing an almost five-fold increase. Motion picture industry representatives have also noticed an increase in hard goods optical disc websites hosted in the Philippines and supplying overseas consumers.

Retail Piracy of Optical Media: While there remains some optical disc production, which is discussed below, the Philippines is now a net importer of pirated discs, primarily from China, Hong Kong, Taiwan, Indonesia, and Malaysia.¹³ Imported pirated discs also flow into the Philippines via Zamboanga and Davao – both in Mindanao, with Malaysia and Indonesia believed to source these discs. One major criminal case in 2006 was concluded against Indonesian nationals smuggling pirate discs from Indonesia.¹⁴ Market intelligence also suggests an increase of locally burned pirated discs. Quiapo Bartertrade complex, a commercial area in metro Manila that was once dominated by Chinese traders, is now primarily dominated by local traders and is suspected as the center of illegal burning operations. Quiapo also apparently hosts release groups putting out the latest run motion pictures on pirate DVDs (some suspected to be sourced from pirate camcords occurring within the Philippines). It should also be mentioned that Quiapo is a center of other organized criminal activity and is well known as a key local market for illegal drug manufacture and distribution.¹⁵ Because law enforcement in Quiapo is difficult (e.g., it is an incredibly hard place to recruit informers), commercial pirates carry out their activities in Quiapo with impunity.

Signal Theft (Cable and Satellite): Signal theft is a growing problem in the Philippines, resulting in a decrease in revenue for rights holders in broadcast programming. The Cable and Satellite Broadcasting Association of Asia (CASBAA) estimates revenue losses of US\$85 million in 2007, up from US\$80 million in losses in 2006. This translates to 925,000 legitimate Pay TV connections and 950,000 illegitimate connections, a 7% increase in pirate connections year-on-year. The major concern remain small rogue cable television operators, especially in the outer provinces, which use pirated programming. The Philippine government has failed to enforce rights in legitimate programming effectively. Specifically, the National Telecommunications Commission (NTC) has failed to invoke its authority to revoke the licenses of the operators that utilize pirated programming. To the contrary, NTC continues to renew the licenses of rogue operators. Digitization of signals, which will help consolidate the industry and reign in pirate cable operators, has slowly begun in Metro Manila, but has yet to be commenced in other areas of the Philippines.

A Memorandum of Agreement (MOA) was recently signed between IP Philippines and the NTC that would establish an administrative enforcement procedure that would enhance investigations of and regulatory action against pirate operators. According to the IP Philippines page http://www.ipophil.gov.ph/pdf_format/GRPCComment2007.pdf *Strengthening the IP System: The*

<http://www.internetworldstats.com/asia.htm#ph> (reporting that there were 14,000,000 Internet users as of April 2007, representing a 15.4% penetration rate, according to Yahoo; and 123,000 broadband subscribers as of September 30, 2007, according to International Telecommunications Union).

¹³ Sources indicate couriers regularly bring infringing DVDs through Manila airport as checked luggage. Movies, music, software, concert DVDs (bootlegs) are coming in from China and Malaysia. Many of these pirate discs have SID codes erased or gouged.

¹⁴ On November 13, 2006, Judge Rufino S. Ferraris, Jr. of the Metropolitan Trial Court, Branch 7, Manila, handed down guilty verdicts against two DVD pirates caught smuggling DVDs and labels from Indonesia at the Davao International Airport in 2004. Defendants Macacuna Gandarosa and Alinor Pangcatan, residents of Tagum, were caught in the act at the Davao International Airport trying to smuggle in several bags containing 8,200 pieces of DVDs and 16,000 printed labels from Manado, Indonesia on board a Merpati airlines plane on September 23, 2004. They eventually pleaded guilty and the court accepted guilty pleas as to two counts each of violating Sec. 19(c)(1) of Republic Act No. 9239 for knowingly possessing pirated goods with intent to profit, and Sec. 19(c)(2) for importing discs without the necessary import clearance from the Optical Media Board. The sentencing of the two accused occurred on November 29, 2006, and they were sentenced to six months in prison (although we do not know whether there was a fine or whether the sentences were served).

¹⁵ Other areas of the Philippines also contain pockets of organized and violent criminal behavior according to recent evidence. In a raid on July 27, 2006 on a residential proper in the Taguig suburb of southern Metro Manila, authorities found 6,500 pirated DVD movies, optical discs containing pirated copies of Sony PlayStation games, Microsoft Xbox games and MP3 music files, and substantial amounts of hard-core pornographic material. The raiding party also seized several hand grenades, hundreds of rounds of 5.56 mm ammunition, and sachets of a highly addictive and illegal amphetamine derivative known locally as “Shabu” and elsewhere as “ice.” The seized ammunition is of the sort used by high-powered automatic assault weapons and the raiding party immediately notified the Bomb Search and Bomb Disposal Unit of the Philippines National Police, which transported the items to a secure facility.

Campaign Against Piracy and Counterfeiting in the Philippines (2005-2006), in March 2007, the NTC and IP Philippines were scheduled to sign an agreement on the implementing rules and regulations (IRR) to expedite cases involving cable piracy. However, to date there are apparently no implementing regulations on the MOA.¹⁶ Specifically, under the Agreement, complaints involving alleged intellectual property infringement would be referred to the IPO for determination of that matter alone. Unfortunately, even with the MOA, there has been no real change in the government's policy or actions related to signal theft. The judiciary is also implicated in that criminal complaints remain stalled in courts.

End-User Piracy of Business Software: End-user piracy of business software remains the most serious threat to the business software industry in the Philippines, severely inhibiting the growth of the legitimate market for software.

Optical Disc Factory Production: IIPA believes there are still at least 10 optical disc plants in operation in the Philippines, and that one additional plant is defunct following an industrial fire,¹⁷ and two additional plants were closed following a raid.¹⁸ Industry has obtained a list of registered optical disc plants, from which the Optical Media Board claims its number of 10 plants. Most of the plants have been visited by industry and the OMB and full inspections conducted, although it remains unclear whether the OMB, still under the leadership of Edu Manzano, has collected exemplar (sample) discs from all the plants. It should do so forthwith to assist with forensic investigations into piracy. The international recording industry group, IFPI, had previously been involved in plant inspections during 2003-2005 but was not formally notified of any plant visits conducted during 2007. Since legitimate sales of music were roughly 4.5 million discs in 2007, which is less than a single optical disc line can produce in one year, the Philippines clearly still has over-capacity (we estimated the annual capacity at 157.5 million discs in 2006).

ENFORCEMENT UPDATES IN THE PHILIPPINES

IIPA was interested to see President Gloria Macapagal Arroyo's letter memorandum on November 16, 2006 to IP enforcement agencies in the Philippines entitled "Sustaining Our Gains In Protecting Intellectual Property Rights." In the memorandum, the President said that there is still a pressing need to sustain gains from enforcement in 2005-06, and issued the following directives:

- "Intensify public information and education campaign on the importance of IPR in promoting creativity, innovation and competitiveness, and educate our people, particularly the youth, on this matter, through our education system, in order to develop an IP conscious culture"
- "Intensify regular and effective (a) raids and "spot" inspections on factories that produce illegal optical discs, trademarked and copyrighted goods, (b) seizure and destruction of pirated and

¹⁶ Alexander Villafania, *NTC, IPOPhil Partner to Tackle Cable TV Piracy*, July 10, 2006, at http://technology.inq7.net/infotech/infotech/view_article.php?article_id=8924. The article notes that

[t]he NTC-IPOPHIL agreement puts into action the enforcement of laws against signal piracy and content copyright infringement not just for the CATV industry but also for the entire broadcasting industry in the country. Under the agreement, the NTC will forward intellectual property infringement cases against cable TV pirates to the IPOPHIL within five days from receipt of complaint. The IPOPHIL would in turn adjudicate the case. IPOPHIL Director General Adrian Cristobal Jr. said both agencies will be coming up with regulatory and enforcement strategies against cable signal piracy, which has been steadily growing in the past few years, largely due to lower cost of cable services and installation of more cable infrastructure ... Joint reports from the Philippine Cable TV Association and the Federation of International Cable TV Association of the Philippines said that the industry's losses on piracy amount to roughly seven billion pesos annually, or about 30 percent of their revenues. Both also stressed that about 1.5 million cable subscribers are illegally connected.

¹⁷ Discmakers, located in Punturin, Valenzuela, was destroyed by fire, and contained two optical disc production lines.

¹⁸ Industry reports that MHN Optical Media Corporation, a two-line DVD plant, was temporarily closed after a raid action in 2005 (but was re-visited on several occasions during OMB probably sometime in 2007) and Bright Future Technology, which had eight CD/DVD lines, was raided twice, and had warrants quashed on both occasions. Bright Future has no license issued by the Optical Media Board but the machinery is still in circulation.

counterfeited goods and equipment used to produce them, and (c) arrests and prosecutions leading to deterrent level sentences served”

- “Consider, and as appropriate, enforce criminal, civil or administrative liability of owners of buildings, such as malls and the like, that lease space to establishments selling pirated and counterfeited goods, or ensure implementation of contracts of lease that prohibit tenants from selling pirated goods in the premises of the lessor”
- “Allocate sufficient resources for the conduct of raids and inspections leading to effective prosecution of pirates and counterfeiters of trademarked goods, especially of products affecting public health and safety, such as medicines, cosmetics, food products and auto parts at the retail, distribution, production and importation points”
- “Consider, and as appropriate, implement measures that include suspension, revocation or denial of pertinent national and local government permits or licenses of individuals, firms or establishments that engage in, allow or tolerate the production, importation or sale of pirated and counterfeited goods”
- “Vigorously enforce copyright protection of printed materials. However, formulate and implement effective strategies that would provide affordable access to copyrighted works, especially textbooks, such as copyright licensing and establishment of copyright collection societies or organizations”
- “Maintain appropriate coordination with the Judiciary in ensuring that courts are adequately skilled in intellectual property cases, and in consultation with the Judiciary and Congress, explore the designation or creation of Special Intellectual Property and International Trade Courts”
- “Continue to provide the Executive and the Legislative with policy and legislative proposals in order to update the country’s intellectual property laws, ensuring that these are in compliance with the country’s existing international obligations embodied in treaties and other agreements”
- “The DTI, through IPO, shall continue to coordinate inter-agency efforts against piracy and counterfeiting, maintain a database and enforcement monitoring system, consolidate information and reports from other agencies, and submit quarterly progress reports to the President, and provide copies to the Executive Secretary and the Cabinet Secretary”

IIPA agrees, at least in principle if not specifics, with most of these directives. Implementing the President’s directives is obviously the key, and very much remains a work in progress with some steps forward and others backward. To make further progress, the various enforcement organs in the Philippines must better work together to tackle the myriad piracy concerns and issues. It has proven in practice to be difficult for right holders to navigate the enforcement system in the Philippines, however, given the manner in which the authorities divide responsibilities, sometimes making it difficult to determine who is responsible for what. Enforcement issues are further complicated by external pressures and forces affecting or negating the good intentions of the Philippine government officials with whom IIPA members interact.

The Intellectual Property Office of the Philippines (IP Philippines) stands as both the head of the industrial property operations in the Philippines, as well as the policy-making body for all intellectual property matters, including copyright policy. IP Philippines does not engage in enforcement, but as the chief concerns in recent years have been enforcement-related or piracy-related, IP Philippines has had to infuse itself into the process, which it has principally done in an informational and reporting role. On-the-ground enforcement efforts are left to several agencies, and in some cases, an amalgam of agencies:

- Optical Media Board (OMB) – Deals principally (but not exclusively) with optical disc pirate production and distribution of pirated products in the market

- Anti-Fraud and Commercial Crimes Division/Criminal Investigation and Detection Group of the Philippine National Police (AFCCD/CIDG-PNP) – Has engaged in enforcement activity against book piracy, among other things.¹⁹ This unit has seen a recent changeover of personnel, and IIPA will be monitoring closely its continued effectiveness.²⁰
- Intellectual Property Rights Division-National Bureau of Investigation (IPRD-NBI) – The Philippines' national investigative agency, under the Department of Justice, which has been helpful in investigating copyright infringements and crimes, and has taken on various enforcement functions.²¹
- Intellectual Property Unit-Bureau of Customs (IPU-BOC) – Has engaged in enforcement of border measures, including seizures of suspected shipments of pirated materials.²²

In addition, in August 2005, three enforcement agencies – the National Bureau of Investigation (NBI), the Optical Media Board (OMB), and the Philippine National Police (PNP), signed a Memorandum of Understanding forming Pilipinas Anti-Piracy Team (PAPT),²³ a government-led initiative that became the embodiment of the Philippine government's efforts to eliminate software piracy and promote faster growth of the country's information technology (IT) industry. The Business Software Alliance (BSA) has generally been happy with PAPT's responsiveness to the problem of end-user piracy of business software. In 2007 the PAPT, acting on information supplied by BSA, conducted a record nine end-user software piracy raids successfully. They also held a number of press conferences to drive home the message of protection of software IPR. In addition, they also have a web site through which useful information with respect to IPR can be found and also reports of infringement can be made. As a result, BSA received a number of leads through the PAPT web site.

Overall Results: In its March 2007 report, *Strengthening the IP System: The Campaign Against Piracy and Counterfeiting in the Philippines (2005-2006)*,²⁴ IP Philippines described in detail the various activities in 2006 of each of the enforcement agencies listed above.²⁵ The seizures are impressive,

¹⁹ According to the IP Philippines March 2007 report, see *supra* note 1, among the priority areas of the AFCCD in its campaign against IPR violations is book piracy. The IP Philippines report noted two key raids by AFCCD/CIDG-PNP: 1) June 19, 2006 raid on the premises of Rose Arts Printers in Sampaloc, Manila, serving two (2) search warrants and seizing thirty-five (35) pirate books, one (1) unit Risograph and one (1) unit cutting machine, with an estimated value of P265,978 (US\$6,500); and 2) December 6, 2006 operation against Stall 36 located at U.P. Shopping Center, U.P. Campus, Diliman, Quezon City, resulting in the confiscation of assorted books, photocopy machines, and ring binders with an estimated value of P500,000 (US\$12,300), and resulting in the arrest of the occupant of the stall, Ms. Trinili Faeldan Gabayno; a copyright infringement case was filed against her with the Office of the City Prosecutor of Quezon City. Both cases, a full 15-20 months later, languish as they are pending under the public prosecution system.

²⁰ Lt. Col. Noel de los Reyes, former head of the Crimes Investigation Division (CID) of the Philippine National Police (PNP), very helpfully and effectively pursued copyright cases, notwithstanding the PNP's authority was limited to complaint-driven actions. We can only hope that Colonel Rene Ong who has taken over for Lt. Col. Reyes will be as strong an advocate.

²¹ See http://www.nbi.doi.gov.ph/about_us.html. According to the IP Philippines March 2007 report, see *supra* note 1, from January to December 2006, the IPRD-NBI "received 128 complaints and filed 549 cases directly with the Department of Justice. It has served 419 search warrants and seized a total of 546,464 pieces and 350 boxes/sacks of counterfeited/pirated goods with an estimated value of P290,964,640.00 [US\$7,200,000]." However, it is to be noted that most of the product seized is counterfeit goods, not pirate copyright materials.

²² See *supra* note 1. There are two initiatives which the Bureau of Customs has taken according to the IP Philippines report. One is the establishment of a "Permanent Bureau of Customs Intellectual Property Office (BOC-IPO)" in connection with the Presidential directive (Executive Order No. 366) for Philippine Government agencies to rationalize their operations. The division will have at least twenty-five (25) personnel engage in border protection of IPR. The second is using and revitalizing the 32 year old "Memorandum of Agreement (MOA) with the Postal Service [Philippine Postal Corporation (PhilPost)]," through which, according to IP Philippines, there have been a number of recent seizures of optical media and other prohibited cargo. These are both positive developments in IIPA's view.

²³ See <http://www.papt.org.ph/>.

²⁴ See *supra* note 1.

²⁵ For example, the IP Philippines report indicated,

"The combined enforcement efforts of the Intellectual Property Unit-Bureau of Customs (IPU-BOC), Optical Media Board (OMB), Anti-Fraud and Commercial Crimes Division/Criminal Investigation and Detection Group-Philippine National Police (AFCCD/CIDG-PNP) and Intellectual Property Rights Division-National Bureau of

although it must be noted that most of the product seized was counterfeit goods, not pirate copyright materials. One exception to this was a Bureau of Customs/Optical Media Board joint operation, netting about US\$2 million worth of DVD replicating equipment, capable of making 400,000 pirated copies a day, on January 25, 2007, for mis-declaration and for violating provisions of Republic Act No. 9239 (Optical Media Act of 2003).²⁶ The results on the copyright side are supported by anecdotal reporting from the industry, including a good amount of industry self-help, and including some ingenious methods of detecting piracy, such as the use of industry-trained DVD sniffing dogs.²⁷

The report also noted some key criminal convictions in copyright cases, from 2006 and before. In all, since 2002, there have been a total of eight (8) criminal convictions in the copyright area, with one of those being the Multilinks/Catherine Marquez case that has unfortunately not led to a successful result (since the convicted person has absconded and the piratical activity, according to sources, continues) (see chart below).

Unfortunately, not much is included in any of the government's reports about enforcement against increasingly damaging forms of piracy that are also relatively new in the market, such as mobile device piracy or Internet piracy. In addition, not much has been said by the government about strengthening the law to impose liability on mall owners for infringing activities occurring in their spaces (although there is a House bill that would accomplish this). While the IP Philippines report touted raids taken on notorious pirate mall hotspots such as Metrowalk, Quiapo, Binondo, 168 Mall, Makati Cinema Square, and Greenhills, the government must be adaptive to the needs of industry in a changing piracy landscape, and establishing landlord liability is one area identified by industry that will have the greatest effect on piratical activities in these piracy hotspots.

Additionally, where international links to piracy are found, such evidence should be further investigated. For example, after a large raid in Manila carried out in September 2007, the local record industry group obtained access to the seized optical discs, and found SID Code on many pirate discs allocated to factories outside the Philippines, specifically, Hong Kong, China and Taiwan. The Optical Media Board should routinely review such seizures for forensic intelligence, and conduct follow-up actions. The import of infringing discs should be worthy of proper investigation, interception, and where appropriate, cooperation with foreign authorities to address these international piracy issues.

Criminal Cases in the Philippines Target Mostly Small-time Retail Pirates, and Take Too Long: While it is promising that five (5) of the criminal cases concluding in 2006 or early 2007 were copyright related, it remains to be seen whether the Philippine authorities will target major pirates. For example, in *People vs. Asmawe Tantowa, Abdulah Mama, Maraue Orot, Pandaw Orot, Oding Baro*,²⁸ the defendants were arrested in simultaneous raids conducted by the Silay police (deputized by the OMB to help fight against pirated optical media products) in Silay City on December 10, 2006, and were found in possession of 1,000 pirated optical discs. The Judge of the Silay Municipal Trial Court in Cities (MTCC)

Investigation (IPRD-NBI) in January to December 2006 resulted to the confiscation of 2,990,301 pieces and 7,559 boxes/sacks of fake goods with an estimated value of P1,353,225,596.96 [more than US\$33 million]."

IP Philippines, gathering reports from enforcement groups in the Philippines including the Bureau of Customs (BoC), the National Bureau of Investigation (NBI), the Optical Media Board (OMB), and the Philippine National Police (PNP), reported that as the end of November 2007, seized goods for the year contributed P2.75 billion (approximately US\$67.8 million). See At the End of November 2007, *Seized Goods for the Year Contributed P2.75 billion...*, PNA (Philippines News Agency), December 15, 2007 [on file with IIPA].

²⁶ The smuggled goods, consisting of four "top-of-the-line" machines, video packaging materials and gadgets used in producing pirated copies, were in two (2) 40-footer and two (2) 20-footer container vans from Hong Kong, United States and Taiwan.

²⁷ On April 16, 2007 in a visit to Manila from their current base of operations in Kuala Lumpur, Malaysia, Lucky and Flo, the Motion Picture Association's DVD-sniffing black Labrador retrievers, helped Philippines law enforcement officials seize an estimated 300,000 pirate DVDs from three malls in Manila, Makati Cinema Square, St Francis Square and Metrowalk Mall, notorious for the sale of pirated movies and music. Among the seizures, which had an estimated street value of US\$500,000, were a significant number of discs containing child pornography. See Motion Picture Association, *In Flying Visit to Manila, Lucky And Flo Lead Anti-Piracy Officers to 300,000 Pirated DVDs*, April 17, 2007.

²⁸ *People v. Asmawe Tantowa, Abdulah Mama, Maraue Orot, Pandaw Orot, Oding Baro*, Criminal Case No. 28267-C (for violation of RA No. 9239, the Optical Media Act of 2003).

sentenced five (5) of the sellers of these pirated DVDs and VCDs to three (3) years imprisonment, and ordered them to pay a fine of P500,000 (US\$12,300) each for violation of the Optical Media Act of 2003. In *People v. Macacuna Gandarosa Y Basheron and Alinor Pangcatan Y Abobakar*,²⁹ another retail case, the accused was sentenced to imprisonment for ninety (90) days plus costs.

The effect of the near-total failure of the judicial system cannot be overstated. Cases sent into the public prosecution system languish for years, with little hope of any resolution or even progress. Prosecutors do not move cases through the system, and are indeed careless in their approaches to cases. Summonses are routinely lost in the mail, hindering any assistance that private lawyers could otherwise provide, and cases routinely fall prey to endless delay tactics by defendants.

Wrong Targets, Wrong Timing: That no pirate manufacturer of optical discs has ever been convicted is telling. It is also worth reiterating that criminal cases in the Philippines take too long to resolve.³⁰ This problem was to have been addressed in part by the reorganization of the Department of Justice Task Force to prosecute copyright cases, limiting the number of prosecutors in Manila to six, but assigning “one (1) prosecutor and one (1) alternate” for each province and city throughout the Philippines to handle IP cases.³¹ It is also telling that nearly 1,000 of these cases remain “pending.” IIPA can only hope the reconstitution of the DOJ Task Force will lead to a dramatic change in results in 2007.

CRIMINAL COPYRIGHT CASES RESULTING IN CONVICTION 2002-2007 PHILIPPINES			
PRESIDING JUDGE	CASE NO.	TITLE	DATE OF DECISION/LAW
Hon. Judge Antonio Jayobo MTCC Silay, Negros Occidental	28277-C	PP v. Abdul Alonto et al.	09 January 2007 (RA 9239: Optical Media Act of 2003)
Hon. Antonio M. Eugenio, Jr. RTC, Branch 24, Manila	00-187015	PP v. Manny Marasigan	05 June 2006 (Copyright infringement)
Hon. Antonio M. Eugenio, Jr. RTC, Branch 24, Manila	98-169591 99-171135	PP v. Nestor C. Yao ³² PP v. Nestor C. Yao alias “Jao Jee Hung”	13 July 2006 (Copyright infringement)
Hon. Rufino S. Ferraris, Jr. MTCC, Branch 7, Davao City	119, 756-G-04 119, 757-G-04	PP v. Macacuna Gandarosa Y Basheron & Alinor Pangcatan Y Abobakar	13 November 2006 (RA 9239: Optical Media Act of 2003)
Hon. Judge Antonio Jayobo MTCC Silay, Negros Occidental	28267-C	PP v. Asmawe Tantowa, Abdulah Mama, Maraue Orot, Pandaw Orot, Oding Baro	20 December 2006 (RA 9239: Optical Media Act of 2003)
Hon. Raul E. De Leon RTC, Branch 258, Parañaque City	03-0320 03-0321, and 03-0322	PP v. Eugene Li	10 February 2005 (Copyright and Trademark infringement and Unfair competition)
Hon. Edwin D. Sorongon RTC, Branch 214, Mandaluyong City	MC-00-3006 to MC-00-3015	PP v. Catherine Marquez	22 June 2004 (Copyright infringement)
Hon. Antonio M. Eugenio RTC, Branch 24, Manila	99-172794	PP v. Harold Chua ³³	03 October 2002 (Copyright Infringement)

Telmarc Cable Case Casts Doubt on The Philippines’ Compliance with International Norms: On May 31, 2007, in the case *Telmarc Cable v. Hon. Antonio M. Eugenio, Jr.*,³⁴ the Honorable Mariano C. Del Castillo of the Manila Court of Appeals, Sixteenth Branch, reversed the Honorable

²⁹ *People v. Macacuna Gandarosa Y Basheron and Alinor Pangcatan Y Abobakar*, Criminal Case No. 119, 756-G-04 and 757-G-04 (for violation of RA No. 9239, the Optical Media Act of 2003).

³⁰ The case against Beltron, which was raided in 1995, is instructive. The issue involved a ruling made by the Department of Justice that Beltron was only civilly liable (as it was a former licensee of Microsoft). The Supreme Court disagreed and ruled in 2005 that Beltron’s officers were liable criminally. Notwithstanding this positive result, industry has yet to receive any notice from the court regarding the arraignment of the accused. In effect, they are into the 13th year since the case began.

³¹ This was accomplished as per Department Order No. 657 s 2005.

³² Defendant Yao was owner of Gains Computer which was raided in 1998. Defendant Yao was sentenced in July 2006 to one year in prison for one case, and three to six years for the other case. The court also required him to pay a total of P200,000 (approximately US\$5,000).

³³ Defendant Chua was owner of Triac Marketing which was raided in 1998. Mr. Chua was sentenced to one year imprisonment and a fine of P50,000 (US\$1,200) in 2002.

³⁴ *Telmarc Cable v. Hon. Antonio M. Eugenio, Jr.*, CA-G.R. SP. No. 96767, May 31, 2007

Antonio M. Eugenio, Jr.'s³⁵ May 29, 2006 denial of a motion to quash 40 search warrants related to Telmarc's alleged signal theft ("illegal and unauthorized decoding, rebroadcast, distribution and/or performance of copyrighted programs in violation of Section 177 in relation to Section 217 of the Intellectual Property Code, R. 8293"). In language eerily similar to that of the court in the *Solid Laguna* case,³⁶ which we have discussed extensively in previous filings, and which the Philippine government has said is not the law given the *en banc* Supreme Court ruling in the *Columbia* case,³⁷ Judge Del Castillo wrote in *Telmarc Cable*,

It has been held that "the true test of sufficiency of a deposition or affidavit to warrant issuance of a search warrant is whether it has been drawn in a manner that perjury could be charged thereon and the affiant could be held liable for the damage caused. The oath required must refer to the truth of the facts within **the personal knowledge** of the applicant for search warrant and/or his witnesses, not of the facts merely reported by a person whom one considers to be reliable."³⁸

In the *Solid Laguna* decision, the Court stated,

To us it is not enough that the applicant and his witnesses testify that they saw stacks of several alleged infringing, pirated and unauthorized discs in the subject facility. The more decisive consideration determinative of whether or not a probable cause obtains to justify the issuance of a search warrant is that they had *personal knowledge* that the discs were *actually infringing*, pirated or unauthorized copies (emphasis added).

and

It cannot be overemphasized that not one of [the applicants or his witnesses] testified *seeing the pirate discs being manufactured* at [the subject facility's] premises (emphasis added).

The *Telmarc Cable* ruling, as the *Solid Laguna* ruling had done, creates an unworkably high evidentiary burden for rights holders to simply obtain a warrant. The evidentiary burden here is far higher than that set in the *Columbia* case referred to by the Philippine government. In that case, the Supreme Court held *en banc* that the procedure for obtaining a search warrant

does not rule out the use of testimonial or documentary evidence, depositions, admissions or other classes of evidence tending to prove the *factum probandum*, especially where the production in court of object evidence would result in delay, inconvenience or expenses out of proportion to its evidentiary value ...

The Philippine government has previously (subsequent to *Solid Laguna* but prior to *Telmarc Cable*) claimed that the ruling of the Supreme Court's Third Division in *Solid Laguna* could not have established a doctrine or principle abandoning or rejecting that of an *en banc* decision (i.e., the decision in the *Columbia* case), by the terms of the Philippine Constitution.

The rule set out in *Solid Laguna* and *Telmarc Cable* is at odds with, departs from, and clearly does not follow the rule in the *Columbia* case. *Solid Laguna* and *Telmarc Cable* set the proof standard impossibly high for obtaining a search warrant, and probably implicate the Philippines' TRIPS obligations.³⁹ The evidentiary standard falls well outside the mainstream of other countries with respect to

³⁵ Presiding Judge of the Regional Trial Court, Branch 24, Manila.

³⁶ *Sony Music Entertainment (Phils), et al v. Hon. Judge Dolores Español et al* (G.R. No 156804, March 14, 2005).

³⁷ See *Columbia Pictures Entertainment, Inc. v. Honorable Court of Appeals, 14th Division and Jose B. Jingco of Showtime Enterprises., Inc.*, G.R. No. 111267, September 20, 1996 (J. Romero, Second Division).

³⁸ *Telmarc Cable* at 8.

³⁹ TRIPS Article 41.2 provides, "Procedures concerning the enforcement of intellectual property rights shall be fair and equitable. They shall not be unnecessarily complicated or costly, or entail unreasonable time-limits or unwarranted delays."

grants of search warrants and seriously jeopardizes the expeditious availability of warrants. The application of *Solid Laguna* or *Telmarc Cable* could lead to courts not granting search warrants expeditiously in cases involving copyright infringement or piracy. Effective criminal enforcement in the Philippines depends on the expeditious availability of warrants. Lack of availability of search warrants in the Philippines would result in less “effective action,” lack of “expeditious remedies” against infringement and lack of “remedies, which constitute a deterrent” to further infringement. It is a basic principle of the TRIPS Agreement (set out in Article 41.1) that enforcement procedures must be “available” in practice (not just on the books) in order to meet the TRIPS standard.⁴⁰

We understand that the cable channels and rights holders in broadcast programming have appealed the decision in the *Telmarc Cable* case. We hope that the case will be reconsidered in light of the standing precedent in *Columbia*; if necessary, the Philippine Congress should pass legislation codifying *Columbia* and overruling *Solid Laguna* and *Telmarc Cable* to ensure that the rule for obtaining a warrant is clear and TRIPS-compatible.

Juliano-Tamano Case: On July 5, 2007, in the case *Juliano-Tamano et al v. Discovery Communications, Europe et al*,⁴¹ the Secretary of the Department of Justice of the Philippines reversed a resolution finding probable cause to indict the Respondents (Juliano-Tamano et al) for violation of the IP Code. In what should have been essentially an open-and-shut cable piracy case involving unauthorized broadcasts of motion pictures and television shows, the Secretary concluded that “It is ... evident that ‘broadcasting’ is not included, intentionally or unintentionally, among the copyright or economic rights protected by RA 8293.” This is clearly incorrect. Broadcasting organizations hold various rights under Section 211 of the Philippines Copyright Act, and the complainants, also being copyright holders in the programming having been disseminated without authorization, hold exclusive rights under Section 177. We understand that the Attorney General’s office has undertaken a review of the reversal, so the case will not be summarily dismissed by the Cotabato City Court. IIPA also understands the AG’s office may be overturning the reversal, which would be the right step.

Marquez Case: IIPA has long documented the problems experience in the *Multilinks Book Supply* case, involving the Marquez defendants. Mrs. Catherine Marquez was convicted on June 22, 2004, and sentenced to one year in jail and to fines of P50,000 (US\$1,200) per count for copyright piracy, and all appeals were exhausted. To this day, she remains free, and there is evidence that she remains involved, if indirectly, in illegal business activities, as it appears several government-run universities, hospitals and agencies are still ordering illegal photocopied books from her business (now fronted by her husband, against whom several cases are also pending). The Marquez family was raided once again on August 3, 2005, and two additional prosecutions were initiated, both moving slowly through the private prosecution system. It is difficult to imagine a clearer example of lack of deterrence than what has occurred in these cases. Mrs. Marquez is now a fugitive from justice and was placed on the “most wanted” list several months ago. It would be an important accomplishment to find her.

Irregularities Continue to Plague the Enforcement System: It is no secret that piracy is funded by wealthy and well connected Filipinos. In general, stall-holders are well organized and are believed to have connections with enforcement authorities. IIPA members report that pirate operators have also established an organized short message service (SMS – text messaging) warning system of impending raids. Such a system would be indicative of an overall lack of information integrity.

Still No Ex Officio Authority for Police: A major hurdle in the Philippine enforcement system remains the fact that the Police cannot act *ex officio* but must always act in conjunction with the Optical Media Board or on a rights holder complaint. This should be remedied, and the authority should of course extend to initiating actions and seizing infringing items *ex officio*.

⁴⁰ The WTO Appellate body confirmed as much in the Havana Club case where it held (with respect to Article 42 of the TRIPS Agreement) that it is not sufficient to have the required procedures available in theory; right holders must have actual access to – and be able to make use of – the procedures under the Agreement.

⁴¹ *Juliano-Tamano et al v. Discovery Communications, Europe et al*, I.S. No. 2006-002, Secy. of Dept. of Justice Chambers, July 5, 2007 (Cotabato City Court).

TRAINING AND PUBLIC AWARENESS

IIPA members continued to provide and participate in various public awareness and training activities in the Philippines in 2007. It is also noteworthy that on January 27, 2007, the government of the Philippines and the U.S. signed a Memorandum of Agreement on Intellectual Property Rights, in part to further strengthen IPR protection in both countries. The following is a non-exhaustive list of industry trainings:

- The Motion Picture Association's local representative participated in a training event in 2007 focusing on exposing participants to the new methods/trends/technology used by pirates to record the latest movies in cinemas using camcorders. Participants were briefed on steps to take when they detect camcording piracy.
- The Business Software Alliance's (BSA) local representative provided five agents of the Criminal Investigation Division of the Philippine National Police with training on January 31, 2007, including computer systems checks and identification of product keys of software installed in computers.
- The BSA's local representative provided a PAPT technical training in June 2007 to 34 agents from the NBI, OMB and PNP. The technical training included a lecture on kinds of software piracy, and software system checks. The agents were trained on how to identify unauthorized software installed in computers and how to capture product keys. There was also a presentation on licensing guidelines.
- The BSA local representative provided a PAPT technical training on September 27, 2007 to agents from the NBI, OMB and PNP.

MARKET ACCESS ISSUES

Restrictions on Foreign Ownership of Mass Media and Advertising: One abiding problem in the Philippines, especially for U.S. interests, is that foreign investment in mass media is strictly prohibited under the Philippines Constitution. The pay television sector, for example, which is classified under mass media, is burdened by such foreign investment restrictions, ultimately impeding further development of the cable television market in the Philippines. Draft cable legislation is reportedly being considered that contains a provision allowing up to 40% foreign investment in cable systems that do not produce their own programs or content.⁴² As the broadcast industry moves toward a converging environment, operators are encouraged to provide both infrastructure and content. It is essential in this environment that foreign equity restrictions such as those found in the Philippines be removed. Pending legislation (a "Convergence Bill") may provide some relief, but consideration of this bill remained stalled in 2006.⁴³

Under Presidential Decree 1986, advertising on pay television is currently limited to 10 minutes per hour of programming. Provisions in the current draft cable legislation also unduly limit advertising to 10 minutes per hour, and require exhibition at the start and/or end of the program only. Restricting advertisement placement will tend to reduce the utility of advertising, leading to a reduction in advertising-based revenue and further impeding the development of the television industry in the Philippines.

COPYRIGHT LAW AND RELATED ISSUES

Copyright protection is governed under Republic Act 8293, the Intellectual Property Code (IPC) of the Philippines (in force January 1, 1998).

⁴² Other important provisions in the draft cable law include some loosening of advertising restrictions and stiffer penalties for cable piracy.

⁴³ IIPA also understands that the bill contains foreign investment restrictions for some copyright industry sectors.

WIPO Treaties Implementation and Other Needed Amendments: The Philippine government has, since it joined the WIPO Copyright Treaty and WIPO Performances and Phonograms Treaty, placed on the Congressional agenda passage of amendments that would fully implement those treaties as well as make other necessary changes to accommodate changing substantive and enforcement concerns (such as the addition of statutory damages and a codification into Philippine law of secondary liability). The latest attempt is contained in Senate Bill 880 (sponsored by Senator Edgardo J. Angara), which is virtually identical to bills proposed in previous Philippine Congresses. Representative Jose Solis has also introduced House Bill No. 1033, which would specifically introduce landlord liability for mall owners harboring pirates in their malls. IIPA strongly supports passage of SB 880, with a couple of modifications,⁴⁴ and House Bill No. 1033.

One of the principal achievements of the Bill is that it would result in full and proper implementation of the WIPO “Internet” Treaties, the WCT and WPPT. The Bill would update and expand the scope of copyright protections for the digital and online world and allow authorities in the Philippines to successfully combat Internet piracy. In particular, the legislation would expand the scope of the reproduction right to include temporary copies and would explicitly broaden the right to control all communications to the public, including by providing an interactive “making available” right for the digital world. The Bill also provides critical protections against circumvention of “technological protection measures” and protections against unlawful tampering or use of “rights management information.”

In short, the Bill would establish a world-class copyright legislation, both in areas of substantive protection and enforcement. The Bill’s improvements include (a) increasing the term of protection for works and sound recordings in line with international trends, (b) providing an importation right, (c) narrowing certain exceptions, (d) providing for Berne and TRIPS-compatible protection for pre-existing works, (e) providing criteria for secondary liability (e.g., creating liability for landlords who lease stalls to pirates in malls), (f) criminalizing end-user piracy of business software, (g) providing for a Berne and TRIPS-compatible presumption of ownership to ease burdens on right holders when enforcing their rights, (h) strengthening border measures, (i) providing for *ex parte* civil searches as required by TRIPS, (j) providing for disclosure of information to right holders to assist in investigations of infringement, (k) allowing “sampling” to efficiently deal with massive seizures of pirated materials, and (l) lengthening the statute of limitations so it is not tied to the vagaries of the court timetable but rather is tied to the initiation of the case by the right holder/claimant. All of these improvements together, if passed and implemented, will result in one of the best and most effective copyright laws in the world.

Philippine creators and society stand to gain much from the passage of a strong copyright law and adequate copyright enforcement. Indeed, Philippine President Gloria Macapagal Arroyo has said as much in a speech in 2006 to mark the U.S. Trade Representative’s recognition of the Philippines’ improved standing on IPR, stating:

“[W]hile we appreciate the U.S. government’s recognition of our efforts to protect intellectual property rights, we mustn’t lose sight of the fact that protection of IPR is first and foremost in the interest of the Filipino people.”

⁴⁴ The proposed modifications to SB 880 are:

- First, IIPA proposes a systematic approach to exceptions and limitations in the IP Code, which would consist, on the one hand, in the extension of the application of the “three-step test” to all limitations on and exceptions to copyright provided for in Chapter VIII, and, on the other hand, in extending, in a *mutatis mutandis* manner, the application of copyright limitations and exceptions to related rights (applying the technique of Article 17 of the WPPT). Such modifications would offer a fuller guarantee for compliance with international norms.
- Second, there is one provision in need of clarification regarding the exclusivity of the “making available” right in the context of related rights so that it is clear that the right of remuneration in Section 209 of the current IP Code does not and will not apply to acts of “making available” a sound recording or performance. The easiest way to accomplish this is to modify Section 209 to expressly provide that it shall not disturb the exclusivity in the “making available” right (proposed Section 208.4 and existing Section 203.5). Another way to approach the problem is by amending Section 202.9 (the definition of “communication to the public” in the context of related rights) to add to the end of the first sentence of Subsection 202.9: “and other than making them available to the public... .”

In the 1990s, the music markets in several Asian countries/territories, including the Philippines, saw enormous growth in the market share for local music; it is no coincidence that such changes occurred just as these countries/territories adopted better copyright laws and saw increases in enforcement activity.⁴⁵ A study of the Business Software Alliance and IDC estimates that for the Philippines, a 10-point reduction in the current 71% piracy rate would yield additional US\$32 million (Php1.3 billion) in tax revenues and US\$623 million (Php 25.3 billion) to the economy, create 2,200 new IT jobs and increase local vendor revenues by US\$431 million (Php 17.5 billion).⁴⁶ Other creators in the Philippines, e.g., film makers like Gerardo De Leon,⁴⁷ Ishmael Bernal,⁴⁸ Eddie Romero,⁴⁹ and film producers like Pia Clemente who in 2006 became the first ever Filipina nominated for an Academy Award for producing the comedy short *Our Time is Up*,⁵⁰ writers like Nick Joaquin,⁵¹ Edith Tiempo,⁵² and Virgilio Almario;⁵³ musicians like Antonio Molina,⁵⁴ Jose Maceda,⁵⁵ and Ernani Cuenco,⁵⁶ as well as those involved in entertainment software development,⁵⁷ all stand to reap the benefits of better copyright protection in the Philippines.

Anti-Camcording Legislation: IIPA also calls upon the government to enact legislation to prevent the unauthorized operation of audiovisual recording equipment in motion picture theaters while a motion picture is being exhibited. While the illegal copying is already a violation of the copyright law, the added protection against unauthorized use of the equipment in the theater will obviate the need to prove infringement in order to combat this highly damaging activity.

Government Legalization: Regarding government acquisition of legitimate software, Executive Order No. 262, 2000 entitled "Providing Policies, Guidelines, Rules and Regulations for the Procurement

⁴⁵ Local market share in the Philippines, Taiwan, Indonesia, Korea, and Hong Kong all increased in the 1990s. The domestic music industry in the Philippines made up 42% of the market in 2000, up from 30% in 1998. The international music market declined in the Philippines for this same period from 67% to 57%. See IFPI, 2001: *The Recording Industry in Numbers 86-110 (2001)*. In Taiwan, local music represents a substantially larger percentage of the market than international music, 66% vs. 28% in 2000 (and local market share in Taiwan has increased since 1991, from 60% to 66%). In Korea, for example, domestic recorded music made up 63% of the market in 2000, up from 49% in 1991, correlative in part to stronger copyright protection in Korea.

⁴⁶ See *New BSA study shows that Philippines' Emerging IT Sector Could Nearly Double in Size by 2009*, December 8, 2005, at <http://www.bsa.org/philippines/press/newsreleases/IDC-Study.cfm>.

⁴⁷ In the 50s and 60s, he produced many films that are now considered classics including "Daigdig ng Mga Api," "Noli Me Tangere," "El Filibusterismo," and "Sisa." Among a long list of films is "Sawa sa Lumang Simboryo," "Dyesebel," "The Gold Bikini," "Banaue," "The Brides of Blood Island." See http://www.ncca.gov.ph/about_cultarts/cultprofile/natarts/cinema/deleon.php.

⁴⁸ Among his notable films are "Pahiram ng Isang Umaga" (1989), "Broken Marriage" (1983), "Himala" (1981), "City After Dark" (1980), and "Nunal sa Tubig" (1976). See http://www.ncca.gov.ph/about_cultarts/cultprofile/natarts/cinema/bernal.php.

⁴⁹ See http://www.ncca.gov.ph/about_cultarts/cultprofile/natarts/cinema/romero.php ("Eddie Romero, is a screenwriter, film director and producer, is the quintessential Filipino filmmaker whose life is devoted to the art and commerce of cinema spanning three generations of filmmakers").

⁵⁰ The Philippines has a rich tradition of motion picture production, including the films of the late Lino Brocka.

⁵¹ Among his voluminous works are *The Woman Who Had Two Navels*, *A Portrait of the Artist as Filipino*, *Manila, My Manila: A History for the Young*, *The Ballad of the Five Battles*, *Rizal in Saga*, *Almanac for Manileños*, *Cave and Shadows*. See http://www.ncca.gov.ph/about_cultarts/cultprofile/natarts/literature/joaquin.php.

⁵² Tiempo's published works include the novel *A Blade of Fern* (1978), *The Native Coast* (1979), and *The Alien Corn* (1992); the poetry collections, *The Tracks of Babylon and Other Poems* (1966), and *The Charmer's Box and Other Poems* (1993); and the short story collection *Abide, Joshua, and Other Stories* (1964).

See http://www.ncca.gov.ph/about_cultarts/cultprofile/natarts/literature/tiempo.php.

⁵³ Among his 10 books of criticisms and anthologies are *Ang Makata sa Panahon ng Makina*, *Balagtasismo versus Modernismo*, *Walong Dekada ng Makabagong Tula Pilipino*, *Mutyang Dilim* and *Barlaan at Josaphat*. See http://www.ncca.gov.ph/about_cultarts/cultprofile/natarts/literature/almario.php.

⁵⁴ Among his compositions are *Hatinggabi*, a serenade for solo violin and piano accompaniment. Other works are (orchestral music) *Misa Antoniana Grand Festival Mass*, *Ang Batingaw*, *Kundiman- Kundangan*; (chamber music) *Hating Gabi*, *String Quartet*, *Kung sa Iyong Gunita*, *Pandangguhan*; and (vocal music) *Amihan*, *Awit ni Maria Clara*, *Larawan Nitong Pilipinas*. See http://www.ncca.gov.ph/about_cultarts/cultprofile/natarts/music/molina.php.

⁵⁵ Among his compositions are *Ugma-ugma* (1963), *Pagsamba* (1968), and *Udlot-udlot* (1975). Other major works include *Agungan*, *Kubing*, *Pagsamba*, *Ugnayan*, *Ading*, *Aroding*, *Siasid*, *Suling-suling*.

See http://www.ncca.gov.ph/about_cultarts/cultprofile/natarts/music/maceda.php.

⁵⁶ His songs and ballads include "Nahan, Kahit na Magtiis," and "Diligin Mo ng Hamog ang Uhaw na Lupa," "Pilipinas," "Inang Bayan," "Isang Dalangin," "Kalesa," "Bato sa Buhangin" and "Gaano Kita Kamahal." See http://www.ncca.gov.ph/about_cultarts/cultprofile/natarts/music/cuenco.php

⁵⁷ See *IT Matters*, <http://www.itmatters.com.ph/features.php?id=090705b>, Sept. 7, 2005 (an article about a Philippine company ArtFarm, which partnered with Tokyo-based software organization Software Partnership International Japan, through its president, Katsumi Yamaguchi, to develop content for video games).

of Goods/Supplies by the National Government” was promulgated. The E.O. prohibits government from purchasing illegal software and allows only suppliers of legitimate software to participate in government bidding. Then, in 2002, Republic Act No. 9184 otherwise known as the “Government Procurement Reform Act” was enacted. Under this law, the Bids and Awards Committee determines the eligibility of prospective bidders for the procurement of goods, with bidders attesting under oath that they are providing/using legitimate software.

Licensing Book Copying: The Philippine government continues to ponder a licensing scheme under a reprographic rights organization (RRO), and indeed, provision for collective management is built into the government’s plan.⁵⁸ There are two RROs in the Philippines, the Philippines Reproduction Rights Organization (PRRO) and the Filipinas Copyright Licensing Society (FILCOLS). Industry notes that in considering reprographic licensing for the Philippines, it is crucial to ensure that:

- Any scheme is voluntary.
- Government oversight and regulations do not rise to the level of interference with market forces.
- Licensing fees are appropriate and fair. Some have suggested PP100 (US\$2.50) per student per semester, which is entirely too low and a non-starter from the publishers' point of view.
- Appropriate parameters are placed on the copying allowed by any license. The publishing industry has heard of proposals along the lines of 10% of a work, one chapter of a book, or one journal article, whichever is greater. However, there are problems with such an approach, since the numerical threshold may lead to abuses (e.g., several students banding together to copy an entire book, or copying a book at a series of shops or over the course of a few days).
- The scheme targets appropriate licensees, i.e., copy shops should not be a primary target.

IIPA notes that any volunteer licensing scheme is distinct from an overall “plan” to fight book piracy, and that licensing organizations do not comprise a “one stop” solution to book piracy in all its forms. In addition, IIPA expects full consultation with the affected industry groups before the Philippines rushes headlong into endorsing an official RRO.

Fair Use Guidelines: IIPA has learned that the National Book Development Board is considering fair use guidelines for classroom use along the lines of those that are in place in the United States. NBDB is apparently still working on a draft, but IP Philippines has provided comments. The timetable being discussed is February 15, which is quite unrealistic if proper dialogue among affected groups is to occur. Industry must be involved in the process, with proper consultation and transparency.

Other Legislation: As is usually the case in the Philippines, there are several copyright-related bills being considered by the current Congress. IIPA has not fully analyzed each of these, but states in general its support for Senate Bill 1572, An Act Strengthening the Enforcement of the Copyright Protection of Intellectual Property Right Owners of Computer Programs Creating For This Purpose the Business Software Copyright Piracy Enforcement Unit, Defining Its Powers and Functions, Appropriating Funds Therefor, and For Other Purposes. IIPA also supports the principles behind Senate Bill 684, An Act Requiring the Teaching of Intellectual Property Ownership Particularly Copyright Law as Part of the Curriculum of All Primary, Secondary and Tertiary Schools In the Country, and For Other Purposes.

Generalized System of Preferences: The Philippines currently participates in the U.S. GSP program, offering duty-free imports of certain products into the U.S. from developing countries. In order to

⁵⁸ The Strategic Plan (2007-2009) contains the directive for IP Philippines to “[a]ssist in formulating an accreditation system for collection societies,” to “[h]elp establish collection societies to help the creative industries manage arrangements for licensing, marketing, and distribution of their works, collection of royalties, and enforcement of their rights,” and one of the key performance indicators in that report is that “[a]t least 4 collecting societies are established.”

qualify for such unilaterally granted trade preferences, USTR must be satisfied that the Philippines meets certain discretionary criteria, including whether it provides “adequate and effective protection of intellectual property rights.” During the first 11 months of 2007, \$1.1 billion worth of Philippine goods, or 12.7% of the Philippines’ total exports to the U.S. from January to November 2007, entered the U.S. under the duty-free GSP code. The Philippines should not continue to expect such favorable treatment at this level when it fails to meet the discretionary criteria in this U.S. law. The Philippine government has recognized the significance of the GSP program to its economy and the need to improve its IPR record in order to claim eligibility under the program.⁵⁹

⁵⁹ Felepe F. Salvosa II, *Continued Inclusion in Watchlist Puts Trade Privilege At Risk - DTI US May Withdraw Duty-Free Status for RP Exports*, BusinessWorld Manila, May 17, 2004, at <http://www.bworld.com.ph/current/TheEconomy/ecostory2.html> (in which Trade Secretary Cesar A.V. Purisima warned citizens that “the Philippines is in danger of losing its trade privileges with the United States if it continues to remain in the latter’s watchlist of intellectual property rights (IPR) violators”).

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2008 SPECIAL 301 REPORT

POLAND

Special 301 Recommendation: IIPA recommends that Poland remain on the Watch List in 2008.

EXECUTIVE SUMMARY

Copyright piracy remains widespread Internet piracy is rising rapidly, and although there has been a good amount of cooperation between industry and police to take action against online infringements and hard goods piracy, more work is needed and the police need more resources to accomplish this important task. In addition, the burning and import of pirate product remain key challenges. Street vendors and flea markets continue distribute pirated products. A major positive development was that the lease for the notorious Warsaw Stadium was terminated and it was closed in September 2007. However, sprawling pirate open-air markets along the German border continue to seriously hurt the legitimate industry in Poland and Germany. Weak border enforcement, lengthy delays and onerous burdens in bringing prosecutions, and the failure to impose deterrent penalties remain systemic deficiencies. Legislative efforts to strengthen enforcement mechanisms, such as including criminal sanctions to the optical disc regulations, are long overdue. The larger problem remains that there is a lack of leadership exhibited by the Polish government on implementing its national anti-piracy plan. Now that the 2007 election cycle is over, the copyright industries hope that the national anti-piracy strategy will be re-energized in 2008.

PRIORITY ACTIONS IN 2008

Enforcement

- Implement the strategic goals outlined in the government's annual strategy plan regarding the prevention of copyright infringement.
- Encourage police to take *ex officio* actions in all copyright areas (in addition to the work already done in business software) and expand *ex officio* authority beyond crimes of a certain scale.
- Support the continued cooperation between industry, Polish police, and its IT team to take actions against Internet piracy. This should include using Government resources to arm the police with additional resources for training and IT equipment.
- Ban the sale and distribution of optical disc products at stadiums, bazaars, outdoor markets and public places, in particular along the Polish-German border, and prosecute those cases.
- Halt the increasing flow of pirate products across the border, especially at the eastern and northern borders, ensuring that sufficient resources (both technical and personnel) are dedicated to this effort and improving cooperation with the customs agencies in neighboring countries.
- Continue working with rights holders on the enforcement of optical disc regulations.
- Direct prosecutors to press for expeditious consideration of criminal copyright cases.
- Appoint specialized prosecutors in each office to handle copyright cases.
- Investigate and prosecute suspects involved in commercial distribution and sale of pirated copyrighted materials using existing organized crime legislation.
- Appoint specialized judges to handle criminal IPR cases and establish a specialized IPR court.
- Continue to conduct and support training seminars for police, prosecutors, and judges on copyright enforcement.

Legal reform

- Amend copyright law's technological protection measures provisions to correct inadequacies and reduce the scope of the overly broad private copy exception.

- Refrain from introducing a mechanism to regulate the relationship between private copying exception and technical protection measures provisions. Permit industry to continue to work to resolve issues related to technological protection measures and interoperability in the marketplace.
- Introduce criminal sanctions in the optical disc decree.
- Refrain from over-regulating collective management of copyright and neighboring rights.
- Adopt anti-camcording legislation.
- Formally withdraw Poland's reservation to Article 12 of the Rome Convention.

POLAND Estimated Trade Losses Due to Copyright Piracy (in millions of U.S. dollars) and Levels of Piracy: 2003-2007¹										
INDUSTRY	2007		2006		2005		2004		2003	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Business Software²	337.0	57%	251.0	57%	202.0	58%	197.0	59%	171.0	58%
Entertainment Software³	76.0	60%	NA	75%	NA	60%	109.3	94%	NA	NA
Sound Recordings & Musical Compositions	28.0	36%	24.0	35%	25.0	31%	36.0	37%	34.0	45%
Motion Pictures⁴	NA	NA	NA	NA	102.0	66%	30.0	35%	30.0	30%
Books	NA	NA	NA	NA	5.0	NA	5.0	NA	5.0	NA
TOTALS	441.0		275.0		334.0		377.3		240.0	

COPYRIGHT PIRACY IN POLAND

Internet piracy: Internet piracy is on the rise in Poland, due to increasing broadband penetration and wider Internet household penetration. Peer-to-peer (P2P) file-sharing networks such as DC++, Gnutella, eDonkey and BitTorrent are the most popular sources of pirated copyright content online. Files are also distributed through File Transfer Protocol (FTP) servers and international cyberlockers, as well as international video hosting sites such as rapidshare.com and megaupload.com. The Business Software Alliance (BSA) continues to report that much of Internet piracy in Poland relates to websites offering illegal copies of software for download and resale, but P2P use is on the rise. Internet piracy, particularly through the BitTorrent and eDonkey protocols, is also a growing concern for the entertainment software industry. There are an estimated 11.4 million Internet users in Poland, about 30% of the population (according to internetworldstats.com). The Polish police continue to scour the Internet in search of illegal music, film files and software, conducting raids where appropriate.

¹ The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2008 Special 301 submission at www.iipa.com/pdf/2008spec301methodology.pdf. For information on the history of Poland under Special 301 review, see Appendix D at (<http://www.iipa.com/pdf/2008SPEC301USTRHISTORY.pdf>) and Appendix E at (<http://www.iipa.com/pdf/2008SPEC301HISTORICALSUMMARY.pdf>) of this submission.

² BSA's 2007 statistics are preliminary. They represent the U.S. software publishers' share of software piracy losses in Poland, and follow the methodology compiled in the Fourth Annual BSA and IDC Global Software Piracy Study (May 2007), available at <http://w3.bsa.org/globalstudy/>. These figures cover, in addition to business applications software, computer applications such as operating systems, consumer applications such as PC gaming, personal finance, and reference software. BSA's 2006 piracy statistics were preliminary at the time of IIPA's February 12, 2007 Special 301 filing and were finalized in June 2007 (see <http://www.iipa.com/statistics.html>) as reflected above.

³ ESA's reported dollar figures reflect the value of pirated product present in the marketplace as distinguished from definitive industry "losses." The methodology used by the ESA is further described in Appendix B of this report. The above results reflect only piracy of PC games.

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

Optical disc piracy, street piracy, and outdoor markets: Hard goods piracy has shifted to the burning of CD-Rs and DVD-Rs. Polish pirates are burning discs specifically for German consumers, distributing them at markets on the Polish-German border and in Germany. The vast majority of pirate optical discs are sold at public markets. The most notorious stadium market, the Dziesięciolecie (Tenth Anniversary Stadium in Warsaw), was finally closed in September 2007. (A new national stadium will be built for the 2012 European Football Championships at this location.) Despite this positive development, it should be stressed that other distribution points have replaced the Warsaw Stadium and the pirate trade in Poland is far from dried up. For example, illegal trade has expanded to “bazaars” and public markets in other parts of Warsaw and is highly organized and generally controlled by criminal gangs. Concerted anti-piracy efforts must continue at these bazaars, flea markets and mini-stadiums, and should include a ban on the sale and distribution of optical disc products at these locations.

Imported pirated discs and weak border enforcement: Imported pirated discs (CDs, DVDs, and CD-ROMS) continued to enter the Polish market in 2007. Forensic examination of pirate sound recordings conducted by the international recording industry indicates that Russia is the main source of prerecorded pirate discs in Poland. The industry continues to believe that organized criminal networks involved in music piracy are now primarily responsible for the distribution of these imported discs. Law enforcement agencies have failed to recognize the many blatant examples of the organized nature of IP crime in Poland such as the highly organized criminal activity at the Polish-German border markets.

Domestic OD production in Poland: Poland’s OD capacity now exceeds one billion units per year. It is important to note, however, that the excess capacity of the Polish manufacturing lines supplies EU markets with legitimate products. Since Poland’s accession to the EU, Polish optical disc plants primarily execute orders coming from other EU countries rather than orders from the local market. Foreign demand for optical discs is so high in the region that some Polish plants sub-contract production to some other countries, including the Czech Republic or Ukraine. (The high production capacity in Poland is mainly due to the presence of one of TechniColor’s largest plants which exports almost all of its production.)

Despite this large overcapacity, there is little evidence to suggest that Polish plants are involved in pirate production of optical discs or are exporting pressed discs. In June 2005, the police seized 54,000 DVDs in a raid against a warehouse in Warsaw. Samples were supplied in early 2007 and MPA/IFPI joint forensics lab matched all samples to CODIC, one of the nine OD plants operating in Poland. This is still the only time locally replicated pirate discs were found in Poland. The forensic report was submitted to the police in May 2007 and it was determined that CODIC ceased its activities in 2005. However, a DVD line is missing and the criminal case has been re-opened.

Nevertheless, such a large production capacity in Poland (bigger than Russia, Ukraine, Bulgaria) requires strong OD regulations, if only to minimize the risk of this capacity being used for illegal purposes. Therefore, the copyright industries maintain their call for the introduction of criminal sanctions in the existing OD regulation.

Piracy of music and sound recordings: Piracy affecting the recorded music industry in Poland remains severe, given the growth both optical disc piracy and Internet piracy. According to the local recording industry group ZPAV, Internet piracy is causing serious damage to the cultural sector as it hinders the development of legitimate on-line services, such as eMusic, iPlay, Melo, mp3.pl, Onetplejer and Soho. The overall music piracy level in Poland is 25%. The largest amount of pirated music can still be found at marketplaces situated along the Polish-German border, mostly smuggled from the East. Forensic examination of pirate products seized/purchased in Poland in 2006-2007 conducted by IFPI Secretariat indicates that Russian optical disc plants are the main source for finished industrially manufactured product. Since the closure of the Warsaw Stadium, ZPAV so far has not observed the emergence of any similar large centers of pirate distribution, but rather a multitude of smaller distribution points in various parts of the country. The estimated piracy level for U.S. music repertoire is 36%, and the estimated trade losses due to physical piracy for 2007 are \$28 million. These estimates do not include losses inflicted by digital piracy. The industry believes the high levels of music piracy in Poland continue because of the following issues: (1) inefficiency of law enforcement agencies in recognizing and prosecuting organized crime activities of pirate distribution both in the country and abroad; (2) lengthy delays in bringing and completing copyright cases, court requests for submission of additional evidence even in the simplest copyright cases; (3) lack of consistent actions and

severe penalties against repetitive copyright infringers which gives them a feeling of impunity; and (4) lack of efficient enforcement at the borders to curb the flow of pirate products, especially at the eastern and northern borders of Poland.

Entertainment software piracy: The Entertainment Software Association (ESA) reports that the pirate market now primarily consists of domestically burned pirated optical disc goods, available largely at open air markets and through street vendors. While the volume of counterfeit *Nintendo* products sold at the retail level has remained the same, retail sales of mod chips and game copiers have increased. Internet piracy continues to rise, and in 2007, a member company's monitoring of P2P networks (specifically the BitTorrent and eDonkey protocols) for several key game titles indicated that Poland has the second highest volume of P2P downloads in the Central Eastern European region (Hungary's rate is higher). Poland typically accounted for about 2% of global downloads of the monitored game titles (for example, one publisher monitored nearly 21,000 downloads of a top game title in Poland within eight (8) weeks of its launch).

Audiovisual piracy: Internet piracy is the motion picture industry's top priority, followed by piracy at markets and bazaars along the Polish-German border and in some large cities (such as Warsaw, Krakow and Poznan). According to the Motion Picture Association (MPA), also of concern is the illegal exchange of movie files on P2P systems at university campuses and the merging of films and Polish subtitles downloaded from the Internet which are then burned on DVD-Rs and sold at local markets. The local burning problem has increased while the import of pirate pressed discs has decreased as is evidenced by the seizures (roughly 50% pressed / 50% burned last year but has now shifted to 25%/75%). Although there is no evidence to date of any MPA member companies' movies having been camcordered in Polish theatres, the number of camcording incidents of Polish movies is on the increase. For example, the films "Ryś," "Testosteron," "Dlaczego nie," and "Świadek Koronny" were all theatrically released in the first quarter of 2007, and sold at local bazaars and available on Polish Internet sites a mere few days after their theatrical release. Also, another local hit ("Katin") was pirated in the post-production process and appeared on the Internet in early November 2007, before its theatrical release. One major studio closed its home entertainment office in Poland because of difficult market conditions, including piracy.

Business software piracy: BSA reports that piracy levels in Poland remain relatively high. One of the largest piracy and enforcement challenges faced by BSA and its members in Poland continues to be the unauthorized copying and use of business applications software within legitimate businesses (corporate end-user piracy). It seems, however, that distribution via Internet (including P2P and auctions) is becoming a bigger problem every year. At the retail level, numerous flea markets still sell pirated software. Estimated 2007 losses due to business software piracy in Poland were \$337 million, with the piracy level at 57%. BSA predominantly uses criminal enforcement and relies on good police cooperation to carry out raids. Additionally, BSA supports and promotes initiatives aimed at the implementation of voluntary auditing procedures to be applied by corporate end-users. According to a 2008 report issued by BSA-IDC, the information technology sector's contribution to the Polish economy could be even bigger if Poland's PC software piracy rate were lowered by 10 percentage points over the next four years. This would create an additional 1,885 jobs, \$1.1 billion in local industry revenues and \$110 million in additional tax revenues for federal, regional, and local governments.⁵

Book and journal piracy: The publishing industry reports steady levels of illegal photocopying of academic texts and journals in and around universities. Industry representatives report that they are losing a significant portion of their market to this type of photocopying, which harms producers of both English language and Polish language materials. The Government of Poland should work with university administrations and lecturers to ensure that proper measures are taken to cultivate a climate of respect for copyright on university campuses.

⁵ The Economic Benefits of Reducing PC Software Piracy, commissioned by BSA and conducted independently by International Data Corporation (IDC), released January 22, 2008, looks at the bottom-line economic benefits of reducing piracy in 42 countries that together account for more than 90 percent of global IT spending in 2007. It is available online at <http://www.bsa.org/idcstudy>.

COPYRIGHT ENFORCEMENT IN POLAND

The local copyright-based industries continue to work well together to ensure that the government gives copyright law and enforcement the necessary attention. In addition, these groups participate in the Governmental Group on copyright infringement, invited by the Minister of Culture to take part in the Group's working sessions as special experts. In addition, a team of police officers, court experts and anti-piracy coalition's representatives prepared a methodology for conducting investigations into Internet copyright infringement cases. On March 27, 2007, the Governmental Group approved this project, and since October 1, 2007, the methodology for handling Internet copyright infringements has been available for authorized police officers and prosecutors throughout Poland.

Lack of governmental will to fight piracy: The activities of the Governmental Group significantly slowed down in the aftermath of the 2005 elections and practically stopped in mid-2007, pending upcoming elections. The copyright industries are hopeful that the new Government will be more open to meeting with private sector representatives of the copyright industries. The Governmental Group should resume its activities in early 2008, under the leadership of the recently appointed Ministry of Culture.

Police actions: The industry groups continue to report good cooperation with police authorities.

The recording industry (ZPAV) reports that the police conducted many well-coordinated raids in 2007. In most cases, ZPAV assists the police prior to raids and during the aftermath, when expert product verification is required. The police conducted numerous raids throughout the country against major file-sharers in P2P networks. Law enforcement regularly contact ZPAV if they have doubts about legitimacy of seized products. According to ZPAV's statistics, in 2007, in 306 of the 1,122 criminal cases that were instigated/launched, the police did so after receiving a complaint from ZPAV. In 749 of these 1,122 cases, the police did so on their own initiative, and the remaining 66 cases were instigated by Customs as well as one by the border police. One of the primary enforcement problems for the recording industry is lack of efficient enforcement at the eastern and northern borders to curb the flow of pirate products from Russia, Belarus and Ukraine. Local regulations resulting from the EU Customs Regulation 1383/03 simply are not applied in practice. ZPAV has often discussed this issue at the meetings of the Intergovernmental Group for Counteracting Copyright Infringements. The other ongoing and still very serious enforcement problems are the prosecutorial bottlenecks and burdensome evidence requests by courts.

The audiovisual industry also has a good relationship with law enforcement and numerous raids were run in 2007. For the first 11 months of 2007, FOTA (the local motion picture group) assisted in 920 investigations that resulted in 917 police raids and 907 criminal cases. The raids resulted in the seizure of 38,000 DVDs, 132,000 DVD-Rs and CD-Rs, and 900 computers. Most of the seized discs (both pressed and burned) contained between four and eight movies. The police are taking *ex officio* actions, but only if there is organized crime involvement or if the pirate is a repeat offender aiming to make a profit. A particularly successful operation in June 2007 targeted a small organized criminal group that was the main pirate supplier of pirate discs to the Wolumen electronic market. The Economic Crime Division of the Warsaw-Zoliborz Regional Police Unit, with the assistance of FOTA, conducted simultaneous raids against six private apartments spread over three districts of the capital city of Warsaw. The raids resulted in the seizure of 8 computers, 7 printers, 14 DVD burners, more than 4,500 pirate DVD-Rs and 28,000 zlotys (~US\$ 10,000). The gang's four members (three Polish citizens and one national from Georgia) was well organized, with two of its members in charge of downloading the movies from the Internet and burning them on DVD-Rs, and the other two organizing the pirate trade.

BSA notes that in 2006 the Polish police remained very active in investigating cases of software piracy and in conducting *ex officio* raids (the Polish Criminal Code does provides *ex officio* authority for software piracy crimes).

Entertainment software publisher relationships with law enforcement authorities continue to be positive with generally high levels of cooperation. Police actively initiate actions involving entertainment software products, though in 2007, focus appeared directed primarily at games on optical disc format rather than all industry products. An ESA member company reports that hundreds of cases involving its products

were initiated in 2007, though most involved retailers with typically small quantities of burned product (between 1-2000 burned copies). Enforcement authorities still generally require a industry right holders to file a motion to pursue charges after the seizures. Given the number of cases, this is both an expensive and time consuming burden.

Internet piracy enforcement: The industries report that cooperation with criminal authorities on Internet cases was very good in 2007. The police continue to investigate instances of Internet piracy and look for copyright infringers at their own discretion -- this is quite a positive development. Although activities conducted by the police to address Internet piracy are praiseworthy, only a few units have the necessary resources and expertise to undertake such Internet actions.

The Polish music industry joined the international campaign against illegal P2P file-sharing in October 2006. Polish police, often assisted by ZPAV representatives, conducted raids in various regions of Poland. Below details of the most important actions in 2007:

8 January 2007: Police officers from Internet crime department of the Municipal Police in Koszalin detained two residents who had illegal Microsoft commercial software installed on 4 computers. Both individuals were the operators of an FTP server connected to the network of a residential complex. Illegally reproduced music, films, computer games and software were made available on the server. About 70 users had access to the network which operated since August 2006. Police officers secured one computer with two hard disk drives, a laptop and 7 additional hard drives. The contents of secured equipment were to be examined by IT experts.

12 January 2007: Officers from the economic crime police in Koszalin searched 12 apartments during an action against P2P file-sharers. 16 hard disk drives with a total capacity of 1.3 terabytes were seized.

5 February 2007: Police officers in Katowice working with officers in Myslowice seized two FTP servers with a total capacity of 480 GB and a computer with hard disc drive of 80 GB during a search at the office of a local Internet access provider. The computer with installed P2P software was used to download and distribute copyrighted content, including music, outside the internal structure of the network; the FTP servers were used to distribute downloaded files among customers of the internal network.

18 February 2007: Police officers from the Regional Police Headquarters in Lublin carried out raids in Pulawy and Lublin against major file-sharers in P2P networks. The file-sharers used DC++ software and two local hubs distributing music and films. The police raided 29 flats and secured 38 computers, 10 hard disc drives and over 2,000 CD-Rs and DVD-Rs.

14 March 2007: Police officers from the economic crime department of the Regional Police Headquarters in Opole, in co-operation with officers in Głogówek, raided four apartments where suspects disseminated music and films using P2P services. The suspects made available over 12,500 music files. The police secured computer equipment, DVD-Rs and CD-Rs with copyright protected content as well as illegal satellite television cards and decoders. The suspects face a penalty of up to 3 years' imprisonment.

22 March 2007: Police officers from the economic crime department of the Regional Police Headquarters in Lodz, in co-operation with the film and recording industries, detained a 48-year old resident of Pabianice who downloaded films from the Internet and offered them for sale. The suspect was involved in this activity for two years and had a professional website with a large repertoire. He sold hundreds of discs a month and turned his activity into a regular source of income. The police secured 5 computers and 1,500 discs, as well as the individual's car. The man will be charged with copyright infringement and will face a penalty of 5 years' imprisonment.

27 April 2007: Police officers from the economic crime department of the Regional Police Headquarters in Kielce detained six individuals who shared music, films and computer programs over a computer network. Police officers secured five computers, six hard disc drives and almost 500 CD-Rs and DVDs. The suspects face a penalty of up to 5 years' imprisonment.

23 May 2007: Police officers from the economic crime department in Poznan detained six students of one of the city's universities. They face charges of unlawful dissemination of music, software and computer games on the Internet, using an internal computer network and P2P software. As a result of the raid, hard disc drives, CDs and DVDs with over 2 TB of data were seized. During one week, about 1,400 users shared files. At least 4 persons directly conducted pirate activity – these were the server's administrators. The other two individuals downloaded files from the Internet for the purposes of creating a 'pirate library.' Detained students face a penalty of up to 5 years' imprisonment. .

31 May 2007: A company providing Internet services in Lublin illegally distributed copyright protected content for profit. Police officers from the economic crime department of the Regional Police in Lublin raided the company's premises and private apartments of its owners. They seized 1,500 CD-Rs and DVD-Rs, financial documentation, 6 hard disc drives, two computers and a laptop. The owners uploaded music videos on a U.S. server. In order to download the file, one had to send a paid SMS (Short Message Service, used in text messaging) and obtain a password in return. Initial investigation showed that about 2,000 people made a payment and downloaded copyright-protected works. Charges of illegal distribution of copyrighted content will be laid against two 27-year-olds who face a penalty of up to 5 years' imprisonment.

1 June 2007: Police officers from Sosnowiec, in co-operation with officers from the economic crime department in Katowice, detained a suspect who offered illegally copied computer software, films, music and computer games. His offer, presented at a website, contained 16,000 items. During a search in his apartment, the police found over 11,000 discs with copyright-protected content and seized computer equipment. The suspect faces a penalty of up to 5 years' imprisonment.

23 August 2007: Police officers in Wroclaw carried out an action against Internet piracy in which 40 computers used to disseminate copyright protected content as well as a server, making file-sharing possible, were seized. Secured equipment contained over 100,000 music files, 2,500 films and around 250 computer software. The value of losses incurred by the producers is estimated at around 3.5 million zlotys.

The audiovisual industry also reports success in certain Internet actions, including some conducted with the recording industry:

8 November 2007--police shut down Polish TopSite: The Economic Crime Division of the Wroclaw Police shut down a Polish TopSite named "HPN" during raids at the Wroclaw Technical University and at the site administrator's home. The operation followed a five-week long joint investigation by both the recording and film industries along with the law enforcement authorities, and was organized in agreement with the University's authorities. The raids resulted in the seizure of six high-speed servers (known as a top-site) with 37 hard drives (containing 12 terabytes of disk space). The site was administered by a 29-year-old individual who was also the University's network administrator. He was arrested together with an accomplice and both were detained for questioning.

16 May 2007--removal of largest site offering Polish Sub-Titles (Napisy.org): Police officers from the Economic Crime units in Katowice, Cracow, Szczecin, Bialystok and Olsztyn, accompanied by film industry investigators, raided a group responsible for distributing unauthorized translations of film dialogue over the Internet through a website called www.napisy.org.pl which operated via a server located in Germany. The translations were used as the source of subtitles to localize pirate copies of movies available on the Internet. Polish subtitles are a big issue because the official Polish translations often do not become available for some time after the release of major films. It is estimated that the site was regularly visited by about 700,000 Internet users and it contained dialogue lists for thousands of films. The uploading of a pirate copy of a latest release was invariably followed

by the posting of a Polish language dialogue list, enabling a localized version with subtitles to be created. The investigation, conducted by the Economic Crime Headquarters in Warsaw, was coordinated with the German film industry (GVU) and police in Germany who seized materials from the server and blocked access to the Internet site. The group was very active and investigation of the seized equipment established that four members were responsible for over 8,500 translated dialogue lists which attracted over 12 million downloads. This police operation generated a huge amount of media interest nationally and also attracted the wrath of the local hacker community who attempted a denial of service attack on the police server in revenge.

17 April 2007--actions against administrators and operators of infringing P2P systems in academic campuses (Koszalin, Poznań, Wrocław): Sixty police officers, accompanied by FOTA and ZPAV personnel, conducted an important raid on the campus of the 18,500-student Koszalin University of Technology where students were sharing large quantities of unauthorized copyrighted content via the university network. The students were using the DC++ file-sharing protocol. Police officers searched 40 rooms in three dormitories in which they seized 16 laptops, 61 hard drives and the main PC running the DC++ hub software. A total of 35 terabytes of movies, music and software was reportedly available to download from the network. The three administrators of the hub, all students at the university, were taken into custody. This operation was the first police action ever conducted in the dormitories of a university campus as police access on university campuses is somewhat limited by Polish laws.

Weak border enforcement: The recording, business software, and film industries all report that the Eastern border remains a problem, despite legislative reforms to the customs law as part of the EU accession process. Customs administration remains inadequate at border checks. For example, in 2007, only a very few border seizures of pirate sound recordings were known to have taken place.

There were, however, two recent successful actions taken at the German border. On October 3, 2007, the Police forces in Gorzow, together with officers of the Border Guards, raided the largest ever pirate lab found in Poland. The raid followed a four-month long investigation by the recording industry and the law enforcement authorities, and resulted in the seizure of 30 CD/DVD burners, 10 printers and 8,000 discs with copyrighted content (movies and interactive games). The pirate lab was located in a private apartment located in the Zary county (south-Western part of Poland, near the border with Germany) and had been in operation for about a year and a half. The pirate discs were destined to be sold at local markets in the city of Leknica that lies on the river "Lusatian Neisse" which forms the border between Poland and Germany. Approximately 90% of the discs were German language versions dedicated to German consumers visiting open air markets in Polish cities near the German border. The rest of the discs were in Russian and were destined for small local Russian speaking communities. The sources of the movies were primarily Internet downloads as well as some Russian made pirate discs.

In January 2008, Polish border police arrested eight people involved in the smuggling and manufacture of pirate CDs and DVDs. During the bust, the border police from the Klodzko region seized 66,000 CDs, DVDs, CD-Rs, and DVD-Rs, 108,000 inlay cards, as well as illegal firearms, contraband cigarettes and tobacco, plus cash (~ US\$72,000). It appears that most of the illegal music and films were produced in Russia and Ukraine and some were locally manufactured; all were destined for the German market. Four of the eight suspects were remanded to custody and the others released. The investigation continues.

Criminal prosecutions: Lengthy delays in bringing and completing copyright cases make it difficult to see the effects of anti-piracy activities. These delays only fuel the notion of impunity among repeat copyright infringers. Continuous exchange of personnel in law enforcement agencies has also a negative impact on enforcement efforts.

BSA reports that in 2007, the prosecutor in Torun decided to issue almost 2,000 prosecution motions against individuals who bought pirated software through an auction site. BSA began a cooperative relationship with the Allegro auction site (the biggest auction site in Poland), and the experience thus far has been a very positive one.

ESA member companies report that there has been an improvement in the prosecutorial process. In the 2007 report, it was noted that some courts required a publisher's local counsel to appear before the court, even if merely to confirm information already provided to the police through a sworn statement at the preliminary investigation stage. However, in recent months, for the cases in which ESA members have been involved, the sworn statement appended to case file has been sufficient.

Expert reports add a bureaucratic layer: Unchanged in 2007, the recording, software, and motion picture industries continue to report the problem of Polish courts appointing independent experts to secure proof of ownership even in the simplest copyright cases, where neither the defendant nor his attorney calls for submission of additional evidence.

Very slow judicial system: In the large urban centers, where most piracy cases are filed, it can take between three to four years before a case is concluded. One solution is to increase the number of judges (rather than prosecutors) and improve the quality of information technology in order to heighten productivity in the judicial process. Admittedly, difficult economic conditions may affect the ability to achieve this, but it is a solution, nonetheless. There is also a rather lengthy preliminary investigation stage (prior to the actual court proceeding) which can last between one to five years.

Additionally, Polish courts are not specialized enough and the judges are changing and leaving their positions too often. BSA and the recording industry have often expressed the opinion that specialized IP courts should be established. The film industry also believes that it might be more practical to appoint specialized judges. The bottom line is that more judges with IPR competences are needed in the courts.

Lack of deterrent sentencing. Industry is not aware of any major sentences issued in 2007. Although the majority of cases brought to court conclude with guilty verdicts, sentences have been insufficient to provide a reasonable level of deterrence. The average fine has not increased over time (usually about US\$50 to US\$150) and imprisonment has not generally been used as a deterrent measure (in some cases, sentences are simply suspended). Penalties in the Copyright Law are strong in relation to local standards, providing fines of up to US\$175,000 and jail sentences of up to five years. The frustrating obstacles of cases languishing in the courts and disappointing results may cause the police to become disenchanted with working with anti-piracy organizations due to the limited chances of obtaining a satisfactory result. Furthermore, absent deterrence, pirates will simply continue on with the business of infringement, confident that any penalty imposed will be minimal. The audiovisual industry reports that it has over 4,500 cases pending in the court system, but closed only about 150 cases in 2007. Finally, the judicial practice of calling experts in obvious cases is still a matter of concern; this practice causes higher costs for the courts and delays prosecutions. ZPAV reports 5,632 criminal cases were pending in 2006.

Civil enforcement in Internet cases: Rightsholders using civil processes are unable to obtain the identity of a suspected infringer from the ISP upon communication to the ISP of an IP address; however, this information may be obtained from public criminal authorities. BSA specifically recommends that the unauthorized downloading of copyrighted files onto personal computers should be clearly added to Article 118 of the copyright law.

Civil actions in software cases: BSA has not conducted any civil actions in Poland for the past several years. Instead, BSA has relied on criminal enforcement to address its piracy problems in Poland mostly because of effective and efficient police cooperation. Procedural delays in obtaining civil orders in the past have been so great that the target was able to legalize its software shortly before raids were conducted. It can take up to three years for a civil copyright infringement case to be closed.

COPYRIGHT AND RELATED LEGAL REFORM IN POLAND

Copyright and Neighboring Rights Act of 1994 (as amended in 2004): Amendments to the 1994 Polish Law on Copyright and Neighboring Rights to implement certain aspects of the WIPO Internet Treaties and of the EU Copyright Directive were published on April 30, 2004. Those amendments contained several improvements, including provisions regarding the regulation of optical disc production (issued in June 2004).

However, a number of troubling issues raised by the copyright industries were not addressed in the 2004 amendments.⁶ In addition, the 2004 amendments failed to fully comply with the WIPO Performances & Phonograms Treaty (WPPT) and to the WIPO Copyright Treaty (WCT) in several ways: (a) inadequate legal protection of technological measures (the language suggests that circumvention for private use may be legal); (b) inadequate protection of rights management information, and (c) a number of new exceptions, including the private copy exception, are too broad and there is no express implementation of the three-step test. Highlighted below are several concerns:

- Article 23 contains an overly broad definition of “private” as it includes persons having a “social relationship”. This approach is not in line with the 2001 Copyright Directive and would not be compatible with the three step test (enshrined in Article 5.5 of the Directive, in the WIPO Treaty and referred to in Article 35 of the Polish Copyright Act). Second, Article 23 should expressly include the condition that the source of the work (to be “privately used”) must be legal. The Polish law should clarify that the private use defense cannot be claimed if the source of the work is illegal (for example a film is illegally camcordered from a cinema, then uploaded to the Internet and subsequently downloaded by others). Doing otherwise would not be compatible with the three-step test. It is also very important that the scope of exceptions and limitations of exclusive rights, including the scope of private use, be defined in accordance with the above international treaties (“three-step test”). However, Article 35 of the Copyright Act lacks one of the elements of this three step test, namely language referring to “special cases.” The industries remain concerned about any effort to regulate the relationship between the private copying exception, technological protection measures, and interoperability; this is best left to the marketplace.
- Article 117 of the Copyright Act which refers to “criminal liability” is also a source of concern. Section 117 states that “*Whoever, without authorization or against its conditions, fixes or reproduces another person’s work ... for the purpose of dissemination*” shall be subject to criminal sanctions. In other words, if the work has been “fixed, reproduced...” without any authorization, this violation can only be subject to criminal remedies if the infringement was made “for the purpose of dissemination.” This condition is mostly problematic in terms of copyright enforcement as it seems to exclude from criminal remedies a wide range of activities which are very harmful to rights holders. The application of criminal law to copyright infringements is important in terms of procedure; it allows for cooperation/investigation with the police. All copyright infringements should -- at least “on the books” -- be subject to this section. Judges will then use their discretionary powers to decide upon the appropriate sanctions/remedies (depending on the circumstances of the case and the seriousness of the infringement). This provision, enacted before online piracy existed, differentiates between on-line and off-line piracy, leaving a very important aspect of on-line copyright infringement immune from criminal sanctions. This approach results in a conflict with the basic principle of equality before the law.
- Article 70 involves a remuneration paid by users of an audiovisual work to a collecting society. It is highly detrimental to motion picture companies, making it more difficult for foreign works to resist collective management of author/performer remuneration rights. The Copyright Law as amended in 2004 includes several amendments related to collecting societies, and the copyright-based industries have been concerned that additional amendments might be proffered. It is difficult to say when legislation affecting this measure might be drafted and considered by the parliament.

Implementation of the EU Enforcement Directive: The Polish Government completed work to amend both its Copyright Act and the Civil Procedure Code in order to implement the EU Enforcement Directive. Poland implemented the Enforcement Directive in May 2007. In connection with the Enforcement Directive implementation, there were discussions to lower the standard of protection in civil proceedings, but such decrease in standards did not take place. On a positive note, Poland is one of the few EU Member States providing for pre-established damages of at least double or (in case of intentional

⁶ Other problems (issues unaddressed/unresolved) in the 2004 Copyright Law amendments include: (a) the need for broader exclusive rights for producers of phonograms and for performers; (b) the need to strengthen enforcement provisions, and using the *ex officio* powers of authorities in copyright infringement actions; improving the scope of injunctive relief; enhancing criminal liability; providing presumptions of ownership; and affording stronger criminal penalties; (c) the narrowing of an overly broad exhaustion rule providing that the imports of copyrighted products that were put into circulation in any country with which Poland has free-trade zone agreements is not a copyright infringement (this conflicts with exhaustion in the EU Copyright Directive and the EU Rental and Lending Directive)

infringement) triple the amount of royalties or fees which would have been due if the infringer had requested authorization to use the intellectual property right in question.

Anti-camcording legislation needed Anti-camcording legislation should be adopted in Poland to require jail sentences, preferably of up to a year or longer for the first offense, and a higher penalty for any subsequent offense. A single illegal recording of a first-run motion picture spread through the Internet and on street corners can destroy a film's ability to recoup the investment made in its production. Such legislation is imperative to curb the illicit camcording in Poland of motion pictures and would significantly benefit the Polish film industry as their work is frequently stolen from theaters. At present, there is no legislative vehicle for camcording legislation, despite conversations with the industry and the Ministry of Culture on this topic.

Optical disc decree and the need for criminal sanctions: Although the current optical disc decree is an adequate legal instrument for regulating the production of optical discs, the introduction of provisions on sanctions should be considered to ensure optical disc plants' compliance with its provisions. For several years now, the copyright industries have recommended that criminal sanctions be added to the decree, given the widespread nature of pirate optical discs in the Polish market. In fact, the industry submitted a recommendation to add criminal sanctions for the government national IP strategy for 2005, but it was not included. Industry is not aware of any official anti-piracy plan issued by the government for 2008. However, the anti-piracy coalition has repeatedly recommended adding criminal sanctions to the OD decree but without success.

Police *ex officio* authority: The Criminal Code contains *ex officio* authority, giving the Polish police the power to initiate investigations on their own motion, for all cases involving the infringement of copyright and neighboring rights. The problem is that these powers should be used more often and more regularly; *ex officio* actions should not be limited to just larger cases.

Withdrawal of Poland's reservation to the Rome Convention: Another year has passed and the Polish Government has still failed to withdraw its reservation to Article 12 of the Rome Convention on the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (1961), permitting it to discriminate against U.S. and other foreign nationals with respect to broadcasting rights. Poland also should be encouraged to give performing artists and phonogram producers an exclusive right instead of merely a claim for remuneration. Many of the primary forms of exploitation of sound recordings take place via the communication of signals rather than the delivery of physical product.

MARKET ACCESS ISSUES IN POLAND

Broadcast quotas: According to the 1992 Broadcasting Act, as amended in 2000 and July 2004, broadcasters must dedicate at least 50% of broadcasting time to European productions and 10% of broadcasting time to European independent productions. Furthermore, Polish broadcasters are subject to an obligation to dedicate at least 33% of their quarterly broadcasting time to programming produced originally in the Polish language. This provision, which goes beyond what is prescribed in the EU's Television without Frontiers Directive, has a negative effect on market access. However, lower percentages to be determined by the National Council apply to broadcasters during the first year of transmission of their program service, thematic program services for which the number of available programs is insufficient; and program services transmitted solely via satellite or cable which in their entirety are available against payment of a fee.

Discriminatory tax treatment of U.S. audiovisual works: After years of successive drafts, the Polish government passed a new Film Law in June 2005 which includes new taxes on box-office and on video/DVD sales to finance subsidies for Polish and European films. These taxes, besides having a detrimental effect on the Polish audiovisual market, would unfairly burden MPA member companies with the cost of financing the government's cultural policy. Further, the wording of the text appears to introduce a double taxation burden on distributors, including our members.

Foreign ownership restrictions: Article 35 of the 1992 Radio and Television Law, restricts foreign ownership in a broadcasting company to 49%. MPA continues to promote the reduction and elimination of

such restrictions in order to further stimulate the foreign investment necessary for the continued development of the television industry.

