

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE®



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Submitted via regulations.gov Docket No. USTR-2011-0021.

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

Re: IIPA Written Submission Regarding 2012 Special 301 Review: Identification of Countries Under Section 182 of the Trade Act of 1974: Request for Public Comment and Announcement of Public Hearing Request to Testify at 2012 Special 301 Hearing (76 Fed. Reg. 81555, Dec. 28, 2011)

Dear Mr. McCoy:

The International Intellectual Property Alliance (IIPA) submits this response to the Federal Register notice which invites "written submissions from the public concerning foreign countries' acts, policies or practices that are relevant to the decision whether a particular trading partner should be identified under Section 182 of the Trade Act [of 1974]." Under Section 182, more commonly referred to as "Special 301," the Office of the U.S. Trade Representative leads an interagency process to identify countries that deny adequate and effective protection of intellectual property rights or that deny fair and equitable market access to U.S. persons who rely on intellectual property protection (19 U.S.C. §2242). IIPA has participated in every Special 301 cycle since the 1988 Trade Act created this process, providing public comments on acts, practices and policies regarding copyright law, piracy, enforcement and market access in selected foreign countries. In this year's filing, including this Submission Letter and appendices, IIPA reports on 41 countries noted in the chart in Section C of this Submission Letter, including 33 which we recommend be ranked on the Special 301 Priority Watch List or Watch List, or monitored under Section 306 of the Trade Act. IIPA has also recommended that USTR conduct one Out-of-Cycle Review (OCR) later in 2012. IIPA will also file under separate cover a Notice of Intent to Testify at the February 23, 2012 public hearing on Special 301.

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

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



In November 2011, IIPA released the latest update of the comprehensive economic report, *Copyright Industries in the U.S. Economy: The 2011 Report*, prepared by Stephen Siwek of Economists Inc. This report details the economic impact and contributions of U.S. copyright industries to U.S. Gross Domestic Product, employment, and trade. The “core” copyright-based industries in the U.S. continue to be major contributors to the U.S. economy, accounting for an estimated \$931.8 billion or 6.36% of the U.S. gross domestic product (GDP) in 2010. These industries provide nearly 5.1 million U.S. jobs, which is 4.75% of the entire private sector labor force in 2010, and pay on average over \$78,000, 27% higher than the overall workforce average. Estimated 2010 foreign sales and exports of key sectors of the core copyright industries amounted to \$134 billion, a significant increase over previous years, and more than foreign sales of other major U.S. industry sectors such as aircraft, automobiles, agricultural products, food, and pharmaceuticals.¹ Linkages between copyright protection and economic development in other countries are documented by the World Intellectual Property Organization’s 2012 study on the *Copyright + Creativity = Jobs and Economic Growth: WIPO Studies on the Economic Contribution of the Copyright Industries*, compiling similar studies in 30 countries.²

While these studies amply demonstrate the contribution of copyright-based industries to the economy, they do not reveal the massive costs imposed by overseas piracy and other market access barriers to U.S. copyrighted products and services. Content industries continue to contend with those who, in the absence of good protection and enforcement, engage in piracy as a high-profit, low risk enterprise. Today, legitimate businesses built on copyright are facing increased threats, as they must compete with the massive proliferation of illegal services that are unencumbered by costs associated with either producing copyrighted works or obtaining rights to use them. An independent study released by BASCAP (Frontier Economics), *Estimating the Global Economic and Social Impacts of Counterfeiting and Piracy* (February 2011),³ estimates the value of digitally pirated music, movies and software (not losses) at \$30-75 billion in 2010 and, growing to \$80-240 billion by 2015. For many countries in this submission, rampant piracy is not only impeding the evolution of legitimate channels for distribution, but also threatens to permanently damage or displace existing and authorized distribution channels that are unable to compete with infringing business models.

B. SUMMARY OF THE IIPA 2012 SPECIAL 301 SUBMISSION

The IIPA 2012 Special 301 Submission provides information intended to assist the U.S. Government in defining concrete plans of action for the year ahead, to reduce global piracy levels, and to open markets to U.S. copyright content in the identified countries. Section C of this Submission Letter provides the IIPA recommendations for the 2011 Special 301 lists. Section D summarizes 12 major cross-cutting initiatives and challenges involved in improving copyright law and enforcement and lowering market access barriers to U.S. copyrighted materials. Appendix A to the submission includes all the country surveys.⁴ Appendix B describes IIPA members’ methodologies for estimating the scope of piracy in various countries. Appendix C provides a chart of countries/territories’ placement on Special 301 lists by USTR since 1989.⁵ Information about the Special 301 histories of countries/territories on which IIPA has filed in the past, whether recommended for placement on a list this year, deserving special mention, or appearing on past lists, is available as an Additional Appendix on the website, at www.iipa.com.

¹See Steven E. Siwek, *Copyright Industries in the U.S. Economy: The 2011 Report*, November 2, 2011. The entire report as well as summaries can be accessed at http://www.iipa.com/copyright_us_economy.html. Core copyright industries are those whose primary purpose is to create, produce, distribute or exhibit copyright materials. These include books, journals, newspapers, and periodicals; motion pictures; recorded music; radio and television broadcasting; and computer software.

²World Intellectual Property Organization, *Copyright + Creativity = Jobs and Economic Growth: WIPO Studies on the Economic Contribution of the Copyright Industries*, 2012 (on file with IIPA).

³Frontier Economics, *Estimating the Global Economic and Social Impacts of Counterfeiting and Piracy: A Report Commissioned by Business Action to Stop Counterfeiting and Piracy (BASCAP)*, February 2011 (on file with IIPA). The report builds on a previous OECD study (*The Economic Impact of Counterfeiting and Piracy (2008)*).

⁴Country surveys were prepared by counsel to the IIPA, Michael Schlesinger, Amanda Wilson Denton, Steven Metalitz, and Eric Schwartz, and are based on information furnished by IIPA’s seven member associations. We thank Pamela Burchette for her contribution in preparing, producing and distributing this submission. The country reports contain information which should not be construed as providing legal advice.

⁵Fifteen of these countries/territories have appeared on a Special 301 list each year since 1989, and are recommended by IIPA to appear there again. A 1994 amendment to Section 182 of the Trade Act, dealing with identification of “priority foreign countries,” provides that the U.S. Trade Representative must take into account “the history of intellectual property laws and practices in the foreign country, whether the country has been identified as a priority foreign country previously, and U.S. efforts to obtain adequate and effective intellectual property protection in that country.” Uruguay Round Agreements Act Statement of Administrative Action, *reprinted in* H.R. Doc. No. 103-316, vol. I, at 362 (1994). Under these criteria, these 15 countries/territories named by IIPA are particularly vulnerable.



C. IIPA RECOMMENDATIONS FOR THE 2012 SPECIAL 301 LISTS

This year IIPA has recommended 41 countries/territories for placement on the Priority Watch List or Watch List, for monitoring under Section 306 of the Trade Act, or as deserving of special mention for copyright, enforcement, and/or market access-related concerns.

PRIORITY WATCH LIST	WATCH LIST	SECTION 306	COUNTRIES DESERVING SPECIAL MENTION
Argentina Canada Chile China (306) Costa Rica India Indonesia (GSP) Russian Federation Thailand Ukraine (GSP)(OCR)	Belarus Brazil Brunei Colombia Egypt Greece Israel Italy Kazakhstan Lebanon Malaysia Mexico Philippines Romania Saudi Arabia Spain ⁶ Switzerland Tajikistan Turkey Turkmenistan Uzbekistan Vietnam	Paraguay	Albania Bulgaria Hong Kong Hungary Latvia Moldova Singapore Taiwan
10	22	1	8

D. INITIATIVES OR CHALLENGES FOR 2012: REDUCE COPYRIGHT PIRACY, REMOVE MARKET ACCESS BARRIERS, STRENGTHEN LAWS

This Submission and its Appendices aim to define and seek implementation of concrete solutions to significant commercial hurdles faced by the content industries of the United States, including those producing business software, motion pictures, entertainment software, music, and books and journals. The following list of cross-cutting initiatives or challenges summarizes what must be done to reduce piracy, open markets to legitimate U.S. copyright business, and ensure that adequate legal structures are in place to keep piracy levels lower into the future.

1. The Need for Deterrent Enforcement Responses to Copyright Piracy

Copyright piracy as we know it today increasingly occurs in ways more sophisticated than the mere duplication and sale of content on physical media. Piracy also includes the unauthorized use of software within businesses (or by governments); the illegal copying, uploading, downloading, making available, communicating, or streaming of copyright materials on the Internet or mobile networks (including, for example, rogue sites often cloaking themselves in a disguise of legitimacy with advertising and payment methods recognized by consumers as “authentic”); the illegal camcording of

⁶Some IIPA members were of the view that Spain should be removed from the Watch List at this time. However, other IIPA members believe that removal would be premature given the perilous state of the Spanish market at the time of this filing.



movies from theater screenings; the illegal photocopying of books or pirate offset printing of popular titles; the illegal public performance or broadcast of audiovisual works or sound recordings; and hard-disk loading of software onto computers without authorization or license. Related to piracy are activities such as the development, manufacture and distribution of circumvention devices used to access and make copies of copyright materials protected by technological protection measures; the trafficking in counterfeit software packaging, labels, holograms, certificates of authenticity, or documentation; and the unauthorized decryption of Pay TV signals, as well as other activities facilitating unlawful use of copyright materials.

Too often, whether due to lack of political will or inadequate rule of law, countries fail to address piracy effectively. The overarching objective for the copyright industries therefore remains to secure in countries around the world effective legal frameworks capable of providing deterrent enforcement against copyright piracy and working to ensure that enforcement authorities robustly use these legal frameworks to combat copyright infringement. To do so, countries should:

- dedicate enforcement resources commensurate with the scale of the piracy problem, to provide for “effective action” and “remedies that constitute a deterrent”⁷ to infringement as the minimum required by the TRIPS Agreement, through civil, administrative, and criminal action, and effective adjudication in the courts;⁸
- train and empower enforcement authorities to investigate and prosecute copyright offenses;
- update laws and enforcement tools to meet the current piracy challenges;⁹
- direct government agencies, state-owned enterprises, enterprises, contractors, and educational institutions to use only legal software, legal copies of textbooks and other educational materials, and other copyright materials, and to ensure their networks or computers are not used for infringing purposes;
- ratify and fully implement the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT) and enforce resulting prohibitions as a means of reducing piracy;
- encourage cooperation by Internet service providers with all content owners, including notice and takedown systems and effective and fair mechanisms to deal with repeat infringers; and
- enact and enforce measures to make it illegal to use or attempt to use an audiovisual recording device to make or transmit a copy of a motion picture.

2. Internet Piracy

Transformative developments on the Internet and mobile (WAP, 3G, Wi-fi) networks have opened up opportunities for faster, more efficient and more cost-effective distribution of information, products and services across the globe. But they also have led to massive infringement of music, movies, games, software, published materials and other copyright materials. A January 2011 study by Envisional concluded that an astonishing 23.76% of all worldwide Internet traffic is copyright infringing, broken down by the following technologies: 11.4% illegal BitTorrent downloading; 5.1% illegal downloading from infringing distribution hubs; 1.4% was illegal video streaming; and 5.8% was other P2P filesharing (eDonkey, gnutella) or Internet protocols, such as Usenet, that are used for file sharing.¹⁰

⁷For effective deterrence, prosecutors and judges (or, where applicable, administrative agencies) should impose penalties that remove the monetary incentives that drive the pirate trade. Small fines do not deter pirates who stand to gain hundreds of thousands to millions of dollars. Recidivism is endemic in many countries. Deterrence requires substantial prison sentences in these cases.

⁸In many countries, specialized IP courts have been established, in addition to IP- or cybercrime-intensive investigative units with police and prosecutors. In the most successful examples, such specialized courts or divisions are starting to make a difference in their localities.

⁹Piracy (both online and offline) has been taken over in many countries by organized crime syndicates, linked across national boundaries, that control large amounts of capital, and exploit complex distribution networks. The private sector does not possess the tools, nor usually the legal authority, to investigate and fight organized crime. In addition, such organized groups or other commercial pirates can become violent, and company representatives and counsel have in some countries experienced threats on their lives, physical intimidation, or attacks leading to injury when doing their jobs to investigate piracy, and this has prevented enforcement activity by the private sector in many instances. Governments can step up to this challenge, including encouraging countries by applying their organized crime laws, like Hong Kong's Organized and Serious Crimes Ordinance and the United Kingdom's Serious Crimes Act 2007, to bring enhanced remedies to bear against syndicate operations involved in piracy, including, *inter alia*, disclosure of information being used to commit piracy and seizure or freezing of assets. Since 2000, INTERPOL has recognized the need for national and international enforcement authorities to coordinate their efforts and cooperate with IP right holders to fight IP crimes including piracy.

¹⁰Envisional, *Technical Report: An Estimate of Infringing Use of the Internet*, January 2011 (on file with IIPA).



Although there are many commonalities, each industry sector has its own unique experience with online piracy phenomena most harmful to them:

- The motion picture industry's windows for distribution (including theatrical, on-demand, Pay TV, home video, and legitimate online services) have been decimated by the availability of Internet downloads or streaming of their films. To give just one example, the recent hit, *The Grey*, which was released on January 27, 2012 in the United States and Canada, was reportedly already available for illegal download on the *isoHunt* BitTorrent site the next day. By mid-afternoon on January 30, isoHunt itself reported that 3,000 people were downloading *The Grey*, or better said, a 1.2 gigabyte pirated version of *The Grey*.
- Online piracy is by far the greatest priority issues for the music industry, which faces a global Internet piracy problem estimated at 95%. To effectively address this problem, it is essential for governments to attack both the supply and demand sides of the piracy equation, through education, criminal and administrative actions where appropriate, a sound framework for civil actions, and legislation that creates incentives for network service providers to address the use of their networks and services for infringing purposes. Mobile piracy (e.g., through the use of "apps" to illegally download content onto a mobile device) is also becoming more prominent, especially in countries with significant mobile penetration and mobile broadband (WAP, 3G, Wifi).
- Online piracy of entertainment software continues to be overwhelmingly international, as reflected in ESA vendor monitoring of peer-to-peer (P2P) and direct download activity. Conclusions drawn from ESA's online vendor monitoring of P2P activity during 2011 indicates that the vast majority of peer connections participating in the unauthorized file sharing of ESA member titles were undertaken by Internet subscribers in foreign countries. ESA vendors identified Italy, Brazil, China, Russian Federation, and Spain as the top five leading countries in overall numbers of detected connections to select ESA member titles on public P2P networks. Other countries moving up in terms of detections compared with 2010 include India (7th place), Poland (8th place), Romania (10th place), United Kingdom (11th place), Israel (12th place), Greece (13th place), Portugal (14th place), and Turkey, rounding out the top 15. ESA vendor monitoring of material made available on "direct download" sites also reveals increases in the number of web links to infringing ESA member game software, and even more dramatic increases in the number of unique URLs through which users directly download infringing copies. This monitoring also highlighted that the vast majority of sites that facilitate web-based game piracy are hosted on facilities outside of the United States.
- Book and journal publishers are plagued by sites that provide and deliver unauthorized digital copies of medical and scientific journal articles on an illegal subscription basis. With the rapid adoption of electronic reading devices (e-readers) and tablets, online piracy affecting trade books (fiction and non-fiction) and academic text books has increased significantly;
- Counterfeit business software products are prevalent on certain auction and e-commerce sites, as well as on well-constructed sites and services that fool consumers, selling well-packaged but poor quality counterfeit copies of language-learning and other software.
- Internet cafés continue to provide opportunities, particularly in developing countries, for getting access to infringing music, motion pictures and videogames.

IIPA's filing to the U.S. Trade Representative in its 2011 Special 301 Out-of-Cycle Review of Notorious Markets presents a non-exhaustive but illustrative list of examples of notorious online piracy services.¹¹ Many of the online "notorious markets" listed in that filing are discussed in detail in the country reports appended to this submission. This list demonstrates that many bad actors are abusing various technologies – all of which have legitimate uses – in order to foster widespread copyright piracy. These include:

¹¹ See International Intellectual Property Alliance, *IIPA Written Submission Re: 2011 Special 301 Out-of-Cycle Review of Notorious Markets: Request for Public Comments*, 76 Fed. Reg. 58854 (September 22, 2011), Docket No. USTR-2011-0012, October 26, 2011, at http://www.iipa.com/pdf/2011_Oct26_IIPA_Notorious_Markets_Submission.PDF.