IPR TRAININGS AND PUBLIC AWARENESS

The copyright industries continue to participate in seminars for law enforcement agencies. Representatives of ZPAV anti-piracy group regularly organize and conduct trainings/seminars for customs, police and border guard officers. Such seminars focus on new methods of pirate activity and disclosed smuggling routes. From January 2006 through October 2007, ZPAV representatives participated as experts in the anti-piracy project financed by the European Commission and the Patent Office of Denmark; the purpose of this project was to train police, customs and border guard officers from all regions of Poland. ZPAV co-organizes and participates in law enforcement conferences on the protection of intellectual property. BSA also participates regularly in police trainings organized by police schools in Szczytno and Słupsk (at least twice a year).

ZPAV, FOTA and BSA launched a new stage of an information campaign to raise awareness of intellectual property rights infringements on computer networks. The campaign aims to inform the management of companies and educational institutions about the threats related to distribution of unauthorized music, films and computer software on their systems. In November 2007, letters were sent to 496 largest companies and 706 academic institutions in Poland with software tools to audit IT resources and Digital File Check, a program helping to find and uninstall P2P software. At the same time, ZPAV is stepping up its educational activities on Internet music among children, young people and adults. The aim is to raise public awareness of intellectual property protection. Joining with the Polish Anti-piracy Coalition, ZPAV has launched the second stage of the 'Be original' education program, which includes meeting with students, teachers and parents. The meetings present the legal and security risks of using the Internet. A special presentation called "The Internet – facts and risks" is run by Hirek Wrona, a popular music journalist, in schools all over Poland. Vivid reaction of young people to such issues shows that direct discussions are necessary and play a significant role in raising their awareness on how to stay legal and safe on the Internet.

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2008 SPECIAL 301 REPORT

ROMANIA

Special 301 Recommendation: IIPA recommends that Romania stay on the Watch List in 2008.

EXECUTIVE SUMMARY

Piracy continued to be a serious problem in Romania during 2007, with the problems of Internet piracy (including peer-to-peer file-sharing and mobile business-to-consumer (B2C) piracy) growing to become the most serious threat to industry, while traditional optical disc piracy (including burning) declined somewhat. While unlicensed business application programs and hard disk loading remain challenges for the business software industry, the Romanian government continued to take efforts to legalize software within its offices. Industry cooperation with police authorities during 2007 remained generally good, but enforcement tends to break down at the prosecutorial level for most sectors, although the business software industry reports improvement on this score. Many cases involving recording piracy and entertainment software piracy were closed by prosecutors in 2007 based on a perceived "lack of social harm." The recording industry has seen this prosecutorial phenomenon with its physical piracy cases, and is concerned that this disturbing attitude has crossed over to Internet cases involving massive uploading of illegal music files. In addition, administrative oversight by the Romanian Copyright Office (ORDA) continues to work in ways that simply do not foster effective enforcement. For example, ORDA still supervises the objectionable hologram system, and in criminal investigations, causes substantial delays by taking many months to deliver the technical reports on the pirated materials to the police. In 2007, ORDA hired additional personnel, improving response time in some cases, but not to the extent necessary for expeditious enforcement. Discussions have been held over the past two years regarding possible upcoming copyright reform efforts, and rightsholders request that their input and expertise be heard in order to close important gaps in the current legislation.

PRIORITY ACTIONS IN 2008

Legislation

- Closely monitor any proposed legislation or Emergency Ordinance which will make further amendments to the copyright law in 2008.
- Avoid any changes to the Copyright Law and other relevant legislation that will weaken the enforcement tools available to right holders.
- Repeal ORDA's exclusive mandate for issuing expert reports in copyright infringement cases and the related obligation to pay fees for ORDA's expertise.
- Abolish the mandatory ORDA-regulated hologram decree, including the related phonogram and videogram registration procedure.
- Solve the issue related to the need to get a computer search warrant from a judge for searching computers, even in raids targeting companies. Amend Law No. 161 of 2003 to provide that the mere verification of the existence of software installed on the computers should not require such a search warrant, or provide clarification on this issue in an amendment to the Copyright Law adopted by the Emergency Ordinance or by Law, mentioned above.

Enforcement

- Have senior levels of Romanian Government officials develop strong political will and express a commitment to eradicate copyright piracy and instruct all enforcement authorities take sustained and concrete actions to support that commitment in-practice.
- Get prosecutors to give high priority to the prosecution of Internet and mobile copyright piracy cases.
- In general, make sure that the appointed special IPR prosecutors operate in a transparent manner, retain close contact with rightholders representatives and provide results by actively and swiftly initiating criminal infringement cases and forwarding them to courts by passing indictments rather than merely dropping the cases for lack of social harm or because the infringement was not properly backed-up by evidence; coordination and instructions should be received by the police officers prior to the raids so that weak files be avoided.
- Rapidly appoint a new Head of the IPR Department within the General Police Inspectorate, a post which is vacant at present, in order to avoid a vacuum within the system.
- Have the police, including the anti-organized crime directorate, continue the positive trend of undertaking regular and consistent anti-piracy enforcement actions. The police have been doing a good job. Now they should increasingly engage and tackle the root of the problem: the suppliers of pirate discs to the small-scale retail and street vendors and, in the case of business software, the companies distributing unlicensed software pre-installed on PCs. At the same time, authorities should go after big end-users of unlicensed software; otherwise, the message on the market remains the intangibility of big targets and focus on small businesses.
- Make sure that the appointed special IPR prosecutors continue providing enhanced results by actively and swiftly initiating criminal infringement cases and forwarding them to courts by passing indictments rather than merely dropping the cases for lack of social harm or because the infringement was not completely backed-up by evidence; coordination and instructions should be received by the police officers prior to the raids so that bringing weak cases is avoided. Instruct prosecutors to stop dismissing copyright cases. This undermines the motivation of the police to take actions. Prosecutors should expeditiously pursue criminal cases, even small-scale infringement cases, to the fullest extent of the law, including requesting that the courts issue deterrent level penalties.
- Improve border enforcement by having customs officials actually use their *ex officio* authority to make inspections and seizures and encourage continued consultations and coordination with right holders' organizations.
- Establish a system at the borders to track the importation of blank optical media products. This should involve the coordination between enforcement authorities (police, customs).
- Establish specialized independent IPR courts under the Appeals Court to alleviate current problems in the civil courts, which are overburdened to handle IPR cases. Establishing specialized courts or at least panels with criminal jurisdiction should also be considered.
- Impose deterrent, non-suspended sentences (in criminal courts) and fines (in both criminal and administrative courts, or in software cases by the raiding agents) and stop dismissing cases involving repeat offenders.

ROMANIA
Estimated Trade Losses Due to Copyright Piracy
(in millions of U.S. dollars)
and Levels of Piracy: 2003-2007¹

INDUSTRY	2007		2006		2005		2004		2003	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Sound Recordings & Musical Compositions²	15.0	65%	12.0	60%	17.0	80%	18.0	78%	18.0	80%
Business Software³	80.0	70%	63.0	69%	61.0	72%	32.0	74%	28.0	73%
Entertainment Software⁴	NA	89%	NA	77%	NA	75%	NA	65%	NA	NA
Motion Pictures⁵	NA	NA	NA	NA	12.0	NA	8.0	55%	8.0	35%
Books	NA	NA	NA	NA	2.0	NA	2.0	NA	2.0	NA
TOTALS	95.0		75.0		92.0		60.0		56.0	

COPYRIGHT PIRACY IN ROMANIA

Internet piracy: Trade in pirated physical product, advertised through Internet websites, has stagnated as opposed to last years' growth. However, the remaining pirates avoid advertising directly, they do not accept newcomers unless recommended by existing trusted clients. They discretely advertise an e-mail address and usually want to meet the client in person. Broadband penetration grew in 2007, offering cheaper and faster ways to connect to the Internet, and the pirate peer-to-peer (P2P) file-sharing phenomenon grew accordingly.

Internet cafés continue to allow customers to download and burn copyrighted materials—music, entertainment software, films and business software. Large amounts of video files are shared over the networks, mainly in Bucharest and other several important cities like Galati, Timisoara, Cluj, Ploiesti, Iasi, Suceava. Currently there are about 7.0 million Internet users in Romania, reflecting about 31% of the country's population, 25% of which has broadband connections (according to internetworldstats.com). Reportedly, the Romanian Internet Service Providers (ISPs) are rather indifferent to this problem; they sometimes use their download speed for music, games and movies using as part of their advertisements. Even when the police request their cooperation in the fight against on-line piracy, local reports indicate that the ISPs will do whatever it takes not to cooperate, making evasive maneuvers and counting on prosecutors' lack of technical knowledge and/or interest.

The entertainment software industry reports that some of its member companies have seen an increase in unlawful P2P downloading of its products in the country. Results from monitoring the downloads of several key titles on the BitTorrent and eDonkey protocols in 2007 indicate that Romania accounts for approximately 2% of global downloads on these protocols (i.e., approximately 10,000 downloads in an 8-week period after launch of a top PC game title). The majority of the downloads were on the BitTorrent protocol, eDonkey being less popular in Romania. In early 2007, the recording industry filed a series of criminal cases involving large scale-

¹ The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2007 Special 301 submission at www.iipa.com/pdf/2008spec301methodology.pdf. For information on the history of Romania under Special 301 review, see Appendix D at (<http://www.iipa.com/pdf/2008SPEC301USTRHISTORY.pdf>) and Appendix E at (<http://www.iipa.com/pdf/2008SPEC301HISTORICALSUMMARY.pdf>) of this submission.

² The legitimate market for recorded music in 2007 continued to decline, which was not only due to piracy. Physical piracy dropped mildly, but retained a relative importance against dropping legitimate sales. In addition, Internet and mobile piracy continued to grow and still predominantly affects international repertoire. The figures here cover both physical and digital piracy and take the lower US Dollar value into account.

³ BSA's 2007 statistics are preliminary. They represent the U.S. software publishers' share of software piracy losses in Romania, and follow the methodology compiled in the Fourth Annual BSA and IDC Global Software Piracy Study (May 2007), available at <http://w3.bsa.org/globalstudy/>. These figures cover, in addition to business applications software, computer applications such as operating systems, consumer applications such as PC gaming, personal finance, and reference software. BSA's 2006 piracy statistics were preliminary at the time of IIPA's February 12, 2007 Special 301 filing and were finalized in June 2007 (see <http://www.iipa.com/statistics.html>), as reflected above.

⁴ ESA's reported dollar figures reflect the value of pirate product present in the marketplace as distinguished from definitive industry "losses." The methodology used by the ESA is further described in Appendix B of this report.

⁵ MPAA's trade losses and piracy levels for 2006 and 2007 are not available. MPAA did provide 2005 estimates for a select group of countries, using a new methodology that analyzed both physical/"hard goods" and Internet piracy. Details regarding MPAA's methodology for 2005 and prior years are found in Appendix B of this IIPA submission.

distribution of copyrighted music on peer-to-peer networks in Romania; so far, there has been no progress on these cases.

Local industries continue to report in 2007 that although the copyright law covers both uploading and downloading, there are problems regarding ISP liability and the Criminal Procedure Law. The Criminal Procedure Law requires that a computer search warrant must be issued in order to search a private computer, and such a warrant may be issued only by a judge and only if the criminal investigation is officially initiated. At the same time, the criminal investigation may be commenced only if sufficient evidence exists. As a result, it has been difficult to gather the evidence necessary to commence a criminal investigation before a search warrant can be issued.

Optical media piracy: Optical disc piracy in Romania continued to decline in 2007. There remains, however, widespread CD-R and DVD-R burning which serves as the main sources of physical piracy in Romania. Burning operations are often controlled by organized criminal groups. Pirate discs are sold via Internet sites or press advertisements and then delivered by mail or personally on the streets. About 30% of the pirated CDs and DVDs are coming from Russia through the border with Moldova. Given the massive CD-R/DVD-R burning, establishing a system at the borders to track the importation of blank optical media products is strongly recommended. Local pirate optical disc production at the industrial level is not the primary optical disc problem industries face in Romania. There are two optical disc plants in Romania, having three production lines with an annual estimated capacity of 10.5 million units/year. Blank CD-Rs and DVD-Rs are imported. The plant capacities are roughly the same. Two years ago, the Government issued Ordinance No. 25/2006 (entered into force on March 1, 2006) which obliges plants to use SID Codes, a helpful tool in monitoring OD plant operations. As a result, it remains premature at this time for the industries to suggest that the Romanian Government adopt a comprehensive optical disc regulatory regime.

Business software piracy: The priorities of the Business Software Alliance (BSA) in Romania targets end user piracy and illegal distribution (either in the distribution channel, by hard-disk loading, or by home burned CDs/DVDs). Although the police have taken actions against hard disk loaders, they continue to focus on smaller, not larger, companies suspected of using unlicensed software. Optical disc piracy relates to home-burning and mailing distribution (even more than flea-markets distribution). The number and importance of cases involving OD piracy increased in 2007 (BSA reports seizures in the tens of thousands of pirated ODs seized this year, with two convictions resulting in prison sentences). Internet-based piracy continues to increase, with online advertisements and potential customers submitting orders via e-mail, or it is operated through websites promoting pirated software for downloads. Even if the legislative framework provides for enough tools to address and fight this type of piracy, the enforcement is still at the beginning stages. Finally, BSA appreciates the work of the Government toward taking significant steps to legalize its own software.

Record and music piracy: The recording industry (which is represented by the national trade organization AIMR and collecting society UPFR) reports that the level of Internet piracy in Romania is so high that the music industry is struggling to develop its legitimate on-line services. With respect to physical piracy, very few stores, commercial centers or markets sell pirated music. The operating method of selling pirate products changed and concentrated around illegal burning studios in private apartments. The illegal goods are advertised on Internet or specific closed circuit channels. The street ban appears to be working, as less pirated materials appear on the streets. In the area of recorded music, the digital piracy rate is huge (roughly 100%). UPFR issued a textbook for law enforcement authorities and organized a training seminar in April 2007 for the police officers and the prosecutors from Bucharest working in on IPR cases. There are 3 links in this process: the police officers, the prosecutors and the judges. Certain police officers are starting to understand the issue. Unfortunately, most prosecutors and judges fail to grasp the amplitude and complexities of the digital piracy phenomenon.

The recorded music industry has made substantial investments in protecting its rights locally, including by providing training and assistance to Romanian law enforcement officials and magistrates. However, the fight against on-line piracy can only be successful if the State authorities play their part, which, in Romania, is clearly not the case. Romanian prosecutors all too often dismissed cases of retail piracy on the basis of "lack of social harm" (see discussion in enforcement section, below). An increasing number of cases reach court, and there is as well as an increase in the number of court verdicts. Obstacles to further improvement remain the lack of budget allocated to fighting IP piracy, officers being overburdened with other case files and the entrenched

opinion that piracy is not a serious crime. In terms of statistics, in 2007, 460 criminal files were opened, in 287 of which the recording industry requested damages. 173 files were dropped by prosecutors, 85 criminal files reached the Court and in 31 cases a conviction was handed down (see further discussion below). UPFR also has been working on public awareness spots on radio and television stations.

Entertainment software piracy: The Entertainment Software Association (ESA) reports that piracy rates for its members' products in Romania have not dramatically changed in Romania over the last year. The pirated game software available is predominantly locally burned, with very little replicated product found in the market. Pirated entertainment software products continue to be available on the streets, as well as being advertised on the Internet and in newspapers. The availability of modification chips has also increased, both at retail outlets and through Internet vendors. Internet café piracy remains a serious problem in Romania, although the situation continues to improve because police and right holder enforcement actions continue against unlicensed cafés. With increased broadband availability, Internet piracy via P2P and torrent downloads of videogames is also on the rise.

Audiovisual piracy: The Motion Picture Association (MPA) reports that optical disc piracy is a big problem. Pirate optical discs (DVDs, CD-Rs and DVD-Rs) generally are sold via the Internet or press advertisements and delivered by mail or personally, on the streets. DVD piracy has reached a level of about 80% of total disc sales. The most popular distribution methods are now Internet sites and street markets (there are over 400 regular markets in Romania and 250 other markets open at various times). As ROACT has blocked access to several well known sites offering movies and/or subtitles, the pirates are increasingly seeking hosting by foreign Internet Service Providers (ISPs). Cable piracy outside Bucharest continues to be a problem; many cable systems retransmit satellite television programs intended for Germany, Italy, and other Western European countries, dubbing them into Romanian; some stations also broadcast pirate videos.

COPYRIGHT ENFORCEMENT IN ROMANIA

Although the police have been conducting an increasing number of raids, these too often have been targeted at the "soft" end of pirate operations (i.e. the small operators, street vendors). The police have assigned two officers in each county to deal with IPR cases. Each county should have a specially-assigned prosecutor for IPR. The problem remains that the personnel with IP training — especially with prosecutors — are constantly being shifted to other jobs. Even more importantly, prosecutors have failed to push for deterrent sentences and courts have failed to impose such sentences. Corruption among enforcement officials remains a recurring and severe problem in Romania (and was noted by the EU during Romania's accession process). Moreover, there is minimal prosecution of corruption.

Mixed results on police actions and major problems with moving forward with prosecutions: The copyright sectors report mixed results with bringing criminal actions in Romania in 2007.

On a positive note, BSA reports that enforcement actions involving business software piracy moved well in 2007. The business software industry's relationship with the local enforcement authorities was good and steady. BSA confirms that Romanian officials remain receptive to the industry's needs and objectives in 2007, but there is a concern that the level of attention by Romanian authorities may be dropping a bit, given that there was a lot of attention in 2006 given in the context of Romania's accession to the EU. BSA reports no major bottlenecks apart from this possible lessening of prioritization. Large end-users (companies) and hard-disk loading cases still need to be targeted in 2008. One of the longstanding, unresolved issues is the need to have a computer search warrant issued in order to search computers with a view to identifying the software installed on them; such warrant may be issued only by a judge and only if the criminal investigation is officially initiated. At the same time, the criminal investigation may be initiated only if sufficient evidence exists. In practice, it has proved difficult to gather such evidence necessary for having the criminal investigation initiated.

BSA reports that the authorities took *ex officio* actions but proved open to private industry's referrals. During 2007, there were more than 680 new raids in end user and reseller cases, and a constant number of hard disk loading raids (this being one of the business software industry's priorities). There were two cases of resellers convicted to actual imprisonment for software copyright infringement (both involved optical disc piracy),

and a total number of 61 convictions from January through December 2007. More than 60,000 pirate ODs were seized. Compared to prior years, 2007 did result in more large end user actions, where more personal computers were searched and illegal software amounting to more than US\$50,000 was found on the PCs at the target locations. Unfortunately, BSA reports that there also were a lot of insignificant raids against very small targets that had only one or two computers.

The entertainment software sector reports that some of its members are very active in Romania. ESA reports that the number of raids taken by the enforcement authorities increased substantially in the last year, but the majority of targets were small (i.e., mostly against Internet game rooms and street/Internet vendors). The majority of the piracy cases involved unauthorized use of member company games in Internet cafés and retail sales of burned pirate product, both of which slightly increased in 2007. To this end, ESA member companies supported over 150 criminal cases involving Internet cafés in 2007. Since it is the company's intent to license the café and create legitimate businesses, it does enter into settlements with the café (as is permitted under current law). Nevertheless, the number of café cases that go to court far exceed any settled actions. In addition, in 2007 entertainment software companies also supported approximately 180 criminal retail piracy cases generally involving street retailers and market vendors. There were also a few cases against retailers advertising burned product via the Internet. Local police (the criminal fraud investigation unit and the criminal investigation unit under supervision from the prosecutor) continue to actively initiate cases involving pirated product and the company's relationship with the police remains strong. For the most part, cases involving company software product were initiated independently by police who conduct the investigations, gather the evidence, and organize the raids. However, the police also welcome leads from rights holders, and companies have on occasion referred Internet cafés and website sellers to the police.

The problem remains with prosecution. The entertainment software industry reports that some of its member companies obtained poor results in criminal actions. In sum, one company experienced more cases being dismissed in 2007 than in 2006. In 2006, 58 out of 266 cases reached the court, with 78% dismissed by the prosecutor. In 2007, 28 out of 183 applications involving this company's products reached the Court through December 2007, with 84% dismissed by the prosecutor. The majority of cases were closed based on "lack of social harm," with a few others closed for lack of evidence. One case was dismissed in 2007 by the prosecutor because the Internet café owner purportedly did not have the necessary *mens rea* to be charged with a criminal offense.

The recording industry reports that the longstanding problem of Romanian prosecutors all too often dismissed cases of retail piracy on the basis of "lack of social harm" is now extending into the Internet area. The industry sees this same dismissive attitude in cases of massive uploading of illegal music files on Internet. This unacceptable reaction cannot be blamed on lack of training, as both the private sector and Romania's trading partners (including the EC and the U.S.) have provided ample training and education on these matters to Romania's magistrates and judiciary.

In 2007, UPFR submitted 46 targeted complaints (34 in Bucharest, 6 in Suceava and 6 in Braila) concerning cases of digital and mobile B2C piracy. In 2008, UPFR plans to submit 50 complaints monthly, in particular against users who share at least 100 GB of pirated content, if only to make the authorities aware of the size of this problem.

As examples of this industry's anti-piracy actions in the online environment, in April 2007, the recording industry (led by UPFR) filed 16 criminal complaints involving large scale-distribution of copyrighted music on peer-to-peer networks in Romania. What happened was that UPFR filed 6 complaints on DC++ with the Bucharest Police; these complaints remained unresolved, due to a lack of cooperation from the police. Following increased pressure on the enforcement officials, UPFR together with 5 teams of police officers from Bucharest, filed 10 more complaints. The industry has been working closely with the police to provide the necessary evidence, but so far, almost a year later, there has been no progress on these cases. In fact, recent indications suggest that these cases may very well be left unprosecuted, and that only fresh criminal complaints meeting unreasonably burdensome and unnecessary evidentiary requirements will be considered. This disturbing lack of progress in response to this first way of actions sends a negative signal about Romania's commitments to properly enforcement intellectual property rights. This matter needs to receive the urgent attention of the General Prosecutor.

These also remain without any concrete result due to a lack of willingness of the prosecutors to take on the cases. At the end of 2007, UPFR launched a new wave of complaints in Bucharest and in the country in a desperate attempt to get at least 2-3 cases to Court. Reasons used by the authorities to delay any follow-up:

- The prosecutors do not want to be the first to launch an Internet case;
- There is a risk that the offender might be a minor;
- It is difficult to present appropriate evidence for a search warrant;
- Launching Internet piracy cases may trigger a negative reaction in the media;
- There is no social harm and important damage when you download some illegal content.

A big difficulty is the refusal of the ISPs to cooperate with police officers or even prosecutors. In some cases, ISPs delay or even refuse to submit any data about their customers. Alternatively, they argue that it is technically impossible to fulfill the authorities' request for data.

The recording industry reports that, in 2007, 460 criminal files on physical piracy were opened. In 287 of these, UPFR filed for damages. In the remaining 173 UPFR did not file for damages because these were small cases (merely a couple of pirate CDs per case). These 173 files were dropped by prosecutors. Of the remainder, 85 criminal files reached the Court and sentences were issued in 31 cases. UPFR field inspectors, in cooperation with the Police, entered 13 illegal burning studios in private apartments and uncovered 27 cases of large-scale piracy (over 1000 CDs). In as far as enforcement action with respect to collective licensing is concerned, 711 criminal cases were initiated in 2007 (122 on broadcasting and 589 on public performance). Of these, 231 were dropped (71 on broadcasting and 160 on public performance) and in 66 cases, a settlement was reached. In 536 cases of these, UPFR requested damages.

Administrative actions with ORDA still causes difficulties: The Romanian Copyright Office (ORDA) is an independent Government agency which still has some enforcement authority. Following raids, the police send the seized product to the Romanian Copyright Office for verification (ORDA). The Romanian Copyright Office checks the seized product and issues its technical report certifying which goods are pirated. This technical procedure with ORDA is often lengthy (2-4 months on average) and the rights holder is not involved in the verification process. Although there was some improvement with respect to the length of time for verification in 2007, further improvement is needed. Upon verification by ORDA, the prosecutor decides whether to file charges and prosecute the case if the prosecutor considers there to be sufficient evidence for conviction.

In addition, ORDA still has a strangle-hold over the objectionable hologram system, and causes substantial delays in criminal investigations as it takes several months to deliver the technical reports on the pirated products (between three and twelve months). A few examples of the continuing problems involving ORDA include:

- The stickering program: ORDA issues holograms for every optical disc (audio, video, software) that is released commercially. All copyright industries agree that this system produces more bureaucracy than help in anti-piracy activities. This type of a state-mandated sticker system, attempted in other countries (Malaysia, Ukraine, Russia), is counterproductive to anti-piracy efforts because it often results in "legalizing" pirate material where the stickers are themselves forged. Moreover, considering the expected decrease in physical piracy, the justification for having any hologram system is disappearing. In addition, there is the potential for Government officials to provide pirates with the legitimate stickers to place on their product. Alternatively, it may prevent the legal distributor from getting product into the marketplace in a timely fashion, due to bureaucratic delays. Pirate material may incongruously become more readily available than legal material because of the sticker program itself. In this context it should be noted that ORDA, other than issuing the holograms as part of this highly bureaucratic system, fails to exercise any meaningful control over how the holograms it issues are actually applied by the users. This reinforces the futility of the system as it currently stands.
- Registering sound recordings and fees: ORDA registers every sound recording that is released to a commercial circle for the purposes of issuing holograms. This is a new requirement introduced by the Government Ordinance No. 25/2006. As expected, the procedure is extremely complicated and time-consuming. Worse yet, the registration of each recording is taxed by ORDA, which is another state fee alongside the hologram fee. This system must be repealed alongside the holograms system.

- **Expert reports and fees:** ORDA issues expert reports in copyright cases. This happens at a slow pace in spite of some improvement since last year, which results in delays in criminal investigations (3-4, and in some cases up to 12 months). The solution here is to follow the prevalent practice in Europe and other countries, and to transfer this task to the copyright industries, who are true experts in their respective products.
- **Collective management:** ORDA supervises collecting societies. It should be once again stressed that collecting societies, as is the case in the majority of jurisdictions world-wide, should be treated like any other commercial business and should not fall under an overly detailed special regulation.

Non-deterrent sentences: Romanian courts remain very reluctant to impose deterrent penalties; there was no breakthrough with this problem in 2007. There have been no reports of effective (i.e., non-suspended or time-already-served) jail terms imposed to date in Romania for copyright piracy. This unfortunate result occurred despite the fact that the copyright industries in the last several years have begun to receive additional cooperation from the police to conduct raids and seizures of infringing product, as well as some support from public prosecutors in bringing the cases to court, and in spite of recent amendments to the law (which increase penalties for software piracy offenses). For example, an entertainment software company reports that the courts typically impose only administrative and/or criminal fines (from US\$150-\$4,200) which are paid to the state and/or suspended jail sentences (from 1 to 2 years). When Internet cafés are involved, the illegally operating cafés are simply closed. This same company saw only one jail sentence issued in 2007 in a case where a recidivist copyright infringer was convicted; there were 6 criminal files open against the same infringer, all cases were gathered before the court and the resulting criminal sentence was for 1 year and 7 months of imprisonment.

Damages difficult to collect with additional legal procedures: An entertainment software company reports mixed results regarding damages. In addition to issuing criminal penalties, courts generally award damages to the injured company in cases involving its products. The company submits to the prosecutor its damages claim based on the price of corresponding legitimate product (without VAT) multiplied by the number of seized products. While Romanian copyright law allows a rights holder to request treble damages, this company typically only seeks double the amount of actual damages; except in recidivist cases where treble damages are requested. In about 60% of all the cases supported by this company, the courts awarded the requested damages. Problems arise, however, as most defendants generally do not comply with the court's order and do not pay the awarded damages unless the rights holder initiates a further proceeding for collection of damages through garnishment effected by court bailiffs.

Lengthy court proceedings: Criminal judgments of even minor fines against copyright infringers still require considerable time and effort in Romania. The time from the police raid to the transfer of the case to the court is never less than 3-4 months, and on occasion may exceed ten months. The average amount of time needed to obtain a criminal court decision is between 1 and 1½ years. Appeals take even longer. At least two or three hearings are needed before reaching a court sentence. Some companies report that they have a number of cases initiated in 2006 or earlier in which no decision has yet been communicated to its local counsel.

COPYRIGHT LAW AND RELATED ISSUES

2007 was a quiet legislative year in Romania, it being the first year in a long time where there were no amendments made to the copyright law, the criminal code, or the criminal procedure code. There were, however, legislative reform discussions held among ORDA, the Public Ministry, the General Inspectorate of Police, the Ministry of Justice and various rights holders (upon ORDA's invitation and within the "IPR Working Group" format) regarding possible amendments to the Copyright Act. The exact scope of any such legislative package is not yet known. Possible issues in such legislation could include lowering the level of criminal sanctions, and even removing administrative fines and providing only for criminal penalties. Also of concern is a proposal raised by ORDA and the Public Ministry that the right to settle certain copyright infringement cases may be eliminated. Another longstanding issue relates to computer searches in public or commercial locations, such as Internet cafes, without a court warrant (discussed earlier and below). Concerns remain that there may be

amendments to exclusive rights such that the “making available” right of authors be made subject compulsory collective management, contrary to the legal principles enshrined in the Berne Convention and the WIPO Treaties. We expect further discussions among this group and public and private stakeholders in 2008.

ORDA and the Ministry of Culture organized several meetings related to the possible amendment of the law, but no progress was made. The private sector expresses its deep concern with respect to ORDA’s attempt through the amendment process to reintroduce its competence for certain law enforcement tasks relating to copyright infringement. Past experience has showed, much to the detriment of right holders, that ORDA is not the appropriate state organ to engage in law enforcement activities.

Copyright Act of 1996, as amended: The 1996 Romanian Copyright Law has been amended a number of time in the past decade. Unfortunately, the resulting legal structure continues to contain a number of key gaps and deficiencies, and as a result, Romanian law is not yet fully compliant with the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty, nor the EU Copyright and Enforcement Directives nor the WTO TRIPS Agreement. Various amendments were made in 2004⁶, 2005⁷, and 2006⁸, many of which were aimed at coming into compliance with EU Directives. To illustrate, among the more problematic provisions reported by local industry colleagues are the following. Article 143 does not appear to prohibit acts of circumvention, but only preparatory acts of circumvention and therefore fails to implement the WIPO Treaties and the EU Copyright Directive. Also of concern is Article 121(2) which would deny protection in the form of retransmission royalties to audiovisual works broadcast on must-carry television stations and retransmitted by cable operators; this approach would violate protections required under Berne Convention’s Article 11bis(2) and the Trade Related Aspects of Intellectual Property Rights (TRIPS).

Street piracy ban: In 2006, a street ban was adopted; Government Ordinance No. 25 of 2006 prohibits street commerce of copyrighted goods (original or pirated). According to the industries, this street ban was a relatively positive move. At least for now, it is slightly more difficult to find pirate product on the streets. Retail piracy moved from the streets to the newspaper and Internet adds or to closed circles in housing compounds and offices. The number of people who offer pirated physical goods today is roughly the same as before the introduction of the ban, but they are geographically more concentrated or work through newspaper adds.

Search warrants: BSA reports that a continuing problem is that the verification of computer systems and of the computing data carriers requires a search warrant, according to Law No. 161 of 2003. The search warrant can be issued only by the court and only after the commencement of the criminal investigation. BSA expects that the consequence will be that the number of *ex officio* police raids will decrease dramatically, as will police raids upon response to right holder leads. Industry reports suggest that the Romanian IPR Working Group has been lobbying to amend the law with respect to the requirement of obtaining a search warrant before

⁶ In 2004, Romania passed amendments to its 1996 Copyright Law (Law 285/2004) which came into force on August 1, 2004. Nevertheless, this package was inadequate, and the industries then argued that further reform of the copyright law, was still needed, particularly with respect to: (1) transient copying exception in the reproduction right; (2) producers of sound recordings not having exclusive rights of broadcasting or communication to the public, but rather a limited right of remuneration; (3) the law clearly providing full protection for pre-existing sound recordings, as required by Article 14.6 of the TRIPS Agreement; and (4) amending two provisions regarding ownership and performance royalties which adversely affect the distribution of films.

⁷ In 2005, the copyright law was revised through an Emergency Ordinance No. 123/2005 which entered into force on September 21, 2005. Although these amendments were far from ideal, there were some positive elements, such as: (1) ORDA no longer has direct enforcement authority in criminal cases, or a central role vis-à-vis other enforcement authorities; (2) penalties for copyright infringement were increased; (3) jurisdiction for criminal piracy cases were moved to the higher level tribunals in hopes of expediting cases; (4) the principle of having a unique collecting society for all right holders was eliminated; (5) the statutory royalty caps for the broadcasting and cable retransmission rights of copyright and related right holders were eliminated. However, the Emergency Ordinance also included some negative developments. For example the withdrawal of the holograms’ administration from the private sector was transferred to ORDA. From the perspective of the recording industry, this is another reason to justify eliminating the hologram system altogether. The text of the Ordinance is unclear in certain places and leaves much room for adverse interpretations. For example, the texts providing for criminal offenses and penalties are not very clear, as they mention also “producing of pirated goods, for *distribution purposes*” as one offense, and, as another more serious offense, the “producing of pirated goods, for *commercial purposes*.”

⁸ The 2005 Emergency Ordinance was voted in the Parliament and became Law No. 329 of 2006, which was aimed at making the Copyright Law compliant with the new Romanian Criminal Code. The copyright law now provides that criminal offenses are also punishable by criminal fine, and the level of such fine is to be established according to the Criminal Code provisions. This 2006 law also expressly introduced the competence of the Romanian Gendarmerie to conduct raids.

checking a computer hard drive for pirated software. The amendment should provide that the mere verification of the existence of software installed on the computers should not require such a search warrant.

Government software legalization (2004): BSA appreciates the work the Government has undertaken to legalize its own software use under Decree H.G. Number 470/01-04-2004. More remains to be done to extend legalization to the public authorities' entire installed base.

Criminal Code reform: A large part of the Criminal Code reform in 2006, including the intellectual property chapter, was postponed until September 1, 2008. In a positive move, Law No. 278 of 2006 introduces criminal liability for legal entities and also provides for the general limits of criminal fines. However, there were some problems. For example, the criminal code does not sanction the possession of infringing materials, including the possession of the equipment used to make infringing material. In addition, for certain actions (such as software piracy), a private complaint is needed as a pre-condition for starting an enforcement action and subsequent prosecution.

It should be stressed that there seems to be no legal tool to compel ISPs to supply data about their customers to law enforcement authorities. In the fight against growing Internet piracy, ISPs hold the key to the data that provides the necessary evidence in order to identify the offender and to get a search warrant.

IPR TRAINING AND PUBLIC AWARENESS

In January 2007, BSA organized a training seminar for 45 police officers and prosecutors. The results were obvious, as the quantity and the quality of raids kept high. In addition, BSA participated in trainings organized by IP Working Group in April 2007, and by the U.S. Embassy. Also last year, an entertainment software company participated in an IPR training session for Romanian police, prosecutors, and judges. In March 2007, the local recording industry (UPFR) issued a technical manual for law enforcement authorities, judges and magistrates regarding digital piracy. In April 2007, UPFR organized a seminar for some 30 IPR police officers and prosecutors from the Bucharest area. When UPFR submitted Internet complaints, the police officers involved in these cases received individual training (however, the cases are now blocked at the prosecutors level).

With respect to online piracy, UPFR managed to get the National Council for Audio-Visual (NCA) in August 2007 to agree to recognize its digital anti-piracy campaign as a "social campaign," which means radio and television stations can broadcast spots related to this subject, without cost. UPFR started to produce a TV spot (which will be finalized in February 2008) in order to be broadcast by the main television stations. The objective is to extend this educational campaign at national level in 2008.

MARKET ACCESS

Broadcast quotas: MPA reports that the Audiovisual Law of June 2002 introduced a quota of "a majority proportion" of EU works from the day Romania accedes to the EU. Such a provision should include a degree of flexibility to respond to market realities. Regulation No. 39 of July 14, 2005 (effective August 1, 2005) imposes a 3% levy on the advertising revenues of all public and private TV stations in support of domestic film production.

Discriminatory tax treatment of U.S. audiovisual works: The Regulation of July 2005 (includes new taxes on box-office and on video/DVD sales to finance subsidies for Romanian and European films. These taxes, besides having a detrimental effect on the Romanian audiovisual market, unfairly burden MPA member companies with the cost of financing the Government's cultural policy.

Screen quota: The new Regulation of July 2005 obliges Romanian cinemas to devote 5% of their screen time to Romanian films, of which at least 1% must be during the highest attendance show times. MPA opposes any type of quota restrictions that limit the ability to distribute film products on based market demand.

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2008 SPECIAL 301 REPORT

SOUTH KOREA

EXECUTIVE SUMMARY

Special 301 Recommendation: IIPA recommends that South Korea remain on the Special 301 Watch List for 2008.

Key Actions to be Taken in 2008:

Ratify and Implement the Korea-US Free Trade Agreement: The U.S. and South Korea successfully negotiated one of the most comprehensive and progressive Free Trade Agreements ever, from the standpoint of improvements in copyright law and enforcement. To redeem the promise of this path-breaking pact, both countries should ratify the KORUS FTA this year. Korean legislation to implement its obligations – already largely drafted – should be revised to fill the remaining gaps (notably with respect to the rights of sound recording producers, and regarding liability of Internet Service Providers (ISPs)), and should be enacted and brought into force.

Step Up the Fight Against Internet Piracy: Although licensed online delivery of copyright material is beginning to claim a foothold in Korea, the country's advanced digital networks remain rife with pirate materials of all kinds. Besides improving and modernizing its laws in the course of implementing its FTA obligations, Korea must ensure that its Copyright Protection Center (CPC) consistently enforces against the online piracy of works of foreign right holders. Korea should begin now to deliver on its FTA commitment to make enforcement against Internet piracy a law enforcement priority, and to target not only direct infringers but also those who profit from services that induce infringement.

Keep Up Pressure Against Book Piracy: The CPC and other enforcement authorities should cooperate with international book publishers to help ferret out underground photocopy and print operations, and the Ministry of Education must follow up on its work to assure that universities deliver and implement action plans to achieve greater legalized use of published materials. Here too, Korea should begin to deliver on the assurances it made in the FTA process.

SOUTH KOREA
Estimated Trade Losses Due to Copyright Piracy
(in millions of U.S. dollars)
and Levels of Piracy: 2003-2007¹

INDUSTRY	2007		2006		2005		2004		2003	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Business Software²	247.0	44%	220.0	45%	200.0	46%	276.0	46%	275.0	48%
Entertainment Software³	461.9	66%	353.5	68%	415.1	55%	349.0	43%	248.4	36%
Books	44.0	NA	45.0	NA	43.0	NA	42.0	NA	38.0	NA
Records & Music	NA	NA	0.3	7%	1.3	13%	2.3	16%	3.5	20%
Motion Pictures⁴	NA	NA	NA	NA	9.0	7%	40.0	20%	40.0	20%
TOTALS	752.9		618.8		668.4		709.3		604.9	

RATIFICATION AND IMPLEMENTATION OF THE KORUS FTA

On June 30, 2007, the U.S. and South Korea signed the Korea-US Free Trade Agreement (KORUS FTA). On the issues of copyright law reform and copyright enforcement, the KORUS FTA is one of the strongest and most progressive trade agreements ever negotiated. It also includes important steps to further open the Korean market to U.S. copyright industries. If these copyright and market access provisions of the FTA come into force, and if they are fully implemented by the Korean government, the positive impact on U.S. copyright industries will be significant. Thus, ratification of the KORUS FTA by both parties, and full implementation of its provisions in Korean law, should be a top priority for 2008.

From IIPA's perspective, some of the critical provisions of the KORUS FTA include:

- Protection of temporary copies. Korea today stands almost alone among nations in refusing to apply the copyright owner's exclusive right of reproduction to cover the making of temporary copies, such as those made in the Random Access Memory of a personal computer. In light of the ever-increasing economic importance of such copies in the digital networked environment, in which the making and use of such temporary copies is rapidly becoming the primary means by which many copyright works are consumed by the public, this is a significant gap in current law. IIPA is pleased that, in Article 18.4.1 of the FTA, Korea has committed to closing this gap by giving the reproduction right a scope that accords with world copyright standards.
- Technological protection measures. Article 18.4.7 commits Korea to repairing the deficiencies in its current legal framework for safeguarding the technologies that right holders use to control access to and use of their works. Such protections are a critical aspect of global minimum standards for copyright protection, as embodied in the WIPO Copyright Treaty (WCT) and WIPO Performances and Phonograms Treaty (WPPT).
- Online service provider liability. By agreeing to the detailed regime set forth in Article 18.10.30 of the FTA, including the critical undertaking to provide legal incentives for service

¹ The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2008 Special 301 submission at <http://www.iipa.com/pdf/2008spec301methodology.pdf>. For information on the history of South Korea under Special 301 review, see Appendix D at (<http://www.iipa.com/pdf/2008SPEC301USTRHISTORY.pdf>) and Appendix E at (<http://www.iipa.com/pdf/2008SPEC301HISTORICALSUMMARY.pdf>) of this submission.

² BSA's 2007 statistics are preliminary. They represent the U.S. software publishers' share of software piracy losses in South Korea, and follow the methodology compiled in the Fourth Annual BSA and IDC Global Software Piracy Study (May 2007), available at <http://www.bsa.org/globalstudy/>. These figures cover, in addition to business applications software, computer applications such as operating systems, consumer applications such as PC gaming, personal finance, and reference software. BSA's 2006 piracy statistics were preliminary at the time of IIPA's February 12, 2007 Special 301 filing and were finalized in June 2007 (see <http://www.iipa.com/statistics.html>) as reflected above.

³ ESA's reported dollar figures reflect the value of pirated product present in the marketplace as distinguished from definitive industry "losses." The methodology used by the ESA is further described in Appendix B of this report.

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

providers to cooperate with right holders in deterring piracy, Korea has taken a significant step forward toward a more effective system for combating the high levels of online copyright infringement that prevail in that market.

- Exclusive rights for sound recordings. Korea will be obligated, under Article 18.6.3 of the FTA, to bring all means of digital dissemination of sound recordings to the public – including webcasting, streaming and digital broadcasting – within the scope of the exclusive rights of recording producers. Implementation of this FTA commitment should help to dispel uncertainty about the reach of current law, and promote a robust legitimate market in licensed use of these new media to disseminate sound recordings.
- Extension of term of copyright protection. Article 18.4.4 of the FTA, when implemented, will bring Korea in line with the unmistakable global trend toward extending the term of copyright protection, thus removing the potential irritant to international trade that results from divergent terms among trading partners.
- Contractual rights. Under Article 18.4.6 of the FTA, Korea is obligated to allow all right holders to exercise economic rights in their own names. This could provide a strong legal counterweight to provisions of current Korean law that mandate collective administration of exclusive rights or rights to remuneration.
- Protection for encrypted signals. Article 18.7 of the FTA commits Korea to providing both civil and criminal remedies against those who decode program-carrying satellite signals without authorization, an important new legal tool to be wielded against signal theft.
- Statutory damages. In a major step forward, Korea agreed in Article 18.10.6 of the FTA to supplement its system of civil damages for copyright infringement with a regime of pre-set statutory damages, a reform that will encourage civil enforcement by providing a predictable and deterrent remedy against infringers.
- Other civil remedial provisions. A number of provisions in paragraphs 7-10 of Article 18.10 of the FTA will enhance the remedies available to right holders in civil litigation in Korea, including seizure and destruction of infringing copies and the materials and implements used to make them; requirements for defendants to identify third parties in the production or distribution chain of pirated products; and the award of costs and attorneys' fees to prevailing parties.
- Outlawing "camcording." Implementation of Article 18.10.29 of the FTA will help to ensure that Korea does not become a source for unauthorized master digital copies of motion pictures through illicit in-theater camcording.
- Ancillary offenses. Korea agreed in Article 18.10.28 of the FTA to provide criminal remedies against trafficking in counterfeit or illicit labels, documentation or packaging associated with pirate product.
- Enforcement against book piracy. In a side letter, Korea agreed "as soon as possible" to take specific steps to increase its efforts against book piracy and other copyright infringements on university campuses, ranging from stronger institutional copyright policies to enhanced training and public education campaigns, and to step up law enforcement training and enforcement activities against underground book piracy operations.
- Enforcement against Internet piracy. In a particularly significant commitment, contained in another side letter to the FTA, Korea agreed to make internet piracy a law enforcement priority, with specific references to cooperation with the private sector and to the need to prosecute not only direct infringers, but also those who "profit from developing and maintaining services that effectively induce infringement." This commitment, which surpasses what is found in other free trade agreements the U.S. has negotiated, is especially appropriate given the ubiquity of online infringement throughout Korea's highly networked digital marketplace.

PIRACY AND ENFORCEMENT UPDATES IN KOREA

Online Piracy

In the Internet-savvy environment of the Korean market, copyright industries face extraordinary enforcement challenges because of the prevalence of all kinds of pirated materials online. Korea continued to make some progress in combating online copyright piracy in 2007, but much more remains to be done.

Statistics compiled by the OECD show that in June 2007, there were more subscribers to broadband access to the Internet in South Korea than in any other developed country, save the much larger markets of the U.S., Japan and Germany, and that, with nearly 30 broadband subscribers per 100 inhabitants, broadband penetration in Korea far exceeds that of any other market of comparable size.⁵ The level of Internet access through mobile devices is, if anything, even more striking. Although legitimate services for online distribution of copyright works are beginning to gain a foothold, Koreans still use their ubiquitous and high-bandwidth access to the Internet to consume unrivalled amounts of infringing copyrighted materials of all kinds. The ongoing challenge is to legitimize the use of these materials by Korea's huge online population.

While every sector of the copyright industry is impacted by online piracy in Korea, the specific problems vary, and specific means of piracy constantly change with technological advances and enforcement pressures. The music industry has long felt the brunt of the impact, from illegal streaming, download and peer-to-peer (P2P) services. Intensive enforcement efforts have made a dent in the problem, and legitimate online music services have grown to the point that Korea has become the world's first market where the sale of physical product in CD format is far outstripped by legitimate digital delivery over networks. By 2007, however, the locus of online music piracy had fully shifted from P2P and unauthorized streaming to "web-hard services" and portal services or forum sites.

"Web-hards" or "cyberlockers" are a form of closed file sharing system in which pirates store their unauthorized files online and distribute passwords to the storage facilities to would-be downloaders. The downloaders usually "pay" for access through "cybercash" credits administered by the web-hard operator. (A few sites provide free downloads, but at slow speeds.) These closed systems are harder for investigators to locate and penetrate than the mass file-sharing services that were the principal problem in earlier years.

Web-hards are also popular with audio-visual pirates, since they make it easy to store even the very large files that digitized movies demand. (The movie industry also reports widespread use for the Internet as a marketing mechanism for sales of pirate physical product.) The web-hard systems are also extremely problematic for the video game and recording industries, and other software applications also show up on web-hard services.

2007 statistics from the government's Copyright Protection Center indicate that web-hards now account for up to 70% of all online piracy cases, up from about 53% a year earlier. Most of the remaining cases reported by the CPC involve portal sites, which offer links to pirated copyright material along with many other services. Many of these portal sites provide user forums within which pirate material is widely promoted, linked to and traded.

P2P piracy also remains a major problem in the country. While some services have begun to legitimize their operations, unauthorized file sharing of music, videogames and movies remain widespread. On file sharing services monitored in 2007, the Motion Picture Association identified over 1.7 million illegal movie files being shared. While letters were sent to all of the file sharing services concerned and there was a 96.7% compliance rate, the files in question invariably resurfaced on the same, or different, file sharing services within weeks or sometimes days. These sites are affecting other industries as well, including the book publishing industry. Sites offering scanned versions of books and journals are growing in number, threatening legitimate markets.

⁵ See <http://www.oecd.org/dataoecd/21/35/39574709.xls> and <http://www.oecd.org/dataoecd/22/15/39574806.xls>.

The realization that Internet-based piracy posed a threat to all copyright industry sectors was one of the motivations for consolidating several separate enforcement agencies into the Copyright Protection Center (CPC) within Korea's Ministry of Culture and Tourism (MOCT). CPC was assigned to deal with online piracy in September 2005, and has been increasingly active in the online arena. By now, all pre-existing enforcement teams in the online environment have been merged into the CPC. Its efforts certainly seem to have enhanced public awareness of the problem. But CPC's progress is limited by its exclusive identification with the established "copyright trust and management" entities.⁶ Major foreign rights holders do not belong to these agencies, and thus online enforcement activities by CPC on behalf of foreign rightholders are limited or nonexistent. CPC has recognized this problem and promised to take more actions against pirating of foreign repertoire and titles, but so far there is little evidence that this is happening. Further, the CPC does not have any investigative or judicial powers and has to rely on the police and prosecutors to investigate and prosecute infringing activities. IIPA continues to urge the Korean government to correct these problems as soon as possible and to undertake aggressive enforcement against online piracy of foreign works. Otherwise, Korea's commitments in the TRIPS Agreement to national treatment in enforcement activities could be questioned. In this regard, Korea's pledge in the FTA side letter to carry out online enforcement activities on behalf of U.S. works, and to do so in a transparent manner, is warmly welcomed. Korea should begin to fulfill this pledge, in the words of the side letter, "as soon as possible."

Some favorable court decisions against online piracy were rendered in 2007, including affirmations of liability for the operators of the original Soribada P2P service on both civil and criminal grounds. While these decisions are welcomed, they must be viewed in context. Soribada 1 featured a technology that is now obsolete, and even the more distributed P2P technology featured in later versions of Soribada is of declining importance in the Korean online piracy environment. Further progress against online piracy in Korea will depend on vigorous and sustained enforcement, adequately resourced, adaptable to new technologies and tactics, and directed squarely against piracy of foreign as well as domestic works. In this regard, the commitment contained in the side letter to the KORUS FTA is of particular importance, and the fulfillment of that commitment should be among the ROK government's top copyright priorities in the year ahead.

Offline Piracy

Piracy problems in Korea are by no means limited to the Internet.

Book Piracy: This problem continues at unacceptable levels in Korea. The chief problems facing book publishers in Korea include massive illegal photocopying in and around university campuses, and more sophisticated pirate print operations. The problem of pirate printing (targeting mostly high level scientific, technical and medical text and reference books) has become particularly severe, with pirates exhibiting high levels of organization, and publishers regularly noting seizure numbers in the thousands, much higher than in other Asian markets. The problems of both pirate printing and illegal photocopying have been exacerbated in recent years by the fact that illegal operatives have developed increasingly evasive practices, moving operations underground where they are quite difficult for authorities to track. The quality of the pirate prints is becoming so high as to make detection increasingly difficult; hence, cooperation with right holders is key to distinguishing pirate (unlicensed) production from legitimate.

The problem of photocopying of educational materials in Korea, in addition to plaguing universities and traditional primary and secondary schools, also permeates Korea's many thriving English language institutes. These for-profit institutions reportedly use massive numbers of unauthorized copies of U.S. publishers' English Language Teaching (ELT) materials in their programs, competing for students based on the asserted quality of their illicit copies.

While most Korean students prefer to go to a copyshop to get a hard copy of a book rather than deal with online versions, there are also some reported instances of digital piracy, such as cell phones with high-resolution cameras being used by university students inside bookstores to copy up to 100-200 pages of textbooks rather than purchase them,⁷ and copyshops using scanned versions of texts to speed up the

⁶ Examples of these entities include the Korean Association of the Phonographic Industry for sound recording producers, and KRTRC for book publishers.

⁷ Kim and Lim, *Cell phone users using their cameras to copy textbooks*, Joong-Ang Ilbo, August 12, 2004.

generation of new pirate “copies on demand.” Furthermore, leading international academic journal publishers complain about copies of their articles being illegally accessed and offered on pay-for-download or P2P sites. This problem is sure to grow unless checked now.

Over the past few years, the Korean Government has taken some important steps to recognize and start to address the serious book piracy issues. The CPC’s supposed assumption of duties related to enforcement against commercial photocopy centers from the Korea Reprographic Transmission and Rights Center (KRTRC) should have eliminated the “conflict of interest” that plagued KRTRC enforcement efforts, since licensing and enforcement functions were separated. As noted above, however, CPC’s main focus is online, and its willingness to act on behalf of foreign right holders (who do not participate in KRTRC) is still questionable. KRTRC remains in charge of enforcement against “offline” infringement, such as unauthorized photocopying. Regarding pirate printing, the publishing industry had some success in 2007 in tracking down massive underground printing operations, leading to significant seizures. However, the burden of initiating, investigating and carrying through enforcement actions remains on right holders. IIPA urges the Korean government to commit more resources to fighting book piracy in 2008, and to act more boldly by initiating its own enforcement actions.

Unfortunately, after significant signs of engagement in 2005-6, the Ministry of Education showed little interest during 2007 in promoting the legal use of published materials at higher educational institutions. This is a disappointing turn of events, as South Korea had been on track to be a regional leader in this type of initiative. The March 2005 issuance by the Minister of Education of a letter requesting every university to devise an action plan for reducing book piracy on campus resulted in several positive responses from universities. Other failed to respond, though, and several responses lacked significant substantive measures. The March 2005 letter was followed by other MOE-issued letters regarding campus crackdowns in March and September 2006, but it is unclear what action, if any, followed these letters. While the letters were a good start, steps toward implementation of the initiatives they signaled have been utterly lacking during 2007, with no evidence of concrete implementation of the action plans or meaningful follow-up by the Ministry. From all that appears, universities’ reporting deadlines have gone unheeded and unenforced. Measures such as adoption of strong pro-copyright policies, monitoring on-campus photocopy shops, and crafting educational campaigns remain words on paper, at best. The Ministry has committed to an ongoing effort, and it should use the tools at its disposal to encourage universities to fulfill their plans, including by reflecting implementation of the action plans in its positive or negative evaluation of institutions, and by conditioning certain funding decisions on full cooperation. Since on-campus infringements tend to spike around the beginning of academic terms – March and September – those periods will be critical for the success of the Ministry’s pro-copyright initiative, and IIPA urges the Ministry of Education to revive its efforts ahead of the upcoming term. IIPA also hopes the CPC will work with industry to devise an appropriate response to raise public awareness about illegal use of published materials at primary and secondary schools, as well as English language teaching materials by language institutes, and to put into place educational initiatives aimed at these schools/institutes, students and parents.

IIPA commends the Korean government for the commitments contained in the KORUS FTA side letter regarding book piracy, and the publishing industry looks forward to working with Korean authorities to achieve real gains in the year ahead.

Burned Optical Media: The motion picture and entertainment software sectors suffer losses due to sales of “burned” optical media (DVD-Rs or CDRs) with their copyright product on them. Street vendors continue to hawk these products, and they are also sold over the Internet. Retail hard-goods piracy is a low priority for Korean enforcement authorities, and the vendors are rarely caught with much pirate product (only catalogs and empty cases). Increasingly, Korean authorities show a willingness to take action against the dispersed underground labs where the discs are burned to order to supply the vendors, and against warehouses and similar sites. While the individual labs are hard to find and neutralize, cumulatively they amount to a significant force, particularly in the audio-visual marketplace. More investigative and enforcement resources should be devoted to identifying shops and offsite facilities engaged in illegal disc burning.

End-User Piracy of Business Software: Although counterfeit software CDs are starting to show up in the market, unauthorized use of software by businesses still causes the greatest losses to the business software industry in Korea. The Korean government continues to work actively to fight corporate end user piracy through its enforcement programs and its efforts to promote public awareness about the benefits of respecting copyrights. In 2007, the police and prosecutors conducted over 1300 end user actions. It is important that the Government maintain this level of enforcement activity. The continuing effectiveness of Korea's enforcement efforts also depends on the willingness of police and prosecutors to seek warrants in end user piracy cases, and on the willingness of courts to issue them, taking into account the fact that first-hand evidence of piracy is not always available at that stage of the case.

Entertainment Software: The availability of circumvention devices, such as mod chips and game copiers that bypass the technological protection measures employed in video game consoles, is extremely problematic. These devices are widely available for sale on the Internet as well as at retail. Nine shipments of the game copiers known as R4 devices, which allow users to download and play unauthorized copies of Nintendo video game software, were detained by the Korean Customs in the last five months alone. Although such devices are clearly prohibited under the Computer Programs Protection Act, no indictments have been brought by Customs or local prosecutors against the importers or the sellers of these illicit devices.

UPDATE ON LAW REFORM

Revision of the Copyright Act of Korea

In December 2006, Korea adopted the first comprehensive rewrite since 1986 of its main copyright law, the Copyright Act of Korea (CAK). As IIPA noted in last year's submission, while the new act contains some significant improvements, in many other ways it represented a missed opportunity for Korea to bring its laws into closer compliance with 21st century global minimum standards.

To some extent, however, the revised CAK (which entered into force in mid-2007) may have been overtaken by events. Following negotiation of the KORUS FTA, the Korean government released an extensive draft amendment to the CAK, intended to implement the significant obligations that the ROK agreed to take on in the FTA. To a considerable extent, the draft amendment achieves this objective. However, as IIPA noted in comments submitted in October 2007⁸, in some areas the implementation proposed in the draft needed improvement.

A revised version of the amendment was submitted to the National Assembly at the end of December 2007, and could be considered in a plenary session as early as February 2008, though consideration may be delayed. Based on a preliminary review of an unofficial translation of the revised amendment, most of the shortfalls of the earlier draft remain.⁹ Some of the most significant problems include:

- While the draft explicitly recognizes the copyright owner's exclusive right to make temporary copies (article 2(22)), a broader and more flexible formulation, more closely tracking the FTA language (FTA Art. 18(4)(1)) and expressly covering reproduction "in any manner or form", would be preferable.
- The exception to protection for temporary copies in proposed Article 35-2 should be narrowed to exclude copies made in the course of a transaction not authorized by the right holder (independent of any knowledge requirement of the infringing nature of the copied work), and to make the exception subject to the internationally recognized "three-step test" for permissible limitations on copyright.¹⁰

⁸ See <http://www.iipa.com/pdf/IIPASubmissionreCAKAmendments100307.pdf>.

⁹ Additionally, some provisions of the earlier draft that were necessary to achieve FTA compliance may have been omitted from the December version. For instance, under Art. 18.10.29 of the FTA, Korea must make it a criminal offense to attempt to camcord a film in a theater without authorization from the right holder. Proposed Art. 138-4 of the earlier draft amendment covered attempts, but the corresponding provision of the amendment bill submitted to the National Assembly (proposed Art. 104-6) does not – at least in the unofficial translation IIPA has reviewed.

¹⁰ The bill also includes an exception (proposed Article 35-3) modeled on the four-factor fair use exception in U.S. law. Fair use is a creature of the U.S. common law legal system, and was not codified until 1976. Since Korea is a civil law system which generally lacks the precedential background against which the U.S. fair use exception has developed, its implementation of any new "fair use" statutory provision must be closely monitored to ensure that a balanced and predictable approach is applied.

- The draft leaves unchanged provisions of current law (Art. 83) that deny sound recording producers an exclusive right to control webcasting, subscription digital broadcasting, and other “digital sound transmission services.” This is inconsistent with Korea’s FTA obligations (art. 18.6(a)), since it represents an exception to rights that both conflicts with the normal exploitation of sound recordings, and creates unreasonable prejudice to the legitimate interests of sound recording producers and performers.¹¹
- Significant gaps remain in the amendment’s treatment of liability of Internet service providers. To comply with the FTA obligations, availability of injunctive relief against ISPs should be confirmed, and it should be clarified that the new safe harbors against monetary damages do not provide a blanket exemption from all liability of the ISP. The circumstances under which an ISP should “take down” infringing content in order to benefit from liability limitations should be further detailed and, in particular, the knowledge standard should not only include situations where the ISP has actual knowledge, but also when it is aware of facts or circumstances from which infringement is apparent. In order to qualify for the safe harbor, an ISP should be required to designate publicly (not just to its users) an agent to receive claims of infringing activity. The criteria for the “mere conduit” and caching safe harbors, as well as the limitations on injunctive relief against ISPs that fall within a safe harbor, should be adjusted to track the FTA, and the discussion of monitoring requirements (which may legitimately be imposed under other provisions of Korean law) should be clarified.
- Statutory damages against those found liable for trafficking in tools for circumventing technological protection measures should be based on the number of devices or services involved, rather than on the number of works affected.¹²
- Criminal penalties – particularly for trafficking in devices or services to circumvent technological protection measures or to decrypt broadcast signals, or for unauthorized commercial distribution of encrypted signals – should be reviewed to ensure that they provide the needed deterrence.

In addition, IIPA remains concerned about a number of provisions of the CAK that are not addressed by the draft FTA implementation legislation. These include:

- Educational exceptions under Art. 25, as expanded by the 2006 amendments to include allowing students as well as teachers at any level to “transmit” complete works (i.e., disseminate them online) “when deemed necessary for classroom teaching,” without any consideration of the availability of licenses to authorize such use, and without any compensation to the right holder for such transmissions on the secondary school level.
- Mandatory collective administration of rights of remuneration created under several provisions, including for “digital sound transmission” and conventional broadcasting with respect to sound recordings¹³; reproduction or transmission by libraries; or use of copyrighted material in school textbooks, or online by post-secondary educational institutions. To improve transparency and forestall opportunities for formal or informal discrimination against foreign right holders, Korean law should allow recognition of more than one organization to collect and distribute remuneration payments, and right holders should be free to choose which organization to use, or whether to by-pass collective administration altogether and contract directly with users for payment of this remuneration.¹⁴

¹¹ As a policy matter, this distinction, based on whether or not a service is classified as “on demand” or “interactive,” is not meaningful in light of rapidly changing technologies for delivery of sound recordings, and in light of marketplace realities. Delivery of music to the consumer through a variety of means, capable of being listened to or captured by a wide variety of devices, is the emerging pattern for the marketing of recorded music, especially in Korea. All digital transmissions will compete on relatively equal footing for a place on the personal copier’s recordable media, so all forms of the digital transmission of recorded music should require the authorization of the copyright owner, regardless of the nature of the communicating entity. Thus, producers need exclusive rights over all forms of Internet or other digital transmission of their phonograms.

¹² The December version of the amendment now provides that statutory damages provisions should apply to violations of the TPM provisions *mutatis mutandis* to their application against acts of infringement. It should be clarified that using a different metric than the number of works involved fits within the *mutatis mutandis* criterion.

¹³ Although Article 82 of the new law for the first time allows foreign sound recording producers to claim remuneration payments for conventional broadcasting, it still denies them to U.S. producers, because U.S. law contains no corresponding provision. Thus, Korea’s long-standing and unjustified discrimination against U.S. producers remains in place and must be changed.

¹⁴ The new law also does nothing to make MOCT reverse its current policy – which is not, apparently, mandated by law – that gives a *de facto* monopoly over administration of the rights of music publishers, including foreign publishers, to KOMCA, the Korea Music Copyright Association, which discriminates against foreign music publishers and composers. Foreign music publishers should be accorded a

- Sweeping exceptions that allow libraries to digitize and to transmit to other libraries throughout the country any material in their collection that was published more than five years ago and that is not sold in a digital format. This exception clearly threatens markets in many works – notably including textbooks, English language instructional material, and scientific, technical and medical journals – that are actively sold in the market far longer than five years after first publication. To ensure compliance with international standards for copyright exceptions (i.e., the three-step test in Article 13 of TRIPS), Korea should at a minimum narrow this exception so that implementation of technological safeguards is a pre-condition to exercise of the exception; allow networking of works only beginning ten years after the material is first published in Korea; require libraries to notify publishers of their intention to digitize works in their collection that the publisher has not chosen to distribute digitally; and provide a more robust compensation mechanism that is, as a practical matter, more accessible to foreign right holders.
- The private copying exceptions in Articles 30 and 87 allowing copying of complete works for “non-profit private purposes” or within the home. Proposals to narrow these exceptions in light of technological and market changes were presented to the National Assembly but ultimately were not adopted. The personal copy exception should be made inapplicable to digital copying to the extent that it exceeds the three-step test for permissible exceptions as enshrined in the TRIPS Agreement and Berne Convention, and should be made inapplicable to copies made from infringing sources.
- Finally, a number of provisions of the CAK that confer policymaking and other powers on the Ministry of Culture and Tourism (MOCT) and other government bodies require clarification. These include MOCT authority to “designate certification agencies to ensure the safety and reliability of transactions of copyrighted works” (Art. 56); to intervene in the marketplace for copyrighted materials in several ways, including to change the royalty rates charged users (Article 105.5 and 105.8); to “promote fair use of works such as [by] making public notification of works upon which copyrights have lapsed” (Art. 134.1); and to “draw up and implement policies on rights management information and technical protection measures” (Art. 134.2), a responsibility apparently shared with the new Copyright Commission (see Art. 112).¹⁵ While some of these new authorities could prove beneficial, there is also a substantial risk of abuse, which should be reined in through implementing decrees, as well as careful monitoring of how these new powers are exercised.

As IIPA noted in its 2007 Special 301 submission on South Korea, the revised CAK “leaves many key issues to implementing decrees.” An Enforcement Decree for the CAK took effect simultaneously with the coming into force of the new law in June. IIPA was able to review an unofficial translation of the text of the Decree. We note that the Enforcement Decree provides procedures for rights holders to invoke Article 104 of the CAK, which requires “online service providers that mainly enable people to transmit [copyright works] among themselves” to “take necessary measures such as blocking illegal transmission of [works] when requested by the right holder.” This is potentially a valuable new tool against online piracy, although it is essential that right holders be able to request blocking without excessive formalities or burdensome documentation requirements. IIPA has also reviewed a draft public notification in which MOCT provided a broad definition of service providers subject to Article 104, including not only peer-to-peer services but also other business models prevalent in the online pirate marketplace in Korea, such as web-hard services that use a point system or “cybermoney” as payment for illegal downloads or streaming. We urge USTR to monitor closely developments in the implementation of Article 104, to ensure that the provision lives up to its potential for serving as an effective tool against online piracy in Korea.

nondiscriminatory opportunity to qualify for “trust licenses” under Article 78 that would give them an unchallenged legal basis for directly managing and enforcing within Korea all the rights applicable to musical compositions within their catalogs.

¹⁵ The new Enforcement Decree to the CAK (discussed below) provides somewhat more detail on how MOCT and its delegates would exercise some of these powers, and in some cases seems to expand them. We note, for example, that under Article 66(3) of the Decree, MOCT’s Copyright Information Center is instructed to “ensure interoperability of technical protective measures.” The Center’s exercise of this authority must be carefully scrutinized to ensure that it does not interfere with the healthy development of markets in copyrighted materials, including those protected by such measures.

Computer Programs Protection Act (CPPA) Amendments

Under Korea's unique copyright law regime, fulfilling the requirements of the KORUS FTA will require amendments not only to the CAK, but also to the CPPA, which governs computer program copyrights and which is administered by the Ministry of Information and Communications (MOIC). A draft amendment to the CPPA was issued in August 2007, and an amendment bill was submitted to the National Assembly in mid-December. IIPA's preliminary review of an unofficial translation of this legislation indicates that its handling of several issues needs improvement, including the following:

- Temporary copies and exceptions. While the amendment bill explicitly includes temporary reproduction within the copyright owner's exclusive rights, it also provides an exception whenever temporary reproduction "incidentally occur[s] as an essential part of the technical process which uses programs" (proposed Art. 12(2)(2)). This exception is too broad. For example, even though the government has stated that one purpose of the change to recognize temporary copying is to reflect the move toward accessing software on the servers of application service providers rather than physically possessing a copy, this exception could allow the customer of an illegitimate ASP to escape infringement liability, since the temporary copy made by the customer could fall within the scope of the exception. Although the exception does not by its terms apply when the end-user knew or had reason to know that the source of the temporary copy was itself infringing, that limitation does not fully address the ASP scenario. IIPA urges that the provision be amended so that the exception does not apply in a transaction that has not been authorized by the right holder. Similarly, the blanket exception for temporary reproductions made in the course of transmitting or receiving a computer program (proposed Art. 12(2)(1)) should also be narrowed to exclude its application in the case of an unauthorized transmission.¹⁶
- Statutory damages. Proposed Art. 32-2(1) appears to impose two conditions on the availability of pre-set statutory damages. First, this option seems to be available only when the right holder "cannot easily provide the amount of damages involved." Second, statutory damages are only available for infringement of a work that has been registered with MOIC prior to infringement. It should be made clear that statutory damages are available "on the election of the right holder" (per KORUS FTA Art. 18.10.6), and the prior registration requirement should be reviewed. Additionally, it is questionable whether the maximum statutory damage amounts provided (KRW 30M/ USD 31,500, and KRW 100M/ USD 105,000 for intentional for-profit infringement) are sufficient to provide the needed deterrence. These caps should be reviewed.
- Online service providers. Although proposed Articles 34-4 et seq. largely implement the applicable FTA provisions, a few important adjustments are needed. First, the text should be reviewed to ensure that it consistently reflects the fact that qualification for the safe harbor is a shield only against award of monetary damages, not a complete exemption from liability (see, e.g. proposed Art. 34-4(2)). Also, ISPs providing storage services should explicitly be required to take action against infringements when they are aware of facts or circumstances from which infringement is apparent, as required under FTA article 18.10.30(b)(v). Further, a copyright owner should be potentially liable under proposed Art. 34-5(5) only if it makes a knowing material misrepresentation in its takedown notice (see FTA Art. 18.10.30.b.ix), not on the broader ground of acting "without any proper legal basis." Proposed Art. 34-7 should also be reviewed to ensure that the procedure it creates for applying to the Minister for an order to disclose the identity of an online infringer is in fact "expeditious," as required by FTA Art. 18.10.30.b.xi. Proposed Art. 34-4(1)(1) needs to more closely track the FTA definition of a provider that transmits, routes, or provides connections for copyright material (see FTA Art. 18.10.30.b.i.A), rather than one that "provides access" to such material.
- Technological protection measures. Here again, the CPPA amendment largely implements the relevant FTA provisions. However, proposed Art. 34-9 (2)(4) needs adjustment, since the exception stated there should not apply if circumvention of an access control enables any unauthorized party to access the program in question (or any other copyright work), including the party that is carrying out the circumvention (see FTA Art. 18.4.7.d.v).

¹⁶ As noted above with respect to the CAK, the proposed "fair use" exception in the CPPA (see proposed Art. 12-4) also requires careful monitoring.

- **Criminal penalties.** Korean authorities should be encouraged to consider whether all the criminal penalties in the amendment are sufficiently stringent to provide deterrence. For example, one who traffics in forged labels for computer programs, or who intentionally removes copyright management information for profit, would face under proposed Art. 46(1)(3)(4) and (6) a penalty of no more than one year in prison or a fine of KRW 10 million (USD 10,500).

Music Industry Promotion Act. Entry into force of this legislation in October 2006 eliminated one tier of review required by the Korea Media Rating Board (KMRB) before importation of foreign sound recordings (although not for music videos). The legislation also introduced regulation of “[o]nline service providers for phonograms,” who:

- are required to obtain copyright licenses and to “take technical measures to prevent illegal reproduction (Article 25.1);
- can have their license to operate such a business revoked or suspended by local or regional officials (Article 32), and can have their servers confiscated if operations continue after revocation (Article 35);
- can have pirate recordings confiscated and destroyed by MOCT or local officials if technological protection measures (TPMs) have been removed (Article 35.3);
- can have criminal penalties imposed (probably fines only) for operating such services in defiance of a revocation order (Article 39.1).

Nonetheless, since the Sound Recordings, Video Software, and Game Products Act (which previously dealt with such issues as to sound recording producers) was the basis for most enforcement against music piracy in Korea, it is essential that the Music Industry Promotion Act which succeeds it not result in weakening of enforcement against piracy of recorded music. For example, Article 37 provides that enforcement activities can be contracted out to an association or similar organization. This is intended to expand the resources available for enforcement against piracy; but if foreign right holders are not able to participate in the designated enforcement organization, the current problem with CPC failing to enforce on behalf of foreign right holders will be re-created.

MARKET ACCESS ISSUES

The KORUS FTA contains commitments that will improve access to the Korean market to producers and distributors of audio-visual products and services. Although the structure of the existing foreign content quotas applicable to broadcast, cable, related media and theatrical exhibition has not been changed, the screen quota has been halved, and the other quotas would be locked in at the least restrictive level allowed under current law. Two commercially meaningful liberalizations are the decreased domestic content quotas for animation and film broadcasting, and the increased quota for single-country sources of foreign broadcast content. Some important foreign investment restrictions would also be phased out, leading ultimately to 100% foreign ownership of many program providers (channel operators), and investment in delivery of television via Internet Protocol (IPTV). Disappointingly, however, Korea has retained the right (though subject to some procedural and substantive conditions) to impose foreign content restrictions on new services and delivery platforms, ranging from video on demand (VOD) to IPTV and other forms of streaming and downloading via the Internet. IIPA hopes that these issues will be re-examined in the near future, with the goal of phasing out quotas in favor of letting market forces determine the content presented to Korean consumers.

As noted by IIPA in last year’s submission, amendments to the Movie Promotion Law that took effect in October 2006 eliminated the “import review” procedure previously imposed against foreign films by the KMRB (a secondary review over and above the “content review” required for all films distributed in Korea). This change gave foreign producers a more level playing field in the Korean market. However, in 2007, a new element of discrimination against foreign producers was introduced, when censorship fees for foreign titles were increased by over 70%. This sharp increase in costs for foreign producers should be re-examined.

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2008 SPECIAL 301 REPORT

SPAIN

Special 301 Recommendation: IIPA recommends that Spain be placed on the Watch List in 2008.

EXECUTIVE SUMMARY

Despite the serious concerns raised with the U.S. government and the government of Spain last year, piracy in Spain, especially Internet piracy, has worsened. The country is generally noted as having one of the worst piracy rates in Europe and appears to be moving in a direction away from other European efforts to strengthen intellectual property rights enforcement. During the past year, Spanish authorities did very little to address concerns regarding IPR enforcement and completely failed to act effectively on issues regarding the responsibility of Internet service providers (ISPs) to cooperate with right holders in the fight against piracy by taking appropriate steps to ensure that their services and/or networks were not used for infringing purposes. Simply put, there has been no tangible progress that could justify Spain's continued absence from the Special 301 list.

Continuing high levels of piracy in Spain are seriously harming the music, entertainment software and filmed entertainment sectors. Internet piracy is the worst in Europe and continues to grow significantly. In fact, piracy on peer-to-peer (P2P) networks is widely perceived as a positive cultural phenomenon and file-sharing as an element of political freedom. Exacerbating this untenable situation are the Spanish government's policies of: (a) "decriminalizing" P2P file-sharing (including the 2006 issuance by the Attorney General of a Circular that stated such downloading is not a prosecutable crime); (b) failing to establish the minimum EU-level requirements regarding Internet service providers under the E-Commerce Directive; and (c) failing to address seriously content owners' concerns in brokering negotiations with ISPs. Legislative changes have been so watered down they are basically ineffective. Furthermore, there is no government leadership against piracy—all negotiations with ISPs have broken down and the Attorney General is requesting dismissal of current criminal cases against illegal portal and link sites (and judges are granting these requests) because of the 2006 Circular. The delay in implementing a system to facilitate and promote ISP cooperation in addressing online infringement has had the damaging effect of promoting more, not less, infringing activity on P2P networks. Spanish Internet service and hosting providers, far from showing willingness to collaborate in the fight against Internet piracy, instead make use of their file-sharing and downloading service capabilities to promote their businesses.

Spain has been able to make some legislative and administrative advances against piracy. The December 2007 Film Law prohibiting sound and image recording in theaters and the effective police effort against organized street piracy are two examples. However, when the Spanish government disproportionately promotes its policy positions (such as "Internet innovation" utilizing unauthorized content or increasing Internet consumers by allowing a "no-sanctions environment"), over a more fundamental fight, such as the right to property, the result is increased piracy. Beyond the Internet, local street sales still have definite organized crime patterns. Enforcement authorities are taking action against this kind of theft involving physical goods. Factory-produced pirate music CD products as well as locally burned CD-Rs and DVD-Rs are still readily available through street sales.

In sum, the Spanish government has made little progress in improving interagency anti-piracy cooperation and coordination, despite promising it would do so two years ago. Incredibly, there is less coordination today than there was two years ago. It is essential that the Spanish government "step up," not step back, to foster respect for and protection of copyrights.

PRIORITY ACTIONS IN 2008

Enforcement

- Achieve in 2008, through the Ministry of Industry, an effective agreement among ISPs and content owners for the immediate and effective implementation of the Graduated Response procedures (contractual or administrative procedures for consumers who abuse their ISP accounts), effective notice and takedown procedures (for sites engaged in copyright violations) and for the use of filtering technology at the network level to effectively prevent protected content from being distributed without authorization (similar to actions being taken in other European countries such as Greece and the United Kingdom and actions being taken by ISPs and User Generated Content sites in the U.S.).
- Reverse the Chief Prosecutor's May 2006 official instruction "decriminalizing" peer-to-peer (P2P) downloading.
- Identify the competent government agency responsible for notifying ISPs when infringing content must be taken down.
- Seek additional personnel for the Ministry of Interior for investigation of Internet activity and assign additional human resources for Internet investigation from the Guardia Civil and National Police.
- Consistent with the recent European Court of Justice (ECJ) decision in the *Telefonica* case, take appropriate steps to facilitate the ability of right holders to obtain the necessary information to take civil actions to protect their rights.
- Continue to take actions in well-known markets to combat the widespread street piracy problem, including: (1) more actions against labs supplying street vendors; (2) more *ex officio* police actions against street sales; (3) increased police coordination; and (4) prosecutors pursuing and courts issuing deterrent criminal penalties.
- Judges and prosecutors should attend seminars to increase their knowledge of intellectual property rights and the impact of piracy and intellectual property courses should be incorporated into law schools' curricula.
- Establish training sessions for criminal and commercial courts dealing with intellectual property issues.
- Improve interagency cooperation on anti-piracy strategies and actions, resulting in more criminal actions, effective prosecutions and deterrent sentencing.

Legislation

- Amend Spain's e-commerce laws to establish a workable notice and takedown procedure and eliminate the current requirement of "actual knowledge" as required by the EU Directives. Specifically, amend the Spanish "Law of Information Society Services and Electronic Commerce Law of Information Society Services and Electronic Commerce" (*Ley de Servicios de la Sociedad de la Información y de Comercio Electrónico* ("LSSI") (2002), including reconsideration of the mid-2007 Ministry of Industry proposal (Article 17bis).
- Work with copyright industry groups in a transparent and cooperative way as copyright reform moves forward. This would include, for example, ensuring against any weakening of the exclusive right of record producers with respect to right of communication to the public and of making available. Also, the limitation of the "making available" right from an exclusive right to a right of remuneration adopted in the 2006 copyright law amendments should be eliminated in future copyright law reform. As agreed in the WPPT, exclusive rights should form the foundation of market based licensing for the delivery of signals and this additional right confuses the developing online marketplace.

SPAIN Estimated Trade Losses Due to Copyright Piracy (in millions of U.S. dollars) and Levels of Piracy: 2005-2007 ¹						
INDUSTRY	2007		2006		2005	
	Loss	Level	Loss	Level	Loss	Level
Sound recordings & musical compositions ²	16.7	20%	25.0	22%	27.0	22%
Entertainment software ³	510.0	35%	111.5	48%	135.3	43%
Business software ⁴	568.0	46%	471.0	46%	417.0	46%
Motion pictures ⁵	NA	NA	NA	NA	253.0	32%
Books	NA	NA	NA	NA	NA	NA
TOTALS	1,094.7		607.5		697.0	

COPYRIGHT PIRACY IN SPAIN

Internet piracy: Internet piracy has reached an epidemic level in Spain and is wreaking havoc on the legitimate markets. Spain is consistently ranked as Europe's top country for the percentage of Internet consumers engaged in piracy. The primary facilitator sites, and those that appear to be the most successful commercially, are located in Spain and run by Spanish operators, although there are Spanish-language sites located elsewhere that also affect the market. In addition, it appears that top-source piracy (that is, the organized groups that put together the initial pirate release of content) is increasing in Spain. There are approximately 22.8 million Internet users in Spain, amounting to 55% of the population (according to Internetworldstats.com). Figures of illegally downloaded music files might exceed 1.1 billion in 2007 (805 million in 2006, according to CIMEC data). The National Music Publisher's Association (NMPA) indicates that its Spanish colleagues, SGAE (the collecting society, la Sociedad General de Autores y Editores, the General Society of Authors and Publishers of Spain), report that widespread Internet-based piracy in Spain is undercutting the legitimate market for music publishers and their royalty collections.

There are several reasons for this rampant Internet piracy problem, much of which has to do with both the actions and inactions of Spanish government:

- The Government failed to implement its own national Anti-Piracy Plan and the group established by the Ministry of Culture as part of the Anti-Piracy Plan ceased to function in 2006 and was not revived in 2007.

¹ The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2007 Special 301 submission at www.iipa.com/pdf/2008spec301methodology.pdf. For information on the history of Spain under Special 301 review, see Appendix D at (<http://www.iipa.com/pdf/2008SPEC301USTRHISTORY.pdf>) and Appendix E at (<http://www.iipa.com/pdf/2008SPEC301HISTORICALSUMMARY.pdf>) of this submission.

² The recording industry clarifies that the 2004 data reflects estimated losses to the entire recording industry in Spain. The 2005 data reflects estimated for U.S. repertoire only. The industry's overall 2005 loss estimates in Spain, for both U.S. and international repertoire approach \$75 million, reflecting both a contracting market and a drop in value, which entails a drop in estimated losses from the prior year of 2004.

³ ESA's reported dollar figures reflect the value of pirate product present in the marketplace as distinguished from definitive industry "losses." The methodology used by the ESA is further described in Appendix B of this report.

⁴ BSA's 2007 statistics are preliminary. They represent the U.S. software publishers' share of software piracy losses in Spain, and follow the methodology compiled in the Fourth Annual BSA and IDC Global Software Piracy Study (May 2007), available at <http://w3.bsa.org/globalstudy/>. These figures cover, in addition to business applications software, computer applications such as operating systems, consumer applications such as PC gaming, personal finance, and reference software. BSA's 2006 piracy statistics were preliminary at the time of IIPA's February 12, 2007 Special 301 filing and were finalized in June 2007 (see <http://www.iipa.com/statistics.html>), as reflected above.

⁵ MPAA's trade losses and piracy levels for 2006 and 2007 are not available. MPAA did provide 2005 estimates for a select group of countries, using a new methodology that analyzed both physical/"hard goods" and Internet piracy. Details regarding MPAA's methodology for 2005 and prior years are found in Appendix B of this report.

- The legal loophole in the LSSI (Information Society Services Law) combined with inadequate ISP liability provisions in the copyright law, result in a failure to implement the minimum obligations of the EU Directives and undermine the legal framework necessary for content owners to do business and commercially survive in the online environment.
- This inadequate legal framework has in turn produced an environment that is not conducive to the ability to reach voluntary agreements between right holders and ISPs that could address the situation. Unfortunately but predictably, discussions between these parties (content owners and ISPs) have gone nowhere. This situation is exacerbated by a seemingly biased Spanish Government, that fails to play its role of neutral and honest broker. In fact, the current Government has neither fostered any agreement between right holders and ISPs, nor has it established alternative measures. In the meantime, illegal Internet sites and P2P file-sharing continue to erode the market for copyrighted products in Spain.
- To make matters worse, the Spanish Government recently took a step backward in the protection of intellectual property. A bill amending the LSSI, supported by ISPs, was adopted by the Congress on December 28, 2007. These December 2007 amendments to the LSSI failed, again, to effectively implement the EU E-Commerce Directive, leaving Spain without effective notice and takedown procedures and with a confusing and unachievable rule requiring “actual notice” by ISPs for the removal of unauthorized content. Liability of the ISPs remains unchanged and the notice and takedown process has not been implemented.
- Furthermore, Spanish legislation does not provide for an express possibility of identifying holders of Internet protocol addresses in the context of civil proceedings, whereas in criminal procedures the judicial authority issues a warrant. The recent *Promusicae vs. Telefonica* decision, issued on January 29, 2008 by the European Court of Justice, considered whether a lack of rules on disclosure in civil proceedings is in line with EU law. The ECJ decision replied to questions referred by a Spanish court in the context of national proceedings where Promusicae had sought to obtain a court order obliging the ISP, Telefonica, to disclose data on users who had shared or uploaded very large music files via the Kazaa network. The ECJ ruling establishes that Member States are allowed, but not obliged, to provide for rules on disclosure of personal data in the context of civil proceedings. Further, the Member States are obliged to strike a fair balance between the fundamental right to privacy and the fundamental right to protection of intellectual property and the right to an effective remedy. The Spanish court, in its reference to the ECJ, had indicated that it is uncertain whether the Spanish law allows for disclosure of data in civil proceedings. The Spanish court will now make its decision in the national proceedings applying the reply given by the ECJ. Should the Spanish court decide against disclosure in the context of civil proceedings, right holders would experience severe problems in obtaining any effective remedy in Spain, in particular with regard to P2P file-sharing infringements, due to the Chief Prosecutor’s circular “decriminalizing” P2P (see below). It should be noted, however, that Spain had not yet implemented the Enforcement Directive when the *Promusicae vs. Telefonica* case was initiated. The Government of Spain should ensure that right holders have the ability to obtain information necessary to protect their rights. In the event that the Spanish court ultimately determines that present law permits no such disclosure, then the Government should move quickly to adopt legislation, as permitted by the ECJ decision, to mandate disclosure.
- In May 2006, Spain’s Office of the Attorney General issued a Circular to all district attorneys, which decriminalizes P2P piracy. The situation has deteriorated over the last year, as the decriminalization of P2P file-sharing expands to facilitation sites and emboldens piracy proponents. For example, a judge recently dismissed a criminal case against the operators of a major link site at the request of the prosecutor, which was based on the Circular.
- Police actions against web sites and pages offering links to files on P2P networks are being derailed because of the 2006 Circular. Those few police actions against organized networks and companies that were clearly obtaining a direct or indirect gain from Internet piracy are now being dropped as a consequence of the requirement to establish commercial intent. This is all the more unacceptable since these sites do generate income through advertising related to the number of visits of the web page, as well as the number of persons signing in to use the service. This means that a clear profit is derived from

the illegal offer and, as such a clear commercial intent. Most of the cases never even reach the trial stage.

- Spanish ISPs do not acknowledge the standing of copyright collecting societies and associations as interested parties and representatives of relevant right holders in notice and takedown requests. They hide behind the unfounded argument that they could be held criminally or civilly liable if they take action based on requests from such organizations, even though it is an established fact that the collective rights societies are fully mandated by their members to file such requests.

Piracy on the streets and the influence of organized crime: Efforts to combat street piracy are having a positive effect, as the National Police and the Guardia Civil have been working hard to combat street piracy. Pirate networks running illegal sale activities in the streets and flea markets seems to be mostly selling film DVDs now. Still, according the record industry, Spain has the worst pirate CD-R problem in Western Europe, and piracy of DVD music videos is also very high. Police actions against “mochileros,” who sell out of backpacks, remain more difficult than actions against the street “manteros,” who sell from blankets and are relatively fixed in location and maintain more product.

Street piracy is highly structured with links to organized crime elements. This aspect has fostered a more pro-enforcement attitude by both the police and the public. The Chinese syndicates are much better organized and financed than their predecessors (primarily from northern and sub-Saharan Africa), and have imposed a price policy (2€ per CD), with aggressive distribution through the use of itinerant sellers on the streets and on entertainment premises. These Chinese networks are not only involved in using CD-R and DVD-R formats, but also directly import pirate CDs manufactured in Chinese plants. Product consists primarily of international releases, although albums of some important national artists have also been detected. The depth of the street piracy problem highlights the need to address the organized production sources of pirate product, not only its distribution. Organized gangs maintain labs and distribution centers in Madrid, Barcelona, Granada, and reportedly in Girona, Tarragona, and Alicante. Significant increases in pirate activity have occurred in Granada, Seville, Oviedo and Gijón.

Piracy of sound recordings and musical compositions: The situation for the recording industry in Spain is dire. The most serious problem is now undoubtedly the illegal use of recorded music on the Internet. Illegally downloaded files might exceed 1.1 billion in 2007 (805 million in 2006, according to CIMEC data). The local music collecting society, la Sociedad General de Autores y Editores, also report that widespread Internet-based piracy in Spain is undercutting the legitimate market for music publishers and their royalty collections. Although physical piracy has decreased in general terms, in particular that of top manta (blankets in the streets), there still remain some black spots in some cities. Estimated trade losses due to music piracy in Spain are \$16.7 million, with a 20% piracy rate and a year-on-year decrease of legitimate sales of a staggering 26%, principally the consequence of Internet piracy.

Audiovisual piracy: The Motion Picture Association (MPA) reports that Internet piracy in Spain is wrecking havoc on the market. It appears that even exchanged P2P movies are now initially produced locally via camcording in Spanish theaters. As broadband penetration climbs in Spain, some MPA member companies are pioneering electronic sell-through partnerships with ISPs. The first was announced in July 2006 between Universal and the largest Spanish ISP, Telefonica (and Telefonica has opened their own EST site called www.pixbox.com which features film and music download to own). This movement, along with the growth of Internet piracy, makes it urgent that Spain revise its implementation of the relevant EU Directives (discussed above and below). MPA reports that the theatrical market in Spain dropped in 2007 (estimated 115 million tickets in 2007 versus 124 million in 2006). Home video sales remained even with the prior year, but is at a level significantly lower than what the Spanish market should be and less as compared to similar markets (such as Italy). Improved enforcement against street piracy has calmed that problem somewhat.

Entertainment software piracy: The Entertainment Software Association (ESA) reports that Spain is consistently among the top five countries in which infringing activity occurring online (particularly through P2P networks) is persistently high. For example, a member company’s monitoring of downloads of four top game titles last year indicated that on average, Spain accounted for approximately 10% of BitTorrent downloads and as much as 35% of eDonkey downloads. A substantial portion of these downloads were hacked versions of the localized

version of the game. The ISPs have generally been of no help, and remain unresponsive to the notices of infringement sent to them. Circumvention devices, such as mod chips and game copiers that bypass the technological protection measures employed in console hardware, remain prevalent in Spain. Spanish law appears ambiguous as to the illegal nature of circumvention devices, despite the fact that such devices are clearly prohibited under the EU Copyright Directive (which Spain was to have already fully and adequately implemented). ESA reports that counterfeit Nintendo video game products remain readily available in several cities in Spain. Adequate implementation would provide for prohibitions against circumvention of the technological measures employed by rights holders to protect their works. An ESA member company also reports a significant decrease in the number of customs (and police) enforcement actions against pirated entertainment software in 2007. ESA estimates that the value of pirated videogame product in the Spanish marketplace rose to \$510 million in 2007, with a 53% piracy rate.

Business software piracy: The Business Software Alliance (BSA) reports several sources of piracy in Spain. Widespread piracy keeps companies (end-users) using unlicensed software, resellers distribute illegal software on the streets, and the Internet continues to present challenges. Nearly all the large companies in Spain have policies to implement a reasonable legal use of software, with only some under-licensing problems. However, piracy at smaller enterprises has stayed at high levels, supported by the high level of piracy in the distribution channel (it is estimated that about 40% of software distributors in Spain are involved in illegal distribution of software). While the Internet is one of the main sources of piracy against business software, Spain is not to be considered one of the top pirate countries in Western Europe for business software Internet piracy. BSA estimates trade losses due to business software piracy in Spain in 2007 amounted to \$568 million, with a 46% piracy rate. According to a 2008 report issued by BSA-IDC, the information technology sector's contribution to the Spanish economy could be even bigger if Spain's PC software piracy rate were to be lowered 10 percentage points over the next four years. This would create an additional 1,982 jobs, \$2.1 billion in local industry revenues and \$288 million in additional tax revenues for federal, regional, and local governments.⁶

COPYRIGHT ENFORCEMENT IN SPAIN

Lack of government leadership: The Spanish government has let another year go by without any leadership to actually implement its own national anti-piracy strategy. To date, no working groups or coordinated inter-ministerial actions have been established by the government to address Internet piracy. The group previously established by the Ministry of Culture as part of an old Anti-Piracy Plan ended its work in 2006, and was not revived in 2007. The only anti-piracy discussions with Government now are *ad hoc* and not coordinated or communicated between Ministries.

The Spanish Government was supposed to broker negotiations with the copyright industries and the ISPs. The effort broke down for many reasons, including ISP intransigence and the mandatory participation of "free Internet" non-governmental organizations. To many in the private sector, it seemed that the Ministry of Industry's attempts at negotiation were weighed towards the ISP and user groups and the Ministry's view that the unauthorized use of content in P2P systems encouraged innovation.

In addition, the recording industry reports that the national government, through its Anti-Piracy Plan, agreed to negotiate with restaurant and bar associations to encourage actions against on-site piracy sales, but no action was ever taken by the government. The only agreements of this type have been completed due to the work of the various associations contacting local municipalities directly.

Internet piracy enforcement: There has been no reconsideration of the Attorney General's 2006 Circular. In fact, a legal study arranged by the music and movie industries was held up by Ministry of Culture (who had previously agreed to present the study to the Attorney General, at the latter's request). Meanwhile, the situation has worsened significantly.

⁶ [The Economic Benefits of Reducing PC Software Piracy](http://www.bsa.org/idcstudy), commissioned by BSA and conducted independently by International Data Corporation (IDC), released January 22, 2008, looks at the bottom-line economic benefits of reducing piracy in 42 countries that together account for more than 90 percent of global IT spending in 2007. It is available online at <http://www.bsa.org/idcstudy>.

For example, a criminal case against the operators of major link site/forum, which had been the target of a police investigation, was provisionally dismissed in December 2007. The Judge agreed with the prosecutor's request for a dismissal based on the Circular; if uploading and downloading are not criminally prosecuted, then facilitating them should not be prosecuted either, despite the fact that such facilitation is commercially-driven. After that decision, the Copyleft Foundation ("Fundacion Copyleft") publicly stated that they would file criminal complaints against any police officer that continued to investigate P2P sites. The Government did nothing to indicate that the dismissal or the threat against investigations were out of line. The head of the police technical unit that investigates these cases subsequently announced at a recent webmasters forum that P2P sites and its activities are in fact not prosecutable and such activity can be engaged in. This decision is being appealed.

Police actions: The industry groups report good relations with the Spanish police authorities. Some enforcement authorities are taking effective action (but with limited resources and with little political support from higher political authorities).

MPA reports that cooperation with police authorities on street actions has been very good. With respect to Internet piracy investigation against larger websites, cooperation also is good in terms of the investigation work. However, the recent judicial precedent based on the long-standing Attorney General's Circular is now changing the attitude of even previously cooperative police investigators.

The international recording industry reports that the Spanish authorities undertook 12,542 enforcement actions in 2007 which resulted in the arrest of 4,636 individuals.

ESA reports that the Spanish authorities took a positive step in the area of online enforcement. For example, in July 2007, Spanish police arrested 16 people involved in an Internet piracy ring. The police found the pirate ring to be in possession of a collection of software codes that facilitated the downloading of more than 4,000 infringing files of video games, movies, music, and other content. Given the state of online piracy in the country, much more needs to be done to address the situation.

BSA reports that its work in 2007 with the police forces continued to work well. Usually the police request BSA support in order to file criminal complaints, as well as industry support in technical experts and other logistics regarding raids. During 2007, BSA conducted the following actions: (a) 9 raids against end user companies; (b) 266 cease and desist letters were issued to end user companies; (c) 12 cases were referred to the police for investigation of alleged infringement activities by illegal distributors; and (d) 29 cease-and-desist letters were issued to Internet infringers.

Civil actions and the commercial courts: BSA reports that in addition to its criminal cases, its civil actions in Spain are working at an acceptable level. The Commercial Courts, which were granted jurisdiction in 2005 for enforcement on intellectual property in the civil arena, are proving to act reasonably quickly in the granting of *inaudita altera parte* search orders. However, BSA does report several problems when working with the commercial courts:

- a) Raids granted based on anonymous information: Before the commercial courts were empowered to handle intellectual property issues, civil courts had no problems in granting raids based on anonymous information. Nowadays, some commercial courts (like those in Madrid and Barcelona) do not accept anonymous information to grant a raid, while all other commercial courts in Spain have no problems in granting raids on the basis of anonymous information. This is making it more difficult for the software industries to pursue actions in these two major markets.
- b) High bonds: All raids are granted under the condition of bonds being posted. Although amounts requested are reasonable (between US\$2,300 to \$4,500), in some cases the bonds requested are so costly (€120,000—approximately US\$150,000—in one instance) as to make it impossible to bring the case.
- c) Calculation of damages: The definition given for damages to be awarded as result of piracy is confusing. Although nearly all business software piracy cases award damages based on the retail price of the legitimate products (a good result), there is an important software piracy case pending before the

Supreme Court that might affect the damage calculation to a lower criteria. This situation is being watched closely.

COPYRIGHT LAW REFORM IN SPAIN

Spain has a poor track record implementing the various EU Directives. At the onset, copyright legislation should be adopted in ways that are consistent with the two WIPO Internet treaties (the WCT and the WPPT). Furthermore, it is imperative that the Spanish government work with the copyright industry groups in a transparent and cooperative way if comprehensive reform of Spanish copyright laws moves forward. For example, this would include ensuring against any weakening of the exclusive right of record producers with respect to rights of communication to the public and of making available. Also, the right of remuneration granted both to audiovisual and musical performers for making available to the public adopted in the 2006 copyright law amendments represented an erosion of the value of the exclusive rights of right holders that were already granted in accordance with the requirements of the WPPT and WCT, and should be eliminated in future copyright law reform.

Effective implementation of the EU Enforcement Directive (2000) is especially important because it should improve enforcement, particularly in the digital environment. However, this appears not to be the case in Spain. A serious problem in the Spanish implementation involves the “right of information” afforded in Article 8 of the Directive (this allows rights holders to identify infringers and obtain information about infringements). This right is supposed to extend to ISPs and to allow rights holders to obtain an order requiring the disclosure of the identity of users, where it appears the user has been committing infringements. This is a critical tool in Internet piracy enforcement. However, industry reports that this right in the Spanish law appears to suffer the defect that it has a dual commercial scale requirement applying to both the services provided by the ISPs as well as to the infringements committed by the user. The Spanish formulation thereby misses a fundamental principle of this Directive, which is that the commercial scale requirement should only apply to the services provided by the ISPs and not to the infringements committed by the user.

Spain’s previously improper implementation of E-Commerce Directive (2000) still has not been corrected. In December 2007, the Spanish Parliament approved amendments to the “Law for the Impulse of the Information Society” (LSSI) which affected different sections the former LSSI and the Electronic Commerce law. This new law was part of the Spanish Government’s “2006-2010 Information Society Development Plan.” In earlier drafts of the law, the Ministry of Industry, on September 2006, introduced a new provision (Article 17bis), which corrected the ineffective implementation of notice-and-takedown procedures. But after strong opposition from ISPs and Internet users associations, the government, during the lead-up to general elections, withdrew the provision from the law. As a result, the only positive point of the new law (Article 11.2) refers to the possibility of preventing access from Spain to a specific service or content provided from a non-EU State when the “competent authorities” have requested the removal/interruption of such content/service. The most important amendment concerns the redefinition of who is a “competent authority” to notify ISPs. The former LSSI gave the possibility that the Ministry of Industry could be the “competent authority,” but now that possibility has been removed. The new wording is not clear, but implies that such a competent authority must be either an administrative or a judicial body. Moreover Article 11.3 says that in situations where the Spanish Constitution, or the laws concerning freedom of information and speech, give competence “exclusively” to the Courts, then only the courts could impose restrictions. It is possible, however, that the new law opens the possibility of creating (probably by new legislation) a “competent authority,” other than current administrative or judicial courts. Unfortunately, the Spanish government, in tune with the ISPs and Internet users associations, appear to support the idea that this provision mandates that only a court order can impose restrictions.

Film Law: On a positive note, and demonstrating that Spain can take positive anti-piracy steps, on December 28, 2007, the Spanish Legislature approved specific legislation prohibiting camcording movies. Regulations determining specific application of the legislation are still pending and may not be issued until after the March 9 general elections. Although camcording has been addressed previously as a general violation of the Copyright Law, this legislation is more specific and expansive and clarifies the problematic private copy defense. The legislation, contained in the Film Law (*Ley de Cine*, Section 5, Article 15.3), states clearly that recording movies (image and/or sound) is prohibited. The prohibition on recording is beneficial to enforcement efforts.

Previously, such conduct had to be directly linked to a further commercial activity to be prosecutable and the private copy exception allowed a very viable defense. Now, however, the specific prohibition eliminates both those difficulties and could allow direct enforcement follow-up.

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2008 SPECIAL 301 REPORT

SWEDEN

Special 301 Recommendation: IIPA recommends that Sweden be placed on the Watch List in 2008.

EXECUTIVE SUMMARY

In 2007, IIPA requested, through a “Special Mention” filing, that USTR devote special attention to the severe problems of Internet piracy and Sweden’s underlying legal and enforcement framework to combat it. These problems are sufficiently serious, and the solutions sufficiently distant, to warrant a Watch List placement in 2008.

INTERNET PIRACY

Significant Internet source piracy infrastructure and group membership have flourished in Sweden. Sweden is a notorious Internet piracy safe haven.¹ Illegal file-sharing is widespread and growing, and there are a number of deficiencies in Sweden’s legal infrastructure and enforcement system. The insufficiency of resources applied to Internet enforcement exacerbates the situation. Illegal file-sharing has, according to a recent study, grown by 49% from 2002 to 2007, and with a few exceptions noted below, is generally unhindered by Swedish enforcement authorities.

Topsites, highly specialized pirate servers with massive storage and high bandwidth, are used by Encoding/Release Groups for the first release of pirated content on the Internet (the same releases often fuel hard disc piracy as well). This source content is then passed down using a series of couriers from Topsites to IRC (Internet Relay Chat) sites, newsgroups and P2P (peer-to-peer) networks. Although the total number of Topsites in the world is difficult to determine due to their highly compartmentalized and secretive nature, it is estimated that there are approximately 300 and that an estimated 65 of them (22%) are located in Sweden, making it one of the most active countries in the world for organized release groups. The country ranks among the top three countries globally in the number of DirectConnect hubs (P2P facilitators) and the largest percent of DirectConnect users per inhabitants in the world. Finally, Sweden is home to *Rizon*, one of the world’s largest IRC networks.

Sweden is also host to *ThePirateBay.org*, one of the world’s largest BitTorrent tracker sites and one of Sweden’s largest web sites (it currently ranks 144 on the Alexa ranking). The site reportedly has over 10 million users and is financed through advertising revenues. It has been translated into over 30 languages, impacting legitimate markets around the world. The owners of the site boast that it is the biggest tracker of its kind and for years have mocked right holders in their efforts to take actions against the site. The site was finally raided in mid-2006 by the Swedish police and servers were seized, but the site and its tracker were quickly up and running soon thereafter. MPA estimates that 95% of the material transmitted over ThePirateBay is infringing.

We can report a welcome development, however, that on January 31, 2008, after an 18 month investigation of ThePirateBay, the four site owners were indicted for criminal copyright infringement. Despite the indictments, the site continues to operate and prosecution will only cover the time period up until the raid in 2006.

Swedish ISPs have the dubious honor of being well known for their lack of cooperation with right holders in taking down infringing content upon receiving cease and desist letters. Although most ISPs had

¹ Pirates have even established a political party, The Pirate Party (“Piratpartiet”), which had about 0.63 percent of the votes in the September 2006 elections (fortunately less than was expected).

been forwarding these letters to alleged infringers, most ceased doing even this after the public debate about peer-to-peer (P2P) piracy arose, claiming that they are not obligated to do so by law. MPA reports that, according to two market research studies, there are approximately 15-24 million movies illegally downloaded every year in Sweden. The entertainment software industry reports that Sweden is typically among the top ten countries for which online infringements are consistently high, on a number of protocols (be it BitTorrent, other P2P networks or websites). For example, with respect to four top game titles monitored, Sweden typically accounted for 1-2% of the total number of global downloads monitored on the BitTorrent and eDonkey network. For one popular PC game, Sweden accounted for 6% of the monitored downloads – more than 30,000 downloads in an 8-week period after launch.

INTERNET ENFORCEMENT

Although movie right holders have brought around 170 cases to the police, the vast majority are not pursued. Only nine cases have actually gone to court and the very few convictions received have resulted in a severe public backlash. IFPI Sweden has brought around 35 cases to the police against up-loaders, but only three cases have been tried so far, all leading to convictions. In addition, IFPI Sweden has brought around ten criminal cases to the police against DC-hub operators, but none of these have been tried yet. Some of these cases were brought to the police as early as November 2005 and April 2006. Lack of police and prosecutorial seems to be the main reason for the delays in moving these cases ahead. In June 2007, the Swedish Court of Appeals upheld the very first conviction for Internet piracy which, however, only involved four songs and a total fine of about \$2000.

Law enforcement officials do not undertake *ex officio* actions even though they have the power to do so. In 2005, the Ministry of Justice tasked the Swedish Prosecution Authority, the Swedish Economic Crime Bureau and the National Police Board to review enforcement against Internet piracy. Its report, published in September 2005, recommended the establishment of specialized units of prosecutors and police officers with information technology knowledge and the right for right holders to gain information, such as Internet protocol (IP) addresses, from the ISP in “small” cases. The copyright industries have continuously pressed for the creation of this unit, which still has not been constituted.

Right holders contemplating legal action against Internet pirates in Sweden face difficulties in identifying infringers due to restrictions imposed by the Electronic Communication Act. Right holders cannot obtain from Internet Service Providers (ISPs), via a civil procedure, the identity of an infringing end user upon communication to the ISP of an IP address. Such information, which is critical to effective Internet enforcement, can only be obtained by a public prosecutor or the police in the course of a criminal investigation, although it appears that even this is only the case with regard to infringements on a particularly large scale.

Though internet piracy is rampant in Sweden, it is not completely without a hard goods piracy problem either. Pirated and counterfeit Nintendo products continue to be available in the market, but there have been no enforcement actions by police or the customs authorities. Sales of mod chips for the *Wii* console and DS game copiers via the Internet have also increased. The piracy level for entertainment software products is at 53%, for PC, console and handheld games.

COPYRIGHT AND ENFORCEMENT LEGISLATION

A number of legislative deficiencies have contributed to the growth of Internet piracy in Sweden and to the growth of a general “lawless” attitude toward illegal file-sharing among the populace.

EU Copyright Directive: The law implementing Sweden’s obligations under the EU Copyright Directive entered into force on July 1, 2005 (Law 2005:360 amending the Act on Copyright in Literary and Artistic Works, Law 1960:729). Particularly disappointing are the inadequate provisions regarding the protection of technological measures and the lack of a specific injunctive relief remedy against ISPs, both required under the EU Directive. The Swedish authorities appear to consider a civil damages action for contributory infringement as a sufficient tool to fight Internet piracy, but civil litigation, without preliminary injunctive relief, is just too slow to act as a deterrent. At least, however, unauthorized downloading of

protected works is now clearly illegal, though without the ability to easily obtain user information from ISPs, right holders are deprived of any meaningful remedy in Sweden. Sweden needs to provide these laws and remedies to effectively combat Internet piracy.

EU Enforcement Directive: Sweden has not implemented the EU Enforcement Directive, although we understand that a proposal has been drafted and is expected to be introduced later this year. This proposal is said to contain a provision on the important right to obtain IP addresses from ISPs in the context of civil proceedings. It is critical that such a provision be adopted as soon as possible. Unfortunately, we have also heard that the present draft proposal does not contain a right to injunctive relief in a civil case against ISPs, and that it therefore fails to cure Sweden's inconsistency with Article 11 of the Enforcement Directive and Article 8(3) of the Copyright Directive. In September 2007, a report was issued by Swedish Chief Judge, Cecilia Renfors ("Renfors Report"), recommending that the upcoming legislation contain provisions requiring ISPs to take action to terminate the contracts of certain users who repeatedly use the Internet to infringe copyright. The report called for a new task force to discuss legal reforms in the area of enforcement and also to make legal services easier and more plentiful in Sweden. While this report and, in particular, the suggestions regarding disconnection of repeat infringers is welcome, it does not go far enough to bring Sweden's legal and enforcement regime into harmony with international trends even assuming that the proposed legislation is adopted in its present form.

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2008 SPECIAL 301 REPORT

TAIWAN

Special 301 Recommendation: Taiwan should remain on the Watch List. Passage of ISP legislation, more effective enforcement against Internet piracy, and curbing illegal photocopying of academic materials, especially on university campuses, are necessary.

EXECUTIVE SUMMARY

Internet piracy continues to be the most urgent problem in Taiwan. While physical piracy is generally under control (with the exception of commercial photocopying of textbooks), additional resources and improved training in Internet enforcement techniques are necessary particularly at the police level. Taiwan must quickly adopt its ISP bill establishing clear secondary liability for ISPs. This would foster better cooperation among right holders and the ISP community. Internet piracy must be made a public crime. The government's educational network, TANet, must be more effectively regulated and students prevented from using its facilities for illegal filesharing.

PRIORITY ACTIONS REQUESTED IN 2008

- **Internet Piracy is a Constantly Growing Problem that is the Highest Enforcement Priority for the Motion Picture and the Music and Recording Industries, but also does Significant Damage to all Other Copyright Sectors:** Internet piracy continues as one of Taiwan's most critical piracy problems. While the authorities have made significant efforts to run raids and bring criminal actions against such piracy, including the use of the new, and long-awaited P2P law passed in June 2007, enforcement should be further strengthened.
- **Adopt, as Soon as Possible, ISP Liability Legislation with an Effective Notice and Takedown System:** Taiwan should be commended for passing strong legislation to deal with growing P2P piracy, which establishes criminal and civil liability for inducing infringements by file sharing services. An ISP liability bill that would: clarify and extend liability to ISPs for infringements in certain cases, create safe harbors from liability including upon expeditious takedown of infringing sites, and set out an expeditious notice and takedown mechanism, should be passed this spring.
- **Implement Effective and Deterrent Policies and Penalties for Online Infringements Occurring Over the Government-Owned TANet:** In the spring of 2007, the Ministry of Education (MOE), in response to urgent rights holder requests, adopted an action plan to deal with the use of its TANet network for illegal P2P file sharing of virtually all copyright products. This plan has yet to be effectively implemented and a government-rights holder special task force created under the plan has not met since last August and must meet on a more frequent basis. This implementation must include clear guidance to universities to block access to students engaged in significant illegal file sharing, to inform rights holders of its actions and to cooperate with enforcement authorities. TIPO/MOEA should work with MOE to ensure that this plan is fully implemented.
- **Provide Improved Training and Manpower to the IPR Police (IPRP) and to the Joint Internet Infringement Inspection Special Taskforce (JIST):** IIPA again calls for increased manpower and equipment at the IPRP and its specialized unit, JIST, particularly increased training to combat Internet piracy.

- **Improve Enforcement Against Illegal Photocopying On and Around University Campuses:** MOE's action plan also covers illegal photocopying of academic books and journals. The plan must be fully and effectively implemented to prohibit illegal photocopying and use of unauthorized materials on campus, backed with sanctions for violations. Universities should also be required to build provisions into outsourcing agreements with on-campus photocopy facilities imposing penalties for those caught engaging in infringing conduct, including lease termination.
- **More Effectively Monitor Exports of Blank ODs to Regions like Latin America:** Customs and other enforcement authorities in Taiwan must work more closely with, particularly, the international recording industry, to take action in Taiwan to prevent smuggled and misdeclared shipments of blank media exported from Taiwan factories to affiliated pirate operations in Paraguay and throughout Latin America.
- **Extend Coverage of the New IP Courts to Criminal Copyright Cases in Taiwan's Courts of First Instance and Create Special IP Prosecutors:** The IP Court has first instance civil and full appellate jurisdiction. Its mandate should be extended to cover criminal copyright cases in trial courts and a division of specialized IP prosecutors should be created.
- **Lengthy Copyright Royalty Rate Reviews Should Cease and Proposed Legislation Halting Such Reviews Should be Adopted:** Legislation has been proposed by TIPO, which would end its review and approval of proposed royalty rates that until 2001 resided in the Copyright Examination and Mediation Committee (CEMC). Delays in these reviews, and unfair outcomes have caused serious harm to the recording industry. This legislation should be passed as soon as possible.
- **Pass Copyright Term Extension Legislation:** The Government of Taiwan should follow the international trend in place in over 80 countries to extend the term of copyright protection. The term should be extended to life plus 70 years, and to 95 years from publication for sound recordings and other works of juridical entities.

For more details on Taiwan's Special 301 history, see IIPA's "History" appendix to this filing at <http://www.iipa.com/pdf/2008SPEC301HISTORICALSUMMARY.pdf>. Please also see previous years' reports at <http://www.iipa.com/countryreports.html>.

TAIWAN
Estimated Trade Losses Due to Copyright Piracy
(in millions of U.S. dollars)
and Levels of Piracy: 2003-2007¹

INDUSTRY	2007		2006		2005		2004		2003	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Motion Pictures ²	NA	NA	NA	NA	98.0	51%	40.0	40%	42.0	44%
Records & Music	4.9	21%	16.2	28%	21.5	26%	49.4	36%	58.0	42%
Business Software ³	104.0	40%	91.0	41%	56.0	43%	88.0	43%	83.0	43%
Entertainment Software ⁴	202.9	94%	NA	NA	161.9	42%	123.0	63%	261.8	42%
Books	16.0	NA	18.0	NA	18.0	NA	20.0	NA	20.0	NA
TOTALS	327.8		125.2		355.4		320.4		464.8	

PIRACY AND ENFORCEMENT UPDATES IN TAIWAN

Over the last year, piracy of physical product (except for illegal photocopying of books and journals on or near university campuses in some areas) and end user piracy of software in businesses has continued to decrease. Taiwan is to be commended for reducing industrial (factory) OD piracy and retail OD piracy to very low levels, and for continued reductions in end user piracy of business software. Enforcement in these areas has continued to be good. However, Internet piracy continues to threaten all these gains.

Internet Piracy: Internet piracy continues and is replacing physical piracy in the marketplace, requiring a significant increased response from Taiwan's government. Over 67% of Taiwan's population used the Internet in 2007 (15.23 million users), with broadband connections growing from 12.25 million in July 2006 to 12.4 million in 2007, (63.4% of all users).⁵ It is the predominant form of piracy for most industries in Taiwan.

To illustrate how Internet piracy has supplanted physical piracy, the recording industry reports that IFPI-Taiwan was involved with the authorities in 363 raids in 2005 with 35 of those involving the Internet. In 2007 there were 401 raids with 265 involving the Internet -- a six-fold increase.

The two infamous websites, *Kuro* (criminally convicted) and *Ezpeer* (settled and illegal operation shut down) were the subject of two significant victories prior to 2007. In February 2007, the authorities raided Foxy, (<http://www.gofoxy.net>), one of the most popular pirate P2P sites (400,000 users at any one time) in Taiwan offering music and movies for download. On September 4, 2007, authorities raided two other major P2P services, Kupeer (<http://www.kupeer.com>) and on September 13, 2007, Hip2p (<http://www.hip2p.com>). Kupeer was the first P2P service raided following adoption of Taiwan's new P2P law in June 2007. Both Kupeer and Hip2p closed down immediately after each raid, demonstrating the deterrent

¹ The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2008 Special 301 submission at www.iipa.com/pdf/2008spec301methodology.pdf. For information on the history of Taiwan under Special 301 review, see Appendix D at (<http://www.iipa.com/pdf/2008SPEC301USTRHISTORY.pdf>) and Appendix E at (<http://www.iipa.com/pdf/2008SPEC301HISTORICALSUMMARY.pdf>) of this submission.

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

³ BSA's 2007 statistics are preliminary. They represent the U.S. software publishers' share of software piracy losses in Taiwan, and follow the methodology compiled in the Fourth Annual BSA and IDC Global Software Piracy Study (May 2007), available at <http://w3.bsa.org/globalstudy/>. These figures cover, in addition to business applications software, computer applications such as operating systems, consumer applications such as PC gaming, personal finance, and reference software. BSA's 2006 piracy statistics were preliminary at the time of IIPA's February 12, 2007 Special 301 filing and were finalized in June 2007 (see <http://www.iipa.com/statistics.html>) as reflected above.

⁴ ESA's reported dollar figures reflect the value of pirate product present in the marketplace as distinguished from definitive industry "losses." The methodology used by the ESA is further described in Appendix B of this report. The piracy level in 2005 does not reflect handheld piracy rates, which were not available for 2005. In 2004, handheld piracy rates were upward of 95%.

⁵ Source: <http://www.twnic.net.tw/download/200307/96305b.pdf>

impact of the new law. Unfortunately, Foxy is still under investigation by prosecutors but the site is hosted in the U.S. by an American citizen originally from Taiwan, and the site is still operating. Action by the Taiwan prosecutor is still pending.⁶ In October, an infamous pirate website, XYZ, was raided and its operator indicted. It had been operating ten years, selling hard copies of software, movies and music.

As noted above, the recording industry took actions against Internet piracy in 265 cases in 2007.⁷ MPA monitored 492 P2P sites and 37 sites suspected of selling pirate hard copies of movies. MPA was involved with 103 raids of auction sites, about the same number as in 2006. 200 raids were taken with MPA involvement of FTP/P2P/forums/streaming sites, twice as many as in 2006.

In its 2007 submission, IIPA reported that Taiwan had the highest number of Internet infringements of business software titles of any country in Asia. BSA reports that for 2007 that number went down from 80,000 to 40,000 in 2006-2007, respectively.

The Taiwan government's university computer network, TANet, which is operated by the Ministry of Education (MOE), is being widely used for Internet piracy including unauthorized P2P file sharing of all types of copyright material, including scanned academic texts and journals. In April 2007, after continued urging by right holders, MOE proposed an action plan to deal with a number of campus-based infringements, including the wide use of TANet for P2P filesharing and other infringements. Part of the draft Action Plan was the creation of a special task force to include all the local and international rights holder organizations which are part of the Taiwan Intellectual Property Alliance (TIPA). The task force met three times in April, July and August, but has not met since that time. Meanwhile, we understand the Action Plan was finalized in October 2007 and that no significant changes were made in the plan from the July draft.

IIPA members report that MOE's actual implementation of this plan has been minimal to date.⁸ They also report that, even though MOE was to mandate its universities to deal with P2P piracy, there is no real enforcement or monitoring of their compliance and little has been done. More positively, some universities have limited the bandwidth available on TANet, which has resulted in diminished use of the network for illegal file sharing. The recording industry reports that it has provided to MOE, over a year ago, IP addresses of students that have misused the TANet for illegal filesharing. However, MOE and the universities have yet to report back to the industry of any action being taken. IIPA urges MOE to work directly with TIPA and its members to implement fully this action plan.

Academic publishers report a significant growth in internet piracy, through the TANet system and otherwise. Unauthorized access to electronic academic and professional journals compromises legitimacy of licenses, and scanned academic texts and reference books are increasingly subject to P2P file sharing.

Other forms of Internet piracy are also growing. Internet cafés have become hotbeds of piracy of motion pictures and music.

The recording industry reported issuing 666 takedown notices to ISPs involving forum and blog sites, auction sites, cyberlockers and streaming sites. ISPs complied with 587 of these notices by taking down the infringing sites. This high compliance rate exists even though the ISP Bill has not yet passed and the liability of ISPs for infringement remains less than clear.⁹

Provide Needed Training, Equipment, and Manpower to the IPRP and JIST: In TIPO/MOEA's "Implementation Plan for Strengthening Internet Infringement Preventive Measures," JIST was given the

⁶ It is reported that of the estimated 250 pirate sites/services operating in Taiwan, 50 are sourced from Taiwan and 200 from elsewhere, including the PRC and the U.S. The dilemma faced in the Foxy situation must be solved in the new ISP Bill by establishing that ISPs are at least subject to injunctive relief through a court ordering that the ISP block access to such foreign site. See 17 USC §512(a)(1) and (j)(1)(B)(ii).

⁷ Infringing music files in various formats such as MP3, midi, WAV and RAM are available from a variety of channels in Taiwan including FTP sites, websites, streaming sites and file-sharing services.

⁸ IIPA and its members were encouraged when it met with MOE officials in July 2007 to hear an explanation of the plan. Recent reports, however, continue to complain about lax implementation of the plan by MOE even six months later.

⁹ Taiwan has what is called "joint tortfeasor" liability for aiding, abetting or participating in, infringement and the ISP Bill clarifies ISP liability under this existing legal doctrine.

exclusive responsibility for tackling Internet piracy. JIST comprises selected personnel with expert knowledge in computers, IT, and technology from the IPRP (who are chiefly tasked with executing the Plan) and the Joint Optical Disk Enforcement Taskforce (JODE). Because Internet piracy has mushroomed in Taiwan, there is an increased need for more manpower, training and equipment at the IPRP to cope with the magnitude of the problem. The IPRP is authorized to have 220 officers available for these enforcement duties. Presently it has only 190. These additional 30 officers are urgently needed. Furthermore, the IPRP needs more and better broadband connections, more computers, and other improved equipment to take on this growing enforcement problem.

Optical Disc Production in Taiwan Has Shifted From Factory Production to “Burning”: Illegal burning of copyright content onto recordable discs is now clearly the predominant form of optical disc piracy in Taiwan. The remaining OD factory production problem now only involves the knowing export of blank media to often affiliated pirate operations outside Taiwan, particularly to Paraguay for transshipment to other countries in Latin America. JODE’s inspection report for all of 2007 is not yet available but inspections will likely be down again, as they were in 2006 from 2005.¹⁰ JODE reports issuing no fines to date but that 9 inspected plants closed voluntarily. The number of plants, mostly producing blank disks, is down from 83 plants in 2006 to a reported 77 in 2007. While pirate factory production is a minor problem, due to commendable enforcement by the enforcement authorities, it is important for Taiwan to continue to monitor the plants vigilantly to avoid backsliding. It remains a concern, for example, that in 2007, as in 2006, no fines or prosecutions against plants were instituted.

OD “burning” remains the biggest problem but even this problem has become less critical due to the growth of Internet piracy. The most recent report from the IPRP shows pirate optical disk seizures down about 84% and OD burner seizures down 63% through October 2007 from the same period in 2006.¹¹ Effective enforcement has reduced the number of night market stalls to under 190 (from a reported 324 in 2006).¹² Retail piracy is now predominantly through home delivery and flyer advertising.

Book Piracy: By far the most damaging piracy problem for U.S. and Taiwanese publishers alike in 2007 continued to be illegal photocopying of academic materials. Textbooks, journals, English language teaching (ELT) materials and professional reference books continued to be reproduced at an alarming rate, primarily on university campuses.¹³ Authorities have been quite cooperative in running raids against commercial photocopy shops (at least off campus) at copyright owners’ requests, and we are pleased to report that 2007 saw some self-initiated action by select local authorities, especially in Taichung. Such *ex officio* action is essential to combat illegal photocopying, especially looking toward activities of copy shops ON campus, and this proactive role by the government should be encouraged.¹⁴ Copy shops continue to grow more sophisticated in their efforts. Photocopy shops do not generally keep stockpiles of copies, but make them to order. Furthermore, print runs are often at night or after hours, with immediate offsite delivery to avoid detection. Thus, IIPA calls on the government to continue to strive for the employment of advanced investigative techniques to stem this form of piracy.¹⁵

Ministries of Justice and the Interior have re-evaluated for officers conducting raids on photocopy shops, with an aim to make these raids more palatable to them. IIPA commends this move. Ensuring that Taiwan’s officer reward schemes place adequate value on stemming book piracy is an important component of success in this area.

¹⁰ <http://www.tipo.gov.tw/eng/prosecution/jode.asp>

¹¹ <http://www.tipo.gov.tw/eng/prosecution/ietf.asp>. It is believed that virtually all these seizures were of “burned” discs.

¹² Source: IFPI-Taiwan

¹³ Profit-based photocopy shops, located on the perimeters of all major college campuses, actively carry out photocopying and binding services both for students and teachers.

¹⁴ IIPA notes also that, due to the sensitivities police have expressed regarding on-campus actions, it is critical that MOE fully and effectively implement its April 2007 action plan, discussed further below.

¹⁵ Some shops, in areas of dense student population, have display racks and catalogs featuring covers of foreign textbooks, arranged by course number and available for copying. Students can choose the course, the text, and the color for the custom cover, and the book is then copied while the student waits.

The industry continues to suffer from some procedural inconsistencies in prosecution, especially in Tainan.¹⁶ Undue hurdles relating to Powers of Attorney and proof of copyright ownership continue to plague the attempts at convictions in this district, and IIPA calls for streamlining of these requirements to avoid unnecessary burdens in the quest for effective prosecution.

The Ministry of Education (MOE), in its Action Plan, called for the issuance of additional programs to deal with illegal photocopying on campus, with a deadline of September 2007. These programs were to include measures designed to minimize illegal copying at on-campus facilities. The action plan needs to adequately address internal sanctions for violations, such as assessments that impact the schools' budgets and mechanisms for terminating leases of on-campus photocopy shops that are caught engaging in illegal activity. The plan should also deal with on-campus enforcement concerns. To the extent that the plan fails to address all of these components now, the authorities should work with right holders to ensure that appropriate measures are included.

The importance of getting an effective plan into place—and enforcing that plan—deserves to be underscored here. Publishers report that, as enforcement against off-campus facilities has increased through the years, illegal operations are shifting toward Taiwan's campuses. On-campus infringement is rapidly becoming the primary problem for the industry. Meetings in mid-to-late 2007 with MOE indicated that they are willing to move an on-campus plan forward, and TIPO has expressed the same willingness. Unfortunately, at least since September 2007, action has not followed. In order to make significant strides towards reducing book piracy in Taiwan, this action must follow in 2008. The next university term opens this month and next, with another window of opportunity in September and October. IIPA calls on Taiwan to start implementing the plans it has, and to strengthen the MOE initiative regarding on-campus infringements of books.

End-User Piracy of Business Software: The rate of business software piracy decreased again in 2007 from 41% in 2006 to 40% in 2007 but and losses to U.S. software publishers increased to were \$104 million in 2007. The use of unlicensed or pirate software in the workplace has always caused the greatest revenue losses for the business software industry. BSA has a good working relationship with the enforcement authorities and is able to get the cooperation of the police and prosecutor's office for enforcement action fairly promptly. Nevertheless, many of the procedural problems noted in IIPA's past submissions continue to persist in 2007, i.e., unclear guidance on the information needed to secure a search warrant for police raids and unduly focusing on the use of informer testimony for all end-user enforcement. BSA urges TIPO to cooperate with it in helping to train prosecutors and judges in the particular intricacies and unique aspect of end-user piracy enforcement.

Entertainment Software Piracy: Pirated *Wii* game discs are now readily available in Taiwan, along with counterfeit cartridge-based games which continue to be exported from the country. In the second quarter of 2007, over 10,000 counterfeit *Wii* discs, imported from China, were seized in the country over a six-week period. While enforcement efforts continue, Nintendo of America (NOA) reports two (2) successful criminal prosecutions in 2007. In May, a Taiwan court imposed an eight month prison sentence on a pirate for violation of the company's copyrights. The action began in May 2005, when U.S. Customs authorities in Miami seized two shipments of counterfeit *Game Boy Advance* components, transshipped through the U.S. for Paraguay. NOA informed Taiwan Customs of the shipment and requested that an investigation be initiated into the shipping company (Salida Industry Co., Ltd) and its owner. The investigation resulted in the indictment of the owner for trademark and copyright infringement in February 2007, and the trial proceeded. Remarkably, the court also imposed a fine on the forwarding company of the shipment, DHL Taiwan. In June 2007, a second case resulted in the imposition of a 14-month prison sentence on the defendant for selling counterfeit Nintendo products. The defendant's store was raided in late 2003 and resulted in the seizure of over 700 counterfeit Nintendo games. The defendant had immediately appealed the December 2003 judgment but in June 2007, the court dismissed the appeal and ordered the defendant to begin serving the prison sentence.

¹⁶ The copy shop owners in Tainan have banded together to form their own "trade association" specifically aimed at frustrating enforcement efforts. They have been at least somewhat successful to date, and the government must take action to ensure that justice is conducted despite delay and harassment tactics employed by the infringers.

Specialized IPR Court Approved in 2007 for Commencement in 2008: In a development that has been commended by IIPA, the Legislative Yuan, in March 2007, approved the Judicial Yuan's recommendation for the creation of an Intellectual Property Court to handle all civil trial court and all civil and criminal appellate IPR cases. The IPR court will NOT, however, have jurisdiction over copyright and trademark cases at the trial level.

IIPA has urged that the IPR court mechanism be extended to first instance criminal cases. We understand that the Judicial Yuan continues to believe that copyright and trademark criminal cases are relatively simple, thus not warranting a specialized court, at least at the first instance level. IIPA disagrees with this, especially given the fact that an increasing number of copyright cases involve fairly complicated legal issues associated with online technologies. We urge the Judicial Yuan to look to remedying this deficiency and to clarify arguments now being made that, somehow, first instance criminal IPR trial courts would be "unconstitutional." The IPR court is now scheduled to become operational in the second half of 2008.

CRIMINAL COPYRIGHT ENFORCEMENT STATISTICS FOR 2007 TAIWAN			
ACTIONS	MOTION PICTURES	SOUND RECORDINGS	TOTALS
NUMBER OF RAIDS CONDUCTED	726	401	1127
NUMBER OF DVD-Rs SEIZED	396,015	86	396,101
NUMBER OF DVDs SEIZED	77,600		77,600
NUMBER OF CDs AND CD-Rs SEIZED	40,653 (CD-R)	1,286,338	1,326,991
NUMBER OF INVESTIGATIONS	1,648	1053 (652 no raid actions but only sending C&D notices)	2,701
NUMBER OF VCD LAB/FACTORY RAIDS	1		1
NUMBER OF CASES COMMENCED	486	401	887
NUMBER OF INDICTMENTS	356	149	505
NUMBER OF CONVICTIONS (INCLUDING GUILTY PLEAS)	453	390	843
ACQUITTALS AND DISMISSALS	NA	2	2
NUMBER OF CASES PENDING	614	11	625
NUMBER OF FACTORY CASES PENDING	0	12	12
TOTAL NUMBER OF CASES RESULTING IN JAIL TIME	223	127	350
SUSPENDED PRISON TERMS			
MAXIMUM 6 MONTHS	0	11	11
OVER 6 MONTHS	0	5	5
OVER 1 YEAR	132	5	137
TOTAL SUSPENDED PRISON TERMS	132	50	182
PRISON TERMS SERVED (NOT SUSPENDED)			
MAXIMUM 6 MONTHS	73	64	137
OVER 6 MONTHS	16	4	20
OVER 1 YEAR	2	9	11
TOTAL PRISON TERMS SERVED (NOT SUSPENDED)	91	77	168
NUMBER OF CASES RESULTING IN CRIMINAL FINES		2	2
UP TO \$1,000	5	0	5
\$1,000 TO \$5,000	5	1	6
OVER \$5,000	1	1	2
TOTAL AMOUNT OF FINES LEVIED (IN US\$)	\$46,488	NA	\$46,488

COPYRIGHT LAW AND RELATED ISSUES

Previous years' reports have gone through, in detail, the legislative landscape in Taiwan, including the 2004 copyright amendments. The following is intended to provide a summary of latest developments only. Please see previous years' reports for more information about past developments at <http://www.iipa.com/countryreports.htm>.

P2P Legislation: IIPA commends the adoption of the P2P bill amending Articles 87 and 93 and adding a new Article 97-1 to the Copyright Law. The amendments would make illegal, and subject to civil and criminal liability, the provision of file sharing services with the intent to facilitate infringement. TIPO also now has the authority to close an infringing P2P service once there is a conviction. This would prevent what occurred with Kuro, when it continued to operate illegally after the service was convicted and while on appeal. We have noted the initial raids done under these new amendments above. We also noted the fact that the services, Kupeer.com and Hip2p.com, closed immediately, and the deterrent impact the new law appears to have had.

ISP Liability: Given the rapid growth of Internet piracy in Taiwan, especially P2P infringements, it is essential that a workable approach to online enforcement be forged between right holders and service providers, who are aware in general and often foresee that infringing activity is occurring over their services,¹⁷ but may not be aware of the specifics of each act of Internet piracy. IIPA understands that the ISP Bill is in its final stages at TIPO and would establish clear joint tortfeasor liability (and a form of vicarious liability where there is ability to control and a direct financial benefit) along with safe harbors much like those in place in the DMCA. In addition, there would be a statutory notice and takedown procedure that would have to be followed for ISPs to benefit from the safe harbors from liability for damages. Some technical changes are in the process of being finalized and IIPA has not seen the Bill as now proposed. There is a good chance that it will be acceptable, however, and, if so, we urge its prompt approval by the EY and its early passage by the LY.

Amend the Criminal Code to Make Internet Piracy a "Public Crime": In 2003, Taiwan designated as "public crimes" all offenses related to OD piracy, obviating the need for a right holder complaint and giving a push to the police undertaking raids directly when piracy was discovered or where it turned up in an investigation. This had an immediate and favorable impact on OD piracy in Taiwan. Given the vast increase in Internet piracy and its damaging impact on the legitimate market in Taiwan, plus the even greater difficulty for right holders to unearth these crimes, Taiwan's criminal provisions should now be further amended to include Internet piracy as a "public crime." Right holders would, of course, continue to work closely with enforcement authorities as they continue to do with OD piracy, but this added ability to react quickly and decisively to piracy on the Internet, is of critical importance if this growth is to be contained.

Taiwan Should Adopt an Anti-Camcording Criminal Provision: A vast number of movies are stolen right off the screen by professional camcorder pirates, who use video cameras to illicitly copy a movie during exhibition in a movie theatre – usually very early in its theatrical release or even prior to the film's release (e.g., at a promotional screening). These copies are then distributed to pirate "dealers" throughout the world and over the Internet. Taiwan should take whatever legislative steps are necessary to criminalize camcording of motion pictures.

Copyright Examination and Mediation Committee Review Process Should be Abandoned: As of 2001, the Copyright Examination and Mediation Committee (CEMC) is no longer responsible for review of royalty rates proposed by collecting societies. However, TIPO still reviews what collecting societies submit to them as their proposed royalty rates for review and approval in advance. This review has caused serious harm to right holders, as detailed in prior submissions and TIPO should no longer require it. TIPO has proposed legislation that would abolish this review mechanism and would provide that administrative review

¹⁷ As a result of the *Kuro* decision and past decisions on accomplice or joint tortfeasor liability, awareness and foreseeability of infringing activities occurring over their services would appear to subject service providers to claims for copyright infringement, although this remains unclear. The ISP Bill would make such liability clear.

would only be undertaken if the parties have not been able to reach agreement. This legislation should be adopted as early as possible. In the interim, TIPO should stop conducting tariff reviews.

Earlier Proposed Legislation on Rental and Parallel Imports: Legislation was contemplated in 2006, led by the Taiwan video rental store community, to propose legislation that would decriminalize parallel imports under certain circumstances and the act of unauthorized rental, also under certain circumstances. IIPA opposed these changes and further consideration was not given in the LY. However, TIPO continues to raise the rental and parallel import issues with the USG in bilateral discussions. These amendments are not needed and IIPA opposes them. However, close monitoring by the USG is needed given the penchant for the rental community to fashion loopholes in existing legislation in both these areas.

Term of Protection: The Government of Taiwan should follow the international trend and extend term of copyright protection to life plus 70 years, and to 95 years from publication for sound recordings and other works of juridical entities.

TRAINING AND PUBLIC AWARENESS

The copyright industries continued to be actively involved in training and raising public awareness about copyright in 2007. The industries participated in a number of government seminars and trainings, including:

- On September 6, 2007 and October 18, 2007, IFPI-Taiwan was involved in three anti-piracy investigation-training events held by TIPO for the local police departments, with each training involving around 50 police officers;
- In September and October 2007, BSA provided three trainings for police on software piracy issues;
- MPA provided regular training seminars in 2007 including four trainings for police units, two trainings for JODE officers and five training programs for Customs officers. In addition it engaged in 25 educational campaigns at high schools and colleges.
- Nintendo of America's in-country representatives provided an extensive four-day training program for about 700 customs agents in Keelung, Taipei, Taichung and Kaohsiung. Another training program was held for 50 customs agents stationed at the Taoyuan International Airport. In addition, NOA provides its training manuals to law enforcement authorities in the country.

Conclusion

Internet piracy should be a significant focus of the enforcement authorities (in addition to action against end-user software piracy and illegal photocopying). More manpower is needed, as is more training and equipment. Legislative changes including, passage of the ISP bill and making Internet piracy a public crime are critical. Stepped up enforcement across the board to deal with this urgent problem is Taiwan's greatest challenge.

Taiwan continues to do an admirable job in its enforcement efforts against hard good piracy but needs to do more to combat illegal photocopying, especially on campus. MOE policies on this issue and on dealing with the use of TANet, remain inadequate and must be stepped up.

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2008 SPECIAL 301 REPORT

TAJIKISTAN

Special 301 Recommendation: IIPA recommends that Tajikistan remain on the Watch List in 2008.

EXECUTIVE SUMMARY

In 1993, Tajikistan and the United States concluded a bilateral Trade Agreement which detailed mutual obligations to improve the protection and enforcement of intellectual property rights. That agreement entered into force on November 24, 1993. Tajikistan has never fully implemented the IPR obligations in that agreement.

In 2007, the U.S. Trade Representative – in retaining Tajikistan on the Watch List – noted that Tajikistan “has not yet fulfilled its IPR obligations under the [1993] U.S.-Tajikistan Bilateral Agreement” and that it needed “to bring its IPR regime into conformity with the TRIPS Agreement as part of its ongoing efforts to join the WTO.” In fact, the Tajik IPR legal regime falls far short of Tajikistan’s obligations under the 1993 bilateral Trade Agreement. Specifically, Tajikistan has not joined the Geneva Phonograms Convention and does not provide any protection for foreign sound recordings, nor does it explicitly protect foreign pre-existing works (before 2000) or sound recordings. Thus, almost fifteen years after pledging to do so, Tajikistan does not even provide basic rights or protection for U.S. or other foreign works or sound recordings.

Legal Reform Deficiencies

In 2000, Tajikistan adhered to the Berne Convention. However, the Tajik Copyright Law (in force, December 17, 1998) falls short of full compliance with the Berne Convention and other international norms. There are many deficiencies in the Copyright Law, including: (1) the over-regulation of the terms and conditions of authors’ contracts; and (2) provisions that provide only for a right of remuneration for producers of sound recordings for the public performance, broadcasting, or communication of a phonogram to the public by cable. The law should be amended to: (1) delete the onerous contract regulations; and (2) add protection for the use of copyrighted materials on the Internet by adopting an exclusive right of making available to the public for authors (i.e., a communication to the public right consistent with the WCT, Article 8), and for phonogram producers (i.e., consistent with the WPPT, Article 14). Many other amendments are necessary for the IPR regime in Tajikistan to be consistent with international obligations, including compliance with the WIPO digital treaties.

IIPA recommends the following legal reforms to improve the IPR regime in Tajikistan:

- 1) Adherence to the Geneva Phonograms Convention.
- 2) Amending the Copyright Law to provide protection for pre-existing works and sound recordings for a minimum of 50 years (and preferably, 70 years).
- 3) Amending the Criminal Code to cover all IPR violations of “works” and “neighboring rights.” The current code does not provide this essential remedy for IPR protection.
- 4) Amending the Criminal Code to raise the penalties for IPR violations to deterrent levels (for example, to 500 times the minimum wage).

5) Amending the Criminal Code to adopt a threshold for a criminal violation calculated on the basis of the price of legitimate product, instead of a threshold based on an undefined “large-scale damage” for IPR crimes, and set that threshold at a low actual level. The current Criminal Code (Article 156) provides for copyright and neighboring rights sanctions, but only where there is “significant harm” to the rightholder.

6) Amending the Criminal Code (or Criminal Procedure Code) to permit the confiscation and destruction of manufacturing equipment used to produce pirated material.

7) Amending the Criminal Procedures Code to provide the proper *ex officio* authority for police officials to initiate copyright criminal cases and investigations.

8) Amending the Administrative Code to provide *ex officio* authority to administrative authorities to commence investigations and cases.

9) Amending the Customs Code to grant the proper *ex officio* authority to border officials to seize illegal material and to commence their own investigations and criminal cases.

10) Amending the Civil Code to provide the proper *ex parte* search provisions for effective enforcement against end-user pirates.

11) Adherence to the WIPO digital treaties – the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT) – plus enacting all of the appropriate implementing legislation in the Copyright Law.

The Customs Code (last revised in 1995) does provide liability for the transfer of illegal goods, including intellectual property material, through the border. A 2002 resolution (No. 185 of the Cabinet of Ministers) established border control rules for goods, including IPR works, and it implemented a customs registry for IPR works requiring a rightholder to file a statement and set of documents for border enforcement. These regulations are cumbersome and an ineffective tool that should be repealed.

There has not been a single criminal IPR case reported under existing law. Nor has there been a single case reported under the Administrative Code. 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 observes that the Government of Tajikistan should, in this spirit of cooperation, and as required by its now well over fifteen-year old obligations under the bilateral Trade Agreement, amend the relevant IPR laws and engage in effective enforcement. The U.S. Government and Tajik Government signed a Trade and Investment Framework Agreement (TIFA) on June 1, 2004 to enhance trade and investment between the two countries.

According to the recording industry (International Federation of the Phonographic Industry, IFPI), there are currently no known optical media plants in Tajikistan.

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2008 SPECIAL 301 REPORT

TURKEY

Special 301 Recommendation: We recommend that Turkey be lowered to the Watch List.

EXECUTIVE SUMMARY

There are signs in Turkey that the enforcement system, from raid to court, is beginning to have a positive effect on the market for some products and services. Significant street raids in the past few years have opened up the legitimate market for some copyright owners in Turkey. In addition, increased cooperation among enforcement and judicial authorities in issuing warrants, and in the adjudication of copyright infringement cases, is beginning to reap benefits in the market in terms of decreased piracy. The motion picture industry experienced a general increase in the sheer number of raids and seizures,¹ and worked with authorities in 2007 to bring more criminal prosecutions against commercial copyright pirates. In two cases decided in 2007 involving repeat copyright infringers, unsuspended prison sentences resulted, providing a level of deterrence not previously seen in court cases in Turkey. Finally, the Turkish government took action in 2006 against the Pirate Bay website through the main ISP in Turkey,² and this event in Internet enforcement has led to similar actions against other websites involved in piracy in 2007.

At the same time, IIPA's recommendation does not reflect a view that all problems have been solved. Quite to the contrary, Turkey remains one of the world's worst pirate markets for published materials. The business software industry, while receiving more cooperation in 2007, still suffers from significant losses due to hard-disk loading and unauthorized use of software in a business setting. Turkey has a serious problem with recidivism in copyright infringement cases, due in large part to the very long litigation periods and the fact that most cases are sent up on appeal where they sit for years. Rising Internet and broadband usage means piracy in the online space increased in Turkey. The banderole system still remains burdensome, but if administered by rights holders, could prove more effective and less prone to abuse (publishers would prefer abolishing the program as to books).

PRIORITY ACTIONS REQUIRED IN 2008

- **Defeat Recidivism Through Deterrent Sentencing and Affirming Lower Court Decisions:** Some criminal convictions, especially against the Uçar optical disc plant in 2005, and "The End" video shop and the Halilogullari family in 2007, sent the signal that piracy does not pay and that engaging in copyright piracy might actually land the defendant in jail. Unfortunately, these sentences are the exception rather than the rule. More likely, criminal convictions result in suspended jail sentences or small fines, and even then, since almost all cases are appealed, most pirates never pay one Turkish Lira in fines. To add to the saga, due to court backlogs at the appeal level, many cases never get affirmed, are subject to amnesties, or are thrown back to the lower court since the law under which the defendant was convicted has been amended. As a result, recidivism runs rampant. Deterrent sentencing and appellate court improvements in getting through the backlog are the only answers.

¹ Turkish creators now have a large stake in protecting their works – industry noted that Turkish movie titles have become more popular than foreign titles, unfortunately, evidenced by the pirate market where local film titles now outnumber foreign film titles in many areas of the country.

² The record industry reports that Pirate Bay is still accessible in Turkey through certain websites.

- **Tackle Growing Internet Piracy, and Sustain Raiding Against Book Piracy, Retail Piracy, Unauthorized Use of Software in a Business, and Other Forms of Piracy in Turkey:** Greater emphasis should be placed on *ex officio* raids, continued work to shut down pirate websites or Internet piracy services/activities, raids against blatant photocopy or print book piracy, and actions against instances of end-user piracy of business software in a commercial setting.
- **Take Urgent Action to Cease Illegal Software Use in the Public Sector:** Despite a circular published by the Prime Minister, some public authorities such as municipalities still continue to use pirated software. The Office of the Prime Minister and the relevant ministries should instruct their agencies to comply with the legislation and set an example of compliance for the public.
- **Fix the Banderole System:** The Turkish authorities should run market sweeps to clear the shelves of product with fraudulent banderoles or no banderoles if the credibility of this program is to be preserved. In addition, rights holder associations can and should be permitted to administer the banderole or, if they choose, to forego the use of banderoles as appropriate.
- **Join the WCT and WPPT:** The Copyright Law of 2001 omits protection for technological measures used by rights holders to protect their products. The law should be amended to prohibit the act of circumvention of technological protection measures and the trafficking in circumvention devices. The government of Turkey has just completed the EU Twinning Project, so there is promise that some positive changes in legal infrastructure are to be considered in 2007. Turkey should finalize harmonization with the EU legislation, protect TPMs, and join the WIPO Treaties.
- **Amend the Private Copy Levy System:** While IIPA members do not generally believe private copying levies are the best way of addressing private, non-commercial copying (and it is critical that they address no more than such forms of copying in any event), the fact remains that some countries like Turkey have chosen to implement them. Where the law provides for a levy and it therefore forms part of the legal and regulatory environment in which right holders operate, it is important that the levies are in fact collected and fairly distributed to right holders. The Turkish Copyright Law contains a levy system but right holders do not receive anything. Instead, the Ministry of Culture and Tourism collects and keeps the fees paid for recording equipment and blank media. This collected amount is neither distributed among right holders nor even used for useful anti-piracy purposes or in ways helpful to right holders. The system in Turkey should be changed as a matter of priority and in a way to make it compatible with the Berne Convention (and by extension, the TRIPS Agreement).

For more details on Turkey's Special 301 history, see IIPA's "History" appendix to this filing at <http://www.iipa.com/pdf/2008SPEC301HISTORICALSUMMARY.pdf>. Please also see previous years' reports at <http://www.iipa.com/countryreports.html>.

TURKEY
Estimated Trade Losses Due to Copyright Piracy
(in millions of U.S. dollars)
and Levels of Piracy: 2003-2007³

INDUSTRIES	2007		2006		2005		2004		2003	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Books	23.0	NA	23.0	NA	23.0	NA	23.0	NA	25.0	NA
Records & Music	22.0	80%	20.0	80%	18.0	80%	15.0	70%	15.0	75%
Business Software⁴	193.0	64%	184.0	64%	157.0	65%	107.0	66%	81.0	66%
Entertainment Software	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA
Motion Pictures⁵	NA	NA	NA	NA	29.0	NA	50.0	45%	50.0	45%
TOTALS	238.0		227.0		227.0		195.0		171.0	

PIRACY UPDATES IN TURKEY

Internet Piracy Threat Real: While street piracy is improving, Internet piracy, in the form of P2P file sharing, video hosting sites, forums providing direct download links, and torrent sites (employing swarm technology for efficient downloads)⁶ is steadily increasing due to the increase in broadband connectivity, which has proliferated and become less expensive. All kinds of creative content owners – of music, movies, software, and books – are victims of Internet piracy. Turkey now boasts 16 million Internet users in total (217,887 independent Internet hosts), amounting to a 21.1% Internet penetration rate.⁷ There are more than 3.2 million broadband connections in Turkey today (some estimate more than 4.3 million ADSL users). Internet usage of copyright materials is beginning to displace physical product in Turkey.⁸ The good news is that the Turkish government began to take steps to correct this nascent problem. In addition to working with Turkish Telecom to block certain access points to the Pirate Bay website, in 2007, access to 107 websites were blocked upon the motion picture industry group AMPEC's applications based on Additional Article 4 of the Copyright Law.⁹ An additional 885 websites have been

³ The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2008 Special 301 submission at www.iipa.com/pdf/2008spec301methodology.pdf.

⁴ BSA's 2007 statistics are preliminary. They represent the U.S. software publishers' share of software piracy losses in Turkey, and follow the methodology compiled in the Fourth Annual BSA and IDC Global Software Piracy Study (May 2007), available at <http://w3.bsa.org/globalstudy/>. These figures cover, in addition to business applications software, computer applications such as operating systems, consumer applications such as PC gaming, personal finance, and reference software. BSA's 2006 piracy statistics were preliminary at the time of IIPA's February 12, 2007 Special 301 filing and were finalized in June 2007 (see <http://www.iipa.com/statistics.html>) as reflected above.

⁵ MPAA's trade loss estimates and piracy levels for 2007 are not available.

⁶ According to the data on consumption of daily content from TNET, the ADSL service of Turkish Telecom, users generally access P2P websites and file sharing web sites, such as those employing BitTorrent technology and sites like Emule (the next generation of eDonkey) which reportedly has around 3 to 5 million users. See <http://en.wikipedia.org/wiki/EMule>.

⁷ See *The World Factbook*, Turkey, at <https://www.cia.gov/library/publications/the-world-factbook/geos/tu.html>. See also Internet World Stats, at <http://www.internetworldstats.com/stats4.htm>. These statistics are up-to-date as of November 30, 2007, are based on Census Bureau data, while usage numbers come from various sources, mainly from data published by Nielsen/NetRatings, ITU, and other trustworthy sources. See also *Internet World Stats*, Turkey, at <http://www.internetworldstats.com/europa2.htm#tr> (reporting that there were 16 million Internet users as of September 2006, representing a 21.1% penetration rate, according to the International Telecommunications Union, and 3,236,700 broadband Internet connections as of September 2007, according to the International Telecommunications Union).

⁸ The following chart is instructive of the overall shift from physical to online in Turkey. It demonstrates that the number of banderole stickers (intended to be used to distinguish legitimate product from pirate product, but see *infra* discussion of problems with banderole system) has steadily decreased while broadband connections have increased.

	ADSL SUBSCRIPTION	BANDEROLES
2003	55,000	39,832,279
2004	450,000	43,927,887
2005	1,520,000	30,750,888
2006	2,800,000	24,658,074
2007	4,300,000	15,132,225

⁹ Additional Article 4 of the Copyright Law No. 5846 specifically addresses the responsibilities of content and Internet service providers. Once an infringement is detected on a site, a cease and desist letter is sent to the site requesting the site to cease infringement within 3 days. If, after this period, infringement continues, a folder containing (a) the printouts of the site showing the infringements; (b) an investigative report about the site; (c) the "ownership license of work of art" related to the titles; (d) the WHOIS details of the site administrator. That folder is provided to a prosecutor together with a formal application to block the site in

blocked following injunction proceedings initiated by the recording industry group MÜ-YAP since August 2006.

In addition to Internet piracy engaged in by users at their computers, shops (including formerly legal shops) are now capitalizing on Internet connectivity to engage in CD-R burning of content downloaded from the Internet and burning compilations on demand to CD-Rs. Another pirate 'service' consists of recording illegal content (including that downloaded from the Internet) directly onto new carriers such as MP3 players and mobile phones. New piracy phenomena, such as mobile device piracy will quickly require a coordinated response in Turkey or the risk is that they will grow out of control.

The trading of hard goods through websites or through newsgroups also remain Internet piracy concerns. Hard good sale lists primarily offer copies of pirate versions of television series (*Lost*, *Prison Break*, *Nip/Tuck*, *House*, *Grey's Anatomy*, etc.) rather than movies. Auction site authorities have usually responded quickly to industry warnings regarding hard good piracy sales.

Book Piracy Problem Remains Severe: While Turkey should be a good market for English language teaching (ELT) materials and a growing market for higher education textbooks, it is unfortunately falling short of potential due to a severe book piracy problem. In fact, illegal commercial photocopying and organized printing of books combine to make Turkey the region's worst book piracy market. Virtually all types of books are affected, including fiction, non fiction, school books, college textbooks, supplements, dictionaries, English language teaching (ELT) texts and scientific, technical and medical (STM) materials. Photocopying is especially prevalent in and around universities, and indeed almost all university campuses are surrounded by photocopy shops, and authorities are often reluctant to enforce against them. Turkey also suffers from pirate imports from Iran over the Eastern borders. There is a fear that in time pirates in Turkey will turn to exporting prints to neighboring markets, so the need for action is immediate.

In 2007, enforcement efforts remained consistent, with significant engagement between the Turkish Publishers Association and key ministries, but cooperation is inconsistent at best. While the Ministry of Culture and Tourism seems increasingly receptive and responsive to articulated publishers' needs, prosecutors' offices have by contrast displayed a lack of cooperation. Unfortunately, this reluctance has led to a series of stymied raids and general disillusionment. Publishers have also faced difficulties with arbitrary amnesties and court delays.

The most bizarre development in 2007 was the Ministry of Education's campaign to encourage photocopying on campuses. This "photocopy machine for every school" campaign – a policy that all state schools should purchase a photocopy machine to provide free supplementary materials for students—devastated the market for both Turkish and foreign publishers of supplementary materials, as schools ceased purchasing such materials altogether. Instead, during this campaign, all the educational materials were simply photocopied and sold to students for the marginal cost of copying. This blatant disregard for copyright is truly stunning, and as a government policy, the "campaign" likely constitutes a violation of Turkey's international obligations.

Business Software Piracy: Unauthorized use of business software by corporate end-users causes significant losses for copyright holders in Turkey. Unlike other industries, which have benefited from market sweeps, the unauthorized use of business software in corporate settings requires a different approach, including campaigns aimed at getting information about companies using illegal software, inspections against such companies, and hands-on programs to explain to the Turkish government and businesses the basics of software asset management. Other problems affecting the business software sector include hard-disk loading, either pre-loaded, or the sale of "stripped PCs" that are later loaded with pirate software.

question. The prosecutor sends the "decision of closure" in no longer than one week (to Turkish Telecom), and access to the sites in question is blocked. Industry notes that Article 4 provides for "rules and procedures" to be issued by the Ministry, but these rules and regulations still have not been completed.

The business software industry reported generally good cooperation from enforcement authorities in 2007 in seeking to improve the end-user software piracy problem. The business software sector seeks the assistance, as do others, of the specialized IP units established under Ministry of Internal Affairs, General Directorate of the Police (a national and armed civil force) to combat end-user piracy infringements. They provide value-added in operations against resellers of pirate software and pirate end-user targets raided in accordance with search warrants issued. In 2007, Business Software Alliance members conducted around 20 raids against corporate end-user piracy targets, which resulted in seizures of pirated material, financial settlements paid by infringers. These raids received media coverage. The industry has also had success in obtaining both civil and criminal actions against pirate software resellers.¹⁰

Optical Disc Piracy: There are essentially three forms of pirate optical discs found in the Turkish market today – local burning of pirated works onto recordable media, imports of pirate optical discs produced elsewhere, and locally produced factory discs. The optical disc piracy problem is predominantly locally burnt discs (both CD-Rs and DVD-Rs). At the same time, the significant decrease in the street sale of locally burnt discs has pushed piracy under-the-counter in retail shops where shop owners burn on order for trustworthy customers, especially in cities outside Istanbul and Ankara (such as Izmir and Antalya). Pirate CDs, CD-ROMs and DVDs are also being imported into Turkey, with recent reports having discs coming into Turkey from Iran over the eastern borders, but with discs also likely emanating from Asia, as in the past. Regarding local factory production, there are now 10 optical disc production plants in Turkey, four of which have DVD capabilities, and having a total of 21 production lines, with a capacity to produce an estimated 73.5 million discs per year (a conservative estimate). It appears that the optical disc piracy problem does not extend as much to factory pressed discs, as at least one industry (the motion picture industry) reports no seizures of pirate pressed discs (whether local pressed or imported) in 2007.

Authorities are taking raids *ex officio* but only under the *banderole* system, i.e., when pirate materials do not bear the obligatory *banderoles*. The motion picture industry group AMPEC conducted 1,154 investigations and 976 raids as of the end of December 2007. As a result, a total of 518,065 pirate DVD-Rs, 685,795 pirate CD-Rs, 17,990,490 covers, 395 CD-Writers, 230 DVD writers, 54 duplicators and 67 computers were confiscated. A total of 944 legal cases have been initiated by AMPEC lawyers as of the end of December 2007. MÜ-YAP conducted 1,532 raids, netting 978,220 pirate optical discs, 67,957 MCs, and 4,516,008 inlay cards.

Unauthorized Public Performances and Broadcast Piracy: Unauthorized public performances of new and popular films using DVDs and VCDs on wide screen systems at schools, cafes and bars, cultural centers and unlicensed video theatres are frequently encountered in Turkey. The motion picture industry enforcement group in Turkey, AMPEC, has been very active sending cease and desist letters and organizing raids with the police. Broadcast/signal piracy of motion pictures also exists. Music broadcast piracy in Turkey is also a major concern, as only a small minority of over 1,200 radio and television broadcasters have a proper license agreement with the local recording industry group, MÜ-YAP. A new phenomenon in music piracy has recently occurred, especially in Turkey's tourist hot spots: hotels (including well known international hotels), bars and clubs selling made-on-the-spot, illegal CD-R copies of the music they play. Moreover, most of the sources of music played in bars and discos are illegal copies or Internet downloads.

Signal Theft/Cable Retransmissions: Retransmission rights are included in the Turkish Copyright Law, but a court decision denied the collecting societies' rights and, as a result, the main cable operator and the biggest digital platform in Turkey are not paying royalties for re-transmission. This problem causes severe monetary loss for right holders in Turkey.

¹⁰ While authorities usually do not take *ex officio* actions without a right holder complaint, the municipalities and police force are taking actions to prevent the sale of pirate copyright material in public places such as streets, parks etc. Furthermore, there are administrative boards which are organized by the City Governorships, which take actions against sale of pirated material in public places.

ENFORCEMENT ISSUES IN TURKEY

As noted in the piracy descriptions above, there are many piracy issues – Internet piracy, book piracy, end-user piracy of business software, optical disc piracy, unauthorized public performance piracy, unauthorized broadcasts, and signal theft/cable retransmissions, all of which sap legitimate copyright business in Turkey, and which require coordinated but often very different approaches to enforcement. The statistics, including the following chart according to the Police Secretary General Directorate, demonstrate that significant seizures of pirated materials are taking place, but also suggest the large scope of the problems industry faces in Turkey. The sections below highlight some key enforcement struggles faced by the industries, including lack of deterrence at court (due to length of time to adjudicate copyright cases, length of appeals, amnesties, low fines and sentences, and other issues), recidivism, the troublesome Attorneyship law, problems with the banderole system, and other issues.

SECURITY GENERAL DIRECTORATE ENFORCEMENT STATISTICS 2007	
JANUARY 1, 2007 – DECEMBER 31, 2007	
TOTAL OPERATIONS	3,741
ARRESTED PERSONS	4,132
SEIZED MATERIALS	
CD/VCDs WITHOUT BANDEROLES	2,143,635
DVDs WITHOUT BANDEROLES	490,195
BOOKS WITHOUT BANDEROLES	234,715
VIDEO CASSETTES WITHOUT BANDEROLES	388
MUSIC CASSETTES WITHOUT BANDEROLES	27,785
PORNOGRAPHIC ISSUES	84,598
CDs/VCDs WITH BANDEROLES	12,165
DVDs WITH BANDEROLES	1
BOOKS WITH BANDEROLES	10,681
MUSIC CASSETTES WITH BANDEROLES	54,900
CD/VCD/DVD INLAYS	8,218,632
TOTAL SEIZED	11,285,567

Deterrence in the Courts: One of the chief reasons for relatively high recidivism rates in Turkey is lack of deterrence at the court. Simply put, piracy is a high-profit, low-risk enterprise. If one is caught, chances are the case (civil or criminal) will make its way through the local courts within a short time, but once on appeal, the case may never be decided. The following are the key issues and concerns:

- **Lack of Speedy Appeals:** The most serious issue in the courts is the failure for verdicts or judgments to make it through the appeals process. While the lower courts take six months to two years to decide copyright cases, once on appeal, even the simplest cases languish for years. Some cases date back to 1999. In many cases, because the appeal took so long, the initial decision had to be thrown out since the law had changed in the time intervening between the initial decision and the decision on appeal. Amnesties have also occurred affecting copyright owners' cases. The Supreme Court of Appeals has reportedly issued no copyright decisions since 2004.
- **Difficulty Obtaining Search Warrants:** Search warrants for criminal raids are difficult to obtain due to procedural rules requiring them to be obtained not from the specialized courts but from an ordinary criminal judge (in practice, the criminal judge is requiring far greater evidence than it is believed would be required from the specialized judge). Public prosecutors require search warrants from judges to approve any raid action in anticipation of a criminal case.
- **No Presumption of Ownership in Some Cases:** The courts still do not, on many occasions, provide presumptions of ownership to rights holders, but instead impose burdensome documentary requirements on right holders to prove ownership.¹¹

¹¹ In cases brought by publishers in the past, many judges demanded notarized translations of original contracts between the author and publisher in order to prove copyright ownership for each title. Since this contract is in English, it must be translated and notarized. The notaries in Turkey have apparently added to the burden by charging inordinate fees. The audiovisual industry
International Intellectual Property Alliance

- **Difficulty Obtaining Preliminary Injunctions:** IIPA members have had difficulty obtaining preliminary injunctions against pirate operations, notwithstanding overwhelming evidence or indicia of piratical activity.¹² Evidence requirements should be made more reasonable and injunctive relief granted by judges more effectively.

Special IP Courts: One positive development in the last several years has been the establishment of specialized IP courts, and six new IP courts were established in 2007 (three criminal, three civil), bringing the total number to 18. There are now IP courts in: Istanbul – 13 IP courts (six criminal and seven civil); Ankara – four IP courts (one criminal and three civil); and Izmir – one IP Court (criminal). As a result, some rights holders are finding it easier to obtain search warrants and decisions in relatively shorter time periods. Nonetheless, industry also reports that the specialized IP courts are seeing their cases overturned on appeal or negated through amnesty.

Some Favorable (and Deterrent) Court Decisions in 2007: There were two big piracy convictions in 2007, following on some significant decisions in recent years (for example, the decision against the Uçar optical disc plant).¹³ In particular, it should be noted that these cases represent the most significant sentences imposed on pirate operators to date, and in the instances below, the first case IIPA is aware of in which a defendant convicted of copyright piracy has served jail time.¹⁴

- **The End Case:** On April 9, 2007, the owner of a video shop, “The End”, located in Istanbul was sentenced to an unsuspended prison term of two years, four months by the Istanbul Specialized IP Court. This decision resulted from two raids conducted by AMPEC and the police in the first half of 2004 that yielded 8,505 pirate discs. Although these seizures were not particularly significant, the judge took into account the blatant recidivist nature of the defendant who had been raided, to date, 30 times by AMPEC and the police (yielding cumulatively more than 120,000 pirate discs). The defendant was also ordered to pay attorney’s fees and costs. After the Uçar optical disc plant sentence of the plant owner (five years, seven months and 15 days of prison term plus a \$120,000 fine), this was the second stiffest sentence to date (under the 2004 amended Copyright Law 5101). Although the defendant has lodged an appeal, this stiff sentence is a positive sign that the Turkish judiciary is now willing to judge repeat offenders in a deterrent manner.
- **Halilogullari Case:** From 2003 to date, AMPEC organized a total of 20 raids on the pirate shop “Film Dunyasi/Gumus Dunyasi” operated by the Halilogullari family, seizing a total of 36,259 pirate CD-Rs,

experienced similar problems. Judges and public prosecutors often ask for the proof of copyright ownership and sometimes even request the establishment of “chain of title” by presenting all the relevant contracts, despite the presumption in Article 15 of the Berne Convention and Articles 11 and 80 of Turkish Copyright Law (which provide presumptions of ownership).

¹² The case involving the EMRE CD Plant indicates how the system fails to function properly. As a result of an investigation by MÜYAP some pirate discs were found at an optical disc plant known as EMRE. One of these CDs was sent to the IFPI-run forensics laboratory for source identification, confirming that the products had indeed been manufactured at EMRE. MÜYAP started a litigation and filed for a preliminary injunction, but the court denied the injunction and the plant received Ministerial approval and certification, notwithstanding clearly incriminating evidence against this plant.

¹³ On July 6, 2005, a raid was run against the “Uçar CD” plant, located in the Kagithane district of Istanbul, revealing three VCD/DVD lines, and resulting in the seizure of 8,650 pirate VCDs, 4,700 pirate DVDs and 10 silkscreens for labels. Upon obtaining a warrant to seal the lines, the machines had been moved. After several months searching, the lines were found on October 27, 2005 on the top floor of a two-story building in Umraniye. On January 17, 2006, the defendant owner of the plant was sentenced to a term of imprisonment of 5 years, 7 months and 15 days, and was also fined approximately US\$120,000. The court also ordered that the sentence be published in three newspapers having a circulation of over 100,000. Although the defendant appealed to the Supreme Court, his conviction and sentence sent a very important message to Turkey’s pirate community. IIPA members noted other favorable decisions in 2005 obtained from different provinces of Turkey. For example on March 9 2005, two video shop owners in Istanbul were sentenced to unsuspended prison terms of two years by the Istanbul Specialized IP Court, with the severity of the sentences based on the fact that these pirates were recidivists. Some important decisions were also obtained from the Adana Court, sentencing pirate street vendors to unsuspended prisons terms and/or fines because of their recidivist nature. In one case which arose from an AMPEC (the motion picture industry’s anti-piracy group in Turkey) operation against a street vendor in 2005, a defendant was sentenced to 14 months imprisonment and a fine. Although the case involved only 56 pirate CD-Rs, the court refused to suspend the sentence, because the defendant was a repeat offender.

¹⁴ Although there are no details available, AMPEC reports that they have recently learned that well over 20 persons sentenced to fines for copyright violations were sent to prison since they were unable to pay the fines.

9,587 pirate DVD-Rs, and 1,276,320 covers.¹⁵ In a landmark court decision at the Istanbul IP Court in 2007, a defendant with a long history of IP offenses was given an unsuspended prison sentence of two years, one month upon conviction for repeat offenses. The defendant, the head of the Halilogullari piracy operation, missed the deadline to appeal and is serving the sentence. This is the first time a prison sentence has been serviced for a piracy offense in Turkey. The court refused to suspend the sentence in view of the likelihood that the defendant would commit another offense, and its suspicions were justified when three business addresses belonging to the same family were raided on September 17, 2007, netting 1,775 pirate CDRs, 4,730 pirate DVDs, 330 pirate PS2 DVD, and one million covers. The latest raids were covered by 'Show TV' for a news report.

Recidivism: Notwithstanding the positive results in a few cases, it is largely due to the very long litigation period and appeal stage that Turkey still suffers from a serious repeat offender problem. The motion picture industry group AMPEC has prepared and submitted some files to the related courts containing the details of repeat offenders to attract attention. Yet, the Supreme Court has issued no decisions in copyright cases since the latest amendment of the Copyright Law in March 2004. Since almost all cases are appealed, no sanctions have been applied in those cases against defendants. Thus, it is no surprise that the system lacks deterrence and that the police raiding pirate operations find the same defendants in charge time and again.

Attorneyship Law Stymies Right Holders: The Attorneyship Law remains problematic for right holders, as it forbids private entities from protecting third parties without having a local lawyer acting on behalf of the right holder as an intermediary.¹⁶ The industries must therefore hire local attorneys to seek raid approval from public prosecutors. Following the raid and the public prosecutor pressing criminal charges, the industry association's lawyer must immediately submit a petition of intervention to become a party to the case, or else cases, which are lost in court, cannot be appealed.¹⁷

Banderole System Should be Administered by Rights Holders, and Right Holders Should Choose Whether to Forego Banderole Use As Appropriate: It remains the case in Turkey that the banderole (sticker) system does not function well as an anti-piracy tool. Some strengthened provisions were introduced in the 2001 copyright law (including the possibility of criminal penalties for unauthorized uses of banderoles or dealing in works without banderoles), but those remain largely untested. Some plants have in the past held unnecessarily large quantities of unused banderoles, which were not secured adequately. In the 2005 "Uçar CD" case, fraudulent banderoles were found on pirate discs in the market. Book publishers also have reported fraudulent banderoles being used on unauthorized books in the market.

IIPA recognizes that the banderole system is the basis on which the authorities are taking raids *ex officio* (i.e., under Article 81), but wishes to see the system improved. Most important, the government must take immediate steps to inspect the markets for false banderoles, and to ensure that those who are caught dealing in copyright works without banderoles, using banderoles without authorization, or using fraudulent banderoles, are prosecuted to the full extent of the copyright law (Article 81 provides for fines and imprisonments for such offenses). IIPA also urges consideration of allowing right holder associations such as MÜ-YAP and AMPEC (and others) to administer the banderoles beginning in 2008. We understand that negotiations with the Ministry of Culture and Tourism are ongoing. Publishers note that the banderole system does not work for books, in that it does not work to curtail piracy as intended, and creates additional burdens and costs associated with doing business in Turkey.¹⁸ It should also be noted

¹⁵ During a raid in October 2005, one of the motion picture industry group's investigators from AMPEC was assaulted and required hospital treatment to recover from injuries.

¹⁶ The Attorneyship Law requires a local lawyer to be hired to act on behalf of the right holder for five key phases of any case: (1) to file an initial complaint with the public prosecutor; (2) to obtain a special search warrant from the judge; (3) to obtain a search warrant from the public prosecutor; (4) to conduct a raid with the police; and (5) to have the public prosecutor press charges and to provide assistance in the courtroom to obtain a conviction.

¹⁷ Industry expertise is in fact important to success of these cases, since the accused can challenge right holders' rights, and prosecutors find it difficult (without involvement of an industry lawyer) to prove their cases because of a lack of access to right holders' documentation.

¹⁸ The government has hinted at possibly removing the banderole requirement as to published materials only. As long as *ex officio* authority is retained, IIPA's position is to support this move.

that as copyright moves into the digital age, there is a marked decrease in the number of banderoles issued simply due to the decrease in physical product.¹⁹

Storage Problems: Unfortunately, perhaps as a symptom of the Police's success over the past couple of years, all the Police and Istanbul Inspection Committee warehouses are filled with pirate materials. This situation is unfortunately impeding the Police's willingness to take more actions. This problem has been discussed with representatives of the Ministry of Culture and they recently hired a bigger warehouse to be used to store pirate materials.

Customs Law Imposes Undue Burdens on Right Holders: IIPA has in the past raised concerns that Customs procedures are not working efficiently to interdict pirate shipments. The motion picture industry reports that Customs procedures are too complicated and time-consuming. The local anti-piracy groups apparently need to apply every month to every Customs office with multiple copies of the same application form (one copy is required for each Customs official sitting in that office). Despite these efforts by right holders to comply with such formalities, cooperation with Customs authorities did not improve in 2007.

Organized Crime: Copyright piracy is an easy target activity for those engaged in other criminal behavior, due to the fact that in Turkey, for the most part, it is a high-profit, low-risk activity (although the recent criminal convictions will hopefully change this). As such, it is not surprising but still unsettling to note that raid targets often turn out to be part of larger organized crime communities, and representatives either come across other indicia of criminal activity or are subject to physical violence or threats. In one operation conducted in 2007 against a pirate lab, the motion picture industry representative from AMPEC and the authorities found fake ID cards, burnt discs and recording equipment/burners, as well as some equipment used to produce the fake ID cards. The individuals apprehended were suspected to be involved in organized crime activities. As noted, the Halilogullari family has long been involved in piracy, and during a raid in October 2005, one of the motion picture industry group's investigators from AMPEC was assaulted and required hospital treatment to recover from injuries. Publishers note that their representatives have been physically threatened when participating in raids in the past.

TRAINING/PUBLIC AWARENESS

Trainings in 2007: Copyright owners continued organizing trainings (e.g., for Police and Customs) and participated in others in Turkey in 2007. In addition, at the local level, various public awareness activities have been implemented, such as television advertisements. Both AMPEC and the Business Software Alliance (BSA) held trainings. The business software sector reports good cooperation in creating awareness both in the public sector and the end-user side on the importance of using only legitimate software. BSA also worked to raise awareness among members of local reseller associations about the need to install only legal software on the hardware they sell. For example:

- In November 2007, a BSA representative attended the Informatics Summit organized in Ankara by the IT industry in Turkey, providing speakers and sponsoring events. The audience included representatives of informatics sector, academia and enforcement authorities. The topic of the presentation delivered by BSA was copyright protection and enforcement activities against piracy.

¹⁹ The following tracks banderole issuance in Turkey between 2004 and 2007 and is evidence of a decreasing physical market for copyright materials.

Banderole Issuance in Turkey 2004-2007				
	2004	2005	2006	2007
Local CD	13,561,500	12,526,294	13,558,571	13,495,433
Local MC	27,868,909	15,806,517	9,010,990	4,557,232
International CD	1,562,010	1,780,370	1,788,003	1,452,421
International MC	935,468	637,707	300,510	41,200
TOTAL	43,927,887	30,750,888	24,658,074	19,546,286

- AMPEC representatives visited a postgraduate education class to provide training and information about piracy for 30 selected students of Bilgi University in Istanbul on May 18, 2007. AMPEC's General Manager, AMPEC's legal counsel, and a police officer from the Istanbul security office gave the students detailed information about enforcement activities in Turkey, piracy and its negative effects, enforcement procedures, how to recognize pirate material, procedures and principles under the new law, the importance of *ex officio* powers granted to the police and municipalities, and how to implement the law properly.
- Istanbul Bilgi University Intellectual Property Law Research Center and MÜ-YAP organized an international symposium titled "Collective Rights Management - Current Problems and Future Prospects" in November 2007. This symposium will be repeated in coming years.
- There have been some seminars and trainings within the context of EU Twinning Project organized by the EU and MOCT. These seminars were attended by the police security forces, municipality representatives, collecting society representatives, MOCT officials, and prosecutors. For example, in a five day seminar from December 11 to 15, 2006, AMPEC participated in a training seminar under the auspices of the EU Twinning project aimed at supporting Turkey's efforts to align its standards with those of the EU and to engage in the fight against piracy.

Notwithstanding these training programs, the industry consensus is that there is still a considerable level of need for such trainings in Turkey, especially hands-on enforcement trainings.

Turkish Government Publications and Circulars: IIPA appreciates the attempts made by the Turkish government in 2006 to highlight the problem of piracy through publications and circulars made available to government officials.²⁰ For example, in September 2006, a publication entitled "Government's Tax Losses Due to Intellectual Property Right Piracy and Counterfeited Goods" was issued by the Ministry of Justice. The circular is addressed to all public prosecutors and can be considered as both advice and an instruction for future action. IIPA hopes that circulars such as these can motivate both Prosecutors and Police to increase their efforts against piracy. These publications should signal to pirates that they can and will be prosecuted for tax evasion as a result of their copyright infringements.

COPYRIGHT LAW AND RELATED ISSUES

EU Twinning Project: The European Commission offers funding to enable countries close to being ready for membership of the European Union to enter into "twinning partnerships" with Member States. Twinning project funding is given to Member States to work with these countries on institution building (legislation, administration, and implementation). In respect of IPR, Turkey entered into a twinning partnership with Greece. A committee was established comprised of EU experts, representatives of Turkish Ministries (such as Ministry of Culture and Tourism, Ministry of Justice, Ministry of Internal Affairs), representatives of professional associations, representatives of the Turkish Patent Institute and other Turkish specialists. Industry views were also represented.²¹ There were five key areas of work under the project: 1) computer programs and rental, lending and related rights, 2) satellite broadcasting and cable retransmissions, 3) terms of protection, resale rights, 4) Information Society Directive implementation²², and 5) enforcement of copyright. Other matters concern developing a training package

²⁰ For example, a circular issued on May 26, 2003 by the Istanbul Police Chief (Celalettin Cerrah) and addressed to the Istanbul Police Headquarters, to all District Police Departments, and to all branches of Police Departments, indicated "the sale of [pirated] works is a financial source of terrorist organizations."