- **Sohu/Sogou** (China); **Xunlei** (China) (which operates an unauthorized deep linking service called “**Gougou**”); and **Zing.vn** (Vietnam), which are sites that collect links to infringing content and provide users the ability to engage in piracy through “deep linking” – by which they bypass the homepage of the other site and link to the illegal content directly;
- **ThePirateBay.org** (Sweden); **Isohunt** (Canada); **Demonoid** (Ukraine); **BTJunkie** (Sweden ISP);¹² **Kat.ph** (formerly **Kickasstorrents.com**) (Canada); **Torrentz.eu** (Canada); and **Rutracker.org** (Russia), which are sites that employ or facilitate the use of the BitTorrent file sharing protocol to enable pirated content –including very large files -- to be quickly located and downloaded;
- **Megaupload/Megavideo** (Netherlands/New Zealand);¹³ **Putlocker.com** (United Kingdom); **Wupload.com** (Netherlands); **Simdisk.co.kr** (and other “webhards” in Korea); **4Shared.com** (registered in the British Virgin Islands); **Gogobox.com.tw** (Taiwan), which are “one-click hosting sites,” colloquially referred to as cyberlockers, which provide access to large libraries of infringing files;
- **vKontakte** (Russia) (which was just found civilly liable for infringement), which is an online social networks which features search functionality specifically designed and operated to enable members to upload music and video files, hundreds of thousands of which contain unlicensed copyright works, which other members search and stream on computers and mobile devices;
- **Letmewatchthis.ch** (Germany); **Video2k.tv** (Russia); **Movie2k.to** (Romania), which are audiovisual “linking” sites, which aggregate, organize, and index links to files stored on other sites;
- **Seriesyonkis.com** (Spain) and **3000filmes.com** (Brazil), which are dedicated “streaming” sites for infringing first-run movies and television content;
- **TaoBao** (China) and **Eachnet.com** (China), which are examples of auction sites of growing concern to several of the copyright industries including the business software, book publishing, and audiovisual industries, other business-to-business (B2B) and business-to-consumer (B2C) sites which have been found to specialize in certain types of illegal merchandise, and sites like **Modchip.ca** (Canada) and **ConsoleSource.com**, which sell circumvention devices into countries where such trafficking is illegal;
- “Usenet” service that market to P2P users much more heavily and directly than do traditional subscription Usenet services;
- **Zaycev.net** (Russia), a popular Russian site dedicated to the free, unlicensed distribution of music for download;
- **Warez-bb.org** (currently hosted in Luxembourg) and **BaixedeTudo** (Brazil), which are examples of forum sites, forum index sites, or blog sites dedicated to distributing infringing content, and also allow for the distribution of hacked or cracked software codes and programs.

The significant challenges of online piracy requires a multi-faceted approach, but some of the solutions are quite straightforward. Governments around the world must recognize the need for proportionate and effective steps to curb online piracy, and provide adequate legal frameworks for the protection of copyright online, including provisions in line with the two treaties adopted by the World Intellectual Property Organization (WIPO) in December 1996, the WCT and the WPPT,¹⁴ provisions recognizing online piracy as a form of cybercrime,¹⁵ and provisions that foster cooperation among the stakeholders (including ISPs) involved in the online supply chain to combat online infringements.¹⁶ Effective

¹²Reports indicate that BTJunkie has shut down as of February 6, 2012.

¹³*MegaUpload* is a one-click hosting site or “cyberlocker” (with headquarters located in New Zealand) which allegedly ran a file-sharing service whereby it sold premium memberships to users in order to induce them to upload and make available millions of infringing files. The seven owners of the site were, in January 2012 subjected to criminal indictments in the United States for amassing huge profits from facilitating massive amounts of copyright infringement.

¹⁴This should include express recognition of protection of reproductions in the online environment, regardless of their duration (i.e., temporary as well as permanent copies capable of being further copied, communicated, or perceived should fall within the exclusive reproduction right), since business and consumers engage in the full exploitation of copyright materials they receive over a network without ever making a permanent copy. This should also include a WIPO treaties-compatible definition of “communication to the public” including an interactive “making available” right.

¹⁵Governments should join and implement the Council of Europe Cybercrime Convention, Budapest, 23.XI.2001, which contains, in Articles 10 and 11, obligations to “adopt such legislative and other measures as may be necessary to establish as criminal offences under its domestic law the infringement of copyright [and related rights] ... where such acts are committed wilfully, on a commercial scale and by means of a computer system,” and to outlaw intentional aiding and abetting of such crimes.

¹⁶Many governments, particularly in Asia and Europe, have recognized the need for urgent steps to curb online piracy, and while not all approaches are favored by all the content industries equally, the goal is the same: to ensure effective action is available in practice against online piracy. There is consensus that bad actors who cause massive harm or profit from their direct involvement in the online infringing supply chain should be held responsible. There is also general agreement that all



enforcement is critical to ensure the healthy development of a legitimate online market, and it must take place before it is too late to recover markets that are severely damaged by widespread and persistent piracy in all its forms.

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

The unauthorized use of software within businesses and other enterprises, also referred to as “enterprise end-user software piracy,” stands as the principal and most damaging form of infringement to the business software industry today. Enterprise end-user software piracy occurs when someone in a business enterprise (or government agency) makes the decision to use software without paying for it. In the most typical example, a corporate entity purchases one licensed (or pirated) copy of software and installs the program on multiple computers. Client-server overuse, another common example of end-user piracy, occurs when too many employees on a network have access to or are using a central copy of a program at the same time, whether over a local area network (LAN) or via the Internet. In whatever way this piracy is carried out, it gives the enterprises involved the productivity benefits that the software provides, while foregoing the expense of licensed copies of the software, thus allowing them to enjoy an unfair commercial advantage over their law-abiding competitors who pay for their software. The unfair advantage can be understood on a macroeconomic level as well, since this means countries with high piracy levels compete unfairly with countries which have lower rates.¹⁷ Sometimes enterprise end-user software piracy is attributable to negligence and poor software asset management (SAM) practices. In many cases, however, enterprise end-user piracy is undertaken willfully, with management fully aware and supportive of the conduct.

Adequate laws prohibiting the unauthorized use of software in a business setting must be enacted and enforced – including, in appropriate cases, through criminal prosecutions¹⁸ – in order to reduce piracy of business software. The adoption of pre-established (statutory) damages for copyright infringement also is needed in many countries to provide predictability, encourage settlements, and provide “remedies which constitute a deterrent to further infringements,” as required by TRIPS Art. 41.¹⁹

Enterprise end-user software piracy also occurs in government agencies. Often, foreign governments fail properly to procure licensed software for their hardware purchases, which leads to unauthorized use and under-licensing practices in the public sector.²⁰ The principal way to address this is through government software legalization programs. It is also critical that governments vigorously pursue legalization of software within state agencies and state-owned enterprises to set an example for private sector businesses and lend credibility to government enforcement efforts against software piracy. Governments should also take steps to ensure that businesses that provide goods and services under government contracts do not do so using unlicensed software.

End-user piracy is not limited to business software but now affects other copyright sectors. For example, in some government, school and university facilities, photocopy machines are routinely used for commercial-scale book piracy. Use of networks, computers, or other equipment owned by a government or public institution to carry out infringement is particularly objectionable. Governments have an opportunity and responsibility to engage in best practices with respect to the handling of intellectual property issues in the operation of government services, and they should be encouraged to lead by example.

stakeholders in the online supply chain, including service providers, should have proper incentives to cooperate to eradicate bad behavior, which has traditionally included notice and takedown, and which at least includes effective and fair mechanisms to deal with repeat infringers in the non-hosted environment. The fact is that momentum is building for workable solutions and all recognize that solutions are required and desirable.

¹⁷For example, China's 78% PC software piracy rate means that Chinese enterprises competing with U.S. firms pay on average for just over one out of five copies of software they use, while their U.S. counterparts (the US has a 20% PC software piracy rate) pay on average for four out of five copies.

¹⁸TRIPS Art. 61 requires that this remedy be available against corporate end-user piracy.

¹⁹The U.S. has the lowest software piracy rate in the world and this is due in large part to the deterrent impact of infringers knowing that right holders can avail themselves of statutory damages.

²⁰In countries having significant state-owned enterprises (China being just one example of several), this problem is compounded.



4. Unauthorized Loading onto PCs (Hard-Disk Loading) and Mobile Devices (Mobile Device Piracy)

Not all retail piracy takes place at the point of sale of illegal merchandise. One example is “hard disk loading” performed by unscrupulous computer manufacturers and dealers who install copies of software onto the internal hard drive of the personal computers they sell without authorization from the copyright holder. A similar problem involves mobile devices, which are now nearly ubiquitous worldwide.²¹ A cottage industry has emerged in which pirates operating from stalls or kiosks, or masquerading as “repair” shops, offer (either at the point of sale of the mobile device, or afterwards) the illicit downloading onto any device²² of virtually any kind of copyrighted material.²³ Enforcement authorities must get up to speed with these piracy phenomena and take action, or the losses from this kind of piracy will mount out of control.

5. Circumvention of Technological Protection Measures (TPMs)

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

Unfortunately, just as content owners would take such self-help measures to protect their content in the face of enormous technological challenges, there are those who build their entire business models around providing devices, tools or technologies to fill demand for gaining unlawful access to the content or copying it. The “mod chip,”²⁴ “game copier,”²⁵ and software and technologies used for “soft modding” facilitate piracy on game console platforms and require strong legal measures and enforcement to make space for the sale of legitimate games.

While implementation of TPMs protections has given rise to effective enforcement actions against distributors of unlawful circumvention technologies, these efforts are critically undermined by countries that have yet to pass such provisions. Countries that lack TPM provisions, such as Canada, not only fail to afford domestic protections for legitimate online business models, but also serve as a source of circumvention devices for consumers who live in countries where such devices and technologies are rightly prohibited.

6. Illegal Camcording of Theatrical Motion Pictures

One of the greatest concerns to the motion picture industry involves illegal recordings of movies from theaters, often just as they open. An unauthorized recording may include a video capture, an audio capture, or both. Approximately 90% of newly released movies that are pirated can be traced to thieves who use a digital recording device in a movie theater to steal the audiovisual work (whether image and/or sound) off the theater screen. The increase in the severity of this problem in recent years tracks the development of camcorder technology that makes detection difficult and copies nearly perfect. All it takes is one camcorder copy to trigger the mass reproduction and distribution of millions of illegal Internet downloads and bootlegs in global street markets just hours after a film’s

²¹Mobile penetration is over 100% in 97 countries, and had reached 70% in the developing world, according to ITU. *Newsroom • ITU StatShot*, August 7, 2011, at www.itu.int/net/pressoffice/stats/index.aspx?lang=en.

²²Cell phones, mp3 players, external hard disks, thumb drives, flash drives, or USB drives are all illegally loaded in this fashion.

²³Works infringed include music, ring tones, games, business software, and published materials (including educational materials, medical and nursing titles, and trade books).

²⁴There is a global market for modification chips (mod chips) sold on the Internet and in videogame outlets which, when easily installed into a console (by the user or by the pirate retailer) will bypass the handshake and allow the play of pirated games.

²⁵“Game copier” devices also bypass TPMs to allow for uploading, copying, and downloading of games for handheld platforms.



theatrical release and well before it becomes available for legal home entertainment rental or purchase from legitimate suppliers.²⁶

A multifaceted approach is needed including: (1) educating the public about the problems posed to businesses and the consumer by unauthorized camcording; (2) working with the private sector to identify and prevent unauthorized camcording in cinemas; and (3) developing and implementing legal measures to effectively deter unauthorized camcording. In 2011, MPAA identified 964 illegal recordings of MPAA member company titles from cinemas around the world; approximately 60% were audio captures. This number does not include the numerous independent films illegally camcorded, and these producers also suffer gravely from illegal camcording.

Anti-camcording legislation – outlawing the use of an audiovisual recording device to make or attempt to make a copy of a motion picture in a theater, or to distribute or transmit such a copy – is critical to stopping the rapid increase in camcording. The U.S. adopted such a law at the federal level seven years ago; several other countries have followed suit; others are considering such legislation; and the 21 members of the Asia-Pacific Economic Cooperation (APEC) grouping committed, in November 2011, to “developing and implementing legal measures to effectively deter unauthorized camcording,” as well as working with the private sector and educating the public.²⁷ 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.

7. Piracy of Books and Journals

The book publishing industry continues to be plagued by large scale unauthorized photocopying of academic, scientific, technical and medical books, principally on and around university campuses;²⁸ sophisticated infringing offset print versions of books (essentially akin to counterfeiting); and unauthorized translations of popular books.²⁹ Photocopy piracy in most countries involves unauthorized commercial copying of entire textbooks by copy shops on and around university campuses, and undertaken on a “copy-on-demand” basis to avoid stockpiling. Book pirates have shifted tactics and are increasingly electronically storing digitized files of books (academic or otherwise) and fulfilling customer requests on a “print-to-order” basis. Authorities need to recognize this shifting pattern and tailor enforcement efforts accordingly (e.g., by including cyber forensics in their investigations). Commercial print piracy is prevalent in many developing countries where unauthorized operations obtain masters or copies of books and run unauthorized editions, in English or via unauthorized translation, off a printing press. In other cases, licensed local distributors or publishers produce print overruns, printing more copies of a title than permitted by their license. 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.

Book and journal piracy calls for aggressive action by law enforcement authorities. But universities and educational institutions (especially those are state-funded or operated) must do more to promote appropriate use and copyright policies, in particular the use of legitimate books and journal publications. IIPA urges the U.S. Government to ensure that such acts of piracy are fully covered in all bilateral, regional, and multilateral engagements.

²⁶Independent film producers who coordinate release patterns with dozens of national distributors may be especially vulnerable to this type of piracy.

²⁷*Effective Practices for Addressing Unauthorized Camcording*, 2011/AMM/014app05, adopted at 23rd APEC Ministerial Meeting, Hawaii, United States, November 11, 2011. APEC members include Australia; Brunei Darussalam; Canada; Chile; People’s Republic of China; Hong Kong, China; Indonesia; Japan; Republic of Korea; Malaysia; Mexico; New Zealand; Papua New Guinea; Peru; The Philippines; Russia; Singapore; Chinese Taipei; Thailand; The United States; and Viet Nam. Asia-Pacific Economic Cooperation, *Member Economies*, at <http://www.apec.org/About-Us/About-APEC/Member-Economies.aspx>.

²⁸Pirate photocopying takes place in a variety of venues, including commercial photocopy shops located on the perimeters of university campuses and in popular shopping malls, at on-campus copy facilities located in academic buildings, libraries and student unions, and in wholly illicit operations contained in residential areas or other underground establishments. Some of these operations are highly organized and networked, and technological advances are making the problem worse, since the shift from physical copy machines to electronic files means shops can print infringing books on demand. Publishers also suffer from unauthorized institutional or business-related photocopying for commercial research (often accompanied by failure to compensate rights holders through collective means or otherwise for copies made).

²⁹This problem affects books and journals of all kinds and genres. 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.



8. Optical Disc and Game Cartridge Piracy

While piracy is migrating to the online space for most of the content industries, physical piracy, including of optical disc (OD) products³⁰ and game cartridges, continues to inflict serious losses, especially in markets with low Internet penetration, or where pirate console- or cartridge-based videogames are popular. In response, programs such as regularized surprise production plant inspections and exemplar (sample) disc collection must continue, and where unlicensed illegal activity is detected, copyright laws and specialized OD laws or regulations should be aggressively enforced. Similarly, unauthorized factory production of entertainment software in cartridge format persists in China, for export globally. Without sustained enforcement actions against these factories, and the prosecution of their owners and financiers, there will be little progress in curtailing this piracy problem.

In recent years, factory production of optical discs has somewhat waned as technological developments have meant fewer large-scale factories and smaller, more agile operations that “burn” music, books and reference publications, games, movies, and business software onto recordable media. CD-R or DVD-R “stack” bays (of ten or twenty discs when “daisy-chained”) are lightweight and can produce multiple discs in minutes. They are being set up anywhere, including in factories but also in shops where vendors can “burn to order,” blurring any distinction between retail piracy and pirate production.

9. Pay TV Piracy and Signal Theft

The unauthorized broadcast, cablecast or satellite delivery of motion pictures, as well as other content (music and sound recordings) costs right holders dearly.³¹ Three key problems are identified by the industry. The first is unauthorized cable access, when individuals or groups illicitly tap into the lines of legitimate cable TV companies. This occurs mostly in major metropolitan areas, and may use circumvention or hacking techniques, codes, or devices. The second involves unauthorized operators who take broadcast signals by unauthorized means (hacked set-top boxes or “overspill” boxes from neighboring countries), replicate the signal and sell it to hundreds or even thousands of consumers, without paying for any of the content. The third is subscriber under-declaration, when cable companies do not pay for all the channels they use, or all the subscribers they serve.