²¹ Industry was represented by FI-YAP (film producers), SESAM (film producers and importers), AMPEC (film industry), MU-YAP (phonogram producers; very active), YAY-BIR (publishers), and BIYEM-YESAM (software owners), among others.

²² IIPA notes that the following are among the things being raised as key issues:

- There are no appropriate provisions on technological protection measures. These should be added to fully implement the WCT and WPPT (and ensure harmony with the EU Information Society Directive).
- Reproduction right for sound recordings: As regards copyright, Article 22 of the current Copyright Law of Turkey is in harmony with the EU Directive, since it defines the concept of reproduction in accordance with Article 2 of the Directive. An issue has arisen with some of the local jurists as to whether the Article 22 concept of reproduction applies to related rights, since first, it is not expressly made so (unlike, e.g., the concept of "fixation" which is expressly made applicable to both copyright and related rights), and second, because in Article 80 (dealing with related rights), different elements of the concept of reproduction are

for judges, and developing a public awareness campaign strategy to inform the general public on the importance of the protection of copyright.

The Committee concluded its work in Turkey in November 2007. Their conclusions will be packaged into a report and submitted to the Turkish Parliament soon. The Committee's conclusion is essentially that Turkish laws are mostly in accordance with the EU legislation, but that some important changes (for example, adding protections for technological protection measures, TPMs) must be made. IIPA is of course encouraged by the project, and looks forward to its recommendations regarding substantive copyright and alignment with EU Information Society Directive. IIPA also notes that, in regard to the legal framework for enforcement, in the least, full alignment with the EU Enforcement Directive should result in improvements, in particular as regards provisional and precautionary measures. While outside of the scope of the EU Twinning project, Turkey should also implement measures to adopt the Council on Europe Cybercrime Convention.

Conforming Copyright Law with New Penal Code: An amendment to the Turkish Copyright Law was published in the Official Gazette on February 8, 2008. The amendment purports to conform the law with the Turkish Penal Code.²³ AMPEC and music industry associations had provided comments, raising certain issues with the proposal, and as a result of this opposition the draft was altered and most of the propositions of the right holders were accepted.

Copyright Law Still Missing Protections Against Circumvention of Technological Protection Measures: Modern-day copyright law in Turkey dates back to a 1951 copyright law (Law No. 5846), which was amended by Law No. 4630 (2001), further amended in 2004 by Law No. 5101 (amending several laws including the copyright law) and amended again in 2008 by Law No. 5728. The 2001 amendments brought Turkey's copyright regime considerably closer to international treaties standards and implemented many of the requirements of the WIPO Internet Treaties, the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT). A notable exception is the failure to protect technological protection measures, *inter alia*, by prohibiting the act of circumvention of technological protection measures and the trafficking in circumvention devices (and provision of circumvention services).

On December 28, 2006, Law No. 5571 introduced an amendment into the Copyright Law which stipulates financial awards for public officials who act to seize illegal copies that do not comply with banderole obligations. IIPA has not had an opportunity to review this amendment, although supports the notion of such meritorious awards in principle.

mentioned (or not mentioned) for different related rights. The broad Article 22 definition of "reproduction" should be made clearly applicable to both copyright and related rights to resolve the potential ambiguity.

- Provisions on exceptions do not seem satisfactory to meet international standards. The government should include a provision on the three-step test to be applied for all exceptions and limitations, and other exceptions must be appropriately narrowed to meet international standards.
- Provisions on copyright levies are not in line with international standards and should be amended in accordance with EC Directive 2001/29. The current Article 44 (Amendment 21.2.2001 - 4630/23) provides,

natural and legal persons who manufacture or import for commercial purposes any kind of materials not carrying works, such as blank video cassettes, audio cassettes, computer discs, CDs, DVDs and all kinds of technical equipment which serve in the course of reproduction of intellectual and artistic works are obliged to collect every month and deposit, until the middle of the following month at the latest, in a special account to be opened with a national bank in the name of the Ministry of Culture and Tourism, an amount to be determined by the Council of Ministers not exceeding 3% of the manufacturing or importation costs. (Addition: 14.7.2004 - 5217/17) A quarter of the amounts collected in the special account shall be transferred to the account of the Ministry of Culture Central Accounting Office and shall be recorded as revenue in the budget. (Amendment: 21.2.2001 - 4630/23; 14.7.2004 - 5217/17) The amounts remaining in this account shall be used for the purpose of strengthening the intellectual property system and the execution of cultural and artistic activities. The rules and procedures concerning the distribution and use of these monies shall be determined with a by-law to be issued by the Ministry of Culture and Tourism. The allowance which is necessary for activities concerning the protection of the cultural heritage within and outside the country shall be placed in the budget of the Ministry. (Amendment: 3.3.2004 - 5101/15) Rules and procedures regarding the application of this article and the fees to be collected shall be determined with a by-law to be issued by the Ministry of Culture.

These articles should be amended to provide for a direct distribution of the relevant remuneration to the right holders.

²³ The Turkish Penal Code was adopted on September 27, 2004 and took effect as of June 1, 2005.

Other Legislation Under Review by MOCT: IIPA members have indicated that the Regulation on Banderoles, Regulation on the Recordation and Registration of Intellectual and Artistic Works,²⁴ the Regulation of Certification of CD Plants, the Regulation of Status for Collecting Societies, and the Regulation of Authorization Mandate are currently being reviewed by the MOCT.

Private Copy Levies:²⁵ The Ministry of Culture and Tourism has issued the Regulation on Principles and Procedures of the Use of Deductions Made From the Prices of Carrying Materials Containing Intellectual and Artistic Works and of Technical Devices Used for Reproduction of Such Works (dated April 13, 2006) which implements a levy system to account for private copying by users but right holders do not receive any of the levies. There is a private copying exception under Article 38, first paragraph in the Copyright Law and levies are provided under Article 44 (amendment 2001). However, these levies, which apply to blank CDs and other recordable media, are not distributed to right holders. MOCT keeps the levies and does not use them for activities which would support the copyright industries such as better enforcement. The situation should be remedied in favor of right holders. The law should be changed and right holders should be entitled to collect private copying levies.

Regulation on “Certification of Businesses” Includes Some Key Components of Good Optical Disc Regulation: The Ministry of Culture and Tourism (MOCT) issued the “Regulation on the Certification of Businesses Undertaking the Distribution or the Recording, Reproduction and Sale of Materials on which Intellectual Property and Works of Art Are Fixed” on April 18, 2005, requiring facilities involved in recording (including optical discs), exhibiting, and distributing copyright works to receive certificates from the MOCT. These regulations provide some essential elements of effective optical disc regulation, including the following:

- **Coverage of Any Business Engaged in Producing Discs Containing Content:** The Regulation does not seem to distinguish between businesses that produce large-scale factory-produced discs and those that “burn” content onto recordable discs. This means all those businesses (whether factory or commercial burning) must be certified, and failure to do so can lead to fines. Thus, it is expected that all the optical disc production facilities in Turkey (the 10 known plants and any more that come on line in the future) will have to apply for a certificate from the MOCT (including those that produce of blank recordable discs, see Article 5(a)). In addition, any premises engaging in “burning” of content onto recordable optical discs also must be certified.
- **SID Code Required for “Fixing Facilities”:** All facilities “where intellectual property and works of art are fixed and reproduced” must use SID Code (mastering LBR code and mold code are not specified, however, and should be).
- **“Fixing Facility” Information Requirement:** “Fixing facilities” must furnish reports indicating their “capacity and that they have the necessary technical equipment,” “[a]n itemised list of the technical equipment at the premises as well as copies of invoices or sale transfer documents of the same,” and “SID code document” and to “inform the General Directorate of all changes in the type of activity, equipment and capacity within ten days and to place the SID code and the certificate numbers on the fixing materials.”
- **Inspection Authority:** MOCT appears to have broad authority to run surprise inspections.
- **Cancellation Remedy:** The sanction for a breach of the Regulations is cancellation of the certificate, if “it is determined that the certified facilities no longer meet the requirements for obtaining certificates,” or “there exists a finalised court conviction arising from having violated the law,” upon

²⁴ In addition, Article 13 of the Copyright Law provides for a registration system in Turkey for movies that will be distributed theatrically in Turkey, but there is no such registration for movies not distributed theatrically, causing chain of title problems for such titles. When regulations for Article 13 of the law are issued, it will be possible for film companies to register their works with the Minister of Culture, which hopefully will relieve right holders of this burden.

²⁵ See generally note 22 on the issue of levies.

notification of such “by the rights owners, professional associations of the relevant field of activity or local authorities.”

- **Administrative Fines:** The only remedy for operating one of the businesses specified without a certificate is an “administrative fine.”

Unfortunately, the Regulation suffers from two major weaknesses. First, the certification authority is overly broad, veering into areas like “[m]ovie theatres and similar places undertaking public display and transmission of cinematographic films,” “[p]remises ... importing, distributing or selling empty fixing materials,” and “[p]remises undertaking sale, distribution, importation and marketing of intellectual property and works of art and fixing materials concerning productions entailing intellectual property and works of art through any means and techniques including digital transmission and those that rent these out.” This broad certification authority unfortunately undercuts the purpose of the legislation, since it requires legitimate businesses (in sectors where the risk of piracy is low) to be certified and subject to the regime, while illegal businesses will never come forward to be certified. This has already proved to be the case, since back in 2005, MOCT could not get all plants to register. One category of operators having to be certified is those engaging in Internet distribution. We underscore that legitimate businesses with legitimate business models in the Internet environment will be burdened by this certification requirement; those engaged in online piracy will ignore it.

Second, while the Regulation calls for “administrative fines” for operating without certification, in the case of optical disc factories, it is feared this remedy is not enough to deter them from simply going underground. The remedies for operating an optical disc plant without certification must include seizure and forfeiture of all equipment and goods found in such a plant, closure of the plant, and criminal liability including deterrent fines and imprisonment, and including individual liability to pierce the veil of the company engaging in production without a certificate.

Proposed Trademark Law Provision Would Exempt Infringing Goods Produced Outside Turkey: A draft amendment to the Turkish trademark law was recently proposed by a member of Parliament, providing that “in order that a penalty may be imposed for a trademark infringement, infringing goods or services should be produced in Turkey.” This provision, with the possible intent of avoiding application of Turkish law to extraterritorial acts, would actually result in a violation of TRIPS at least as soon as such goods enter the Turkish border and infringement ensues. IIPA understands that it is very unlikely that this proposal would be approved by the Parliament. Nonetheless, IIPA is monitoring this situation closely, and all steps should be taken to ensure that such a provision is never enacted in Turkey.

RTÜK (Radio and Television Supreme Council of Turkey)²⁶ Failure to Enforce Licensing As Pre-Condition to Broadcast: Radio and Television Supreme Council of Turkey has not taken necessary steps to fulfill its obligations under Law No. 3984 (which stipulates that conclusion of licenses with right holders is a pre-condition to engaging in broadcasting activities), since it has not enforced against broadcasters who do so without a license.²⁷ Under that Law, the failure to sign licensing agreements with collecting societies should be subject to administrative fines from YTL125 000 (New Turkish Lira) up to YTL250.000 (New Turkish Lira) and closure of the radio-TV station.

²⁶ The Radio and Television Supreme Council – RTÜK, was founded as an impartial public legal entity that has broad competencies and responsibilities compared to its former position pre-1994. It is a statutorily mandated Council responsible for the regulation of the radio and television broadcasts all across Turkey. The Supreme Council is composed of 9 members who are elected by the Grand National Assembly of Turkey. See http://www.rtuk.org.tr/sayfalar/IcerikGoster.aspx?icerik_id=be70e800-a512-4dd8-803f-857b504fd1f9.

²⁷ The amendment in Article 37 of the Law on Radio and Televisions No 3984 provides that broadcasting organizations shall sign agreements so as to get an authorization from right holders or their Collecting Societies of which they are members, within the framework of the Law on Intellectual and Artistic Works No 5846, and to pay the royalties.

GENERALIZED SYSTEM OF PREFERENCES (GSP)

In addition to the Special 301 process, the copyright industries and the U.S. government have used the GSP program, a U.S. trade program that offers preferential trade benefits to eligible beneficiary countries based on discretionary criteria, such as the provision of “adequate and effective” copyright protection, to evaluate Turkey’s progress on copyright matters. During the first 11 months of 2007, \$1.04 billion worth of Turkish goods (or 24.4% of Turkey’s total exports to the U.S. from January to November) entered the U.S. under the duty-free GSP codes. Turkey should not expect to be able to retain this duty-free status for many of its imports into the U.S. if it cannot meet the discretionary criteria for adequate and effective copyright protection under the GSP statute.

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2008 SPECIAL 301 REPORT

TURKMENISTAN

Special 301 Recommendation: IIPA recommends that Turkmenistan remain on the Watch List in 2008.

EXECUTIVE SUMMARY

In 1993, Turkmenistan and the United States concluded a bilateral Trade Agreement which detailed mutual obligations to improve the protection and enforcement of intellectual property rights. That agreement entered into force on October 25, 1993. Turkmenistan has never implemented the IPR obligations in that agreement.

In 2007, the U.S. Trade Representative -- in retaining Turkmenistan on the Watch List -- noted "Turkmenistan's lack of progress on IPR issues" and its "lack of fulfillment of its IPR obligations under the [1993] United States --Turkmenistan Trade Agreement." In fact, the Turkmen IPR legal regime falls far short of Turkmenistan's obligations under that 1993 Trade Agreement. Now almost fifteen years since signing the agreement, Turkmenistan has done little to modernize its copyright regime or to join any of the relevant treaties it obligated itself to join in the bilateral Trade Agreement. Turkmenistan is not a member of the Berne Convention, the Geneva Phonograms Convention, or either of the WIPO "digital" treaties. Thus, Turkmenistan is not providing any protection for foreign works or sound recordings, denying even the most basic rights or remedies, much less any actual enforcement of those rights, as required by international norms.

Legal Reform Deficiencies

Turkmenistan never adopted a comprehensive separate copyright and neighboring rights law. Instead, in October 1993, Turkmenistan formally incorporated the Soviet-era Civil Code (Chapter IV) into its legal structure. On March 1, 1999, the Civil Code was revised, with extensive amendments pertaining to copyright. As a result, the operational copyright law is the 1961 Civil Code as amended in 1999. The rights and provisions necessary to comply with basic international norms are lacking. A draft Law on Copyright and Neighboring Rights has been under consideration for years, but has never been adopted by the Parliament to our knowledge.

IIPA recommends the following IPR legal reforms in Turkmenistan:

- 1) Adherence to the Berne Convention.
- 2) Adherence to Geneva Phonograms Convention.
- 3) Adoption of a Berne, WTO TRIPs, and WIPO "digital" treaty (WCT/WPPT) compliant Copyright Law to protect works and sound recordings. Also, the Civil Code should be repealed or scaled back upon adoption of a Copyright Law to avoid confusion and misinterpretation of rights and remedies as between two "competing" laws.
- 4) Adoption of provisions in the Copyright Law to protect for pre-existing works and sound recordings for a minimum of 50 years (and preferably, 70 years).
- 5) Amending the Criminal Code to raise the penalties for IPR violations to deterrent levels (for example, to 500 times the minimum wage).

6) Amending the Criminal Code to adopt a threshold for a criminal violation calculated on the basis of the price of legitimate product, instead of a threshold based on an undefined “large-scale damage” for IPR crimes, and, set that threshold at a low actual level. Article 153 of the current Criminal Code does provide sanctions for copyright and neighboring rights violations, but only in cases of “significant harm” — a threshold that is too vague, and likely, too high.

7) Amending the Criminal Code (or Criminal Procedure Code) to permit the confiscation and destruction of manufacturing equipment used to produce pirated material.

8) Amending the Criminal Procedures Code to provide the proper *ex officio* authority for police officials to initiate copyright criminal cases and investigations.

9) Amending the Administrative Code to provide *ex officio* authority to administrative authorities to commence investigations and cases.

10) Amending the Customs Code to grant the proper *ex officio* authority to border officials to seize illegal material and to commence their own investigations and criminal cases.

11) Amending the Civil Code to provide the proper *ex parte* search provisions for effective enforcement against end-user pirates.

12) Adherence to the WIPO “digital” treaties -- the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT) -- plus enacting all of the appropriate implementing legislation in the Copyright Law.

IIPA knows of no cases to date where the Criminal Code (Article 153) was used against a copyright pirate. Turkmenistan, by failing to provide a proper legal regime, and lacking any police, prosecutorial, judicial, or border activity, is clearly not providing “adequate and effective” enforcement as required by the 1993 bilateral Trade Agreement.

After adopting the necessary legal reforms, 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 copyright industries have no reports and no information about any enforcement activity undertaken in Turkmenistan in 2007.

According to the recording industry (International Federation of the Phonographic Industry, IFPI), there are no known optical media plants in Turkmenistan.

The U.S. Government and Turkmen Government signed a Trade and Investment Framework Agreement (TIFA) on June 1, 2004 to enhance trade and investment between the two countries.

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2008 SPECIAL 301 REPORT

UZBEKISTAN

Special 301 Recommendation: IIPA recommends that Uzbekistan remain on the Watch List in 2008.

EXECUTIVE SUMMARY

In November 1993, Uzbekistan and the United States signed a bilateral Trade Agreement (in force, January 13, 1994). The agreement conferred Normal Trade Relations (then called Most Favored Nation) status on Uzbekistan, in exchange for Uzbekistan agreeing to adopt critical IPR legal reforms, and to comply with international copyright treaty norms. In a series of meetings with IIPA and the U.S. Government in 2002 and 2003, the Government of Uzbekistan pledged to finally adopt its 1994 commitments into its IPR legal regime. It never did, and now fourteen years after the 1994 Trade Agreement, some of the most basic protections are denied rightholders in Uzbekistan. For example, since Uzbekistan is still not a member of the Geneva Phonograms Convention it does not provide any protection or rights for U.S. or other foreign sound recordings; further, it does not protect pre-existing foreign works prior to 2005 as a result of a reservation it made when it joined the Berne Convention (in contravention to the Convention and the 1994 Trade Agreement).

In April 2007, the U.S. Trade Representative, in announcing Uzbekistan's retention on the Watch List noted "the lack of significant progress on IPR issues" including its Article 18 reservation pertaining to Berne Convention accession and its failure to join the Geneva Phonograms Convention. The U.S. Government noted many legal and enforcement reforms that Uzbekistan must enact to comply with the 1994 U.S.-Uzbekistan Trade Agreement. The USTR noted that "IPR enforcement in Uzbekistan remains weak." As a result, Uzbekistan should be denied trade benefits and preferences including its eligibility to participate in the Generalized System of Preferences (GSP) program, because Uzbekistan is not providing the statutorily mandated "adequate and effective" copyright protection and enforcement under its present IPR regime.

Legal Reform Deficiencies

The Copyright Law of Uzbekistan was overhauled in 1996 (in force, September 17, 1996), and two additional copyright law amendments were adopted in 2000. Separately, Uzbekistan adopted a Law on Computer Programs and Databases, which was amended in 2002. In July 2006, Uzbekistan adopted a new Law on Copyright and Related Rights (in force, July 20, 2006).¹ The 2006 Copyright Law was aimed – according to the Government of Uzbekistan – at harmonizing Uzbek law with the requirements of the Berne Convention and WTO/TRIPs, which the government hopes to accede to at some future date. The 2006 law added: a making available right; a right of communication to the public; provisions pertaining to technological protection measures and copyright management information; regulations pertaining to private copying and public performance royalties; and, extensive provisions and regulations involving collective administration (chapter 4 of the law). Unfortunately, the Copyright Law could have benefited from more input by copyright rightholders, and as a result, is either missing key provisions

¹ Note, IIPA has and bases this filing on an unofficial English translation of the 2006 Copyright Law. In 2006, Uzbekistan also adopted conforming amendments to its Civil Code on copyright and neighboring rights, as well as a decree on royalties for public performances and private copying (IIPA does not have English translations of these laws/regulations).

(protection for pre-existing works and sound recordings), or has several unclear or incomplete protections (technological protection measures).

In 2005, Uzbekistan finally adhered to the Berne Convention (effective April 19, 2005). Unfortunately, as noted, Uzbekistan made a reservation to its accession regarding Article 18 that denies protection for pre-existing works from the United States and all other Berne countries. This reservation, as noted by WIPO and other copyright experts to the Government of Uzbekistan, is in contravention to the Article 18 obligations of Berne (and the 1994 Agreement). Uzbekistan must withdraw its reservation immediately and provide clear protection for pre-existing works (and separately, for sound recordings as well).

On November 30, 2005, IIPA testified at the GSP country practice hearing regarding Uzbekistan's legal deficiencies. After that hearing, the U.S. Government asked IIPA for a list of "steps that the Government of Uzbekistan should take with respect to protecting IPR in order to retain GSP eligibility." IIPA provided the U.S. Government with eight recommendations for improving IPR in Uzbekistan, in a written response on December 14, 2005. Those steps were:

1) Notifying the WIPO that the Government of Uzbekistan removes its reservation to Article 18 of the Berne Convention so that Uzbekistan can properly provide protection – as required by Berne and the U.S. Bilateral – for pre-existing works.

2) Joining the Geneva Phonograms Convention.

3) Clarifying in the Uzbek Copyright Law that pre-existing works and sound recordings are protected in Uzbekistan for a minimum of 50 and preferably for 70 years (the U.S. provides over 70 years of such protection to foreign works and sound recordings).

4) Ratifying and fully implementing the WIPO Copyright Treaty ("WCT"), and the WIPO Performances and Phonograms Treaty ("WPPT").

5) Fixing the deficiencies in the Copyright Law including: (1) the absence of an exclusive public performance (or making available) right for producers of sound recordings, at a minimum for digital transmissions (in lieu the current law provides only a right of remuneration for the public communication of the recording, broadcasting, or communication to the public by cable); and (2) delete the onerous provisions that over-regulate the terms and conditions of authors' contracts.

6) Adopting clear civil *ex parte* search procedures into the Uzbek law.

7) Amending the Customs Code to provide customs officials with the proper *ex officio* authority. (Including not adopting a proposed registration system for customs enforcement which will weaken, not strengthen, enforcement at the border).

8) Amending the Criminal Code (and/or Criminal Procedure Code) as follows:

i. To provide for liability for infringement of neighboring rights violations (i.e., crimes involving the pirating of sound recordings);

ii. To toughen the existing penalties which are too weak because: (1) there are currently no criminal penalties applied "until one year after administrative penalties are assessed" — providing pirates with a chance to pirate without penalty the first time; and (2) the levels — set at 50 to 100 times the minimum wage — were much too low to be deterrent penalties as needed. The IIPA recommends that the first provision be deleted; and the second (50 to 100 times) be raised considerably to at least 500 times the minimum wage.

iii. To add the proper *ex officio* authority for police and prosecutors to commence criminal copyright cases.

IIPA again testified at the U.S. Government's GSP country practice hearing regarding Uzbekistan's legal deficiencies on October 4, 2007. Over two years after we created the list above, and after two rounds of hearings on this matter, to the best of our knowledge, Uzbekistan has failed to undertake at least seven of these eight steps. It did adopt a copyright law (step #5), which as noted, still has deficiencies.

Recommended Legal Reforms

IIPA recommends the adoption of the following legal reforms and treaty accessions in Uzbekistan in order to provide for effective copyright protection and enforcement:

- 1) Adherence to the Geneva Phonograms Convention.
- 2) Amending the Copyright Law to provide protection for pre-existing works and sound recordings for a minimum of 50 years (and preferably, 70 years).
- 3) Amending the Criminal Code to include "neighboring rights" violations (the current code only applies to infringements of "works").
- 4) Amending the Criminal Code to raise the penalties for IPR violations to deterrent levels (for example, to 500 times the minimum wage).
- 5) Amending the Criminal Code to adopt a threshold for a criminal violation calculated on the basis of the price of legitimate product, instead of a threshold based on an undefined "large-scale damage" for IPR crimes; and, set that threshold at a low actual level.
- 6) Amending the Criminal Code (or Criminal Procedure Code) to permit the confiscation and destruction of manufacturing equipment used to produce pirated material.
- 7) Amending the Criminal Procedures Code to provide the proper *ex officio* authority for police officials to initiate copyright criminal cases and investigations.
- 8) Amending the Administrative Code to provide *ex officio* authority to administrative authorities to commence investigations and cases.
- 9) Amending the Customs Code to grant the proper *ex officio* authority to border officials to seize illegal material and to commence their own investigations and criminal cases.
- 10) Amending the Civil Code to provide the proper *ex parte* search provisions for effective enforcement against end-user pirates.
- 11) Adherence to the WIPO digital treaties: the WIPO Copyright Treaty ("WCT") and the WIPO Performances and Phonograms Treaty ("WPPT"), plus enacting all of the appropriate implementing legislation in the Copyright Law.
- 12) Correct deficiencies (and some uncertainties) in the Copyright Law of 2006, including:
 - i. Providing protection for pre-existing works and sound recordings;
 - ii. Adopting an exclusive right of public communication for sound recording producers for the recording, broadcasting, or communication to the public by cable (which appears to be limited to a right of remuneration in Article 51);

iii. A clarification about the scope and application of the rental right for audiovisual works and computer programs (Article 21);

iv. Improvements, consistent with the digital treaties (WCT and WPPT), to the provisions pertaining to technological protection measures (Article 63) and rights management information (Article 64); and

v. Deleting the onerous provisions (found in Articles 38 through 42) that over-regulate the terms and conditions of author's contracts.

Other Legal Reforms

Although Uzbekistan has proposed and/or made changes in some of these areas previously, these proposed changes were not always adequate to fix the deficiencies. The 2000 Copyright Law amendments did two things: (1) added "copying of a record" to the enumerated rights of producers to fix a glaring deficiency; and (2) added a broad national treatment obligation into the law (Article 56.3), but not a clear point of attachment for all works and sound recordings — this latter problem appears (in the unofficial translation) to have been corrected by Article 4 of the 2006 law.

IIPA is unaware of any recent amendments to the Criminal Code following passage of the 2006 Copyright Act to adopt deterrent penalties for intellectual property violations. Drafts to amend the Criminal Code were circulated in 2004, but, to our knowledge, never adopted. In fact, the 2004 draft would have weakened, not strengthened, criminal penalties because: (1) no criminal penalties are applied "until one year after administrative penalties are assessed" — providing pirates with a chance to pirate without penalty the first time; and (2) the levels — set at 50 to 100 times the minimum wage — are much too low to be deterrent penalties as needed. If a similar draft is proposed, IIPA would recommend that the first provision be deleted, and the second provision (regarding the minimum wage), be raised considerably to at least 500 times the minimum wage, as has been done in other countries.

Another 2004 draft to amend the Customs Code would have established a complicated registration system for IPR enforcement at the border. IIPA strongly recommends that Uzbekistan not adopt a border registration plan because it will prove counterproductive to effective enforcement at the border.

A 2001 resolution (No. 285 of the Cabinet of Ministers) established a licensing system for the production, reproduction and sale of records, cassettes and CDs, according to which only licensed entities could carry out such activities. Industry experience shows that such licensing systems are not effective against the pirate production enterprises, which are common in this region. IIPA recommends that this plan be repealed.

Enforcement Progress and (GSP) Trade Benefits

The U.S. Government and Uzbek Government signed a Trade and Investment Framework Agreement (TIFA) on June 1, 2004 to enhance trade and investment between the two countries.

In 2005, Uzbekistan benefited from \$11.4 million worth of GSP benefits, although in 2006, that number decreased to \$2.8 million. In the first 11 months of 2007, Uzbekistan received \$2.7 million in such benefits. Thus, even as the U.S. Government is promising to enhance trade and investment with Uzbekistan and providing GSP benefits and other aid, the Uzbek copyright regime is, at present, among the weakest of all of the countries in the C.I.S. Uzbekistan is not complying with the IPR eligibility requirements for GSP benefits and should be immediately removed from eligibility to participate until such time as it has achieved "adequate and effective" copyright protection and enforcement as contemplated by the GSP statute. Further, Uzbekistan is not in compliance with its bilateral and multilateral obligations, and is woefully inadequate in its IPR regime as a potential WTO member.

After the Uzbek Government adopts the necessary legal reforms, including accession to the relevant treaties to protect foreign works and sound recordings, and pre-April 2005 works (i.e., books, films, music, software) it needs to commence enforcement actions. Such actions should begin with police raids and seizures at a minimum, and it must act to stop the retail distribution of illegal material through the use of administrative and criminal sanctions.

According to the recording industry (International Federation of the Phonographic Industry, IFPI), illegal musical CDs produced in neighboring countries are entering Uzbekistan as a result of poor border enforcement (on both sides of the border). The IFPI reports there are no known optical media plants in Uzbekistan, although the opportunity is there for the startup of pirate CD operations due to the poor enforcement regime.

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2008 SPECIAL 301 REPORT

VIETNAM

Special 301 Recommendation: Vietnam should remain on the Watch List.

EXECUTIVE SUMMARY

Having recently passed its one-year anniversary of accession to the World Trade Organization (January 11, 2007), the government of Vietnam has made some progress on promises made in the area of protection of intellectual property rights. Signs of progress in 2007 included an agreement by the government to procure legal software, actions taken by administrative authorities against unauthorized use of software by businesses and in government agencies, reductions in signal theft due to the removal of pirated international channels from local operator VTC, and continued consideration of modifications to Vietnam's judicial system, administrative regulations, and criminal regime to deal with IP infringements.

Nonetheless, the Vietnamese market remains largely closed due to high copyright piracy rates, overall lack of enforcement against copyright piracy, and market access barriers that make Vietnam one of the most restrictive markets in the world for U.S. content. An organized campaign, including stiff deterrent criminal remedies against large-scale producers and distributors of pirate product in Vietnam, and market opening measures, would send the message to foreign right holders that their investment in Vietnam's future is welcome.

PRIORITY ACTIONS FOR 2008

- **Commence Anti-Piracy Campaign:** While Vietnam made some improvements in enforcement of copyright, in the area of software in particular, the government should take stricter measures in 2008 to provide a "deterrent" against infringement by commencing an anti-piracy campaign against organized piracy activities in the country, including targeting sources of pirate production, like the optical disc plants in operation in Vietnam, pirate distribution warehouses, and pirate retail shops selling CDs, DVDs, and illegal reprints or photocopies of books. Remedies should include tough administrative fines, license revocations, and shop closures, and criminal penalties through targeted prosecutions.
- **Confirm Criminal Remedies for Copyright Piracy (TRIPS Requirement) and Lower Thresholds:** The Vietnamese government has failed to issue a long-promised Circular to confirm that at least willful infringements of copyright on a commercial scale, i.e., that are detrimental to the interests of right holders, and other violations of the IP law as deemed necessary to provide a deterrent, shall be subject to criminal remedies in Vietnam. In addition, as Vietnam looks to amend its Criminal Code in 2008, maintenance of the Circular's coverage should at least be maintained, and the relevant provisions should allow criminal prosecutions to be brought more easily, since, to date, very few if any copyright infringements have been handled criminally.
- **Afford U.S. Right Holders With Access to the Vietnamese Market:** Various market access barriers exist in Vietnam today, the most serious being the limitations on foreign companies' setting up subsidiaries to produce or distribute "cultural products." Various other content restrictions, such as the proposed 67% film distribution quota, effectively keep foreign right holders out of the market, leaving it open to pirates who offer uncensored, untaxed products and do not reinvest in cultural industry. Vietnam must eliminate existing foreign investment restrictions and other barriers to entry to allow foreign right holders to participate in the Vietnamese market with respect to the production, importation and distribution of physical product as well as the importation and distribution of digital

product via online and mobile networks in order to provide a legitimate alternative to pirate product. Foreign companies should be permitted to establish and/or establish in Vietnam for the purpose of importing and distributing copyrighted materials, including to license their content to Vietnamese internet or mobile content providers for sale to the public.

- **Pass Optical Disc License Regulation:** IIPA understands that a draft regulation on optical disc management has been under consideration by Vietnam for some time. Given that the OD piracy situation remains serious in Vietnam, such regulations should be passed forthwith. Vietnam now has between five and seven optical disc plants with capacity to produce that far outstrips any rational legitimate domestic demand. A comprehensive regulation on the licensing of optical disc manufacture is urgently needed that includes the mandatory use of source identification (SID) Codes (including on blank discs), government inspections of optical disc production facilities, revocations and suspensions for violating plants, and provisions prohibiting the unauthorized commercial burning of content onto CD-R.
- **Join the WIPO Internet Treaties, the WCT and WPPT:** Vietnamese government representatives have indicated they are still studying whether to join the WIPO Copyright Treaty and WIPO Performances and Phonograms Treaty (WPPT). However, the 2005 IP Code includes the major implementing components for those treaties, so Vietnam should be encouraged to join its regional neighbors and join these important treaties as soon as possible.

VIETNAM										
Estimated Trade Losses Due to Copyright Piracy										
(in millions of U.S. dollars)										
and Levels of Piracy: 2003-2007¹										
INDUSTRY	2007		2006		2005		2004		2003	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Business Software ²	82.0	90%	53.0	88%	21.0	90%	30.0	92%	24.0	92%
Books	17.0	NA	18.0	NA	16.0	NA	16.0	NA	12.0	NA
Motion Pictures	NA	NA	NA	NA	NA	NA	10.0	NA	7.0	100%
Records & Music	NA	95%	NA	95%	NA	95%	NA	NA	NA	NA
Entertainment Software	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA
TOTALS	99.0		71.0		37.0		56.0		43.0	

PIRACY AND ENFORCEMENT UPDATES IN VIETNAM

The Vietnamese government made some progress in the fight against business software piracy and pay TV signal theft in 2007. The efforts of the government are also reflected in an increasingly transparent modus operandi with respect to all aspects of copyright protection, including enforcement, through a comprehensive revamping of the website of the Copyright Office of Vietnam (<http://www.cov.org.vn/Vietnam/home.asp>) and the provision of most of the information in English translation (<http://www.cov.org.vn/English/home.asp>). In addition, a government Decision No. 51, contains goals for Vietnam to reduce its piracy rate to at least meet the level attained by other countries in the region.

The latest reporting from the website indicates that in the first nine months of 2007, the government of Vietnam oversaw the following enforcement results:

¹ The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2008 Special 301 submission at www.iipa.com/pdf/2008spec301methodology.pdf. For information on the history of Vietnam under Special 301 review, see Appendix D at (<http://www.iipa.com/pdf/2008SPEC301USTRHISTORY.pdf>) and Appendix E at (http://www.iipa.com/pdf/2008SPEC301HISTORICAL_SUMMARY.pdf) of this submission.

² BSA's 2007 statistics are preliminary. They represent the U.S. software publishers' share of software piracy losses in Vietnam, and follow the methodology compiled in the Fourth Annual BSA and IDC Global Software Piracy Study (May 2007), available at <http://w3.bsa.org/globalstudy/>. These figures cover, in addition to business applications software, computer applications such as operating systems, consumer applications such as PC gaming, personal finance, and reference software. BSA's 2006 piracy statistics were preliminary at the time of IIPA's February 12, 2007 Special 301 filing and were finalized in June 2007 (see <http://www.iipa.com/statistics.html>) as reflected above.

- The Vietnamese government reported that the Inspectorate of the Ministry of Culture, Sports, and Tourism (formerly the Ministry of Culture and Information) and inter-agency inspection teams of local provinces and cities inspected 14,677 facilities doing business in cultural items and discovered and handled 4,952 facilities found to be in violation of the law. In all, 267 facilities were warned, 123 facilities had their business licenses suspended, and 43 facilities had their practicing certificates temporarily seized.
- The government reported that 802,990 disks and tapes of all types, 454,424 packages and labels, 14,603 books, 13 computers and 23 hard disks were seized. The total of all administrative fines was reported to be 15 billion VND (approximately US\$940,000) during the first nine months of 2007.

Industry reports that in 2007, the government began *ex officio* actions in the form of unannounced sweeps of shops dealing in pirated DVDs, VCDs and CDs.

Notwithstanding the increased activity in 2007, unfortunately, piracy levels in Vietnam for other sectors continued to rank among the highest in the world. The music/sound recording industries reported piracy rates of over 90%. Major piracy issues include optical disc piracy (both factory and burned), book piracy, and business software end-user piracy. One anecdote that typifies the situation involves the closure of a store selling pirate movies, at 12A Hai Ba Trung, in Hanoi. The reason for the store's closure was stated in big banners announcing that the shop moved to a bigger and better location.

Optical Disc Production and CD-R “Burning” in Vietnam: Technological advances in Vietnam and lax IP laws have made Vietnam an attractive place for pirate optical disc manufacture in recent years. Between five and seven optical disc plants operate in the country, and while some production is legitimate blank CD-R production due to migration from other locales,³ the estimated production capacity of at least 42 million discs per year (12 production lines as of January 2007) dwarfs any rational legitimate domestic demand. In addition to nearly 100% piracy rates domestically, Vietnamese-sourced pirate products have been found in other Asian countries,⁴ Canada, the Czech Republic, and Poland.

The industries have intelligence that syndicates outside Vietnam have established replication facilities in the Mekong River countries (Laos, Cambodia, Myanmar, Thailand, PRC and Vietnam) largely in response to Vietnam's booming economy. Apparently these underground plant operators are increasing production in order to respond to higher disposable income rates in Vietnam and a resulting desire among Vietnamese consumers for the latest western music and movies. Another indicator that physical piracy is growing stems from the number of CD/DVD/VCD players that are entering the country from China. The availability of these inexpensive players in the market place can be taken as an indicator of greater demand for music and movie products in the optical disc format.

Business Software End-User Piracy: Business software end-user piracy – the unauthorized use of software by businesses – remains the most damaging form of piracy in Vietnam for the business software sector. In 2006 the Vietnam authorities, including the IT Crime Unit of the Department of Economic Police of Vietnam, and the Inspectorate of the Ministry of Culture, Sports, and Tourism, began running raids against end-user piracy targets, as well as against hard-disk loading at retail, with some

³ See *Taiwanese Optical-Disc Makers Facing EU Anti-Dumping Probes Eye Vietnam*, at Investment & Trade Promotion Centre, Ho Chi Minh City, August 17, 2005, at http://www.itpc.hochiminhcity.gov.vn/en/business_news/business_day/2005/08/folder.2005-08-17.7878435323/news_item.2005-08-17.5001252474?b_start:int=20 (noting that “once EU adopts some anti-dumping sanctions that might hamper optical-disc exports from China, Vietnam is expected to become another rising production” for optical discs, and noting that Ritek already operates a plant in Vietnam, and that Gigastorage Corp. had investigated whether to move into the Vietnamese market).

⁴ *Bootleg DVD Movie Kingpin Jailed for Life*, The Standard Online, November 25, 2006, at http://www.thestandard.com.hk/news_detail.asp?we_cat=3&art_id=32633&sid=11044738&con_type=1&d_str=20061125 (a recent smuggling ring was uncovered in Guangxi Province, which borders Vietnam); one defendant was convicted to life in prison in China; the case was reported in Vietnam at <http://www.toquoc.gov.vn/vietnam/showPrint.asp?newsId=9385>).

success.⁵ Industry reported that in 2007, the government conducted four raids against end-user piracy.⁶ The government also reported that in the first five months of 2007, the MCST investigated eight facilities dealing in hard-disk loading of pirate software onto computers in Ho Chi Minh City, as well as Nghe An and Ha Tinh Provinces, resulting in removal of pirate software in 117 computers. However, in all of these software cases combined, the government meted out only 110 million VND (US\$6,900) in fines, and each individual case, even the one involving 6.5 billion VND (US\$408,000) worth of illegal software, the maximum fine is limited to only 100 million dong (about \$6,275). Fines generally have measured from 15-30 million VND, or about US\$940-1,880. This overall lack of deterrence remains a major problem in Vietnam which must be addressed in 2008. In addition, government actions have been undertaken primarily by the Economic Police and the Inspectorate of MOCST based in Hanoi. IIPA would like to see more actions taken by local authorities in major cities such as Ho Chi Minh City, Da Nang, and Hai Phong.

Government Legalization of Business Software and Other Copyright Materials:

Increasingly, as copyright markets evolve into the digital environment, losses due to unauthorized uses in the workplace mount for all the copyright industries; especially problematic is the unauthorized use by governments of business software. In many countries, government agencies, contractors, and employees – which can represent a large percentage of workplace users depending on the country – are not doing their part to ensure that uses of software and other copyright materials are legitimate. IIPA thus looks to governments to employ strategies to legalize use of business software and other copyright materials.

Book and Journal Piracy: Book and journal publishers continue to suffer from overwhelming piracy, in the form of illegal reprints, translations, and photocopies. Government-owned bookshops, roadside vendors and copyshops all sell illegal copies of bestselling trade books, travel books and academic textbooks, and unlicensed print overruns continue to plague foreign publishers who engage local production. The English language teaching market continues to be hard hit, with approximately 90% of this market (private-sector education and universities) being supplied by unauthorized reprints and adaptations.

Universities could take a more active role in ensuring that illegal reproduction is not happening on campuses. Some publishers report positive steps in this regard by particular universities in Hanoi. This type of responsiveness is to be commended. State-sector publishers also have an interest in making sure their licenses (such as those of the Ministry of Youth and the General Publishing House of Ho Chi Minh City) are not misused. This type of misuse hurts legitimate local and foreign publishers alike, resulting in distribution of unauthorized books through the mainstream state bookshops. Government publishing houses could help reduce piracy by ensuring that they lend their names and ISBN numbers only to works for which they have documented proof of legitimacy.

Internet and Digital Device Piracy: Vietnam has seen rapid growth in Internet usage as well as mobile device penetration; Vietnam now boasts over 18 million Internet users (21.4% Internet penetration),⁷ and has 106,772 individual web hosts (as of 2007)⁸ and 30,000 hosted websites.⁹

⁵ Specifically, the government conducted its first two administrative raids in Vietnam against end-user software piracy in 2006. On October 5, 2006, the MOCI and the Economic Police successfully raided a joint venture company in Hanoi. Forty-two computers were examined during the raid. The total value of pirated software used by the infringing company was estimated at about VND1 billion (approximately US\$62,750). In early December 2006, a ceramics company in Ho Chi Minh City was raided, and 30 computers containing unauthorized software applications were confiscated. The estimated total value of the illegal software found amounted to 1.5 billion VND (approximately US\$94,000).

⁶ Details of four end-user software piracy are as follows:

- On March 27, 2007, two companies in Ho Chi Minh City were inspected by authorities and infringing software was discovered, and 24 hard disks and 150 CDs containing pirated software were seized.
- On October 26, 2007, an inter-agency squad inspected a design company, and discovered 82 computers with unlicensed software amounting to over 6.5 billion VND (US\$408,000). A small administrative fine was issued in the case.
- On December 11, 2007, an inter-agency squad inspected a company in Ho Chi Minh City and discovered 17 computers with unlicensed software. Pirated software valued at US\$50,200 (800 million VND) was found at this site. An administrative fine was imposed in the case.

⁷ See Internet World Stats, at <http://www.internetworldstats.com/stats3.htm>. These statistics are up-to-date as of November 30, 2007, are based on Census Bureau data, while usage numbers come from various sources, mainly from data published by Nielsen/NetRatings, ITU, and other trustworthy sources.

According to VNNIC, as of the end of November 2007, there are over 1.2 million broadband Internet connections in Vietnam,¹⁰ a rapid expansion compared with previous years, so it is crucial that the government take proper steps to protect against illegal uses of copyright materials over the Internet and by digital and mobile devices. Internet and mobile device piracy is affecting more sectors, with new reports from the publishing industry this year of growing electronic piracy of textbooks and dictionaries, among other published products. Unauthorized deep-linking sites (in which the website contains links to pirate material hosted by third-parties), such as Socbay.com and Zing.vn, which make available infringing deep-links from third party illegal sites to the public, are becoming prevalent in Vietnam. These sites offer large number of infringing recorded music files including local, regional and international repertoire.

One way to make headway into damaging Internet piracy is to permit legitimate copyright owners to participate in the growing mobile and Internet markets for copyright materials. Namely, Vietnam should permit foreign copyright holders to license their content to Vietnamese Internet or mobile content providers, and foreign-owned enterprises should be permitted to invest in Vietnam to engage in the importation and distribution of copyrighted materials including for Internet and mobile users.

Signal Piracy: IIPA is pleased to report that Vietnam saw a “dramatic fall” in illegal connections as estimated industry losses declined from \$38 million in 2006 to \$10 million in the first ten months of 2007.¹¹ The improvement has been attributed largely to the removal of pirated international channels from local operator Vietnam Television Technology Investment and Development Company (VTC), operated by the Ministry of Posts and Telematics.

Courts and Judicial Reorganization: In Vietnam, there have been very few cases involving copyright reaching final court decision, thus the courts have not been well tested and lack clear direction on how to handle copyright cases. In one of the first reported copyright cases to make its way to the Supreme Court in Vietnam, the People’s Supreme Court in Hanoi issued a decision on the first major literature copyright lawsuit between two experts of the literature classic *Tale of Kieu* (the 3,254-verse epic work by Vietnam’s most revered poet, Nguyen Du), finding that Dao Thai Ton’s reproduction “in a faithful and comprehensive way” and use of the essays of Nguyen Quang Tuan “in their original versions” in his book titled *Tale of Kieu – Research and Discussion* was permissible under Vietnamese law (the case was brought prior to the adoption of the new IP Code) since the purpose was to provide commentary and criticism of Mr. Tuan’s interpretation. It appears that the new IP Code would not permit such wholesale copying of the essays without permission or license, would not meet the criteria of any exception under Vietnamese law, and would not meet Vietnam’s international commitments.

There have been no cases brought to IIPA’s knowledge under the Criminal Code involving copyright infringement in Vietnam. In order to truly tackle copyright piracy in Vietnam, it will be necessary for the current laws to be applied to their maximum extent. In addition, it is hoped that the amendment to the Criminal Circular will open the way for more availability of the criminal process in copyright cases.

Finally, IIPA understands that a process is underway to review and revamp the judiciary in Vietnam. Building IP expertise should be a part of this effort.

⁸ See World Factbook, Vietnam, at <https://www.cia.gov/library/publications/the-world-factbook/geos/vn.html>.

⁹ Vietnam News Service, *WTO Ushers Viet Nam Into World Economy*, Nov. 22, 2007.

¹⁰ See Internet World Stats, at <http://www.internetworldstats.com/asia.htm#vn>. These statistics are up-to-date as of November 30, 2007, are based on Census Bureau data, while usage numbers come from various sources, mainly from data published by Nielsen/NetRatings, ITU, and other trustworthy sources.

¹¹ *Pay-TV Piracy Deprives Industry of \$US1.54 Billion for 2007*, November 5, 2007, at <http://www.onscreenasia.com/article-2065-paytvpiracydeprivesindustryofus154billionfor2007-onscreenasia.html>.

TRAINING AND PUBLIC AWARENESS

The copyright industries remained engaged in training in Vietnam of Vietnamese IP officials and officers in 2007.¹²

- The Business Software Alliance (BSA) conducted a software asset management (SAM) seminar, on December 13 in Ho Chi Minh City. The seminar in Hanoi reached a total of about 170 attendees, and the session in Ho Chi Minh City reached about 320 attendees, from the public sector, small and medium enterprises, and multinational corporations.
- On May 15, 2007, the Vietnam National Software Association (VINASA), the Vietnam Informatics Association, the Ministry of Posts and Telecommunications, and the former Ministry of Culture and Information organized a seminar on software copyright in the international economy, attended by many government officials and local and foreign software company representatives. BSA spoke and participated in the event, which was organized under the “Program for Increasing Awareness on Software Copyright in the International Economic Integration” in accordance with Directive No. 04/2007/CT-TTG of February 22, 2007 of the Prime Minister on the Strengthening of Copyright Enforcement for Computer Programs, and Decision No. 51/2007/QĐ-TTĐ of the Prime Minister Approving the Program on the Development of Vietnam’s Software Industry Through 2010, issued on April 12, 2007.
- A representative of Vietnam’s Copyright office attended the WIPO ASIA - Pacific Regional Seminars on the Issues and Recent Developments of the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT). Representatives from the governments of Bhutan, Brunei, Cambodia, Laos, Malaysia (the host), Myanmar, Nepal, Pakistan, Korea, Sri Lanka, Thailand, and Vietnam were in attendance. Industry representatives from IIPA, the Recording Industry of Malaysia (RIM), the International Federation of Phonographic Industries (IFPI), and the Motion Picture Association (MPA) were in attendance.

COPYRIGHT LAW AND RELATED ISSUES

Copyright Law and Implementing Regulations to IP Code: Copyright is governed by the “Intellectual Property Code,”¹³ effective July 1, 2006, and an Implementing Decree.¹⁴ In addition, the Civil Code still applies, as Article 5 of the IP Code retains a clause making the Civil Code supreme to the IP Code where inconsistent.

The law resulted in a number of advances in Vietnam’s copyright system. For example, it provided protection for temporary reproductions (Article 4(10)), and provided, for the first time in Vietnam, protection against circumvention of technological protection measures used by right holders to protect their works/subject matter in the digital environment (Articles 28(12) and 35(7)), as well as prohibitions against trafficking in circumvention devices (Articles 28(14) and 35(9)).

¹² Training activities in 2006 included Business Software Alliance (BSA) seminars on software asset management in March 2006 in Hanoi and Ho Chi Minh City, for 460 IT experts and specialists from various domestic and international businesses and organizations, a September 2006 BSA training for 25 officers from the IT Crime Unit of the Department of Economic Police and the former MOCI on identifying illegal software and the collection of evidence in end-user software piracy cases, and Motion Picture Association participation in the November 2006 ASEAN-PTO Workshop on IPR in broadcasting and effective practices in anti-piracy enforcement.

¹³ Law No. 50/2005/QH11, Pursuant to the Constitution 1992 of the Socialist Republic of Vietnam as amended and supplemented by the Resolution No. 51, 2001, QH10 of the 10th Section of the 10th National Assembly dated 25 December, 2001.

¹⁴ Decree Providing Detailed Provisions and Guidelines for the Implementation of the Civil Code and the Intellectual Property Law with Respect to Copyright and Related Rights, No. ____/2006/ND-CP March 31, 2006, effective.

However, the Law still contains some deficiencies, however, when evaluated on the basis of full TRIPS compliance and on the basis of the terms of the U.S.-Vietnam Bilateral Trade Agreement (BTA).¹⁵ The Vietnamese government should work to correct as many deficiencies as possible in the coming months. The following is a non-exhaustive list of issues outstanding:

Substantive Issues

- **Restrictions on IP Rights:** Article 7(2) gives the State unchecked power to decide when a right holder may exercise rights and under what circumstances, without taking into account the balance already created through exceptions to protection, e.g., in Article 25. Leaving Article 7(2) intact creates inconsistencies with the Berne Convention, the TRIPS Agreement and the WIPO Treaties. The second half of Article 7(3) violates Vietnam's current and future obligations by permitting the State to restrict the ability of a right holder to exercise lawful rights, and could even result in an open-ended compulsory licensing to use copyright materials seemingly without limitation or reason. The provision should be deleted. The first clause of Article 8 also runs afoul of Vietnam's bilateral commitments and would be Berne and TRIPS-incompatible since it establishes impermissible content-based restrictions of protection under copyright. That clause should be deleted.¹⁶
- **Civil Code Supremacy:** As mentioned above, the Civil Code is supreme to the IP Code, resulting in legal uncertainties and inconsistencies which endanger Vietnam's ability to fulfill its Berne, BTA and TRIPS obligations.
- **Unacceptable Hierarchy Between Works and Other Subject Matter:** Article 17(4) creates an unacceptable hierarchy of the rights of authors over related rights. The need for the authorization of the author does not cease to exist because the authorization of the performer or producer is also required, and vice versa. Article 35 of the implementing regulations reinforces the supremacy of copyright over related rights.¹⁷
- **Importation Right Not Provided (BTA Requirement):** Articles 20 and 30 fail to provide an "importation" right as required by BTA Articles 4.2(a) and 4.6(b).
- **Exceptions Overly Broad:** Certain exceptions, including Article 24(1) (personal use copy exception), (d)*bis* (library archive copies "for the purpose of research"), (g) ("[d]irectly recording and reporting performances for public information and educational purposes"), and (k) do not accord with the Berne Convention, TRIPS, and the BTA. For example, Article 24(1)(k) regarding personal use imports needs to be specifically narrowed in order to comply with TRIPS Article 60. Article 25((1)(e) is Berne and TRIPS-inconsistent, as it provides that it is permissible to put on stage "dramatic works and other forms of performing arts in cultural gatherings or in promotional campaigns" as long as there is no

¹⁵ See Agreement Between The United States of America and The Socialist Republic of Vietnam on Trade Relations, July 13, 2000 (BTA). The BTA required Vietnam to bring its copyright regime, including enforcement provisions, into compliance with the TRIPS Agreement by December 2003. Vietnam acceded to the Geneva Convention (the Convention for the Protection of Producers of Phonograms Against Unauthorised Duplication of their Phonograms) on July 6, 2005 and the Brussels Convention in late 2005. Vietnam was also planning to accede to the Rome Convention at the end of 2005. There are no plans to accede to WCT and WPPT although Vietnam acknowledges that its law will comply with these and that Vietnam will eventually accede. For a complete analysis of the copyright law and remaining deficiencies, please see IIPA's 2007 Special 301 country report on Vietnam, at <http://www.iipa.com/rbc/2007/2007SPEC301VIETNAM.pdf>.

¹⁶ We note that a new Article 24 was added just prior to passage of the Law, and it is unclear what its scope may be. It provides, "[t]he protection of the copyright to literary, artistic and scientific works referred to in Article 14.1 of this Law shall be specified by the Government." Article 14.1 enumerates the various subject matter of copyright (not including related rights). This provision could be innocuous; however, to the extent it coincides with Articles 7 and 8 to deny rights to authors or right holders or cede rights, it could be problematic.

¹⁷ Article 35 provides,

Protection of related rights without prejudice to copyright provided in paragraph 4 of Article 17 of the Intellectual Property Law means that organizations or individuals using works subject to copyright protection for performances, phonograms or broadcasting must guarantee personal rights and property rights as specified in Articles 19 and 20 of the Intellectual Property Law.

admission charge; however, the provision that performers may not be paid was struck in the bill that was passed into law. It was already believed that “cultural gatherings” and especially “promotional campaigns” could be read in an overly broad way, but with payments being made, this provision runs afoul of the Berne three part test.¹⁸ The implementing regulations worsen the situation, in that, under Article 25(2) of the implementing regulations, it appears the IP Code would allow the copying of a computer program “for archives in libraries for the purposes of research.” If this is what is intended by the implementing regulation, it would create a TRIPS-incompatible exception which must be remedied.

- **Impermissible Compulsory Licenses:** Article 25 enacts into law in Vietnam a broad broadcasters’ compulsory license as to all works except cinematographic works (excluded by the terms of Article 26(3)).¹⁹ Notwithstanding the attempt in Article 26(2) to limit the scope of the compulsory license to the three step test, it is hard to see how the compulsory license in clause 1 would not collide with the three step test in virtually all instances. If this provision applied to performers only, it might be acceptable, but as drafted, it creates a Berne- and TRIPS-incompatible compulsory remuneration scheme. Similarly, the Article 33 compulsory license (which is a last minute addition to this legislation) for use of sound recordings and video recording for commercial “broadcasting” is in violation of international standards; 33(1)(b) allows “[u]sing a published sound/video recording in ... business and commercial activities.” Again, the Vietnamese attempt to limit the scope of these compulsory license provisions with the Berne three part test language (Article 33(2)) fails, because this compulsory license, by its very nature, conflicts with a normal exploitation of the sound and video recordings, and unreasonably prejudices the legitimate interests of the right holders involved.
- **Duration Provisions Are BTA-Incompatible:** Articles 27(2)(a) (with respect to cinematographic works) and 34(2) (with respect to phonograms) do not comply with BTA Article 4.4 since they do not provide the term promised under that Agreement.²⁰

Enforcement Issues

- **No TRIPS/Berne-Compatible Presumption of Ownership, and Imposition of a Prohibited Formality:** Article 203 fails to provide a Berne and TRIPS-compatible presumption of copyright ownership, and could impose a Berne-prohibited formality by requiring a registration certificate in order to enforce copyright. Article 3.2 of the BTA provides, “[a] Party shall not ... require right holders to comply with any formalities or conditions ... in order to acquire, enjoy, *enforce* and exercise rights or benefits in respect of copyright and related rights.” Articles 208(1) (regarding provisional measures)

¹⁸ By contrast, Title 17, Section 110(4) of the U.S. Copyright Act permits “performance of a nondramatic literary or musical work otherwise than in a transmission to the public, without any purpose of direct or indirect commercial advantage and without payment of any fee or other compensation for the performance to any of its performers, promoters, or organizers” if there is “no direct or indirect admission charge” or if “proceeds, after deducting the reasonable costs of producing the performance, are used exclusively for educational, religious, or charitable purposes and not for private financial gain.” Section 110(4) also provides right holders with an opportunity to object to such performances. The Vietnamese provision is much broader in the subject matter (“dramatic works and other forms of performing arts”), the setting (“cultural gatherings or in promotional campaigns”) and the payment scheme (payments not prohibited).

¹⁹ The Article reads as follows:

Use of published works without obtaining permission but paying royalties, remuneration

1. Broadcasting organizations using published works for the purpose of carrying out broadcasting programs with sponsorship, advertisements or collection of money in any form shall not be liable for obtaining permission from, but shall be liable to pay royalties or remunerations to, the copyright owner in accordance with the Government regulations,

2. Organizations and individuals when using the works stipulated in paragraph 1 of this Article must not influence the normal exploitation of works and must not prejudice rights of authors or copyright owners, and must provide information about the name of the author and origin of the works.

3. The use of works referred to in clause 1 of this Article shall not apply to cinematographic works.

²⁰ BTA Article 4.4. provides,

Each Party shall provide that, where the term of protection of a work is to be calculated on a basis other than the life of a natural person, the term shall be not less than 75 years from the end of the calendar year of the first authorized publication of the work or, failing such authorized publication within 25 years from the creation of the work, not less than 100 years from the end of the calendar year of the creation of the work.

and 217(1)(a) (with respect to border measures), since they apply the same standard of proof, also violate international standards.

- **“Compelling Distribution or Use for Non-Commercial Purpose of Goods, Materials and Implements”**: Article 12.4 of the BTA provides that infringing goods, materials, equipment, implements, etc. be seized and disposed of outside the normal channels of commerce, and (in the case of goods) destroyed (if permissible constitutionally). Article 202(5) of Vietnam’s IP Law provides that one application of civil remedies could include “Compelling distribution or use for non-commercial purpose of goods, materials and equipment used for the production and business of IPR infringing goods.” This provision falls short of what the BTA (and TRIPS) would allow, notwithstanding that the drafters added “provided that such distribution and use does not affect the exploitation of rights by the intellectual property rights holder.” There remains no possibility of seizure or destruction of the infringing goods, materials or equipment used in the infringing activity. With regard to administrative remedies, Article 214(3)(a) is similarly too broad, providing for the possibility of “distribution and use of the [goods/implements] for non-commercial purpose provided that such distribution and use does not affect the IPR owner’s capacity to exploit his/her IPRs.”
- **Administrative Remedies Too Low to Deter Piracy**: At a seminar held in Ho Chi Minh City on December 13, 2007, organized by the Business Software Alliance, the Deputy Inspectorate of the Ministry of Culture, Sports and Tourism acknowledged that the current administrative penalties of 20 to 30 million VND (US\$1,250-1,876) are too low, and they have asked that the fine levels be increased to up to “five times the value of the infringed material.” IIPA agrees with this proposal by the Ministry.

Criminal Code of Vietnam: Article 14 of the BTA requires Vietnam to “provide criminal procedures and penalties to be applied at least in cases of ... infringement of copyrights or neighboring rights on a commercial scale,” and to provide that “penalties *available* include imprisonment or monetary fines, or both, sufficient to provide a deterrent, consistent with the level of penalties applied for crimes of a corresponding gravity.” These BTA provisions essentially restate the TRIPS Article 61 test, which Vietnam is now also obliged to follow.²¹ The IP Code unfortunately does not expressly provide for BTA or TRIPS-compatible criminal penalties. The Criminal Code (Article 131) is at best ambiguous, and the Supreme Court Circular on the Criminal Code establishes thresholds for criminal liability that make it unlikely that Vietnam could meet its TRIPS or BTA obligations without amendment/reinterpretation.

The Vietnamese government has been working since 2006 on a new draft Circular which it hopes will resolve the BTA and TRIPS issue. To date, agreement has been reached on providing that infringements/violations listed in Articles 28 of the IP Code would be subject to criminal penalties under the Vietnamese Criminal Code (Article 131), but no agreement has been reached to add related rights to that general statement. Further, the thresholds for criminal liability remain too strict, and not in compliance with the requirement to criminalize at least all copyright piracy carried out “on a commercial scale.”²² Resolution of these issues is crucial to Vietnam meeting its TRIPS and BTA commitments, and to establishing a copyright enforcement system capable of deterring infringement and ultimately legitimizing the market for copyright materials in Vietnam.

IIPA understands that the Criminal Code will be amended, as early as 2008. IIPA hopes that the progress made in addressing the deficiencies in the current Code and Circular will not be forgotten as the drafters proceed, and that a workable system enabling enforcement officials to weed out copyright piracy in the country will be established and/or maintained.

²¹ Article 14.2 of the BTA also requires Vietnam to “provide that, in appropriate cases, its judicial authorities may order the seizure, forfeiture and destruction of infringing goods and of any materials and implements the predominant use of which has been in the commission of the offense.”

²² It is reported that some government officials do not believe criminal enforcement for copyright infringement can be read into Article 131 of the Criminal Code, and that amendment of the Criminal Code is therefore required, but that relevant sectorial authorities have been given instructions to make renewed efforts to get the Circular issued.

Optical Disc Regulations: The Copyright Office has reportedly prepared a Draft Circular on Optical Disc Management, intended to regulate optical disc production. Effective prevention of optical disc piracy can only be achieved through targeted legislation or regulation and by the establishment of specific enforcement mechanisms. APEC Member Economies' Ministers endorsed a paper, "Effective Practices for Regulation of Optical Disc Production" in 2003, which contained many key aspects that are necessary features of an effective optical disc regulatory scheme. Vietnam should join other APEC Member Economies that have already enacted such legislation, and modernize its legislative framework to meet the challenge of optical disc piracy. Essential provisions for an effective optical disc regulatory scheme include:

- The establishment of a competent licensing authority to grant licenses to optical disc production facilities as well as to deny, suspend, or revoke a license if that should become necessary. In addition, commercial CD-R/DVD-R "burning" (i.e., for the purpose of sale, distribution, or other commercial dealing) of copyrighted materials onto recordable optical discs undertaken by traditional optical disc manufacturing plants or outside of such plants (the latter which is fast becoming a major problem) should be subject to registration to ensure that unregistered commercial conduct is punishable.
- The requirement to use SID Codes to trace pirate discs to their source of production.
- The establishment of licensee record-keeping requirements in the application process and after a license is granted, to provide governments with the means to judge whether an applicant qualifies for a license, and to provide maximum transparency after a license is granted (e.g., exemplars will be provided from each plant for every disc produced, allowing for transparent accounting of licensed production and forensic evidence should such be needed). CD-R burning registration should also entail record-keeping of orders.
- The ability to inspect plants (in addition to traditional search and seizure) and burning facilities, including nighttime inspections, to ensure that plants/facilities are engaging in legal activities.
- Government record-keeping of all plants/facilities and all actions taken with respect to them (e.g., inspections, searches).
- The establishment of adequate penalties for violations of a license (or burning without registering) including criminal penalties and possibility of plant/burning facility closure.
- To put into place controls to track the export of discs, and export and import of equipment and raw materials, including the masters or stampers which are the key components for producing pre-recorded content (an automatic license is one common approach).

MARKET ACCESS

Various market access barriers exist in Vietnam today, the most serious being limitations and prohibitions on foreign companies' setting up subsidiaries to produce or distribute "cultural products," including IIPA members' products. This leaves right holders no choice but to license Vietnamese companies (which often refuse to license due to the prevalence of piracy). Various other content restrictions, such as the proposed 67% film distribution quota, effectively keep foreign right holders out of the market in Vietnam, leaving it open to pirates who offer uncensored, untaxed products and do not reinvest in cultural industry as our right holders invariably do. Market access restrictions in Vietnam should be lifted to let foreign right holders avail themselves of this developing market.

Quantitative Restriction on Foreign Film and Other Restrictions Relating to Audiovisual Content: Under current regulations, there are no explicit screen quotas or restrictions on the number of imported films. However, under the market liberalization measures offered by Vietnam in conjunction with its bid to gain WTO accession, the number of cinematographic films imported each year may not exceed

two-thirds of those domestically produced, which is a major restriction on the number of imported films allowed. Also, the number of foreign films projected by each cinema would only be allowed to reach two-thirds of the total projected films in any given year. Since the domestic films industry is underdeveloped and the number of domestic films produced has generally ranged between 10 and 15 films or less per year, these proposed restrictions would pose a significant barrier to the import and distribution of foreign films in Vietnam.

In the television sector, foreign content is reportedly limited to 50% of broadcast time, although it is unclear whether this is enforced. In addition, foreign programming is not allowed during prime time viewing hours of 7:00 p.m. to 9:30 p.m.

Foreign investors are now investing in cinema construction and operation through joint ventures with local Vietnamese partners, but these are subject to government approval. Only cinema exhibitors are allowed to import foreign films into Vietnam, but under the Cinema Law (Article 13(2)), foreign organizations and individuals and Vietnamese residing overseas may establish and manage “film distribution enterprises” and “film projection enterprises” in Vietnam, apparently with no ownership restrictions.²³

Sound Recordings and Musical Compositions: Under present rules in Vietnam, the ability of foreign sound recording companies to set up subsidiaries to produce or distribute “cultural products” is unclear. It appears that they must license a Vietnamese company. In addition, Vietnamese companies have not been interested in licensing legitimate product from American companies given that pirated versions of these products are already available in the Vietnamese market. Thus, right holders in sound recordings (and musical compositions), especially with respect to physical product, are largely excluded from the market. U.S. right holders should be permitted to establish wholly owned subsidiaries in Vietnam that are permitted to engage in all industry activities, including but not limited to creation, manufacture, sale, promotion, publication, distribution, and advertising. It is especially important that foreign-owned enterprises be permitted to invest in Vietnam for the purpose of importing and distributing recorded music for online and mobile distribution to the public.

Vietnam’s failure to make any significant commitments to market access for U.S. and other foreign record companies within the framework of the WTO accession agreement is, we believe, a major mistake that prejudices both U.S. and Vietnamese interests. Consumers in markets around the world demand and get access to popular cultural materials, with the only question being whether such access will be provided by legitimate or illegitimate means. If major record companies can not do business in Vietnam, then pirates will form a unique pirate supply chain for consumers. This is what has happened in other markets – like that in China – which results in harming U.S. right holders, but also the local artists.

OTHER REGULATIONS ISSUED OR CONSIDERED IN 2007

In 2007, the Vietnamese government continued its active legislative and regulatory agenda, including in the area of IP. New regulations adopted in 2007 include:

- Directive No. 04/2007/CT-TTG dated 22 February 2007 of the Prime Minister on the Strengthening of Copyright Enforcement For Computer Programs. This directive instructs local governments to adopt measures to protect against copyright infringement of computer programs, and to budget funds annually for the purchase of software by government entities.
- Decision No. 51/2007/QD-TTG of the Prime Minister Approving the Program on the Development of Vietnam’s Software Industry Through 2010, issued on April 12, 2007.

²³ This is in contrast to “film production” in which the Director or Director General must be Vietnamese.

- Many local provinces and cities issued local directives relating to intellectual property infringements (in furtherance of the Plan of Action No. 168/CTHD/VHTT, KH & CN, NN & PTNT, TC, TM, CA on Cooperation in Preventing and Combating Intellectual Property Violations From 2006 – 2010, issued by six ministries on 19 January 2006), including, e.g., Directive No. 19/2007/CT-UBND dated 3 August 2007 on Strengthening and Encouraging Intellectual Property Activities in Hai Phong City. These directives instruct local departments to conduct activities to improve public awareness and to increase enforcement activities against IP infringement.

Several draft regulations or guidelines remain under consideration in Vietnam. We recommend that the government expedite the issuance of these regulations, including the following:

- Draft Decree of the Government on Punishing Administrative Violations Related to Copyright and Related Rights. This decree will prescribe administrative sanctions for violations under the law on intellectual property. The Ministry of Culture, Sports and Tourism has submitted this draft decree to the Prime Minister for consideration and promulgation.
- Draft Interministerial Circular Providing Guidelines on Applying a Number of Provisions of the Law on Intellectual Property in the Resolution of Disputes on Intellectual Property in the People's Courts. This draft was presented in early 2007, and was generally praised by a number of experts. The current status or timetable for issuance is unclear.
- Draft Interministerial Circular to be Issued by the Ministry of Culture, Sports And Tourism and the Ministry of Planning and Investment Providing Guidelines on the Implementation of the Provisions on Economics and Finance in the Law on Intellectual Property and Decree No. 100/2006/ND-CP dated 21 September 2006.
- Draft Circular on Computer Programs. IIPA understands that the authorities may be working on a draft circular specifically related to computer program issues, including copyright, and looks forward to reviewing a draft.
- Draft Circular on IP Evaluators. Vietnam's law on intellectual property provides a role for "IP evaluators," akin to expert witnesses, to participate in the adjudication of IP disputes. It is unclear whether these individuals or organizations will provide testimony, or will also participate in deciding cases. This draft Circular is forthcoming.

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2008 SPECIAL 301 REPORT

PARAGUAY

Special 301 Recommendation: IIPA recommends that Paraguay remain under Section 306 monitoring in 2008.

EXECUTIVE SUMMARY

Meaningful change in reducing piracy in Paraguay did not occur in 2007--not in the streets, not in Ciudad del Este, not in reducing the transshipment of pirated products or raw materials to other countries. IIPA members report continued cooperation with key Paraguayan authorities in 2007, the all-too-familiar problem of good intentions and poor results continues. Large-scale importation of blank media, along with local production and distribution of pirated goods remains almost unchecked. Corruption and an ineffective judicial system are recurrent problems. One bright spot is that the special anti-piracy unit (UTE) did conduct several high-impact raids in 2007. It is imperative that Paraguay adopt changes to its criminal code so that deterrent sentencing in criminal copyright piracy cases is possible. More judicial training on IPR enforcement and the adoption of sentencing guidelines is direly needed. IIPA supports the renewal of the bilateral Memorandum of Understanding on Intellectual Property Rights (IPR MOU) which will be in force through 2009. IIPA recommends that the U.S. government maintain close consultations on progress being made on-the-ground in Paraguay regarding new MOU commitments. Protecting and enforcing copyrights must be elevated to a national priority; the vast scale of piracy is devastating the economy and thoroughly undermining the rule of law.

PRIORITY ACTIONS IN 2008

Enforcement

- Improve border enforcement, including (a) the interception and seizure of piratical and counterfeit goods, (b) the interception and seizure of contraband PC hardware, and (c) the inspection of blank optical disc media.
- Investigate and conduct raids against the large-scale distribution points operating in Ciudad del Este, including addressing the role of landlords with respect to the open and notorious illegal activities taking place on their premises.
- Impose deterrent remedies against pirates, including criminal penalties.
- Audit large-scale importers of blank CD-Rs who are suspected suppliers of pirate organizations for possible tax evasion. Pursue audits of customers of those importers. Tax authorities should consider creating a specialized unit familiar with the business of optical media and other exportable products.
- Improve training for officials in the UTE, the special IP task force, and provide sufficient resources for UTE to hire, train and maintain its inspectors.
- Improve training for prosecutors and judges in order to improve effective deterrence against criminal copyright piracy.
- Request that the Supreme Court suspend and/or remove expert witnesses and judges reported to be involved in corruption cases from current dockets.
- Create a specialized IPR court.
- Ease regulations for the destruction of seized evidence. As it stands now, destruction procedures are very expensive because they require high court fees from the complainants for each individual case instead of pooling them together.

Legislation

- Pass legislation to amend Article 184 of the criminal code to increase penalties for copyright infringement (designating IPR violations as major crimes), establish *ex officio* actions, and criminalize the circumvention of technological protection measures.
- Issue and implement a software legalization decree (long overdue from previous IPR MOU).
- Halt further consideration of possible development of a regulatory decree (or other legislation) which would detrimentally interfere with collective rights management.

PARAGUAY										
Estimated Trade Losses Due to Copyright Piracy										
(in millions of U.S. dollars)										
and Levels of Piracy: 2003-2007¹										
INDUSTRY	2007		2006		2005		2004		2003	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Sound Recordings & Musical Compositions ²	128.0	99%	128.0	99%	128.0	99%	127.8	99%	154.6	99%
Business Software ³	6.0	81%	6.0	82%	6.0	83%	6.0	83%	5.0	83%
Entertainment Software ⁴	NA	NA	NA	98%	NA	NA	NA	NA	NA	NA
Books	NA	NA	2.0	NA	2.0	NA	2.0	NA	2.0	NA
Motion Pictures ⁵	NA	NA	NA	NA	2.0	86%	2.0	95%	2.0	80%
TOTALS	134.0		136.0		138.0		137.8		163.6	

The IPR Memorandum of Understanding and Action Plan: Both the Paraguayan and the U.S. governments have invested years of effort to improve the Paraguayan system. On December 19, 2003, both countries agreed on a Memorandum of Understanding on Intellectual Property Rights (IPR MOU). The IPR MOU was extended through 2007. Unfortunately, Paraguay has not met the objectives of this original IPR MOU to date in several ways, including:

- Failing to significantly reduce the levels of copyright piracy;
- Not increasing criminal penalties available for and applied in criminal copyright cases through legislative changes;
- Not strengthening deterrence by requiring imposition of mandatory minimum prison sentences on offenders convicted of manufacturing, importing or distributing commercial quantities of pirated or counterfeit goods;

¹ The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2008 Special 301 submission at www.iipa.com/pdf/2008spec301methodology.pdf. For information on the history of Paraguay under Special 301 review, see Appendix D at (<http://www.iipa.com/pdf/2008SPEC301USTRHISTORY.pdf>) and Appendix E at (<http://www.iipa.com/pdf/2008SPEC301HISTORICALSUMMARY.pdf>) of this submission.

² RIAA reports that its estimated piracy losses include both domestic piracy in Paraguay and estimated losses caused by transshipment. The decrease in 2003 and 2004 estimates are due to lower average prices of recorded music and currency devaluation.

³ BSA's 2007 statistics are preliminary. They represent the U.S. software publishers' share of software piracy losses in Paraguay, and follow the methodology compiled in the Fourth Annual BSA and IDC Global Software Piracy Study (May 2007), available at <http://w3.bsa.org/globalstudy/>. These figures cover, in addition to business applications software, computer applications such as operating systems, consumer applications such as PC gaming, personal finance, and reference software. BSA's 2006 piracy statistics were preliminary at the time of IIPA's February 12, 2007 Special 301 filing and were finalized in June 2007 (see <http://www.iipa.com/statistics.html>) as reflected above.

⁴ ESA's estimated piracy rates for Paraguay in 2006 reflect on the piracy rate for handheld products, which may differ from and often underestimate overall piracy levels in country. ESA's reported dollar figures reflect the value of pirate product present in the marketplace as distinguished from definitive industry "losses."

⁵ MPAA's trade losses and piracy levels for 2006 and 2007 are not available. MPAA did provide 2005 estimates for a select group of countries, using a new methodology that analyzed both physical/"hard goods" and Internet piracy. Details regarding MPAA's methodology for 2005 and prior years are found in Appendix B of this IIPA submission.

- Not providing for the seizure of an infringer's assets upon conviction for commercializing pirate product; and
- Not finding ways to work with the judiciary to promptly resolve pending cases.

IIPA and its members requested heightened consultations during 2007 in advance of any renewal of this IPR MOU, urging the Government of Paraguay to meet its MOU commitments. In December 2007, both governments initialed a new MOU and Action Plan, thus extending their cooperation on IPR issues until the end of 2009. The text will be signed and made publicly available in 2008.

COPYRIGHT PIRACY IN PARAGUAY

Widespread piracy at the borders and in the streets remained a serious problem in Paraguay, with no significant improvements to report in 2007. Internet piracy is beginning to infiltrate this market.

Optical media piracy, border measures and transshipment: Paraguay continues to serve as a favorite destination for much of the pirated optical media product produced in Southeast Asia (e.g., Malaysia, Macau, Hong Kong, Singapore, and Taiwan). In addition, Paraguay remains a significant transshipper of pirate products and optical media to its neighbors, especially Brazil.

Pirates continue to shift their products from pre-recorded optical disc product to importing blank recordable CDs (CD-Rs) into Paraguay. Around 30% of all importation of blank media come from two major manufacturers. Most of this product comes from Southeast Asia (Taiwan and China) and almost all of it is destined for pirate production of music, movies and software to be sold in Brazil. The amount of optical medial product legally imported into Paraguay decreased in 2007, compared to 2006. The year-end estimate for 2007 for legally declared imports of compact discs (including CDs and DVDs) was 90 million units, according to the RISMOMP, the Office of the Ministry of Industry and Commerce overseeing imports of optical discs.⁶ This lower number is likely due to the optical disc plants operating in Paraguay (see below), which likely lowered their costs and increased their production. Another 100 million units of blank media that had been previously routed through Paraguay are now being diverted to the border between Uruguay and Brazil.

Moreover, the entertainment software industry reports that for 2007, the market remains replete with pirated and counterfeit video games. A survey of the market found that about 70% of the pirated product sold at retail consisted of imported or factory-replicated games on DVD, with the remaining 30% locally produced, burned product. The country also remains a major transshipment point for pirated and counterfeit video games from Asia into South America. In most cases, shipments of pirated entertainment software on optical media originate from Malaysia, while counterfeit cartridge games and components are shipped from China—all for subsequent and further shipment into South America's key markets like Brazil. Shipments of counterfeit cartridge games and components, for example, have been seized in the U.S. and in Uruguay, with Paraguay as the destination country. Border enforcement efforts must also focus on counterfeit game cartridges, game components and console game discs, for which the volume of suspect shipments is also as significant as optical disc products. In addition, there remains a big problem with increasing illegal importation of computer hardware parts and components, which are then assembled into computers and frequently loaded by system builders and assemblers with illegal business software. Much of this contraband hardware arrives in Paraguay, and then enters Brazil, Argentina and Uruguay.

As if the excessive levels of imported blank media were not a severe enough problem, there are five (5) optical disc factories in Paraguay. In recent years, the Paraguayan government authorized and provided incentives to set up four new industrial CD-R and DVD-R plants in Ciudad del Este. These plants have a capacity for the manufacture of 120 million units per year. UTE plans to inspect these plants in February 2008 to determine the new capacity.

⁶ According to UTE calculations, over 360 million units of blank optical media were imported in 2006, but from January to September 2007, only 60 million units were legally imported. This drastic decline in importations is likely due to an increase in national production levels and blank optical media entering as contraband.

In addition to their clandestine industrial CD production capacity, the pirates of Ciudad del Este revised their replication methods. Hundreds of smaller burning labs have replaced the illegal CD plants. Many of these burning facilities are supplied by pirate kingpins who coordinate their work and provide the small labs with blank CD-Rs. These “sprayed” plants serve Paraguayan, Argentine, Uruguayan and (mostly) Brazilian illegal CD-R duplicators.

Internet Piracy: Paraguay has only 16,000 broadband subscribers and 260,000 Internet users, (according to Internetworldstats.com). Internet-based piracy has grown mostly because Internet access is becoming more affordable. Cyber cafés have proliferated across the country. Moreover, almost all the computers in these cyber cafes have installed illegal games and software. People use Internet forums and webspaces to offer their products and upload links to free hosting sites such as Megaupload or Rapidshare. In addition, sell-through Internet sites are increasingly hurting local markets.

Organized crime: Again in 2007, organized criminal groups remain involved in the production and distribution of pirated and counterfeit product, and/or in the importation and distribution of raw materials. Organized crime elements from Taiwan, the Far East and the Middle East control much of the distribution in Ciudad del Este and in other cities. Some industries continue to report that organized crime elements are working more with smaller labs, making it harder to identify those operations. In 2007, a sizeable amount of Nintendo counterfeit products were seized in Gallery Page, Ciudad del Este, and evidence seized at the raid indicates a possible connection with criminal groups.

Local Piracy: The level of piracy in Paraguay remained steady in 2007, at 99% of that market. Recorded CD-Rs/DVD-Rs, and cartridge-based video games are dominant forms of piracy. The legitimate recording market is so small that it is difficult to quantify; only a few stores still sell some legal product. A few local artists produce their own recordings and sell them in CD-R format due to piracy. Hard copies of illegal software continue to be readily available in large quantities in Ciudad del Este.

The book publishing industry continues to report concerns about use of photocopied books in universities and encourages institutions of higher learning to take a more active role to ensure use of legitimate materials by students and lecturers.

The business software industry reports severe problems with end-user piracy, whereby businesses inflict the most economic harm on the potential growth of a legitimate software base in Paraguay. Government implementation of a software legalization decree (required by the original IPR MOU) is long overdue. Furthermore, the Business Software Alliance (BSA) reports a marked change in Internet piracy in Paraguay over last year. The growing Internet piracy problem is changing the marketing and distribution of pirated products. With respect to piracy targeted at corporations, email is used to place orders online, and purchasers obtain the products via a distributor hired by the piratical organization. In addition to commercial software, these groups offer pirated compilations of business software, including those specially tailored to a particular business sector, for example, to engineers, architects, and accountants.

COPYRIGHT ENFORCEMENT IN PARAGUAY

Copyright anti-piracy actions taken by Paraguayan authorities, while well intended, continue to be largely ineffective in deterring widespread piracy. One bright side is that the Specialized Technical Unit (UTE) in the Ministry of Industry and Commerce, has conducted several high-impact raids and has worked well with industry representations on operations and investigations.

In 2007, the UTE seized US\$49 million in pirated products in 74 enforcement actions. Copyright merchandise accounts for an estimated 70% of the value of these seizures. Organized criminal elements make enforcement extremely difficult. Border enforcement remains weak. There are still too few criminal investigations and prosecutions against copyright pirates. Unfortunately, IPR infringements are treated as minor offenses and deterrent penalties are rarely issued because of gaps in the criminal code and copyright law.

The entertainment software industry has undertaken several raids in Ciudad del Este since the inception of its anti-piracy program in early 2007. In mid-2007, a raid against four retail locations and a warehouse resulted in the seizure of about 17,800 pirated games discs and almost 1,000 pirated Nintendo video game cartridges. Another raid yielded 5000 pirated games discs. ESA has also participated in raids conducted by UTE and these raids have resulted in the seizure of a significant amount of pirated product. A later raid against Gallery Page, a well-known center for the sale and distribution of pirated and counterfeit goods in Ciudad del Este, resulted in the seizure over 26,000 pirated games on optical media discs, 203 GameCube mini-game discs, and almost 31,000 inserts for the optical media discs.

Border enforcement: The Government needs to combat cross-border piracy and corruption of its agents. In 2007, Paraguayan Customs operations were nearly non-existent; in addition, even enforcement units that have actually undergone polygraph testing continue to experience problems with corruption. The border with Brazil remains wide open and *sacoleiros*, individuals who come to buy counterfeit products to later sell in Brazil, pass easily over the Friendship Bridge. Some border actions taken in early 2007 drove the traffic off the Bridge and into the water, where there are very few patrol boats. In addition, an undetermined amount of merchandise is being trafficked into Brazil through 'dry' border crossings including Pedro Juan Caballero and Salto de Guaira. Tax authorities should conduct strict audits of businesses catering to the *sacoleiro* traffic in Ciudad del Este since tax evasion is rampant. A new recordation process established with the customs authorities was a welcome development, but there must be better cooperation with the Recordation Office when suspect products are found.

Customs operations with industry coordination and the Ministry of Industry and Commerce (MIC) were conducted in 2007. Overall, the relationship with Customs improved and they conducted around 10 meaningful operations. Some were river operations in order to eliminate one of the contraband routes.

In September 2003, the recording industry reached an agreement with customs and the MIC which provides that no blank CD-R shipment will be released until these groups verify that the submitted invoices and documents are valid and accurate. Cooperation improved a great deal and the audit of invoices continues. Importers are aware of the procedure and are now following proper procedures to bring in digital media. Hence the numbers of seizures decreased over last year from 7.5 to 2.5 million units of blank optical discs. The overall reduction in imported units also affected the number of seizures. Customs also helped with an effort to identify administrative and tax violations by some of the CD-R plants. In fact one plant was fined over US\$1 million for tax and reporting irregularities.

One of the major successes involved a raid run by UTE in October 2007 in the infamous pirate market of Paseo San Blas, which is an open mall located at the foot of the Friendship Bridge, which separates Ciudad del Este from Brazil's Foz de Iguacu. In this action, 52 points of sale were targeted, resulting in the seizure of 67,500 music CD-Rs, 123,000 film DVDs and almost 1 million jewel boxes. Earlier that same day, authorities seized a full-scale replication lab, located in the same vicinity, that had 214 active burners and more than 14,000 CD-Rs. This action was part of a program designed by INTERPOL to curb piracy in the Tri-Border area. To avoid pre-raid leaks, the authorities brought in enforcement personnel from Asuncion, and UTE had to overcome some judicial opposition to the lab raid.

BSA reports that it carried out 14 border actions in Ciudad del Este, all of which were done with the support of the UTE. This represents almost twice the number of actions performed in 2006. BSA also notes that their efficacy was improved thanks to the intelligence operations of UTE, which keeps targets under surveillance. Seizures of business software programs in these border actions were worth over US\$4.0 million. In addition, BSA requests that border officials strengthen their monitoring of importers of computer parts.

Criminal copyright enforcement: Industry generally reports that cooperation with UTE is very good. Overall, UTE's performance improved during 2007 but it has been very difficult to recruit and retain personnel. UTE could benefit from more training and more competitive wages (their low salaries prompt staff turnovers).

The recording and motion picture industries are represented by APDIF in Paraguay. While APDIF's cooperation with UTE in 2007 was excellent, the number of raids for the year decreased by 49% to 80

operations and the amount of product seized by 58% to 4.9 million units. It is clear that the authorities are not able to maintain the intensity of the campaign without major support from the industries.

According to local legislation, piracy is a crime to be pursued *ex officio*. However, IFPI reports that 70% of the anti-piracy operations are initiated by complaint of the industry. This is largely due to the high level of corruption in the National Police. In 2007, the recording industry supported efforts to conduct 80 raids, which resulted in the seizure of over 4.9 million units of infringing products (mostly music CDs) and the closure of 13 manufacturing facilities, most of them small to mid-sized CD-R replication facilities, and 37 storage facilities of different sizes. In 2006-2007, the revised business model for pirates changed from large-scale operations to loosely knit, small-scale groups. Identifying and immobilizing these organizations has become more difficult. The more sophisticated criminals involved in optical disc piracy have adopted the "cell" structure of operations.

BSA reports that the authorities remain cooperative with industry officials on both criminal and civil cases during 2007, and this includes the MIC, the General District Attorney, the Network Investment and Export of Paraguay (REDIEX), and the UTE. BSA launched a national public awareness campaign called "Don't put your business at risk" in October 2007. Some 3,600 letters were sent to local companies and businesses to inform them about the benefits of using legal software. As a result, 14 border raids took place in Ciudad del Este, seizing merchandise for US\$4 million. There were also undercover procedures made in Asuncion, brought against illegal distributors of computers that were fully loaded with unlicensed software. Eight people are formally linked with these cases, two of them with previous criminal records related to intellectual property infringements. Additional actions were taken in support of the "First Day Of Regional Fair Play On Technology", held on December 5, 2007, which consisted of joint investigations by the police, the District Attorney's office (Ministerio Publico), the UTE, and software companies conducted, simultaneously, in ten states.

Internet Enforcement: In 2007, BSA conducted a raid against one Internet pirate who operated internationally. This defendant offered franchises supplying pirated software products targeted at specific professions (e.g. architecture, medicine, law). In this action, 213 pirated DVDs were seized, many that were used as masters for these "special packages" of programs. Such packages often included four or five DVDs. This criminal case is still in the investigation phase in the prosecutor's office.