Regulations imposing licensing on distributors of signals have in some countries been effective at weeding out unlicensed television distributors and consolidating the market into legitimate options (Lebanon is one example of this). In countries still experiencing major Pay TV theft, governments must take active steps to enforce. Pay TV signals are almost always encrypted; so in addition to strong copyright laws securing all the necessary exclusive rights, signal theft laws should prohibit the decryption of encrypted cable or satellite signals, as well as the onward use of the signals already decrypted (whether lawfully or not), without the authorization of the right holder of the content of the signal (and, if any, of the signal itself).

10. Using FTAs to Improve Global Standards of Copyright Protection and Enforcement

The negotiation of bilateral and regional free trade agreements (FTAs) over the past fifteen years has proven to be of great value to the U.S. economy, and have included enforceable obligations for our trading partners to modernize their copyright law regimes and to improve enforcement procedures. The agreements have helped U.S. copyright industries to compete fairly in foreign markets, and have helped our trading partners develop their domestic copyright industries, a true win-win for both parties. At the time of this submission, FTAs with 17 countries had entered into force. FTAs with Colombia, Korea, and Panama have not yet entered into force. The pending negotiations for a Trans-Pacific Partnership (TPP) FTA present an opportunity to expand the benefits of existing FTAs to a broader range of markets

³⁰OD include formats such as compact discs (CD), video CDs (VCD), CD-ROMs, CD-Recordables (CD-Rs), digital versatile discs (DVDs), DVD-Recordables (DVD-Rs), universal media discs (UMD), and high definition formats such as Blu-ray.

³¹For example, the Cable and Satellite Broadcasters Association of Asia (CASBAA) estimated the cost of piracy of Pay TV and signal theft in Asia alone at well over US\$2 billion in 2010. See CASBAA, *Asia-Pacific Pay-TV Industry 2010*, at www.casbaa.com/publications?page=shop.getfile&file_id=67.



around the Pacific Rim. IIPA members believe that the TPP IP text should use the KORUS FTA as a baseline. Enhancement of copyright standards and enforcement consistent and co-extensive with those agreed to by current FTA partners, Australia, Singapore, Chile and Peru, and an expansion of these protections to other TPP negotiating countries, will contribute to U.S. job growth, an increase in exports, and economic recovery in line with the current Administration's goals.³² On January 13, 2012, IIPA filed the views of the U.S. copyright industries on Japan's, Canada's, and Mexico's expression of interest in the proposed Trans-Pacific Partnership Trade Agreement (TPP).³³

11. Implementation of the WCT and WPPT

The WCT and WPPT provide a basic legal framework for the protection of online copyright. These treaties, in force since 2002, now have 89 adherents each. Effective implementation of the global legal minimum standards embodied in the WCT and WPPT is critical in the fight against online piracy, and is a key element of the "adequate and effective" copyright protection that is demanded under the Special 301 program. These standards include clarifying exclusive rights for the online world, and prohibiting through civil and criminal remedies the production of or trafficking in tools that circumvent technological protection measures used by right holders to prevent access to content or the exercise of exclusive rights. A number of key trading partners, including Canada, New Zealand, and Israel among developed countries, and India and Thailand among developing countries, have not yet ratified and/or properly implemented these treaties. The U.S., which was one of the first countries to implement these changes in its laws more than a decade ago, should continue to make it a priority to encourage other countries to follow this path.³⁴

One of the key aspects of WCT and WPPT implementation involves adequate and effective protection against the circumvention of TPMs. In order for such protection to be "adequate and effective," as required by the WIPO treaties, countries must address acts of circumvention, trafficking in circumvention devices, tools, and technologies, and the provision of circumvention services (such as the installing of "mod chips" into game consoles). Countries must also ensure that both TPMs that control access to content as well as TPMs that prevent the unauthorized copying or other exercise of exclusive rights are covered. Exceptions to protection in this area must be narrowly tailored to ensure that prohibitions on circumvention are not rendered ineffective. Civil and criminal (and where available, administrative) remedies should be provided

12. Market Access Barriers

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

- ownership and investment restrictions on copyright-related businesses;
- discriminatory or onerous content review/censorship systems;³⁵
- discriminatory restrictions including on the ability to fully engage in the development, creation, production, distribution, promotion, and publication of copyright materials;

³²We note that the KORUS FTA provides a strong starting point for an enhanced TPP agreement consistent and co-extensive with previous FTAs.

³³International Intellectual Property Alliance, *Re: Japan's Expression of Interest in the Trans-Pacific Partnership Trade Negotiations*, 76 Fed. Reg. 76478 (December 7, 2011), Docket No. USTR-2011-0018, January 13, 2012, at www.iipa.com. International Intellectual Property Alliance, *Re: Canada's Expression of Interest in the Trans-Pacific Partnership Trade Negotiations*, 76 Fed. Reg. 76480 (December 7, 2011), Docket No. USTR-2011-0019, January 13, 2012, at www.iipa.com. International Intellectual Property Alliance, *Re: Mexico's Expression of Interest in the Trans-Pacific Partnership Trade Negotiations*, 76 Fed. Reg. 76479 (December 7, 2011), Docket No. USTR-2011-0020, January 13, 2012, at www.iipa.com.

³⁴The 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.

³⁵In China, for example, entertainment software companies continue to face lengthy delays in the censorship approval process, wiping out the very short viable window for legitimate distribution of their videogame products. Further, while piracy enters freely in these markets, countries like China and Vietnam impose content review processes which clear the way for further piracy and, adding insult to injury, are discriminatory to foreign content, further skewing the playing field.



- the maintenance of quotas including screen time and broadcast quotas or complete bans on broadcast of foreign programming or advertising;
- mandatory blackout periods for films;
- local print requirements;
- onerous import duties or the improper assessment of duties on an ad valorem basis;³⁶ and
- government procurement preferences for domestic products or those with locally-owned or locally-developed IP.³⁷

Whatever form they take, whenever such market access restrictions impede the entry of legitimate products, they make it easier for pirate operations to fill the void, become de facto “exclusive” distributors of the products, and cement strong loyalties with their consumer base that make them even harder to dislodge.

U.S. officials should continue to strive to open markets and eliminate or phase out market access barriers including those identified in this year’s IIPA submission.

E. CONCLUSION

The health and competitiveness of the U.S. economy depends on a thriving copyright sector that creates jobs and exports. It is essential to the continued growth and future competitiveness of these industries that our trading partners provide high levels of protection for copyright, more effective policies and tools to enforce that protection, and freer, more open markets. To meet the constantly evolving threats to copyright worldwide, our country should remain committed to a flexible and innovative response to this threat. Special 301 remains one cornerstone of the U.S. response, and we urge USTR and the Administration to use Special 301 and other trade tools available to encourage the countries identified in our recommendations this year to make the political commitments, followed by the necessary actions, to bring real commercial gains to the United States through strengthened copyright and enforcement regimes worldwide.

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

Respectfully submitted,

/Steve Metalitz/
/Michael Schlesinger/
/Eric Schwartz/
/Amanda Wilson Denton/

Counsels for
International Intellectual Property Alliance

³⁶*Ad valorem* duties are based on potential royalties generated from a film rather than the accepted practice of basing duties on the value of the carrier medium (i.e. the physical materials which are being imported). This is a growing, dangerous, and very costly phenomenon to the film industry. The International Chamber of Commerce recognized in a policy statement, *The Impact of Customs Duties on Trade in Intellectual Property and Services*, that such a practice distorts markets, increases costs for suppliers and buyers, depresses commercial activity, and impedes the availability of intellectual property in the country imposing the tariffs.

³⁷As an example, over the past several years, China has been rolling out a series of policies aimed at promoting “indigenous innovation.” The apparent goal of many of these policies is to develop national champions by discriminating against foreign companies and compelling transfers of technology. These include policies providing government procurement preferences for goods or services with locally-owned or locally-developed IP. The Chinese government has made a series of commitments in bilateral negotiations with the United States to eliminate such policies that link government procurement to where IP is owned and developed, including most recently at the US-China Joint Commission on Commerce and Trade (JCCT) negotiations in November 2011.

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ARGENTINA

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

2012 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: IIPA recommends that Argentina remain on the Priority Watch List in 2012.

Executive Summary¹: Digital piracy in Argentina is widespread and takes many forms. The rise in online piracy has not diminished the piracy of hard goods found at street fairs such as the public market near Buenos Aires known as “La Salada”; indeed, smaller “saladitas” are appearing in the region based on the same model. End-user piracy of business software applications, especially in corporate settings, causes serious economic harm, and the Argentine government should review its agencies’ use and procurement of computer software to ensure that legal software is being used. Although the copyright industries appreciate the continued cooperation of the police with enforcement raids, only a small number of criminal cases result in final judgments with deterrent sanctions. In one positive development, Argentina’s courts confirmed indictments of the founders of one of the country’s most popular sources of unauthorized content online, the advertising-based website Taringa.net. Civil infringement actions suffer from extensive court delays and the lack of a statutory damages remedy. The police corps and the judiciary simply lack the resources or the awareness to permit effective enforcement against copyright piracy. Government involvement is needed to forge new cooperative solutions to halt the transmission of illegal copyrighted materials on telecommunications networks. IIPA urges the Government of Argentina to adopt a comprehensive national strategy aimed at protecting and enforcing the Argentine Copyright Law.

PRIORITY RECOMMENDED ACTIONS FOR ARGENTINA IN 2012

- Commit, at the highest levels of the Argentine Government, to develop and implement a coordinated anti-piracy campaign that addresses hard goods and online infringements as a matter of national priority.
- Develop processes that enhance cooperation between rights holders and intermediaries in ways that are likely to contribute to a decline in online piracy.
- Require that the federal and Buenos Aires provincial governments take appropriate measures to:
 - Identify distributors of pirate products in public markets and revoke licenses to those points of sale.
 - Halt the distribution of pirate and counterfeit merchandise at the “La Salada” Fair and similar markets.
- Support efforts to issue an executive decree requiring government legalization of current business software, within a balanced and neutral system to select technical solutions and improve procurement practices.
- Provide more resources and high-level support for police Internet crime units to address illegal downloading.
- Instruct prosecutors to seek deterrent criminal sentences on major piracy cases. Encourage judges around the country to resolve these cases expeditiously and to impose deterrent sentences.
- Improve border enforcement, partnering with Paraguayan and Brazilian officials to establish a program to inspect goods in-transit for potential pirate product.

Generalized System of Preferences: Argentina is a beneficiary country under the U.S. Generalized System of Preferences (GSP) program, which requires that a beneficiary country provide “adequate and effective” protection to U.S. copyrighted materials. During the first 11 months of 2011, more than US\$425 million in imports to

¹For more details on Argentina’s Special 301 history, see IIPA’s “History” appendix to this filing at <http://www.iipa.com/pdf/2012SPEC301HISTORICALCHART.pdf>, as well as the previous years’ reports, at <http://www.iipa.com/countryreports.html>. For a summary of IIPA’s 2012 global issues, see our cover letter at <http://www.iipa.com/pdf/2012SPEC301COVERLETTER.pdf>.



the U.S. from Argentina enjoyed duty-free treatment under the GSP Program, or more than 14% of Argentina's entire imports into the U.S.²

COPYRIGHT PIRACY IN ARGENTINA

The nature and scope of piracy in Argentina remained unchanged over the past year. Street piracy continues to rise, mostly in the form of DVDs burned with movies, but illegal copies of other copyright products are also available in hard goods. In just the past year, the number of fairs where pirate products are sold has increased. The highest levels of this activity are seen in Buenos Aires, Capital Federal, Córdoba, Mendoza, San Juan, and Tucumán. For most copyright industries, however, digital piracy does the most damage, most frequently in the form of Internet direct downloads of pirated content from hyperlinks and cyberlockers. End-user piracy continues to be the most damaging form of infringement for the business software industry, as it limits the ability for legitimate business software to enter the Argentinean market. A combination of extremely high piracy and market access impediments makes Argentina one of the least hospitable markets for entertainment software publishers in the region.

Internet piracy: Argentina is a highly connected country, but one that suffers from such a lack of enforcement that its market of 27.6 million Internet users³ is largely out of reach for legitimate copyright sectors. With the increased availability of pirated content via broadband in homes, Internet cafés, and public telephone call center/LAN houses, Internet piracy is having significant prejudicial consequences on the sale and distribution of legitimate materials. Increased broadband penetration has altered Argentina's Internet piracy landscape, resulting in the proliferation of piracy through peer-to-peer (P2P) file sharing services (including BitTorrent and eDonkey) and sites offering links to download movies and entertainment software from free file hosting sites.

The recording industry reports that digital piracy continues to represent 99% of the entire digital music market in 2011. Digital piracy for this sector occurs predominantly via direct download, for example from cyberlockers that host infringing content. Within the legitimate 1% of total music consumption in Argentina, legitimate digital sales represent 12% of the local legitimate music market, and are made up of two segments: mobile (96%) and Internet (4%). There are two prominent "topsites," sources at the top of the distribution chain for illegal copies, that facilitate music piracy in Argentina: Taringa (www.taringa.net), and Musicuo (www.musicuo.com). Taringa, a site financed through revenue from banner ads, recently faced criminal charges for facilitating copyright infringement. The Criminal Superior Court of Buenos Aires affirmed the indictments of Hernán Botbol, Matias Botbol and Alberto Nakayama, Taringa's founders, on 29 counts for providing the means for the unauthorized reproduction and distribution of literary works. The court pointed to the fact that Taringa's owners and administrators knew that the site's users used the website to commit infringement on a daily basis, but continued to knowingly facilitate the downloading of unauthorized content. The Court ordered the first-instance judge to submit the three accused to a full criminal trial.

Musicuo is an on-demand streaming music site similar to www.grooveshark.com, that offers thousands of unauthorized music titles. The founder of Musicuo (also founder of Cuevana, an on-demand streaming movies site) has openly admitted that the site's activity might be infringing copyright, and that he hopes to reach an agreement with rights holders soon. Musicuo incentivizes infringement by rewarding users who upload to a single account at least 1000 songs not already existing on the site, and who offer those files to be shared to other users, with an advertisement-free VIP account. The site is becoming increasingly popular in the Internet community, and has even been featured by the Rolling Stone Magazine-Argentinean edition.

The local recording industry group reports that over 50% of Argentinean Internet users who download unauthorized music from the web believe that the activity is included in their ISP connection charges.

²During 2010, more than US\$528 million in imports to the U.S. from Argentina enjoyed duty-free treatment under the GSP Program, or more than 10% of Argentina's entire imports into the U.S.

³This figure reflects about 66% of the population, according to internetworldstats.com, as of June 2011.

For the business software industry, the Internet offers local packages of pirated and counterfeit software, including compilations containing dozens of computer programs. The Business Software Alliance (BSA) notes the use of P2P sites is the favored method to access unauthorized copies of software programs; there are a few pirate websites but they are not the largest source of pirated programs. BSA does perform take-down operations with local ISPs and there is a high degree of success; however, for every site removed, more appear.

For 2011, Argentina placed 21st in the world in the number of connections by peers participating in the unauthorized file sharing of select ESA member titles on public P2P networks.

MPAA notes that Peer Media Technologies reported that during 2011, users initiated over 11 million downloads/uploads of unauthorized copies of major U.S. movie titles via certain P2P protocols in Argentina.⁴

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

Piracy of business software programs: The most damaging form of piracy to the business software industry is business end-user piracy of software, which remains quite high in Argentina, especially in small- and medium-sized organizations. While a good number of businesses have legalized their software applications, just as many newcomers in the market have yet to acquire legal software. This problem involves the federal, provincial and municipal government offices as well as a number of private companies. According to a 2010 report issued by BSA and IDC called *The Economic Benefits of Reducing PC Software Piracy*, the information technology sector’s contribution to the Argentine economy could be even bigger if Argentina’s PC software piracy rate were to be lowered 10 percentage points over four years. This would create an additional 4,420 jobs, US\$949 million in local industry revenues and US\$202 million in additional tax revenues for federal, regional, and local governments.⁵ There was no positive news to report on any progress made by the government to legalize its software last year. It is still easy to find hardware dealers selling computers with illegal original equipment manufacturers (OEM) versions or simply illegal copies pre-installed on computer hard disks.

Hard goods piracy, La Salada and end-user piracy: The sale of pirate product, including optical discs, by street vendors continues unabated throughout Argentina. La Salada Fair is an enormous central market in Buenos Aires that provides pirated and counterfeit merchandise to retailers and re-sellers from Argentina and neighboring countries. La Salada Fair is clearly the most important center of manufacturing, distribution and selling of illegal products in Argentina. But as a result of its profitability, it has also been the most imitated business model in the last year. Thus, a number of “Saladitas,” or smaller versions of the Salada Fair market, have appeared across Argentina. There are Saladitas in the City of Buenos Aires and every town of the province of Buenos Aires. The phenomenon has not gone unnoticed, and the activity in Saladitas is now considered a priority for possible regulation by law. A bill

⁴A major U.S. movie is defined as a movie released in 1,000 or more theaters in the U.S., so these numbers reflect only a small subset of movie-related piracy activity (since it excludes non-major releases, including local titles, other peer-to-peer protocols, and non-peer-to-peer ones, such as websites, and streaming via other technologies). Also, since local language title versions for scanning are not always available from established sources, and access to foreign language BitTorrent sites may fluctuate, results in certain countries are likely underrepresented.

⁵This report is posted on BSA’s website at <http://www.bsa.org/idcstudy>. BSA’s 2011 software piracy statistics will not be available until after the filing deadline for this submission, but will be released in May 2012, at which time piracy rates and U.S. software publishers’ share of commercial value of pirated software will be available at www.iipa.com. In 2010, the software piracy rate in Argentina was 70%, representing a commercial value of unlicensed software attributable to U.S. vendors of US\$409 million. These statistics follow the methodology compiled in the Eighth Annual BSA and IDC Global Software Piracy Study (May 2011), <http://portal.bsa.org/globalpiracy2010/index.html>. These figures cover packaged PC software, including operating systems, business applications, and consumer applications such as PC gaming, personal finance, and reference software – including freeware and open source software. They do not cover software that runs on servers or mainframes, or routine device drivers and free downloadable utilities such as screen savers. The methodology used to calculate this and other piracy numbers are described in IIPA’s 2012 Special 301 submission at <http://www.iipa.com/pdf/2012spec301methodology.pdf>.

currently under consideration by the province of Buenos Aires Congress would impose certain requirements on fairs having more than six stores.

As for La Salada Fair itself, the physical area continues to grow. It is made up of four markets – *Punta Mogotes*, *Urkupiña*, *Ocean* (indoor fairs) and *La Ribera* (open-air fair) – built up on the Riachuelo shore. It is a sprawling area with about over 30,000 stands selling everything from music to bags, and it provides pirate and counterfeit merchandise to retailers and re-sellers from Argentina and neighboring countries. This market opens twice a week – on Tuesdays and Sundays – at changing times but mostly at midnight, and is visited by approximately 1 million people each day. The total volume of sales in 2010 amounted to around US\$2.9 billion (equivalent to around ARS\$12 billion), of which around 10% came from counterfeit music CDs and film DVDs, and accounts for four percent of the country's GDP. Although La Salada is mainly a physical market, it has its own websites where customers can check out information about the market hours and directions (official sites: <http://www.puntamogote.com.ar/>; <http://www.mercadolasalada.com>). Additionally, the pirate and counterfeit merchandise is openly advertised and sold on such websites, though no CDs or movies are offered online. The social and economic dimensions of this phenomenon are so extraordinary that a documentary has been filmed by the Argentine film director Julián D'Angiolillo. *Hacerme feriante* (Becoming a Stall-Holder) was released on February 10th, 2011, showing the large numbers of visitors to the market, the manufacturing of the products, and role of the Fair in the region. Police are well aware of the illegal activities taking place at the fair. Local government officials and flea market administrators simply do not cooperate with the private sector in raiding actions and refuse to close stands engaged in the sale of infringing works.

Flea market fairs are appearing in more and more cities across the country. The interior of the country remains plagued with street vendors selling pirate product (for example, in the cities of Tucuman and Santa Fe). Pirate stands are often seen around train stations and other high-traffic areas. In general, the largest concentration of pirate product of films and music is in the greater Buenos Aires district, but the industries face serious challenges in larger cities throughout the provinces. In addition, blank optical media products, mostly from Southeast Asia, continue to enter the Argentine market via Uruguay and Paraguay. This media serves as the basis for the local "burning" of copyrighted materials on these discs, a widespread phenomenon that adversely affects the legitimate markets of almost all the content industries.

The Business Software Alliance (BSA) reports that physical commercial software piracy has nearly disappeared in Argentina, owing to the realization on the part of the business community of the costly risks involved in infringement suits, on one hand, and the rise in Internet piracy, on the other.

Piracy of music and sound recordings in both the physical and online environment continues unabated in Argentina. Hard goods (physical) piracy of music accounted for 60% of the music market in 2011, up 10% from the previous year. The local recording industry group has noticed an increase in the hard goods piracy of music in general, but that the products sold on the street most often are DVDs burned with movies. There has been an increase in the number of fairs where pirate products are sold.

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

COPYRIGHT ENFORCEMENT IN ARGENTINA

Local industry representatives describe their relationships with Argentinean authorities as fluid and cooperative, as in years past. Unfortunately, the limited training, resources, and human capital available to police forces and the judiciary in Argentina make effective enforcement of copyright in the country extremely difficult. Federal and state police forces lack sufficient resources to provide expert reports on seized products, which delays processing cases. There is no dedicated police force to handle piracy cases. Industries report continued good cooperation with Argentina's police forces and border officials. While there also has been significant support from the Federal Police Cyber Crime division on Internet cases, few prosecutions are pursued and few criminal cases reach final judgment. The minimum penalty of one month is so low as to be considered negligible, deterring courts from issuing any prison terms at all. Anti-piracy enforcement actions rely entirely on private sector initiative, resources, and complaints.

Inter-industry cooperation on Internet piracy cases: IIPA reported just one year ago that local ISPs were slowly beginning to collaborate in certain limited circumstances, such as taking down infringing sites in very specific instances. Unfortunately, that cooperation has improved little in the past year. Takedowns are limited to hosted content, and ISPs refuse to cooperate with rights holders on any copyright actions within P2P networks. While ISPs claim to have no responsibility for the activities of users on their networks, Argentineans have a different impression; one out of two Argentineans who download unauthorized music believes that the activity is covered by their ISP's charges.

Since 2007, the local sound recording and film industry sectors have been trying to achieve broader voluntary cooperation with Argentine ISPs on Internet piracy matters. ISP industry groups have rejected proposals by the local sound recording group to negotiate terms of cooperation. Also, despite appeals from the sound recording industry to the Ministry of Telecommunications and ISP trade groups, the Argentine authorities view Internet piracy as a problem of private interests, and have refused to engage in industry talks, leaving rights holders unable to organize roundtable discussions with ISPs on a voluntary campaign to curb piracy. The disengaged attitude of the Argentine authorities has proven to be the most problematic in the region. With no mechanism in place for rights holders and ISPs to work together on this serious and damaging problem, it is time for the Government of Argentina to reconsider its "hands off" approach and work with industry groups to find solutions to halt the transmission of illegal copyrighted materials on telecommunications networks.

The recording industry continues to be very active in Internet piracy enforcement in Argentina. With the cooperation of ISPs in the removal of hosted content, from July 2010 to June 2011 the local recording industry organization, CAPIF, produced the following takedown results: 25,555 web pages and blogs posts, 780,878 links to cyberlockers containing infringing files, 798 music videos, 100,087 forum posts, 29,063 P2P links to infringing content, 22 domain names, and 46,846 pre-release copies of sound recordings.

Software actions: BSA reports cooperation on the part of the police and the courts in general, noting that preliminary measures are executed rapidly. However, BSA has experienced problems with confidential information being leaked to targets of investigation and a general slowness in resolving judicial procedures. The business software industry is unaware of any *ex officio* actions being taken against software piracy. The industry continues to support any effort by the Argentine federal, provincial or municipal levels of government to legalize business software currently installed on government computers and improve their procurement practices.

BSA takes a variety of actions in Argentina, ranging from civil claims to non-judicial procedures (such as cease and desist letters, notices to ISPs, and the like). During 2011, the BSA program in Argentina conducted 79 raids or court actions against commercial computer software end users, with successful results in 100% of its claims. In the past, criminal copyright actions in the software area were not widely used by BSA. More recently, the various agencies (including the Federal Police, Gendarmería, etc.) are improving their technical capacities to support the courts in the investigation of computer crimes (including piracy) and the provision of technical reports, which is useful

evidence in judicial cases. In smaller provinces, local police are not trained in computer crimes, and there have been problems caused by pre-raid leaks. In some cases, it is possible to replace local police with the better trained Gendarmería. In addition, preliminary injunctions and searches performed by court officers and the police under instructions from civil courts have been effective to obtain the legalization of commercial software in use and the payment of damages.

Criminal actions involving hard goods: The recording industry indicates that both the police and customs authorities do take *ex officio* actions and industry supports those actions. The recording industry focuses on investigating complex organized crime cases, and planning street piracy actions. From January to November of 2011, rights holders assisted in 185 raids (including street vendors, fairs, warehouses, laboratories, retail stores, newsstands, and border actions), resulting in the seizure of 338,249 copies of media with infringing content (most of which were CD-Rs or DVD-Rs containing music and movies) and 642 pieces of optical disc burning equipment. These figures have dropped compared to 2010, in which there were 309 raids resulting in the seizure of 3,819,434 copies and 2,188 pieces of equipment.

Difficulties, however, that create bottlenecks include the fact that obtaining search warrants is increasingly difficult; enforcement authorities do not have enough physical space for the storage of raided products; and forensic analysis can take months.

Slow prosecutions and non-deterrent judgments: The Argentine judicial system is formal and heavy on written submissions, which means that the process of administering justice is time-consuming. Perhaps even more frustrating, very few criminal cases that reach final sentencing, and most copyright infringement cases close with a suspension of judgment. In 2011, there were no convictions but courts issued 142 suspensions of judgment. This problem can also be attributed to the lack of human resources and poor infrastructure in the courts. But clearly, there is a lack of will by both prosecutors and judges to push these cases through.

Delays and weak damages in civil infringement cases: The business software industry continues to rely on civil enforcement in Argentina, given the systemic problems with criminal enforcement. Even so, there remain problems in some provincial judicial jurisdictions, where there are procedural delays in obtaining and conducting civil searches in business software piracy cases. Civil actions are also weakened by the unavailability of deterrent civil damages; this important problem could be corrected if Argentina were to introduce an effective statutory damages system.

Border enforcement: The Argentina Customs Code currently provides for *ex officio* actions. Customs authorities have a good understanding of the damage that piracy causes, not only to the owners of intellectual property rights, but also to the State itself, since pirate products evade taxes and do not generate legitimate employment. For about four years the Argentina Customs, has implemented a forum aimed to IP right holders to generate a communication space, but at present, the forum has become a formal meeting instead of an active organism to act against piracy. Given the extent of the piracy and counterfeiting problems in the tri-border area, Argentina should forge a working plan with Brazilian and Paraguayan customs officials to inspect goods in-transit for potential pirate product.

Industry trainings and public awareness efforts: The sound recording and business software sectors offer courses and seminars for the judiciary and commercial chambers in Argentina. The national affiliate of IFPI has provided training courses to cybercrime police forces, but there is just one police department investigating cybercrime in Argentina, which is unable to handle the workload at hand. Training for additional specialized forces to investigate IP cybercrime is needed. The national affiliate of IFPI also organizes a seminar for judges of various jurisdictions every year. To improve judicial awareness of intellectual property and end user software piracy, BSA has developed a training program for provincial judges, which is pending approval to be conducted in 2011. (For more information, see <http://www.jufejus.org.ar/>.)

COPYRIGHT LAW REFORM IN ARGENTINA

Argentina's Copyright Act (1933, as amended), while one of the oldest in the Western Hemisphere, has remained remarkably flexible over the years. Argentina is a member of the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty (the "WIPO Internet Treaties"), and those provisions are self-executing, taking precedence over national law. Still, further refinements are needed. Specificity in national legislation helps to provide clear "rules of the road" for rights holders, consumers and enforcement authorities, including the courts.

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

- Provide express protection for the "communication to the public" and "making available" rights as required by WIPO Internet Treaties, to give legal background to digital businesses for authors, performers and phonogram producers;
- Extend the scope of the reproduction right to explicitly cover temporary copies;
- Protect against the act of circumvention as well as the manufacture or distribution of devices aimed at circumventing TPMs;
- Protect against the removal or alteration of digital rights management information (RMI);
- Increase the minimum penalty for piracy (currently one month under Article 72bis of Act 11.723 of the Copyright Act) up to at least two years to apply deterrent sanctions;
- Establish statutory damages provisions in civil infringement cases;
- Explicitly provide for the seizures of infringing equipment;
- Provide clear guidelines regarding liability for ISPs, and include notice and takedown provisions; and
- Provide equitable and balanced treatment for all rights holders, treating juridical entities no less favorably than natural persons.

Government software legalization: Unfortunately, no progress was made on this important issue last year, and it is clear that the current government is not going to make any effort in this area. With respect to government legalization efforts, the business software industry continues to call upon the Argentine Government (in particular, the Subsecretaría de la Gestión Pública—the Undersecretariat for Public Administration) to issue an executive decree that would require government legalization of current business software programs on computers and improve procurement practices. While several "standards" have been issued by the Subsecretaría, the Argentine Government has not taken action toward legalizing its software inventories.

MARKET ACCESS ISSUES

Legal offer of sound recordings: In 2012, the recording industry expects to see additional openings of Musimundo (Megatone) retail record stores, and there are expectations that iTunes will become available in Latin America. These operations face enormous challenges to compete with rampant piracy, but the content industries are optimistic about the opportunity to provide more legal options in the market.

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

Customs duties affecting audiovisual works: The Argentine Customs Valuation Code requires that all audiovisual works, excluding computer software, must pay an *ad valorem* customs duty based on the value of the “authors’ rights,” that is, on the potential royalty generation of the film, rather than solely on the value of the physical materials which are being imported. The Motion Picture Association (MPA) opposes this burdensome practice, which is a form of double taxation since royalties are subject to remittance, withholding and income taxes. Customs duties should be based on specific fees, such as weight or length, or, if *ad valorem*, be based on the value of the carrier medium only. Because of this duty, MPA member companies import negative prints on a temporary basis and copy positive prints locally. There have been no new developments in this matter in 2011.

Withholding taxes and royalties on computer software: The software industry continues to report a problem regarding the withholding that local licensees must perform when wiring royalties to foreign licensors. The local tax collection authority, AFIP, refuses to apply the special rules that the Income Tax Law provides for “authors’ rights” international transfers. AFIP contends that the legal nomenclature “author” is limited to physical persons, and that a legal person (e.g., a corporation) cannot be an author and, as a result, cannot hold these “authors rights.” In 2011, AFIP’s position was upheld by the Argentinean National Supreme Court of Justice, resulting in a considerable increase in the international license cost for end users. This problem could be solved by amending the Income Tax Act to establish a concrete withholding rate for software license payments, similar to what was done for music and motion pictures several years ago. There is also a clear need for the U.S. and Argentina to reach agreement on a treaty to avoid double taxation.

Audiovisual Communications Services Law: In September 2010, Argentina’s Federal Authority on Audiovisual Communication Services passed a bill that limits advertising on pay TV to six minutes per hour and discriminates against foreign pay TV networks by disallowing advertisers to write off investments in these networks, yet permitting advertisers to write off investments in Argentine pay TV networks.

CANADA

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

2012 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: IIPA recommends that Canada be maintained on the Special 301 Priority Watch List in 2012.¹

Executive Summary: More than 15 years ago, Canada played an important and positive role in negotiation of the WIPO Internet Treaties. But today, Canada stands virtually alone among developed economies in the OECD (and far behind many developing countries) in failing to bring its laws into compliance with the global minimum world standards embodied in those Treaties and in legislative best practices worldwide. Bill C-11, tabled in September 2011, is the fourth copyright reform proposal in 6 years. Like its predecessors, the Bill takes some critical steps forward toward compliance with the Treaties, including robust anti-circumvention provisions, and a new cause of action that is intended to target online services that primarily enable infringement. However, its approach to the role of service providers in combating online piracy is insufficient and deeply flawed, and it would add a host of new exceptions to copyright protection, many of which are inconsistent with Canada's international obligations under the Berne Convention and TRIPS, and significantly broader than those found in other jurisdictions. Canada should be encouraged to enact the bill this year, but only after its flaws are corrected. Canada's enforcement record also falls far short of what should be expected of our neighbor and largest trading partner, with ineffective border controls, insufficient enforcement resources, inadequate enforcement policies, and a seeming inability to impose deterrent penalties on pirates. Canada's parliamentary leadership and government, at the highest levels, have acknowledged many of these deficiencies, but have done very little to address them. While we are encouraged by a few examples of improved enforcement responsiveness against physical piracy, and by some improvements in the business software sector, overall the piracy picture in Canada is nearly as bleak as it was a year ago. The country is perpetuating its reputation as a haven where technologically sophisticated international piracy organizations can operate with virtual impunity in the online marketplace. To underscore U.S. insistence that Canada finally take concrete action to address the serious piracy problem it has allowed to develop just across our border, and that it bring its outmoded laws up to contemporary international standards, IIPA recommends that Canada be maintained on the Priority Watch List in 2012.