Few prosecutions and non-deterrent sentences: The recording industry reports that prosecutors are offering a good level of cooperation, but corruption concerns remain with the prosecutors and prosecutor assistants in Ciudad del Este. There are still nine specialized IPR prosecutors (each unit usually consisting of one prosecutor and two assistants) in Paraguay, four in Asunción and five in Ciudad del Este (where they are also in charge of tax evasion cases.) The prosecutors now have the ability to pursue copyright infringement cases as "public" actions (thanks to Law No. 1.444, which entered into effect in July 1999).

The recording industry reports that in 2006, Paraguayan courts issued 14 criminal judgments against pirates of sound recordings, but none resulted in effective incarceration. The recording industry is pleased to note that, in a landmark sanction against Happy Cruiser S.A., a blank optical disc plant in Paraguay was fined just over US\$1 million for unpaid taxes and fines. The sentence was a result of a year-long investigation conducted by the Specialized Intelligence Unit of Paraguay Customs Service, which aside from imposing the payment of back taxes and fines, has also remitted the case to the Paraguayan Tax authorities for further investigation.

Delays in criminal cases and fears of leaks: The recording industry notes that the Paraguayan courts do not resolve copyright cases in an expeditious manner. For example, the Santa Ana case has been lingering in the judicial system for over two years and has received fourteen postponements to date. Another example involves the indictment of a Chinese individual and his company, Neptune Technologies, for smuggling blank media into Paraguay. The individual was indicted for tax evasion, fraud and contraband but the case is still pending due to questionable postponements. A new development in 2007 is the case of a high profile Lebanese national. Six separate cases have been initiated against this individual over the past 18 months by the UTE. The last case brought in December 2007 involved the seizure of 1,200 burners. This gentleman is believed to be the prominent distributor of pirate music and film in the Paseo San Blas.

Industry also reports that there is a lack of cooperation among judges in Ciudad del Este. Orders to conduct raids have taken an inordinate time, during which key information about the target has been leaked, making searches and confiscations very difficult. For example, BSA reports that in one software case brought in Ciudad del Este in October 2007, a judge took eight hours to authorize a raid. By the time the authorities arrived at the target, it was too late; all the merchandise was gone.

The Paraguayan Government needs to understand that cases like this are tests for its judicial system. Raids, numerous though they may be, remain an inadequate deterrent absent follow-up investigations, the initiation of criminal prosecutions against pirates, and ultimately, the imposition of penalties as appropriate upon those found guilty of piracy. Judges and prosecutors would all benefit from further appropriate training intellectual property matters.

Delays and low damages in civil cases: BSA reports that in 2007, it carried out four civil *ex parte* actions in Asuncion City. Three cases involved judges and experts, and settlements were reached in which the defendants paid damages; the fourth case is still underway.

A continuing problem that BSA faces with civil enforcement is the sometimes unreasonable delay of some courts in granting *ex parte* search orders. In many cases, it can take a minimum of 45 days to obtain a civil warrant search. It takes an average of three years to reach a decision from a district court and an additional year if the case is appealed. Because the search warrants take so long to be issued, there is a danger of leaks. BSA has met with the President of the Supreme Court to suggest that new courts with exclusive jurisdiction for intellectual property infringements be created (like those courts that exist for Drug Corruption and Terrorism). The creation of such a court would be beneficial for the entire industry and specialized IPR training for these judges could be offered.

BSA also notes that some courts are issuing extremely low damages in infringement actions. One case from 2006 is currently on appeal for failure to follow specified due process procedures (which include notifying the victim and the complainants). In this particular case, a criminal fine of US\$750 (3,500,000 guaranies) in a case involving software seized with a value – if it had been a legitimate product – of almost US\$1 million.

COPYRIGHT LAW AND CRIMINAL CODE ISSUES IN PARAGUAY

Criminal code problems: There are two principal problems with Paraguay's Criminal Code. First, Article 184 identifies cases involving acts infringing authors' rights (copyright). But it does not contain any provisions regarding the infringement of neighboring rights, the rights which protect producers of sound recordings. The criminal code therefore does not protect against acts of piracy involving sound recordings. This law in fact abrogated the penalties provided under an 1985 law (Law No. 1.174), which established relatively strong criminal prohibitions for piracy of sound recordings, and also clearly provided that the state could proceed *ex officio* against infringers. The recording industry continues to bring cases based on the copyright law, but bases the enforcement remedies on the criminal law as well as other violations (such as contraband, tax evasion, etc.), not copyright *per se*. Second, the current criminal code provides a penalty of up to three years or a fine. Unfortunately, this allows judges to impose either a fine or a prison sentence. This kind of choice will likely limit the deterrent effect of the law because convicted defendants could buy out, or convert, their jail time into fines. The current penalty of six months to three years for IPR violations prevents any effective deterrent sentences. In fact, one criminal code provision (article 321) does obligate judges to issue fines instead of incarceration for cases involving penalties of less than 6 months.

Criminal code reform: IIPA and its members have been working for years to try to fill the troubling gaps in the criminal code, strengthen enforcement remedies, increase penalties for copyright infringement, elevate copyright infringement to the level of major crimes. At various times, legislative proposals have been made to amend the copyright law, amend the criminal code, or amend both.

The most recent solution is based on a comprehensive criminal code effort ongoing in the Paraguayan Congress. Included in this large legislative package are specific provisions to amend the troubling Article 184, including: establishing *ex officio* actions in all piracy cases (including sound recordings); sanctioning the

circumvention of technological protection measures; setting higher penalties for organized crime cases; and increasing the upper limit of sanctions for piracy. Unfortunately, this bill does not include a minimum penalty for piracy that will allow judges to suspend or opt for fines. The amendment of article 184 of Penal Code was approved at the House and sent to the Senate. Support from the Executive Branch is needed to get the package to pass without further weakening of Article 184. Unfortunately, Article 184 amendments are part of a larger legislative consideration of the entire criminal code and its progress has been very slow.

Copyright Law of 1998 and reform: Almost a decade has passed since Paraguay adopted a new copyright law in 1998 (Law No. 1.328/98). Paraguay has deposited its instruments of ratification to both the WIPO Treaties—the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty. In order to achieve the kind of comprehensive implementation desired by the copyright industries, further refinements to Paraguayan laws are necessary. For the time being, however, reform of the criminal code (above) is paramount.

The recording industry has also presented a project to extend the term of protection for works and phonograms from 50 to 70 years. Unfortunately the bill had been pending in the lower house for a long time, and has now fallen off the docket because the bill met with government opposition. Passage of this bill should be supported because it would provide authors, performers and producers with much needed protection.

Possible regulations on mandatory collective management: The Paraguayan Congress had considered a bill that would have replaced the current voluntary establishment of collecting societies with a mandatory government collective. Opposed by the recording industry, this bill was rejected. Recent reports indicate that the Copyright Office is planning to pursue this issue, and as a result, has drafted a regulation/decreed that it hopes will be promulgated by the Minister of Industry and Commerce. Among its many problems, four significant issues include:

- The creation of a centralized bureau to make all collections on behalf of authors, publishers, performers and producers. The Decree would propose that all rates will be fixed by the Government, not the rightsholders.
- The establishment of caps to all rates, so right holders would not be able to negotiate their own rights and to pursue future increases.
- The creation of a scheme of automatic discounts to all rates (up to 70% of the effective rate) when the broadcasters and other users of music advance some payments to the official body.
- The establishment of a mandatory distribution rule of 70% for copyright owners and 30% for neighboring rights owners on all collections.

Industry recommends that any regulatory decree on this matter, especially one which might follow the objectionable provisions in the earlier bill, not move forward.

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2008 SPECIAL 301 REPORT

SPECIAL MENTION

BULGARIA

IIPA includes Bulgaria in its Special 301 filing again this year due to continuing concerns regarding high levels of piracy, lack of leadership and coordination by certain Bulgarian government officials, and the need to improve enforcement of existing laws.

PIRACY

During 2007, Internet piracy in Bulgaria reached alarming proportions, no longer a distant second to the longstanding problem of physical (hard goods) piracy. The 2006 trend in Internet piracy of migrating from offering access to illegal content in the free-hosting area towards peer-to-peer (P2P) file sharing continued in 2007. The Cyber Crime Unit of the GDCOC in early 2007 tried to address this P2P threat and issued protocols of warning and instructions to several portals to take down their pirate torrent tracking sections. Two such sites, www.zamunda.bg and www.arenabg.com, did not comply with the police instructions and were raided in March 2007. Criminal proceedings were initiated against the owners of these sites, but neither case has reached the court yet. These enforcement actions triggered a media debate which revealed that some political officials openly challenged both the government's and the creative industries' effort to fight widespread Internet piracy. There is currently little dialogue between the industry and the Internet Service Providers (ISPs) in Bulgaria, despite attempts to establish cooperation made within Council on IP Protection at the Minister of Culture in 2006 and in 2007.

Copyrighted material can still be downloaded from certain accounts hosted on servers managed or controlled by some of the local ISPs, whereas "warez" sites have significantly diminished and the few such sites that have been encountered prove to be hosted on servers located abroad. For the business software sector, end user piracy, particularly in the small and medium enterprises, is still the major threat for the software industry in Bulgaria. In addition to Internet and mobile piracy, the massive burning of copyrighted materials on CD- and DVD-Rs remains a key element of a landscape still dominated by piracy. Indeed, these illegal discs are still easily available, especially in the summer and winter resorts in all major cities, and are allegedly linked with the influence of organized crime elements remains notorious.

One of the main reasons for continued high levels of piracy, however, are the prosecutors and the courts, who in practice consistently fail to treat copyright infringements as serious crimes. Unjustified delays permeate the process, and the whole system lacks transparency. Only recently have senior Bulgarian prosecutors shown a welcomed willingness to improve this situation, but much more needs to be done. During 2006 the interagency council on IPR met regularly and provided a platform for the private sector and the authorities to work together and achieve progress in addressing Bulgaria's various anti-piracy enforcement issues. Alarmingly, this process was interrupted in mid-2007 when a new Deputy Minister of Culture was appointed. Communication with the new Deputy-Minister is formalized and his assessment of the private sector's suggestions and proposals is non-transparent, inconsistent and unpredictable. The industries are concerned about the willingness of officials at the Ministry of Culture to promote effective copyright protection and enforcement.

ENFORCEMENT

Take more actions against Internet piracy. This includes taking actions involving ISPs (Internet Service Providers) and LANs (local area networks) facilitating illegal traffic in copyright materials in the online environment. Increased resources for the Economic Police Section and the Cyber-Crime Unit are needed. The recording and business software industries enjoy constructive and productive relationship with the Cyber Crime Unit of the GDCOC in 2007. The Ministry of Interior and the head of the Cyber Crime Unit in particular, are fully dedicated to

their tasks and excellent partners in the fight against copyright crime, including Internet piracy; the commitment and positive support from the chief of the Cyber Crime Unit deserves special mention. In 2007, for example, the Cyber Crime Unit and the recording industry (led locally by BAMP) organized 13 raids that interrupted the free sharing of 42 terabytes of illegal content that included music, films and software. 50 computer systems and FTP servers were seized and 13 criminal investigations were commenced.

Increase *ex officio* enforcement actions against retail piracy: Such actions should be initiated in the more flagrant markets and street fairs, especially in the Black Sea and other tourist resorts. Unfortunately the ban of street sales of ODs containing copyrighted material is not enforced as the Sofia Mayor's order that provided such a ban was challenged and the court ruled against it.

Improve enforcement the Optical Disc Law: It remains important that manufacturing of discs infringing copyright/neighbouring rights automatically leads to a revocation of the license. Regular plant inspections should be increased and rightholders' experts should be allowed to participate in inspections. Unfortunately, 2007 amendments to the Optical Disc law did not substantially strengthen its enforcement measures (see legal reform discussion, below).

Improve prosecutions and strengthen the judiciary: This element highlights the need to improve training for prosecutors, investigative magistrates and judges on copyright and to give priority to IPR infringement cases. As for criminal copyright piracy cases, prosecutors are now more responsive but there still is a lack of expert knowledge of IPR and continued inefficiency at the investigation level. Thanks to the copyright industries' initiative, a small booklet with best practices for prosecutors named "Protection of Intellectual Property under the Criminal Code" was produced, serving as a guideline to prosecutors' offices throughout Bulgaria. This booklet has been financed as part of the project "Intellectual Property Protection" of the Democratic Commission at the U.S. Embassy in Bulgaria and was prepared with participation of the Bulgarian Association of Music Producers (BAMP) and the U.S. Department of Justice.

The Business Software Alliance (BSA) reports that due to the recognized weakness of the Bulgarian judiciary it is very often the case in its software actions that either the supervising prosecutor or the judge on duty (entitled to approve the search and seizure protocols) impede or prevent raids against alleged offenders. In some instances, when the right holder's lead is reported to the supervising prosecutor, the latter refuses--without any reason whatsoever -- to allow the police to conduct the raid and respectively initiate criminal proceedings, and in others this motion is groundlessly delayed. When finally such permission is given, it turns out that due to leak of information material evidence on the offence has been lost or destroyed. It is also the case that judges on duty refuse to approve the police protocols of search and seizure although such actions have been conducted in compliance with the procedural law and duly reported. As a result, the willingness of the police enforcement agencies to take action against software piracy is very often challenged and impeded by the motions on behalf of the judiciary that are wrongful or not justified and as a result such cases are altogether dropped.

The situation concerning Bulgarian judges is difficult to analyze, as the majority of cases have not reached court stage. The random distribution of cases, although considered a major anti-corruption measure, now presents another difficulty to the specialization of judges in IPR. Local copyright sectors served as the driving force for setting up of a working group with experts from the Supreme Cassation Prosecutor's Office for developing unified procedural practices for prosecutors in the investigation and prosecution of IPR related crimes. As mentioned above, the methodology was completed and published in October 2007 and due to this it is still early to evaluate its actual contribution to improving the work of the prosecutors on IPR cases.

Continue to improve border enforcement to halt the importation and exportation of piratical products. Since Bulgaria joined the EU on January 1, 2007, EC Regulation 1383/2003 concerning customs actions against goods suspected of infringing certain intellectual property rights and the measures to be taken against goods found to have infringed such rights is directly implemented in Bulgaria. Nevertheless, the Regulation itself envisions that the simplified procedure for destruction of infringing goods can only be enforced if provided for by local law. Such laws have not yet been adopted and this hampers rightholders from achieving expeditious results.

Take administrative action against all users of recorded music that fail to pay royalties. The sound recording industry reports that piracy is damaging the collective rights management infrastructure: (1) Broadcasting of music: Despite the fact that the law provides labels and performers with broadcasting rights, cable operators and a large number of radio broadcasters still fail to pay for the use of music. The relevant government agencies have failed to exercise appropriate oversight and to intervene. That needs to change. (2) Public performance of music: For the first time, in October-November 2007 the Ministry of Culture and the police, together with representatives of the collecting societies and BAMP, initiated a series of inspections to check businesses regarding public performance of music. However, most public places still fail to respect the Copyright law and do not pay for public performance of recorded music, causing continued large losses for the music sector. Sustained enforcement actions are, therefore, required to stimulate awareness among public performance users (3) Private copying levies: While IIPA Members do not generally believe that private copying levies are the best way of addressing private, non-commercial copying (and it is critical that such levies address no more than such forms of copying), some countries have chosen to implement such levies. Where the law provides for a levy and it thus forms part of the legal and regulatory environment, it is important that the levies are collected and fairly distributed. In Bulgaria, legal and practical obstacles prevent the private copying levy system from functioning properly and deprive right holders of legitimate compensation. In fact, there is currently no collection or distribution of any levies due to legal inefficiency and resistance of manufacturers and importers against paying levies despite a legal obligation to do so. The Copyright law does require producers and importers of blank media to provide information to the relevant collecting societies on the number of blank media produced and/or imported by the respective manufactures/importers but there are no sanctions for such non-compliance, which renders the law totally ineffective. Customs does not provide any assistance in this, and, to date the Ministry of Culture also refuses to assist in this process even though this is officially within its competence.

LAW REFORM

The Optical Discs Act: The law regarding the manufacture and trade in optical discs, which the industries worked hard to pass and implement, still contains deficiencies. Efforts to strengthen the law were undertaken last year, and on October 19, 2007, amendments to the OD law entered into effect. Unfortunately, the new amendments failed in their main purpose to ban street sales of optical disc media with copyrighted material. Surprisingly, the newly appointed Deputy Minister of Culture opposed the creative industries' proposal during the sessions of the Parliamentary Committee on Economic Matters and the provision was dropped. Another loophole in these most recent amendments is that they do not provide for increased powers of the state control bodies in conducting surprise inspections and seizing documents, samples, raw materials, manufacturing equipment, or matrices. Such powers are essential for the purpose of establishing evidence related to alleged infringements. The law still does not allow right holders and their organizations and representatives to participate in the inspections. In general, the amendments could be described as superficial without bringing about any real improvement in enforcement. The recording industry continues to believe that amendments to the Optical Disc Law are necessary to enable regular plant visits by rights holder representatives, thus ensuring enhanced transparency in the OD manufacturing process. For the moment, the lack of a legal basis for participation of private sector experts prevents recording industry representatives from visiting any plants that do not wish to cooperate voluntarily and, as a result, puts into question the transparency of the optical discs production process.¹

The industries continue to insist on a codified ban of street sales, which would ensure the necessary legal ground for local authorities to intervene. Otherwise any local attempt to ban the street sales will be subject to administrative action and will likely fail to be implemented in practice.

Draft amendments to the Bulgarian Copyright Act: A major legislative concern for the recording industry in 2007 is related to a draft bill to amend Article 40 of the Bulgarian Copyright Act, which deals with collective rights management. The initiative for this draft was taken without any consultation with the right holders

¹ Representatives of the recording industry visited and collected information on six out of the nine functioning optical plants in Bulgaria [TOT 2002 Ltd., East European Authoring and Encoding Center, Silver First Ltd., Starsound Ltd., Media Sys Ltd., CHSL Ltd.] and took samples of their products. Optical Storage Plc. terminated its activity and sold out its two lines to Silver First Ltd. – Plovdiv. Media Plant is temporarily closed due to legal issues. Two plants refused to grant access to the private sector – “Crystal Tone 2” and “Euro Silver Group” (note: these are owned by the same person).

concerned. The procedure of its preparation has from the outset been secretive and non-transparent. The draft appears to impose very strict controls on the collecting societies, in favor of various media organizations and their users. The Draft, if adopted without changes, would introduce far-reaching and unwarranted state control over the collecting societies. Considering the less than exemplary state of IPR protection in Bulgaria, any copyright amendment that openly favors users to the detriment of right holders, would seriously endanger and jeopardize an already very fragile collective management capacity. If adopted in the version proposed by the broadcasters, the Bill would send collective management in Bulgaria back to square one. Together with the collecting societies, BAMP managed to be admitted to participate in the legislative process and is now trying to block, or at least reduce, any possible harm that the Draft may cause to the collective management system in Bulgaria.

Hotel Tourism Act: Since the beginning of 2007, the industries and the collecting societies insist on amendments to the Tourism Act that would guarantee better enforcement related to the public performance, in particular in Hotels. In 2008, these amendments will stay as a priority on this industry's legislative agenda.

Customs: As mentioned above, the adequate implementation of Regulation 1383/2003/EEC would enhance customs control on illegal copyright-related traffic. This is aimed at obtaining a speedy and practical enforcement that would enable Bulgarian customs to implement the summary procedure for destruction of confiscated illegal goods within 10 days after the seizure (as required per Article 11 of the Regulation). Customs authorities have declared their willingness to cooperate and to prepare the needed piece of domestic legislation in 2008.

EU Enforcement Directive: In early 2006, Bulgaria implemented the EU Enforcement Directive 2004/48/EC into its copyright laws and other laws. In 2007, BSA started a test civil case against a hard disk loader. Unfortunately, due to the lengthy civil proceedings this case has not yet been considered on the merits and it is still early to evaluate the level of implementation and enforcement of these provisions in practice.

The Data Retention Directive implementation: Recently Bulgaria adopted the Act on Electronic Communications ('AEC'). Chapter 15 of this law contains provisions on security of electronic communications and on the relevant protection of user's data. The act transposes the EU Data Retention Directive and stipulates that, because of national security concerns and the detection of crimes, some categories of data have to be retained by the providers of public electronic communications networks and/or services. Further to Article 251(2) of AEC, a joint Ordinance by the Ministry of Interior and the State Agency for Information Technology and Communications has to be adopted and enter into force as of March 15, 2009. A draft is ready and presented for public discussion. The problem in relation to this is that all content-related data are per definition excluded from the scope of application of the Ordinance. At the same time, the lack of relevant information on copyright infringements in the online environment presents a constant obstacle to the investigation of Internet IPR crimes. The lack of relevant material and a procedural legal framework that would involve ISPs in IPR protection, and the deficiency of adequate data collecting that would evidence the committed Internet crime and disclose the copyright violators' identity, present serious problems. These issues need to be urgently addressed and resolved satisfactorily before ultimate adoption.

The Radio and TV Act: The last amendment of the Radio and TV Act (in late 2005) provided for obligatory contracts with the collecting societies as part of the license/registration package of any broadcaster to be presented to the Council of Electronic Media (CEM). These provisions were finally implemented in 2007. Now, CEM has to inform the Ministry of Culture on the results of its inspection. Unfortunately, CEM lacks the competence to monitor the implementation of the relevant copyright obligations by the broadcasters, let alone the right to impose sanctions in cases of infringement. A new Draft to supplement the Radio and TV Act is under preparation in order to establish legislative harmony with the Act on Electronic Communications. Additional amendments that would involve CEM in copyright enforcement monitoring and to provide for better IPR protection in the broadcasting environment should be adopted in order to make this piece of legislation truly effective.

Criminal Code (2006): One of the main legislative achievements in 2006 was the amendment to the Criminal Code criminalizing the storage (holding in possession) of "tangible materials containing copyrighted material. The creative industries' hope and expectation that this amendment would bring a chain of enforcement actions against wholesalers of pirate ODs ending in court unfortunately were not realized. Sadly, another year has passed and the local industries report that, to the best of their knowledge, not a single verdict has been issued in any copyright case.

COORDINATION / GOVERNMENT LEADERSHIP / PUBLIC AWARENESS

The Council: It is particularly important to continue coordination between private sector and law enforcement authorities through the Council on IP Protection at the Ministry of Culture, created in January 2006. The Council is a major partner in the area of enforcement, being the most important interagency coordination body and a facilitator for dialogue with the private sector. The Council on IP Protection reopened its sessions in October 2007 headed by the new Deputy Minister. The latter declared his willingness to further develop the IPR-related interagency cooperation and identified IPR protection as a priority. In November 2007, the Council reviewed the 2007 enforcement data and set out the parameters of an Action Plan for the first half of 2008. BAMP made proposals for legislative amendments that would encourage effective border control, stimulate ISP cooperation against illegal content sharing, and guarantee better copyright protection in both the audiovisual sector and in the public performance environment. Due to the short period of activity of the Council under its new leadership, it is premature to assess its effectiveness. However, there are some disturbing symptoms that betray a negative approach of the administration to the music sector and a lack of willingness to communicate with the industries. The collective management societies suffer from the same deficit of trust and support. This situation should be closely monitored.

Industry cooperation: To provide formal assistance to the Ministry of Interior's (Moi) enforcement agencies, at the end of 2004 BSA and IFPI signed a Memorandum of Understanding and Cooperation with the Moi. This Memorandum was followed by implementing a joint strategy to fight Internet piracy. In 2007, two addendums to the Memorandum, one with the National Police Directorate (Economic Police) on the PDC program, and the other with the GDCOC, provided for the donation of technical equipment and assistance in the investigation of software and cyber crimes, among other issues. It is still early to evaluate the impact of these memoranda.

Public Awareness: It is important for the Bulgarian government to support country-wide pro-copyright education and anti-piracy awareness campaigns. In 2007, the Public Awareness Campaign of the Ministry of Culture terminated in March with presentations in cinemas, Internet banners and a photo exhibition "Gallery of Portraits in Favor of Intellectual Property." The Bulgarian government allocated a sum of 30,000 BGN to assure a follow-up of the campaign focusing on media communication. However, the 2007 follow-up seems delayed; only 1/3 of the amount was used. It is essential that the awareness campaign is continued.

Economic Studies: According to a study on the economic contribution of the copyright industries in Bulgaria released by the Ministry of Culture and the World Intellectual Property Organization (WIPO) in May 2007, the Bulgarian copyright industries have a major contribution to the national economy. The study stated that the creative industries' contribution to the total growth of economy in 2005 was as follows: 4.52% of the gross output, 2.84% of the GDP, 3.43% of the gross value added, and 4.31% of national employment. A rapid increase in the number of people employed in the copyright-based industries occurred during 2003-2005. In fact, Bulgarian employment in the copyright industries was comparable to that in Canada. For the same two-year period, the relevant value added growth rate in Bulgaria was 38%. The study reflects the positive trend of the copyright-based sector development and grants serious arguments to claim sustainable support and relevant policy making solutions from the state authorities that would protect IPR and give impetus to the creative sector.

Training: The recording industry (represented locally through BAMP) and the BSA regularly conduct training for the law enforcement agencies and the judiciary, and participate in conferences and seminars organized by local or international governmental or non-governmental organizations.

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2008 SPECIAL 301 REPORT

SPECIAL MENTION

GERMANY

Special 301 Recommendation: IIPA urges USTR to give special attention to Germany in 2008 and heighten its bilateral engagement to ensure that it adopts amendments to its law which provide for effective enforcement, particularly in the Internet environment.

EXECUTIVE SUMMARY

Internet and physical piracy have become grave problems in Germany over the last few years. The German recording and film industries, for example, are being undermined by widespread copying and burning of CDs/DVDs (486 million burned CD-equivalents, compared to 150 million sold CDs) as well as illegal downloading of their copyrighted content.

Germany's ability to combat such piracy depends on its having an effective legal infrastructure, both with respect to substantive standards of protection and with respect to enforcement. Germany has been engaged in the process of implementing the EU's 2004 Enforcement Directive which contains critical tools for fighting Internet as well as physical piracy. Unfortunately, Germany is about to approve amendments to its law which not only do not fully implement this Directive but would make it extraordinarily difficult for right holders and the government to fight, in particular, growing Internet piracy.

IIPA urges USTR to engage with the German government to ensure that the German Federal Parliament's Legal Committee and the German Federal Parliament as a whole revisit certain key elements of the legislation to improve it significantly. Such improvements would include: (a) introducing the right to obtain from third party ISPs IP addresses of infringers in the context of civil cases; (b) removing the double commercial scale requirement in the existing proposal for implementation of the Enforcement Directive, which would prevent this "right of information" from applying to infringers that are not acting on a commercial scale; and (c) specifically implementing the right to injunctive relief required by Article 8(3) of the EU Copyright Directive and Article 11 of the Enforcement Directive. Without these critical remedies against Internet (including P2P) piracy, the major and growing Internet piracy problem in Germany is likely to escalate and further undermine the copyright industries.

ENFORCEMENT ISSUES IN GERMANY

The Growth of Internet Piracy: An estimated 374 million music titles were illegally downloaded in Germany from file-sharing systems in 2006. In contrast, only 27 million tracks were sold through legal online platforms. The damage to record companies was estimated at 440 million euros (US\$ 642 million) from Internet piracy alone. The film industry is also affected by massive illegal downloading and streaming of films. According to the findings of the Brenner Study commissioned by the Filmförderungsanstalt (Film Development Agency) and conducted from January to June 2005, 11.9 million German-language or German-dubbed films were illegally downloaded. In 2006, the film industry was able to measure up to 2 million downloads of pirate copies of these films off the Internet within just 30 days of their availability. For other film titles, the download figures are higher than the number of those going to the cinema during the same period. This early availability of films off the Internet poses a threat to the industry's necessary tiered exploitation (cinema, DVD/video/online, Pay TV, etc.) required for the financing of films. Other industries are impacted as well—book and journal publishers, for instance, are finding that the number of infringing ebook

and audiobook files on P2P networks in Germany is increasing every year. It is imperative that right holders and the German government have the right tools available to them.

The Right to Obtain IP Addresses and the Identity of Infringers from ISPs: Under the EU Enforcement Directive, right holders are entitled to obtain the IP addresses and the identity of infringers under its “right of information” provision (Article 8(1)). Germany has not yet implemented that Directive. Furthermore, under Germany’s recent adoption of the law implementing the Data Retention Directive, it no longer appears possible to obtain from ISPs in civil cases, even under court order, the identity of P2P filesharers hiding behind dynamic IP addresses provided by ISPs. Without such a right, copyright owners are left only with a criminal remedy where such information can be obtained upon court order. In practice, however, many law enforcement officials authorities in Germany refuse to prosecute online copyright infringements on grounds of proportionality despite the cumulative damage. Relegating right holders only to a criminal remedy, already rarely used in Germany against illegal filesharing, effectively deprives right holders of any remedy at all.

Commercial Scale Requirement: Even if the law implementing the Data Retention Directive allowed for the communication of IP addresses and the identity of infringers for civil enforcement purposes, the legislation pending to implement the Enforcement Directive’s “right of information” would still be problematic. Section 101(1) and (2) of the Government proposal imposes a double commercial scale condition, both with regards to the act of the intermediary and the infringement. According to the Enforcement Directive, (cf. Recital 14), the “commercial scale” condition relates to acts carried out by the intermediary, not by the infringer. As a result, Section 101 of the Government proposal would impede the establishment of the identity of the infringer by making it impossible to say whether the user is acting on a commercial scale unless information can first be obtained from the ISP. Moreover, many users engaged in activities that are gravely harmful to right holders (e.g., release groups, massive uploaders, etc.), do not act on a “commercial scale.”

The combination of these two deficiencies effectively means that there will be no right of information in civil Internet copyright cases in Germany. This must be remedied.

Lack of Clarity on the Availability of Injunctive Relief Against ISPs: The draft now being considered by the German Federal Parliament does not contain a provision entitling right holders to apply for injunctive relief against ISPs whose services are used by third parties to infringe a copyright or related right. The Government considers German case law to be adequate to permit such actions. However, this case law requires establishing a violation of a duty of care by the ISP. Accordingly, given the importance of this remedy, it would be highly preferable if Article 8(3) of the European Copyright Directive (2001/29/EC) and Article 11 of the Enforcement Directive were specifically implemented in the law, since these provisions grant injunctive relief irrespective of an ISP’s liability.

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2008 SPECIAL 301

SPECIAL MENTION

HONG KONG

IIPA recommends that USTR actively monitor developments in Hong Kong during 2008 with respect to the issues discussed in this Special Mention report.

LEGISLATIVE ISSUES

Copyright (Amendment) Ordinance

On July 5, 2007, the Copyright (Amendment) Ordinance 2007 was enacted. Although a number of the concerns raised by IIPA about this legislation were successfully addressed in the legislative process, some of its provisions remain problematic, and others remain the subject of ongoing negotiations or proceedings. In particular:

- **Liability of business infringers of books and journals:** The new amendment makes permanent the unwise temporary provisions in the Copyright Ordinance that immunize from criminal liability the possession of pirated text materials for use in a trade or business. The new criminal offense for businesses that engage in “regular and frequent” infringing acts of copying or distribution of books or academic journals has not yet come into force, and its usefulness is completely uncertain until subsidiary legislation to define the scope of a “safe harbor” from liability has been completed. Earlier drafts of the safe harbor proposal would have sheltered a great deal of commercial scale infringement. We understand that a final version of the safe harbor proposal is expected to be submitted to the Legislative Council in February, and we encourage the Commerce and Economic Development Bureau (CEDB) to continue working with rights holders to find safe harbor terms that will not undermine the effectiveness of the criminal provision. In any case, the new offense remains flawed since it provides a defense that exempts otherwise criminal infringement if a court later finds the publisher’s licensing terms to be “commercially unreasonable.”
- **Technological protection measures (TPMs):** While many of the serious problems in the original amendment bill were corrected before enactment, there is still doubt that the legislation fully protects all access controls used in connection with the exercise of copyright in a work, and also about the scope of some of the exceptions recognized in the statute to the prohibitions on circumvention of TPMs. Additionally, IIPA remains concerned about Section 273H, the “further exceptions by notice” provision, which on its face gives the Secretary for Commerce and Economic Development broad power to recognize additional and permanent exceptions, including to the prohibition on trafficking in circumvention products and services. IIPA was pleased to see that, in the first exercise of Section 273H power, the Secretary took a more focused approach and proposed to confine additional exceptions to the prohibition on the act of circumvention itself. We urge USTR to monitor closely the pending Section 273H proceedings, to ensure that the Secretary carries through on his stated plan to recognize only exceptions that are “narrow in scope and focused on the problems identified,” and that the precise text of all exceptions that he proposes to recognize are made available for public comment. It is also important that any exceptions recognized be time limited to three or four years, to take into account the rapid pace of change both in technology and in market practices.

- **Copyright exceptions:** The amendment includes broad new exceptions for “fair dealing” in copyright materials for the purposes of education or public administration. “Fair dealing” would excuse some unauthorized uses by schools even of works that are targeted to the educational marketplace (e.g., textbooks), and even if the use falls within a licensing scheme that is readily available. The key concept underpinning the new public administration exception – that it is intended to be used only for “urgent business” of governmental bodies – remains undefined. Implementation of these provisions must be carefully watched to ensure that these exceptions are confined within bounds that meet international standards that apply to Hong Kong, notably the “three-step test” of the TRIPS Agreement, Art. 13.
- **Parallel imports:** The amendment shortened from 18 to 15 months the period after public release during which unauthorized parallel imports would attract criminal liability. However, as enacted the Ordinance also includes provisions on presumptions and affidavit evidence that should facilitate criminal enforcement against parallel imports. Because the Hong Kong administration has declared its intention to ultimately “fully liberalize the use of parallel imports of copyright works” (i.e., to eliminate the copyright owner’s control over importation), continued vigilance is called for. Any further changes should require a persuasive justification of the need to weaken the importation right, or to shorten the period in which legitimate rights holders may enjoy that exclusive right in Hong Kong.¹

“Digital Environment” Consultation

In December 2006, the Commerce, Industry and Technology Bureau (CITB)² issued its long-awaited consultation paper on “Copyright Protection in the Digital Environment.” The paper asked questions and proposed options on a wide range of topics, including (1) liability for unauthorized uploading and downloading of copyright works; (2) whether an all-embracing exclusive right of communicating copyright works to the public ought to be introduced into Hong Kong law; (3) the role of online service providers in combating Internet piracy; (4) procedures to facilitate the identification of online infringers so that right holders may pursue them; (5) whether statutory damages for infringement should be provided; and (6) whether to expand Hong Kong’s existing statutory exception for certain temporary copies of works. Some 600 responses were received by the April 2007 deadline.

IIPA has been advised that CEDB will submit a preliminary legislative proposal in March 2008. Reportedly, this will propose adding to the Copyright Ordinance a broad exclusive right to communicate copyright works to the public. While this would be welcomed, other tentative conclusions reportedly reached by CEDB are more problematic. For instance, although additional legal tools are needed to ensure that online piracy can be effectively deterred, we understand that CEDB is inclined not to recommend any changes in liability for uploading and downloading. Similarly, CEDB reportedly does not plan to propose any new, more efficient means for rights owners to learn the identity of Internet service provider (ISP) subscribers who are using their access to commit infringements; nor do they support the institution of a pre-set statutory damages regime to provide greater deterrence and to facilitate settlement of copyright claims. Finally, CEDB reportedly will not seek to clarify the scope of secondary liability as to ISPs, and may not propose any changes that increase the incentives for ISPs to cooperate in anti-piracy

¹ The HKSAR’s current position represents a complete about-face from three years ago, when CITB stated definitively “on balance, we propose to retain all the existing restrictions on parallel imports of copyright works.” See CITB Preliminary Proposals on Various Copyright-Related Issues offered to the Legislative Council’s Panel on Commerce and Industry for deliberation on June 21, 2005. The subsequent reversal in the government’s position was unexpected and difficult to justify.

² During 2007, the name of this HKSAR agency was changed to the Commerce and Economic Development Bureau (CEDB).

activities with right holders, both with respect to pirate content residing on servers (e.g., stored on websites) as well as in the P2P environment.

While it is commendable that Hong Kong's government is looking at these crucial issues for the future of copyright protection, it would be regrettable if this opportunity to enact a world-class law on these topics in Hong Kong were squandered in favor of piecemeal tinkering with the Copyright Ordinance. IIPA urges USTR to monitor developments on the digital environment initiative closely.

Other Legislative Issues

Failure to Criminalize Pay TV Theft: Local television industry representatives have complained about the lack of sufficient criminal penalties under the Copyright and Broadcast Ordinances against pay television signal piracy. Present remedies provide no criminal liability against so-called overspill signals accessed through unauthorized decoders. Although trafficking in such decoders is subject to criminal penalties, a criminal prohibition is needed against the possession and use of such devices in homes or businesses.

Copyright Term Extension: Hong Kong should bring its Copyright Ordinance into line with the growing regional and global trend by enacting a 20-year extension of the term of copyright protection.

PIRACY AND ENFORCEMENT ISSUES

Internet Piracy: Internet piracy in Hong Kong causes increasing harm to rights holders, primarily due to the explosion in use of the Internet for illegal peer-to-peer (P2P) file sharing on services located both in Hong Kong and abroad. Increased availability of broadband service in Hong Kong is fueling this trend. Pirate audio-visual material can be found via more than 100 online fora or newsgroups operating in Hong Kong.

On May 18, 2007 the Hong Kong Court of Final Appeal upheld the conviction of Chan Nai-ming on criminal copyright charges for the attempted distribution of illegal copies of three Motion Picture Association (MPA) member company titles via BitTorrent, a P2P network forum. Chan, who had been free on bail awaiting his appeal to Hong Kong's highest court, was taken into custody after the court's ruling to begin serving three months in prison. The case was the world's first in which criminal charges were filed against a user of BitTorrent technology.

In addition, the Internet is being used as a mechanism to promote hard goods piracy. For example, book and journal publishers report an increase in 2007 of online promotion and sales of academic materials by photocopy shops.

Optical Disc Piracy: There are currently 81 licensed optical disc production plants with 684 production lines in the Hong Kong Special Administrative Region (HKSAR), with an annual production capacity of nearly 2.4 billion units. Seizures of pirate optical media products continued at a very high rate in 2007 (some 5 million DVDs and VCDs, and nearly 1.3 million DVD-Rs and CD-Rs, had been seized by the end of November). The majority of these were smuggled in from the PRC, mostly from Shenzhen, rather than produced within the HKSAR. Some pirate product originating on the mainland is transshipped through Hong Kong to other destinations. High profile enforcement efforts against optical disc piracy continue. For instance, in "Operation Octopus" in mid-October, over 100 law enforcement officers carried out raids throughout the territory, seizing more than 64,000 discs of U.S., Hong Kong, and Japanese movie titles. Another operation seized a lab with 97 DVD-R burners operating at full capacity.

Entertainment Software: As reported in past years, entertainment software publishers continue to face burdensome evidentiary requirements for prosecuting copyright offenses, which cause an expenditure of excessive resources in order to bring a copyright infringement case. Under Hong Kong procedure, the copyright holder must provide Section 121 affirmations for every copyright infringement prosecution, which includes providing evidence of copyright ownership as well as attaching true copies of the video game titles that are the subject of the case. Some judges now require that true copies of each

of the video games allegedly infringed be appended to the affirmation to be served on each defendant in the case, an especially onerous requirement when there are multiple defendants and when older games are involved. The proposal to designate foreign copyright registries (including the U.S. Copyright Office registry) under Section 121 remains pending. Recognizing U.S. copyright registration certificates and allowing their substitution for copies of the genuine article would greatly reduce the burden on copyright owners and expedite compliance with the affirmation requirements. IIPA hopes that the Hong Kong government will soon adopt the measures necessary to recognize foreign copyright registries for this purpose.

Hong Kong remains a major transshipment point for pirated Nintendo video games originating in China and destined for various regions. A joint enforcement action by Hong Kong Customs and Excise (C&E) officials with the Entertainment Software Association (ESA) resulted in the seizure of about 1,800 counterfeit optical discs and other products (such as cartridges and memory cards for Nintendo systems). One of the actions resulted in the arrest of 18 individuals and the matter remains pending before the courts.

Book Piracy: The book publishing industry reports that C&E has continued in its responsiveness to its complaints about illegal photocopying during 2007. Procedural hurdles experienced in previous years seem to have largely been addressed in the past year, and the level of ongoing cooperation is commendable. The industry remains concerned about underground photocopy operations and needs the continued cooperation of C&E in finding and tackling these hard-to-detect targets.

Other Enforcement Observations: IIPA applauds Hong Kong authorities for using innovative legal tools to attack pirate enterprises. The Organized and Serious Crime Ordinance (OSCO), which became applicable to copyright offenses in 2004, has been used since then to mount 6 successful operations against organized pirate optical disc syndicates, leading to 54 arrests, seizure of over half a million pirate discs and nearly 300 DVD burners, and freezing of some HK\$83 million (US\$10.7 million) in assets. The first court order for confiscation of the proceeds of piracy was issued in October 2007 against Lau Ka Pui, who had been convicted of criminal infringement relating to 30,000 pirate computer games on optical disc, and whose HK\$1.2 million (US\$150,000) of proceeds were identified by Hong Kong's Customs and Excise Department. Lau's 16 month jail sentence will be more than doubled if she does not surrender the identified assets.

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2008 SPECIAL 301

SPECIAL MENTION

JAPAN

IIPA accords Special Mention to Japan in this report to call attention to several areas where Japan is lagging in its efforts to keep its Copyright Law up to date with 21st century realities. We urge USTR to escalate its bilateral engagement with Japan in order to encourage positive action in the following areas, among others.

Japan faces a serious and growing problem of online copyright piracy. All forms of copyright materials, such as musical recordings, audio-visual materials, business software, and book and journal publications, are suffering from widespread infringement via peer to peer (p2p) and mobile services. The motion picture industry reports that 80% of pirated DVDs and other optical media products sold by street vendors (some of them involved with Yakuza organized crime groups), or via Internet auction sites, originate from p2p downloading. In spite of the criminal conviction of the developer of the “Winny” p2p file sharing system in 2006, it remains in operation and is the most popular p2p system for music piracy. The motion picture industry reports that p2p piracy of its products has largely migrated to the “Share” network, but that the overall level of online piracy remains undiminished. Recording industry estimates indicate that over 150 million tracks were illegally downloaded in 2006, which is ten times more than the number legitimate music downloads to personal computers. An alarming and more troubling development is the proliferation of unauthorized services for downloading sound recordings to mobile phones, a form of infringement that is enabled by the rollout of third generation mobile phone receivers. Japanese consumers (particularly teenagers) flock to these free unauthorized services, directly threatening the robust growth of the JPY 70 billion (US\$652 million) market in legitimate mobile music services.

While Japanese authorities have been responsive to this growing threat in some cases, systematic changes are needed before Japan can effectively combat online piracy. Among other changes, Japan should consider the following: instituting a more streamlined system for notice and takedown of infringing material from networks and from online auction sites; providing a faster and more reliable method of requiring Internet Service Providers (ISPs) to disclose contact information on subscribers who have been identified as using the networks to carry out infringements; and relaxing the requirement for formal complaints before criminal proceedings can be commenced against those involved in piracy via p2p networks. (Additionally, many of the legislative changes discussed below could have a significant impact on online piracy.)

Along with online piracy, IIPA remains concerned about a number of legislative, regulatory and enforcement-related matters pending in Japan. The U.S. government should continue to engage actively with Japanese officials on the following issues, among others:

- **Statutory damages:** Japan’s own IP strategy plan gave high priority to reform of damages provisions for its intellectual property laws, but key changes are yet to be made. We urge Japan to move more quickly to implement a system of pre-set statutory damages for copyright infringement, at levels sufficient to achieve deterrence. Among other areas, such a change would substantially assist in the fight against willful use of unlicensed software applications in the workplace, which is the single greatest source of piracy losses to the business software industry.
- **Private use exception:** The broad provision of Japanese copyright law on this topic (Article 30(i)) must be narrowed to take into account the ability of home users to download unauthorized digital copies that can be easily re-disseminated, such as over mobile platforms or peer-to-peer (p2p)

networks. As noted above, the reality is that such downloading is feeding retail (including offline) piracy of audio-visual works and other copyright materials. In addition, the status quo threatens to undermine the prohibition on unauthorized uploads (the “making transmittable” right). IIPA is encouraged by reports that legislation is under consideration to make the Article 30 exception inapplicable to copies knowingly made from unauthorized sources. It would be a major step forward if this principle were applied to downloads from illicit mobile and p2p services.

- **Technological protection measures (TPMs):** Current laws (the Copyright Act and the Anti-Unfair Competition Law) do not fully meet Japan’s obligations under the WIPO Internet treaties to provide an adequate and effective legal regime against circumvention of TPMs. For instance, there are no criminal remedies (under the Unfair Competition Law) for trafficking in tools to circumvent access controls, and no civil remedies (under the Copyright Act) for dealing in copy control circumvention devices or software. These deficiencies should be remedied.
- **End-user infringement:** Article 113 of the copyright law should be re-examined to ensure that it covers all knowing unauthorized use of software programs, and possession of infringing copies with intent to violate any exclusive right of copyright owners. A subcommittee advising the Bunkacho (Culture Ministry) has called for some expansion of this provision to cover the situation in which the defendant offers to distribute unauthorized copies online but cannot be proven to have actually possessed the copies. Japan should be encouraged to move forward on this change.
- **Exceptions to protection:** Japan is, once again, considering a new limitation to copyright that would allow widespread unauthorized copying of scientific, technical, and medical publications by pharmaceutical companies for distribution to their customers. No defensible justification has been offered for this limitation, and IIPA applauds the recent decision by the Japanese government to explore its options carefully and postpone any recommendation regarding the proposal. Market mechanisms are already in place for pharmaceutical companies to obtain necessary licenses for this copying and distribution. IIPA hopes that the government will continue to encourage use of these mechanisms to solve the problem. The publishing industry’s market in Japan would be seriously undermined if Japan were to implement the proposed limitation, calling into question the country’s compliance with international standards for exceptions to copyright protection. In addition, IIPA remains concerned about the education exceptions in Article 35 of Japan’s copyright law. Japan should clarify the applicability of Article 35 to textbooks and course packs, and should build in technological safeguards to reduce the risk of infringement in the distance learning environment. In general, Japan should ensure that both current and proposed exceptions do not undermine or discourage licensing arrangements and that they meet international standards.
- **Injunctions against indirect infringers:** In fulfillment of Japan’s obligations under the WIPO Internet Treaties to provide effective remedies against online infringements, injunctive relief should be made available against infringers (such as the providers of illicit mobile or p2p services) even if they do not themselves make “physical use” of infringing articles. This result appears consistent with case law from Japanese courts; if it is advisable to codify this result in statute, Japan should be encouraged to do so without unduly restricting the range of cases in which such relief would be available.
- **Liability of search engines:** IIPA urges caution in approaching this topic, which is also under study within the expert committees advising the Bunkacho. No exception to copyright liability for the benefit of search engines should be considered without strong evidence of need. The parameters of the internationally recognized “3-step test” for restrictions on copyright protection must always be kept in mind. A better topic for study would be how to ensure that copyright law provides the maximum incentives for cooperation between search engine providers and rights owners in dealing with pervasive online copyright piracy.

- **Copyright term extension:** Japan recently increased the term of copyright protection, but only for cinematographic works. It should now follow through and get in step with most other OECD members by extending the term for all copyrighted works, as well as for producers of phonograms and performers, without conditioning the term extension on registration or similar formalities.
- **Compulsory licensing:** In December 2006, Japan eliminated the exclusive rights of sound recording producers over simultaneous retransmission of their recordings over networks via IP multicasting. A compulsory licensing system replaced it for commercial multicasting, but it appears that rights were totally eliminated in the case of non-commercial retransmission via multicasting. The new law represents a significant step backward; a system of exclusive rights should govern these transactions. While effective collective licensing has an important role to play, elimination of exclusive rights will not succeed in promoting new paths for content distribution.
- **Copy protections on digital free-to-air broadcasts:** IIPA is encouraged by indications that Japan's Ministry of Information and Communication will take into account the views of all affected industries in arriving at a new policy in this area, which could have a significant impact on the ability of copyright owners to prevent unauthorized re-distribution of their works contained in such broadcasts.

IIPA is pleased to note that in 2007, Japan adopted legislation to prevent the unauthorized operation of audiovisual recording equipment in theaters while a motion picture is being exhibited. Vigorous enforcement of this law will help close off one important avenue for audio-visual piracy. Japanese authorities should also be commended for their increased use of the Organized Crime Punishment Law to seize the financial proceeds of organized groups engaged in enterprises based on piracy, including online auction sellers and street vendors.

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2008 SPECIAL 301 REPORT

SPECIAL MENTION

JORDAN

Special 301 Recommendation: IIPA recommends that USTR actively monitor developments in Jordan during 2008 with respect to the issues discussed in this Special Mention report.

EXECUTIVE SUMMARY

U.S. copyright owners want to be able to conduct legitimate copyright business in Jordan, but very high piracy levels make this difficult. As a result of high piracy rates and no enforcement against street piracy, the legitimate recording industry is barely able to survive. The piracy problem is viewed by the industries as all the more serious considering the fact that Jordan has an FTA with the United States, and is unjustly complacent about its track record in the field of IP protection.

IIPA believes that there is a necessity to establish a comprehensive, ongoing, anti-piracy campaign if real progress is to be made in reducing piracy levels. IIPA recommends that the Jordanian government take some concrete steps to improve the situation. Based on the experience of IIPA members fighting piracy around the world, we recommend that, as a beginning, the following steps be taken:

- A cyber crime & IPR unit (comparable to the successful Lebanese model) should be established within the Jordanian police, which would be responsible for anti-piracy actions throughout Jordan.
- A special IPR unit should be established within Jordanian Customs with a particular focus on the Syrian border.
- The governmental body in charge of enforcement (now the National Library) should allocate increased resources, including personnel, to effectively conduct regular inspections and raids, with other bodies monitoring its performance to ensure accountability.
- Cases brought against pirates out of raids should proceed in an efficient manner to final resolution in the courts, with deterrent fines and penalties meted out in appropriate cases.
- Complainants should be able to take raids *ex parte* (without notifying the defendant) more effectively.
- Complainants and/or their representatives should be able to (or should continue to be permitted to) attend (themselves or through their representatives) raids and assist with the identification of all infringing product.
- Enforcement authorities should not make unreasonable documentary demands to prove ownership and the like.
- The Law of Evidence and the Law of Criminal Courts Procedures should be amended, or an exception provided, to allow for infringing copies and tools/implements of piracy to be tagged after raids (at present, each confiscated item is registered during raids, which is onerous and time-consuming).

Finally, IIPA calls upon the government of Jordan to take immediate steps to remedy remaining FTA deficiencies in its laws and enforcement system.

PIRACY AND ENFORCEMENT ISSUES

The main problem in Jordan remains the blatant selling of pirated optical discs, mainly locally burned CD-Rs/DVD-Rs but also factory-produced discs believed to be imported from neighboring Syria, on street corners and markets. CD burning now takes place in shops in Amman and elsewhere in Jordan, destroying the legitimate music market. Whereas piracy levels have always been high in Jordan (hovering at close to 80% for international repertoire), the record industry now reports the number is over 90%.

The National Library in Jordan officially states that it has conducted 815 raids on retail piracy outlets during 2007 and seized in total more than 309,000 pirate CD-Rs and almost 34,000 pirate DVD-Rs. The National Library estimates that about 30% of the seized products contain music; about 50% contain films; about 5% contain games; and about 15% contain software. Unfortunately, the National Library claims it is not responsible for enforcement actions against street vendors as this is under the jurisdiction of local authorities. The raiding activity that has occurred to date has not made a dent in high levels of piracy and the total lack of enforcement actions against street piracy does not help matters.

Intelligence reveals that some pirated CDs might be smuggled into Jordan from neighboring Syria. While industry has no access to the plants, industry believes that at least 4 optical disc plants are operational in Syria, not only distributing inside Syria, but also exporting heavily to Iraq and also to Jordan and Lebanon. The recording industry's international group, IFPI, is not aware of a single seizure of pirated optical discs by Jordanian Customs in 2006 or 2007. The lack of strict border control measures by Jordanian customs further exacerbates an already piracy-driven market.

FREE TRADE AGREEMENT

The United States-Jordan Free Trade Agreement went into force on December 17, 2001,¹ triggering due dates for the government of Jordan to meet various requirements to protect intellectual property (as contained in Article 4 of the FTA). Jordan joined the WTO effective April 11, 2000 and the Berne Convention effective on July 28, 1999, making it subject to those international obligations as well. The triggering dates for Jordan's FTA obligations were as follows:

- December 17, 2003: WIPO Copyright Treaty Articles 1-14 and WIPO Performances and Phonograms Treaty Articles 1-23;² national treatment [Article 4(3)-(5)]; and the substantive obligations in Article 4(10)-(16) of the FTA.³
- December 17, 2004: The enforcement obligations in Article 4(24)-(28) of the FTA.

In the 2005 Special 301 cycle, IIPA urged the U.S. Government to initiate immediate dispute settlement consultations under Article 16 and 17 of the U.S.-Jordan Free Trade Agreement, and to take all steps necessary to resolve the dispute by bringing Jordan into compliance with the FTA as soon as possible. In the 2007 review, IIPA reiterated several issues as ripe for consideration for dispute settlement if the government of Jordan did not take immediate steps to remedy them. Those issues included the following FTA requirements:

- **Anti-Circumvention and Technological Protection Measures ("TPMs") [FTA Article 4(13)]**
- **Appropriately Narrow Exceptions and Limitations [FTA Article 4(16)]**

¹ The FTA went into force when the United States formally notified the government of Jordan that it had taken necessary procedures to ratify the Agreement (Jordan had already ratified the Agreement in 2000).

² The FTA expressly states that the obligation to implement the WIPO Treaties does not apply to Articles 1(4) and 6(2) of the WCT, and Articles 5, 8(2), 12(2), and 15 of the WPPT.

³ Jordan also needed to accede to the WCT and WPPT by December 17, 2003; it missed this deadline, but joined the WCT on April 27, 2004 and the WPPT on May 24, 2004.

- **Compensatory Damages [FTA Article 4(24)]**
- **Deterrent Statutory Maximum Fines [FTA Article 4(25)]**
- **Seizure of Documentary Evidence [FTA Article 4(25)]**
- ***Ex Officio* Enforcement Authority [FTA Article 4(26)]**
- **Presumptions of Ownership and Subsistence of Copyright [FTA Article 4(27)]**
- **Fixing Provision Allowing Alteration of Features in Seized Materials, Which Impinges on Exclusive Adaptation Right [Article 47(a)]**
- **Customs/Border Provisions – Article 59 of TRIPS**

The U.S. government has been working with counterparts in the Jordanian government to resolve many of the remaining FTA deficiencies, and good progress has been made in dealing with TPMs, exceptions, compensatory damages, seizure of documentary evidence, *ex officio* enforcement authority, and dealing with seized materials. Outstanding issues remain the deterrent effect of statutory maximum fines, presumptions, and customs/border provisions, some of which may have to be fixed through legislative amendments.

GENERALIZED SYSTEM OF PREFERENCES

In addition to benefits Jordan receives under the FTA, Jordan continues limited participation in the Generalized System of Preferences (GSP) program, a U.S. trade program that offers preferential trade benefits to eligible beneficiary countries. One of the discretionary criteria of this program is that the country provides “adequate and effective protection of intellectual property rights.” During the first 11 months of 2007, \$11.1 million in Jordanian imports into the U.S. (or 0.9% of Jordan’s total exports to the U.S.) entered the U.S. under the duty-free GSP code.

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2008 SPECIAL 301

SPECIAL MENTION

NEW ZEALAND

In July 2007, the Commerce Committee of New Zealand's parliament issued its long-awaited report on the Copyright (New Technologies and Performer's Rights) Amendment Bill. This extensive proposed amendment to the New Zealand copyright law was already problematic in several respects, but the changes proposed by the Commerce Committee, if adopted, would make the legislation significantly worse. IIPA makes this Special Mention submission to urge the U.S. government to engage actively with New Zealand to seek a satisfactory resolution of numerous issues in this legislation, including the following:

1. Treatment of Technological Protection Measures (TPMs): New Zealand's efforts to update its existing law fall far short of meeting international minimum standards, as reflected in the implementation of the WIPO Copyright Treaty (WCT) and WIPO Performances and Phonograms Treaty (WPPT) by nearly all of New Zealand's OECD cohorts. Among other problems with the new legislation:

- Narrow definitions risk excluding from coverage many technologies used by right holders to control access to their works. (The Commerce Committee proposals would increase this risk, since they would exclude any technology that "controls access to a work for non-infringing purposes," a description that could be applied to almost any access control, since circumvention could lead to a non-infringing use.) The definition of "TPM spoiling device" is also too narrow, and even a device "primarily designed or produced" for circumvention purposes would be legal if it had any other significant application. Coverage of circumvention services should also be broadened.
- The act of circumventing TPMs would never be prohibited, regardless of the circumventor's intent or motive, and even though the circumvention would leave a previously protected work "in the clear" for infringement by others.
- Liability for trafficking in "TPM spoiling devices" would require proof of knowledge that the device "will or is likely to be used to infringe copyright," a heavy burden that a clever defendant could make almost insurmountable by concocting a record that there might be non-infringing uses of works whose protection could be circumvented through use of the device.
- Traffickers would be permitted to supply libraries, schools or archives with circumvention devices or services, ostensibly for non-infringing purposes, and even for some others (such as encryption research) regardless of whether they constitute infringement. These provisions risk in effect condoning the development of a public marketplace in circumvention tools.

2. Internet Service Provider (ISP) Liability Limitation: Although there were some problems with these provisions in the original bill (e.g., it appears to immunize an ISP that receives a direct financial benefit from infringing activity on its network), the Commerce Committee changes would greatly intensify them. For example:

- ISPs could claim the shelter of a liability "safe harbor" even if they had not implemented a policy for terminating the accounts of subscribers who repeatedly infringe copyright. The

“repeat infringer” policy is a threshold requirement for ISP liability limitation in the laws of virtually every country that addresses the issue. The Commerce Committee’s recommendation to drop it would eliminate an important incentive for cooperation in combating online piracy.

- Criminal liability for recklessly providing a false take-down notice, which the Commerce Committee would impose, is overkill, and would needlessly discourage use of a procedure which ought to be encouraged.
- Under the amendment bill, an ISP with “reason to believe” that material it is storing is infringing would have to cut off access to it in order to claim a liability safe harbor. The Commerce Committee would rewrite this provision so that, absent actual knowledge of infringement, only a takedown notice from the right holder would trigger this responsibility. This unduly restrictive test would create a perverse incentive for ISP inaction, even when the ISP is aware of facts from which infringement is apparent.
- The ability of the courts to issue injunctions against ISPs – a critical enforcement tool, even in situations where ISPs do not face monetary damages -- would be severely curtailed under the Commerce Committee version. Even infringing activity that takes place under the authority and control of the ISP would be entirely immune, so long as it could not be proven to have been carried out “on behalf of or at the direction of” the ISP. Another amendment recommended by the Commerce Committee would create ambiguity about whether any injunction could be issued against an ISP that qualifies for a safe harbor, or whether its activities that enable infringement would be placed entirely beyond the reach of the courts.

3. Communication Works: On the path to creating a technologically neutral and comprehensive exclusive right of communication to the public, the drafters of the amendment bill strayed by establishing a broad and unprecedented new category of protected work – a “communication work” – that overlaps confusingly with the previously defined categories found both in New Zealand’s law and that of most other countries. Worse, the amendment defines as the author of such a work whoever transmits it, makes it available, or arranges to do so, as long as that person “has responsibility to any extent for its contents” – potentially a nearly limitless set. These novel definitions threaten to disrupt well-established licensing and payment structures, and to complicate the application of treaty obligations. IIPA urges New Zealand instead to ensure that the owners of rights in existing categories of works enjoy the exclusive right to control all the various forms of delivering such works to the public, and the unencumbered ability to enter into contractual arrangements for that purpose. This approach should achieve the intended objective of the drafters in a less disruptive manner.

4. Transient Copying Exception: The amendment bill proposes a new exception for incidental copying, but this should be limited to transient copies made in the course of a transaction authorized by the relevant rights holder. Careful crafting of this exception is needed, among other reasons, in order to maintain the proper balance of legal incentives for ISPs, whose servers make unauthorized transient copies of copyright works in the course of infringing communications, to cooperate with right holders to combat such infringements.

5. Library Digital Dissemination: The conditions under which libraries would be allowed to provide digital remote access to materials in their collections must be narrowly circumscribed to avoid interference with the normal exploitation of those works and to meet the other criteria of the internationally accepted standards for exceptions and limitations on copyright (i.e., the “three-step” test codified in TRIPS Art. 13). It is questionable whether the provisions of the pending legislation achieve this.

6. Exception for Time-Shifting of Works Disseminated by Broadcast, Cable or Internet: While this provision remains relatively narrowly crafted, its interaction with other provisions of the law still demand careful review. For example, someone trafficking in tools for circumventing technological

measures used in connection with streaming dissemination of copyright material could defend against liability by claiming that his customers might use the tool in order to exercise this exception.

7. Computer Program Exceptions: Proposed new exceptions for, e.g., correcting errors in computer programs, must also be carefully analyzed for compatibility with the three-step test, bearing in mind once again the knock-on effect with respect to technological protection measures.

Copyright law revision gives New Zealand an opportunity to provide itself with useful new tools for grappling more effectively with a growing digital piracy problem within the country, as well as to advance toward accession to the WCT and WPPT, and to position itself as a more attractive free trade agreement partner. The significant flaws in the pending legislation – including the unhelpful changes proposed by the parliamentary committee – undermine these goals. IIPA urges the U.S. government to deliver these messages in its bilateral discussions with New Zealand, and to seek to turn the revision process in a more constructive direction during 2008.

USTR's February 4 announcement that it will "begin a detailed exploratory process to determine whether it should participate in the full Trans-Pacific Strategic Economic Partnership" – the so-called P-4 Agreement among New Zealand, Brunei, Singapore and Chile – may provide a valuable platform in this regard. Among other benefits, this initiative could provide the framework for persuading New Zealand to agree to meet stronger intellectual property standards based on those in the FTAs that the U.S. has already concluded with Singapore and Chile. IIPA supports this process and encourages New Zealand to keep this goal in mind as it proceeds with copyright law revision.

New Zealand should also take whatever steps are necessary to ensure that adequate legal prohibitions are in place against camcorder piracy – the unauthorized operation of audiovisual recording equipment in a theater while a film is being screened – since, on a worldwide basis, pirate audio-visual products are sourced to professional camcorder pirates over 90% of the time.

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2008 SPECIAL 301

SPECIAL MENTION

SINGAPORE

IIPA urges USTR to monitor developments in Singapore in 2008 with regard to the issues identified in this Special Mention filing.

COPYRIGHT LAW AND RELATED ISSUES

Implementation of FTA Provisions re Digital Audio Transmissions: On August 15, 2005, the Copyright (Amendment) Act 2005 went into force in Singapore, with the goal of bringing the country's law into compliance with the copyright-related provisions of the U.S.–Singapore Free Trade Agreement. Unfortunately, the treatment of certain non-interactive digital audio transmissions in the amendment places Singapore in violation of its FTA obligations.

Article 16.4(2)(a) of the FTA provides in pertinent part:

Each Party shall provide to authors, performers, producers of phonograms and their successors in interest the exclusive right to authorize or prohibit the communication to the public of their works, performances, or phonograms, by wire or wireless means, including the making available to the public of their works, performances, and phonograms in such a way that members of the public may access them from a place and at a time individually chosen by them. Notwithstanding paragraph 10, a Party may provide limitations or exceptions to this right in the case of performers and producers of phonograms for analog or digital free over-the-air terrestrial broadcasting and, further, a Party may provide limitations with respect to other non-interactive transmissions, in certain special cases provided that such limitations do not conflict with a normal exploitation of performances or phonograms and do not unreasonably prejudice the interests of such right holders.

While the FTA permits Singapore to provide limitations with respect to non-interactive transmissions, it does so only “in certain special cases provided that such limitations do not conflict with a normal exploitation of performances or phonograms and do not unreasonably prejudice the interests of such right holders.”

Section 107B of the Singapore Copyright Act exceeds the allowable discretion under the FTA by wholly exempting from protection certain non-interactive transmissions—notably, simultaneous retransmissions of a broadcast signal (so-called simulcasting). This exemption does not apply to a special case, most certainly conflicts with the normal exploitation of a sound recording, and prejudices the interests of the right holders. Interestingly, some of the principal beneficiaries of this gap in protection are state-owned entities, such as MediaCorp, owned by Temasek Holdings, the Singapore Government's investment arm. MediaCorp relies on this provision to simulcast its radio broadcasts over the Internet to audiences all over the world, and refuses to obtain the multi-territory license for simulcasting. This FTA-incompatible provision must be quickly addressed by Singapore.

Deterrent penalties for business end-user piracy: The Copyright (Amendment) Act also brought into force criminal penalties for willful infringement of copyright for commercial advantage (Section 136(3A)). This provision was intended to provide a criminal remedy for the most damaging business software infringement problem in Singapore, the willful use of unlicensed software applications in the workplace. At the time of enactment, IIPA questioned whether the maximum penalties provided for violation of Section 136(3A) were sufficient to meet Singapore's obligation under Article 16.9.21.a of the FTA to provide deterrent penalties. The results in the first completed prosecution of a business end-user pirate under this section confirms these apprehensions: although it was undisputed that the defendant was using over 50 unlicensed copies of programs with a retail value of over S\$78,000 (US\$55,000), under the law the maximum fine that could be imposed was only S\$40,000 (US\$28,000).¹ Clearly, the authorized criminal penalty fell far short of deterrent levels. Singapore should be urged to review this issue and to increase the authorized penalties for violation of Section 136(3A) so that they are more consistent with those for comparable offenses and so that they deliver the deterrence required by the FTA.²

Parallel Imports: Since Singapore's law does not protect against parallel imports, there has been an influx into Singapore of pirated product masquerading as legitimate imports, especially pirated music imports from China, which are sold in small retail outlets and makeshift stalls in public housing estates. Because of police reluctance to accord priority to such infringement, industry must resort to expensive and lengthy civil litigation in order to keep such pirate music products out of the market. These lawsuits are hampered by the requirement to prove that the retailer had the requisite knowledge that the discs were infringing, as well as the onus of proving infringement. Legislative proposals to shift the burden of proof in these cases were not included in the 2005 amendments. Last year, the recording industry proposed that a short window period be provided to protect against parallel imports of new releases, but the government rejected this idea. If Singapore persists in refusing to provide an exclusive right to authorize imports, it should at least act to reverse the burdens of proving knowledge in cases involving import piracy.

PIRACY AND ENFORCEMENT UPDATE IN SINGAPORE

Optical Disc Piracy: In 2005, the police raided three optical disc plants, all involved in the export of pirated music and movie products seized in South Africa, among other countries. Despite evidence of piracy, state prosecutors did not charge the plants, but instead issued written warnings. (The authorities also have yet to prosecute the exporter.) Furthermore, after declining to prosecute the plants criminally, the authorities also refused to grant recording industry representatives access to records seized from the plants (including production records), thus frustrating the ability of right holders to seek civil redress and damages for the massive infringements that occurred. Ironically, recording industry investigators were responsible for gathering most of the evidence upon which the plant raids were conducted in the first place. There are now fresh indications that one of the factories previously implicated in the supply of

¹ In fact, because the defendant had pled guilty, the fine actually imposed in this case (PP v. PDM International Pte Ltd.) was only S\$30,000.

² For example, most other criminal copyright violations are punishable in Singapore by fines of up to S\$10,000 per infringing copy or S\$100,000, whichever is higher. See Sections 136(1) and 136(2). Penalties for trademark counterfeiting are at comparable levels.

pirate materials to Africa, has once again been involved in the supply of pirate discs, this time to Europe.

In September 2005, a seizure at the Trendisc Technology plant involved 400,000 pirated movie VCDs, most of them dubbed in French, and intended for export to Africa. While the individuals involved were prosecuted and sentenced to jail in March 2006, the fine imposed against Trendisc itself in September 2006 amounted to only S\$54,000 (about US\$35,000).

Optical disc piracy cases, especially those of this magnitude and importance, should be prosecuted vigorously, and deterrent sentences should be imposed. The authorities, including the Attorney General's Chambers, should provide better cooperation with right holders to provide access to evidence essential to support potential civil claims.

Book Piracy: U.S. book publishing companies continue to suffer from illegal commercial photocopying. A few stores, located in the Queensway shopping center and well-known to the industry and to authorities, have become blatant repeat offenders, despite another round of raids in 2007. The industry needs more support from the Singapore Police in tackling the problems created by these sophisticated syndicates. Specifically, IIPA would like to see the same model of police-initiated raids that has been successful in tackling optical disc operations in the past employed to combat book piracy, including the use of police investigative powers to bring the syndicate owners to prosecution.

IIPA applauds efforts by the Intellectual Property Office of Singapore (IPOS) in its campaigns to increase awareness of the importance of copyright among students. Campaigns such as the iperckidz program in the schools can only serve the country well. Despite this effort, and some efforts made at the university level, students continue to display attitudes of disrespect for copyright protection. IPOS and the Ministry of Education need to continue to play an active role in addressing this problem and promoting cooperative efforts with university administrations to discourage use of infringing materials by students in classrooms.

Music Piracy: Broadband penetration in Singapore is among the highest in Asia, and online music piracy is a serious and growing problem. Because of inaction by the Intellectual Property Rights Branch (IPRB) and a lack of cooperation from Internet Service Providers (ISPs), the problem threatens to worsen.

File sharing of infringing copies of music files via P2P services is on the rise in Singapore, especially using Gnutella clients such as Bearshare and Limewire. Although the IPRB took stern action against two file sharers who were sentenced to imprisonment in 2006, they have since refused to take further action despite complaints filed by the industry. In 2005, the recording industry filed complaints and provided evidence of infringing file sharing activities against 33 individuals. The IPRB informed the recording industry around May 2007 that it had prosecuted none of these infringers, but had merely given warnings to seven of them. No information was given about the fate of the other 26. In October 2006, the recording industry filed 25 additional complaints with IPRB against infringers who were uploading music files illegally. The IPRB informed the industry in July 2007 that it would not be taking any action and suggested that "Collaborative Enforcement" was the best form of action. By that, the IPRB meant that the industry should take up private prosecution or civil proceedings.

In Singapore, it is difficult to obtain information on infringing subscribers from the ISPs, who insist on a court order before releasing any information. Because this entails a lengthy and

expensive process, it raises questions of compliance with the FTA, which calls for Singapore to provide an “expeditious” mechanism for right holders to use. The recent case of *Odex et al vs. Pacific Internet* raises another FTA issue; it held that only the copyright holders or their exclusive licensees are entitled to file such proceedings, but the FTA contemplates enforcement by associations of right holders as well.

The ISPs in Singapore do not assist the rights holders in their fight against internet piracy. In 2007, the local record industry association sent notices to 7 ISPs informing them of infringing file sharing activities conducted by 554 subscribers, requesting that a warning be sent to the subscriber or that the accounts be terminated. All of the ISPs took the stance that they were not obliged to assist the rights holders. The largest ISP, SingNet, which was sent notices of infringing activities pertaining to 478 subscribers, has refused to even meet the industry representatives.

The government should take proactive steps to curb rising online music piracy by taking enforcement actions and by considering legislation which will compel ISPs to take some responsibility in the fight against infringing activities on their networks.

In the offline environment, the recording industry is frustrated by the reluctance of the IPRB to take enforcement action against retail piracy of physical product (CDs), even in cases where evidence of pirate sales is strong. As recently as October 2007, the IPRB refused to take action, stating that they would only act in cases that involve syndicates or that they classify as complex.

Entertainment Software: Entertainment software companies remain very satisfied with the record of the Singapore Government on enforcement for their products, particularly with the efforts of the local police.³ The Government continues to have an excellent record of cooperation and partnership with the entertainment software industry on educational initiatives aimed at increasing the public's awareness of the importance of protection of copyright in interactive games. There is, however, a rising concern with respect to the sale of circumvention devices, which facilitate the play of pirated games on consoles. Enforcement actions conducted by the entertainment software industry have only met with limited success. As the sale of such devices is illegal under the anti-circumvention provisions of the Copyright Act, the Singapore police should be encouraged to conduct enforcement actions and pursue prosecutions against retailers and distributors of such devices. Increased police actions and prosecutions, with corresponding media coverage, would serve as a deterrent to the proliferation of such devices.

Other Observations: Apart from the problems noted above, IIPA is pleased with the government's response in certain other areas. Singapore continues to boast among the lowest piracy rates in all of Asia. Effective enforcement at the border (where shipments of pirate product from Malaysia continue), and responsiveness to complaints of business end-user piracy, have contributed to this outcome. Aside from the problem of business end-user piracy prosecutions discussed above, criminal copyright cases (including those involving distribution of pirate software) have generally resulted in the imposition of penalties and sentences that have acted as significant deterrents.

³ There is a thriving legitimate market for this industry's products, with retail and mall piracy having been effectively addressed by the local authorities.

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2008 SPECIAL 301 REPORT

SPECIAL MENTION

SWITZERLAND

Special 301 Recommendation: IIPA urges that USTR give special attention to Switzerland in 2008 and heighten its bilateral engagement with a view to Switzerland's reviewing the copyright amendments it adopted last October.

EXECUTIVE SUMMARY

In our 2007 submission, IIPA expressed concern over the direction of the Swiss effort to amend its copyright law to bring it into compliance with the WIPO Internet Treaties (WIPO Copyright Treaty (WCT) and WIPO Performances and Phonograms Treaty (WPPT)). Switzerland adopted two sets of amendments on October 5, 2007, one to implement obligations under the WCT and WPPT (the law also authorized Switzerland to ratify the treaties) and the other to make other amendments to the copyright law. The amendments are due to enter into force on July 1, 2008.

While the amendments were improved in many respects from the version that was pending in February 2007, there still remain serious problems. The Swiss law, as amended, will: diverge from the protection granted in EU member states; violate Switzerland's international obligations; and will have a deleterious effect on the legitimate industries in the online marketplace. IIPA urges the Swiss government to review these amendments again and further amend them to bring Switzerland's copyright law in tune with the laws in the EU and other OECD countries and with Switzerland's international obligations in the WCT and WPPT and the TRIPS agreement. We urge that the issues of copyright reform and the importance of effective copyright enforcement in both the offline and online environment continue to be addressed in the work program of the new Swiss-U.S. Trade and Investment Cooperation Forum.

COPYRIGHT LAW REFORM AND RELATED ISSUES

Copyright Law Reform: The copyright industries continue to be concerned with the Swiss effort to implement the WIPO Internet Treaties. The current amendment would create a difficult legal environment for the protection of copyrighted materials. The vast majority of European countries have amended their laws to meet their international obligations and all EU member states have implemented the EC Copyright Directive adopted in 2001. Switzerland also committed to implement these Treaties on June 21, 2001, when it signed an agreement, which extends the coverage of the EFTA Convention to the protection of intellectual property (Chapter VII, Article 19 and Annex J to the Convention).¹

The key problems in these two sets of amendments can be summarized as follows:

¹ The EC Copyright Directive, which has been implemented by all EU Member States as well as a number of other European countries provides a standard level of copyright protection across Europe. While Switzerland is by no means obliged to implement every aspect of the Copyright Directive, the Swiss WIPO Treaties' implementation does not create a level playing field and is inconsistent with the rules across Europe. Such consistency is vital in a networked environment. Article 19(4) of the EFTA Convention states that Member States should avoid or remedy trade distortions caused by actual levels of protection of intellectual property rights. The EFTA Convention (Article 2) also promotes the enactment and respect of equivalent rules as well as the need to provide appropriate protection of intellectual property rights, in accordance with the highest international standards.

Technological protection measures (TPMs): Legal protection for technological measures is insufficient to satisfy treaty standards and represents a dramatic departure from the standard in the EU Copyright Directive (Articles 6.1 and 6.2) and the U.S. Digital Millennium Copyright Act (17 U.S.C. §1201). The Swiss law would allow circumvention of technological measures “for the purposes of a use permitted by law” (Article 39(a)(4)). While certain narrow exceptions to the act of circumvention would be justifiable, such as those in the Digital Millennium Copyright Act, this provision sweeps so broadly to as to permit circumvention of any type of technological measure for any permitted purpose. This is far too broad, particularly given the inappropriately wide scope of the private copying exception, which taken together with this provision would allow individuals to circumvent access or copy control measures in order to copy from illegal sources and share with friends. It would thus seriously undermine the legal protection of technological measures and would diminish right holders’ ability to enforce “effective legal remedies” (as required by WCT Article 11) in the event of such circumvention. While this provision is overbroad, IIPA acknowledges that the Swiss Parliament limited the “permitted purpose” exception to acts of circumvention only and appropriately does not apply it to permit trafficking in circumvention tools. Adequate standards for protection against acts of circumvention of technological measures are set out in both the EU Copyright Directive and the DMCA, neither of which goes so far as to permit or sanction such acts in such a sweeping manner. It should be noted that beyond the public rhetoric against Digital Rights Management (DRM), both the Copyright Directive and the DMCA have gone a long way to promote new modes of delivery of copyright works for consumers.

On a more positive note, the penal provisions for infringement of copyright and related rights have been improved. Infringement of copyright/related rights on a commercial scale now is sanctioned with up to 5 years’ imprisonment or a fine (Articles 67(2) and 69(2)); imprisonment has to be combined with a fine. The previous provisions set out a penalty of imprisonment of up to 3 years and a fine of up to 100,000 francs (US\$90,500). A new Article 69a provides for fines for the circumvention of TPMs, the manufacture, import, distribution etc. of circumvention devices, the removal or alteration of electronic rights management information and the reproduction, distribution, importation etc. of works from which electronic rights management information has been removed or altered without authority. The violation of the anti-circumvention provisions on a commercial scale is sanctioned with up to one year imprisonment or a fine.

The “Review” Mechanism in Article 39b: The new law sets up a review mechanism -- “observatory” -- to review “the effects of technological measures” that might be caused by employing devices and services to protect unauthorized access to, or infringement of, copyright or related rights. The objective of the observatory as set out in the law is to promote solutions based on partnership between the opposing parties. The Federal Government may, but has not yet conferred administrative powers to the observatory. Details on the observatory mechanism are set out in a draft decree implementing Article 39b of the Copyright Act. The draft decree focuses its attention too narrowly on abuse of technological measures, thus potentially undermining the body’s authority to act as a fair mediator. It also sweeps more broadly than the system set up in the Copyright Directive, which defaults first to the right holder to provide the solution with the national governments acting only if voluntary action does not accomplish the result. Finally, this “observatory” system has no authority to review whether the blanket ability to engage in acts of circumvention to facilitate taking advantage of copyright exceptions can have a debilitating effect on the development of new business models in the online environment, such as on-demand and interactive services. This system should be reconsidered and brought more closely into conformity with the systems in place in the EU or in the U.S.

Private Copy Exception: While efforts were made by right holders during the debates on the bills as they were being developed to ensure that the private copy exception in Article 19 of the copyright law did not apply to copies made from illegal sources, such a clarification was not made in the final law. Unfortunately, the Explanatory Memorandum in the “Botschaft” to the draft dated March 10, 2006, issued by the Swiss government states that there should be no distinction whether the work or phonogram comes from a lawful or unlawful source. Consequently, it could be argued on the basis of this Memorandum that the making of copies from unlawful sources would be allowed. That position encourages copyright infringement on a massive scale, is clearly inconsistent with the three-step test and other international norms, and threatens the vitality of Switzerland’s digital environment.

Moreover, the concept of what is a “private” copy is overly broad, in that the law refers to the “private circle” (“any use in the personal sphere or within a circle of persons closely connected to each other, such as relations or friends”) rather than to copies made “by the individual for his or her own private use and for no direct or indirect economic or commercial gain” (see Article 5.2b of the EU Copyright Directive).

Finally, Article 19(2) allows for “private copies to be made by third parties” including libraries and “other public institutions and businesses” which provide their users with photocopiers and even if the copying is subject to payment. This is completely inappropriate for a “private copy” exception and is consistent with the three-step test in the WCT, WPPT and TRIPS.

Mandatory collective administration: The new Articles 22a to 22c provide overbroad benefits to state-licensed broadcasting organizations in the following activities, at the expense of record producers and artists:

- Use of archive works (Article 22a): while the definition of archival productions (“archive works”) is acceptable, Article 22a(1) is too broad in that it also applies to other works or parts of works which are integrated into the archive work, as far as they do not determine to “a significant degree” the character of the archive work. The Article also requires mandatory collective administration of the exploitation of archival productions only by approved collecting societies.
- Use of orphan works (Article 22b) and use of background music in connection with broadcasts (Article 22c): also these uses require mandatory collective administration, which is unnecessary and should be disfavored.
- Reproduction for broadcasting purposes: Article 24b sets out mandatory collective administration for the reproduction rights in sound recordings for broadcasting purposes (“ephemeral right”). Furthermore, efforts to include a specific time period after which the reproductions made under this article have to be destroyed were not successful, the broadcasters’ preferred wide interpretation that these reproductions are to be destroyed after “they have served their purpose” unfortunately prevailed. Because no effective time limit is set for retaining such copies, the Article would run afoul Article 11bis(3) of the Berne Convention which provides that the copies must be “ephemeral.”

The mandatory collective administration provisions of the mentioned uses in effect constitute an expropriation of the right holders’ exclusive rights (guaranteed under the WIPO Treaties) and also act as an onerous and unnecessary price control, lowering the record producers’ share of remuneration inappropriately, since the Copyright Act (in Article 60(2)) limits the level of remuneration which can be collected (the cap on remuneration for related rights remained unchanged at 3% of the proceeds from or cost of utilization).

Camcording Legislation: The illicit recording of movies at movie theaters (“camcorder piracy”) is a major source of pirated motion pictures available over the Internet, as well as on street corners and flea markets around the world. Switzerland has been traced as a source for unauthorized camcording. In order to facilitate enforcement and prosecution of such piracy, anti-camcording legislation should be adopted in the Switzerland to require jail sentences, preferably up to a year or longer for the first offense, and a higher penalty for any subsequent offense. One illicit recording of a first-run motion picture spread through the Internet and on street corners can destroy a film’s ability to recoup the investment made in its production. Therefore, the result is exponentially greater economic harm than what is traditionally experienced as a result of a single act of “theft.”

**APPENDIX D: CHART OF COUNTRIES' SPECIAL 301 PLACEMENT (1989-2007)
AND IIPA 2008 SPECIAL 301 RECOMMENDATIONS**

COUNTRY	IIPA UPDATE WITH Recommendation February 2008	USTR 301 PLACEMENT (as of April/May of each year)																		
		2007	2006	2005	2004	2003	2002	2001	2000	1999	1998	1997	1996	1995	1994	1993	1992	1991	1990	1989
Argentina	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	WL	PWL	WL	WL	WL	WL	WL
Armenia								WL	WL	WL										
Australia												WL	WL	WL	WL		WL	PWL	PWL	PWL
Austria												OO	OO							
Azerbaijan				WL	WL	WL	WL	WL	WL											
Bahamas			WL	WL	PWL	PWL	WL + OCR	OCR	OCR											
Bahrain												WL	WL	WL	WL					
Bangladesh	WL																			
Belarus	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	OO	WL	OO							
Bosnia and Herzegovina																				
Brazil	WL	WL+OCR	PWL	PWL	PWL	PWL	PWL	WL	WL	WL		WL	WL	PWL	OO	PFC	PWL	PWL	PWL	PWL
Brunei	WL																			
Bulgaria	SM		WL	WL	WL							PWL	WL	OO	OO					
Burma (Myanmar)																				
Cambodia																				
Canada	PWL	WL	WL + OCR	WL + OCR	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	OO		WL	WL	WL	WL
Chile	PWL	PWL	WL + OCR	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL
Colombia		WL	WL	WL	WL	WL	PWL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL
Costa Rica	PWL	WL	WL	WL	WL	WL	WL + OCR	PWL	WL	WL	WL	WL	WL	WL						
Croatia			WL	WL	WL	WL														
Cyprus												OO	OO	OO	WL	WL	WL	WL		
Czech Republic		OCR							WL	WL	WL	OO								
Denmark									WL	WL	WL	WL								
Dominican Republic	WL	WL	WL	WL	WL	WL	PWL	PWL	PWL	PWL	PWL	WL	OO							
Ecuador		WL	WL	WL	WL	WL			WL	WL	PWL	PWL	WL			WL	WL			
Egypt	PWL	PWL	PWL	PWL	PWL	WL	PWL	PWL	PWL	PWL	PWL	PWL	WL	WL	WL	PWL	PWL	WL	WL	WL
El Salvador													WL	WL	WL	WL	WL			
Estonia												OO								
European Union			WL	WL + OCR	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	
Georgia									OCR											
Germany	SM											OO	OO	OO	OO	OO		WL	WL	
Greece	WL							WL	WL	PWL	PWL	PWL	PWL	PWL	WL	WL	WL	WL	WL	WL
Guatemala		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	PWL	PWL	WL	WL	OO	OO					PWL	PWL	WL	
Iceland																				

**APPENDIX D: CHART OF COUNTRIES' SPECIAL 301 PLACEMENT (1989-2007)
AND IIPA 2008 SPECIAL 301 RECOMMENDATIONS**

COUNTRY	IIPA UPDATE WITH Recommendation February 2008	USTR 301 PLACEMENT (as of April/May of each year)																		
		2007	2006	2005	2004	2003	2002	2001	2000	1999	1998	1997	1996	1995	1994	1993	1992	1991	1990	1989
India	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PFC	PFC	PFC	PWL	PWL
Indonesia	WL	WL	PWL + OCR	PWL + OCR	PWL	PWL	PWL + OCR	PWL	WL	PWL	PWL	PWL	PWL	WL	WL	WL	WL	WL	WL	WL
Ireland									WL	WL	WL	WL	OO							
Israel	WL	PWL	PWL	PWL	WL + OCR	WL	PWL + OCR	PWL	PWL	PWL	PWL	WL	OO	OO	OO					
Italy	WL + OCR	WL	WL	WL	WL	WL	WL	WL	WL	PWL + OCR	PWL	PWL	WL	WL	WL	WL	WL	WL	WL	WL
Jamaica		WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL								
Japan	SM								OCR		WL	WL	WL	PWL	PWL	PWL	WL	WL	WL	WL
Jordan	SM										WL	WL	WL	OO	OO					
Kazakhstan (GSP)	WL			WL	WL	WL	WL	WL	WL		OO									
Kenya																				
Kuwait	WL	WL	WL	PWL	PWL	WL	WL	WL	WL	PWL	PWL	WL	WL	OO						
Kyrgyz Republic									OCR											
Laos																				
Latvia			WL + OCR	WL	WL	WL	WL	WL	WL											
Lebanon (GSP)	WL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	WL	OO										
Lithuania	WL	WL	WL	WL	WL	WL	WL	WL	WL											
Luxembourg												WL								
Macau								WL	WL	PWL	PWL									
Macedonia																				
Malaysia	WL	WL	WL	WL	WL + OCR	WL	WL	PWL	PWL	OCR									WL	WL
Mexico	PWL	WL	WL	WL	WL	WL	OCR			WL	OO	OO	OO							PWL
Moldova									WL											
Morocco																				
Netherlands											OO									
New Zealand	SM						WL	WL		WL							WL	WL		
Nicaragua											OO	OO								
Nigeria	WL																			
Oman									WL	WL	WL	WL	WL	OO						
Pakistan	WL	WL+OCR	WL	PWL	PWL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL
Palestinian Authority										OCR										
Panama											OO	WL	OO		OO					
Paraguay		306	306	306	306	306	306	306	306	306	PFC	PWL	WL	OO	OO		WL			
People's Republic of China	PWL	PWL	PWL + 306	PWL	306 + OCR	306	306	306	306	306	306	306	PFC	WL	PFC	WL	WL	PFC	PWL	PWL
Peru	PWL	WL	WL	WL	WL	WL	WL	WL	PWL	PWL	WL	WL	WL	WL	WL	WL	WL			
Philippines	WL + OCR	WL	WL	PWL + OCR	PWL	PWL	PWL + OCR	PWL	WL	WL	WL	WL	WL	WL	WL	WL	PWL	WL	WL	WL
Poland	WL	WL	WL	WL	WL + OCR	PWL	WL + OCR	WL	PWL	WL	WL	WL	WL	WL	WL	PWL	PWL			
Portugal													OO							WL
Qatar							WL		WL	WL	WL	OO	OO	OO						
Romania	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	OO	OO	OO	WL						

**APPENDIX D: CHART OF COUNTRIES' SPECIAL 301 PLACEMENT (1989-2007)
AND IIPA 2008 SPECIAL 301 RECOMMENDATIONS**

COUNTRY	IIPA UPDATE WITH Recommendation February 2008	USTR 301 PLACEMENT (as of April/May of each year)																		
		2007	2006	2005	2004	2003	2002	2001	2000	1999	1998	1997	1996	1995	1994	1993	1992	1991	1990	1989
Russian Federation (GSP)	PWL	PWL+OCR	PWL + GSP	PWL + OCR	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL
San Marino																				
Saudi Arabia	PWL	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	SM								WL	WL	WL	WL	WL	WL	OO					
Slovak Republic				WL	WL	WL	WL	WL												
Slovenia									OCR											
South Africa										WL	WL		OO	WL						
South Korea	WL	WL	WL	WL	PWL	WL + OCR	WL	PWL	PWL	WL	WL	WL	PWL	PWL	PWL	PWL	PWL	WL	WL	PWL
Spain	WL								WL	WL	OO			WL	WL	WL	WL	WL	WL	WL
Sri Lanka																				
Sweden	WL									WL	WL	WL								
Switzerland	SM																			
Taiwan	WL	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											
Thailand	PWL + OCR	PWL	WL	WL	WL	WL	WL + OCR	WL	WL	WL	WL	WL	WL	WL	PWL	PFC	PFC	PFC	PWL	PWL
Tunisia											OO									
Turkey	WL	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											
UAE								WL	OCR	WL	WL	WL	WL	WL	WL	WL	WL	WL		
Ukraine	PWL	PWL	PWL	PFC + OCR	PFC	PFC	PFC	PFC	PWL	PWL	WL									
Uruguay				WL	WL	WL	PWL	PWL	WL	WL	OO	OO								
Uzbekistan (GSP)	WL	WL	WL	WL	WL	WL	WL	WL	WL											
Venezuela		PWL	PWL	PWL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL
Vietnam	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	OO	OO						
Yemen											OO									

- PFC: Priority Foreign Country
- PWL: Priority Watch List
- WL: Watch List
- OO: Other Observations (an informal listing formerly used by USTR)
- SM: IIPA unranked countries deserving Special Mention
- OCR: Out-of-cycle review to be conducted by USTR.
- GSP: GSP IPR review underway (based on copyright industries' petitions)
- DS: Dispute Settlement

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

APPENDIX E: HISTORICAL SUMMARY OF SELECTED COUNTRIES' PLACEMENT FOR COPYRIGHT-RELATED MATTERS ON THE SPECIAL 301 LISTS

FEBRUARY 2008

ARGENTINA

IIPA recommends that Argentina remain on the Priority Watch List. See IIPA's 2008 report on Argentina at <http://www.iipa.com/rbc/2008/2008SPEC301ARGENTINA.pdf>.

Argentina has been on the Special 301 lists since 1989, fluctuating between the Watch List and the Priority Watch List. In April 1996, USTR elevated Argentina to the Priority Watch List because of serious problems involving patent legislation and the lack of criminal penalties for infringement of computer programs. USTR has kept Argentina on the Priority Watch List every year since 1996.

The same copyright-related issues have been on the 301 lists for many years. For example, in the April 30, 2001 Special 301 Announcement, USTR noted that despite inadequate implementation of a 1998 law criminalizing software piracy, Argentina strengthened its copyright laws by "ratifying the latest act of the Berne Convention." In its April 30, 2002 Special 301 Announcement, USTR noted that despite some progress in improving Argentina's intellectual property regime, "significant barriers to the effective enforcement of intellectual property rights remain." No such improvement was noted in USTR's 2003 Special 301 Announcement, which cited "lax and ineffective enforcement against piracy ... and counterfeiting," and enforcement efforts were hampered by "inadequate resources and border controls and slow court procedures." In 2004, IIPA recommended that Argentina remain on the Priority Watch List citing the growing problem of pirate optical media, and the lack of prosecutions or deterrent sentences stemming from raids and seizures. USTR agreed, stating then that "Argentina's overall copyright, patent, and data protection regimes do not appear to comply with its international obligations" and that "enforcement against piracy and counterfeiting remains lax and ineffective." Specifically, "enforcement of copyrights remains inconsistent, and the effectiveness of enforcement remains hampered by "inadequate resources, border controls, and slow court procedures." USTR continued to follow suit in April 2005, noting problems with Argentina's enforcement regime included the "lack of deterrent criminal penalties in commercial piracy cases, delays in bringing and completing criminal and civil infringement cases, ineffective border controls, and lack of deterrent civil damages." In April 2006, USTR stated: "Copyright piracy also remains a significant problem in Argentina, with the U.S. copyright industry reporting that music piracy worsened in 2005, mainly in the areas of physical piracy (burned CD-Rs) and Internet piracy. Copyright piracy also continues in the areas of entertainment and business software and book publishing. Although the Argentine Government took some IPR enforcement actions during 2005, the United States encourages stronger IPR enforcement actions to combat the widespread availability of pirated and counterfeit products." In April 2007, USTR repeated its concerns: "Copyright piracy also remains a significant problem in Argentina. Although cooperation has improved between Argentina's enforcement authorities and the U.S. copyright industry, and the Argentine Customs authority has taken steps to improve enforcement, the United States encourages stronger IPR enforcement actions to combat the widespread availability of pirated and counterfeit products."

Argentina also participates in the Generalized System of Preferences (GSP) program, a U.S. trade program that offers preferential trade benefits to eligible beneficiary countries. One of the discretionary criteria of this program is that the country provide “adequate and effective” copyright protection. On January 15, 1997, the Clinton administration withdrew 50 percent of the trade benefits granted to Argentina under the GSP program, and placed increased duties on about \$260 million worth of Argentina’s imports (resulting in only about a \$13 million penalty). Argentina remains a beneficiary country under the GSP trade program.

ARMENIA

Armenia does not currently appear on any of the USTR lists. IIPA did not make a submission on Armenia in 2008, but has in years prior; see IIPA’s country page at <http://www.iipa.com/countryreports.html>.

In 1995 and 1997, IIPA requested that USTR add the nations of the Commonwealth of Independent States (CIS) collectively, excluding the Russian Federation, to the Special 301 Watch List because almost none of the CIS countries had met their bilateral IPR obligations, piracy was rampant, enforcement inadequate, and copyright law reform urgently needed. In 2000, IIPA recommended that ten of the CIS countries be placed on the Special 301 Watch List (Armenia, Azerbaijan, Belarus, Georgia, Kazakhstan, Kyrgyz Republic, Moldova, Tajikistan, Turkmenistan, and Uzbekistan). In the May 30, 2000 Special 301 Announcement, USTR placed seven CIS countries on the Special 301 Watch List for the first time: Armenia, Azerbaijan, Kazakhstan, Moldova, Tajikistan, Turkmenistan, and Uzbekistan. In 2001, IIPA recommended that USTR place Armenia on the Watch List, and USTR agreed. In the 2001 Special 301 submission, IIPA suggested again that 10 of the 12 CIS countries individually (excluding Russia and Ukraine, for much more serious piracy problems) be listed, and for filing purposes only, grouped them together due to the similarity of copyright concerns each country faces. These deficiencies include the lack of legislative implementation of the bilateral trade agreements, the failure to comply with the WTO TRIPS Agreement, and the failure to adopt optical media production and distribution controls. In its April 30, 2001 Special 301 Announcement, USTR noted that “Armenia has several remaining steps to take in order to fulfill its intellectual property commitments under the 1992 U.S.-Armenia Trade Agreement and to become TRIPS-consistent in preparation for accession to the WTO.” In its April 30, 2002 announcement, USTR kept Armenia on the Watch List, noting that the country has many steps to go to comply with the intellectual property requirements of the 1992 U.S.-Armenia Trade Agreement. In particular, USTR pointed out Armenia’s lack of protection for U.S. and other sound recordings, lack of retroactive protection for works or sound recordings under its copyright law, and weak enforcement of intellectual property rights. Despite continued deficiencies in its protection and enforcement of intellectual property, Armenia became a member of the WTO, effective February 5, 2003.

In June 1999, IIPA filed a petition with USTR requesting that the country eligibility of Armenia and several CIS countries under the Generalized System of Preferences (GSP) trade program be reviewed for its failure to provide adequate and effective copyright protection and enforcement for U.S. copyright owners. In February 2000, the administration accepted IIPA’s petition for review of Armenia, Kazakhstan, Moldova, Ukraine, and Uzbekistan, and on May 12, 2000, the U.S. Government held public hearings on the GSP petitions regarding these five countries. Several years later, Armenia acceded to the WTO on February 5, 2003. On September 3, 2003, USTR announced that it had terminated Armenia’s GSP review. Armenia is a beneficiary country under the GSP trade program.

AUSTRALIA

Australia does not currently appear on any of the USTR lists. In 1994, Australia was named to the. Between 1991 and 1994, IIPA filings cited a number of issues that harmed U.S. copyright industry sales and exports in Australia, notably the threat to remove parallel import protections for sound recordings and computer programs; the failure to provide exclusive rental rights to sound recordings; the denial of national treatment to the U.S. recording and music publishing industries in the administration of Australia’s audio levy; concerns about the strength of copyright protection for computer programs; and a severe problem of bootleg recordings of U.S. performers. In 1991, Australia was placed on USTR’s Priority Watch List, where it remained until 1993. Australia was briefly dropped from the Watch List after some legal reforms were undertaken but was reinstated to the Watch List because of deficiencies in the protection of pharmaceutical test data in 1996. In 1997, noting

the renewed threat to weaken or eliminate the importation right, IIPA recommended placement of Australia on the Watch List. USTR agreed, and Australia remained on the Watch List through 1999, in part because of what was described as “serious concern” over 1998 legislation abolishing the importation right for sound recordings and pending legislation abolishing the importation right for other copyrighted works including software, electronic games, and gaming equipment. Although Australia was removed from any Special 301 List in 2000, USTR noted in its May 1, 2000 Special 301 Announcement the possible initiation of future WTO dispute settlement cases against several countries, including Australia, for apparent noncompliance with TRIPS obligations. Since that time, the U.S. and Australia have entered into a Free Trade Agreement, which includes obligations on intellectual property rights and enforcement. IIPA continues to follow copyright-related developments in Australia.

AZERBAIJAN

IIPA did not make a submission on Azerbaijan in 2008, but has in years prior; see IIPA’s country page at <http://www.iipa.com/countryreports.html>.

In 1995 and 1997, IIPA requested that USTR add the nations of the Commonwealth of Independent States (CIS) collectively, excluding the Russian Federation, to the Special 301 Watch List because nearly all of the CIS countries had failed to meet their bilateral IPR obligations, piracy was rampant, enforcement inadequate, and copyright law reform urgently needed. In 2000, IIPA recommended that ten of the CIS countries be placed on the Special 301 Watch List (Armenia, Azerbaijan, Belarus, Georgia, Kazakhstan, Kyrgyz Republic, Moldova, Tajikistan, Turkmenistan, and Uzbekistan). In its May 30, 2000 Special 301 Announcement, USTR placed seven CIS countries on the Special 301 Watch List for the first time: Armenia, Azerbaijan, Kazakhstan, Moldova, Tajikistan, Turkmenistan, and Uzbekistan.

In 2001, IIPA recommended and USTR agreed to place Azerbaijan on the Watch List. In the 2001 Special 301 submission, IIPA suggested again that 10 of the 12 CIS countries individually (excluding Russia and Ukraine, for much more serious piracy problems) be listed, and for filing purposes only, grouped them together due to the similarity of copyright concerns each country faces. These deficiencies include the lack of legislative implementation of the bilateral trade agreements, failure to comply with the WTO TRIPS Agreement, and the failure to adopt optical media production and distribution controls. In its April 30, 2001 Special 301 Announcement, USTR noted that “Azerbaijan has yet to fulfill its intellectual property commitments under the 1995 U.S.-Azerbaijan Trade Agreement,” citing failure to adhere to the Geneva Phonograms Convention as well as weak criminal provisions for IP violations. In 2002, IIPA recommended that Azerbaijan remain on the Watch List, and USTR agreed, noting that the country “has several remaining steps to take before fulfilling its intellectual property rights commitments under the 1995 U.S.-Azerbaijan Trade Agreement.” In particular, USTR pointed to Azerbaijan’s lack of protection for U.S. and other foreign sound recordings and lack of a clear provision of retroactive protection for works or sound recordings. USTR’s 2003 Announcement, which again kept Azerbaijan on the Watch List, cited similar problems, noting “provisions under the Azerbaijani Criminal Code are minimal and contain a high threshold for the imposition of criminal penalties.” Moreover, they are limited to copyright and patent violations, completely excluding neighboring rights violations, and do not provide *ex officio* authority. In 2004, IIPA recommended, and USTR agreed, that Azerbaijan remain on the Watch List. USTR stated that then that Azerbaijan had “yet to fully implement the 1995 US-Azerbaijan Trade Agreement and address deficiencies in its IPR law,” and as “a result of these inadequacies, IPR enforcement in Azerbaijan remains weak and ineffective.” USTR kept Azerbaijan on the Watch List in 2005 for many of the aforementioned reasons. In 2006, Azerbaijan joined the two WIPO Treaties (WPPT and WCT). Citing progress made in IPR enforcement, USTR removed Azerbaijan from the Watch List in April 2006.

BAHAMAS

IIPA did not file on The Bahamas in 2008 or 2007, but has in prior years; see IIPA country report page at <http://www.iipa.com/countryreports.html>.

To cap the 301 history, in 2001, the IIPA recommended that the Bahamas be placed on the Watch List in order to monitor the promises made in the bilateral agreement. In its April 30, 2001 Special 301 Announcement, USTR announced that an out-of-cycle review (OCR) would be conducted. On February 12, 2002, USTR

announced the outcome of the OCR and placed the Bahamas on the Watch List. USTR pointed to the failure of the Bahamas to amend certain objectionable provisions in its copyright law, and made clear that “the key concern remains the existence of provisions in the Bahamian law allowing for compulsory licensing to Bahamian cable operators of retransmission of premium cable television programming.” The Bahamas’ efforts to amend the copyright law, address remaining problems in its regulations, and engage right holders in the regulatory process have not resulted in concrete action to satisfy its bilateral commitments. In its April 30, 2002 Special 301 decision, USTR kept the Bahamas on the Watch List, and indicated that another OCR would be conducted “to review actions in this regard.” (IIPA believes that OCR did not occur.) In its 2003 301 announcement, USTR cited the same problems, and elevated the Bahamas to the Priority Watch List, and The Bahamas remained there in the 2004 301 cycle. There, USTR noted that draft legislation for amendments to correct problems in the copyright law had passed through the lower house of Parliament, and urged The Bahamas to “work to fulfill its obligations under the agreement and promptly enact these necessary amendments to the copyright law.” USTR moved The Bahamas from the Priority Watch List to the Watch List in its 2005 Special 301 Announcement. The Bahamas was praised for passing an amendment to its copyright act regarding compulsory licensing but USTR expressed concern that the amendment had not been enacted or implemented. In addition, USTR stated that, “the amendment and proposed implementing regulations contain certain deficiencies that we urge the Bahamas to address in the near term. Until this copyright amendment is properly put into effect, problems continue to persist in the area of copyright protection for U.S. cable programs and motion pictures.” As recommended by IIPA, USTR chose to keep the Bahamas on the Watch List in 2006, but removed it from the Watch List in April 2007.

The Bahamas currently participates in the Caribbean Basin Initiative (CBI), and is also an eligible beneficiary country under the Caribbean Basin Trade Partnership Act (CBPTA). One of the CBI discretionary criteria requires that the Bahamas provide “adequate and effective means under its laws for foreign nations to secure, to exercise, and to enforce exclusive rights in intellectual property, including . . . copyrights.”

BAHRAIN

IIPA did not make a submission on Bahrain in 2008, but has in years prior; see IIPA’s country page at <http://www.iipa.com/countryreports.html>.

Bahrain does not currently appear on any of the USTR lists. IIPA first recommended placing Bahrain on the Watch List in 1993, and renewed its recommendation over the next two years, citing severe video and audio piracy problems, including exports. In April 1995, USTR placed Bahrain on the Watch List. From 1996 through 1999, IIPA recommended that Bahrain remain on the Watch List because its law was out of sync with its international obligations under TRIPS, and because high piracy levels continued while enforcement was weak. USTR kept Bahrain on the Watch List through the 1998 cycle. However, due to concerted enforcement actions throughout 1998 and into 1999, USTR removed Bahrain from the Watch List in April 1999. Since it was removed from the 301 lists, Bahrain has not reappeared on any list. In 2004, the United States and Bahrain concluded negotiations toward a Free Trade Agreement, promising stronger levels of copyright protection and enforcement in Bahrain. On December 15, 2005, Bahrain joined the WCT and WPPT. In January 2006, the U.S. legislation implementing the U.S.-Bahrain FTA was signed into law by the President. In June 2006, Bahrain enacted legislation intending to implement the substantive copyright obligations of the U.S.-Bahrain Free Trade Agreement. The legislation contains some FTA-incompatible elements that will need to be fixed or will leave Bahrain in violation of the FTA. In 2007, IIPA mentioned Bahrain in its “Dispute Settlement” section, specifically highlighting deficiencies under the U.S.-Bahrain Free Trade Agreement.

BANGLADESH

IIPA recommends that Bangladesh be placed on the Watch List in 2008.

Bangladesh currently does not appear on any USTR list. In 2005 and again in 2006, IIPA highlighted concerns in Bangladesh in its Special Mention section, noting that “due to the total lack of enforcement, the overall piracy situation in Bangladesh has worsened over the last year.” In 2007, IIPA recommended that Bangladesh be placed on the Watch List, for proliferation of optical disc production capacity and major piracy problems.

See IIPA's 2008 report on Bangladesh at <http://www.iipa.com/rbc/2008/2008SPEC301BANGLADESH.pdf>. Bangladesh participates in the Generalized System of Preferences (GSP) program which includes, as one of its criteria of eligibility, that a country provides "adequate and effective" copyright protection.

BELARUS

IIPA recommends that Belarus remain on the Watch List in 2008, where it has appeared since 1999. See IIPA's 2008 Belarus country report at <http://www.iipa.com/rbc/2008/2008SPEC301BELARUS.pdf>.

In 1995 and 1997, IIPA requested that USTR add the nations of the Commonwealth of Independent States (CIS) collectively, excluding the Russian Federation, to the Special 301 Watch List because nearly all of the CIS countries had failed to meet their bilateral IPR obligations, piracy was rampant, enforcement inadequate, and copyright law reform urgently needed. In both 1998 and 1999, IIPA made individual filings focusing on concerns in Belarus, Ukraine and Kazakhstan, the countries with the most serious IPR problems in addition to the filing made for Russia. In 1998, Belarus was placed on the Other Observations list. The next year, Belarus was elevated to the Watch List. In 2000, IIPA recommended that ten of the CIS countries be placed on the Special 301 Watch List (Armenia, Azerbaijan, Belarus, Georgia, Kazakhstan, Kyrgyz Republic, Moldova, Tajikistan, Turkmenistan, and Uzbekistan). In the May 30, 2000 Special 301 Announcement, USTR kept Belarus on the Watch List. In 2001, USTR again kept Belarus on the Watch List, noting its lack of protection for U.S. and other foreign sound recordings and its lack of clear, retroactive protection for pre-existing works or sound recordings. USTR also noted weak IPR enforcement and high piracy levels. Further, though Belarus had amended its criminal code, relevant government agencies did not have the authority "to initiate criminal cases concerning copyright infringement on their own initiative." In its April 30, 2002 Special 301 Announcement, USTR again placed Belarus on the Watch List. Not only did USTR cite the continued problems noted in the 2001 announcement, but further noted that "Belarus has also become a transshipment point for pirate materials throughout the region. The United States is very concerned about recent reports that optical disk production capacity has migrated from Ukraine into Belarus due to lax border enforcement." USTR's 2003 Special 301 Announcement expressed gratification that the Armita optical media plant was shut down and that the Geneva Phonograms Convention had entered into force in Belarus. USTR also, however, restated numerous concerns from the 2001-2002 Announcements, as well as the Interior Ministry's comments that it does not intend to take action to end retail piracy of optical media. Belarus therefore remained on the Watch List in 2003. In 2004, IIPA recommended that Belarus remain on the Watch List because there were "no reports of any legal reform or enforcement success in 2003." In agreeing, USTR in its 2004 301 Announcement noted that Belarus had yet to take the several steps necessary to "fulfill its intellectual property commitments under the 1993 U.S.-Belarus Trade Agreement and to address other deficiencies in its IPR regime" which include weak enforcement, high levels of piracy, and a need to amend its copyright law to bring it into compliance with WCT and WPPT. USTR's 2005 Special 301 announcement echoed similar concerns raised in past reviews of Belarus' IPR protection and enforcement. In 2006, IIPA recommended that Belarus be retained on the Watch List. USTR agreed, and Belarus remained on the Watch List due to continued concern over failure to fulfill commitments under a bilateral agreement between the countries, and expressed its concern that

[IPR enforcement] remains weak, that piracy levels remain high, and that Belarus needs to take strong enforcement action against optical media plants that are producing pirated goods. The Belarus copyright law needs to be amended to provide adequate protection for sound recordings and pre-existing works, as well as to implement the WIPO Internet Treaties, which Belarus joined in 1998. ... [The U.S.] will continue to monitor (Belarus') progress in strengthening its IPR regime, especially in the context of Belarus' bid for accession to the WTO.

In 2007, IIPA recommended that Belarus be retained on the Watch List, and USTR did so. In June 1999, IIPA filed a petition with USTR requesting that the country eligibility of Belarus and several other CIS nations under the Generalized System of Preferences (GSP) trade program be reviewed for its failure to provide adequate

and effective copyright protection and enforcement for U.S. copyright owners, as required under the GSP. Benefits were withdrawn from Belarus for reasons unrelated to intellectual property matters.

BELIZE

IIPA did not make a submission on Belize in 2008, or in any prior years.

USTR placed Belize on the Watch List in its 2004 Special 301 Announcement citing inadequate enforcement efforts. In its 2005 Special 301 Announcement, USTR retained Belize on the Watch List stating that, "Although IPR legislation in Belize generally is consistent with international standards, the Government of Belize continued to make only minimal IPR enforcement efforts, which has led to the widespread availability of counterfeit and pirated goods." In 2006 USTR raised Belize from the Watch List to the Priority Watch List, noting that piracy is widespread, and "concerns remain about the ability and willingness of authorities to conduct inspections, seize counterfeit and pirated goods, complete prosecutions and issue deterrent sentences. A continuing concern is the lack of IPR enforcement in Belize's Corozal Commercial Free Trade Zone, through which infringing products are transshipped from Mexico to the United States and elsewhere." USTR lowered Belize to the Watch List in 2007.

Belize currently participates in the Generalized System of Preferences (GSP) program, a U.S. trade program that offers preferential trade benefits to eligible beneficiary countries. One of the discretionary criteria of this program is that the country/territory provides "adequate and effective protection of intellectual property rights."

BOLIVIA

IIPA did not make a submission on Bolivia in 2008, but has in years prior. See IIPA's country reports page at <http://www.iipa.com/countryreports.html>.

To recap, in February 1995, IIPA recommended that Bolivia be added to the Special 301 Watch List because of widespread piracy of all kinds of copyrighted works unchallenged by any meaningful government enforcement efforts. In 1996, IIPA again advocated that Bolivia be placed on the Watch List; USTR placed it on the Special Mention list and added an out-of-cycle review (OCR). In December 1996, upon conclusion of the OCR, USTR announced that Bolivia was being elevated to the Watch List because it had not yet taken adequate steps to combat copyright piracy, particularly in the area of illegal computer software production; to adequately implement the Andean Pact Decision 351 on copyright requirements; or to revise its copyright law to conform with international standards. Bolivia stayed on the Watch List in 1997. In April 1998, Bolivia signed a bilateral investment treaty with the U.S. and in so doing, committed to becoming TRIPS-compatible within 12 months. As a result, USTR placed Bolivia on the Other Observations list for 1998. However, USTR has kept Bolivia on the Special 301 Watch List since 1999.

After a several year hiatus, in 2002, IIPA recommended that Bolivia remain on the Watch List, pointing to that country's continued high piracy rates and failure to meet basic TRIPS standards. USTR's April 30, 2002 Special 301 Announcement again placed Bolivia on the Watch List but noted that "[t]he United States is heartened by the appointment of a new director to head the intellectual property rights service (SENAPI), and encourages Bolivia to support the director's efforts to improve the IPR situation in Bolivia." The USTR 2003 Special 301 Announcement also kept Bolivia on the Watch List, noting "efforts to amend its copyright law have languished," and adding that "the government has not taken significant steps toward legalizing the use of its own software." In 2004, IIPA recommended that Bolivia remain on the Watch List. USTR agreed in its Special 301 Announcement citing, among other things, "sporadic and largely ineffective" enforcement efforts, weak border enforcements, and disappointing court enforcements of IPR law. USTR did note that Bolivia had "publicly committed itself to transparency and has demonstrated at multiple levels a desire to work with the United States." In its 2005 Special 301 Announcement, USTR retained Bolivia on the Watch List. IIPA recommended that Bolivia remain on the Watch List for 2006. USTR agreed, as there had been no notable improvements to its IPR regime, and noting that Bolivia's copyright laws are inadequate, IPR enforcement is weak, and "U.S. copyright industry continues to report that music piracy in Bolivia is so rampant that all

international recording companies have closed their offices in Bolivia.” The U.S. urged Bolivia “to increase its IPR enforcement efforts, including providing for civil *ex parte* searches, preventing unwarranted delays in civil enforcement, providing adequate civil and criminal damages in copyright cases, and strengthening border measures.” IIPA did not make a submission on Bolivia in 2007. USTR retained Bolivia on the Watch List in 2007.

With respect to other trade programs, in 1995, IIPA requested that USTR initiate investigations of Bolivia’s copyright practices under the statutory provisions of the GSP and ATPA programs, both of which include discretionary criteria that the country provide “adequate and effective” copyright protection. IIPA never received notice of any formal action taken on its 1995 GSP and ATPA petitions, thus concluding they were denied.

BOSNIA AND HERZEGOVINA

IIPA did not make a submission on Bosnia and Herzegovina in 2008, but has in various years prior. See IIPA’s country reports page at <http://www.iipa.com/countryreports.html>. To date, Bosnia and Herzegovina has not appeared on a USTR Special 301 list. This country is a beneficiary country of the GSP trade program.

BRAZIL

IIPA recommends that Brazil remain on Watch List in 2008. See IIPA’s 2008 Brazil country report at <http://www.iipa.com/rbc/2008/2008SPEC301BRAZIL.pdf>.

Over the years, Brazil has received a significant degree of attention from the U.S. Government under the Special 301 bilateral trade tool. On April 30, 1993, USTR designated Brazil as a Priority Foreign Country. As a result of the ensuing Section 301 investigation, the Brazilian Government committed in a February 1994 diplomatic agreement to take certain concrete steps to improve its IPR regime, including the early implementation of TRIPS, improving protection for computer software, addressing certain tax issues affecting computer software, and improving copyright enforcement in general. Over the next few years, Brazil’s placement on the Special 301 lists seesawed between the Priority Watch List and the Watch List. On May 1, 1998, USTR removed Brazil from the Special 301 list, in recognition of its legislative accomplishments on copyright legal reform, adding: “However, Brazil must take further significant steps to combat piracy.” In February 1999, IIPA recommended that Brazil be elevated to the Priority Watch List because of the continuing failure of that government to address the rising piracy problems and deteriorating enforcement actions by the government authorities despite very active participation in anti-piracy efforts by the affected copyright industries. USTR put Brazil back on the Watch List in April 1999, noting that “the lack of effective enforcement is a serious and growing concern. Some efforts have been made to improve copyright enforcement, but these efforts have fallen short given the scale of the piracy problem in Brazil and the absence of a coordinated strategy on the part of the government. We have particular concerns with proposed legal reforms that could reduce criminal penalties for intellectual property crimes and remove policy authority to engage in *ex officio* searches and seizures on their own initiative ... We also look to the Brazilian Government to ensure full implementation of all TRIPS obligations, including enforcement obligations, no later than January 1, 2000.” The 2000 deadline came and went. Despite IIPA’s recommendation that Brazil be elevated to the Priority Watch List, USTR kept Brazil on the Watch List, and noted in the May 1, 2000 Special 301 Announcement: “... Progress has not been sufficient on Brazil’s commitment to increase effective enforcement actions, from raids through judicial decisions, against intellectual property infringement; the rate of CD piracy in Brazil continues to worsen. Failure to address this problem could lead to the collapse of the market for legitimate CDs in Brazil.”

In 2001, USTR kept Brazil on the Watch List, noting that “[t]he serious copyright piracy problem shows little sign of abatement.” Despite this, USTR was “pleased to see the establishment of an Inter-Ministerial Committee to Fight Piracy pursuant to the Presidential Decree of March 2001.” In its 2002 Special 301 submission, IIPA recommended that Brazil be elevated to the Priority Watch List. In its April 30, 2002 Special 301 Announcement, USTR did in fact elevate Brazil to the Priority Watch List. The announcement noted that despite enacting modern, largely TRIPS-consistent legislation, the country has taken “no serious enforcement actions against increasing rates of piracy.” Despite encouragement from some positive moves by the Brazilian

Government, including the income tax authority's destruction of a large amount of seized pirated goods, and São Paulo's creation of a piracy and related crimes division in the civil police force, USTR notes that there are still enforcement problems. For example, the Inter-Ministerial Committee has "taken very little action on the anti-piracy front." The USTR's 2003 Special 301 Announcement commented on the continued lack of enforcement actions, noting "very few prosecutions and deterrent convictions result from raids." Brazil therefore remained on the Priority Watch List.

In 2004, IIPA recommended that Brazil remain on the Priority Watch List; USTR agreed, noting that "Brazil continues to fall short in providing adequate and effective protection of IPR." Despite positive developments regarding "the formation and activities of the Brazilian Congress' Chamber of Deputies' Commission of Parliamentary Inquiry on piracy and amendments to the criminal code, protection has not significantly improved." The Announcement noted that USTR plans to continue monitoring Brazil's progress in these areas, "including through the ongoing GSP review that was initiated by USTR in 2001." Despite various efforts and initiatives during 2004, such as the adoption of a National Action Plan by Brazil's National Council to Combat Piracy and Intellectual Property Crimes, USTR retained Brazil on the Priority Watch List again in 2005. In 2006, IIPA recommended that Brazil be moved from the Priority Watch List to the Watch List, and that an out-of-cycle-review (OCR) be conducted later in the year. In recognition of significant improvements, including the formation of a public-private National Anti-Piracy Council and development of a national action plan by Brazil's National Council to combat piracy and IP crimes, USTR terminated a review of whether to remove Brazil's benefits under GSP because of inadequate copyright enforcement. However, because piracy levels remain high and criminal prosecutions minimal (along with issues related to the patent industry), Brazil remained on the Priority Watch List for 2006. In 2007, IIPA recommended that Brazil be placed on the Watch List in light of progress made; USTR did place Brazil on the Watch List and added an out-of-cycle review in 2007 (no decision has been announced as of this 2008 301 filing), noting: "This decision recognizes Brazil's considerable progress in enhancing copyright enforcement. Brazil's National Anti-Piracy Council is increasingly recognized as a model of public-private collaboration in the area of IP enforcement. In addition, the Brazilian Government's national action plan to address piracy and IP crimes has produced continuing positive results, particularly through effective police actions. While piracy and counterfeiting still exist at high levels and criminal prosecutions often lag police actions, Brazil merits recognition for its vigorous efforts. The United States looks forward to a continued healthy dialogue with Brazil on IP issues, including through the U.S. – Brazil Bilateral Consultative Mechanism and the U.S. – Brazil Commercial Dialogue."

In addition to 301 activities, the copyright industries over the years have invoked additional trade leverage, specifically, that of the GSP trade program. Five years ago, IIPA's dissatisfaction with the progress being made by Brazil to enforce its copyright law led IIPA to file a petition with USTR in August 2002, requesting that Brazil's eligibility under the Generalized System of Preferences (GSP) trade program be reviewed for its failure to provide adequate and effective copyright protection and enforcement for U.S. copyright owners. The petition was accepted, and hearings were held in March 2001 and October 2003. In July 2004, USTR initiated a 90-day review of Brazil's efforts to enforce copyrights. In December 2004, USTR announced that it would again extend review of Brazil's GSP eligibility for an additional 180 days, until March 2005. In its 2005 Special 301 announcement, USTR revealed that Brazil's GSP review would be extended, for a third time, until September 2005. During 2005, there was a significant positive shift by Brazilian Government officials in addressing the rampant piracy problem, with increased seizures and public awareness efforts. USTR ended Brazil's GSP review in January 2006. While IIPA supported this decision, we noted that sustained and concrete results were still needed for reduce the high levels of copyright piracy and obtain deterrent criminal sentences. Brazil is a beneficiary country under the GSP trade program.

BULGARIA

IIPA provides an update on the situation in Bulgaria in 2008 but makes no recommendation as to listing on any Special 301 list; see IIPA's 2008 Bulgaria country report at <http://www.iipa.com/rbc/2008/2008SPEC301BULGARIA.pdf>.

To recap, by 1995, it was clear that not only had Bulgaria failed to carry out its intellectual property protection obligations under the 1991 bilateral agreement with the United States, but also that the Bulgarian Government

had begun to play a direct role in massive piracy. One of the compact disc plants was operated by the government in partnership with a leading pirate company; another was operating on land leased by the government; and both were churning out pirated sound recordings for export into Russia, Europe, and other markets. Accordingly, in February 1995, IIPA asked USTR to designate Bulgaria as a Priority Foreign Country and to withdraw Bulgaria's preferential trade benefits under the Generalized System of Preferences (GSP) program. Faced with the prospect of sanctions under Special 301, and aided by a change in government in Sofia, Bulgaria moved quickly to address the issues highlighted in IIPA's filing. On the eve of USTR's Special 301 decision, the U.S. and Bulgaria exchanged letters in which Bulgaria promised to accede to the Geneva Phonograms Convention "on a priority basis" and to protect U.S. sound recordings published in the last 50 years; to establish a title-verification system to prevent piracy of compact discs, laser discs, CD-ROMs and videos; and to enact deterrent criminal penalties applicable to a broad range of infringements, including inflation-adjusted fines and mandatory destruction of pirate product. In response to these commitments, USTR listed the country on its Special Mention list without otherwise ranking it for Special 301 purposes for 1995.

In 1996, the IIPA filing commended Bulgaria's enactment of criminal sanctions and its accession to the Phonograms Convention, but noted that other critical commitments, such as title verification, had not been met, and that real enforcement against piracy was virtually nonexistent, while high-volume pirate CD production continued unchecked. IIPA recommended that Bulgaria be placed on the Special 301 Watch List. In its April 30 report, USTR listed Bulgaria on the Special Mention list, noting that a title verification decree had just been issued, but criticizing lax enforcement and increased exports of pirated product. It scheduled an out-of-cycle review (OCR), which concluded on October 2, 1996. At that time, USTR placed Bulgaria on the Watch List, citing the lack of progress in suppressing the production and export of pirate CDs and CD-ROM products. In its 1997 filing, IIPA called for elevating Bulgaria to the Priority Watch List because of its continued failure to enforce its laws aggressively against the unauthorized production and world-wide export of CD-based products, and the overall lack of criminal prosecution. IIPA noted that deterrent penalties remained absent from the Bulgarian law, although the primary problem was the lack of effective enforcement, not the legal framework. As the piracy problem escalated in 1997 with a production capacity level of over 40 million units, USTR announced an OCR. Upon completion of the OCR in January 1998, Bulgaria was elevated from the Watch List to the Priority Watch List because of its persistent failure to take any meaningful action to eliminate the massive volume of exported pirate music CDs and CD-ROMs. In that January OCR, and again in its February 1998 301 submission, IIPA recommended designation of Bulgaria as a Priority Foreign Country (PFC) because of the longevity of the problem, and the lack of political will to shut down the production and export of illegal goods.

With the possibility looming of a PFC designation in April 1998, the Bulgarian authorities finally took action in February and March 1998, to control the production and distribution of pirate CDs by Bulgarian plants by closing all of the plants and re-opening them only upon compliance with the newly introduced Plant Licensing Decree. The United States Government decided to keep Bulgaria on the Priority Watch List in April, and to conduct a six-month OCR in 1998 to monitor the progress and success of these production controls. Satisfied that progress was being made, USTR announced in November 1998 that it was moving Bulgaria to the Watch List, a placement supported, albeit cautiously, by IIPA. At the time of the announcement in November 1998, both USTR and IIPA agreed that title verification had to be significantly improved, and that additional controls on optical media production were required. In USTR's April 1999 Special 301 Announcement, progress in Bulgaria was noted, and in recognition of its "firm commitment to effective enforcement" of its IPR laws and its roles as serving as "a model for other economies which are at risk of developing unwanted production capacity of pirated optical media," Bulgaria was removed from all Special 301 lists. In 2002, IIPA recommended that Bulgaria be placed on the Watch List, noting resurging problems with the production, distribution, and importation of optical disc media. Though Bulgaria was not placed on any 301 list in 2001 or 2002, USTR's April 30, 2002 announcement stated that "based on recent reports of increased piracy in Bulgaria, the United States will be closely monitoring the situation and will look to the Government of Bulgaria to ensure the maintenance of the Optical Disk (OD) regulations." USTR noted that despite Bulgaria's reputation for tackling optical media piracy, "we are concerned by reports that it may weaken its optical media control regime." Despite IIPA's request to add Bulgaria to the Watch List in 2003, USTR choose to keep Bulgaria off the lists, noting again that increased piracy and revisions to CD planting licensing laws may be being revised to undermine their effectiveness. IIPA recommended Bulgaria be added to the Priority Watch List in its Special

301 Report for 2004. USTR, in its 2004 Special 301 Announcement, placed Bulgaria on the Watch List for the first time in 5 years due to a “steady resurgence of piracy, mainly in the sale of pirated optical disc media, in Bulgaria over the past few years.” USTR cited “poor enforcement, including ineffective prosecutions, minimal judicial sentences, shortcomings in current and draft legislation, and lax border measures” as contributing to this resurgence.

In USTR’s 2005 Special 301 announcement, Bulgaria remained on the Watch List for many of the previously raised issues including rampant optical disc piracy, lack of an effective criminal code and problems with enforcement measures. Although improvements have been noted during 2005, IIPA recommended that Bulgaria remain on the Watch List in 2006. USTR agreed and retained Bulgaria on the Watch List in 2006. Further action is needed, including “sustained and consistent enforcement activities, devoting sufficient resources to combat piracy and counterfeiting, improving IPR legislation, and attacking the growing problem of Internet piracy. In particular, Bulgaria’s Government should make judicial enforcement in the courts a priority.” In 2007, IIPA recommended that Bulgaria be added back to the Watch List, but USTR did not choose to place Bulgaria on any list in 2007. Bulgaria’s eligibility as GSP beneficiary country ended when , it joined the European Union on January 1, 2007.

BURMA (MYANMAR)

Burma (Myanmar) has never appeared on any USTR list. IIPA did not make a submission on Burma (Myanmar) in 2008. See IIPA’s country reports page at <http://www.iipa.com/countryreports.html>. In 2005 and again in 2006, IIPA noted copyright concerns in its Special Mention section. Specifically in 2006, IIPA noted that “because, like its Southeast Asian neighbors, the potential for migration into its territory of sources of production of piracy, including optical disc plants, gives rise to our collective concern.” In the 2007 Thailand country report, IIPA noted pirate imports from Burma (Myanmar) into Thailand.

CAMBODIA

Cambodia has never appeared on a USTR Special 301 list. IIPA did not submit a recommendation on Cambodia in 2008, but has specially mentioned it in the past, due to its location, the potential for migration of more optical disc plants remains a possibility. See IIPA’s country reports page at <http://www.iipa.com/countryreports.html>.

In its 2003 submission, IIPA also highlighted concerns in IIPA’s Special Mention section, citing concerns over migration of optical disc plants. In its 2004 Special Mention section, IIPA highlighted certain legislative and enforcement deficiencies, particularly the lack of an optical disc regulation, which, if passed, would help insulate Cambodia from potential migration of optical disc plants from neighboring countries. In the 2005 Special Mention section, IIPA noted that “Given the country’s location, the potential for migration of more optical disc plants engaged in piracy remains a concern.” IIPA continued to include Cambodia in its Special Mention section in 2006, since it “is still believed there is one optical disc plant in the capital, and due to its location, the potential for migration of more optical disc plants remains a possibility.”

Cambodia currently participates in the Generalized System of Preferences (GSP) program which includes as one of its criteria of eligibility that a country provides “adequate and effective” copyright protection.

CANADA

In 2008, IIPA again recommends that Canada be elevated to the Priority Watch List. See <http://www.iipa.com/rbc/2008/2008SPEC301CANADA.pdf>.

For more than a decade, USTR has kept Canada on the Watch List for a variety of copyright and patent concerns as well as poor border enforcement. In its 2004 Special 301 Announcement, USTR placed Canada on the Watch List for making “little headway in addressing long-standing intellectual property issues related to

copyright and patent reform such as ratification of the WIPO Internet treaties.” Furthermore, USTR noted that “progress has stalled on the outstanding issue of national treatment of U.S. artists in the distribution of proceeds from Canada’s private copying levy and its ‘neighboring rights’ regime.” In 2005, USTR noted that Canada continued to exhibit deficiencies in the areas of border protection and IPR enforcement and had not yet ratified and implemented the WIPO Internet Treaties. Accordingly, Canada was retained on the Watch List by USTR in its Special 301 2005 announcement. Following the recommendations of IIPA, Canada remained on the Watch List in April 2006, and the United States announced that it would “conduct an out-of-cycle-review (OCR) to monitor progress on IPR issues under the leadership of its new government,” Noting that it would be looking to the new government to make progress on IPR issues a priority in the coming year, including the ratification and implementation of the WIPO Internet Treaties and amendment of the copyright law to provide protection of copyrighted works in the digital environment. The United States encouraged Canada to “provide an adequate and effective IPR protection regime that is consistent with its international obligations and its advanced level of economic development, including improved border enforcement, ratification and implementation of the WIPO Internet Treaties, and strong data protection,” On January 8, 2007, IIPA urged that USTR elevate Canada to the Priority Watch List in its OCR recommendation. Since USTR had not completed the OCR before the February 2007 Special 301 deadline, IIPA repeated the call to elevate Canada to the Priority Watch List in 2007. USTR, however, again kept Canada on the Watch List in 2007.

CHILE

In 2008, IIPA recommends that Chile remain on the Priority Watch List. See IIPA’s 2008 Chile country report at <http://www.iipa.com/rbc/2008/2008SPEC301CHILE.pdf>.

In 2001, IIPA recommended that Chile be placed on the Watch List due to continued high piracy levels. USTR placed Chile on the Watch List in 2001, noting in its April 30, 2001 Special 301 Announcement that “Chile’s intellectual property laws are not fully consistent with its international obligations.” The announcement pointed specifically to Chile’s failure to enact TRIPS-compliant legislation. USTR also noted that “[i]nadequate enforcement against piracy and counterfeiting also remains a serious problem.” In 2002, IIPA recommended that Chile remain on the Watch List, pointing to the country’s significant piracy problems and enforcement failures. In its April 30, 2002 Special 301 Announcement, USTR again placed Chile on the Watch List, noting deficiencies in both legislation and enforcement. USTR’s 2003 Special 301 Announcement retained Chile on the Watch List, even after the Chile FTA negotiations were announced. In 2004, IIPA recommended that Chile be placed on the Watch List. In its Special 301 Announcement, USTR agreed, keeping Chile on the Watch List. However, USTR noted that the U.S.-Chile FTA agreement, entered into on January 1, 2004, coupled with two amendments to the copyright law that sought to implement the FTA and TRIPS, pointed toward better protection of IPR in Chile. Additional legislative efforts continued in 2004, and the industries remain concerned about these new efforts. With its decision to keep Chile on the Watch List in its 2005 Special 301 Announcement, USTR noted that despite Chile’s attempts to bring its protection of IPR into compliance with FTA and TRIPS, “Copyright piracy is still a serious problem in Chile.”

IIPA recommended that Chile be elevated to the Priority Watch List in 2006. USTR retained Chile on the Watch List for 2006, and stated that it would conduct an out-of-cycle-review (OCR) to monitor progress on IPR issues. “The copyright piracy situation in Chile has not improved since last year, and digital piracy is a growing problem. Significant amendments to Chile’s IPR legislation are needed to bring Chile’s IPR regime in line with its international and bilateral commitments.” Greater efforts are needed “to meet standards set in the TRIPS Agreement, the United States – Chile Free Trade Agreement (FTA) and other international agreements.” In the OCR, IIPA recommended that Chile be elevated to the Priority Watch List, and USTR did so, on January 8, 2007. IIPA recommended that Chile remain on the Priority Watch List in 2007, and USTR agreed in April 2007.

The U.S.-Chile FTA entered into effect on January 1, 2004. For years, Chile participated in the Generalized System of Preferences (GSP) program, a trade program that offers preferential trade benefits to eligible beneficiary countries and includes an IPR discretionary criterion for eligibility. Chile’s participation in the GSP program basically ended when the FTA entered into force.

COLOMBIA

IIPA did not make a submission on Colombia in 2008, but has in years prior; see IIPA's country page at <http://www.iipa.com/countryreports.html>. IIPA continues to support the U.S.-Colombia FTA, which is facing a likely vote in the U.S. Congress in the late winter/spring 2008.

Between 1989 and 2001, Colombia was on the Special 301 Watch List for problems involving copyright enforcement and inadequate patent and trademark legislation. In 1997, USTR noted that “[p]iracy continues to be a significant problem and that the Television Broadcast Law discriminated against foreign content.” Because of the need for the Colombian Government to license pay-TV operators and improve enforcement efforts, IIPA recommended that Colombia be elevated to the Priority Watch List in 1998. In 1998, USTR kept Colombia on the Watch List, and added an out-of-cycle review (OCR) in December 1998. In October 1998, President Clinton met with President Pastrana and they initiated consultations on a bilateral investment treaty. One of the key elements of the 1998 OCR was whether or not the Colombian Government would issue licenses to cable TV operators. In 1999, USTR kept Colombia on the Watch List, noting that although the Colombian Attorney General had initiated legal action against 108 television operators, “Colombia has still to resolve the major issue USTR highlighted in its December [1998] OCR — failure to license legitimate pay television operators and pursue pirate operators.” USTR also added a September 1999 OCR to measure Colombia's progress. Progress was made on issuing these licenses, and on December 17, 1999, USTR announced its decision to keep Colombia on the Watch List as a result of the September 1999 OCR. Colombia remained on the Watch List in 2000 in large part because of insufficient enforcement of copyright laws and high piracy levels. USTR's April 30, 2001 Special 301 Announcement noted that “current enforcement efforts and penalties have not proven to be a significant deterrent.” In 2002, IIPA recommended that Colombia remain on the Watch List and that an OCR be conducted to monitor legislative and enforcement improvements. In the April 30, 2002 Special 301 Announcement, USTR elevated Colombia to the Priority Watch List. USTR pointed to a need for stronger IPR enforcement, noting that despite occasional seizures of pirated and counterfeit goods, “prosecutions rarely follow.” Despite continued high levels of piracy (especially in the home video market), USTR noted Colombia's exemplary progress in the area of data protection, and the 2003 USTR Special 301 Announcement downgraded Colombia from the Priority Watch List to the Watch List.

In its 2004 Special 301 Report, IIPA recommended that Colombia be placed back on the Priority Watch List, noting that piracy, especially in the music sector, continued to dominate the Colombian market. USTR kept Colombia on the Watch List for 2004, noting that despite a continued demonstration by the Colombian Government to strengthen IPR protection, problems continue, such as high levels of piracy and a lack of successful prosecutions for violations of IPR. Many of the same problems with Colombia's IPR regime were cited when USTR decided to retain Colombia on the Watch List in its 2005 Special 301 announcement. In 2006, IIPA again recommended that Colombia be elevated to the Priority Watch List, but USTR retained Colombia on the Watch List. Negotiations on the U.S.–Colombia Trade Promotion Agreement were concluded in February 2006, and the United States expects to see continued progress in implementation of its IPR commitments. Further improvements are needed in “addressing copyright piracy, conducting effective prosecutions, imposing deterrent sentences by courts and completing other IPR enforcement initiatives.” A congressional vote on this agreement is pending. In February 2007, IIPA recommended that Colombia remain on the Watch List, and USTR kept Colombia on the Watch List in 2007.

Colombia currently participates in both the Generalized System of Preferences (GSP) program and the Andean Trade Preferences Act (ATPA), U.S. trade programs that offer preferential trade benefits to eligible beneficiary countries. After the trade promotion agreement enters into effect, these benefits will end. One of the discretionary criteria of these programs is that the country provide “adequate and effective protection of intellectual property rights.”

COSTA RICA

For the third consecutive year, IIPA recommends that Costa Rica be elevated to the Priority Watch List in 2008. See IIPA's 2008 Costa Rica country report at <http://www.iipa.com/rbc/2008/2008SPEC301COSTARICA.pdf>.

To recap this 301 story, Costa Rica was placed on the Special 301 Watch List in 1995, for problems associated with inadequate patent protection and inadequate copyright enforcement. In the April 30, 2001 Special 301 Announcement, Costa Rica was placed on the Priority Watch List. USTR noted that "there is growing concern regarding the lack of effective enforcement activity by the Government of Costa Rica." The United States "urge[d] Costa Rica to improve coordination of enforcement activities between public prosecutors and investigators; appoint special prosecutors to take on intellectual property cases; create a coordinated nationwide plan for defending and enforcing IP rights; and improve enforcement-related training at all levels of government." In addition, the announcement noted that "[t]he United States will conduct an out-of-cycle review in the fall to assess Costa Rica's legislative enforcement." On October 31, 2001, USTR announced its decision regarding the out-of-cycle review. Because "little progress has been made on the four-point list of enforcement-related actions in USTR's April 30 announcement," Costa Rica remained on the Priority Watch List. In 2002, IIPA recommended that Costa Rica remain on the Priority Watch List, until concrete results were obtained in the improvement of its enforcement regime. In its April 30, 2002 Special 301 Announcement, USTR downgraded Costa Rica, placing it on the Watch List. USTR noted Costa Rica's "concerted government strategy for improving the enforcement of intellectual property rights [including] ... appoint[ing] specialized prosecutors, intensif[y]ing training activity for officials involved in enforcement, and implement[ing] a decree focused on legitimizing software used by government agencies." In its 2003 Special 301 Announcement, however, USTR pointed out several deficiencies, including "two amendments to improve penalties and enforcement infrastructures [that are] pending and an executive decree on data exclusivity [that] has yet to be signed." These failures, along with other problems such as delays in judicial proceedings and lack of official investigators, necessitated Costa Rica's continued placement on the Watch List. In 2004, IIPA highlighted copyright concerns in Costa Rica in its Special Mention section. That year, USTR kept Costa Rica on the Watch List, noting in its Special 301 Announcement that the country needed to "improve its criminal and civil systems of intellectual property," and "make significant modifications and clarifications in the area of data protection."

USTR commended Costa Rica's joining of the Central American Free Trade Agreement, and hoped that as Costa Rica begins to come into compliance with these agreements, it will solve some of its IPR problems. Citing continued problems with Costa Rica's data protection measures and IPR enforcement, USTR retained Costa Rica on the Watch List in 2005. In 2006, IIPA recommended elevating Costa Rica to the Priority Watch List, but USTR kept Costa Rica on the Watch List, with USTR citing concerns of inadequate copyright protection, criminal and civil enforcement, and border enforcement. In 2007, IIPA recommended that Costa Rica be elevated to the Priority Watch List, but USTR kept Costa Rica on the Watch List in April 2007. Costa Rica was the last trading partner to ratify the U.S.-CAFTA-DR, and it is expected to enter into force in late February 2008. Once the FTA enters into force in Costa Rica, it will cease to benefit from a variety of U.S. trade programs.

CROATIA

IIPA did not make a submission on Croatia in 2008, but has in various years prior. See IIPA's country reports page at <http://www.iipa.com/countryreports.html>.

In 2005, IIPA highlighted copyright concerns in Croatia in IIPA's Special Mention section. On October 10, 2002, USTR announced that it was conducting several out-of-cycle reviews (OCRs), including one on Croatia. The results of that review were never made available, though we note that the country was elevated to the Watch List in 2003. In both its 2002 and 2003 Special 301 submissions, IIPA identified piracy and copyright enforcement-related problems in Croatia, but did not make a formal 301 ranking recommendation. In its 2003 Special 301 Report, USTR noted that "Croatia's otherwise strong protection and enforcement of intellectual

property rights . . . is undermined by inadequate protections in the patent area and delayed judicial decision-making.” They urged Croatia to ratify and implement the 1998 bilateral Memorandum of Understanding Concerning Intellectual Property Rights and to maintain criminal copyright enforcement. In the meantime, Croatia was placed on the Watch List. Croatia remained on the Watch List in 2004. In its Special 301 Announcement, USTR noted that even though Croatia ratified the 1998 U.S.-Croatian MOU Concerning Intellectual Property Rights, problems still persist, notably within the country’s patent regime. Croatia was retained on the Watch List in USTR’s 2005 Special 301 Announcement. Again in 2006, Croatia remained on the Watch List due to limited progress on IPR issues. Of great concern is inadequate border enforcement, contributing to the “growing importation of pirated goods into Croatia.”

Croatia currently participates in the Generalized System of Preferences (GSP) program, a U.S. trade program that offers preferential trade benefits to eligible beneficiary countries. One of the discretionary criteria of this program is that the country provide “adequate and effective means under its laws for foreign nations to secure, to exercise, and to enforce exclusive rights in intellectual property, including . . . copyrights.”

CYPRUS

Cyprus does not currently appear on any of the USTR lists. IIPA did not make a submission on Cyprus in 2008, but has in years prior. See IIPA’s country reports page at <http://www.iipa.com/countryreports.html>.

Cyprus was on the Special 301 Watch List from 1991 through 1994. In 1993, because of widespread piracy and an untenable delay in the effective date of amendments to the Cypriot copyright law, IIPA filed a petition with USTR, requesting that Cyprus lose its beneficiary country status under the Generalized System of Preferences (GSP) program. On September 21, 1993, USTR announced that it would conduct an “expedited review” against Cyprus; at that time, Ambassador Kantor warned that “[s]uspending criminal copyright penalties is unprecedented, and we view it with utmost seriousness.” Three months later, on December 22, 1993, Ambassador Kantor announced his decision to suspend GSP benefits to Cyprus, but he deferred the suspension because Cyprus intended to implement amendments to its copyright law on January 1, 1994. On June 30, 1994, USTR terminated the GSP review because there was a significant improvement in enforcement efforts which resulted in increases in sales of legitimate product and a decrease in piracy after the criminal penalties entered into effect. In April 1995, Cyprus was placed on USTR’s Special Mention list, primarily due to improvements in copyright enforcement. In the April 1996 Special 301 Announcements, USTR acknowledged that while Cyprus had made progress in its copyright enforcement efforts, the administration would be monitoring efforts by the Cypriot Government to continue to act aggressively against piracy of software and of video and audio recordings. In keeping Cyprus on the Special Mention list in 1997, USTR notified Cyprus that USTR expected that the Government of Cyprus would act expeditiously to implement fully its TRIPS obligations. In 1998, IIPA recommended the placement of Cyprus on the Other Observations list (formerly known as the “Special Mention list”). Cyprus has not been on a USTR list since 1997. In 2006, IIPA included Cyprus in its Special Mention section as a result of high piracy in the audiovisual, sound recording, and entertainment software sectors.

CZECH REPUBLIC

IIPA did not file on the Czech Republic in 2008, but has in prior years; see IIPA country report page at <http://www.iipa.com/countryreports.html>. In January 2008, USTR placed the Czech Republic on the 301 Watch List.

In April 1990, the former state of Czechoslovakia was one of the first Eastern European countries to sign a bilateral trade agreement with the U.S. which incorporated intellectual property rights commitments. Revisions to the 1965 Copyright Act were adopted effective June 1, 1990, adding protection for computer programs and increasing the term of protection for audiovisual works and sound recordings. When the Czech Republic split from the former Czechoslovakia on January 1, 1993, it acknowledged its successor interest to the trade agreement, as well as to the text and effect of the copyright law and its treaty relations. In early 1996, further amendments to the law were made that improved protection, in particular, for computer programs and sound

recordings. The Czech Republic appeared on the Special 301 Special Mention list for the first time in 1997, after IIPA recommended that the Czech Republic be placed on the Watch List because of its poor enforcement record. Since 1998, IIPA has recommended that the Czech Republic be placed on the Watch List. USTR has agreed, and the Czech Republic was on the Watch List in 1998, 1999, and 2000. USTR also noted in its May 1, 2000 Special 301 Announcement the possible initiation of a future WTO dispute settlement case against the Czech Republic for noncompliance with TRIPS obligations. IIPA recommended that the Czech Republic be placed on the Watch List in 2002 and 2003, but that did not happen. When Czech Republic joined the European Union on May 1, 2004, the Czech Republic was graduated from the U.S. Generalized System of Preferences (GSP) trade program, a program which requires, among other elements, the adequate and effective protection of U.S. copyrights. In 2006, IIPA highlighted copyright concerns in the Czech Republic in the Special Mention section of its 301 submission to USTR. In 2007, IIPA did not file a recommendation on Czech Republic. USTR conducted an out-of-cycle review for Czech Republic in 2007, and in January 2008 placed it on the Watch List, primarily for weak border enforcement.

DOMINICAN REPUBLIC

IIPA recommends that the Dominican Republic remain on the Watch List in 2007. See IIPA's 2008 Dominican Republic country report at http://www.iipa.com/rbc/2008/2008SPEC301DOMINICAN_REPUBLIC.pdf.

Special 301 is not the only trade forum in which the copyright industries have engaged the Dominican Republic. In June 1999, IIPA filed a GSP/CBI petition against the Dominican Republic for its failure to provide adequate and effective copyright protection and enforcement to U.S. copyright owners, one of the key criteria of both programs. IIPA's petition was accepted by USTR in February 2000 and hearings were held in May 2000 and again in October 2003. In July 2004, USTR announced that it had closed the review, citing "positive steps taken by the [Dominican Republic] in conjunction with the recently concluded U.S.-Central American FTA (CAFTA), which includes binding . . . intellectual property provisions." That review was, in fact, the second GSP IPR review brought by the copyright industry. In June 1992, the Motion Picture Association (MPA) filed a GSP petition against the Dominican Republic for its failure to afford adequate and effective copyright protection to U.S. copyright owners of motion pictures due to the unauthorized retransmission of U.S. films and television programming by broadcasters and cable system operators. USTR accepted that petition, and in 1993 the Dominican Republic took a number of initial steps to address those serious problems. Although piracy remained a serious concern, the Dominican Government made promises for improvement, and MPA withdrew its GSP petition in September 1994.

With respect to Special 301 placements, USTR placed the Dominican Republic on the Special 301 Other Observations list in 1996 to encourage it to address the shortcomings in its intellectual property regime. In its 1997 Special 301 decisions, USTR elevated the Dominican Republic to the Watch List because of persistent piracy problems, especially involving broadcast and cable piracy. In February 1998, IIPA recommended elevating the Dominican Republic to the Priority Watch List for its continued and persistent failure to improve enforcement to address widespread piracy and to engage in legal reform. In 1998, USTR followed IIPA's recommendation, and elevated the Dominican Republic to the Priority Watch List. The Dominican Republic has remained on the Priority Watch List every year since then. In the April 30, 2001 Special 301 Announcement, USTR noted that "[t]here have been substantial improvements in the copyright area, especially with the passage of TRIPS-conforming law and the impressive efforts on the part of the National Copyright Office (ONDA). Nonetheless, there continues to be concern with respect to the enforcement of the new copyright law, and enforcement coordination between ONDA and the police remains poor." In 2002, IIPA recommended that the Dominican Republic stay on the Priority Watch List in order that there be continued progress on effective implementation and enforcement of the copyright law. In its April 30, 2002 Special 301 Announcement, USTR kept the Dominican Republic on the Priority Watch List, noting enforcement difficulties and the "widespread sale of pirated materials." USTR's 2003 Special 301 Announcement revealed that the Government of the Dominican Republic (GODR) took several important steps in 2002-2003. As part of its aggressive campaign against piracy, the GODR "initiated inspections of two television stations and submitted evidence of piracy to the Attorney General for prosecution, and initialed action against a third station." Furthermore, GODR appointed an intellectual property rights committee to review the patent law and bring it into compliance with TRIPS. The changes made by the committee were then announced in an executive decree. These steps were

sufficiently progressive for USTR to move the Dominican Republic from the Priority Watch List to the Watch List. In 2004, IIPA recommended that the Dominican Republic be elevated to the Priority Watch List, noting the problems surrounding the “government’s questionable commitment to effective and transparent copyright enforcement.” In keeping the Dominican Republic on the Watch List, USTR reported in its 2004 Special 301 Announcement that in “March 2004, the Dominican Republic concluded an FTA with the United States that will require the Dominican Republic to upgrade considerably the level of intellectual property protection.” However, USTR also noted that “concerns still remain regarding the protection and enforcement of intellectual property, particularly with respect to copyright piracy and patent protection.” USTR retained the Dominican Republic on the Watch List in its Special 301 2005 Announcement stating that, “Concerns still remain regarding the protection and enforcement of intellectual property, particularly with respect to ongoing broadcast piracy and ineffective prosecution of copyright and trademark infringement cases.”

In 2006, IIPA recommended that the Dominican Republic be elevated to the Priority Watch List. Due to “slow progress on a range of IPR issues,” USTR notes, “(t)he United States encourages the Dominican Republic to focus its efforts on combating broadcast piracy, deterring copyright and trademark infringement, and ensuring an expeditious resolution of pending civil and criminal IPR cases.” The Dominican Republic remained on the Watch List for 2006, and the “United States will continue to work with the Dominican Republic on the implementation of its IPR obligations to ensure that it meets its international and CAFTA-DR commitments.” IIPA recommended again in 2007 that the Dominican Republic be placed on the Priority Watch List, .but USTR kept the Dominican Republic on the Watch List in April 2007.

The U.S.-CAFTA-DR Agreement was ratified by the Dominican Republic in September 2005. The FTA entered into force on March 1, 2007 at which time the Dominican Republic ceased to benefit from most U.S. trade programs (like GSP and CBI).

ECUADOR

IIPA did not make a submission on Ecuador in 2008, but has in various years prior. See IIPA’s country reports page at <http://www.iipa.com/countryreports.html>

Ecuador appeared on the Special 301 Watch List in 1992 and 1993, before being removed from the list in 1993, when it signed a bilateral intellectual property rights agreement with the U.S., which was negotiated in conjunction with a bilateral investment treaty. Ecuador reappeared on the Watch List in 1996. In February 1997, IIPA recommended that USTR commence a World Trade Organization dispute settlement case against Ecuador for its failure to fully implement the terms of its WTO accession protocol by July 31, 1996. In April 1997, USTR stated that it would initiate a WTO case against Ecuador, and it elevated Ecuador to the Priority Watch List with an out-of-cycle review (OCR) later in 1997. By the time of that OCR, Ecuador had reversed its previous position regarding its accession, which was encouraging to the U.S. In February 1998, IIPA recommended that USTR keep Ecuador on the Priority Watch List to monitor its implementation and enforcement of then-pending copyright legislation in fulfillment of its multilateral and bilateral obligations. USTR agreed, scheduled an OCR, and kept Ecuador on the same list in February 1999. Ecuador was placed on the Watch List in 1999 and 2000. In the May 1, 2000 Special 301 Announcement, USTR noted that “serious enforcement problems remain, with piracy levels still high, difficulty getting court orders enforced by the national police and the customs service . . .” In 2002, IIPA recommended that Ecuador be returned to the Watch List, to monitor the implementation and enforcement of the country’s copyright legislation in fulfillment of its multilateral obligations and bilateral commitments. The 2003 USTR Special 301 Announcement noted the “lessening of intellectual property protection in Ecuador, with a decrease in enforcement efforts.” Most of USTR’s concerns were directed at patent issues, but one major copyright problem highlighted involved a poorly drafted provision in the Education Law which appears to allow free software to educational institutions. Due to their concerns, USTR moved Ecuador back to the Watch List in 2003. In 2004, IIPA recommended that Ecuador stay on the Special 301 Watch List due to ineffective copyright enforcement by the Ecuadorian Government. USTR agreed, and Ecuador remained on the Watch List. In its 2004 Special 301 Announcement, USTR noted that though the IPR law was generally adequate in the country, Ecuador had shown “little

progress in improving IPR protection over the last year . . .” and enforcement remained a concern. Echoing previous concerns, USTR retained Ecuador on the Watch List in its 2005 Special 301 Announcement.

In agreement with the recommendation of IIPA, Ecuador remained on USTR’s Watch List for 2006. Concerns include high piracy levels in the business software and recording industries, and inadequate enforcement of its IP law. “Ecuador has not yet established a specialized IP court, as it was required to do under its 1998 intellectual property law, and many Ecuadorian courts appear unwilling to enforce the IP law.” The United States “urges Ecuador to strengthen IPR enforcement and will closely monitor Ecuador’s efforts to address IPR concerns, particularly through the U.S. – Andean Trade Promotion Agreement negotiations.” IIPA recommended that Ecuador remain on the Watch List in 2007, and USTR agreed in April 2007.

Ecuador currently participates in both the Generalized System of Preferences (GSP) program and the Andean Trade Preferences Act (ATPA), U.S. trade programs that offer preferential trade benefits to eligible beneficiary countries. One of the discretionary criteria of these programs is that the country provide “adequate and effective protection of intellectual property rights.”

EGYPT

IIPA recommends that Egypt remain on the Priority Watch List in 2008. See IIPA’s 2008 Egypt country report at <http://www.iipa.com/rbc/2008/2008SPEC301EGYPT.pdf>.

As early as 1985, IIPA targeted Egypt as a major copyright offender, and because of its leadership role in the Middle East, pressed it to adopt a model law for the region. Seven years later, after long and frustrating delays, USTR placed Egypt on the Priority Watch List (in April 1992) and Egypt finally passed amendments to its law (in June 1992). These amendments fell short of internationally accepted standards. In April 1993, Egypt was kept on the Priority Watch List and an out-of-cycle review (OCR) was scheduled for December 1993. In June 1993, because Egypt had not made corrective amendments to its law, IIPA filed a petition, which was accepted for consideration by USTR in October 1993, to remove Egypt as a beneficiary of the Generalized System of Preferences (GSP) program. As a result of 1994 amendments which improved copyright protection in general and dealt with certain sector issues of concern (e.g., protection of computer programs), Egypt was moved to the Watch List on April 30, 1994, and another OCR was scheduled for October 1994. On July 1, 1994, the GSP investigation was successfully concluded, but Egypt was retained on the Watch List as a result of the OCR in October 1994. Egypt remained on the Watch List in 1995 and 1996 largely as a result of inadequacies in its patent regime, and in 1997, largely because of patent concerns, Egypt was elevated to the Priority Watch List. In 1998, IIPA recommended that Egypt be on the Watch List because of wavering copyright enforcement and the imposition of low, non-deterrent penalties for infringement.

From 1998 through 2001, USTR kept Egypt on the Priority Watch List, noting inadequate protection for pharmaceutical patents, lax enforcement on unchecked copyright piracy, and unclear protection for pre-existing sound recordings. In the April 30, 2001 Special 301 Announcement, USTR noted deficiencies in Egypt’s copyright law which appeared inconsistent with the country’s TRIPS obligations. In addition, USTR voiced concern regarding “Egypt’s approval of fraudulent licenses to distributors of pirated copyright works, which facilitated pirate operations while hampering legitimate producers.” In 2002 and 2003, IIPA recommended that Egypt remain on the Priority Watch List, citing deficiencies in the draft copyright and patent laws, as well as lax enforcement and unchecked copyright piracy. In 2002, Egypt remained on the Priority Watch List, but in the 2003 USTR Special 301 Announcement, Egypt was lowered to the Watch List for passage of a new IPR Code and improvements in patent protection (although USTR noted the new IPR Code contains many “TRIPS inconsistencies”). USTR found that Egypt also “made some progress in combating piracy of records and music, books and business software applications.” IIPA once again recommended that Egypt be returned to the Priority Watch List in 2004, noting high levels of piracy and low levels of enforcement as barriers to the legitimate market. USTR agreed and placed Egypt on its Priority Watch List in 2004. In its 2004 USTR Special 301 Announcement, USTR noted that “deficiencies in Egypt’s copyright enforcement regime [and] judicial system . . . necessitate the elevation of Egypt to the Priority Watch List.” In particular, USTR identified problems with copyright enforcement resulting from the lack of implementing regulations for Egypt’s recent IPR law, and a slow court system where “collection of judgments is difficult and transparency is

lacking.” Egypt was retained on the Priority Watch List in USTR’s 2005 Special 301 announcement in part for “deficiencies in Egypt’s IPR enforcement regimes for copyrights and trademarks, and problems with its judicial system.”

In 2006, IIPA recommended that Egypt remain on the Priority Watch List. Echoing previous concerns, USTR agreed, stating

Improvements in IPR enforcement are needed, particularly in the areas of fighting copyright piracy for book publishing, entertainment software, and business software. In addition, the Egyptian court system continues to operate inefficiently, resulting in a lack of satisfactory resolutions of copyright and trademark cases, difficulty obtaining deterrent sentences, and a lack of transparency.

In addition, the United States encouraged Egypt to “accede to and implement the WIPO Internet Treaties,” and expressed its hoped to see improvements in Egypt’s IPR regime that will “strengthen trade and investment ties between the two countries.”

In 2007, IIPA recommended again that Egypt remain on the Priority Watch List. USTR retained Egypt on the Priority Watch List in 2007.

Egypt currently participates in the Generalized System of Preferences (GSP) program, a U.S. trade program that offers preferential trade benefits to eligible beneficiary countries. One of the discretionary criteria of this program is that the country provides “adequate and effective” copyright protection.

EL SALVADOR

El Salvador does not currently appear on any of the USTR lists. IIPA did not make a submission on El Salvador in 2008, but has in various years prior. See IIPA’s country reports page at <http://www.iipa.com/countryreports.html>.

El Salvador was first placed on the Special 301 Watch List in 1992, where it remained for several years. While legal reform of the copyright law and various criminal codes was achieved, effective copyright enforcement was not achieved (in contrast, there was some progress on trademark matters). In 1996, IIPA recommended to USTR that El Salvador be elevated to the Priority Watch List; USTR chose to keep El Salvador on the Watch List. In 1997, El Salvador was removed from all Special 301 lists. In March 1999, El Salvador signed a bilateral investment treaty with the United States, which the U.S. Senate ratified in late 2000. In April 2000, USTR did not place El Salvador on any of the 301 lists but did conduct an out-of-cycle review (OCR) to assess that government’s efforts to improve enforcement procedures and promote the use of authorized software in all government industries. Based on some progress made at that time, El Salvador remained off all 301 lists. El Salvador was not placed on any list in either 2001 or 2002. In 2002, IIPA had recommended that El Salvador be placed on the Watch List, noting the country’s defects in civil and criminal enforcement, and the legislature’s efforts to eliminate criminal enforcement altogether. Years ago, the copyright industries also attempted to invoke other trade remedies to resolve the problems of high levels of piracy and poor enforcement in El Salvador. IIPA filed a June 1993 petition with USTR, requesting it to initiate an investigation of El Salvador’s copyright practices under the statutory provisions of the Generalized System of Preferences (GSP) program and the Caribbean Basin Economic Recovery Act (CBERA or CBI), both of which include discretionary criteria that the country provide “adequate and effective means under its laws for foreign nations to secure, to exercise, and to enforce exclusive rights in intellectual property, including . . . copyrights.” IIPA’s 1993 GSP/CBI petition was not accepted.

The U.S.-CAFTA-DR Agreement has been signed, and its entry into force with each Central American partner took place on a rolling basis in 2006. Entry into force with El Salvador was March 1, 2006. Once the FTA enters into force in El Salvador, it ceased to benefit from a variety of U.S. trade programs (such as GSP and CBI). e period in the previous year.

ESTONIA

Estonia does not currently appear on any of the USTR lists, and has not, since 1998. IIPA did not make a submission on Estonia in 2008, but has in various years prior. See IIPA's country reports page at <http://www.iipa.com/countryreports.html>.

In 1998, Estonia appeared on the USTR Special 301 list for the first time when USTR placed it on the Other Observations list. In both 1999 and 2000, IIPA recommended placement of Estonia on the Watch List because of significant deficiencies in the Estonian legal regime, the significant enforcement problems (particularly at street markets and the border), and the growing piracy problem across many industries (and the disruption it has caused in other countries). In 2002 through 2004, IIPA recommended that Estonia be placed on the Watch List, pointing to the country's piracy problem and the absence of deterrent penalties. When Estonia joined the European Union on May 1, 2004, Estonia was graduated from the U.S. Generalized System of Preferences (GSP) trade program, a program which requires, among other elements, the adequate and effective protection of U.S. copyrights.

GEORGIA

Georgia does not currently appear on any of the USTR lists. IIPA did not make a submission on Georgia in 2008, but has in various years prior. See IIPA's country reports page at <http://www.iipa.com/countryreports.html>.

In 1995 and 1997, IIPA requested that USTR add the nations of the Commonwealth of Independent States (CIS) collectively, excluding the Russian Federation, to the Special 301 Watch List because almost none of the CIS countries had met their bilateral IPR obligations, piracy was rampant, enforcement inadequate, and copyright law reform urgently needed. In 2000, IIPA recommended that ten of the CIS countries be placed on the Special 301 Watch List (Armenia, Azerbaijan, Belarus, Georgia, Kazakhstan, Kyrgyz Republic, Moldova, Tajikistan, Turkmenistan, and Uzbekistan). In the May 30, 2000 Special 301 Announcement, USTR placed seven CIS countries on the Special 301 Watch List for the first time, but not Georgia. In the April 30, 2001 Special 301 Announcement, USTR noted that it would conduct an out-of-cycle review (OCR) of Georgia in December 2001. On February 12, 2002, USTR announced the result of its OCR of Georgia. Though USTR decided not to place Georgia on any list, it noted continued deficiencies in copyright protection and enforcement "such as the lack of *ex officio* authority . . . for customs and criminal authorities, as well as the lack of civil *ex parte* search and seizure procedures conducted without notice to the alleged infringers." In its February 15, 2002 submission, IIPA recommended that Georgia be placed on the Watch List, pointing to that country's continued piracy and enforcement problems. In 2003, IIPA again recommended that Georgia be added to the Watch List, and in 2004 highlighted the country in its Special Mention section, pointing out key deficiencies in its enforcement regime.

Georgia began participating in the Generalized System of Preferences (GSP) program, a U.S. trade program that offers preferential trade benefits to eligible beneficiary countries, in 2001. One of the discretionary criteria of this program is that the country provide "adequate and effective" copyright protection.

GERMANY

IIPA specially mentions Germany in 2008 in connection with pending legislation that IIPA believes would undermine enforcement against Internet piracy. IIPA makes no recommendation for inclusion on any Special 301 lists. Germany does not currently appear on any of the USTR lists, and has not since 1998. Germany was placed on the Special 301 Watch List from 1991 to 1992. Though it was removed from any list in 1993, Germany was placed on the Other Observations list from 1994 to 1998, primarily due to heavy U.S. trade losses attributable to business software and audiovisual piracy. In those years, IIPA's Special 301 submissions focused on the problems with Germany's enforcement against end-user software piracy and its inadequate legal framework, especially the discriminatory failure to prohibit the unauthorized fixation, and subsequent reproduction and distribution, of live performances of U.S. artists (the "bootlegging" issue). The latter set of

issues was resolved by the enactment of copyright law amendments in 1995. In 1998, IIPA recommended the placement of Germany on the Watch List because of serious problems in the audiovisual industry (namely, the manufacturing and distribution throughout Europe of “smart cards” and “descrambling” devices) and in the software industries, where some jurisdictions were still denying *ex parte* search orders. In keeping Germany on the Other Observations list in 1998, USTR Barshefsky noted progress made in 1997 with respect to the availability of civil *ex parte* search orders, but shared the Alliance’s concerns “regarding a major audiovisual piracy problem and the role of German firms in the manufacturing and/or exporting throughout Europe of pirated ‘smart cards’ and other ‘de-scrambling’ devices used to steal encrypted satellite, cable and broadcast transmissions, particularly of U.S. motion pictures.” The IIPA recommended in our 1999 Special 301 Report that Germany be kept on the Other Observations list.

GREECE

For the second year in a row, IIPA recommends that Greece be placed on the Watch List in 2008. See <http://www.iipa.com/rbc/2008/2008SPEC301GREECE.pdf>. Greece does not currently appear on any of the USTR lists.

Greece was on the Watch List from 1989 to 1994 and was elevated to the Priority Watch List in 1995, where it remained until 2000. Then the United States filed a TRIPS case against Greece in 1997. In May 1998, Greece passed an amendment to the Broadcast Law that finally began to improve the longstanding problem of TV piracy. The same month, USTR announced the commencement of WTO dispute settlement consultations. In the April 30, 2001 Special 301 Announcement, USTR noted, “Greece has passed new legislation providing for the immediate closure of television stations that infringe upon intellectual property rights, and estimated levels of television piracy in Greece have fallen significantly as a result.” However, the announcement points out that “[p]iracy rates for audio-visual works, video games and business software . . . remain high.” Greece was removed from the Priority Watch List and placed on the Watch List in 2001. In 2002, USTR kept Greece on the Watch List, noting persistent problems with “optical disk piracy and unauthorized book photocopying.” USTR also noted Greece’s “lack of deterrent penalties imposed on pirates and inefficient judicial action,” as well as the continued problem of unauthorized use of software in government offices. USTR removed Greece from the 301 lists in 2003. IIPA recommended that Greece be placed on the Watch List in 2007 but USTR did not do so.

GUATEMALA

IIPA did not make a submission on Guatemala in 2008, but has in various years prior. See IIPA’s country reports page at <http://www.iipa.com/countryreports.html>. Guatemala has been on the Watch List since 2001.

To recap, after seven years on the Special 301 Watch List (1992-1998), USTR elevated Guatemala to the Priority Watch List in 1999 and 2000. In its April 30, 2001 Special 301 Announcement, USTR noted that despite amendments to the 1998 Copyright Act, “criminal penalties in cases of infringement of intellectual property, and the provision providing for statutory damages was removed.” Guatemala was placed on the Watch List in 2001. In 2002, IIPA recommended that Guatemala remain on the Watch List, noting that much is needed before the country will meet its multilateral and bilateral intellectual property rights obligations. In its April 30, 2002 Special 301 Announcement, placing Guatemala on the Watch List, USTR noted with approval the June 2001 appointment of a special prosecutor for intellectual property rights. Despite this, USTR pointed to continued high piracy levels, most notably with regard to business software, that have not been met by adequate enforcement. The 2003 USTR Special 301 Announcement retained Guatemala on the Watch List, noting that decreased criminal penalties and ineffective legal remedies in civil actions remain serious problems. In 2004, IIPA highlighted copyright concerns in Guatemala in its Special Mention section. In its 2004 Special 301 Announcement, USTR maintained Guatemala on the Watch List for intellectual property concerns, notably with respect to protection of confidential test data. Because of continuing problems with enforcement and the deficiencies in the 2000 copyright legislation, IIPA filed a GSP/CBI petition in August 2000, requesting a review of Guatemala’s IPR practices because of its failure to provide adequate and effective protection of U.S. copyrighted works. Unfortunately, the U.S. Government rejected IIPA’s petition, likely because Congress had extended new trade benefits to Costa Rica under the U.S.-Caribbean Trade Partnership Act (CBTPA),

which requires eligible countries to have very high levels of IPR protection. In its 2005 Special 301 announcement, USTR retained Guatemala on the Watch List primarily due to the existence of high piracy and counterfeiting rates. Although Guatemala has worked with the U.S. to implement CAFTA-DR, it again remained on the Watch List for 2006. “The United States hopes that the continuing implementation of CAFTA-DR will result in a stronger IPR legislative regime in Guatemala, an effective enforcement system, and a significant reduction of piracy and counterfeiting.” Although IIPA did not make a recommendation for Guatemala in 2007, USTR retained it on the Watch List in April 2007.

The U.S.-CAFTA-DR Agreement has been signed, and its entry into force with each Central American partner took place on a rolling basis; entry into force for Guatemala was accomplished on July 1, 2006. Once the FTA enters into force in Guatemala, it ceased to benefit from a variety of U.S. trade programs (such as GSP and CBI).

HONG KONG

In 2008, IIPA includes Hong Kong in its Special Mention section. See IIPA’s 2008 report on Hong Kong at http://www.iipa.com/rbc/2008/2008SPEC301HONG_KONG.pdf. Hong Kong does not currently appear on any of the USTR lists.

Hong Kong first appeared in IIPA’s Special 301 recommendations in 1995, when we called for Special Mention status (equivalent to USTR’s Other Observations category) in order to focus attention on the increased flow of pirated materials from China into Hong Kong, and to encourage enactment of tougher penalties for commercial piracy operations. By 1996, as this pirate flow across the Chinese border became a flood, IIPA recommended placement on the Watch List to encourage Hong Kong to devote more resources to copyright enforcement and to aggressively deploy new legal tools against piracy. USTR decided to list Hong Kong in the Other Observations category, and maintained it there after an out-of-cycle review (OCR) that concluded in December 1996. In its 1997 filing, citing a flood of digital piracy in the Hong Kong market, and increasing evidence that some of it was originating within the territory, IIPA urged USTR to elevate Hong Kong to the Priority Watch List. Because of the then-worsening piracy situation, USTR placed Hong Kong on the Watch List on April 30, 1997, and maintained it there in a January 16, 1998 OCR announcement, concluding that “the piracy situation in Hong Kong has not improved.” In 1998, IIPA noted that despite Hong Kong’s efforts, the digital piracy problem was out of control; the territory had changed from being an importer of pirate optical media product to being a major producer and exporter, trends that justified keeping Hong Kong on the Watch List. USTR, calling for full implementation of new anti-piracy legislation, effective enforcement, and a significant reduction in piracy rates, kept Hong Kong on the Watch List. Hong Kong was removed from the Watch List after a February 1999 OCR, but Ambassador Barshefsky added a September 1999 OCR to assess Hong Kong’s intellectual property progress.

On December 17, 1999, USTR announced that as a result of the September OCR, Hong Kong would remain off the Special 301 Watch List because “Hong Kong has undertaken significant enforcement actions since April [1999] to address the problem of piracy, but significant follow-up efforts are needed as piracy problems continue. USTR will monitor action by Hong Kong authorities to reclassify piracy as an organized and serious crime, to extend the mandate of the special anti-piracy task force beyond December 1999, and to prosecute corporate policy and the illegal loading of software by dealers onto computer hard drives.” Hong Kong has not appeared on any Special 301 lists since 1998. IIPA noted Hong Kong in its Special Mention section in 2004, citing strong concern over legislation that exempted those who used printed copies of works in trade or business from criminal liability. In 2005, IIPA once again included Hong Kong in the Special Mention section of the Special 301 report to “urge the U.S. Government to monitor legislative developments in Hong Kong closely throughout the coming year and engage with the Hong Kong Government to ensure that the Copyright Ordinance remains an effective tool in fighting all types of piracy, including digital theft,” and asked for an OCR “to determine whether industry’s concerns with current deficiencies in copyright legislation were adequately addressed in Hong Kong’s consultative and legislative processes on copyright laws.” In 2006, IIPA highlighted copyright concerns in Hong Kong in its Special Mention section, and requested that an OCR be conducted at an appropriate point to determine whether industry’s concerns with current deficiencies in copyright legislation

are being adequately addressed in Hong Kong's consultative and legislative processes on copyright laws. Again in 2007, IIPA included Hong Kong in its Special Mention section.

HUNGARY

IIPA recommends that Hungary remain on the Watch List in 2008, where it has appeared since 2003. See IIPA's 2007 Hungary country report at <http://www.iipa.com/rbc/2008/2008SPEC301HUNGARY.pdf>.

On September 24, 1993, the U.S. and Hungary entered into a comprehensive bilateral Intellectual Property Rights Agreement, which obligated Hungary to make significant improvements in its copyright laws. In 1994 and again in 1997, Hungary adopted amendments to update its copyright law and to make it compatible with the TRIPS Agreement. In 1994, 1995 and 1996, Hungary did not appear on any Special 301 lists. In 1997, IIPA recommended that Hungary be placed on the Special Mention list because of its enforcement and legal framework deficiencies. USTR did place Hungary on the Special Mention list in 1997 and 1998 at the urging of copyright owners because of the lack of effective enforcement. Hungary implemented extensive changes to its copyright law in June 1999; these changes became effective on September 1, 1999. The amendments were intended to bring the Hungarian law into compliance with the TRIPS Agreement as well as the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty, and to comply with several of the European Union Directives, such as the Term Directive. In 2001, USTR elevated Hungary to the Priority Watch List, from its Watch List designation in 1999 and 2000, largely as a result of its failure to provide adequate protection of "confidential test data submitted by pharmaceutical companies seeking marketing approval." In 2002, IIPA recommended that Hungary be placed on the Watch List, noting the country's need to comply with TRIPS by remedying its criminal enforcement problems. USTR kept Hungary on the Priority Watch List in 2002, noting in its April 30 Announcement that despite progress bringing its legislation into compliance with TRIPS and the U.S.-Hungary bilateral IPR agreement, enforcement and piracy remain problems. USTR's 2003 Special 301 Announcement noted Hungary's positive steps, primarily in the area of patent protection, but also that the country "has made important strides in modernizing its legal regime for copyright over the last several years, including extensive revisions to its criminal code." This progress allowed Hungary to move from the Priority Watch List to the Watch List in 2003.

IIPA recommended that Hungary remain on the Watch List in 2004 because, although the country had made great strides to modernize its copyright legal regime, copyright owners reported "persistent prosecutorial delays and problems in a market that could otherwise sustain substantial growth." USTR kept Hungary on the Watch List, noting poor enforcement of its copyright law, which has led to high piracy rates. When Hungary joined the European Union on May 1, 2004, Hungary was graduated from the U.S. Generalized System of Preferences (GSP) trade program, a program which requires, among other elements, the adequate and effective protection of U.S. copyrights. Although USTR praised Hungary for making improvements with its IPR protection in its 2005 Special 301 Announcement, Hungary was retained on the Watch List to monitor continuing issues. In 2006, IIPA once again recommended that Hungary stay on the Watch List, where it remained in 2006. USTR noted legislative improvements, while concerns remain with growing copyright piracy, "prosecutorial delays, judicial imposition of low fines or weak sentences, and weak border enforcement." In 2007, USTR agreed with IIPA's recommendation and kept Hungary on the Watch List.

ICELAND

IIPA did not make a submission on Iceland in 2008, but has in one prior year (2005), noting concerns over Internet piracy, particularly through peer-to-peer (P2P) networks. See IIPA's country reports page at <http://www.iipa.com/countryreports.html>. Iceland has never appeared on a USTR list.

INDIA

In 2008, IIPA recommends that India remain on the Priority Watch List. See IIPA's 2008 India country report at <http://www.iipa.com/rbc/2008/2008SPEC301INDIA.pdf>.