PRIORITY RECOMMENDED ACTIONS FOR CANADA IN 2012

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

¹For more details on Canada's Special 301 history, see IIPA's "History" appendix to this filing at <http://www.iipa.com/pdf/2012SPEC301HISTORICALCHART.pdf>, as well as the previous years' reports, at <http://www.iipa.com/countryreports.html>. For a summary of IIPA's 2012 global issues, see our cover letter at <http://www.iipa.com/pdf/2012SPEC301COVERLETTER.pdf>.



Enforcement

- Direct the Royal Canadian Mounted Police (RCMP), Canadian Border Services Agency (CBSA), and Crown prosecutors to give high priority to intellectual property rights enforcement, including against retail piracy and imports of pirated products, and to seek deterrent penalties against those convicted of these crimes.
- Make legislative, regulatory or administrative changes necessary to empower customs officials to make *ex officio* seizures of counterfeit and pirate product at the border without a court order.
- Make the legal and policy changes to enforcement called for by parliamentary committees.
- Increase resources devoted to anti-piracy enforcement both at the border and within Canada, (including online).

COPYRIGHT LEGAL REFORM AND RELATED ISSUES

Canada's main legislative challenge has persisted for more than a decade: to modernize its laws and bring them into full compliance with the globally accepted minimum benchmarks for modern copyright legislation (including the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT)). The pending Bill C-11, like its immediate predecessor, 2010's Bill C-32,² is a promising but flawed proposal. Although the bill's stated objectives deserve strong support, its actual text fails to achieve them in significant respects. While some of Bill C-11's provisions would bring Canada much closer to compliance with modern global copyright norms, others would take it farther from current best practices and even raise serious questions about compliance with its existing international obligations.

Technological Protection Measures (TPMs): Sound copyright reform legislation should comprehensively protect TPMs, both insofar as they manage access to copyright works, and in their use to prevent unauthorized copying and the exercise of other exclusive rights. It is particularly important to deal effectively with trafficking in devices and technologies aimed at circumventing TPMs, and with the provision of circumvention services, and to define violations without imposing onerous requirements to prove the intent of the alleged violator. Legislation should also provide a reasonable regime of civil and criminal remedies, both for acts of circumvention and for trafficking in circumvention technologies or offering circumvention services, while also recognizing some reasonable exceptions to the prohibitions.

Bill C-11 is a major step in the right direction and largely meets these criteria. The main concerns in this area involve the scope of some exceptions, and the provision (proposed section 41.21) authorizing recognition of additional exceptions by regulation. Such an authorization is prudent to allow the law to adapt to unforeseeable technological and market changes, but the Bill C-11 provisions may cross the line from commendable flexibility to debilitating unpredictability. In particular, we urge that regulations be limited to exempting a class of technological measures from protection against the act of circumvention, not against trafficking in devices, technologies or services; the latter, more sweeping exceptions, with greater potential to harm the marketplace, should require new legislation. Second, the authority to recognize further exceptions to the prohibition on the act of circumvention should not extend to requiring copyright owners to provide access to works for beneficiaries of the new exceptions. Third, any additional exceptions recognized should be time-limited, not permanent, so that there will be a reconsideration of whether the conditions that gave rise to the need for a regulatory exception still exist three or four years later.

Making Available Right: Bill C-11 falls short in providing an exclusive making available right for sound recording producers, as required by Article 14 of WPPT. Proposed section 18.(1.1)(a) appears to do so (dubbing it a "sole right," like other exclusive rights in the law). However, proposed section 67.1(4)(b) seems to prohibit any lawsuit for infringement of this exclusive right (without Ministerial consent) until a tariff has been filed with the Copyright Board covering the work in question. Such a precondition of prior approval by a government ministry might be

²Legislative action on Bill C-32 was underway at the time Parliament was dissolved for national elections that were held in April 2011.

suitable for claims of equitable remuneration, but is entirely inapt in the case of an exclusive right. This provision must be changed if Canada is to achieve the government's stated intention of using Bill C-11 to fully comply with the WCT and WPPT.

Online Piracy: It is a matter of high priority that copyright reform legislation in Canada effectively address the pervasive problem of Internet piracy. Bill C-11 does include one potentially useful – but seriously flawed – new legal tool in this arena. Otherwise, it largely follows the unsatisfactory path laid down by the three previous copyright reform proposals.

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

- It should incorporate a standard more in line with global norms by covering not just services that are “designed primarily” to enable infringement, but also those that evidence shows are “operated with the object of enabling or inducing infringement.”
- None of the four “service provider” exceptions should bar claims under this provision. As currently drafted, the hosting and caching exceptions (proposed sections 31.1(3) and (5)) could be read to apply enablement claims. This would shield massive commercial enablers from all liability for inducing infringement, depending on their choice of technology for doing so.³
- Those liable under the new provision should be subject to statutory damages. Proposed section 38.1(6)(d) inexplicably immunizes such enablers from Canada's statutory damages regime. Enablers, including those like Canada's IsoHunt that profit from massive commercial scale infringers, should not be immune from this effective deterrent remedy.

Bill C-11, like its predecessors, continues to take a blanket immunity approach (rather than a remedial limitation) for a number of network services activities. This casts serious doubt on whether right holders could ever obtain an injunction to prevent infringements carried out using a service provider's systems, e.g., an order removing an infringing file that is being hosted by a service provider. Additionally, contrary to international best practices, there are no threshold requirements to qualify for these immunities. Even a provider who took no steps with regard to known repeat infringers would be eligible for full immunity.

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

Most other developed countries have put in place a procedure for “notice and takedown” to deal more efficiently with the problem of pirate material being hosted by ISPs. A 2004 decision of Canada's Supreme Court

³Making the hosting exception inapplicable to enablement claims is particularly critical, since sites that host and stream or permit downloading of illegitimate content are a significant and growing source of illicit distribution of content online.

observed that enacting such a procedure would be an “effective remedy” for the problem.⁴ But the current Canadian Government, like its predecessors, remains steadfastly opposed to the procedure. Bill C-11 continues this unfortunate trend, and provides no alternative expeditious means of removing or disabling access to infringing content hosted online.

Instead, the bill confines itself to the same flawed “notice and notice” regime proposed by the Canadian Government years ago. Requiring ISPs to forward notices from copyright owners to infringing end-users, and to preserve identifying information on those end-users for six months, may have value, particularly in the peer-to-peer (P2P) environment. Yet this value is limited if notice after notice is sent with no prospect of real consequences for the infringing end-user.⁵ The value of the proposed “notice and notice” regime is further compromised by the lack of any requirement that ISPs keep track of notices, so that repeat infringers are not repeatedly sent the same notice which they have ignored previously. To treat the first-time violator identically with the serial offender virtually guarantees that the notices will have no deterrent effect.

A properly designed and implemented “notice and notice” system is a complement to, not a substitute for, notice and takedown. Particularly if coupled with an obligation to implement policies for identifying and addressing repeat infringers, combining these approaches could be a useful part of a system that gives ISPs strong incentives to effectively address the dissemination of infringing materials.⁶

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

In sum, Bill C-11 not only fails to address online piracy effectively; it could in fact exacerbate it. The bill provides some of the most sweeping immunities in the world to network service providers without creating any standards that would provide meaningful incentives for them to cooperate with copyright owners to deal with copyright infringements that take place in the digital network environment. By immunizing service providers against liability, even when they have actual knowledge of infringement and the power to restrict or prevent it, the bill provides safe harbors to far more than just innocent intermediaries. Such an approach seems inconsistent with the stated intentions of the legislation’s drafters, and can hardly be said to comply with the mandate of the WIPO Internet Treaties that national law “permit effective action against any act of infringement of rights covered by this Treaty.”⁷

Statutory Damages: One of the most progressive features of current Canadian copyright law is Section 38.1, providing copyright owners who have been victimized by infringement with the option to choose statutory damages, to be set by the court within a range provided by the statute per work infringed. Bill C-11 takes some significant steps backwards. First, as noted above, it inexplicably makes statutory damages unavailable in actions against the most culpable violators: massive, commercial scale operations directed at enabling infringement. Second, it limits statutory damages to a range of C\$100 - C\$5,000 for all infringements carried out by any defendant for “non-commercial purposes.” Even this meager award is available only to the first copyright owner to seek a statutory damage award against a given defendant. All other right holders would be barred from seeking statutory damages. Indeed, statutory damages would be entirely eliminated for all other infringements carried out by that defendant prior

⁴Society 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>.

⁵This is precisely why the voluntary “notice and notice system” in which some Canadian ISPs participate has had no appreciable impact on online infringements.

⁶There are also a number of unanswered questions about the “notice and notice” provisions of proposed section 41.25-26 in Bill C-11, such as how the statutory damages of C\$5,000-C\$10,000 (which would be the exclusive remedy against an ISP that fails to forward the notice or preserve the identifying data) is to be assessed in the typical p2p situation in which a right holder gives notice simultaneously about hundreds or thousands of infringements of multiple works. Of course, the most effective deterrent against non-compliance with “notice and notice” would be to reduce or eliminate protections against infringement liability for non-compliant ISPs.

⁷See WCT, Art. 14.2; WPPT, Art. 23.2.

to the date that the first copyright owner's lawsuit was filed. These sharp limitations can be invoked by institutional as well as individual defendants, and (unlike in some previous bills) they apply even to infringements not carried out for "private purposes." It seems likely that acts such as posting massive amounts of copyright material on a website or otherwise making it freely available for downloading would qualify for the statutory damages limitations, so long as such acts are "non-commercial," a term the bill does not define.

It is likely that these provisions would render the statutory damages option ineffective where it is compellingly needed: in the online environment, including in P2P cases against non-commercial but large scale infringers.⁸ For example, where a defendant operates a publicly accessible server to which he uploads a copy of a work – or of hundreds or thousands of works – it may be extremely difficult to calculate actual damages, since logs of how many people downloaded infringing copies as a result may be unobtainable or non-existent. Canada's existing statutory damages scheme fills this gap, and allows the courts at least to approximate the fully compensatory and deterrent damages award which Canada, as a WTO member, is obligated to make available. See TRIPS, Article 41. That gap will rapidly reopen if these infringing activities are treated as "non-commercial," thus replacing statutory damages with a de facto C\$100-C\$5,000 retrospective license for unlimited non-commercial infringement by anyone caught uploading any number of infringing copies.

Copyright exceptions: Much of Bill C-11 consists of nearly a score of new or expanded exceptions to copyright protection. Many of these raise significant questions. For example:

(1) Fair dealing (section 29): "Education" would be added to research and private study as uses that qualify for the fair dealing exception. Because "education" is not defined, this could be a dramatic change, with unpredictable impacts extending far beyond teaching in bona fide educational institutions, and weakening protections for a wide range of works. Under Canadian precedent, consideration of the impact on the market for a work is not the predominant factor in a fair-dealing analysis; and Canadian courts are required to give the terms in this section a "large and liberal interpretation".⁹ Book and journal publishers are particularly concerned about the impact on well-established collective licensing mechanisms for administering permissions to copy works for educational use. While a "market failure" concern may justify extension of fair dealing to parody and satire, such a concern is absent in the case of an "education" expansion of the exception.

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

(3) Private copying (proposed section 29.22): Any legitimate and legally-obtained (other than by borrowing or renting) copy of a work may be further copied if the reproduction is "used only for private purposes" – a phrase that remains undefined, and may not be limited to the private purposes of the copier. The exception is not limited to format-shifting; it applies to all works (including computer programs and cinematographic works on DVD, which were excluded from the exception in some earlier bills; it contains no numerical limitations on the number of copies or for

⁸Of course, as already noted, statutory damages would be denied altogether in claims against parties that knowingly enable online infringement, under Sec. 27(2.3).

⁹*CCH Canadian v. Law Society of Upper Canada*, 2004 SCC 13. See also *SOCAN v. Bell Canada et al.*, 2010 FCA 139 (Federal Court of Appeal holding that 30-second previews offered by commercial online music services qualify as copying for "research" for fair dealing purposes).

whom they can be made; and it is silent on whether the exception trumps a contractual prohibition on copying. The two main limitations – that the exception does not apply if a technological protection measure has been circumvented, and that all copies made under the exception must be destroyed if the user gives up possession of the source copy – are not sufficient to dispel concerns about this very broad exception, which needs substantial trimming.¹⁰

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

(5) Educational exceptions: Some of these expand on exceptions that are already in the Copyright Act, but others (proposed sections 30.01-04) are entirely new. For example, proposed section 30.04 would immunize nearly anything done “for educational or training purposes” by an educational institution or its agent with respect to “a work or other subject matter that is available through the Internet,” so long as the Internet site or the work is not protected by a TPM; but the exception would not apply if the user knows or should have known that the work was made available online without consent of the copyright owner. The provision still seems to allow infringement of a work obtained offline so long as the same work is available somewhere online without a TPM. This should be re-examined, taking into consideration both the scope of Canada’s existing fair dealing exceptions for research and private study, and applicable international standards. Other concerns about these proposed education exceptions include the practical enforceability of some of the conditions on their exercise, and in some cases their impact on well-functioning established collective management systems for licensing, which seemingly would be replaced by untested compulsory licenses.

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

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

¹⁰Bill C-11 fails to make the needed legislative amendment to Canada’s existing private copying exception for sound recordings (section 80), to clarify that it applies only to individuals who make copies for their own use from recordings they already own. Any broader application of the private copy exception would raise serious questions about Canadian compliance with its WTO TRIPS obligations.

measures to protect proprietary software from tampering, modification or reverse engineering. This proposal demands close scrutiny.

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

Legal Reforms Needed to Enforcement Regime: Along with reform of Canada’s substantive copyright law, legislative changes are necessary, though not alone sufficient, for Canada to begin to remedy its serious deficits in copyright enforcement (discussed in more detail in the next section). Among other critical changes, the Canadian Border Services Agency (CBSA) must be given the independent authority it currently lacks to act *ex officio* against any suspected pirate or counterfeit imports. Two parliamentary committees that issued reports in 2007 on the problems of counterfeiting and piracy called for this reform, along with other essential changes, including:¹¹

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

Adopting all these Parliamentary recommendations would repair long-standing defects in Canadian law, and help to provide the legal framework necessary for effectively addressing piracy.

COPYRIGHT PIRACY AND ENFORCEMENT

The Piracy Situation in Canada

The biggest void in Canada’s enforcement effort is online. Canada has gained a regrettable but well-deserved reputation as a safe haven for Internet pirates. No other developed country is farther behind the curve in combating copyright infringement on digital networks. No Canadian enforcement authority currently has adequate resources, training and legal tools to tackle the problem effectively. Meanwhile, most copyright industry sectors report serious offline piracy problems as well.

Audio-visual: A 2010 joint study conducted by IPSOS and Oxford Economics for the Motion Picture Association documents the harm inflicted by movie piracy on the Canadian economy. The report estimates more than C\$1.8 billion and 12,600 full-time equivalent jobs were lost across the entire Canadian economy in 2009-10 as a result of movie piracy. It also estimated direct consumer spending losses to the movie industry, i.e. cinema owners, distributors, producers and retailers, at C\$895 million (US\$898 million); tax losses to government at C\$294 million; (US\$295 million) and a loss of GDP of C\$965 million (US\$968 million) across the Canadian economy.¹²

An increasing share of this damage is inflicted online. Canada is home to some of the world’s most popular Internet sites dedicated to piracy. Because Canada is viewed as a country in which laws to address digital piracy are

¹¹See reports from the Standing Committee on Public Safety and National Security, <http://cmte.parl.gc.ca/Content/HOC/committee/391/secu/reports/rp2985081/securep10/securep10-e.pdf>, and from the Standing Committee on Industry, Science and Technology, see <http://cmte.parl.gc.ca/cmte/CommitteePublication.aspx?COM=10476&Lang=1&SourceId=213200>.

¹²Canadian Motion Picture Distributors Association/Canadian Association of Film Distributors and Exporters News Release “Ipsos/Oxford Economic Study Reveals \$1.8 billion in Losses Across the Canadian Economy due to Movie Piracy”, February 17,2011, http://www.mpa-canada/CMPDA-CAFDE_news-release_ottawa-ON_February-17-2011_EN.pdf

weak, ineffective or non-existent, many sites dedicated to piracy claim that their services are legal there. Although the locus of pirate sites tends to shift across borders to avoid enforcement efforts, Canada has consistently been home to the operators or hosts of some of the world's top pirate BitTorrent sites. While the specific rankings and traffic figures fluctuate over time, there is no doubt that Canada has become a magnet for sites whose well-understood *raison d'être* is to facilitate and enable massive unauthorized downloading of pirated versions of feature films, TV shows, and other copyright materials.

As an example, IsoHunt, which boasts that it is "one of the 200 largest websites on the Internet," has operated with impunity from Canada for more than 8 years.¹³ A U.S. court issued a permanent injunction against IsoHunt after finding that over 90% of the downloads made using IsoHunt's services related to infringing content and that the defendants were liable for inducing infringement.¹⁴ Yet its Canadian operator continues to openly run the site and has commenced an action in Canada seeking a declaration that its operations do not violate Canadian law. IsoHunt is ranked as the fourth most popular infringing BitTorrent site in the world, with another Canadian-hosted site, kat.ph, ranking third.¹⁵ Both Isohunt and Kat.ph (formerly KickAssTorrents) were cited by USTR in its Notorious Markets list released in December 2011, along with a third BitTorrent Indexing site with Canadian connections, torrentz.eu, which is an aggregator of dozens of leading BitTorrent sites.¹⁶ The scope of these mega-sites is staggering: IsoHunt receives over 1.2 million visitors per month (according to Compete.com), and claims to handle 142 queries from users every second, or over 12 million per day.¹⁷ The sites directly impact the U.S. market; for instance, in October 2011, IsoHunt attracted 180,000 unique users from the United States. But smaller pirate sites also use Canada as a base for disrupting other global markets for audio-visual product; for instance, a number of French language torrent and peer-to-peer services are operated from the province of Québec.

Online piracy of audio-visual material in Canada damages independent producers as well as the major studios. Internet piracy prevents the establishment of legitimate online distribution platforms and services for consumers, which independents can use to finance future productions. The Independent Film and Television Alliance (IFTA) reports that online piracy in Canada remains a significant export constraint for independent producers and distributors, the majority of which are small to medium sized businesses. It has also begun to impact financing and distribution of independent content. Authorized distributors find it almost impossible to compete with the Internet pirates, and so are increasingly unable to commit to distribution agreements. The drastically lower license fees that distributors can offer in this environment are inadequate to assist in financing of independent productions. Minimum guarantees for license fees for all licensed uses of content – including DVD, television, and online rights – are being undermined by piracy. In a marketplace dominated by illegal content, often offered free to the consumer, legitimate Canadian distributors that pay taxes and employ workers find it increasingly difficult to develop viable legal offerings, and are being pushed out.

In the offline world, the Motion Picture Association of America (MPAA) reports that through greater engagement of police forces in the Greater Toronto area (GTA), notably the Toronto Police Services, York Police Department, and RCMP, the level of illegal distribution and sale of counterfeit DVDs in GTA malls has decreased. The hard goods piracy problem for the motion picture industry is now concentrated in the nearby Peel Region, where distribution and sales of pirate product are highly organized on a large scale, especially in flea markets. More than 30 vendors openly display counterfeit DVDs at various flea markets in this region. The problem is likely to persist until other regional police forces become more engaged in the fight against piracy. Enforcement efforts continued in Peel Region in 2011, with over 1 million counterfeit DVDs surrendered to industry investigators.

¹³"Celebrate! 8 Years of IsoHunt Torrent Search," at <http://isohunt.com/forum/viewtopic.php?t=693393&start=0&postdays=0&postorder=asc&highlight=&sid=>, (visited 1/28/11).

¹⁴Columbia Pictures Industries, Inc. v. Fung, CV 06-5578 SVW (JCx), 2009 U.S. Dist. LEXIS 122661, at * 39-53 (C.D. Cal. Dec. 21, 2009). The U.S. court concluded with respect to IsoHunt and related sites that "evidence of intent to induce infringement is overwhelming and beyond dispute;" that the sites "engaged in direct solicitation of infringing activity" and that their "business model depends on massive infringing use."

¹⁵"Top 10 Most Popular Torrent Sites of 2012," <http://torrentfreak.com/top-10-most-popular-torrent-sites-of-2012-120107/> (visited 1/28/11)

¹⁶See http://www.ustr.gov/webfm_send/3215.

¹⁷"Celebrate! 8 Years of IsoHunt Torrent Search," at <http://isohunt.com/forum/viewtopic.php?t=693393&start=0&postdays=0&postorder=asc&highlight=&sid=>, (visited 1/28/11).

Entertainment software: In 2011, the Entertainment Software Association's (ESA) investigations uncovered a number of instances of retail piracy in Québec, British Columbia, and Ontario involving sales of pirated software to local consumers. Pirates openly advertised these operations on the Internet through their own websites and/or online classifieds, such as Kijiji and Craigslist, and via social networking sites. Some of these pirates also operated stores, often found in malls, including the notorious Pacific Mall, and some of these with multiple locations. Popular pirated materials sold by these operations included burned optical discs and memory sticks containing hundreds of illegal copies of videogames for numerous gaming platforms including the Wii, PlayStation 2, Xbox 360, DS, PSP, as well as personal computers and modified consoles containing hard drives pre-installed with sometimes hundreds of pirated copies of games; and circumvention or modification devices (including installation services).

The widespread availability of circumvention devices in Canada, which are not clearly prohibited under Canadian law, also serves to aggravate the piracy problem. As noted earlier, circumvention devices, such as mod chips and game copiers, enable the playback of pirated games by bypassing the TPMs in game consoles. Computer software that effects a "soft modification" of the security technology of game consoles, and thereby facilitates the play of pirated games, is widely available on sites hosted in Canada and are used by Canadian circumvention services. As ESA's investigations have revealed, most vendors of pirated games also offer circumvention services or devices for sale, and an increasing number of vendors are engaging only in sales of circumvention technologies and services, thereby allowing them to induce and/or facilitate game piracy without fear of prosecution. The lack of TPM protections in Canada also enables vendors to import circumvention devices from overseas manufacturers by the thousands and then export them to buyers in the United States and other countries where such devices are illegal. Because these pirates recognize no borders, Canada functions as a safe haven from which they can redistribute circumvention devices around the world. Some of the sites through which circumvention devices are sold to U.S. consumers relocated their hosting from the U.S. to Canada to continue operations. Efforts by RCMP and Canadian prosecutors to clamp down on this activity as violations of computer intrusion laws have been thwarted by courts in Québec, further underscoring the lack of effective remedies.

Canada's lack of TPM provisions also exacerbates the rate of online piracy, because without the aid of circumvention devices, users would be unable to play console games that were unlawfully downloaded. Indeed, two of the world's leading Internet sites dedicated to the sale of circumvention devices for all current consoles are based in Canada, although they market aggressively to U.S. customers and price products in U.S. dollars. Both these sites – modchip.ca and consolesource.com – appear on the USTR list of notorious online markets released in December 2011.¹⁸ At least one of the world's top sites dedicated to aggregating links to pirate entertainment software – fullreleases.net – is also Canadian-based. These sites' practices are vigorously and publicly defended by the Canadian Coalition for Electronic Rights, an advocacy group that represents circumvention businesses and which continues to actively lobby to defeat Bill C-11.

Business software: Unlicensed use of software by business end users accounts for the largest part of piracy losses in the business software sector. However, active enforcement efforts are having a positive impact on the end-user piracy problem, though it remains serious, particularly in the province of Québec. Online piracy of business software is also a serious problem.¹⁹

Music and Sound Recordings: Internet music piracy remains prevalent in Canada, aided by weak and outdated copyright laws. This uncertain legal environment contributes to the formidable propensity of Canadians to

¹⁸See http://www.ustr.gov/webfm_send/3215.

¹⁹BSA's 2011 software piracy statistics will not be available until after the filing deadline for this submission, but will be released in May 2012, at which time piracy rates and U.S. software publishers' share of commercial value of pirated software will be available at www.iipa.com. In 2010, the software piracy rate in Canada was 28%, representing a commercial value of unlicensed software attributable to U.S. vendors of US\$693 million. These statistics follow the methodology compiled in the Eighth Annual BSA and IDC Global Software Piracy Study (May 2011), <http://portal.bsa.org/globalpiracy2010/index.html>. These figures cover packaged PC software, including operating systems, business applications, and consumer applications such as PC gaming, personal finance, and reference software – including freeware and open source software. They do not cover software that runs on servers or mainframes, or routine device drivers and free downloadable utilities such as screen savers. The methodology used to calculate this and other piracy numbers are described in IIPA's 2012 Special 301 submission at <http://www.iipa.com/pdf/2012spec301methodology.pdf>.

patronize illegal online sources of copyright material, thus stunting the availability and growth of legal alternatives. For example, according to Nielsen SoundScan Canada, the digital share of total album sales in Canada was 19.1% in 2010, compared with 26.5% in the US.

Overwhelmed by competition from “free” music on the Internet, retail sales of music in Canada have dropped by more than half since 1999, including a 13.5% total decrease in 2010. There is no indication that Canada’s piracy problem has abated.

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

The Canadian Response

These realities point to serious deficiencies in enforcement against piracy. Much of the problem is attributable to Canada’s inability to advance copyright law reform. For example, only when Canada’s copyright law is modernized to include clear criminal prohibitions against trade in circumvention devices will Canadian law enforcement even have the legal authority to enforce against mod chip manufacturers, distributors and exporters. Until then, rather than attacking the problem at its source, the burden of combating this activity is unfairly shifted to law enforcement in the countries to whose markets these devices are being exported, and whose governments (unlike Canada’s) have already stepped up to the problem by adopting laws to implement the WIPO Internet Treaties.

Canadian government inaction has effectively handcuffed its law enforcement agencies at the border, a key anti-piracy battlefield. Canadian customs officers in the CBSA lack statutory authority to seize even obviously counterfeit products as they enter Canada. Unless a court order has been previously obtained,²⁰ 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.²¹

As discussed above, similar legal deficiencies hamper attempts by copyright owners or law enforcement to combat piracy on the Internet. Though the online piracy problem is pervasive and growing, Canadian law lacks the fundamental legal tools for addressing it. Until Canada adopts a modernized legal regime that includes such tools, prospects for progress against online piracy will remain dim.

However, not all enforcement problems in Canada can be traced to deficiencies in the law. Even when pirate activity is clearly illegal, Canada’s response too often falls short. Both CBSA and RCMP lack dedicated resources – including manpower and data and intelligence management – to address Canada’s growing piracy problems. Nor is there progress to report on interagency cooperation. The existing arrangement under which CBSA can refer cases to the RCMP through designated RCMP liaison officers is unwieldy and impractical.²²

²⁰Court 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.

²¹Both parliamentary committees that studied this topic in 2007 called explicitly for such amendments to be enacted.

²²The 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.

Nevertheless, there are some encouraging signs, notably the increased and largely effective law enforcement engagement against sales of pirate DVDs in the GTA malls, as well as improved law enforcement activity against game piracy in 2011 in Toronto and Québec. This commendable engagement should be sustained and expanded to other law enforcement agencies. Police agencies have responded well to anti-piracy training programs offered by industry, but too often lack the resources to properly investigate IP crimes or to prepare the cases for prosecution. On the whole though, the Canadian law enforcement commitment to act against copyright piracy, especially on the retail level, remains under-resourced.²³ ESA reports that in most of the country, police action generally depends on one or two interested law enforcement officials, motivated by an ESA training event they attended or a working relationship with one of ESA's outside investigators.

The continued prevalence of pirate product in Canada's retail market reflects the Canadian Government's failure to provide RCMP with adequate enforcement resources, and shows that its record of cooperation with right holders to attack piracy, while improving, remains spotty. Although the RCMP has now listed intellectual property crimes among its top-stated priorities, its actions in the past have not always reflected adherence to this commitment. The RCMP Enforcement Policy, which reflects a reluctance to target "retail" piracy, does not account for the reality that as technology constantly advances, "retailers" now use ordinary computer equipment to become mass manufacturers, producing literally hundreds of thousands of pirated DVDs, CDs, software and video games. Moreover, there is a demonstrated link between those who sell, manufacture and distribute counterfeit products and organized criminal operations. When government authorities refuse to pursue criminal investigations or initiate prosecutions against retail pirates, copyright owners are left with only civil remedies to pursue, and pirates are not deterred.

The same problems extend to prosecutors and courts in Canada. Few resources are dedicated to prosecutions of piracy cases, and prosecutors generally lack specialized training, and too often fail to advocate fervently for imposition of deterrent penalties. The result is that those few pirates who are criminally prosecuted generally escape any meaningful punishment.²⁴ This is true even for some recidivists involved with large commercial operations, for which a financial penalty is merely the cost of doing business. Almost all ESA cases in 2011 resulted in modest penalties with no jail time, for example.

Even the RCMP acknowledges that the penalties for engaging in copyright piracy in Canada – usually insignificant fines – remain simply insufficient to deter people from engaging in this highly profitable and relatively risk-free crime. As the RCMP told a parliamentary committee in 2007, "[t]he current criminal penalties imposed by courts pose little deterrence. It is not unusual to charge the same groups multiple times for IPR crimes, as they see the fines simply as the cost of doing business."²⁵ The weak penalties obtained also discourage prosecutors from bringing cases, and encourage recidivism. The 2010 regulations authorizing the confiscation of proceeds of copyright infringement as a remedy in criminal cases could help to interrupt this vicious cycle, but only if prosecutors invoke them and courts implement them vigorously.

The U.S. Government should press the Canadian Government to initiate and adequately fund a coordinated federal law enforcement effort against copyright piracy. This should include a nationwide program to crack down on the importation of pirate goods at all major Canadian points of entry. Raids and seizures against retail targets, as well as against the manufacturers of pirate products, must be stepped up. Since the availability of pirated products will not

²³The 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.

²⁴While calling for increased statutory penalties for piracy, and for new remedies such as forfeiture of the proceeds of piracy, the Industry, Science and Technology Committee of the House of Commons also opined that "the justice system should be imposing stiffer penalties for such offences within the limits of current legislation," and recommended that the government "immediately encourage prosecutors" to do so.

²⁵See Public Safety and National Security Committee report, at 12. RCMP has been saying this consistently in policy assessments going back at least 12 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.

be reduced without criminal prosecutions against infringers and the imposition of deterrent sentences, particularly jail time, Crown counsel should be encouraged to take on more copyright infringement cases, and should be provided with the training and other support needed to fully prosecute them. Canadian courts should be looked to for more consistent deterrent sentences, including jail time for piracy cases. Canadian authorities should be encouraged to accord a high priority – in practice, not just in rhetoric – to the serious piracy problems within their country, and to devote adequate resources to the investigation and prosecution of these cases.²⁶

While the shortcomings of Canada's legal regime hinder any efforts at criminal prosecution of the online piracy that is prominent in the market, the law also fails to provide adequate incentives for service providers to cooperate with right holders in dealing with online infringement. A voluntary code of conduct, to which a number of the major ISPs subscribe, calls for a "notice and notice" system, under which ISPs are supposed to pass along to their subscribers notices received from copyright owners regarding infringing activity. There is no indication that this voluntary system has had any material effect on the problem, no doubt because even repetitive notices to subscribers carry no consequences. Even though the ISP customer service agreements prohibit the use of their services for copyright infringement, and provide for suspension or termination of service for violations, these provisions have never been enforced, at least not publicly, which is the only way that they could have any widespread deterrent effect. ISPs do not even track how many notices are sent to any individual subscriber, and thus have disabled themselves from instituting any effective repeat infringer program. Not until there are stronger legal incentives for effective cooperation against online piracy is the situation likely to improve.

²⁶Numerous recommendations of the parliamentary committees echo these concerns.

CHILE

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

2012 SPECIAL 301 REPORT ON COPYRIGHT ENFORCEMENT AND PROTECTION

Special 301 Recommendation: IIPA recommends that Chile remain on the Special 301 Priority Watch List in 2012.

Executive Summary:¹ In late March 2011, Chilean President Piñera met with President Obama and promised to make “significant progress” in 2011 toward full implementation of the U.S.-Chile FTA. Unfortunately, major elements of FTA compliance remain outstanding, with detrimental effects to the fight against widespread physical and digital piracy in Chile. Changes that the Government of Chile made to the Chilean Copyright Law in 2010, while welcome, have proven to have had little effect on high piracy levels and inadequate enforcement in Chile in the past year. While these amendments demonstrate the government’s desire to encourage industry cooperation against online piracy, they largely fail to meet the standards required for proper implementation of Chile’s FTA copyright protection and enforcement obligations, nor do they address Chile’s FTA obligations on Technological Protection Measures (TPMs), now both several years past due. Hard goods piracy remains at steady levels while Internet piracy continues to grow, a major obstacle for the development of a new digital economy. Industry cooperation with Chilean copyright enforcement authorities generally is good; however, additional resources are still needed to address the low number of street actions, and increased attention on the part of the judiciary is needed to follow through on the positive efforts of the Carabineros and Civil Police. At the end of the day, few copyright prosecutions are undertaken and even fewer result in deterrent sentencing, due largely to inadequate minimum penalties in the law.

PRIORITY RECOMMENDED ACTIONS FOR CHILE IN 2012

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

¹For more details on Chile’s Special 301 history, see IIPA’s “History” appendix to this filing at <http://www.iipa.com/pdf/2012SPEC301HISTORICALCHART.pdf>, as well as the previous years’ reports, at <http://www.iipa.com/countryreports.html>. For a summary of IIPA’s 2012 global issues, see our cover letter at <http://www.iipa.com/pdf/2012SPEC301COVERLETTER.pdf>.