India has been on the Priority Watch List since 1989 and was named a Priority Foreign Country in 1991. Its practices in the patent, trademark and copyright area, as well as market access for motion pictures, were declared by USTR as “unfair” on March 4, 1992, and a Section 301 investigation was launched against India at that time. The motion picture market access problems were substantially resolved by the end of 1992, but patent and copyright enforcement problems persisted. These kept India a Priority Foreign Country until June 30, 1994, when it was moved to the Priority Watch List after it adopted significant amendments to its copyright law. USTR subjected India to a special out-of-cycle review (OCR) in January 1995 and its position on the Priority Watch List was retained. In 1996, IIPA recommended that India remain on the Priority Watch List as its enforcement program began to take shape; USTR agreed.

In 1997, IIPA recommended that India be moved to the Watch List as a result of continued encouraging raiding activity. However, USTR disagreed and in April 1997 kept India on the Priority Watch List, in part because of copyright issues, but also because of serious patent protection shortcomings. In 1997, USTR initiated a WTO dispute settlement case against India on patent protection matters. In September 1997, the WTO panel agreed with the U.S. claim that India failed to implement its obligation under TRIPS to establish a “mailbox” system to receive patent applications, and on related matters. This case was the first intellectual property rights dispute to go through the WTO panel process. India appealed the case, lost, and in April 1999 enacted legislation to address the WTO settlement. In our 1999 and 2000 Special 301 filing, IIPA again recommended that India be placed on the Watch List in light of progress on copyright issues. In both years USTR maintained India on the Priority Watch List. In the April 30, 2001 Special 301 Announcement, USTR kept India on the Priority Watch List, largely for failures in its patent system. The announcement noted that India’s copyright law was “generally strong,” though “poor enforcement allows rampant piracy.” In 2002, IIPA recommended that India remain on the Priority Watch List, noting the country’s high piracy rate and an overcrowded and ineffective court system that prevents conclusion of even the simplest criminal cases. In its April 30, 2002 Special 301 Announcement, USTR kept India on the Priority Watch List, citing patent protection problems as well as copyright legislation and enforcement deficiencies. USTR’s 2003 Special 301 Announcement noted little change, commenting, “piracy of copyrighted works remains a problem . . . and protection of foreign trademarks remains difficult.” Export of counterfeit goods to other countries was also cited as a major problem. These deficiencies necessitated India’s continued placement on the Priority Watch List. IIPA recommended that India remain on the Priority Watch List in 2004, noting its high piracy and low enforcement rates. USTR identified improvements in India’s IPR regime in its 2004 Special 301 Announcement, but kept the country on the Priority Watch List because “protection of intellectual property in some areas remains weak due to inadequate laws and ineffective enforcement.” In 2005, IIPA once again recommended that India remain on the Priority Watch List, and USTR agreed, noting, “protection of intellectual property in many areas remains weak due in part to inadequate laws and to ineffective enforcement. Consequently, India will remain on this year’s Priority Watch List,” and noting:

[C]opyright piracy is rampant, and the U.S. copyright industry estimates that lost sales resulting from piracy in India of U.S. motion pictures, sound recordings, musical compositions, computer programs, and books totaled approximately \$500 million in 2004. India is not a party to the WIPO Internet Treaties. We understand, however, that India is in the process of discussing amendments to the Indian Copyright Act which would enable India to implement these treaties. India has not adopted an optical disc law to address optical media piracy, and cable television piracy continues to be a significant problem...

and

India’s criminal IPR enforcement regime remains weak in multiple areas, including border protection against counterfeit and pirated goods, police action against pirates, following up raids by obtaining convictions for copyright and trademark infringement, courts reaching dispositions and imposing deterrent sentences, and delays in court dispositions.

In 2006, IIPA recommended that India again remain on the Priority Watch List. USTR agreed, keeping India on the Priority Watch List and citing the numerous problems that have plagued its IPR regime for years. USTR urged India to address deficiencies in its copyright law and its enforcement system, and “welcomes deeper cooperation with India, as envisioned in statements issued by our leaders to ‘work together to promote

innovation, creativity and technological advancement by providing a vibrant intellectual property rights regime...”

In 2007, IIPA recommended that India remain the Priority Watch List. USTR kept India on the Priority Watch List in its April 2007 decision.

India currently participates in the Generalized System of Preferences (GSP) program, a U.S. trade program that offers preferential trade benefits to eligible beneficiary countries. One of the discretionary criteria of this program is that the country provide “adequate and effective” copyright protection.

INDONESIA

IIPA recommends that Indonesia remain on the Watch List in 2008. USTR lowered Indonesia to the Watch List in November 2006 (as the result of an out-of-cycle review, in which IIPA recommended that it be lowered), and that another out-of-cycle review (OCR) be conducted (to be concluded by September 2007) to ensure that the Indonesian Government sustains the progress made to date in combating optical disc piracy, follows up with deterrent arrests and successful prosecutions of the main perpetrators of these piracy operations (i.e., plant managers and owners, not mere employees), and improves enforcement against photocopy piracy (mainly on and near university campuses), print piracy, and unauthorized translations, end-user software piracy (where piracy levels are among the worst in the world), and signal theft piracy, among other piracy concerns. See IIPA’s 2007 Indonesia country report at <http://www.iipa.com/rbc/2008/2008SPEC301INDONESIA.pdf>.

IIPA has closely monitored developments in Indonesia since 1985, when, in its first submission to USTR on piracy, IIPA named Indonesia as Asia’s second worst pirate country. In 1987, following a petition by IIPA to revoke Indonesia’s GSP benefits, Indonesia adopted an improved copyright law and, in 1989, entered into a bilateral copyright agreement whereby U.S. works and sound recordings acquired protection under Indonesian law. Although government initiatives virtually wiped out audio piracy in 1988 and made great progress against videocassette piracy in 1991 and 1992, Indonesia remained on the Watch List continuously from 1989 through 1995, because piracy of U.S. books and computer software soared over the years, and extensive market access barriers hampered the entry of U.S. companies into the Indonesian market. These continuing problems led USTR, on IIPA’s recommendation, to elevate Indonesia to the Priority Watch List in 1996, where it remained through 1999.

In 2000, IIPA recommended that Indonesia be lowered to the Watch List “[i]n recognition of the adverse conditions under which market liberalization, anti-piracy, and copyright law reform efforts must proceed in Indonesia.” USTR agreed, and Indonesia appeared on the Watch List in 2000. In 2001, IIPA recommended that Indonesia be elevated back up to the Priority Watch List, due to the continuing domination of piracy in the market, and the emergence of optical disc piracy in Indonesia. USTR agreed, noting in its April 30, 2001 Special 301 Announcement that “[p]iracy levels in Indonesia’s enormous market for copyright and trademark goods are among the highest in the world.” The announcement pointed out that “[i]t is becoming increasingly apparent that, as other countries in the region intensify their fight against copyright infringement, audio and video pirates are finding refuge in Indonesia.” In 2002, IIPA once again recommended that Indonesia remain on the Priority Watch List, noting its concern over rising optical disc pirate production in the country, and its defunct court system. USTR kept Indonesia on the Priority Watch List, noting “a troubling increase in illegal production lines for optical media and pirated books far beyond Indonesia’s domestic consumption capacity,” and a “judicial system [that] continues to frustrate right holders with years of delay and a pronounced lack of deterrent penalties.” In 2003, IIPA once again recommended, and USTR agreed, that Indonesia should remain on the Priority Watch List. In its announcement, USTR noted, “overall protection of intellectual property rights remains weak.” IIPA recommended that Indonesia remain on the Priority Watch List in 2004, and USTR agreed. The 2004 Special 301 Announcement noted that progress in the area of strengthening IPR, particularly in the area of enforcement against piracy and counterfeiting, “has been inconsistent.” USTR decided in its Special 301 2005 Announcement to keep Indonesia on the Priority Watch List and conduct an OCR. Although USTR acknowledged some IPR progress in Indonesia, namely the approval of optical disc regulations, it was noted that “serious concerns remain, however, over numerous issues, including: lack of effective IPR enforcement; the adequacy of the new regulations to reduce the production, distribution, and

export of pirated optical media products; trademark infringement; and deficiencies in Indonesia's judicial system." In January 2006, USTR completed its OCR of Indonesia.

In February 2006, IIPA recommended that Indonesia remain on the Priority Watch List. While commending Indonesia for taking steps to fight production and retail piracy, as well as re-establishing a Ministerial-level National IP Task Force, USTR noted that serious concerns remained and retained Indonesia on the Priority Watch List for 2006, with an OCR to assess progress. USTR urged Indonesia to enforce "its IPR laws effectively and in a deterrent manner against piracy and counterfeiting," by "conducting seizures of pirated goods and the machinery used to make them, by arresting and prosecuting IPR infringers, and by ensuring that courts impose jail sentences for IPR crimes and that offenders actually serve such sentences." On September 15, 2006, IIPA recommended that Indonesia be lowered to the Watch List, with the condition that, should the Indonesian Government fail (a) to follow up these raids with arrests and successful prosecutions of main perpetrators of these piracy operations (i.e., managers and owners, not mere employees), and (b) to make improvements in enforcement against: book piracy, namely, photocopy piracy (mainly on university campuses), print piracy, and unauthorized translations; end-user software piracy (where piracy levels are the third worst in the world); and signal theft piracy, that Indonesia should once again be moved to the Priority Watch List in the 2007 Special 301 cycle. In November 2006, USTR lowered Indonesia to the Watch List concluding:

[T]hat throughout 2006, Indonesia bolstered implementation of its regulations designed to stop illegal production of pirated optical discs such as CDs and DVDs by controlling the licensing of factories and conducting raids against pirate optical disc production facilities. Indonesia's authorities also conducted numerous raids on retail outlets selling pirated goods.

The United States indicated in its announcement that it would closely monitor Indonesia's progress and notes that "sustained efforts and continued progress on key IPR issues will be essential to avoid a future return to the Priority Watch List." IIPA recommended that Indonesia remain on the Watch List in its 2007 Special 301 report. USTR agreed and kept Indonesia on the Watch List in its April 2007 announcement.

Indonesia currently participates in the Generalized System of Preferences (GSP) program, a U.S. trade program that offers preferential trade benefits to eligible beneficiary countries. One of the discretionary criteria of this program is that the country provides "adequate and effective protection for intellectual property rights."

IRELAND

Ireland does not currently appear on any of the USTR lists. IIPA did not file a 2008 submission on Ireland and it has not appeared on any list since 2000. Ireland first appeared on a Special 301 list in 1996 when USTR accorded it Special Mention status for patent law deficiencies. IIPA recommended Ireland for the Watch List in its February 1997 filing and highlighted at that time its significant enforcement deficiencies and high levels of piracy, particularly in the software and video areas. IIPA also included Ireland in its Priority Practices section in that February 1997 submission because its outmoded law (and its enforcement regime) were hopelessly out of compliance with its TRIPS obligations, which became effective in Ireland on January 1, 1996. USTR agreed with IIPA's recommendation and placed Ireland on the Watch List in April 1997. Simultaneously, Ambassador Barshefsky announced that USTR would commence a TRIPS case in the near future. During 1997, following a series of bilateral negotiations with Ireland, it became clear that the Irish Government had no intention of introducing and adopting a TRIPS-compatible law within any reasonable time. As a result, USTR commenced the TRIPS case on January 9, 1998. In early February 1998, following the commitment of the Irish Government to "accelerate its implementation of comprehensive copyright reform legislation," USTR decided not to bring the case before a dispute settlement panel, though it reserved the right to do so if the timetables were not met. Ireland remained on the Watch List in 1998, 1999 and 2000. USTR noted in the May 1, 2000 Special 301 Announcement that "Ireland's commitment to enact comprehensive copyright legislation has not been met. We understand recent progress has been made toward finalizing this legislation and expect it will be enacted by Parliament before its summer recess." Ireland enacted new IPR legislation in June 2000. IIPA made no

recommendation concerning Ireland in its 2001 Special 301 submission. Consequently, USTR did not place Ireland on any list during 2001.

ISRAEL

IIPA recommends that Israel be put on the Watch List in 2008. See IIPA's 2008 Israel country report at <http://www.iipa.com/rbc/2008/2008SPEC301ISRAEL.pdf>.

IIPA first reported serious piracy problems in Israel in 1993. At that time, IIPA noted the need for copyright law modernization and urged USTR to place Israel on the Special 301 Watch List. No action was taken by USTR until 1994, when Israel was placed on USTR's Special Mention status, where it remained in 1995 and 1996. In 1997, USTR elevated Israel to the Watch List, noting the "rapidly growing rate of audio CD piracy for export" and the lack of a strong legal framework or effective enforcement to combat piracy.

In 1998, because of an antiquated copyright law, large-volume pirate optical disc production, lack of cooperation of Israeli Government authorities in raids and enforcement, and the increasing influence of organized criminal elements in the manufacturing, distribution and export of pirated optical discs, videos and software, IIPA recommended that USTR place Israel on the Priority Watch List. USTR agreed, noting in its April 2001 Special 301 Announcement that "Israel's domestic market for copyright goods remains dominated by pirated music, video and software CDs," and "Israel is part of an enormous transshipment network for pirated versions of Russian-language software, as well as audio and video CDs and cassettes." In 2002, IIPA once again recommended that Israel remain on the Priority Watch List, and USTR agreed, noting that despite progress achieved in 2001, problems such as "the lack of a clear definition for end user piracy of business software as a crime, court procedural delays, and inadequate compensatory and deterrent civil damages." In 2003, IIPA once again recommended that Israel remain on the Priority Watch List due to "its failure to criminalize and enforce against the unlicensed used of software in a business setting . . . in violation of TRIPS," while also noting that piratical production of optical discs for export had abated. USTR lowered Israel to the Watch List, noting passage of a law that increased criminal penalties for piracy and strengthened the ability of Israeli authorities and courts to prosecute and punish copyright crimes. IIPA recommended that Israel be returned to the Priority Watch List in its 2004 report, noting a proposed copyright amendment which "seriously threatens the rights of foreign copyright holders, especially U.S. phonogram producers." USTR declined to elevate Israel, instead keeping it on its Watch List for 2004, but announcing that an out-of-cycle review (OCR) would be conducted later in the year to assess whether Israel made progress in responding to U.S. concerns regarding the provision of "national treatment for U.S. rights holders in sound recordings." In January 2005, USTR deferred its OCR decision on Israel. In its 2005 Special 301 Announcement, USTR elevated Israel to the Priority Watch List, while noting, among other things, an apparent breakthrough at the time on the national treatment issue:

Israel made progress by giving written assurances that it will continue to provide national treatment for U.S. rights holders in sound recordings. In addition, the U.S. copyright and trademark industries report a more serious treatment of IPR violations by Israeli courts and continuing efforts by Israeli authorities to improve enforcement of copyrights and trademarks. However, the U.S. copyright industry notes that the persistence of a significant level of piracy, such as the "burning" of copyright-infringing content onto CD-Rs and DVD-Rs, suggests that additional IPR enforcement resources are needed.

IIPA recommended that Israel remain on the Priority Watch List in 2006 due to copyright legislation that would weaken protection and could violate Israel's bilateral obligations to protect works and sound recordings in accordance with the principle of national treatment. USTR agreed, noting that the "United States urges Israel to provide national treatment for U.S. right holders in accordance with its international obligations, including those under the 1950 United States – Israel Bilateral Copyright Agreement." In 2007, IIPA recommended that Israel remain on the Priority Watch List, due in part to concerns over draft copyright legislation. USTR retained Israel on the Priority Watch List in 2007.

ITALY

IIPA recommends that Italy remain on the Watch List in 2008, with an added out-of-cycle review (OCR) later this year. Italy has appeared on the Watch List since 2001. See IIPA's 2008 Italy country report at <http://www.iipa.com/rbc/2008/2008SPEC301ITALY.pdf>.

Italy was listed on USTR's Watch List throughout most of the 1990s, primarily due to enforcement shortcomings that allowed piracy (especially of U.S. motion pictures, sound recordings/music, and computer software) to reach levels unmatched in any other western European country. By February 1998, Italy had still not passed the Anti-Piracy Bill and IIPA recommended its elevation to the Priority Watch List from the Watch List, where it had been listed since 1989. USTR agreed, and Italy was on the Priority Watch List in 1998 and 1999. In February 2000, USTR kept Italy on the Priority Watch List, and added a September out-of-cycle review (OCR). USTR also noted the possible initiation of a future WTO dispute settlement case against Italy for noncompliance with TRIPS obligations. In recognition of the July 2000 passage of the Anti-Piracy Bill, USTR announced in November 2000 that Italy would be moved from the Priority Watch List to the Watch List. In the 2001 Special 301 submission, the IIPA recommended that Italy be placed on the Watch List with an OCR based on concerns that Italian authorities may not adequately implement the new Anti-Piracy Law. USTR kept Italy on the Watch List in 2001, noting in its April 30, 2001 Special 301 Announcement its own concern about full implementation of Italy's Anti-Piracy Law. In 2002, IIPA recommended that Italy be maintained on the Watch List, noting enforcement problems and a need for judicial reform. USTR again placed Italy on the Watch List in 2002, noting that "Italy still has not clarified the Anti-Piracy Bill's implementing regulations for business software." In its 2003 Special 301 Announcement, USTR described further problems with Italy's new laws: "Notwithstanding new government procedures to exempt business software that were enacted on January 25, 2003 . . . Italy continues to enforce a problematic program requiring copyright owners to pay for and apply a government-approved sticker on genuine copyrighted works." Italy therefore remained on the Watch List in 2003. In its 2004 Special 301 Report, IIPA recommended that Italy remain on the Watch List, noting the country's piracy rate as one of the highest in Europe. USTR agreed, maintaining the ranking in its 2004 Special 301 Announcement and noting the country's high piracy rates "[d]espite the continued implementation of the 2000 Copyright Law and increased enforcement actions in 2003." In its 2005 Special 301 Announcement, USTR decided to retain Italy on the Watch List. Although acknowledging an increase in raids and a reduction in piracy rates, USTR stated in its Report that, ". . . Italy continues to possess one of the highest overall piracy rates in Western Europe." In 2006, IIPA once again recommended that Italy remain on the Watch List. USTR agreed, noting that while progress has been made with increased enforcement actions, piracy remains extremely high and there is "inadequate judicial enforcement, and a lack of judicial imposition of deterrent fines and jail sentences for criminal copyright and trademark infringers."

In its April 2007 decision, USTR noted: "The United States notes that Italy increased cooperation between its government agencies and the private sector in 2006, as well as expressed renewed interest in working more closely with the United States to improve IPR protection and enforcement in Italy. However, the U.S. copyright industries report that Italy maintains one of the highest overall piracy rates in Western Europe. Italy made some progress in 2006 through increased raids, seizures, and arrests of IPR infringers, notably through enforcement actions by the Guardia di Finanza, but there continues to be inadequate judicial awareness of IPR infringement as a serious crime and therefore a lack of judicial imposition of deterrent fines and jail sentences for criminal copyright and trademark infringers. The United States continues to observe wide variations in the effectiveness of IPR enforcement activities within Italy, particularly in the courts. The U.S. copyright industries report continuing high rates of copyright piracy in Italy, especially on the Internet. The United States urges Italy to make IPR enforcement a top priority, commit high-level support for IPR enforcement, provide deterrent IPR enforcement through increased convictions and jail sentences, dedicate more resources for law enforcement and the judiciary, and implement a plan to combat Internet piracy. The United States will continue to work with Italy on these issues, with the goal of improving IPR protection and enforcement."

JAMAICA

Jamaica has been on the Special 301 Watch List since 1998. IIPA has not filed on Jamaica in the 301 process. The 2003 USTR Special 301 Announcement stated that “Jamaica’s trademark and copyright regimes are generally consistent with international standards and enforcement efforts over the last year have been commendable.” It remains on the Watch List, however, because of lack of parliamentary action to bring patent and industrial design laws into conformity with international standards. In 2004, USTR maintained Jamaica on the Watch List, stating that “while Jamaica’s trademark and copyright laws are generally in line with international standards, we remain concerned over the continued failure to enact the Patents and Designs Act to meet Jamaica’s obligations under the TRIPS Agreement and the U.S.-Jamaican bilateral IP Agreement.” Jamaica remained on the Watch List in 2006 due to its continued failure to fulfill its obligations noted above.

Jamaica currently participates in the Generalized System of Preferences (GSP) program, a U.S. trade program that offers preferential trade benefits to eligible beneficiary countries.

JAPAN

In 2008, IIPA again includes Japan in its Special Mention section. See IIPA’s 2008 Japan country report at <http://www.iipa.com/rbc/2008/2008SPEC301JAPAN.pdf>.

Japan does not currently appear on any of the USTR lists. Years ago, Japan appeared on USTR’s Special 301 Watch List from 1989 until 1993. Japan was elevated to the Priority Watch List by USTR in 1994 where it remained through 1996. In its Special 301 1997 announcement, USTR moved Japan from Priority Watch List to Watch List, citing improvements to Japan’s IPR legislation along with concerns regarding Japan’s protection of trade secrets and end-user software piracy. Japan remained on the Watch List through 1999. In 2006 and 2007, IIPA highlighted copyright concerns and included Japan in its Special Mention section.

JORDAN

In 2008, IIPA includes Jordan in its Special Mention section. See IIPA’s 2008 Jordan country report at <http://www.iipa.com/rbc/2008/2008SPEC301JORDAN.pdf>.

Jordan does not currently appear on any of the USTR lists. In 2005, IIPA recommended that the U.S. Government commence a dispute settlement action under the U.S.-Jordan Free Trade Agreement for failure to meet the requirements of that Agreement unless the deficiencies raised could be promptly and satisfactorily resolved. USTR first placed Jordan on the Special Mention list in 1995, where it remained in 1996 due to its inadequate intellectual property laws. USTR elevated Jordan to the Watch List in 1997, noting a law that “falls far short of international standards in most respects” and rampant piracy due to a lack of “effective enforcement mechanisms.” In 1998, IIPA recommended that Jordan be elevated to the Priority Watch List because of the “glacial pace” of Jordan’s efforts to pass the draft copyright law amendments and Jordan’s total failure to implement and enforce the copyright law. USTR decided to keep Jordan on the Watch List, in part because of Jordan’s April 1998 “Action Plan” designed to bring it into conformity with TRIPS within two years. Despite passing the long-awaited copyright amendments in late 1998, in April 1999, Jordan remained on the Watch List because of what USTR described as limited progress in the implementation of the 1998 Action Plan and patent-protection deficiencies. After Jordan took the initiative of passing further amendments, thereby bringing its law very close to TRIPS compliance, and joining the Berne Convention, Jordan was removed from the Watch List on December 10, 1999 after an out-of-cycle review. On April 11, 2000, Jordan joined the World Trade Organization, thereby making it bound by the provisions of the TRIPS agreement. Six months later, Jordan signed a historic Free Trade Agreement with the United States. Jordan has not appeared on any Special 301 list since 1999. In 2007, IIPA included Jordan in its “Dispute Settlement” section, specifically highlighting deficiencies under Jordan’s implementation of the U.S.-Jordan Free Trade Agreement.

In addition to benefits it receives under the FTA signed in 2000, Jordan continues limited participation in the Generalized System of Preferences (GSP) program, a U.S. trade program that offers preferential trade

benefits to eligible beneficiary countries. One of the discretionary criteria of this program is that the country provide “adequate and effective protection of intellectual property rights.”

KAZAKHSTAN

IIPA recommends that Kazakhstan be placed back on the Watch List in 2008, from which it has been off since April 2006. See IIPA's 2008 Kazakhstan country report at <http://www.iipa.com/rbc/2008/2008SPEC301KAZAKHSTAN.pdf>.

In 1995 and 1997, IIPA requested that USTR add the nations of the Commonwealth of Independent States (CIS) collectively, excluding the Russian Federation, to the Special 301 Watch List because almost none of the CIS countries had met their bilateral IPR obligations, piracy was rampant, enforcement inadequate, and copyright law reform urgently needed. In both 1998 and 1999, IIPA made individual filings focusing on concerns in Belarus, Ukraine and Kazakhstan, the countries with the most serious IPR problems (although problems persist in other former republics) in addition to the filing made for Russia. In 1998, Kazakhstan was placed on the Other Observations list, and the next year, Kazakhstan was removed from the Special 301 list. In 2000, IIPA recommended that ten of the CIS countries be placed on the Special 301 Watch List (Armenia, Azerbaijan, Belarus, Georgia, Kazakhstan, Kyrgyz Republic, Moldova, Tajikistan, Turkmenistan, and Uzbekistan). In the May 30, 2000 Special 301 Announcement, USTR placed Kazakhstan on the Special 301 Watch List.

In June 1999, IIPA filed a petition with USTR requesting that the country eligibility of Armenia, Belarus, Kazakhstan, the Kyrgyz Republic, the Republic of Moldova, Ukraine, and Uzbekistan under the Generalized System of Preferences (GSP) trade program be reviewed for its failure to provide adequate and effective copyright protection and enforcement for U.S. copyright owners, as required under the GSP. In February 2000, the administration announced that it accepted IIPA's petition for review of Armenia, Kazakhstan, Moldova, Ukraine, and Uzbekistan. On May 12, 2000, the U.S. Government held public hearings on the GSP petitions regarding these five countries. The U.S. Government again held hearings with respect to Kazakhstan on October 7, 2003. USTR terminated its GSP IPR review of Kazakhstan in April 2006. In 2005, \$206.4 million worth of Kazakhstan's imports to the United States benefited from the GSP program, accounting for 19.1% of its total exports to the U.S. During the first 11 months of 2006, \$473.1 million worth of Kazakh goods (or 48.8% of Kazakhstan's total exports to the U.S. from January to November) entered the U.S. under the duty-free GSP code, accounting for a 154.6% increase from the previous year.

In 2001, IIPA recommended and USTR agreed to keep Kazakhstan on the Watch List. In its April 30, 2001 Special 301 Announcement, USTR noted that Kazakhstan “does not clearly provide retroactive protection for works or sound recordings under its copyright law. In addition there is weak enforcement of intellectual property rights in Kazakhstan.” In 2002, IIPA recommended that Kazakhstan remain on the Watch List, noting, as with the other CIS countries, problems with legal reform and enforcement. USTR kept Kazakhstan on the Watch List in 2002, citing the remaining steps the country must take in order to fulfill its obligations under the 1992 U.S.-Kazakhstan Trade Agreement. The 2003 USTR Special 301 Announcement took a similar view and maintained Kazakhstan's status on the Watch List, pointing out their lack of full retroactive protection for works or sound recordings, weak enforcement, and potentially non-deterrent Criminal Code provisions with their very high burden of proof. Similarly, in its 2004 Special 301 Report, IIPA again recommended that Kazakhstan remain on the Watch List. In its Special 301 Announcement, USTR agreed, noting that while fulfilling many of its treaty obligations under 1992 trade agreement with the U.S., Kazakhstan still needed to take “additional steps . . . particularly with respect to copyright protection and enforcement.” Noting that some progress had been made with regards to Kazakhstan's IPR regime in 2004, namely the ratification of the WIPO Internet Treaties, amendments to the copyright law and proposed amendments to the criminal code, USTR retained Kazakhstan on the Watch List in its 2005 Special 301 Announcement. The Announcement stated that, “Kazakhstan's Civil Procedure Law still does not appear, however, to provide for civil ex parte search procedures needed to provide enforcement against end-user software pirates. In addition, there are few convictions, and those who are convicted receive only minimal penalties. As a result, piracy is still a major

problem.” While IIPA recommended that Kazakhstan remain on the Watch List, it was removed in 2006 due to “progress on copyright enforcement.”

KENYA

IIPA did not make a submission on Kenya in 2007 and 2008, but has in prior years; see IIPA's country reports page at <http://www.iipa.com/countryreports.html>.

In 2006, IIPA identified copyright concerns with Kenya in its Special Mention section “because of rampant piracy for all sectors, and a Government system that is unwilling and unable to address the problem.” The country currently participates in the Generalized System of Preferences (GSP) trade program which requires, as one of its eligibility criteria, that a country provide “adequate and effective” copyright protection.

KUWAIT

IIPA recommends that Kuwait remain on the Watch List in 2008. See IIPA's 2008 Kuwait country report at <http://www.iipa.com/rbc/2008/2008SPEC301KUWAIT.pdf>.

Kuwait was on the Watch List from 2000 to 2003. USTR first placed Kuwait on the Special 301 Special Mention list in 1995. In April 1996, USTR elevated Kuwait to the Watch List, where it remained through 1997, noting that Kuwait had been slow in adopting copyright legislation and that unauthorized duplication of software, particularly in government agencies, remained a major problem. In IIPA's 1998 Special 301 filing on Kuwait, IIPA recommended that USTR elevate Kuwait to the Priority Watch List because of growing losses due to piracy and the Kuwaiti Government's continued failure to enact a copyright law. USTR agreed, stating that “the pace of work thus far has not been sufficient to complete the needed steps by January 1, 2000.” Again in 1999, IIPA recommended that Kuwait remain on the Priority Watch List and that Kuwait be designated as a Priority Foreign Country if it failed to pass a new copyright law. USTR kept Kuwait on the Priority Watch List in 1999, agreeing to conduct a December out-of-cycle review to decide whether to designate Kuwait. As a result of the enactment of a new copyright law in December 1999, Kuwait averted being designated. In 2000, IIPA recommended keeping Kuwait on the Priority Watch List since the law passed was TRIPS-incompatible and the government took no enforcement actions. USTR decided to lower Kuwait to the Watch List in 2000 in recognition of passage of the copyright law. In 2001 through 2003, IIPA never wavered in recommending that Kuwait be elevated to the Priority Watch List, since the 1999 law is TRIPS-deficient, enforcement efforts have never taken off, and piracy rates remain the highest in the region. USTR, while noting “continuing problems with copyright piracy” (2002) and that Kuwait needed “to pass long-promised amendments to Kuwait's 1999 Copyright Law, increas[e] the effectiveness of enforcement procedures, strengthe[n] an existing interagency process, and improv[e] judicial capacity to penalize present offenders and deter future ones” (2003), kept Kuwait on the Watch List in those year's announcements.

IIPA recommended that Kuwait be placed on the Priority Watch List in 2004, noting it had the worst rate of optical piracy in the Gulf Region. In its 2004 Special 301 Announcement, USTR elevated Kuwait to the Priority Watch List “due to its failure to address serious and rampant copyright infringement and failure to amend its copyright law.” Among the problems listed were Kuwait's failure to implement the 2002 work plan to increase IPR enforcement, the worst retail optical disc piracy rate in the region, corporate end user piracy, hard-disc loading, and cable piracy. In 2005, IIPA once again recommended, and USTR agreed, to keep Kuwait on the Priority Watch List, “due to its high rates of copyright piracy and its lack of progress in amending its copyright law to meet international obligations.” USTR went on to note:

Kuwait has not yet fully implemented the 2002 work plan that outlined the steps it would take to increase IPR enforcement. In 2004, IPR enforcement efforts remained insufficient and penalties for infringement remained inadequate to deter potential offenders. Kuwait proposed a draft copyright law in 2004, which has not yet been passed by Kuwait's legislature. The U.S. copyright industry reports that Kuwait continues to have high levels of retail optical disc piracy, as well as problems with corporate end-user software piracy, cable piracy, and Internet piracy.

We urge Kuwait to improve the situation by making public declarations at the highest level that piracy in Kuwait will not be tolerated, increasing the frequency of raids on suspected infringers, prosecuting offenders, imposing deterrent sentences, publishing the outcomes of inspection raids in order to deter others, and amending its copyright law in the near future to correct its deficiencies. Kuwait has made some progress, such as Kuwait Customs' creation of a special IPR unit in April 2004 that began taking some enforcement actions. The Ministry of Commerce also stepped up enforcement efforts in late 2004.

In 2006, IIPA recommended that Kuwait be lowered from the Priority Watch List to the Watch List. USTR agreed, indicating its hope to see continued progress in Kuwait's IPR regime by ensuring that

law enforcement officials are engaged in combating piracy and counterfeiting, that judicial authorities impose deterrent penalties for IPR violations, and that necessary legislation is passed to strengthen its IPR regime. The United States is concerned that several key pieces of IPR legislation (including amendments in the areas of copyrights, trademarks, geographical indications, patents, data protection, and enforcement) have been pending for many years, and hopes that Kuwait will expeditiously enact and implement such legislation in the near term.

In 2007, IIPA recommended that Kuwait remain on Watch List. USTR agreed with IIPA's recommendation.

KYRGYZ REPUBLIC

The Kyrgyz Republic does not currently appear on any of the USTR lists. IIPA did not make a submission on the Kyrgyz Republic in 2007 and 2008, but has in various years prior; see IIPA's country page at <http://www.iipa.com/countryreports.html>.

In 1995 and 1997, IIPA requested that USTR add the nations of the Commonwealth of Independent States (CIS) collectively, excluding the Russian Federation, to the Special 301 Watch List because almost none of the CIS countries had met their bilateral IPR obligations, piracy was rampant, enforcement inadequate, and copyright law reform urgently needed. In 2000, IIPA recommended that ten of the CIS countries be placed on the Special 301 Watch List (Armenia, Azerbaijan, Belarus, Georgia, Kazakhstan, Kyrgyz Republic, Moldova, Tajikistan, Turkmenistan, and Uzbekistan). In the May 30, 2000 Special 301 Announcement, USTR did not put the Kyrgyz Republic on any list. In the April 30, 2001 Special 301 Announcement, USTR noted that it would conduct an out-of-cycle review (OCR) on the Kyrgyz Republic. On February 12, 2002, USTR announced the result of its OCR of the Kyrgyz Republic. Though USTR decided not to place the Kyrgyz Republic on any list, it noted continued deficiencies in copyright protection and enforcement "such as the lack of *ex officio* authority . . . for customs and criminal authorities, as well as the lack of civil *ex parte* search and seizure procedures conducted without notice to the alleged infringers." In 2002, IIPA recommended that the Kyrgyz Republic remain on the Watch List, noting, as with the other CIS countries, problems with legal reform and enforcement. The Kyrgyz Republic did not appear on any list in 2002.

In 2004, IIPA highlighted concerns with the Kyrgyz Republic in its Special Mention section. In particular, IIPA noted the lack of effective enforcement against piracy, and the lack of compliance with enforcement obligations of the WTO TRIPS agreement. In June 1999, IIPA filed a petition with USTR requesting that the country eligibility of Armenia, Belarus, Kazakhstan, the Kyrgyz Republic, the Republic of Moldova, Ukraine, and Uzbekistan under the Generalized System of Preferences (GSP) trade program be reviewed for its failure to provide adequate and effective copyright protection and enforcement for U.S. copyright owners, as required under the GSP. In late 1999, the Kyrgyz Republic acceded to the World Trade Organization. In February 2000, the Administration announced that it accepted IIPA's petition for review of Armenia, Kazakhstan, Moldova, Ukraine, and Uzbekistan and rejected the petition for review of the Kyrgyz Republic.

LAOS (LAO PEOPLE'S DEMOCRATIC REPUBLIC)

Laos does not currently appear on any of the USTR lists. IIPA did not make a submission on Laos in 2008, but has in years prior; see IIPA's country page at <http://www.iipa.com/countryreports.html>. In its 2003 through 2005 submissions, IIPA noted Laos in its Special Mention section, citing optical disc piracy concerns. In 2006, IIPA also included Laos in its Special Mention section, urging the Government of Laos to "implement the Agreement on Trade Relations by passage of a modern copyright statute" and "enact or issue regulations to allow licensing of optical disc manufacturing facilities and to provide a level of transparency and oversight into these groups that are producing pirate and other illegal materials in Laos." In 2007, IIPA again included Laos in its Special Mention section.

LATVIA

IIPA did not make a submission on Latvia in 2008, but has in years prior; see IIPA's country page at <http://www.iipa.com/countryreports.html>.

IIPA first filed a Special 301 report on Latvia in 2000, when we recommended that Latvia be added to the Watch List for serious deficiencies in the copyright law, criminal code and implementation of the new customs code. USTR accepted our recommendation, and placed Latvia on the Watch List for the first time in 2000. Latvia remained on the Watch List in 2001. In its April 30, 2001 Special 301 Announcement, USTR noted that "[l]arge volumes of pirated products are transshipped through Latvia from Russia and Ukraine." Local enforcement is poor and "[l]egislation is needed to improve the ability of law enforcement and judicial authorities to combat this piracy, such as providing for adequate civil *ex parte* search remedies." Again citing Latvia as a major transshipment point for large volumes of pirated products, USTR kept the country on the Watch List in 2002. The USTR 2003 Special 301 Announcement noted that there was some positive movement in 2002, including raids on sellers of pirated optical media. Latvia stayed on the Watch List, however, because of the continuing transshipments and the fact that "police, customs officials, prosecutors and judicial authorities have not placed sufficient emphasis on combating piracy." In 2004, IIPA recommended that Latvia be maintained on the Watch List, noting that the anti-piracy efforts in the country were "inadequate, if not virtually non-existent." USTR agreed, citing a variety of copyright concerns in its 2004 Special 301 Announcement, including Latvia's continued status as a "consumer of and transshipment point for pirated goods, especially from Russia." USTR also identified high piracy levels for the motion picture, recorded music, and entertainment software industries, and raised concerns over the growth of Internet piracy in Latvia. Finally, though some progress had been made on end-user piracy in the business software industry, USTR stressed that "unlicensed use of business software by government ministries remains a serious concern." USTR retained Latvia on the Watch List in its Special 301 2005 Announcement. USTR acknowledged that progress was made in the form of legislative actions but also called attention to the problems of IPR enforcement and piracy levels. Again in 2006, USTR concurred with IIPA's recommendation and retained Latvia on the Watch List, noting that: "...some key IPR issues remain in need of attention, including copyright piracy, especially on the Internet, and the lack of effective border enforcement. The United States encourages Latvian customs officials to take increased action to inspect and seize transshipped pirated and counterfeit goods coming into Latvia from Russia and exported to Lithuania, Poland, and other EU countries." USTR also said it would conduct an out-of-cycle-review (OCR) in 2006 to monitor further progress; as of the date of this 2007 submission, USTR had not yet issued any announcement regarding an OCR result. In 2007, IIPA included Latvia in its Special Mention section.

In September 2003, the U.S. Government welcomed the European Commission's decision to accept a political understanding with the U.S. to preserve U.S. bilateral investment treaties (BITs) with several EU-accession countries, including Latvia. The Latvian BIT provides important copyright-related obligations for broad national treatment for U.S. works and sound recordings. When Latvia joined the European Union on May 1, 2004, Latvia was graduated from the U.S. Generalized System of Preferences (GSP) trade program, a program which requires, among other elements, the adequate and effective protection of U.S. copyrights.

LEBANON

IIPA again recommends that Lebanon be lowered to the Watch List in 2008. The IIPA Petition regarding Lebanon's IPR practices remains ongoing. See IIPA's 2008 Lebanon country report at <http://www.iipa.com/rbc/2008/2008SPEC301LEBANON.pdf>.

Isolated from normal world trade patterns due to years of civil strife, Lebanon did not appear in IIPA reports until 1995, when IIPA first recommended placement on the Special Mention list because of its high levels of piracy and outmoded copyright law. IIPA's 1996 filing recommended a Watch List placement, stressing pervasive TV piracy, an ineffective judicial system, and lack of any progress toward copyright and broadcast law reform. In 1997, IIPA recommended once again that Lebanon be placed on the Special 301 Watch List, noting a video market dominated by piracy, increasing book and software piracy, an immobilized copyright reform process, and backlogged and inefficient courts that continued to pose major impediments to effective enforcement of copyright infringement across the board. In 1998, IIPA again called on USTR to place Lebanon on the Watch List for failure to pass a new copyright law, and for uncertainty over whether the law would include a Berne- and TRIPS-incompatible "compulsory license" on computer software. USTR agreed for the first time to place Lebanon in its Other Observations category, noting "widespread copyright piracy and an inadequate law," and that "[u]nauthorized use of software is pervasive among private firms and government ministries." USTR's Ambassador Barshefsky called on the Lebanese Government "to pass a TRIPS-consistent copyright law, to take effective measures to eliminate use of unauthorized copies of software in government offices, and [to] reduce the rate of video piracy."

Lebanon was kept on the Watch List in 2000 largely because of the continued international deficiencies in the copyright law, pervasive piracy and inefficient enforcement against piracy. In the 2001 Special 301 submission, the IIPA recommended that Lebanon be elevated to the Priority Watch List due to a lack of enforcement against copyright piracy. USTR agreed, and elevated Lebanon to the Priority Watch List, citing continuing piracy problems, particularly cable piracy. In June of 2001, the IIPA filed a request for review of Lebanon's GSP benefits for its failure to protect the intellectual property rights of U.S. copyright owners. USTR accepted this request on September 3, 2003, and the review remains ongoing. In 2002 and 2003, IIPA continued to recommend that Lebanon remain on the Priority Watch List (and in 2002, requested that USTR conduct an out-of-cycle review to ascertain whether sufficient progress was being made in the fight against cable piracy and pervasive retail piracy; USTR did not accept the recommendation for the OCR). USTR decided to keep Lebanon on the Priority Watch List in 2002, noting the country's "severe copyright piracy problem and the lack of a comprehensive governmental commitment to eliminate piracy and foster legitimate business." USTR also retained Lebanon on the Priority Watch List in 2003, noting that while "some raids of pirate stores and operations occurred in 2002, leading to the first sentencing of a software pirate," otherwise there was very little progress; USTR also noted an "overly broad software exception for certain educational uses."

On September 3, 2003, the United States Trade Representative "accepted for review" a Petition filed by the IIPA with the U.S. Government as part of its "Country Eligibility Practices Review" of the Generalized System of Preferences (GSP) trade program. To qualify for benefits under the GSP Program, namely, duty-free imports of many important Lebanese products into the U.S., USTR must be satisfied that Lebanon meets certain discretionary criteria, including whether it provides "adequate and effective protection of intellectual property rights." IIPA's Petition noted three major deficiencies in Lebanon's protection of copyright that caused economic harm to U.S. right holders that result in Lebanon failing to meet the GSP standard of providing "adequate and effective" copyright protection in practice: (1) deficiencies in the copyright law in Lebanon that render legal protection inadequate and ineffective; (2) the failure to enforce criminal remedies against pirate cable TV operators, making protection of U.S. audiovisual works inadequate and ineffective; and (3) enforcement efforts against piracy in Lebanon that are inadequate and ineffective. Since 2003, IIPA has testified twice, most recently on November 30, 2005, and made several supplemental submissions in the GSP Review.¹ On all of these occasions, IIPA states its view that the GSP Subcommittee should recommend to the

¹ On October 7, 2003, IIPA testified regarding the deficiencies of Lebanon's protection of copyright that warranted immediate suspension or withdrawal of Lebanon's GSP benefits. On February, 14, 2004, IIPA provided the GSP Subcommittee a copy of IIPA's February 2004 Special 301 report on Lebanon to supplement the public GSP file on this

President that he make a determination that Lebanon fails to meet the eligibility requirements of the GSP program, and remove Lebanon's eligibility to participate in the Program until such time as it has achieved adequate and effective copyright protection and enforcement as contemplated by the GSP statute.

USTR, in its 2003 Special 301 decision in May, reiterated the concern of the U.S. Government regarding "Lebanon's severe copyright piracy problem and the lack of a comprehensive government commitment to eliminate piracy and foster legitimate business." The decision continues:

Despite the entry into force in 1999 of a new copyright law, there has been little action by Lebanon against piracy. Some raids of pirate store and operations occurred in 2002, leading to the first sentencing of a software pirate and financial penalties in other cases. However, pervasive cable piracy continues to undermine legitimate theatrical, video, and television service providers. Overall Lebanon had made little progress in 2002 in addressing its significant IPR deficiencies. The United States urges the Lebanese Government to press forward with its recent proposal to draft a law regulating the cable television industry and to mount an aggressive campaign against pirates. End-user piracy of computer software is widespread among large companies, banks, trading companies, and most government ministries. Also troubling is an overly broad software exception for certain educational uses in the new copyright law that seriously undermines the viability of this market for legitimate products. Book piracy also remains a serious problem . . . A committed and vigorous program to enforcement** intellectual property rights, particularly copyright protection, is essential to the success of the Lebanese Government's efforts to reform its economy, increase trade and foreign direct investment and prepare for accession to the WTO.

IIPA recommended Lebanon be maintained on the Priority Watch List in 2004 due to the continued dominance of pirated product in the market. USTR agreed, keeping Lebanon on its Priority Watch List in 2004. While USTR commended Lebanon for many of the positive changes it had made in 2003, including a "crackdown on illegal cable operators, a large scale raid on pirated DVDs, movement toward full legalization of government software [and] increased *ex officio* inspection along the borders," USTR noted rampant piracy in Lebanon, a slow and inefficient judiciary, the country's failure to join the latest text of the Berne Convention, or ratify the two WIPO Treaties, the WCT and WPPT. In 2005, IIPA recommended, and USTR agreed, to keep Lebanon on the Priority Watch List. In its Announcement in April 2005, USTR praised Lebanon for conducting IP product raids and for its judicial and border enforcement activities. It was decided however, that Lebanon would remain on the Priority Watch List.

In 2006 IIPA once again recommended that Lebanon remain on the Priority Watch List and, noting that Lebanon fails to meet the criteria for benefits under the GSP trade program, recommended that the GSP benefits be immediately suspended. Reiterating the continuing concerns from earlier years including cable piracy, copyright piracy, and ineffective judiciary, USTR kept Lebanon on the Priority Watch List. USTR further states, "The United States urges the Lebanese Government to continue its efforts to address these problems and to ratify and implement the WIPO Internet Treaties" and will "monitor the IPR situation in Lebanon closely, particularly under the GSP petition for inadequate copyright protection." In 2007, IIPA recommended that Lebanon be lowered to the Watch List. USTR kept Lebanon on the Priority Watch List in 2007.

LITHUANIA

IIPA recommends that Lithuania remain on the Watch List in 2008, where it has appeared since 2000. See IIPA's 2008 Lithuania country report at <http://www.iipa.com/rbc/2008/2008SPEC301LITHUANIA.pdf>.

IIPA first filed a Special 301 report on Lithuania in 2000, when we recommended that Lithuania be added to the Watch List because of serious concerns over copyright enforcement at all levels, including criminal, civil,

investigation. On May 25, 2004, IIPA wrote to the GSP Subcommittee advocating the immediate suspension or withdrawal of Lebanon's GSP benefits for its continuing failure to comply with the IPR obligations under the GSP program. On November 9, 2005, IIPA filed a pre-hearing Brief advocating withdrawal of GSP benefits, and on December 14, IIPA filed answers to post-hearing comments (the GSP hearing was held on November 30, 2005).

administrative and border measures. USTR agreed, and Lithuania was placed on the Special 301 Watch List for the first time in 2000. In the 2001 Special 301 submission, the IIPA recommended that Lithuania be added to the Priority Watch List due to a lack of on-the-ground enforcement and exploitation of this weakness by pirates to the detriment of other markets in Latvia, Estonia, and Poland, for example. In the April 30, 2001 Special 301 Announcement, USTR placed Lithuania on the Watch List and announced that it would conduct an out-of-cycle review (OCR) “to assess Lithuania’s enforcement efforts.” On October 31, 2001 USTR announced the outcome of its OCR of Lithuania. USTR kept Lithuania on the Watch List “because of serious on-the-ground enforcement failures.” In 2002, IIPA recommended that Lithuania remain on the Watch List, noting the continued lack of effective enforcement and high piracy rates. In its April 30, 2002 Special 301 Announcement, USTR kept Lithuania on the Watch List, citing the country’s weak enforcement, position as a major transshipment point, that “the country remains flooded with pirated copyright materials, including large volumes of optical media products.” The USTR 2003 Special 301 Announcement also cites the transshipment problem, and noted that the lack of adequate and effective enforcement continues to be the most persistent IPR problem in Lithuania, and kept it on the Watch List in 2003.

IIPA recommended that Lithuania remain on the Watch List in 2004, noting “the most persistent problem confronting the copyright industries in Lithuania is the lack of effective, on-the-ground enforcement, both in-country and at its borders, resulting in high piracy levels.” In its 2004 Special 301 Announcement, USTR kept Lithuania on the Watch List, noting that despite “continue[d] . . . progress towards improving its legislative framework for protecting IPR and in combating software piracy,” optical media piracy levels remain high. Furthermore, as USTR pointed out, “Lithuania is a key transshipment point in the Baltic region for pirated music . . . DVDs and videogames.” When Lithuania joined the European Union on May 1, 2004, Lithuania was graduated from the U.S. Generalized System of Preferences (GSP) trade program, a program which requires, among other elements, the adequate and effective protection of U.S. copyrights. Lithuania was retained on the Watch List in USTR’s Special 301 2005 Announcement for several outstanding issues including high piracy rates, problems with customs enforcement and the absence of deterrent penalties within the judicial system. IIPA once again recommended, and USTR agreed, that Lithuania remain on the Watch List in both 2006 and 2007, with USTR noting that “despite some IPR improvements this past year, numerous IPR issues remain.”

MACAU

Macau does not currently appear on any of the USTR lists. IIPA did not file a report on this country in 2008 nor in any year since 2001. Macau first appeared on a Special 301 in 1998. IIPA’s 1998 filing described it as one of the world’s leading sources of digital copyright piracy for export, thanks to a proliferation of pirate optical media production facilities, and recommended placement on the Priority Watch List. USTR agreed, citing an “explosion of illegal CD, CD-ROM and VCD manufacturing,” and calling for better copyright enforcement and implementation of import and export licensing of optical media production equipment and finished product. Macau remained on the Priority Watch List in 1999. In May 2000, in recognition of what USTR described as “reasonable progress in attacking the piracy problems that led to its placement on the Special 301 Priority Watch List,” Macau was lowered to the Watch List and USTR added an out-of-cycle review (OCR). In December 2000, USTR announced that Macau would remain on the Watch List, despite concerns that the “enforcement of the strong new intellectual property laws is not as vigorous as it needs to be.” In the 2001 Special 301 submission, the IIPA recommended that Macau be kept on the Watch List and an OCR be conducted “to evaluate Macau’s enforcement progress.” In its April 30, 2001 Special 301 Announcement, USTR kept Macau on the Watch List, noting a concern with “Macau’s failure to convict and sentence manufacturers of infringing intellectual property products.” Macau was removed by USTR from the Watch List in April 2002.

MACEDONIA

Macedonia has never appeared on a USTR list. IIPA has not filed a report on this country since 2005. In 2005, IIPA identified Macedonia in the Special Mention section of its Special 301 Report, see <http://www.iipa.com/rbc/2005/2005SPEC301MACEDONIA.pdf>, noting particular concerns with the country’s weak enforcement, and piracy rates of as high as 95% in some industries. Despite ratifying the two WIPO

Digital Treaties, the WCT and WPPT, Macedonia has made reservations with respect to the treaties that threaten to undermine some of the protections the treaties seek to provide. Macedonia currently participates in the GSP program.

MALAYSIA

In 2008, IIPA recommends that Malaysia remain on the Watch List, where it has appeared since 2002. See IIPA's 2007 Malaysia country report at <http://www.iipa.com/rbc/2008/2008SPEC301MALAYSIA.pdf>.

IIPA first identified Malaysia in 1985 as a country with a serious piracy problem, and supported the bilateral negotiations that led to Malaysia's adopting a comprehensive copyright law in 1987, and joining the Berne Convention in 1990, thus extending protection to U.S. works. In 1994, IIPA filed a "Special Comment" on Malaysia calling for judicial reforms so that deterrent sentences could be imposed on copyright pirates. In 1999, IIPA filed an "Open Recommendation" report on Malaysia focusing on optical media piracy and calling for the adoption and implementation of a comprehensive regulatory system for the import, export and operation of optical media production equipment and materials; sustained and consistent anti-piracy enforcement policies; and the prompt and consistent imposition of deterrent penalties on commercial pirates by Malaysian courts. In the April 30, 1999 Special 301 Announcement, USTR announced that an out-of-cycle review (OCR) of Malaysia would be conducted in September 1999. As a result of the OCR, USTR announced in December 1999 that Malaysia would not appear on any Special 301 lists but would be monitored for both TRIPS compliance and the passage of a comprehensive optical disc law. Because Malaysia was slow to enact and implement legislation to deal with the optical disc piracy problem, USTR placed Malaysia on the Priority Watch List in 2000.

In 2001, IIPA recommended and USTR agreed to keep Malaysia on the Priority Watch List, and USTR also decided to conduct an OCR to assess Malaysia's enforcement efforts and implementation of its new Optical Disc Act. On October 31, 2001, USTR kept Malaysia on the Priority Watch List as a result of the OCR. In 2002, IIPA recommended that Malaysia be lowered to the Watch List, but provided a series of target actions the government needed to take to sustain progress achieved in 2001; IIPA also recommended that USTR conduct an OCR to re-examine Malaysia's 301 status based on the degree of fulfillment of the target actions. USTR placed Malaysia on the Watch List in 2002, citing that country's serious optical media piracy problem, and stating, "there is concern that Malaysia has not established a climate of deterrence." USTR continued: "[w]ithout criminal prosecutions and the imposition of serious criminal sentences, there is no true deterrence to piracy in Malaysia." In 2003, IIPA recommended that Malaysia be retained on the Watch List, and that an OCR be conducted, noting "lack of deterrent sentencing results in organized criminals remaining free to produce and export product with impunity around the globe." The USTR 2003 Special 301 Announcement, keeping Malaysia on the Watch List in 2003, noted that "[p]rosecution is a weak link, and the judicial process remains slow," while also noting that the Malaysian Government intensified anti-piracy efforts in 2002, leading to closures of some unlicensed manufacturers of optical discs. In 2004, IIPA again recommended that Malaysia remain on the Watch List and that an OCR be conducted to determine whether Malaysia had progressed in reducing the high levels of manufacture and export of pirate optical discs. In its 2004 Special 301 Announcement, USTR placed Malaysia on the Watch List, noting that "[p]iracy rates remain high for optical media (especially entertainment software) and books, and the substantial export of illegal goods continues." In addition, USTR identified Malaysia as the "world's largest exporter of pirate entertainment software." In order to monitor Malaysia's progress toward eradicating its unacceptably high rate of pirate optical disc production and export, and efforts to improve its "lax enforcement," USTR announced that it would conduct an OCR of Malaysia in the fall of 2004. In early 2005, that review concluded with Malaysia's maintenance on the Watch List. In 2005, IIPA recommended that USTR retain Malaysia on the Watch List, and that it conduct an OCR to evaluate progress on various enforcement and legislative fronts. In its April 2005 Special 301 Announcement, USTR retained Malaysia on the Watch List. While acknowledging the Malaysian Government's stepped up enforcement efforts in 2004, USTR stated that Malaysia "has high piracy rates for optical media and is a substantial exporter of counterfeit and pirated products."

Again in 2006, IIPA recommended that Malaysia remain on the Watch List and that USTR conduct an OCR. Despite significant improvements, USTR retained Malaysia on the Watch List to monitor continuing progress. “The United States urges Malaysia to continue its enforcement efforts,” and “will work with Malaysia to make progress on these pressing IPR issues through the upcoming U.S.-Malaysia Free Trade Agreement negotiations.” It was added that “Malaysia should address several deficiencies in its copyright law to fully implement the WIPO Internet Treaties, and should join the WCT and WPPT.” In 2007, IIPA recommended that Malaysia remain on the Watch List. USTR kept Malaysia on the Watch List in 2007.

MEXICO

IIPA recommends that Mexico be elevated to the Special 301 Priority Watch List in 2008. See IIPA's 2008 Mexico country report at <http://www.iipa.com/rbc/2008/2008SPEC301MEXICO.pdf>.

In 1998 and 1999, IIPA urged the U.S. Government to place Mexico on the Priority Watch List but USTR kept Mexico on the Other Observations list despite Mexico's failure to resolve any of the identified problems. In 1999, Mexico was finally placed on the Watch List. In its April 30, 1999 announcement, USTR noted that “piracy and counterfeiting remain problems [despite Mexico's commitment] to implement and enforce high levels of intellectual property protection consistent with its international obligations.” Mexico did not appear on any Special 301 lists between 1999 and 2002. In its April 30, 2002 Special 301 Announcement, USTR did not place Mexico on any list, but did state that it would conduct an out-of-cycle review (OCR) “to assess where there has been an improvement in enforcement efforts . . . specifically whether raids against intellectual property piracy operations have led to prosecutions and convictions.” High-level government engagement, by both governments, on copyright matters is required, and IIPA requested such in public letters sent to the U.S. Government in March 2002 and April 2003. In its 2003 Special 301 Announcement, USTR decided to add Mexico to the Watch List, citing “lax enforcement against copyright and piracy and trademark counterfeiting,” difficulties for foreign firms attempting to enforce trademark rights in Mexico, the failure of raids to lead to prosecutions and convictions and copyright amendments that do not meet international obligations. The 2004 USTR Special 301 Announcement commended Mexico for its many improvements in IPR protection, including enacting “legislation classifying piracy as an organized crime.” USTR kept the country on the Watch List, however, largely because piracy of copyrighted material remains a major problem due to “lax enforcement at both the criminal and administrative level . . .”

USTR retained Mexico on the Watch List in its 2005 Special 301 Announcement stating that, “Despite an increase in the number of searches and seizures of counterfeit and pirated goods, the scope of IPR violations continues to outpace the Government of Mexico's IPR enforcement efforts, with U.S. copyright industry loss estimates increasing in 2004 to \$870 million.” IIPA recommended that, in 2006, Mexico remain on the Watch List and that “high-level engagement continue to combat the very high levels of piracy in that marketplace.” Although commending Mexico for drafting new IPR legislation, USTR retained Mexico on the Watch List and noted that these laws need to be enacted and implemented. Additionally, Mexico is encouraged to “follow its commendable raids with aggressive prosecutions and deterrent penalties, to improve domestic cooperation efforts on enforcement, and also to encourage cooperation between Mexican Customs and the PGR to stem the flow of infringing items before they reach the markets.” In 2007, IIPA recommended that Mexico be raised to the Priority Watch List, but USTR retained Mexico on the Watch List in 2007, but noted: “The United States encourages Mexico to follow its commendable raids with aggressive prosecutions and deterrent penalties, including prison terms, improve domestic cooperation efforts between federal, state, and local enforcement authorities, and increase IPR enforcement efforts by customs authorities. The United States urges Mexico to pass IPR legislation to give *ex officio* authority to law enforcement and customs authorities, criminalize camcording in theaters, and implement fully the WIPO Internet Treaties.”

MOLDOVA

Moldova does not currently appear on any of the USTR lists. IIPA did not file on this country in 2008. In 1995 and 1997, IIPA requested that USTR add the nations of the Commonwealth of Independent States (CIS) collectively, excluding the Russian Federation, to the Special 301 Watch List because nearly all of the CIS

countries had failed to meet their bilateral IPR obligations, piracy was rampant, enforcement inadequate, and copyright law reform urgently needed. In 2000, IIPA recommended that ten of the CIS countries be placed on the Special 301 Watch List (Armenia, Azerbaijan, Belarus, Georgia, Kazakhstan, Kyrgyz Republic, Moldova, Tajikistan, Turkmenistan, and Uzbekistan). In the May 30, 2000 Special 301 Announcement, USTR placed seven CIS countries on the Special 301 Watch List, including Moldova. Though IIPA recommended that it be placed on the Watch List in 2002, Moldova has not appeared on any list since 2000. IIPA included Moldova as part of its Special Mention section of the IIPA 2004 report, noting that while many legal reforms have been made over the past few years, Moldova “is not yet providing the type of effective enforcement necessary to stem the copyright piracy there, or to be in compliance with the enforcement obligations of the WTO TRIPS Agreement.”

In June 1999, IIPA filed a petition with USTR requesting that the country eligibility of Armenia, Belarus, Kazakhstan, the Kyrgyz Republic, the Republic of Moldova, Ukraine, and Uzbekistan under the Generalized System of Preferences (GSP) trade program be reviewed for its failure to provide adequate and effective copyright protection and enforcement for U.S. copyright owners, as required under the GSP. In February 2000, the administration announced that it accepted IIPA’s petition for review of Armenia, Kazakhstan, Moldova, Ukraine, and Uzbekistan. On May 12, 2000, the U.S. Government held public hearings on the GSP petitions regarding these five countries. On October 23, 2000, the IIPA requested that its petition on Moldova be withdrawn, as a result of cooperation with that government on legal reforms following the filing of the petition. The U.S. Government accepted that action and the GSP review of Moldova ended.

MOROCCO

IIPA did not make a submission on Morocco in 2008, but has in years prior; see IIPA’s country page at <http://www.iipa.com/countryreports.html>.

In 2006, IIPA highlighted Morocco in its Special Mention section, noting that Morocco just passed “one of the most modern copyright laws in the world, including key protections for the digital age, and enforcement mechanisms to account for the changing nature of commercial copyright piracy.” In 2007, IIPA included Morocco in its “Dispute Settlement” section, specifically highlighting deficiencies under the U.S.-Morocco Free Trade Agreement. USTR did not include Morocco on any lists in April 2007.

NEW ZEALAND

In 2008, IIPA specially mentions New Zealand; see <http://www.iipa.com/rbc/2008/2008SPEC301NEW-ZEALAND.pdf>. New Zealand does not currently appear on any of the USTR lists.

New Zealand appeared on the Special 301 Watch List in 1991 and 1992. In 1998, at the urging of IIPA, USTR initiated an out-of-cycle review (OCR) in response to New Zealand’s sudden decision to abolish the right to control unauthorized (“parallel”) imports for all copyright owners. This erosion of intellectual property protection, combined with what USTR described as an “enforcement regime [that] does not effectively deter piracy,” led USTR to follow IIPA’s 1999 recommendation and place New Zealand on the 1999 Watch List. New Zealand did not appear on any Special 301 lists in 2000. In the April 30, 2001 Special 301 Announcement, USTR noted it had placed New Zealand on the Watch List for a failure to introduce promised legislation banning parallel imports on “newly-released copyright products.” By the time USTR made its designations for 2002, New Zealand had still not introduced this legislation. Therefore, in the April 30, 2002 Special 301 Announcement, USTR kept New Zealand on the Watch List. It was dropped from the Watch List in 2003 after partial protection was restored for copyright owner control of importation. In 2005, IIPA recommended that New Zealand be returned to the Watch List, from which it was removed in 2003, to encourage it to focus on its long-delayed copyright law reform efforts. In 2006 and 2007, IIPA highlighted copyright concerns with New Zealand in its Special Mention section.

NICARAGUA

Nicaragua does not currently appear on any of the USTR lists. IIPA did not file a country report on Nicaragua in our 2008 301 submission. In April 1997, USTR added Nicaragua to the Special 301 Other Observations list. In January 1998, Nicaragua and the U.S. signed a bilateral intellectual property rights agreement obligating Nicaragua to provide a higher level of protection than the TRIPS Agreement by July 1999. In her May 1, 1998 announcement keeping Nicaragua on the Other Observations list, Ambassador Barshefsky noted, "piracy of video recordings, unauthorized video and sound recordings, and U.S. satellite signals by local cable television operators remains widespread. The copyright law does not explicitly protect computer software We look to Nicaragua to update its legal structure, to reduce piracy rates affecting all forms of intellectual property, and to bring its IP regime into compliance with the obligations of the IPR agreement quickly." Nicaragua has not appeared on a 301 list since 1998.

The U.S.-CAFTA-DR Agreement has been signed, and its entry into force with each Central American partner took place on a rolling basis; entry into force with Nicaragua was April 1, 2006. Once the FTA entered into force in Nicaragua, it ceased to benefit from a variety of U.S. trade programs (such as CBI).

NIGERIA

In 2008, IIPA again recommends that Nigeria be placed on the Watch List. See IIPA's 2008 Nigeria country report at <http://www.iipa.com/rbc/2008/SPEC301NIGERIA.pdf>.

In 2005, IIPA highlighted copyright concerns in Nigeria stemming from very high piracy rates, inadequate cooperation between government agencies, and a proliferation of optical disc manufacturing plants. In 2006, IIPA included Nigeria in its Special Mention section "to highlight the alarming growth in optical disc production capacity, and rampant piracy concerns, and an enforcement system which is ineffective in tackling the problem." In 2007, IIPA recommended that Nigeria be placed on the Watch List. Nigeria does not currently appear on any USTR lists.

Nigeria currently participates in the Generalized System of Preferences (GSP) trade program, which requires eligible beneficiary countries to provide "adequate and effective" protection of intellectual property, including copyright.

OMAN

IIPA did not make a submission on Oman in 2008, but has in years prior; see IIPA's country page at <http://www.iipa.com/countryreports.html>.

Oman does not currently appear on any of the USTR lists. IIPA reported on Oman for the first time in 1995, urging that Oman be placed on the Special Mention list (equivalent to USTR's Other Observations category) because it had no copyright law and was a potential haven for piracy in the Persian Gulf region. USTR agreed, and thereafter raised Oman to the Watch List in 1996, describing the country's intellectual property protection regime as "minimal and stagnant." In 1997, USTR decided to keep Oman on the Watch List, noting that efforts to modernize Oman's copyright law were "progressing slowly." In 1998 and 1999, IIPA recommended that Oman be kept on the Watch List, as Oman's market was "dominated by piracy," and was "a haven for pirates fleeing less hospitable neighboring states," and in 2000, IIPA recommended keeping Oman on the Watch List primarily for failure to stop piracy of business software. USTR agreed all three years. On May 21, 2000, Oman enacted copyright legislation as one of the final pieces in Oman's WTO accession process (Oman joined the WTO in November 2000). In the 2001 Special 301 submission, the IIPA recommended that Oman be placed on the Watch List, to ensure the market would be cleaned up, and encourage enforcement against corporate end-user piracy of business software. USTR decided to remove Oman from the Watch List, and they remained off the list in 2002 (IIPA did not file a report on Oman in 2002). In 2007, IIPA included Oman in its Special Mention section. USTR did not include Oman on any lists.

Oman currently participates in the Generalized System of Preferences (GSP) program, a U.S. trade program that offers preferential trade benefits to eligible beneficiary countries. One of the discretionary criteria of this

program is that the country provides “adequate and effective protection of intellectual property rights.”

PAKISTAN

IIPA recommends that Pakistan remain on the Watch List in 2008. See IIPA’s 2008 Pakistan country report at <http://www.iipa.com/rbc/2008/2008SPEC301PAKISTAN.pdf>.

Pakistan was on the Special 301 Watch List from 1989 to 2003. In 1997 and 1998, USTR noted that piracy of computer software, videos, and books remained widespread. In 1999, IIPA recommended that Pakistan remain on the Watch List, and noted for the first time the sudden arrival of CD manufacturing capability. USTR noted the CD plants and Pakistan’s TRIPS-incompatible law. In 2000, IIPA again recommended that Pakistan be kept on the Watch List, again noting the increasing pirate CD production problem. In 2001, IIPA made the same recommendation. In the April 30, 2001 Special 301 Announcement, USTR noted that despite new legislation, “[t]he sharp growth in optical media piracy, however, offsets the promising developments in legal infrastructure.”

In 2002 and again in 2003, IIPA recommended that Pakistan be elevated to the Priority Watch List, noting the alarming rise of pirate optical disc production. USTR, in keeping Pakistan on the Watch List both years, recognized Pakistan’s position as “one of the world’s largest exporters of pirate CDs and optical media” (2002). USTR’s 2003 Special 301 Announcement described Pakistan as the “fourth largest source of counterfeit and piratical goods seized by the U.S. Customs Service” in 2002, and notes again the substantial increase in optical media production in 2002. IIPA recommended that Pakistan be designated as a Priority Foreign Country in 2004, for extremely high levels of piracy, and the Pakistani Government’s complete lack of attention to the problem. The 2004 USTR Special 301 Announcement again described Pakistan as the “fourth largest source of counterfeit and piratical goods seized by the U.S. Customs Service” and elevated Pakistan to the Priority Watch List, citing worsening piracy and counterfeiting problems. USTR retained Pakistan on the Priority Watch List in its Special 301 2005 Announcement stating that, “... the overall piracy and counterfeiting problems in Pakistan have not improved significantly over the past year...” IIPA recommended that Pakistan be lowered to the Watch List in 2006, and that USTR conduct an OCR. Citing “notable progress on IPR issues during the past year,” Pakistan was lowered to the Special 301 Watch List. Noting significant improvements, USTR also indicated that piracy rates remained a concern and that the United States would work with Pakistan to “achieve further improvements in its IPR protection and enforcement regimes.” In 2007, IIPA recommended that Pakistan remain on the Watch List, and that an out-of-cycle review (OCR) be conducted in September 2007 to assess Pakistan’s progress in (1) undertaking significant action against pirate booksellers, often located in Urdu bazaars, namely, FIA-led enforcement followed by prosecutions of cases leading to significant penalties; (2) ensuring that the National Book Foundation ceases all activity considered infringing under international norms; (3) making the Intellectual Property Organization a more meaningful and effective organization, functioning to allow input from government officials and private sector representatives alike, and staging a comprehensive plan for tackling Pakistan’s outstanding piracy issues; (4) beginning the prosecution of the optical disc manufacturing pirates that were arrested over a year ago; (5) stepping up enforcement against retail piracy; and (6) improving border enforcement against the growing number of pirate imports from Malaysia and other countries. USTR agreed to grant an OCR, and IIPA made a submission in late 2007, recommending that Pakistan remain on the Watch List.

Pakistan currently participates in the U.S. GSP program offering duty-free imports of certain products into the U.S. from developing countries. In order to qualify for such unilaterally granted trade preferences, USTR must be satisfied that Pakistan meets certain discretionary criteria, including whether it provides “adequate and effective protection of intellectual property rights.” In June of 2001, the IIPA filed a request for review of Pakistan’s GSP benefits for its failure to protect the intellectual property rights of U.S. copyright owners. IIPA’s petition was accepted but on January 24, 2005, the U.S. Government review was terminated, due to progress made in reducing the impact of optical disc piracy in Pakistan. IIPA endorsed the termination of the GSP review of Pakistan, while noting that outstanding issues such as book piracy continue to merit attention through other mechanisms. As a result of termination, Pakistan continues to enjoy duty-free status for imports of certain products into the United States.

PALESTINIAN AUTHORITY

The Palestinian Authority does not currently appear on any of the USTR lists. IIPA has not filed a report on the Palestinian Authority since 2001 but has in years prior; see IIPA's country page at <http://www.iipa.com/countryreports.html>. IIPA filed its first Special 301 comments on the Palestinian Authority in 1999, over concerns about the rapid growth of optical media and video piracy in the West Bank and Gaza Strip. IIPA recommended that USTR signal its engagement with the Palestinian Authority by placing it on the Watch List. In addition to recommending a Watch List designation in 1999, IIPA also recommended that USTR conduct an out-of-cycle review (OCR) to monitor the anti-piracy and legal measures undertaken by the Authority. The Palestinian Authority did not appear on any Special 301 lists in 1999. In 2000, raising increasing concerns over pirate production for export, IIPA recommended that the Palestinian Authority be placed on the Priority Watch List. On May 1, 2000, USTR announced that it would conduct an OCR of the Palestinian Authority. The scheduled review has not yet occurred, due to unrest in the area. In 2001, noting continuing unrest, the IIPA recommended that USTR conduct an OCR of the area when conditions permit. USTR did not place the Palestinian Authority on any list in 2001 or 2002.

The West Bank currently participates in the Generalized System of Preferences (GSP) program, a U.S. trade program that offers preferential trade benefits to eligible beneficiary countries. One of the discretionary criteria of this program is that the country/territory provides "adequate and effective protection of intellectual property rights."

PANAMA

Panama does not currently appear on any of the USTR lists. IIPA did not file on this country in 2008. Panama was placed on the Special 301 Special Mention list (now known as Other Observations) in 1994 and again in 1996. In October 1996, USTR initiated a review of Panama's intellectual property rights regime under the Generalized System of Preference (GSP) program. IIPA participated in the GSP hearings in November 1996, during which the Panamanian Government acknowledged that its system for protecting intellectual property had not been fully implemented, although some enforcement actions were beginning to be taken. On April 30, 1997, USTR elevated Panama to the Watch List and scheduled an out-of-cycle review (OCR) to assess Panama's efforts to "improv[e] its intellectual property laws and their enforcement." As a result of this OCR in October 1997, USTR decided to remove Panama from the Watch List, given "visible progress" made since its placement on that list. In 1998, Panama was elevated to the Other Observations list amid USTR's concerns that "inadequate enforcement continues to be a major problem." Because of progress made in Panama during that year, USTR terminated the GSP review on October 26, 1998. Panama has not appeared on any Special 301 list since 1998. In 2006, Panama was included in IIPA's Special Mention section, where it was noted that the ongoing negotiations of the Free Trade Agreement offers the opportunity to encourage compliance with other evolving international trends in copyright and enforcement standards.

Panama and the U.S. completed negotiations for a Trade Promotion Agreement (TPA) in December 2006, and U.S. Congressional approval is pending. After the FTA enters into force in Panama, it will cease to benefit from a variety of U.S. trade programs (such as GSP and CBI). IIPA supports this .

PARAGUAY

In 2008, IIPA recommends that Paraguay remain under Section 306 monitoring; see IIPA's 2008 Paraguay country report at <http://www.iipa.com/rbc/2008/2008SPEC301PARAGUAY.pdf>

The bilateral history of engagement between the U.S. and Paraguay has been a lengthy and intricate one. In 1992, IIPA reported that Paraguay was the central point for the production, export, and transshipment of pirate audiocassettes throughout South America. By that time, the recording industry had already spent several years working to improve the on-the-ground enforcement situation in Paraguay. In April 1992, USTR placed Paraguay on the Watch List. In early 1993, Paraguayan officials made a political commitment to end the

widespread piracy of sound recordings. By April 1993, because Paraguay had substantially reduced the level of piracy of sound recordings and music, Ambassador Kantor removed Paraguay from the Watch List. In early 1994, despite some positive enforcement efforts made by Paraguayan authorities, the recording industry reported a recurrence of the pre-1993 problems involving the export of pirated product at the Brazilian border. In 1994 and 1995, USTR kept Paraguay on the Special Mention list, despite industry recommendations to elevate back to the Watch List. In 1996, IIPA recommended a Priority Watch List placement because of increasing piracy problems in Paraguay, especially at the border. USTR elevated Paraguay to the Watch List on April 30, 1996. During an out-of-cycle review (OCR) in October 1996, USTR kept Paraguay on the Special 301 Watch List, noting “the Government of Paraguay must take strong, coordinated, government-wide action to institute effective enforcement systems.” In early 1997, IIPA recommended that USTR designate Paraguay as a Priority Foreign Country because of the longstanding problems of piracy, ineffective enforcement and an inadequate copyright law. In April 1997, USTR elevated Paraguay to the Priority Watch List, noting that “despite efforts of concerned government officials, piracy and counterfeiting in Paraguay have reached alarming levels and much more needs to be done.” In late 1997, USTR conducted an OCR of Paraguay’s Special 301 status. Because Paraguay simply failed to meet the standards laid out in that review, USTR designated Paraguay as a Priority Foreign Country on January 16, 1998. A Section 301 investigation commenced on February 17, 1998. During the investigation, U.S. and Paraguayan officials met several times for consultations. The U.S. had hoped for dramatic progress in many areas by July 1998, but this did not happen. Some accomplishments were achieved, however. On April 23, 1998, the Attorney General (Fiscal General) issued a circular to his prosecutors, urging them to apply the maximum penalties in cases of piracy, and requesting that they report on pending IPR proceedings. While this is a useful instruction, no copyright cases have reached the sentencing stage in Paraguay.

On November 17, 1998, USTR announced that a comprehensive bilateral intellectual property agreement with Paraguay was concluded which “will significantly improve intellectual property protection for copyrights, patents and trademarks and ensure continued progress in the fight against piracy and counterfeiting in Paraguay.” By signing the Memorandum of Understanding and Enforcement Action Plan, USTR decided not to take further trade action at that time and terminated both the Section 301 investigation as well as its review of Paraguay’s IPR practices under the Generalized System of Preferences, which had commenced in October 1996 as part of the 1995 GSP Annual Review. In IIPA’s 1999 and 2000 Special 301 filings, IIPA supported USTR’s continued Section 306 monitoring despite concerns that Paraguay had already missed most of the interim deadlines of the November 1998 MOU/Action Plan, and that Paraguayan courts had not yet issued a sentence in a copyright infringement case. In 2001, IIPA continued to support USTR’s Section 306 monitoring of Paraguay. USTR’s April 30, 2001 Special 301 Announcement noted inadequate implementation of the MOU and that “Paraguay continues to be a regional center for piracy and counterfeiting and a transshipment point to the larger markets bordering Paraguay, particularly Brazil, where the sales of pirated copyright products in optical media and other formats have been of particular concern.” In 2002, IIPA recommended that Paraguay remain subject to Section 306 monitoring. USTR agreed, noting in its April 30, 2002 announcement Paraguay’s failure “to implement vigorous border enforcement measure, as agreed to in the MOU,” and that “pirate optical media production has been dispersed to smaller enterprises, in order to evade law enforcement efforts.” Paraguay remained subject to Section 306 monitoring in 2002. The Memorandum of Understanding expired in January 2003, but USTR and Paraguay agreed to extend its provisions until it can be renegotiated. The 2003 USTR Special 301 Announcement notes the lack of improvement in Paraguay, including “poor internal enforcement and weak border enforcement.” Paraguay therefore continues to be subject to Section 306 monitoring in 2003.

In December 2003, a second IPR MOU was signed by both governments, and IIPA recommended again that Paraguay be monitored under Section 306 in 2004, and USTR agreed. In its 2004 Special 301 Announcement, USTR noted that Paraguay continued to have problems in providing protection for copyrights and trademarks, both with respect to poor internal enforcement and weak border enforcement. These issues were revisited in USTR’s Special 301 2005 announcement which continued Paraguay’s Section 306 monitoring and stated, “We remain concerned over several issues, including: persistent problems with enforcement due to porous borders; the involvement of organized crime in piracy and counterfeiting operations; ineffective prosecutions for IPR infringements; and the lack of consistent deterrent sentences, including imprisonment, in court cases.” IIPA and USTR agreed that continued Section 306 monitoring was needed in 2006, with USTR reiterating the lack

of improvement in IPR protections and enforcement. The second IPR MOU expired at the end of 2005 and has been extended for two years. In 2007, IIPA and USTR again agreed that Section 306 monitoring was needed for Paraguay. Late in 2007, both governments renewed their commitments to a new IPR MOU, which will be formally signed in early 2008.

Paraguay participates in the Generalized System of Preferences (GSP) program, a U.S. trade program that offers preferential trade benefits to eligible beneficiary countries. One of the discretionary criteria of this program is that the country provide “adequate and effective protection of intellectual property rights.”

PEOPLE’S REPUBLIC OF CHINA

In 2008, IIPA recommends that USTR maintain China on the Priority Watch List. See IIPA’s 2008 People’s Republic of China country report at <http://www.iipa.com/rbc/2008/2008SPEC301PRC.pdf>.

After USTR placed China on the Priority Watch List in both 1989 and 1990 to encourage it to commence a law reform process, China passed a new copyright law in September 1990 (effective June 1, 1991). That law was incompatible with the Berne Convention and had numerous other defects, and as a result of these inadequacies as well as high and growing losses due to copyright piracy, USTR named China a Priority Foreign Country in April 1991. In January 1992, China and the U.S. settled the resulting Section 301 action by entering into a Memorandum of Understanding (MOU). This MOU committed China to adopt Berne-compatible regulations to its copyright law and to join the Berne Convention (which China did, effective October 15, 1992) and the Geneva Phonograms Convention (which it also did, effective June 1, 1993). U.S. works became fully eligible for protection in April 1992 under the 1992 MOU, and China was consequently placed on the Watch List in April 1992.

On September 30, 1992, China’s Berne-compatible regulations went into effect (but only applied to foreign works, leaving domestic Chinese copyright and related rights owners with less protection for their works, performances and sound recordings than that enjoyed by foreign right holders). China remained on the Watch List in 1993, with IIPA and USTR pushing for passage of legislation to make copyright piracy a criminal offense, as well as to beef up enforcement measures. On November 30, 1993, Ambassador Kantor elevated China to the Priority Watch List due to China’s failure to enforce its laws. In February 1994, IIPA reported significantly increased trade losses, up to \$823 million for 1993. Due to the absence of criminal penalties and a total lack of enforcement, USTR once again named China as a Priority Foreign Country in June 1994, though the National People’s Congress, through a “Decision” of the Standing Committee, adopted criminal penalties for copyright piracy in July 1994. It was not until 1995 that the “Decision” was implemented by a set of “Interpretations” issued by the Supreme People’s Court. However, because the “Decision” appeared not to have the full effect of a “Law” (which was not adopted until March 1997, effective October 1997), the criminal provisions were rarely used and deterrence suffered accordingly. Meanwhile, U.S. trade losses continued to mount. On February 4, 1995, the U.S. Government announced \$1.08 billion in retaliatory tariffs to compensate for trade losses due to copyright piracy in China. Imposition of these tariffs was narrowly averted by the U.S.-China IPR Agreement on February 26, 1995. As a result of this agreement, the second Section 301 case against China was terminated, China was made subject to monitoring under Section 306, and, on April 30, 1995, USTR moved China to the Watch List.

While some progress was made during 1995 to set up the enforcement infrastructure promised in the 1995 agreement, its principal provisions (those dealing with CD factories, with imposing deterrent penalties and with eliminating onerous market access barriers) remained largely unfulfilled. This led IIPA, in February 1996, once again to urge that China be named a Priority Foreign Country and that the previously terminated Special 301 investigation be reopened. USTR took these actions on April 30, 1996 and a retaliation list, comprising over \$2 billion worth of products, was published on May 15, 1996. This was followed by protracted and often heated discussions, which led to the closure of 15 CD factories, other enforcement actions by Chinese authorities, and the announcement of certain market-opening measures. Finally, on June 17, 1996, the U.S. and China agreed on a set of announcements which averted the imposition of trade sanctions, and which led to the Section 301 action once more being terminated. This left China subject to monitoring of its compliance with the 1995 and

1996 agreements under Section 306 of the U.S. Trade Act as it remains today. The U.S. Government, led by USTR, has continued since then to meet regularly with Chinese authorities to monitor compliance with China's agreements. In 2001, China amended its copyright law and joined the World Trade Organization, stating it would implement its obligations under the TRIPS Agreement, from the time of its joining the WTO.

Between 1998 and 2004, IIPA continued to recommend, and USTR agreed, that China be subject to Section 306 monitoring to ensure its compliance with the 1995 IPR Agreement and the 1996 Action Plan. In its 2004 Special 301 Announcement, USTR additionally stated that it would begin an out-of-cycle review (OCR) of China in early 2005, "to evaluate whether China is implementing its commitments and whether the actions undertaken are bringing forth substantial progress toward China's objective of significantly reducing its level of IPR infringement." In the OCR, IIPA recommended that "USTR immediately request consultations with China in the World Trade Organization, and that it place China on the Priority Watch List pending an OCR to be concluded by July 31, at which time further appropriate multilateral and bilateral action, including the possible establishment of a dispute settlement panel in the WTO, will be determined." In its April 2005 Special 301 Announcement, USTR announced in its OCR results that China would be "elevated to the Priority Watch List on the basis of serious concerns about China's compliance with its WTO TRIPS obligations and commitments China made at the April 2004 JCCT to achieve a significant reduction in IPR infringement throughout China, and make progress in other areas," concluding that "China has failed to significantly reduce IPR infringement levels, as required under the JCCT." USTR also decided that it would "invoke the transparency provisions of the WTO TRIPS Agreement to request that China provide detailed documentation on certain aspects of IPR enforcement that affect U.S. rights under the TRIPS Agreement," would "for example, be seeking information on criminal and administrative penalties actually imposed," and that it would "use the JCCT and IPR Working Group to secure new, specific commitments concerning additional actions that China will take that result in significant improvements in IPR protection and enforcement, particularly over the [second half of 2005]."

Once again, citing piracy rates that continue to be the highest in the world (at 85-95%, depending on the industry), IIPA recommended that China remain on the Priority Watch List in 2006. IIPA noted China's failure to follow through on its JCCT commitments and the fulfillment of its TRIPS obligations, urged it to join WCT and WPPT by the date promised and to provide meaningful, deterrent criminal prosecutions with deterrent penalties IIPA stated that "[f]ailure to bring more prosecutions for copyright piracy raises a serious question about China's compliance with its international legal obligations by failing to provide a deterrent to further infringements." USTR agreed with IIPA's recommendation, noting that "[i]nadequate IPR enforcement is one of China's greatest shortcomings as a trading partner." China remained on the Priority Watch List, and remains subject to Section 306 monitoring. "Faced with only limited progress by China in addressing certain deficiencies in IPR protection and enforcement," USTR continues to consider its "WTO dispute settlement options." In 2007, IIPA again recommended that China remain on the Priority Watch List. USTR retained China on the Priority Watch List in 2007 but also filed two dispute settlement cases against China in the WTO, the first challenging certain of China's IPR practices as violations of China's TRIPS enforcement obligations, and the second challenging a number of market access restrictions as violations of China's GATT and GATS obligations.

PERU

IIPA recommends that Peru be raised to the Priority Watch List, where it has appeared since 2001. See IIPA's 2007 Peru country report at <http://www.iipa.com/rbc/2008/2008SPEC301PERU.pdf>.

USTR first placed Peru on the Special 301 Watch List in 1992, where it remained for seven years. In February 1995, IIPA was greatly concerned about the inadequate copyright law and poor enforcement efforts in Peru and filed a petition to deny preferential trade benefits under both the Generalized System of Preferences (GSP) program and the Andean Trade Preferences Act (ATPA). Peru amended its copyright law in 1996 and established an administrative agency to handle copyright enforcement. As a result of such progress, these petitions were not accepted by USTR. USTR's April 1996 Special 301 Announcement noted that some progress had been taken by INDECOPI (a quasi-governmental agency), but urged the government "to intensify its anti-piracy efforts, particularly to combat sound recordings and book piracy." USTR kept Peru on the Watch

List in both 1997 and 1998. In both 1999 and 2000, IIPA recommended, and USTR agreed, that Peru should be elevated to the Priority Watch List.

In 2001, IIPA recommended that Peru be put on the Watch List in recognition of noticeable progress INDECOPI has made on copyright issues. USTR agreed, placing Peru on the Watch List for 2001. In the April 30, 2001 Special 301 Announcement, USTR noted that “the Government of Peru took several positive steps in cooperating with U.S. industry on intellectual property protection.” The announcement points out that “[d]espite these efforts, however, criminal enforcement remains a problem.” In 2002, IIPA recommended that USTR keep Peru on the Watch List, noting high piracy levels, weak enforcement, and a failure to require government agencies to use licensed software. Peru remained on the Watch List. USTR’s 2003 Special 301 Announcement noted that Peru “took some steps to destroy pirated and counterfeit products” in 2002, but “piracy rates for all copyright industries remained high, in particular for sound recordings.” Lack of prosecutions and deterrent sentences remain serious problems, so Peru remained on the Watch List in 2003. IIPA recommended that Peru continue to be on the Watch List in 2004. In its 2004 Special 301 Announcement, USTR agreed, noting “continuing concerns with respect to Peru’s IP regime over the lack of data protection, weakened patent protection, widespread piracy of copyrighted works and lack of effective IPR enforcement.” Peru was retained on the Watch List in USTR’s 2005 Special 301 Announcement for several outstanding issues highlighted in USTR’s Special 301 2004 Announcement. In 2006, IIPA recommended that Peru remain on the Watch List, citing ineffective administrative and criminal enforcement as the primary concern. USTR reports that the United States is “pleased at the signing on April 12, 2006 of the United States-Peru Trade Promotion Agreement (PTPA) and looks forward to stronger IPR protection and enforcement in Peru.” Peru remains on the Watch List, and the United States encourages the Government of Peru to strengthen its IPR protections in order to “meet its international and PTPA commitments.” In 2007, IIPA recommended that Peru remain on the Watch List, where it had appeared since 2001; USTR agreed with IIPA’s recommendation.

Peru and the U.S. signed a Trade Promotion Agreement in April 2006, and the U.S. Congress voted favorably in 2007. After this FTA enters into force in Peru, it will cease to benefit from a variety of U.S. trade programs (such as GSP and ATPA). In early 2008, the U.S. Congress is considering extending ATPA benefits to the Andean countries, including Peru.

THE PHILIPPINES

IIPA recommends that the Philippines remain on the Watch List and recommends that USTR conduct an out-of-cycle review (OCR). See IIPA’s 2008 Philippines country report at <http://www.iipa.com/rbc/2008/2008SPEC301PHILIPPINES.pdf>.