COPYRIGHT PIRACY IN CHILE

The copyright industries report no decline in Chile's widespread "street piracy," and illegal downloading continues to be pervasive and largely unchecked. Although the country is emerging as a sophisticated digital market (broadband is now available to 54.8 percent of the population, according to www.internetworldstats.com), without effective anti-piracy mechanisms to keep pace with the increase in Internet users and available bandwidth, legitimate online distributors of copyrighted materials face enormous challenges. Internet piracy occurs most significantly via peer-to-peer (P2P) file sharing of infringing content, but also occurs through hosted sites, illegal use of cyberlockers, hyperlinks to infringing materials and, increasingly, illegal mobile and smart phone downloads.

Optical disc piracy, street piracy and border issues: As most of the pirate music consumers in Chile have migrated to the Internet, today street vendors ("*ambulantes*") primarily sell DVDs containing movies and music videos. The recording industry, however, reports that optical discs still face a 50% piracy rate of the total market in Chile. Vendors cover their pirate wares with big towels printed with the cover image of movies, games, music, or software. A buyer asks for the product, the seller makes a phone call, and in a few minutes a runner appears with the pirated product. Police actions against the street vendors are frequent but produce only transitory changes in the street piracy situation. In recent years, the film, music and business software industries have reported that "in-house piracy" in Chile is driven by street purchasers who seek illegal copies of films, games, and software from individuals with access to copying equipment at work. These in-house vendors use catalogues distributed by email or on paper, receive the requests, fulfill orders and then receive payment from a distributor. Finally, Chile is a major port of entry for blank optical disc media coming from Asia. The illegal importation and smuggling of pirate goods from Peru seriously affects the northern cities of Arica, Iquique, and Antofagasta. Some products are imported through the Port of Iquique, falsely identified, and re-exported to other countries.

Business software piracy: The Business Software Alliance (BSA) reports that both the public and private sector in Chile have a better understanding in 2011 of the risks involved in pirated software and the importance of IP to the economy, but the increasing ease with which consumers can access digital pirated software counters any progress with public awareness. As a result, overall, business software piracy neither rose nor fell in Chile during 2011. End-user piracy (the unauthorized use and copying of software by businesses and other enterprises) remains a problem and currently causes the greatest damage to the business software market in Chile. Other significant forms of software theft include unauthorized pre-installation of software by hardware retailers, in-house and external IT advisors who often load unauthorized copies of software onto computers or networks, and Internet piracy. The PC software piracy rate in Chile remained steady in 2010 at 64%.² This translates to a commercial value for pirated U.S. vendor software of \$173 million.

End-user piracy of business software occurs in a variety of professional business, including media, architecture, design, engineering, and publicity, to name a few. Perhaps of most immediate concern is the piracy that occurs within public agencies, which are in a position to set a national example. Adopting appropriate provisions to regulate the acquisition and management of software by the government is a critical solution, and one required by the FTA. Internet piracy of business software is also a major concern in Chile, making the need for deterrent measures against online infringement an immediate one.

²BSA's 2011 software piracy statistics will not be available until after the filing deadline for this submission, but will be released in May 2012, at which time piracy rates and U.S. software publishers' share of commercial value of pirated software will be available at www.iipa.com. In 2010, the software piracy rate in Chile was 62%, representing a commercial value of unlicensed software attributable to U.S. vendors of US\$192 million. These statistics follow the methodology compiled in the Eighth Annual BSA and IDC Global Software Piracy Study (May 2011), <http://portal.bsa.org/globalpiracy2010/index.html>. These figures cover packaged PC software, including operating systems, business applications, and consumer applications such as PC gaming, personal finance, and reference software – including freeware and open source software. They do not cover software that runs on servers or mainframes, or routine device drivers and free downloadable utilities such as screen savers. The methodology used to calculate this and other piracy numbers are described in IIPA's 2012 Special 301 submission at <http://www.iipa.com/pdf/2012spec301methodology.pdf>.

Piracy of music and sound recordings: The recording industry, led by its national group (IFPI Chile), reports that the level of piracy of optical discs remains stable at 50% of the market, while online music piracy is growing. Physical piracy, primarily in the form of pirate CD-Rs and DVD-Rs, is highest in the cities of Santiago, Concepción, Iquique, and Valparaiso. Internet piracy is growing quickly, now exceeding the hard goods problem significantly, as legitimate sales of physical product decline. The growing market for digital music is nearly out of reach for the recording industry. Internet piracy is estimated at 90% of all music consumption in the country. The majority of legitimate music sales over the Internet are downloaded to smart phones. IFPI Chile reports that the recording market for physical copies in Chile suffered a decrease of 1% in 2010. In turn, digital sales increased by 18% mainly due to “mobile” music consumption. Digital sales to computers continue to be heavily affected by piracy, especially via P2P exchanges and links posted on blog, social, and forum websites.

The most common form of Internet piracy is the exchange of illegal files through P2P networks (the most popular being ARES, eMule, eDonkey, Bit-Torrent, and the Pirate Bay) and links to cyberlockers containing infringing content posted on social sites such as Chilecomparte. Pirated copies on the Internet are readily available for download and are used as source materials to burn CDs/DVDs for distribution in the streets. For 2011, Chile placed 18th in the world in the number of connections by peers participating in the unauthorized file sharing of select ESA member titles on public P2P networks, up from its 24th place ranking position in 2010.

Another growing problem stems from the cyberlinks posted on forums and social sites. A clear example of this is the site “Chilecomparte,” one of the most popular social communities on the Internet in Latin America, which allows registered users to post and exchange thousands of unauthorized copies of music files. The Prosecutor’s Office has issued an action plan to address the case, apparently addressing the lack of training on IPR Internet related cases. As of today, however, the Chilean authorities have taken no action to address the massive piracy taking place through Chilecomparte.

Camcorder piracy: In the past several years, the Motion Picture Association (MPA) has seen pirated videos enter the market originating from illegal filming in Chilean movie theaters. Known as camcorder piracy, this activity was the subject of trainings subsequently conducted for cinema employees on how to spot illegal camcording among moviegoers.

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

COPYRIGHT LAW ISSUES IN CHILE

A set of amendments to the copyright law went into effect in May 2010, addressing two areas of high importance to rights holders: ISP liability and deterrent criminal penalties. The ISP liability provisions, in particular, have been a source of much anticipation and, upon adoption, merited a strong sense of accomplishment within the Government of Chile despite falling short of meeting Chile’s FTA obligations in this area. Unfortunately, the government has become content to rest on its laurels for this advancement in voluntary cooperation among rights holders and ISPs, and now demonstrates no interest in revisiting an FTA-compliant notice and takedown system.

The ISP liability provisions of the new legislation provide, on one hand, a means by which rights holders may seek a court order for the removal of infringing material by an ISP (Article 85Q of the Copyright Act) or, on the other hand, a mechanism for a voluntary notice system by which ISPs are to forward notices of infringement to users

within five working days of their receipt (Article 85U). The judicial order takedown procedure in Article 85Q results in concrete results to remove infringing material, though it is the lengthier of the two processes. Meanwhile, the notice-forwarding requirement of Article 85U has the potential for quicker responses to known instances of infringement. However, under the latter procedure, failure to comply on the part of the ISP or failure to remove content on the part of the user results in no negative consequences. As a result, speedy compliance cannot be guaranteed.

While the new ISP liability provisions fall short of establishing an effective notice and takedown procedure as required by the U.S.-Chile FTA, they do take an important first step in developing voluntary notice systems between rights holders, ISPs, and users. Unfortunately, while maximum criminal penalties for repeat offenders were increased to deterrent levels, minimal levels are still available and continue to be favored by Chilean judges. The law establishes a number of exceptions and limitations to copyright that could undermine important copyright protections, and fails to resolve gaps in copyright protection and enforcement in areas including *ex parte* searches and statutory damages. Provisions for the protection of TPMs have not been adopted. Finally, government software legalization has not been adopted. Given each of these shortcomings, Chile is not in compliance with its FTA obligations.

The recording industry reports that in 2011 it initiated a campaign sending around 300 notices to the biggest ISP in the country (VTR). However, VTR failed to forward the notices to its subscribers arguing “technical difficulties and staff problems.” Further attempts from IFPI Chile to make VTR forward the notices also were unsuccessful. IFPI Chile then contacted other ISPs in the Santiago area (Telefonica, Claro and Entel) but no agreement has been reached with them to establish a uniform mechanism to comply with the legal mandate. Unfortunately, there is no specialized authority empowered in the Chilean Government to enforce Article 85U of the Intellectual Property Law, a fact that is not lost on ISPs. The government should authorize the Intellectual Property Rights Department (under the Direction of Museums and Libraries) or another authority within the government to follow up, advise, and ultimately enforce the obligations of ISPs under the law. Otherwise, rights holders will continue to suffer a growing level of Internet infringement without any practical chance of exercising their rights against the most damaging form of piracy in the country.

The U.S.-Chile FTA:³ Since the U.S.-Chile FTA went into force on January 1, 2004, Chile has failed to meet the bulk of its obligations that were due under a series of transition period deadlines, all of which have passed. Each of the following obligations remains outstanding:

- Adopt effective provisions on limitations of liability for ISPs and efficient notice and takedown measures (Article 17.11.23).
- Provide for a right of communication to the public and non-interactive digital transmissions (Article 17.6.5).
- Provide adequate protection to temporary copies (Articles 17.5.1 and 17.6.1).
- Provide for legal remedies for rights management information (Article 17.7.6).
- Provide for pre-established damages (statutory damages) in civil judicial proceedings (Article 17.11.9).
- Provide for civil remedies, including seizures, actual damages, court costs and fees, destruction of devices and products (Article 17.11.12).
- Provide for various border measures (Articles 17.11.17 through 17.11.21).
- Provide for the protection of technological protection measures (TPMs) and enforce anti-circumvention provisions against circumvention, including preparatory acts (Required by FTA Articles 17.7.5.a and c, as well as the WIPO Internet Treaties).

IIPA and its members strongly support the FTA and for many years have urged Chile to fully and promptly comply with its FTA and international obligations.⁴

³The U.S.-Chile Free Trade Agreement is posted on USTR's website at http://www.ustr.gov/Trade_Agreements/Bilateral/Chile_FTA/Final_Texts/Section_Index.html. For an earlier review by IIPA of the U.S.-Chile FTA IPR Chapter, see IIPA's Submission to the U.S. International Trade Commission on the U.S.-Chile Free Trade Agreement, May 8, 2003, available at http://www.iipa.com/rbi/2003_May8_ChileFTA_ITC.pdf.

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

- **ISP liability:** Chile's Copyright Law as amended creates a "notice plus notice" architecture for ISPs to engage with users regarding instances of infringement, but lacks the threat of any real consequences for typical online piracy and fails to impute liability upon an ISP that gains knowledge of infringement outside of a court order. Due to these shortcomings, the new procedure falls short of the Chile's FTA obligations. It also is inadequate to deal with piracy over P2P networks, a prevalent form of piracy in Chile. Specifically:
 - Chapter III on "Internet Service Providers Limited Liability Provisions" generally tracks the safe harbors in the FTA (articles 85-L to 85-Ñ). However, the new law requires that ISPs have "effective knowledge" before voluntarily removing infringing content – and under Article 85-Ñ such knowledge must be based on notification from a court of law rather than from a right holder. This structure severely limits the possibility of the voluntary cooperation between ISPs and rights holders that is needed for an effective response to online piracy.
 - Article 85-O requires ISPs to have a contractual policy to cancel the subscriptions of infringers, but only when those subscribers have been convicted twice for copyright infringement. Considering the infrequency of prosecutions in Chile, this condition will likely never be met in reality, and is unlikely to have any deterrent effect.
 - Article 85-U requires ISPs to inform subscribers of notifications from rights holders within five days of receipt, but the law fails to ensure compliance with this notification requirement through any incentives or penalties.
- **No civil *ex parte* remedy or statutory damages:** No provisions are included to strengthen the civil *ex parte* search remedy, nor are there any provisions establishing statutory damages.
- **Overbroad exceptions to protection:** The law as adopted contains certain exceptions that appear to be incompatible with the FTA. For example, provisions on reverse engineering are too broad: the exception is not restricted to achieve interoperability (which is the FTA standard). Exceptions involving libraries could allow libraries to reproduce entire works in digital form without any restrictions on further use, reproduction or distribution. Finally, all enumerated exceptions and limitations to Chile's copyright provisions must be consistent with the three-step test set forth in the FTA, ensuring that exceptions and limitations are not overbroad.⁵
- **Low minimum criminal sentences:** As adopted, the amendments achieve new maximum prison sentences and fines, which can reach US\$140,000 (2,000 *Unidades Tributarias Mensuales* (UTMs)) for repeat offenders. The law does not, however, increase the minimum sanctions for infringements. As a result, the copyright industry fears that most judges, who usually apply only the lower limits, will continue to apply these low levels of sanctions. Efforts in separate legislation (discussed below) may go part of the way

(...continued)

⁴Past IIPA Special 301 submissions have detailed the history of Chile's FTA implementation, and are available at <http://www.iipa.com/countryreports.htm#C>.

⁵Specifically, Article 17.7(3) of the U.S.-Chile FTA provides that "Each Party shall confine limitations or exceptions to rights to certain special cases which do not conflict with a normal exploitation of the work, performance, or phonogram, and do not unreasonably prejudice the legitimate interests of the right holder."

toward implementing more deterrent criminal sanctions for piracy. Sanctions should clearly apply in cases involving Internet piracy, especially involving those who upload protected copyrighted materials.

- No protection for Technological Protection Measures: Rights holders remain extremely disappointed that Chile continues to ignore its obligation under Article 17.5 of the FTA to provide adequate legal protection for TPMs used to control access or otherwise restrict unauthorized acts with respect to a protected work.

Trans-Pacific Partnership FTA: Chile is an initial TPP negotiating partner. IIPA views the TPP negotiations as an opportunity to make progress on Chile's outstanding IPR obligations under the U.S.-Chile FTA.

COPYRIGHT ENFORCEMENT IN CHILE

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

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

BSA continued to bring only civil actions in Chile last year, conducting raids in Santiago and 4 other regions, with plans to expand to a 5th region in 2012. Civil *ex parte* actions are a critical remedy for the business software industry. BSA reports that in 2011, Chilean judges continued to improve their response to civil complaints and accepted more BSA requests for *ex parte* raids, which is a commendable achievement. However, despite this progress, BSA is still struggling with a very difficult provision of Chilean law regarding *ex parte* proceedings in civil cases. When *ex parte* search requests are filed, they are registered in a public electronic register, where target companies may learn about a search request before the inspection takes place. This notice violates TRIPS Article 50, and it undercuts the effectiveness of the remedy. BSA continues to move forward on this issue and is hopeful that with the new copyright law, the judges (including the judicial police's IPR branch, BRIDEPI) are improving their understanding of IP issues and software piracy specifically.

Criminal anti-piracy enforcement: There are three overwhelming problems in getting effective criminal enforcement in Chile. First, the IPR Prosecutor's Office is not dedicating the time and resources to understand and build Internet piracy cases, while the National Prosecution Office lacks a special branch to investigate intellectual property cases. In general all enforcement authorities lack adequate training and expertise to investigate and prosecute Internet piracy cases. This is the biggest factor behind law enforcement's inability to achieve significant results. Despite all efforts developed by the private sector in organizing seminars and informative materials for enforcement officers, the government is not taking the issue seriously or assuming the duty of training its own personnel. Second, the National Police (Carabineros), the Prosecutor's Office and the Judicial Police suffer from a lack of sufficient human resources. The Carabineros, particularly the organized crime investigations department, continue to be a major support for anti-piracy actions in Chile. However, raids are limited to requests from rights holders. Finally, even with higher penalties available under the 2010 amendments, judges continue to impose the minimum available penalties, which are not deterrent. Under the new Chilean Criminal Procedure System, judges continue to follow the principle of *in dubio pro reo* ("when in doubt, for the accused"), typically preferring the lower of the range of penalties. Compounding the problem, the Criminal Procedures Code and the Penal Code treat copyright piracy as a misdemeanor, empowering prosecutors to enter into agreements with the accused to effectively

substitute community services and a probationary period for criminal penalties. The General Attorney's office needs to prioritize copyright cases and instruct prosecutors to file criminal charges in important infringement cases.