The Philippines has been on USTR’s list for well over a decade, and IIPA has a long history of involvement with copyright issues there. In 1992 and 1993, IIPA recommended that USTR identify the Philippines as a Priority Foreign Country, given the almost complete lack of attention by the Philippine Government toward enacting copyright reform and improving enforcement. In 1992, USTR elevated the Philippines from the Watch List to the Priority Watch List. On April 6, 1993, the Philippine Government exchanged letters with the U.S. Government, committing the Philippines to provide strong intellectual property rights protection and improved enforcement. As a result of that agreement, USTR dropped the Philippines from the Priority Watch List to the Watch List in 1993.

In June 1997, the Philippines enacted a comprehensive modernization of its copyright law (effective January 1, 1998). In 1998, IIPA, asking USTR to keep the Philippines on the Watch List, commended the government on the law, but noted ongoing problems with enforcement and the need to clarify omissions and ambiguities in the new law. USTR agreed to keep the Philippines on the Watch List in 1998 and 1999. In 2000, IIPA called for the Philippines to be elevated to the Priority Watch List, noting that optical disc pirate production had taken root in the country and that fundamental improvements in the investigative, prosecutorial and judicial systems were needed. In its May 1, 2000 Special 301 Announcement, USTR maintained the Philippines on the Watch List, but also noted the possible initiation of a future WTO dispute settlement case against the Philippines for noncompliance with TRIPS obligations.

Noting increased pirate production and cross-border distribution, the IIPA recommended in 2001 that the Philippines be placed on the Priority Watch List “to underscore U.S. insistence that these long-standing and serious problems be effectively tackled.” USTR agreed and placed the Philippines on the Priority Watch List in 2001. In the April 30, 2001 Special 301 Announcement, USTR noted concern that “the Philippines has the potential of becoming a center of pirate optical media production in Asia.” In 2002, IIPA recommended, and USTR agreed, to keep the Philippines on the Priority Watch List and conduct an OCR due to rampant pirate optical disc production and to review whether the Philippines had passed and implemented an optical disc law. In 2003, IIPA recommended, and USTR agreed, to keep the Philippines on the Priority Watch List. The 2003 USTR Special 301 Announcement noted that optical media piracy had increased to the point where the Philippines was a net exporter of pirated optical media. In 2004, the IIPA recommended, and USTR agreed, that the Philippines be placed on the Priority Watch List. USTR’s 2004 Special 301 Announcement mentioned little improvement in the Philippines, noting that “serious concerns remain regarding the lack of consistent, effective, and sustained IPR protection in the Philippines.”

In 2005, IIPA recommended that the Philippines be maintained on the Priority Watch List, and that an OCR be conducted to evaluate whether recently initiated enforcement and legislative actions to eradicate copyright piracy were being sustained. In its 2005 Special 301 Report, USTR announced that The Philippines would be retained on the Priority Watch List and that an OCR would be conducted. Positive improvements made by the Philippines, which include the implementation of the Optical Media Act and accession to the WIPO Internet Treaties, were acknowledged. USTR noted:

Despite these improvements, U.S. industry continues to raise serious concerns about high levels of copyright piracy and trademark counterfeiting, including book piracy, increasing levels of pirated optical media imported into the country, and pervasive end user software piracy. The U.S. copyright and trademark industries also report continued difficulty protecting their rights through the Philippine legal system due to low conviction rates and imposition of non-deterrent sentences.

In 2006, IIPA recommended that the Philippines remain on the Priority Watch List pending the outcome of a review. In February 2006, USTR announced the results of the OCR, and lowered the Philippines to the Watch List, noting “substantial improvements in IPR protection,” but also noted that “there is much work to be done.” USTR noted:

[T]he Philippines is encouraged to increase IPR enforcement actions, including inspections and raids of OD plants, seizure of pirate and counterfeit products and the machinery used to produce infringing products, arrests and convictions of pirates and counterfeiters, imposing deterrent sentences against criminal IPR infringers, and ensuring the destruction of seized goods and equipment. The United States will use the bilateral Trade and Investment Framework Agreement to engage the Government of Philippines on strengthening its IPR regime.

In 2007, IIPA recommended that the Philippines remain on the Watch List because of the lack of criminal convictions against pirate plant owners and mall owners, general ineffectiveness of the courts hearing piracy cases, the continued prevalence of book piracy, optical disc piracy, Pay TV piracy, and the unknown final disposition of pirate goods and materials and implements found in various raids, IIPA called for the U.S. Government to conduct an out-of-cycle review (OCR) to determine whether the Philippine Government has taken adequate steps to address these concerns. No OCR was granted.

The Philippines currently participates in the Generalized System of Preferences (GSP) program, a U.S. trade program that offers preferential trade benefits to eligible beneficiary countries. One of the discretionary criteria of this program is that the country provides “adequate and effective protection of intellectual property rights.”

POLAND

IIPA recommends that Poland remain on the Watch List in 2008. See IIPA's 2008 Poland country report at <http://www.iipa.com/rbc/2008/2008SPEC301POLAND.pdf>.

To recap Poland's Special 301 placement in recent years, in its May 1, 2000 Special 301 Announcement, USTR elevated Poland to the Priority Watch List, from the Watch List where it had been listed since 1994, for its failure to bring its copyright regime in line with TRIPS obligations and Business Economic Relations Agreement, and noted the possibility of the initiation of a TRIPS case against Poland. In June 2000, Poland finally enacted TRIPS-compliant amendments to the copyright law. USTR responded by moving Poland to the Watch List in a November out-of-cycle review (OCR), noting that "it is critical that Poland also addresses remaining intellectual property problems, including weak enforcement against piracy and counterfeiting." In 2001, IIPA recommended that Poland remain on the Watch List, but that USTR conduct an OCR "to ensure that progress continues in Poland on both enforcement and legislative reform." IIPA recommended that the review "focus on distinct and tangible improvements made in halting the activities involved in the sale and distribution of piratical materials at the Warsaw Stadium." Though USTR did not conduct an OCR, in the October 31, 2001 Special 301 "out of cycle" decision announcement, continued concern over the large amounts of pirate products in the Warsaw Stadium was noted by USTR. The announcement urged Polish authorities to act immediately to halt the sale of pirated products in and through the stadium. In 2002, IIPA recommended that Poland be placed on the Watch List. USTR agreed, again pointing to the Warsaw Stadium as a glaring example of Poland's failure to provide adequate enforcement of intellectual property rights. In order to monitor Poland's enforcement efforts, USTR stated in the April 30, 2002 Special 301 Announcement that it would conduct an OCR. On October 30, 2002, IIPA filed recommendations for several on-going OCRs, including Poland. The results of that review were not made available. The 2003 USTR Special 301 Announcement commented that the situation in Poland (including the Warsaw Stadium market) had not changed, and placed Poland on the Priority Watch List. IIPA recommended that Poland remain on the Priority Watch List in 2004, citing serious problems with imports of pirated copyright products, and optical disc production.

USTR lowered Poland's ranking to the Watch List in its 2004 Special 301 Announcement, even though pirating, border control, and enforcement efforts remained a serious issue. USTR further noted that after being put on the Priority Watch List the Polish Government demonstrated "its willingness to address U.S. IP-related concerns, especially regarding copyright protection, and has made changes over the past year that have provided the foundation for long-term, sustained improvements." Finally, USTR stated that it would conduct an OCR in the fall of 2004 to ensure that Poland continued its efforts to strengthen IPR protection and enforcement. IIPA participated in that review, recommending that Poland remain on the Watch List. In January 2005, USTR concluded the review, maintaining Poland's placement on the Watch List, "... to monitor its progress in improving IPR protection." Poland was praised for passing copyright legislation and optical disc regulations and for engaging in anti-piracy activities. IIPA recommended that Poland remain on the Watch List in 2006. USTR agreed, and despite "some progress" in 2006, including increased raids and seizures of pirated goods and "improved coordination with private industry" Poland was retained on the Watch List. Reiterating concerns from previous years, "the United States encourages Poland to continue...progress by committing its resources and attention to IPR enforcement,," In 2007, IIPA recommended that Poland remain on the Watch List. USTR retained Poland on the Watch List in April 2007. During 2007, the infamous Warsaw Stadium closed.

In addition to Special 301 oversight, Poland's intellectual property rights practices were also subject to a review under the Generalized System of Preferences (GSP) program. IIPA filed a petition with USTR on June 1, 1993, asking that Poland lose its eligibility to receive preferential trade benefits under the GSP program. On July 24, 1995, Ambassador Kantor announced that he was extending Poland's GSP review until February 1996 "in the expectation that, by that time, Poland will have taken the steps required to provide adequate protection to U.S. sound recordings." Although this issue was not satisfactorily resolved, USTR terminated its GSP review of Poland on October 4, 1996. Given continuing legal deficiencies in Poland's copyright law, IIPA filed a GSP petition with USTR to do a review of Poland for its failure to provide adequate and effective copyright

protection for U.S. copyright owners. The administration did not accept IIPA's petition. When Poland joined the European Union on May 1, 2004, Poland was graduated from the U.S. Generalized System of Preferences (GSP) trade program, a program which requires, among other elements, the adequate and effective protection of U.S. copyrights.

QATAR

Qatar does not currently appear on any of the USTR lists. IIPA did not file on this country in 2008. IIPA first reported on Qatar in 1995, when it recommended that Qatar be placed on Other Observations because of its lack of any copyright law or enforcement effort. USTR agreed, and placed it there in 1995 and 1996, noting that it expected Qatar to take steps to address shortcomings in its intellectual property regime. In 1997, USTR once again kept Qatar on the Other Observations list, noting that no enforcement had yet taken place. In 1998, IIPA recommended that Qatar be elevated to the Watch List, so that USTR could signal its engagement with Qatar over high piracy levels for all kinds of copyrighted products and an inadequate law, making Qatar a potential "haven of piracy." USTR agreed, and in raising Qatar to the Watch List in 1998, USTR called upon Qatar to legalize the software used in government offices, improve copyright enforcement, and implement its TRIPS obligations. As recommended by IIPA, Qatar remained on the Watch List in 1999 and 2000 because of its failure to enact TRIPS-consistent legislation and serious enforcement problems. IIPA recommended that Qatar remain on the Watch List in 2001 for failure to adequately address the piracy of business software and other copyrighted products. USTR did not place Qatar on any list in 2001. In 2002, IIPA again recommended that Qatar be returned to the Watch List, to address serious software piracy issues, and in recognition that Qatar had failed to pass promised copyright legislation in 2001. In April 2002, USTR decided to place Qatar back on the Watch List, for failure to sign and implement the copyright law. On October 10, 2002, USTR announced that several countries, including Qatar, were currently undergoing out-of-cycle reviews. Those reviews were not conducted. In 2003, IIPA recommended that Qatar be maintained on the Watch List. In its submission, IIPA noted that though Qatar took steps to bring its copyright law into compliance with international standards, software piracy remained at high levels due to Qatar's failure to enforce its copyright law. USTR did not place Qatar on any list in either 2003 or 2004.

ROMANIA

IIPA recommends that Romania remain on the Watch List in 2008. See IIPA's 2008 Romania country report at <http://www.iipa.com/rbc/2008/2008SPEC301ROMANIA.pdf>.

In a Side Letter to the 1992 trade agreement with the U.S., the Romanian Government committed to take several actions to improve intellectual property rights, including adhering to the Berne Convention (1971 text) and the Geneva Phonograms Convention. Romania agreed to submit for enactment, no later than December 31, 1993, legislation necessary to carry out its obligations and to make "best efforts" to implement legislation by that date. In 1995, after Romania failed to meet these goals and deadlines, IIPA recommended that Romania be added to the Watch List, and USTR agreed. In 1996, USTR moved Romania to Special Mention following adoption of its new copyright law in February 1996. Romania remained as a Special Mention country in USTR designations in 1997 and 1998 because of its lax enforcement and the bilateral agreement shortcomings.

Since 1999, IIPA has recommended that Romania be placed on the Watch List as a result of unacceptable piracy rates, its non-TRIPS-compliant regime, and to encourage the commitment of resources to effective enforcement of its copyright law. USTR has consistently agreed. Romania is making legal reforms, including its February 2001 deposit of the WIPO Copyright Treaty (WCT) and the WIPO Performance and Phonograms Treaty (WPPT). The USTR 2003 Special 301 Announcement noted that Romania "increased raids and seizures of materials in 2002," but "poor border enforcement, the low priority level given to piracy . . . and the lack of resources dedicated to the issue" are continuing problems. In 2004, IIPA once again recommended that Romania remain on the Watch List. In its 2004 Special 301 Announcement, USTR agreed, noting that "IPR enforcement did not improve in Romania in 2003. High piracy levels continued across all sectors, optical disc piracy grew, and poor border enforcement led to a surge in imports of pirated material." USTR retained

Romania on the Watch List in its 2005 Special 301 Announcement stating that, “Although Romania improved its IPR regime in 2004 by amending its Copyright Law to include civil ex parte search authority, IPR enforcement did not improve in Romania in 2004. The U.S. copyright industry continued to experience high piracy rates and significant losses in Romania in 2004 due to weak enforcement and judicial deficiencies.” Romania remains on the Watch List in 2006, as recommended by IIPA. USTR notes some improvements this year, including designation of a national coordinator for IPR enforcement and “increased dedication of resources for IPR enforcement.” The United States will continue to monitor Romania for needed progress in its IPR regime, particularly in the prosecution, conviction, and effective sentencing of IPR infringers. In 2007, IIPA recommended that Romania remain on the Watch List. USTR retained Romania on the Watch List in April 2007.

When Romania joined the European Union on January 1, 2007, its eligibility as a GSP beneficiary country ended.

RUSSIA

In 2008, IIPA recommends that Russia remain on the Priority Watch List. See IIPA’s 2008 Russia country report at <http://www.iipa.com/rbc/2008/2008SPEC301RUSSIA.pdf>.

In its 1995 submission, frustrated by the lack of progress in criminalizing piracy, IIPA recommended Russia for the Priority Watch List. USTR moved Russia from the Special Mention category in 1994 to the Watch List for 1995. Also in 1995, IIPA petitioned to remove Russia’s status as a “beneficiary developing country” under the Generalized System of Preferences (GSP) program. The GSP program expired on July 31, 1995 and was not renewed again until October 1996. During this hiatus, IIPA’s petition was, in effect, not accepted. In February 1996, IIPA urged that Russia be named a Priority Foreign Country. USTR kept it on the Watch List, subject to an OCR, which occurred in December 1996. USTR again decided to keep Russia on the Watch List at that time (because of the expected passage of the criminal law amendments).

In our February 1997 submission, IIPA again pressed for a Priority Foreign Country designation if by April 1997 Russia had not taken a series of steps, including commencement of major enforcement actions, and the introduction of legislation providing full retroactive protection for both pre-1995 sound recordings and pre-1973 works. Some more aggressive enforcement actions were undertaken during this period, but there was no movement on even drafting a bill (or decree) on retroactive protection and little optimism that this would soon occur. Shortly following its submission, IIPA again petitioned USTR to deny Russia duty free trade benefits under the GSP program, for its clear failure to provide “adequate and effective” protection for U.S. copyrighted works. USTR moved Russia up to the Priority Watch List in its April 1997 announcement and later again denied IIPA’s GSP petition. During the first year (1997) following adoption of the new criminal provisions making piracy a crime with real penalties, there was some progress in the enforcement area. In particular, raids commenced and some administrative actions were concluded; two criminal convictions with very low penalties were reported, only later to be voided by a government amnesty at the beginning of 1998. There was no progress at all with the legislative agenda concerning retroactivity or correcting other enforcement deficiencies. From 1998 through 2002, IIPA recommended that Russia remain on the Priority Watch List because of massive piracy losses, a rapidly growing optical media piracy problem, virtually no enforcement or deterrent system, and some deficiencies in the IPR regime, particularly around retroactive protection for sound recordings. In its 2002 announcement, USTR noted provisions in Russia’s enforcement regime that “appear to be inconsistent with the TRIPS Agreement and the intellectual property rights provisions of the 1992 U.S.-Russian Federation Trade Agreement.”² USTR also pointed to other problems such as weak enforcement and “[l]ack of an effective OD law.”

² This agreement, originally concluded with the Soviet Union in May 1990, was re-signed on behalf of the Russian Federation by President Yeltsin in June 1992 and put into force at that time by granting MFN treatment to Russia. The agreement was also the model for trade agreements signed with all the other countries of the CIS during the next two years.

The USTR 2003 Special 301 Report notes that Russia made considerable progress over the last year in revising intellectual property laws, but still needs amendments to the copyright laws in order to be compliant with TRIPS. Increasing piracy of optical media and ineffective enforcement of intellectual property laws remain serious problems, so Russia was kept on the Priority Watch List in 2003. IIPA recommended and USTR agreed that Russia should remain on the Priority Watch List for 2004. The major problems cited in the 2004 Special 301 Announcement were Russia's copyright law and enforcement measures which are "deficient and appear to be inconsistent with the 1992 U.S.-Russian Federation Trade Agreement." In addition, Russia's copyright law does not protect pre-existing works and border enforcement has not been able to prevent the significant problem of unauthorized production and export of pirated optical media products. In its Special 301 2005 Announcement, USTR retained Russia on the Priority Watch List citing similar concerns of past 301 announcements and stating that, "...overall IPR enforcement in Russia remains inadequate and piracy and counterfeiting levels continue to rise. Problematic IPR enforcement issues include the lack of an effective and deterrent criminal enforcement system (including many suspended sentences of major pirates), the lack of effective plant inspection and enforcement mechanisms; the lack of civil ex parte search procedures; an extremely porous border; delays in criminal prosecutions and adjudications; and infrequent destruction of seized pirate goods." It was also announced that an OCR would be conducted, but it appears this was not conducted.

In 2006, IIPA recommended that Russia be designated as a Priority Foreign Country, and once again urged USTR to withdraw or suspend GSP duty-free benefits. USTR retained Russia on the Priority Watch List, citing continuing concerns in multiple areas of its IPR regime. It will continue to closely monitor Russia's progress, through the "ongoing review of whether to remove Russia's benefits under the Generalized System for Preferences due to inadequate copyright enforcement, WTO accession discussions, and the United States-Russia Bilateral IPR Working Group." In November 2006, the United States and the Russian Federation signed a bilateral WTO Protocol which was then followed by a Side Letter on Intellectual Property Rights committing Russia to take specific enforcement steps to halt, in particular, OD piracy for export. The agreement includes specific deadlines for such actions to be taken which must be before full accession to the WTO. In 2007, IIPA recommended that Russia remain on the Priority Watch List, that an out-of-cycle-review (OCR) be conducted, and that Russia's GSP benefits be suspended.

IIPA filed a GSP petition against Russia's copyright practices more than seven years ago and that investigation is still open. In August 2000, IIPA filed a petition with USTR requesting that the country eligibility of Russia under the Generalized System of Preferences (GSP) trade program be reviewed for its failure to provide adequate and effective copyright protection and enforcement for U.S. copyright owners, as required under the GSP. In January 2001, the Administration announced that it accepted IIPA's petition. In its April 30, 2001, Special 301 Announcement, USTR noted certain deficiencies in Russia's copyright law making it incompatible with the 1991 bilateral trade agreement and TRIPS.

SAUDI ARABIA

In 2008, IIPA recommends that Saudi Arabia be elevated to the Priority Watch List. See IIPA's 2008 Saudi Arabia country report at <http://www.iipa.com/rbc/2008/2008SPEC301SAUDIARABIA.pdf>.

Saudi Arabia was on the Priority Watch List from 1993 to 1995. In April 1995, USTR kept Saudi Arabia on the Priority Watch List and added an out-of-cycle review (OCR) for October 1995. On November 13, 1995, USTR decided to keep Saudi Arabia on this list, and looked to the Saudi Government to "increase its enforcement actions against pirate activity and to take action against the illegal use of computer software, particularly by large end-users in Saudi Arabia." In April 1996, Saudi Arabia was lowered to the Watch List in recognition of end-of-1995 enforcement actions taken by the Ministry of Culture and Information. It remained on the Watch List in 1997. In 1998 and 1999, IIPA recommended, and USTR agreed, that Saudi Arabia should remain on the Watch List, noting that copyright enforcement efforts by the Saudi Government had improved over 1997, but raising several concerns, including lack of "transparency" and failure to impose "strong deterrent penalties."

In 2000 and 2001, IIPA recommended that Saudi Arabia be elevated to the Priority Watch List, for continued piracy, lack of effective and deterrent enforcement actions, and a TRIPS-incompatible copyright law. In both 2000 and 2001, USTR kept Saudi Arabia on the Watch List, but noted that “the level of activity undertaken by enforcement officials has been insufficient to deter piracy” in its 2000 announcement, and “[e]nforcement actions against copyright infringement are not carried out with sufficient regularity and are not accompanied by the appropriate level of publicity and sentences to reduce the level of piracy” in its 2001 announcement. In 2002 and 2003, IIPA recommended that Saudi Arabia remain on the Watch List, noting increasing enforcement, but many of the same structural difficulties, including lack of transparency. USTR agreed. In its 2003 Special 301 Announcement, USTR commented that “Saudi Arabia has made great strides in fighting copyright piracy . . . over the past year” and is working to revise its intellectual property laws, but “the United States remains concerned about continued high losses experienced by U.S. copyright . . . industries.” In 2004, IIPA recommended that Saudi Arabia remain on the Watch List 2004, and that USTR conduct an OCR to determine if the copyright law had been implemented properly to protect all U.S. works in line with international standards. USTR kept Saudi Arabia on the Watch List. The 2004 Special 301 Announcement praised Saudi Arabia for the improvements it made, but identified significant and continuing problems with piracy and copyright protection in Saudi Arabia, particularly the failure to provide “adequate protection for sound recordings, . . . *ex parte* civil search orders [, or] deterrent penalties.”

In 2005, IIPA recommended that Saudi Arabia remain on the Watch List. USTR announced in its 2005 Special 301 Report that Saudi Arabia would be retained on the Watch List and that an OCR would be conducted and stated that, “[d]espite improvements made by Saudi Arabia on IPR legislation, the U.S. copyright industry reports that piracy rates remain high due to the absence of deterrent penalties and the lack of transparency in Saudi Arabia’s enforcement system.” In its OCR submission, IIPA noted the following:

IIPA recognizes that the Government of Saudi Arabia has made progress through the passage of copyright law implementing regulations and has continued to run raids. However, the failure of these actions to effectively deter piracy, resulting from lack of transparency in the raids and subsequent enforcement processes (e.g., lack of knowledge about final disposition of infringing goods and implements, no decisions of courts in writing), as well as the failure to impose meaningful deterrent remedies, makes it absolutely essential that Saudi Arabia remain on the Special 301 list. To take Saudi Arabia off the list at this juncture would subject copyright owners to many more years of excessive piracy in Saudi Arabia. Because of the magnitude of the continuing problems, which only appear to be getting worse, we would recommend that Saudi Arabia be elevated to the Priority Watch List and at a minimum be maintained on the Watch List as a result of this out-of-cycle review, pending further review of whether the Government of Saudi Arabia adequately addresses these problems by the next annual Special 301 review.

In its 2006 Special 301 submission, IIPA recommended that Saudi Arabia remain on the Watch List, but with an OCR to monitor Saudi Arabia’s implementation of new transparency and enforcement commitments made in early 2006. USTR kept Saudi Arabia on the Watch List and agreed to an OCR as recommended by IIPA. USTR recognized progress made since Saudi Arabia joined the WTO in 2005, and encouraged increased transparency of its IPR regime, improved border enforcement measures, continued raids and inspections to combat piracy, judicial transparency and the imposition of deterrent sentences against criminal IPR offenders. In October 2006, in its OCR submission, IIPA recommended that Saudi Arabia be elevated to the Priority Watch List, due to its complete lack of progress in remedying the enforcement and other deficiencies noted in February, and in order hopefully to spur long promised action by the Saudi Government. In its 2007 submission, IIPA again recommended a Priority Watch List ranking, since nothing whatsoever had changed since its 2006 submission. In April 2007, USTR combined its Special 301 and OCR decisions and retained Saudi Arabia on the Watch List.

SERBIA AND MONTENEGRO

Serbia and Montenegro have never appeared on a USTR Special 301 list. In 2006, the countries split into separate nations. IIPA did not file on either country in 2007. However, in prior years (2005 and 2006), IIPA recommended that Serbia and Montenegro be placed on the Watch List, noting unacceptably high piracy levels, inadequate legislation, and ineffective enforcement remedies. Serbia and Montenegro participate in the Generalized System of Preferences (GSP) program, a U.S. trade program that offers preferential trade benefits to eligible beneficiary countries. One of the discretionary criteria of this program is that the country provide “adequate and effective” copyright protection.

SINGAPORE

In 2008, IIPA includes Singapore in its Special Mention section, noting deficiencies in implementing the U.S.-Singapore Free Trade Agreement and some enforcement concerns. See IIPA’s 2008 Singapore report at www.iipa.com/rbc/2008/2008SPEC301SINGAPORE.pdf.

Singapore does not currently appear on any of the USTR lists. Singapore, notorious as the “world capital of piracy” until the late 1980s, changed course and rigorously enforced its 1987 copyright law for several years thereafter. In 1994, IIPA recommended that Singapore be placed on the Watch List, reporting that Singapore had become a major transshipment point for pirated copyrighted works, and that its government virtually refused to pursue criminal prosecutions against flagrant software piracy. USTR decided to place Singapore in its Other Observations category. In 1995, USTR elevated Singapore to the Watch List, citing weakened patent protection, and it remained there in 1996 and 1997, primarily because of its failure to bring its copyright laws up to the standards of the TRIPS Agreement. In 1998, IIPA called for Singapore to be elevated to the Priority Watch List, stressing that Singapore’s unique “self-policing” system was inadequate to deal with rising levels of digital piracy, and that further legislative improvements, and better regulation of optical media production facilities, were urgently needed. Agreeing that the “self-policing” policy was “outdated and ineffective,” USTR decided to keep Singapore on the Watch List for 1998, citing evidence of more active government enforcement against piracy, as well as the progress made toward achieving TRIPS-consistent copyright law.

In 1999 and 2000, IIPA recommended and USTR agreed that Singapore remain on the Watch List. In the May 1, 2000 Special 301 Announcement, USTR noted that while “[o]verall piracy rates in Singapore decreased slightly during 1999 the open retail availability of pirated CDs, VCDs and CD-ROMs in notorious shopping malls and at stalls continues to be a serious problem.” IIPA made no recommendation regarding Singapore in 2001 or 2002; USTR did not place Singapore on any list in either of those years. IIPA highlighted Singapore in the Special Mention section of its 2004 Special 301 report, noting the continuing problem of “illegal photocopying of textbooks and academic journals,” and concerns over the export of pirate optical media discs.” In its 2005 Special 301 Report, IIPA recommended that the U.S. Government initiate the dispute settlement procedures of the U.S.-Singapore FTA during 2005 to require Singapore to fully meet its FTA obligations, including some critical areas in which Singapore’s law (at that point) failed to fully comply with the FTA. On August 15, 2005, the Copyright (Amendment) Act 2005 went into force in Singapore, for the most part culminating that country’s efforts to bring its law into compliance with the copyright-related provisions of the U.S.–Singapore Free Trade Agreement. In 2006, IIPA included Singapore in its Special Mention section because of two legislative issues of major concern to copyright owners that were not addressed in recent legislation: adequate treatment/protection of non-interactive digital audio transmissions; and protection against unauthorized (parallel) imports, as well as, among other piracy and enforcement concerns, increasing evidence of pirate production in Singapore for export. In 2007, IIPA included Singapore in its “Dispute Settlement” section and also in its Special Mention section, noting both enforcement problems as well as deficiencies in implementing the U.S.-Singapore Free Trade Agreement. Singapore did not appear on any of USTR’s lists in 2007.

SLOVAK REPUBLIC

IIPA did not file on the Slovak Republic in 2008.

The Slovak Republic was originally placed on the Watch List because of concerns in the area of patent protection. The 2003 USTR Special 301 Announcement also noted that “home CD-burning is on the rise and pirate CDs continue to be available on the public market in Eastern Slovakia.” The Slovak Republic was placed on the Watch List by USTR once again in 2004, which noted, among other things, that “imports of pirated optical media, primarily from the Ukraine and Russia, have increased.” USTR retained the Slovak Republic on the Watch List in its 2005 Special 301 Announcement stating that, “The situation has not improved over the past year, although Slovakia has expressed its interest in taking steps to address inadequacies in its IPR regime.” When the Slovak Republic joined the European Union on May 1, 2004, Slovak Republic was graduated from the U.S. Generalized System of Preferences (GSP) trade program, a program which requires, among other elements, the adequate and effective protection of U.S. copyrights. In 2006, the Slovak Republic appeared Special 301 Watch List, primarily due to patent issues, where it has been since 2001. IIPA did not file on this country in 2007

SOUTH AFRICA

IIPA did not make a submission on Morocco in 2008, but has in years prior; see IIPA’s country page at <http://www.iipa.com/countryreports.html>.

USTR placed South Africa on the Special 301 Watch List in 1995. After South Africa made progress on trademark issues, USTR provisionally removed it from the Watch List in April 1996, placing it in USTR’s Other Observations category. USTR conducted an out-of-cycle review (OCR) in September 1996 to confirm that legislative changes that South Africa had committed to implement were being carried out, and that other measures had been taken to resolve outstanding concerns regarding trademarks. As a result of this review, South Africa was taken off the Special 301 list. In 1997, IIPA recommended that South Africa be placed on the Other Observations list because of resurgent book piracy and TRIPS deficiencies in South Africa’s copyright law. USTR included South Africa in the 1997 National Trade Estimate (NTE) release, noting “substantial software losses, book piracy, and satellite signal piracy.” In addition, USTR recognized that “[e]nforcement remains a problem in part because of a lack of availability of enforcement resources.”

In 1998, USTR placed South Africa on the Watch List because of continuing problems in the patent system, “TRIPS deficiencies,” and U.S. copyright industry estimates that losses due to copyright piracy increased by 26% between 1996 and 1997. In 1999, IIPA recommended, and USTR agreed, that South Africa remain on the Watch List. In her April 30, 1999 announcement, Ambassador Barshefsky added a September 1999 OCR, noting that “the U.S. copyright industry estimates that trade losses due to piracy of copyrighted works increased more than 35 percent between 1997 and 1998.” As a result of a health initiative related to pharmaceutical patents, USTR decided to remove South Africa from the Special 301 lists in late 1999, and despite IIPA recommendations in 2000, 2001, and 2002 to place South Africa on the Watch List, South Africa has not appeared on any Special 301 list since its removal in late 1999. In 2005, IIPA highlighted piracy, enforcement, and legislative concerns in South Africa in IIPA’s Special Mention section. In 2006, IIPA included South Africa in its Special Mention section to highlight several copyright piracy, enforcement and legislative concerns. In 2007, IIPA included South Africa in its Special Mention section; South Africa did not appear on any of USTR’s lists in 2007.

South Africa currently participates in the U.S. GSP program offering duty-free imports of certain products into the U.S. from developing countries. In order to qualify for such unilaterally granted trade preferences, USTR must be satisfied that South Africa meets certain discretionary criteria, including whether it provides “adequate and effective protection of intellectual property rights.”

SOUTH KOREA

IIPA recommends that South Korea remain on the Watch List in 2008. See IIPA's 2008 South Korea country report at http://www.iipa.com/rbc/2008/2008SPEC301SOUTH_KOREA.pdf.

South Korea made its first appearance on the Priority Watch List in 1989, and remained there, except for 1990 and 1991, until 1997, when it was moved down to the Watch List. South Korea made considerable progress in bringing enforcement in the video, audio and book areas up to commendable levels after 1993, but software piracy remained a serious concern, and the book piracy situation deteriorated. IIPA's reports in the mid-1990s also focused on TRIPS compliance issues, and market access barriers affecting the motion picture and computer software industries. USTR's decision in 1996 to maintain South Korea on the Priority Watch List noted software end-user piracy and the "failure to provide full retroactive protection for pre-1957 works as required under the TRIPS Agreement" as major problems. In 1997, USTR lowered South Korea to the Watch List because of its continued progress in the fight against piracy. In 1998 and 1999, IIPA recommended that South Korea remain on the Watch List, highlighting the persistence of software piracy, the lack of full protection for pre-1957 works, and a lack of transparency in some aspects of the enforcement system. USTR kept South Korea on the Watch List both years.

In 2000, IIPA recommended that South Korea again be elevated to the Priority Watch List because of unacceptable enforcement policies against institutional end-user software pirates, legislative action weakening the protection for computer programs, and an increase in piracy of audiovisual products, sound recordings, and books. USTR agreed, and placed South Korea on the Priority Watch List in May 2000. After a December OCR, South Korea remained on the Priority Watch List. In 2001, IIPA recommended that South Korea remain on the Priority Watch List due to continued business software and increasingly sophisticated book piracy, ineffective administrative and criminal enforcement, as well as a lack of any deterrent value for enforcement actions. USTR kept South Korea on the Priority Watch List in 2001, noting that despite increased copyright enforcement programs, it was still too early to determine whether or not they had any effect. Though IIPA recommended that South Korea remain on the Priority Watch List in 2002, USTR lowered the country to the Watch List. In its April 30, 2002 Special 301 Announcement USTR noted positive steps toward increasing South Korea's intellectual property protections, including creation of a special enforcement unit, and preparation of draft legislation on "exclusive transmission rights for sound recordings and performances." USTR's 2003 Special 301 Announcement revealed, however, that these steps fell short of the specific pledges the Korean Government made to the United States to improve IPR protection and enforcement. In addition, new problems have arisen regarding "alleged infringement of a U.S. industry's IP in the creation/promulgation of a new telecommunications standard (WIPI)" and "pirates' ability to obtain rights to register and distribute U.S. films in the Korean market." Other existing problems have yet to be resolved, including "protection of temporary copies, reciprocity provisions regarding database protection, . . . *ex parte* relief, [and] the lack of full retroactive protection of pre-existing copyrighted works." For 2003, South Korea was kept on the Watch List, but USTR outlined several areas in which the country must take action in order to avoid being elevated to the Priority Watch List. As a result, USTR announced that it would conduct an OCR in the Fall. Having concluded the OCR in December of 2003, USTR announced in January of 2004 that it had elevated South Korea to the Priority Watch List, noting that "growth of online music piracy has caused serious economic damage to both domestic and foreign recording companies, and continued piracy of U.S. motion pictures in Korea has resulted in millions of dollars in lost revenues for U.S. and Korean copyright holders." In its 2004 Special 301 Announcement, USTR kept South Korea on the Priority Watch List, noting that despite progress since the conclusion of the 2003 OCR, significant problems remained, including the country's failure to update its laws and bring it into compliance with modern, international standards.

In 2005, IIPA recommended that South Korea be maintained on the Priority Watch List. In its 2005 Special 301 Announcement, USTR lowered Korea from the Priority Watch List to the Watch List, stating:

Meaningful improvements made by Korea include: introducing legislation that will create protection for sound recordings transmitted over the Internet (using both peer-to-peer and web casting services); implementing regulations that restore the ability of the Korea Media Rating

Board to take necessary steps to stop film piracy; and increasing enforcement activities by the Standing Inspection Team against institutions using illegal software.

In January 2006, IIPA recommended that South Korea be placed on the Watch List, with an OCR to determine whether publishers' and music industry issues have been adequately addressed.

On February 2, 2006, U.S. Trade Representative Rob Portman announced the U.S. Government's intention to negotiate a free trade agreement (FTA) with the Republic of Korea. The negotiations are expected to commence in the coming months (after the expiration of a 90-day consultation period). Just prior to the FTA announcement, the long-standing motion picture screen quota issue was resolved, and it was hoped that an FTA with Korea would bring resolution to many other issues.

In its 2006 Special 301 Report, USTR retained Korea on the Watch List, while noting that the "United States is pleased that Korea established the Copyright Protection Center and increased enforcement against institutions using illegal software by establishing a Standing Inspection Team." Although noting that progress has been made, the United States "urge[d] Korea to accelerate its efforts to combat piracy of DVDs, computer software, and books, as well as to decrease street vendor sales of pirated and counterfeit goods and infringing activities on university campuses."

In 2007, IIPA recommended that South Korea remain on the Watch List, and that an out of cycle review (OCR) be conducted. USTR retained South Korea on the Watch List in 2007.

SPAIN

IIPA recommends that Spain be added to the Special 301 Watch List in 2008. See <http://www.iipa.com/rbc/2008/2008SPEC301SPAIN.pdf>. Spain does not currently appear on any USTR lists.

Spain first appeared on USTR's Special 301 Watch List from 1989 through 1994. In IIPA's 1994 Special 301 filing, the business software industry hoped that Spain's implementation of the EU Software Directive would improve enforcement efforts. After some initial success in obtaining raids on end-users after that legislation was enacted, action by the courts had slowed to the point where it became clear that renewed attention to the problem was required. In 1998, IIPA recommended that Spain be placed on the Special 301 Watch List, primarily due to continuing high levels of piracy and losses experienced by the software industries. On May 1, 1998, Ambassador Barshefsky placed Spain on the Special 301 list of Other Observations. While noting the high levels of business software piracy in Spain, the Ambassador added, "The United States is concerned that judicial proceedings are frequently delayed and that penalties assessed against infringers are inadequate to serve as a deterrent against piracy." However, in 1999 IIPA recommended that Spain be placed on the Special 301 Watch List due to one of the highest levels of piracy of business software in Europe. USTR agreed and elevated Spain to the Watch List for the first time since 1994. In 2000, IIPA again recommended that Spain remain on the Watch List for one of the highest levels of piracy for business software in the European Union. USTR agreed, and kept Spain on the Watch List in 2000. Though IIPA did not make any formal recommendation for Spain in 2002, it did note certain copyright issues in its Special 301 cover letter to USTR that year. In 2004, IIPA recommended that Spain be returned to the Watch List, citing the country's high piracy rates and the dominance of pirated material in street markets. In both 2005 and 2006, IIPA highlighted copyright concerns in Spain in the Special Mention section of its Special 301 Report. In 2007, IIPA recommended that Spain be added to the Special 301 Watch List but USTR chose not to do so.

SWEDEN

In 2008, IIPA recommends that Sweden be added to the Watch List for legislative and enforcement deficiencies in dealing with Internet piracy. See IIPA's 2008 report at www.iipa.com/rbc/2008/2008SPEC301SWEDEN.pdf. In 2007, IIPA included Sweden in its Special Mention section for the same above-mentioned reasons. Sweden currently does not appear on any USTR list.

SWITZERLAND

In 2008, IIPA includes Switzerland in its Special Mention section for inadequacies in its legal framework with respect to Internet piracy. It was also included in IIPA's Special Mention section in 2007 to call attention to inadequate legislation then pending which then passed in 2007. See IIPA's 2008 report at www.iipa.com/rbc/2008/2008SPEC301SWITZERLAND.pdf. Switzerland currently does not appear on any USTR list.

TAIWAN

In 2008, IIPA recommends that Taiwan remain on the Watch List. See IIPA's 2007 Taiwan country report at <http://www.iipa.com/rbc/2008/2008SPEC301TAIWAN.pdf>.

Taiwan was the subject of the IIPA's first report on worldwide piracy in 1985. U.S. efforts to reduce the massive levels of piracy in Taiwan began in earnest in 1988-89 with the negotiation of a new bilateral treaty governing copyright protection. Concerns surged in the early 1990s over new pirate CD manufacture and export from Taiwan, escalating cable piracy, and mushrooming export levels of pirated software. U.S. trade losses reached an unprecedented \$370.0 million in 1991, and almost doubled in 1992, when Taiwan was named by USTR as a Priority Foreign Country. However, under the threat of retaliation, Taiwan adopted a new copyright law in May 1992, and finally signed a comprehensive Memorandum of Understanding (MOU) containing specific and wide-ranging commitments to improve copyright protection.

While some steps had been taken by April 1993 to implement the MOU, numerous commitments remained unfulfilled such that USTR decided to keep Taiwan on the Priority Watch List pending compliance with an "immediate action plan" that included a requirement that it finally adopt its long-pending cable law, legitimize the cable industry and reduce piracy. In 1993, Taiwan passed its cable law, implemented an export control system to block the export of counterfeit software and pirated CDs, and finally began to mete out serious fines and jail terms to convicted pirates. These improvements, and sharp reductions in piracy losses, led IIPA to recommend that Taiwan be moved to the Watch List in 1994. USTR agreed, and kept Taiwan in the same position in 1995.

In 1996, IIPA pointed to the prominent Taiwanese role in massive software piracy networks encompassing "Greater China" as a growing problem that Taiwan needed to address. Just before USTR's Special 301 Announcement in April 1996, Taiwan adopted an 18-point "Action Plan" that pledged improvements in tackling the "Greater China" piracy problem as well as other enforcement issues, including reform of the Export Monitoring System (EMS). Because this plan had the potential for continuing the "significant strides" Taiwan had made in improving IPR enforcement, USTR decided that Taiwan should be moved from the Watch List to Special Mention, with an OCR to be conducted in October 1996. On November 12, 1996, USTR announced that Taiwan's "considerable success" in implementing the Action Plan justified removing it from Special 301 lists. In 1997, IIPA noted that some issues addressed in the April 1996 Action Plan, such as bootleg audio products and the Export Monitoring System, had yet to be fully resolved, while other issues, such as the ongoing cross-straits networks for production and worldwide export of pirated videogames, were not adequately addressed by the Action Plan. While USTR decided to keep Taiwan off the Special 301 list, it continued to monitor the situation in Taiwan. In 1998, IIPA recommended that Taiwan be elevated to the Watch List, noting that Taiwan remained a "node" in a web of "Greater China" piracy of entertainment video games; CD, CD-ROM, CD-R, and audio bootleg piracy remained problems, as did various structural deficiencies including the failure of the EMS to curtail exports of pirate videogames and components, and unreasonable documentary requirements imposed on plaintiffs by the Taiwanese courts (including the requirement that powers of attorney be signed by the CEO of a corporation). USTR, in specially mentioning Taiwan, stated that Taiwan had made "recent assurances" and that USTR would "closely monitor implementation of the specific measures over the next several months." The result of that monitoring was to place Taiwan on the Watch List on August 11, 1998, because of "continuing concerns about enforcement of intellectual property rights in Taiwan." In 1999, IIPA recommended, and USTR agreed, to keep Taiwan on the Watch List.

In 2000, IIPA recommended that Taiwan remain on the Special 301 Watch List, with an OCR to continue monitoring progress. With trade losses growing to over \$314 million by 1999, doubling video piracy levels and rapidly increasing piracy rates for sound recordings, musical works, business and entertainment software, the Alliance voiced its concern for the worsening situation that would affect the entire Greater China region. USTR agreed, and retained Taiwan on the Watch List in 2000. In 2001, IIPA recommended that Taiwan be elevated to the Special 301 Priority Watch List due to the failure to enact and effectively implement comprehensive regulations to control and curtail the illegal manufacture of optical media goods in Taiwan, and the failure of the Taiwan government authorities to shut down known commercial pirates and curtail growing online piracy. USTR agreed, placing Taiwan on the Priority Watch List in 2001. On October 31, 2001, Taiwan passed the Optical Media Management Statute. It brings under the control of the Ministry of Economic Affairs (MOEA) a system of granting permits to persons/entities engaged in the production of “prerecorded optical discs”; otherwise regulating production of stampers/masters (through SID Code and other requirements); and requiring transparency (i.e., a reporting requirement) with respect to production of “blank” media.

IIPA recommended that Taiwan remain on the Priority Watch List in 2002, pointing to extremely high piracy rates and a pirate trade in optical media that remains at epidemic proportions. In its 2002 announcement, USTR stated that “the lax protection of IPR in Taiwan remains very serious.” Calling the country “one of the largest sources of pirated optical media products in the world,” USTR kept Taiwan on the Priority Watch List in 2002. IIPA also recommended that an OCR be conducted to determine whether Taiwan has made serious progress in combating its significant optical media piracy problem through legislative and enforcement efforts. The 2003 USTR Special 301 Announcement described the numerous steps Taiwan took in 2002 – their “Action Year for IPR.” Positive measures included expanding an interagency task force to 220 people, opening warehouses to store seized pirated goods and manufacturing equipment, and introducing an amended copyright law to strengthen IPR protection and bring Taiwan into compliance with TRIPS and other international IPR standards. These steps, however, have not produced any noticeable results, and “piracy and counterfeiting levels remain unacceptably high.” USTR therefore kept Taiwan on the Priority Watch List in 2003. In 2004, IIPA recommended that Taiwan remain on the Priority Watch List. In addition, IIPA suggested that USTR conduct an OCR to evaluate Taiwan’s adoption of legislation correcting the deficiencies in the copyright amendments adopted in 2003, and to assess whether it had improved enforcement against OD factories.

In its 2004 Special 301 Announcement, USTR commended Taiwan for its efforts to improve enforcement. In keeping on the Priority Watch List, however, USTR noted significant copyright concerns, particularly with respect to optical disc manufacturing, which appeared to have migrated from large plants to small, custom burning operations, in the face of strengthened enforcement from Taiwanese authorities. USTR also announced that it would conduct an OCR to evaluate Taiwan’s progress in improving protection for intellectual property. With passage of amendments in the Legislative Yuan’s Special Session in August 2004, the deficiencies in the 2003-passed amendments were, for the most part, repaired. However, with Taiwan’s enforcement actions remaining at a high level, IIPA recommended in the November 2004 OCR that Taiwan be lowered to the Watch List but not removed. On January 18, 2005, USTR announced that Taiwan was being lowered to the Watch List. In the 2005 Special 301 report, IIPA noted that, even though enforcement was at a high level, some critical problems remained; thus, IIPA recommended that Taiwan remain on the Watch List. In Its Special 301 2005 Announcement in April 2005, USTR retained Taiwan on the Watch List to “monitor Taiwan’s efforts to combat Internet piracy, enact judicial reforms, . . . prevent illegal copying of textbooks, abolish the Export Monitoring System (EMS), and prevent unauthorized cable operations in South and Central Taiwan.” More specifically, USTR noted:

In August 2004, Taiwan’s legislature approved a number of amendments to its copyright law that provide greater protection for copyrighted works and increase penalties for infringers. In addition, Taiwan authorities made permanent an IPR-specific task force that has increased the frequency and effectiveness of raids against manufacturers, distributors, and sellers of pirated product. . . . With respect to the judicial process, Taiwan authorities continue to conduct regular training seminars for judges and prosecutors on IPR matters and plan to establish a specialized IPR court. During the past year, Taiwan’s IPR task force increased inspections of

optical media factories and retail distribution centers, and the number of raids and inspections conducted by the National Police also increased sharply. The U.S. copyright industry reports that Taiwan's increased enforcement efforts resulted in a significant drop in estimated trade losses from a high of \$847.9 million in 2002 to \$315.5 million in 2004. The United States commends Taiwan for its accomplishments on these important issues. However, we continue to look to Taiwan to improve its efforts in such areas as effectively combating increasing levels of Internet piracy of copyrighted works, further reducing corporate end-user business software piracy, and halting the illegal copying of textbooks. Other issues that require monitoring include transshipment of counterfeit and pirated goods to third areas, ensuring that changes to Taiwan's export monitoring system do not result in a resurgence of counterfeit exports, . . . and stopping unauthorized cable operations in central and southern Taiwan.

In 2006, IIPA recommended that Taiwan remain on the Watch List. While noting positive progress, including the first conviction for Internet copyright infringement, USTR kept Taiwan on the Watch List for 2006. The United States commended Taiwan for its efforts to improve its IPR regime, and reiterated the need for key Internet-related legislative improvements and continued effective enforcement. In 2007, IIPA recommended that Taiwan remain on the Watch List and an out of cycle review (OCR) be conducted primarily to monitor progress in passing legislation dealing with P2P piracy and ISP liability. USTR retained Taiwan on the Watch List in 2007.

TAJIKISTAN

IIPA recommends that Tajikistan remain on the Watch List, where it has appeared since 2000. See IIPA's 2008 country report at <http://www.iipa.com/rbc/2008/2008SPEC301TAJIKISTAN.pdf>.

In 1995 and 1997, IIPA requested that USTR add the nations of the Commonwealth of Independent States (CIS) collectively, excluding the Russian Federation, to the Special 301 Watch List because nearly all of the CIS countries had failed to meet their bilateral IPR obligations, piracy was rampant, enforcement inadequate, and copyright law reform urgently needed. In 2000, IIPA recommended that ten of the CIS countries be placed on the Special 301 Watch List (Armenia, Azerbaijan, Belarus, Georgia, Kazakhstan, Kyrgyz Republic, Moldova, Tajikistan, Turkmenistan, and Uzbekistan). In the May 30, 2000 Special 301 Announcement, USTR placed seven CIS countries, including Tajikistan, on the Special 301 Watch List.

In 2001, IIPA recommended, and USTR agreed, that Tajikistan be kept on the Watch List. In its April 30, 2001 Special 301 Announcement, USTR noted Tajikistan's failure "to fulfill all of its intellectual property commitments under the 1993 U.S.-Tajikistan Trade Agreement," citing failure to adhere to the Geneva Phonograms Convention as well as "weak enforcement of intellectual property rights" and failure to implement criminal provisions for IPR violations as required by the bilateral agreement. For these reasons, as well as the lack of protection for foreign sound recordings and retroactive protection for works or sound recordings, IIPA again recommended and USTR again kept Tajikistan on the Watch List in both 2002 and 2003. In 2004, IIPA recommended, and USTR agreed, that Tajikistan should remain on the Watch List. In its Special 301 Announcement that year, USTR pointed out continuing legal deficiencies with Tajikistan protection of sound recordings, as well as weak enforcement. In its Special 301 2005 Announcement, USTR reiterated several outstanding IPR issues and retained Tajikistan on the Watch List for failing to address these issues. IIPA recommended that Tajikistan remain on the Watch List in 2006, stating that "over ten years after pledging to do so, Tajikistan does not even provide the basic rights or protections for U.S. or other foreign works or sound recordings." USTR noted once again that IPR obligations under the U.S.-Tajikistan Bilateral Agreement have not been fulfilled, and retained Tajikistan on the Watch List. The United States urges Tajikistan to "take necessary steps to bring its IPR regime into conformity with the TRIPS Agreement as part of its ongoing efforts to join the WTO." In 2007, IIPA again recommended that Tajikistan remain on the Watch List. USTR retained Tajikistan on the Watch List.

THAILAND

In 2008, IIPA recommends that Thailand remain on the Priority Watch List, with an out-of-cycle review. See IIPA's 2008 Thailand country report at <http://www.iipa.com/rbc/2008/2008SPEC301THAILAND.pdf>. Thailand is currently on the Watch List.

IIPA first identified Thailand in 1985 as a country with one of the worst piracy records in the world. In January 1989, following a petition filed by IIPA in 1987, President Reagan revoked Thailand's preferential trade benefits under the Generalized System of Preferences (GSP) program for its failure to provide "adequate and effective" copyright protection and enforcement. In April 1992, Thailand was named a Priority Foreign Country under Special 301. In Spring 1993, under the threat of trade retaliation, the Royal Thai Government initiated strong enforcement actions and raids, primarily in the audio and video areas. The Thai Government also began drafting a revised copyright law, and in August 1993, Thailand pledged to the U.S. to continue aggressive raiding, amend the copyright law to bring it up to Berne and TRIPS standards, and create a specialized intellectual property rights (IPR) court empowered to give improved remedies. On the basis of these commitments, USTR removed Thailand from its status as a Priority Foreign Country and placed it on the Priority Watch List. In November 1994, after Thailand enacted its new copyright law, USTR moved Thailand from the Priority Watch List to the Watch List, where it has remained ever since.

GSP benefits were partially restored in August 1995, and the specialized IPR Court was authorized in 1996, although it did not begin operations until December 1997. 1998's IIPA filing focused on lack of progress in reducing persistently high piracy rates since the enactment of the new copyright law, but noted the potential for the new court to advance this goal by imposing deterrent penalties on commercial pirates, and recommended that Thailand remain on the Watch List. USTR agreed, pledging to monitor the activities of the new court to see if tough sentencing would reduce piracy rates. Subsequently, in June 1998, the U.S. restored virtually all Thailand's GSP benefits, as the Thai Government committed to an ambitious action plan for better enforcement against piracy. IIPA's 1999, 2000, and 2001 filings stressed the growing role of Thailand as a source of pirate optical media production and export, and the need for the IPR court to impose deterrent penalties on commercial pirates. In June 2001, six copyright-based associations submitted a request that the eligibility of Thailand as a GSP beneficiary country be reviewed, and that its benefits be suspended or withdrawn if Thailand fails to remedy the deficiencies which adversely affect U.S. copyright owners. In May 2003, the petition was withdrawn. The U.S. Government has since that time heavily engaged with Thailand in securing needed regulations to control pirate optical discs and ramped up enforcement efforts.

In 2002, IIPA recommended that Thailand remain on the Watch List, and requested that USTR conduct an out-of-cycle review (OCR), noting, among other problems, exponential growth in its capacity for production of optical media. USTR agreed, noting in its April 30, 2002 announcement that "the significant and growing problems of optical media production and end-user piracy of business software remain largely unaddressed." That review was not conducted. In 2003, IIPA recommended that Thailand be elevated to the Priority Watch List, citing increased concerns over rampant optical disc piracy for export. In the 2003 USTR Special 301 Announcement, in which Thailand was retained on the Watch List, USTR noted the United States' concern about "the explosion of copyright piracy within [Thailand's] borders," and noted that optical media piracy, signal theft and cable piracy all continued to increase. IIPA recommended that Thailand be elevation to the Priority Watch List in 2004, as a result of serious problems with optical disc piracy, and enforcement that, while on a brief upswing, eventually tapered off. USTR, in its May 2004 announcement, kept Thailand on the Watch List in 2004, citing "serious concerns about the Thai Government's failure to effectively address the growth in optical media piracy, copyright and trademark infringement, counterfeiting, end user piracy, and cable and signal piracy." In the 2005 Special 301 report, IIPA recommended that Thailand be elevated to the Priority Watch List. In its 2005 Special 301 Announcement, USTR, while commending Thailand on its improved IPR protection efforts, retained Thailand on the Watch List to monitor future progress. USTR noted "the growing problem of optical disc piracy at plants in Thailand, as well as deficiencies in Thailand's optical disc legislation. Piracy also remains high in the areas of photocopying of books, cable piracy, videogame piracy, business software end-user piracy, Internet piracy of music, and unauthorized public performances of motion pictures and television programs in hotels, bars, and restaurants."

Negotiations between Thailand and the U.S. on Free Trade Agreement started in June 2004, but stalled in 2005 (and appeared to be doomed due to the coup in September 2006). In February 2006, IIPA again recommended that Thailand be elevated to the Priority Watch List. Noting “some progress in strengthening its IPR regime during 2005, including some enforcement efforts to combat piracy and counterfeiting,” USTR retained Thailand on the Watch List. USTR noted that “[c]oncerns remained regarding high piracy and counterfeiting rates,” and noted the “proliferation of optical disc pirate production at plants ... especially in light of comparatively weak optical disc legislation” passed in 2005. USTR indicated that the U.S. Government would “continue to work with Thailand to address these significant concerns regarding its intellectual property laws and enforcement.” In 2007, IIPA recommended that Thailand be elevated to the Priority Watch List. USTR agreed with IIPA’s recommendation and raised Thailand to the Priority Watch List in its April 2007 announcement.

Thailand currently participates in the Generalized System of Preferences (GSP) program, a U.S. trade program that offers preferential trade benefits to eligible beneficiary countries. One of the discretionary criteria of this program is that the country provides “adequate and effective protection of intellectual property rights.”

TURKEY

In 2008, IIPA recommends that Turkey remain on the Priority Watch List. See IIPA’s 2008 Turkey country report at <http://www.iipa.com/rbc/2008/2008SPEC301TURKEY.pdf>.

Turkey has been a regular on the Special 301 lists, and its intellectual property rights legislation and practices are currently under scrutiny as part of an ongoing investigation under the Generalized System of Preferences (GSP) program. There has been sporadic progress on copyright issues during this decade-long engagement. Turkey has been on the Special 301 Watch List (1990-1991, 2001-2002) and the Priority Watch List (1992-2000). In IIPA’s 1993, 1995 and 1996 Special 301 submissions, IIPA recommended that Turkey be designated a Priority Foreign Country for its failure to enact copyright reform and its lack of enforcement efforts to combat high levels of piracy, but these recommendations were not accepted by USTR.

In 1997, USTR outlined six benchmarks for progress in Turkey, which included: (1) taking effective enforcement actions to their conclusions to address widespread piracy; (2) passing copyright and patent law amendments to bring Turkey into compliance with its TRIPS and Berne obligations; (3) amending the Cinema, Video and Music Works Law to include higher, non-suspendable fines and jail terms; (4) issuing a directive to all government agencies to legalize software, (5) starting a public anti-piracy campaign about the software end-use problem and continuing training of enforcement officials so that the levels of piracy decline; and (6) equalizing taxes on the showing of foreign and domestic films. Progress in meeting these benchmarks has been slow; for example, USTR noted in its May 1, 2000 Special 301 Announcement that “Turkey has not yet addressed all of the benchmarks set out in the 1997 review,” and that enforcement efforts remain ineffective.

In 2001, IIPA recommended that Turkey remain on the Priority Watch List. However, USTR downgraded Turkey to the Watch List in April 2001, noting that “the Turkish Parliament passed amendments to the Copyright Law designed to bring Turkey into compliance with its TRIPS obligations.” In 2002, IIPA recommended that Turkey be elevated to the Priority Watch List, noting a worsening situation for most copyright industry sectors, specifically the abject failure of the “banderole” system and poor enforcement. Even though USTR again kept Turkey on the Watch List in April 2002, it acknowledged that “[l]ack of effective IPR protection in Turkey is a serious concern,” that “broadcasting regulations issued last year by the Ministry of Culture undermine the intent of the 2001 copyright law,” and that “[p]iracy levels remain extremely high and government efforts to control piracy, specifically the ‘banderole’ system, have failed.” In 2003, in acknowledgment of resolutions to the broadcast regulation issue and the false licensee issue, IIPA recommended that Turkey remain on the Watch List. USTR agreed, and in its May 1 announcement, USTR noted “some positive movement” on these issues. IIPA recommended that Turkey be placed on the Watch List in 2004, in part in recognition of amendments that would ban street crimes. In its 2004 Special 301 Announcement, USTR, once again elevating Turkey to the Priority Watch List, cited, among other things, the

proliferation of book and optical media piracy. In addition, USTR cited problems with the judiciary's failure to impose deterrent penalties despite amendments in 2001 which would allow the requisite level of penalties to be applied in copyright infringement cases.

In 2005, IIPA recommended that USTR place Turkey on the Watch List. In its April 2005, USTR retained Turkey on the Priority Watch List, noting in part:

With regard to copyright piracy, large-scale commercial photocopying of books and highly organized print piracy continue to be the chief problems in Turkey. During 2004, Turkey improved its copyright legislative regime and the U.S. copyright industry reported an almost immediate effect of the new law on retail street piracy. As a result of the new copyright legislation, major campaigns have been carried out against street piracy and courts have been willing to impose higher penalties.

IIPA recommended that Turkey remain on the Priority Watch List in 2006. USTR agreed and retained Turkey on the Priority Watch List in its 2006 Special 301 Report. USTR indicated that the U.S. Government

encourages Turkey ... to address the following IPR concerns: continuing enforcement against book, retail, and optical disc piracy; increasing judicial efficiency and reducing backlogs of court cases; addressing the growing problem of Internet piracy; increasing customs' *ex officio* inspections and seizures of pirated and counterfeit goods; and ensuring the seizure and destruction at pirate optical disc plants of pirated goods and the equipment used to produce them.

IIPA recommended that Turkey remain on the Priority Watch List in 2007. USTR retained Turkey on the Priority Watch List in April 2007.

In addition to the Special 301 process, the copyright industries and the U.S. Government have used the GSP program, a U.S. trade program that offers preferential trade benefits to eligible beneficiary countries based on discretionary criteria, such as the provision of "adequate and effective" copyright protection, to evaluate Turkey's progress on copyright matters. On June 1, 1993, IIPA filed a petition urging the President to withdraw Turkey's eligible beneficiary status under the GSP program for its failure to provide "adequate and effective protection" to U.S. copyrights. USTR accepted IIPA's petition. USTR announced on January 16, 1998, that it would not consider any requests to expand the scope of preferential trade benefits Turkey receives under the GSP program; USTR noted there "Turkey's future benefits under the Generalized System of Preferences (GSP) will depend on progress on the remaining benchmarks [outlined by USTR in 1997]." Competitive need waivers under the GSP program were granted back to Turkey in 2002. The GSP case against Turkey remained pending for almost 8 years. Finally, in 2003, IIPA was notified formally that the GSP investigation was closed in 2001.

TURKMENISTAN

IIPA recommends that Turkmenistan remain on the Watch List in 2008, where it has appeared since 2000. See IIPA's 2008 Turkmenistan country report at <http://www.iipa.com/rbc/2008/2008SPEC301TURKMENISTAN.pdf>.

In 1995 and 1997, IIPA requested that USTR add the nations of the Commonwealth of Independent States (CIS) collectively, excluding the Russian Federation, to the Special 301 Watch List because nearly all of the CIS countries had failed to meet their bilateral IPR obligations, piracy was rampant, enforcement inadequate, and copyright law reform urgently needed. In 2000, IIPA recommended that ten of the twelve CIS countries be placed on the Special 301 Watch List (Armenia, Azerbaijan, Belarus, Georgia, Kazakhstan, Kyrgyz Republic, Moldova, Tajikistan, Turkmenistan, and Uzbekistan). In the May 30, 2000 Special 301 Announcement, USTR placed seven CIS countries on the Special 301 Watch List for the first time, including Turkmenistan.

In 2001, USTR kept Turkmenistan on the Watch List. In its 2001 Special 301 submission, IIPA suggested again that ten of the twelve CIS countries individually (excluding Russia and Ukraine for much more serious

piracy problems) be listed, and for filing purposes only, grouped them together due to the similarity of copyright concerns each country faces. These deficiencies include the lack of legislative implementation of the bilateral trade agreements, failure to comply with the WTO TRIPS Agreement, and the failure to adopt optical media production and distribution controls. In its April 30, 2001 Special 301 Announcement, USTR noted Turkmenistan's failure to provide "protection for U.S. and other foreign sound recordings, nor does it provide protection of pre-existing works or sound recordings under its copyright law." Echoing the previous year's submission, IIPA recommended that Turkmenistan remain on the Watch List in 2002. USTR agreed, again pointing to the country's lack of protection for certain sound recordings and pre-existing works and sound recordings. USTR announced the same decision in 2003, adding, "the Customs Code does not provide the proper authority to seize material at the border," which is a necessity for proper border enforcement. In 2004, IIPA recommended, and USTR agreed, to keep Turkmenistan on the Watch List. In its 2004 Special 301 Announcement, USTR noted that the country had failed to completely satisfy its obligations under the 1993 U.S.-Turkmenistan agreement by failing to sign the Berne Convention, Geneva Phonograms Convention, and otherwise update its copyright law to reflect international standards. In its 2005 Special 301 Announcement, USTR retained Turkmenistan on the Watch List for failing to address several outstanding IPR protection issues cited in previous Special 301 Announcements. USTR stated in its announcement that, "IPR enforcement is inadequate, since Turkmenistan has not adopted criminal penalties for IPR violations, and the Turkmen Customs Code does not provide ex officio authority to seize suspected infringing material at the border. There are no known civil ex parte search procedures."

In 2006, IIPA recommended that Turkmenistan remain on the Watch List for "failing to enact the necessary legal reforms it obligated itself to adopt over ten years ago." USTR retained Turkmenistan on the Watch List, noting concerns about its "lack of progress in IPR issues during the past year and its lack of fulfillment of its IPR obligations under the United States-Turkmenistan Trade Agreement." Turkmenistan is urged to strengthen its IPR regime and to adopt legal reforms that will bring it into compliance with its obligations under the bilateral United States-Turkmenistan Trade Agreement. In 2007, IIPA recommended that Turkmenistan remain on the Watch List. USTR kept Turkmenistan on the Watch List in April 2007.

UKRAINE

IIPA recommends that Ukraine remain on the Priority Watch List in 2008. See IIPA's 2008 Ukraine country report at <http://www.iipa.com/rbc/2008/2008SPEC301UKRAINE.pdf>.

Over the past decade, Ukraine has been subject to intense trade engagement under both Special 301 and the Generalized System of Preferences (GSP) review process. In 1998, USTR agreed with IIPA's recommendation and placed Ukraine on the Watch List. In 1999, Ukraine was elevated to the Priority Watch List. In 2000, Ukraine became Central and Eastern Europe's number one pirate CD-producing country. Fueled by serious reform and on-the-ground enforcement deficiencies, IIPA recommended that USTR designate Ukraine as a Priority Foreign Country. Instead, USTR placed Ukraine on the Priority Watch List, with the caveat that it was prepared to designate Ukraine as a Priority Foreign Country if sufficient action were not taken to curb pirate production by August 1, 2000. When Presidents Clinton and Kuchma endorsed a Joint Action Plan to address the piracy problem in June 2000, USTR announced that it would defer a decision on whether to identify Ukraine as a Priority Foreign Country.

In June 1999, IIPA filed a petition with USTR requesting that the country eligibility of several CIS countries, including Ukraine, be commenced under the Generalized System of Preferences (GSP) trade program for their failure to provide adequate and effective copyright protection and enforcement for U.S. copyright owners. In February 2000, the administration announced that it accepted IIPA's petition for review of Ukraine (and others), and hearings were held on May 12, 2000. In 2001, IIPA recommended that USTR designate Ukraine as a Priority Foreign Country, due to its continued position as the largest producer and exporter of illegal optical media disks in Central and Eastern Europe. USTR agreed, designating Ukraine as a Priority Foreign Country, on March 12, 2001 for its failure to implement the Joint Action Plan agreed to by then-President Clinton and President Kuchma in Kiev on June 1, 2000. The designation in March commenced a formal investigation of the IPR protection and enforcement failures in Ukraine, consistent with Special 301 legal requirements. On

December 20, 2001 that investigation formally ended and the U.S. Government announced the imposition of trade sanctions amounting to \$75 million, effective on January 23, 2002 as the result of the continued failure on the part of the Government of Ukraine to meet its obligations under the Joint Action Plan, namely to properly regulate optical media production.

The imposition of sanctions in January was in addition to the complete withdrawal of trade benefits to Ukraine under the General System of Preferences program; that suspension was announced on August 10, 2001, effective September 24, 2001. In its April 30, 2001 Special 301 Announcement, USTR noted Ukraine's "persistent failure to take effective action against significant levels of optical media piracy and to implement intellectual property laws that provide adequate and effective protection." In February of 2002, Ukraine enacted a deficient law intended to regulate optical media production and distribution (Optical Disc Licensing Bill # 8278-1), hoping to avoid sizable, looming trade sanctions. The U.S. Government properly reacted to that bill, calling it an insufficient measure and refusing to forestall the trade sanctions or to re-institute the GSP benefits. On January 17, 2002, USTR announced that it would begin implementing trade sanctions against Ukraine on January 23. In 2002, IIPA recommended that Ukraine remain a Priority Foreign Country for its failure to adopt an effective optical media regulation and its continued failure to implement the Joint Action Plan of June 1, 2000. USTR designated Ukraine a Priority Foreign Country in 2002, pointing to the country's significant optical disc piracy problem. Although production of pirated media has declined, USTR extended Ukraine's status as a Priority Foreign Country in 2003, noting that "any positive movement on copyright is still overshadowed by the continued lack of adequate OD media protection." In 2001, \$37.8 million worth of Ukrainian imports to the United States benefited from the GSP program, accounting for 5.8% of its total exports to the U.S. There are no GSP figures for Ukraine in 2002 or 2004, as the benefits were withdrawn due to Ukraine's continued failure to provide adequate and effective copyright protection. In 2003, despite being ineligible for GSP benefits, \$7,000 worth of goods entered the U.S. under the duty-free GSP code. In 2004, IIPA again recommended, and USTR agreed, that Ukraine, largely due to its failure to enact and enforce optical disc media licensing legislation, or to fully comply with the Joint Action Plan to Combat Optical Disc Piracy, remain a Priority Foreign Country. Citing continued high levels of piracy, weak IPR enforcement efforts and a failure to address previously raised issues, USTR maintained Ukraine's status as a Priority Foreign Country in its 2005 Special 301 Announcement. It was decided that an out-of-cycle review (OCR) would be performed, "... to monitor Ukraine's progress in passing amendments to its optical media law, implementing the new law, and deterring optical media piracy through adequate enforcement."

The 2005-2006 history of Ukraine's 301 placement, the restoration of trade sanctions and GSP eligibility is as follows: after Ukraine's adoption of the optical disc law in August 2005, the U.S. Government announced on August 31, 2005 that it was terminating the 100% *ad valorem* duties that had been in place since January 2002 on Ukrainian exports. It then announced an OCR in October 2005 which concluded in January 2006. On January 23, 2006, the U.S. Government announced that it was lowering the designation of Ukraine from a Priority Foreign Country to placement on the Priority Watch List; coupled with that designation, the U.S. Government also announced the reinstatement of GSP benefits for Ukraine on January 23rd. In the first 11 months of 2006, \$20.2 million worth of Ukrainian goods benefited from the GSP program, accounting for 1.3% of the country's imports to the U.S.

In its February 2006 Special 301 Report, IIPA recommended that Ukraine remain on the Priority Watch List, applauding the significant amendments adopted to Ukraine's optical disc laws and their agreement to cooperate with copyright industries on enforcement. IIPA "strongly urges the Government of Ukraine to fulfill its obligations and remain vigilant on its pledges of cooperative enforcement in order to improve on-the-ground efforts." USTR retained Ukraine on the Priority Watch List for 2006, stating,

Although Ukraine is no longer a major producer of pirated optical discs, it remains a transshipment point and storage location for illegal optical media produced in Russia and elsewhere. The United States encourages Ukraine to further improve border enforcement efforts and to impose deterrent criminal penalties for unauthorized production and export of pirated products...Although the United States recognizes Ukraine's marked improvements in IPR protection, it will continue to monitor closely Ukraine's further progress on IPR protection and enforcement.

IIPA recommended that Ukraine remain on the Priority Watch List in 2007. In 2007, USTR retained Ukraine on the Priority Watch List.

UNITED ARAB EMIRATES

The UAE does not currently appear on any USTR lists. IIPA has not filed a report on this country since 1999. The UAE was on the USTR Watch List from 1991, after being named by IIPA as a major pirate exporter of audiocassettes in the Gulf Region. Although the UAE passed a copyright law in 1992, piracy losses continued to rise until September 1, 1994, when the Ministry of Information and Culture (MOIC) began its enforcement campaign following a moratorium to permit shops and manufacturers to sell off existing pirate stock. By early 1995, audio piracy had been virtually wiped out, and video piracy sharply reduced, but little had been done to clear pirate software from the market. Because of software piracy and the continuing need for the UAE to bring its copyright law into compliance with international standards, USTR kept the UAE on the Watch List after an out-of-cycle review (OCR) in November 1995. In April 1996, Ambassador Barshefsky maintained the UAE on the Watch List, noting continued deficiencies in the copyright law. In 1997, the UAE was kept on the Watch List by USTR, who noted that efforts to reduce software piracy had “not been sufficient to reduce the level of illegal activity.”

In 1998, IIPA, in recommending that the UAE be kept on the Watch List, noted that the UAE authorities had taken sufficient enforcement actions to reduce piracy rates for nearly all the copyright industries, but that a court decision (Shama Delux) potentially jeopardized the protection of all foreign works in the UAE. Ambassador Barshefsky, in announcing USTR’s 1998 decision to keep the UAE on the Watch List, called upon the government “to clarify that U.S. copyrighted works are protected,” and to ensure that the copyright law is “TRIPS-consistent before the end of the transition period for developing countries.” In 1999, IIPA recommended that USTR drop the UAE to the Other Observations list, to acknowledge the progress of the UAE Government in “fighting piracy through a sustained enforcement campaign.” Ambassador Barshefsky kept the UAE on the Watch List for certain deficiencies in the patent area, but finally dropped the UAE from the Special 301 lists because of significant progress in eradicating piracy in 2000. USTR placed UAE on the Watch List in 2001 for concerns over adequate and effective intellectual property protection unrelated to copyright. IIPA made no recommendations for UAE in 2002 through 2008, nor has USTR placed the country on any list in those years. The U.S. announced in 2004 the commencement of negotiations toward a Free Trade Agreement with the Emirates, which is certain to raise the levels of substantive protection and enforcement. The Emirates also joined both the WCT and WPPT in 2004.

The UAE is currently negotiating a Free Trade Agreement with the United States, including an IP Chapter.

URUGUAY

Uruguay currently does not appear on any Special 301 list. IIPA did not file a 2008 report on this country, but has in prior years; see IIPA’s country page at <http://www.iipa.com/countryreports.html>.

USTR placed Uruguay on the Other Observations list in 1996 and again in 1997 to encourage Uruguay to “accelerate its efforts to enact TRIPS-consistent legislation and to continue its IPR enforcement efforts.” In July 1998, the President of Uruguay, Dr. Julio Marie Sanguinetti, met with Ambassador Barshefsky to discuss regional issues and intellectual property issues in his country. Reportedly the President responded positively to the Ambassador’s entreaties to press for passage of the long-pending copyright bill, indicating that he will work with the Uruguayan legislature to pass a good law. Unfortunately, passage of this bill has not yet been achieved and the most current draft legislation is still problematic, and not TRIPS-compliant. USTR kept Uruguay on the Watch List in 1999 and 2000.

In 2001, IIPA recommended that Uruguay be elevated to the Priority Watch List due to the long delay in passing much-needed copyright legislation, the continued high levels of piracy, and inadequate enforcement. IIPA also recommended that USTR conduct an out-of-cycle review (OCR) to monitor Uruguay’s advances on

these copyright issues. In its April 30, 2001 Special 301 Announcement, USTR elevated Uruguay to the Priority Watch List, noting Uruguay's failure to update its copyright law: "Uruguay's draft copyright legislation has become entangled in legislative wrangling and currently contains numerous shortcomings even in its draft form, most notably the separation from the comprehensive copyright bill of software protection into a stand-alone bill." In June 2001, the IIPA filed a request for review of the intellectual property practices of Uruguay. USTR has not yet decided whether to accept the request. In 2002, IIPA recommended that Uruguay remain on the Priority Watch List, noting the country's failure to pass much-needed copyright legislation and ineffective criminal and civil enforcement against high levels of copyright piracy. USTR kept Uruguay on the Priority Watch List in 2002, noting that "inadequate civil remedies and lax border enforcement have caused high piracy rates to persist, and have allowed Uruguay to become a major transshipment point for pirated products." In 2002, Uruguay amended its copyright law, and the new law went into effect January 2003. The 2003 USTR Special 301 Announcement noted that the new amendments "represent an improvement . . . and contain many provisions that upgrade the prior Uruguayan copyright scheme." These changes convinced USTR to downgrade Uruguay to the Watch List in 2003, but they noted that enforcement and transshipment are problems that still need to be addressed. IIPA highlighted copyright concerns in the Special Mention section of its 2004 301 Report, citing legislative deficiencies (despite a recent update of its copyright law) as well as problems with prosecutions of intellectual property cases. In its 2004 Special 301 Announcement, USTR maintained Uruguay on the Watch List, citing its failure "to pass the implementing regulations for its 2002 copyright legislation to improve and strengthen Uruguayan copyright protection." USTR retained Uruguay on the Watch List in its Special 301 2005 Announcement. Although progress with Uruguay's IPR protection efforts was acknowledged, it was stated that, "Despite this progress, however, we note that Uruguay has not yet ratified the WIPO Internet Treaties. Piracy of copyrighted works still proliferates and IPR enforcement remains ineffective." In 2006, citing "progress on copyright enforcement," USTR removed Uruguay from the Watch List. That same year, a Bilateral Investment Treaty between Uruguay and the U.S. entered into force.

Uruguay still participates in the Generalized System of Preferences (GSP) program, a U.S. trade program that offers preferential trade benefits to eligible beneficiary countries. One of the discretionary criteria of this program is that the country provide "adequate and effective" copyright protection. In August 2001, IIPA filed a petition to review Uruguay's eligibility to maintain GSP benefits. In January of 2003, Uruguay enacted amendments to its copyright law after a decade of debate. Noting that such action was a major achievement, notwithstanding the fact that the amended law fell short in several key areas, IIPA requested to withdraw its GSP petition against Uruguay. In the fall of 2003, USTR acknowledged that it would not act on this GSP petition.

UZBEKISTAN

IIPA recommends that Uzbekistan remain on the Watch List, where it has appeared since 2000. See IIPA's 2008 Uzbekistan country report at <http://www.iipa.com/rbc/2008/2008SPEC301UZBEKISTAN.pdf>.

In 1995 and 1997, IIPA requested that USTR add the nations of the Commonwealth of Independent States (CIS) collectively, excluding the Russian Federation, to the Special 301 Watch List because almost none of the CIS countries had met their bilateral IPR obligations, piracy was rampant, enforcement inadequate, and copyright law reform urgently needed. In 2000, IIPA recommended that ten of the CIS countries be placed on the Special 301 Watch List (Armenia, Azerbaijan, Belarus, Georgia, Kazakhstan, Kyrgyz Republic, Moldova, Tajikistan, Turkmenistan, and Uzbekistan). In the May 30, 2000 Special 301 Announcement, USTR placed seven CIS countries on the Special 301 Watch List, including Uzbekistan.

In June 1999, IIPA filed a petition with USTR requesting that the country eligibility of Armenia, Belarus, Kazakhstan, the Kyrgyz Republic, the Republic of Moldova, Ukraine, and Uzbekistan under the Generalized System of Preferences (GSP) trade program be reviewed for failure to provide adequate and effective copyright protection and enforcement for U.S. copyright owners, as required under the GSP. In February 2000, the administration announced that it accepted IIPA's petition for review of Armenia, Kazakhstan, Moldova, Ukraine, and Uzbekistan. On May 12, 2000, the U.S. Government held public hearings on the GSP petitions regarding these five countries. Again, on October 7, 2003, the U.S. Government held hearings with respect to

Uzbekistan. The U.S. Government has not yet decided on whether to withdraw or suspend GSP benefits in Uzbekistan. In 2001, IIPA recommended and USTR agreed to place Uzbekistan on the Watch List. In the 2001 Special 301 submission, IIPA suggested again that 10 of the 12 CIS countries individually (excluding Russia and Ukraine for much more serious piracy problems) be listed, and for filing purposes only, grouped them together due to the similarity of copyright concerns each country faces. These deficiencies include the lack of legislative implementation of the bilateral trade agreements, failure to comply with the WTO TRIPS Agreement, and the failure to adopt optical media production and distribution controls. IIPA again recommended that Uzbekistan remain on the Watch List in 2002. USTR agreed, noting in its April 30, 2002 Special 301 Announcement the many steps that Uzbekistan still must take in order to fulfill its obligations under the 1994 U.S.-Uzbekistan Trade Agreement: “[s]pecifically, Uzbekistan is not yet a party to the Berne Convention or the Geneva Phonograms Convention. Uzbekistan is not providing any protection or rights to U.S. and other foreign sound recordings, and it does not clearly provide retroactive protection for works or sound recordings under its copyright law.” USTR’s 2003 Special 301 Announcement cited the same problems, added that the Customs Code does not give proper authority to seize material at the border, and kept Uzbekistan on the Watch List. In 2004 IIPA recommended, and USTR agreed, to keep Uzbekistan on the Watch List. The 2004 Special 301 Announcement noted that despite recently announcing a plan to amend its IPR laws, Uzbekistan “still appears to be out of compliance with its intellectual property commitments under the 1994 U.S.-Uzbekistan Trade Agreement, particularly with respect to copyright protection and enforcement.”

USTR retained Uzbekistan on the Watch List in its 2005 Special 301 Announcement stating that, “Uzbekistan does not provide protection for sound recordings or pre-existing works, and is not a member of the Geneva Phonograms Convention or the WIPO Internet Treaties. In addition, IPR enforcement in Uzbekistan remains very weak due to a lack of ex officio authority that would allow customs officials to seize infringing materials at the border, a lack of civil ex parte search procedures, and inadequate criminal penalties for IPR violations.” In 2006, IIPA recommended that Uzbekistan remain on the Watch List for “failing to adopt the necessary legal reforms it obligated itself to adopt over ten years ago.” USTR agreed due to concerns over “lack of significant progress on IPR issues this past year,” and Uzbekistan remains on the Watch List in 2006. Although Uzbekistan joined the Berne Convention in April 2005, its reservation to Article 18 denies protection for pre-existing works and must be withdrawn. Additionally, Uzbekistan “appears to be out of compliance with its intellectual property commitments under the United States-Uzbekistan Trade Agreement, particularly with respect to copyright protection and enforcement.” With these and the many concerns noted in prior years, the United States “will continue to work together with Uzbekistan on these outstanding IPR issues through discussions related to Uzbekistan’s bid for WTO accession.” IIPA recommended that Uzbekistan remain on the Watch List in 2007. USTR retained Uzbekistan on the Watch List in 2007.

VENEZUELA

IIPA did not make a submission on Venezuela in 2008, but has in years prior; see IIPA’s country page at <http://www.iipa.com/countryreports.html>.

In an effort to spur government action to take copyright reform and reduce the high levels of piracy, IIPA filed a petition on June 1, 1993 asking that Venezuela’s eligibility to receive preferential trade benefits under the Generalized System of Preferences (GSP) program be reviewed. After the Venezuelan Congress passed the new copyright law in August 1993, USTR accepted IIPA’s request to withdraw the petition, and no formal GSP review was initiated. In 2005, \$744.4 million worth of Venezuela’s exports to the United States benefited from the GSP program, accounting for 2.3% of its total exports to the U.S. During the first 11 months of 2006, \$630 million worth of Venezuelan goods (or 1.9% of Venezuela’s total exports to the U.S. from January to November) entered the U.S. under the duty-free GSP code, representing a 7.3% decrease from the same period in the previous year.

In 1999 and 2000, Venezuela remained on the Watch List, as recommended by IIPA. In 2001, IIPA recommended that Venezuela remain on the Watch List. USTR agreed, noting in its April 30, 2001 Special 301 Announcement that “Venezuela continues to present a mixed record of success with respect to its protection of intellectual property rights, although in some respects it is gradually moving in the right direction.” IIPA

recommended that Venezuela remain on the Watch List in 2002, citing continued high piracy rates, lengthy judicial delays, and the failure to impose deterrent penalties. In its April 30, 2002 Special 301 Announcement, USTR kept Venezuela on the Watch List, noting that “limited resources and a lack of IPR enforcement by Venezuela customs have hampered the government’s efforts to lower copyright piracy levels.” USTR’s 2003 Special 301 Announcement commented that Venezuela’s commitment to protection of intellectual property rights appeared to be decreasing in 2002. Piracy and counterfeiting increased, while deterrence and prosecution levels stayed low. USTR kept Venezuela on the Watch List in 2003, adding that it intended to review the country’s progress later in the year. USTR kept Venezuela on the Watch List in 2004, noting signs of decline in its commitment to IPR protection. USTR elevated Venezuela to the Priority Watch List in its 2005 Special 301 Announcement, “...due to the continuing deterioration of its already weak IPR regime and its declining commitment to IPR protection.”

IIPA recommended that Venezuela remain on the Priority Watch List in 2006. USTR agreed, citing “minimal progress” in the past year, and retained Venezuela on the Priority Watch List. The one positive note was the adoption of a regulation allowing *ex officio* seizures of pirated and counterfeited goods; this was countered by the rise in already high levels of copyright piracy and the proposal of legislation that would “severely undercut the existing Venezuelan copyright law, as well as bilateral and international standards of IP protection.” In 2007, IIPA recommended that Venezuela remain on the Priority Watch List. USTR kept Venezuela on the Priority Watch List in 2007. Venezuela is a beneficiary country of the Generalized System of Preferences (GSP) trade program.

VIETNAM

In 2008, IIPA recommends that Vietnam remain on the Watch List. See IIPA’s 2008 Vietnam country report at <http://www.iipa.com/rbc/2008/2008SPEC301VIETNAM>.

Vietnam first appeared on the Special 301 list in 1995 in the Other Observations category, after IIPA reported that its market was completely dominated by piracy. In 1997, IIPA renewed its call for Priority Watch List status, citing the troubling trend of government involvement in audiovisual piracy, and the failure to take any meaningful steps toward protection of U.S. works in Vietnam. On the eve of USTR’s 1997 Special 301 decision, the U.S. and Vietnam announced the conclusion of a bilateral copyright agreement providing such a point of legal attachment. Ambassador Barshefsky called this “an important step in bringing Vietnam’s copyright system into line with international standards,” but because of the serious and growing piracy problem in Vietnam, she placed the country on the Special 301 Watch List. IIPA renewed its Priority Watch List recommendation in 1998, because the bilateral copyright agreement had not been implemented, piracy levels remained at or near 100 percent, and the Vietnamese Government appeared to be consolidating its role in audio-visual piracy. USTR decided to keep Vietnam on the Watch List, calling copyright piracy “the most pressing problem” to be faced, and scheduling an out-of-cycle review (OCR) for December 1998. That OCR was subsequently postponed, and on December 27, 1998, the U.S.-Vietnam Bilateral Copyright Agreement went into force.

In 1999, IIPA recommended that Vietnam remain on the Watch List so that USTR could effectively monitor and support government efforts to implement the commitments of the Bilateral Copyright Agreement. USTR agreed, and Vietnam maintained its position on the Watch List. In 2000 and 2001, USTR agreed with IIPA’s assessment of continuing IPR problems in Vietnam, and retained Vietnam on the Watch List in both years. In 2002, USTR kept Vietnam on the Watch List, noting that “[e]nforcement of intellectual property rights . . . in Vietnam remains weak, and violations of IPR are rampant.” Vietnam remained on the Watch List in 2003 as well; the 2003 USTR Special 301 Announcement commented that “Vietnam has increased the number of administrative and law enforcement actions against IPR violations, but effective enforcement remains the exception rather than the norm.” IIPA noted Vietnam in the Special Mention section of its 2004 Special 301 Report, citing problems with the probable “migration of optical disc and cartridge manufacturing facilities, as well as optical disc overproduction.” USTR kept Vietnam on the Watch List in 2004. The 2004 Special 301 Announcement noted that IPR violations and enforcement continue to be problems despite improvements in laws and regulations. In IIPA’s 2005 Special 301 report, IIPA mentioned Vietnam in its Special Mention section

to urge the U.S. Government to ensure that Draft copyright legislation provides the high standards of intellectual property protection required under the U.S.-Vietnam Bilateral Trade Agreement and the TRIPS Agreement, if Vietnam is to accede to the WTO, as well as to note serious piracy concerns, including book piracy and software piracy, and to note that Vietnam is a country of concern given the possible migration to its territory of optical disc and cartridge manufacturing facilities engaged in illegal activities. In its April 2005 Announcement, USTR retained Vietnam on the Watch List, stating, "IPR infringement remains rampant in Vietnam, and enforcement continues to be ineffective despite some improvement in laws and regulations. Judges in Vietnam have been reluctant to impose penalties or fines at levels sufficient to deter future infringements, and *ex officio* raids are sporadic at best."

In 2006, IIPA recommended that Vietnam remain on the Watch List, and USTR agreed in the 2006 Special 301 Report. In its announcement, USTR indicated that the U.S. Government "commends Vietnam for its improvements in IPR protection, including Vietnam's passage of a comprehensive IPR law in November 2005, but notes some remaining deficiencies and ambiguities." USTR also noted, "IPR infringement remains rampant in Vietnam, with reports from the U.S. copyright industry that in some cities, 100 percent of the CDs, VCDs, and DVDs sold are pirated." USTR indicated that the U.S. Government would continue to work with Vietnam to address outstanding IPR issues during WTO accession discussions. Vietnam became the 150th member of the World Trade Organization on January 11, 2007. Again in 2007, IIPA recommended that Vietnam remain on the Watch List. USTR kept Vietnam on the Watch List in its April 2007 announcement.