The recording industry has an active criminal anti-piracy campaign in Chile, but reports disappointing results in 2011. The recording industry's anti-piracy group (IFPI Chile) assisted the police last year and reports that hard goods raids continue to be focused in Santiago and Valparaiso. Most of these raids are requested by the industry rather than being initiated by the local authorities. Flea markets such as Bio-Bio in the outskirts of Santiago are still plagued with pirate product. The police are taking a small number of *ex officio* actions in cases of street piracy and some laboratories. Customs also works on its own but eventually requests a complaint from the right holders. The recording industry reports that 133 raids on physical piracy were carried out during 2011 (44 less than the previous year), and 317,661 pirate copies along with 217 CD/DVD burners were seized in the operations (1,793 less than the previous year). However, police operations rarely result in the arrest of responsible individuals and almost never in effective prosecutions. Thirteen individuals were convicted on music piracy cases. These figures reflect a combination of factors, including the weak attention of Chilean authorities to cases of piracy and the massive migration of music pirate activities to the Internet. Therefore, less and less burned music CD-Rs are found on streets, replaced by more and more DVD-Rs containing movies and games.

Internet piracy and cybercrime cases: Chile's Judicial Police created a specialized, dedicated force to investigate Internet crimes. The Cyber Crime Brigade has been active and helpful on many Internet anti-piracy actions, but obtaining follow-through by prosecutors remains difficult. During 2011, through the efforts of IFPI Chile, a total of 136,146 infringing cyberlocker links, 8,335 P2P links and 1,252 forum posts were removed. As with physical piracy, the industry hopes to continue fighting piracy through local teams. The Specialized Prosecutor's Office continues to show very little interest in prosecuting the social site Chilecomparte for its dedicated pirate music and video components, despite the fact that Chilecomparte is the biggest local online source for unauthorized distribution of pirate music.

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

ISP cooperation: With respect to online hosted infringing content, the recording industry reports that the voluntary notice procedures implemented in the recent copyright law amendments are working adequately to foster cooperation between rights holders and ISPs in cases where content is hosted on the ISP's server. IFPI Chile reports that ISPs are not cooperating in forwarding notices to their subscribers, as mandated by the new Intellectual Property Law. IFPI Chile is conducting consultations with major ISPs in the country and official authorities to explore a solution to the lack of action from ISP's. In the meantime, rampant Internet piracy goes unaddressed, especially among users of P2P networks.

Inadequate border enforcement: Chile's Iquique port is a transshipment point for blank media from Asia entering Colombia, Peru and Bolivia. The main problem that occurs is smuggling. In addition, the northern cities of Arica, Iquique and Antofagasta often serve as an entry point for blank optical disc media that is coming from Southeast Asia. To better track imports of blank media, the government should establish a customs policy whereby all blank CD shipments must pass through "red light" proceedings. This procedure would require that every shipment of optical media be inspected for price and classification accuracy as well as legitimacy of exporters and importers. To simplify such an operation, Chilean Customs may want to consider limiting the number of ports of entry for blank optical media, as in programs already implemented in Mexico and Paraguay. The creation of an importers' register would also improve disclosure; such a system should also involve rights holders. There was no progress at all on these issues last year, and the interested industry will be reevaluating its strategy on this issue in view of the new government in Chile.

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

Trainings: The copyright sectors stand ready to provide trainings to Chilean enforcement personnel. Specifically, BSA has thirteen years of experience conducting software anti-piracy actions in Chile and is prepared to work with the competent authorities there to combat copyright infringement. In 2011, BSA participated in a seminar with lawyers of the Tax Agency to demonstrate its activities; participated in rebuilding a web platform developed by the Ministry of Economy (www.innovacion.cl); and participated in the creation and support of an Internet platform developed by INAPI called "Protege Tu Idea" (www.inapi.cl/protegetuidea/), in coordination with Police, INAPI, Customs, and Judicial Police. BSA also continues to work before the courts of Santiago, Valparaiso, Viña del Mar, Rancagua, Temuco and Antofagasta (and this year will include Concepción) to educate regarding IP law and BSA's activities. The local music recording industry group, IFPI Chile, regularly participates in training seminars for Carabineros and the Civil Police, and in April 2012 will provide a seminar for judges in Santiago, in collaboration with the American Embassy.

CHINA (PRC)

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

2012 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: IIPA recommends that USTR maintain China on the Priority Watch List in 2012 and that China be monitored under Section 306 of the Trade Act.¹

Executive Summary: The development of the market for creative products in China continues to face significant challenges, notwithstanding some positive developments in 2011. High copyright piracy levels persist in China, from widespread online piracy of music, films, television programming, books and journals, and other copyright materials, to pervasive use of unlicensed software by businesses and pre-installation of unlicensed software and other copyright materials (hard disk loading piracy) at the distribution level, and continued physical piracy, including the online sale of hard goods pirated materials. The Chinese market remains mostly closed to U.S. copyright-based companies, as barriers to creative content remain in place, some of which violate China's WTO commitments. The current state of copyright protection in China not only harms U.S. companies, but has a detrimental impact on Chinese businesses.²

IIPA hopes that in 2012, the Chinese Government will demonstrate greater resolve to address piracy concerns and expeditiously lift restrictions and open the market in China for copyright materials to foreign right holders. Some positive signs emerged in 2011. The Special IPR Enforcement Campaign ("Special Campaign") which ended on June 30, 2011, resulted in closures of some websites responsible for piracy in China. While it has not yet had a demonstrable impact in terms of reducing the availability of pirate materials, the Campaign demonstrated the importance of a high-level political commitment from the Chinese Government in this regard. In November 2011, China's State Council announced a number of new measures aimed at strengthening IP protection, including the establishment of a permanent State Council-level leadership structure, headed by Vice Premier Wang Qishan,³ and an office within the Ministry of Commerce to lead and coordinate IPR enforcement across China. As part of these measures, the Chinese Government also agreed to implement mechanisms to hold local government officials responsible for effectively enforcing IP violations. Further, the 2011 Joint Commission on Commerce and Trade (JCCT) negotiations resulted in some important new commitments by China to: 1) ensure that government agencies at all levels use only legitimate software and that all types of software used by government agencies are licensed; 2) devote increased resources to conducting software license audits and inspections of government agencies and publish the results; 3) complete software legalization by provincial governments by mid-2012 and by municipal and county governments by 2013; 4) promote and conduct enterprise software management pilot projects and publish progress reports, and 5) eliminate by December 1, 2011 catalogues at the provincial, municipal and autonomous region level, or other measures linking innovation policies to government procurement preferences. In terms of cooperative activities, the Chinese Government agreed to "hold government/industry roundtables in China to discuss online copyright protection and enforcement, including library copyright protection," and agreed that an exchange will also be set up to deal with issues related to music "broadcast tariff rates" in China.⁴

IIPA applauds these important developments, but they cannot overshadow the disappointment over failure to address important concerns, including the lack of follow through on many of China's prior JCCT commitments, and

¹For more details on China's Special 301 history, see Additional Appendix available at <http://www.iipa.com/pdf/2012SPEC301HISTORICALSUMMARY.pdf>. Please also see previous years' reports at <http://www.iipa.com/countryreports.html>. Section 306 monitoring is with respect to, among other obligations, those set out in Ministry of Foreign Trade and Economic Cooperation Minister Wu Yi, *People's Republic of China Intellectual Property Rights Memorandum of Understanding—1995 Action Plan*, February 26, 1995.

²The Guangdong Chamber of Audio and Video Distributors ceased its operations in February 2011 because of rampant piracy problem and the lack of Chinese Government support.

³Specifically, China committed to make "permanent the leadership structure under the recent Special IPR Campaign."

⁴See *21st U.S.-China Joint Commission on Commerce and Trade Fact Sheet*, December 2011, at <http://www.commerce.gov/node/12467>.



the issue of Internet infringement liability, through “the early completion of a Judicial Interpretation that will make clear that those who facilitate online infringement will be equally liable for such infringement.” It is also necessary for the Government to sustain enforcement efforts against all kinds of piracy, including online and mobile piracy, through criminal and civil enforcement and the imposition of effective administrative remedies. Other important changes are needed, including: market opening measures in the area of theatrical distribution, by easing the “20 film” quota for revenue-sharing films and opening up theatrical film distribution and renegotiating the master contract; opening the market for the publishing, music, and entertainment software industries in China; and ceasing other discriminatory or market-restricting measures.

The current Copyright Law revision process provides an opportunity to make important improvements in China’s legal system, which will aid authorities and judges in meting out stronger civil and administrative measures and hopefully lead to a stronger criminal response to the massive copyright piracy problem in China.

PRIORITY ACTIONS REQUESTED IN 2012

Enforcement

- Expand on results obtained through the recent Special Campaign with the new State Council-level leadership structure, headed by Vice Premier Wang Qishan, including effective administrative, civil, and criminal enforcement against online and mobile piracy, end-user piracy of business software, and physical piracy.
- Ensure that China implements mechanisms, including transparent performance indicators, to hold local government officials responsible for effectively enforcing IP violations, including Internet and mobile piracy, and enterprise end-user piracy of business software.
- Increase the number and effectiveness of criminal prosecutions, including against online piracy and those services that facilitate piracy, such as *Sohu/Sogou* and *Xunlei*; bring criminal cases against enterprise end-user software piracy; allow specialized IPR judges to hear criminal cases; and move more criminal IPR cases to the intermediate courts.
- Ensure that the State Administration of Radio, Film, and Television (SARFT) is implementing watermarking in theatrical prints and ensure that China Film Group/ exhibitors step up efforts to deter illegal camcording.
- Follow through with JCCT commitment to resolve the longstanding complaint about those engaged in unauthorized copying and distribution of academic, scientific, technical and medical journals. In particular, the Ministry of Education should adopt regulations to ensure that all books and journals acquired by and used at universities (whether by professors, professional staff or students) and by the government are legitimate copies.
- Establish a central authority responsible for compiling statistics of ongoing and completed civil, administrative, or criminal enforcement actions taken against and cases involving copyright infringement.
- Increase actions by SARFT, the General Administration on Press and Publication (GAPP), MOC, and the Ministry of Industry and Information Technology (MIIT) to revoke business licenses and halt online services that deal in/provide access to infringing materials, and shut down websites that engage in such activities.
- Enhance “pre-release” administrative enforcement for motion pictures, sound recordings, and other works, e.g., by establishing voluntary government-backed online copyright bulletin boards.
- Combat piracy occurring on mobile networks, such as unauthorized WAP sites and Mobile “Apps” which facilitate users to carry out unauthorized downloading and streaming of infringing music to smart phones.
- Expand resources at National Copyright Administration of China (NCAC), local Copyright Administrations, and Law and Cultural Enforcement Administrations (LCEAs), commensurate with the scale of the piracy problem, for more effective enforcement actions against all forms of piracy.
- Allow foreign rights holder associations to increase staff and conduct anti-piracy investigations.
- Confirm shorter, more reasonable time limits for civil IP infringement trials, if necessary, through amendments to the Copyright Law or the promulgation of a new judicial interpretation.
- Impose uniform and deterrent penalties upon infringers in civil, administrative, and criminal enforcement actions.

Legislation and Related Matters

- Follow through on JCCT and bilateral commitments to complete a Judicial Interpretation (which is now reportedly in informal drafting stages) that will make clear that those who facilitate online infringement will be liable for such infringement.
- Amend the Copyright Law and subordinate legislation/regulations to ensure full compliance with the Berne Convention, the TRIPS Agreement, the WIPO Copyright Treaty (WCT), and the WIPO Performances and Phonograms Treaty (WPPT), consistent with the recommendations made in this filing.
- Ensure through legislative changes, as necessary, the criminalization of the unauthorized use of software by enterprises (end-user software piracy), hard disk loading of software or other copyright materials, Internet piracy including the communication to the public or the making available of any work or set of works, and the circumvention of technological protection measures (or trafficking in circumvention technologies or providing circumvention services). With respect to criminalization of enterprise end-user piracy of software, the January 2011 Criminal IPR Opinions (cited and discussed below) clarify that “for profit” includes “other situations to make profit by using third parties’ works,” and this idea should be carried forward and made much more explicit with respect to software in a new judicial interpretation, amendments to the Copyright Law, and/or amendments to the Criminal Law (for which a revision process has just started).
- Specify and lower the proof requirements for evidence preservation orders and injunctions in civil copyright infringement actions.
- Make it a violation of law to use, or attempt to use, an audiovisual recording device to make or transmit a copy of a cinematographic work or other audiovisual work, or any part thereof, from a performance of such work in an exhibition facility.
- Allow foreign right holders to commence “incidental civil claims” against those being prosecuted for copyright crimes at the local level courts.
- Lower the threshold for criminal enforcement actions to be taken against infringers, including Internet infringers, and including infringements undertaken for purposes other than commercial gain.

Market Access

- Implement the market access WTO case, in order to provide the publishing, audiovisual, music, and other industries with fair, meaningful, and equitable access to the Chinese markets for their goods and services.
- Relax the 20 film quota, grant rights to other companies to import and distribute motion pictures theatrically, and renegotiate the master contract.
- Cease discriminatory and highly suspect censorship for online distribution of music in China. Remove the exclusive licensee requirement for online music distribution.
- Remove existing prohibitions against participation by foreign enterprises in publishing activities.
- Ensure that no measure in China conditions market access on local ownership or development of a service or product’s intellectual property, or compels transfers of foreign intellectual property and R&D to China, including sales of information security software and cloud computing products.
- Refrain from introducing mandates or preferences favoring the acquisition of Chinese (over foreign) software.
- Ease the ban on the sale and importation of videogame consoles.

PIRACY AND ENFORCEMENT CHALLENGES AND UPDATES IN CHINA

Previous IIPA submissions, including those made to USTR in the Special 301 process, those related to China’s WTO compliance,⁵ those describing “notorious markets,”⁶ and those submitted in 2010 to the U.S.

⁵International Intellectual Property Alliance, *China’s WTO Compliance - Notification of Intent to Testify and Testimony Re: “Request for Comments and Notice of Public Hearing Concerning China’s Compliance With WTO Commitments”* (76 Fed. Reg. 50286, August 12, 2011), September 21, 2011, at http://www.iipa.com/pdf/2011_Sep21_IIPA_China_WTO_Compliance_Request_to_Testify_and_Testimony.pdf.

⁶International Intellectual Property Alliance, *IIPA Written Submission Re: 2011 Special 301 Out-of-Cycle Review of Notorious Markets: Request for Public Comments*, 76 Fed. Reg. 58854 (September 22, 2011), Docket No. USTR-2011-0012, October 26, 2011, at http://www.iipa.com/pdf/2011_Oct26_IIPA_Notorious_Markets_Submission.PDF.

International Trade Commission (ITC) on identification and quantification of IP infringement in China,⁷ have described in detail the many forms of copyright piracy and enforcement challenges faced by IIPA members in China. Notwithstanding some incremental gains in the past year, piracy of business software, music and recordings (including music services based on providing access to infringing materials), movies, books and journals, and entertainment software, in physical form and in the online environment, continues to dominate the marketplace, causing severe harm to the creative sectors and related industries in the United States. Such piracy activities greatly disadvantage companies that respect copyright, whether they are Chinese or foreign entities. For example, the recording industry estimates that physical music piracy rates are about 90%, and approaching 99% in the online environment—a situation that will hopefully change when *Baidu's* licensed music service becomes fully operational. The Business Software Alliance (BSA) annual Global Software Piracy Study indicates that the piracy rate for software deployed on PCs in China in 2010 was 78%, with the commercial value of this unlicensed software estimated to be a staggering \$7.8 billion.⁸ For the industries as a whole, a May 2011 ITC report found that copyright infringement was the largest category of reported IP infringement in China in 2009 and that overall IP infringement in China costs the U.S. economy as much as \$107 billion and 2.1 million jobs.⁹

The enforcement situation in China remains difficult, with an overall lack of deterrence due to various factors, including difficulty in obtaining effective and deterrent administrative enforcement, lack of transparency, and difficulty in obtaining deterrent criminal prosecutions. These deficiencies exist notwithstanding continued good relationships with China's law enforcement, highlighted by Chinese Government support during the 2010-2011 Special IPR Enforcement Campaign and a greater willingness to cooperate with foreign rights holders. The following highlights some key piracy and enforcement challenges and updates.

Internet and Mobile Piracy: The nature of Internet-based (and mobile) piracy continues to evolve in China with developments in technology and increasingly sophisticated Internet and mobile users. It is estimated that there were 513 million Internet users in China as of the end of 2011, or 38.3% of the entire Chinese population (according to the China Internet Network Information Center (CNNIC). Perhaps more astonishingly, according to the MIIT, total mobile phone subscribers exceeded 975 million by the end of November 2011.¹⁰ China now boasts 356 million Chinese who access the Internet through their mobile devices, roughly 69.3% of all Internet users, almost one-third of whom have high-speed 3G networks.¹¹ Broadband penetration continues to grow, with over 15.5 million broadband connections by the end of 2011. Thus, in addition to the online piracy threat, piracy is now taking place directly on mobile devices over wireless broadband networks (3G), and the pre-loading of infringing files on mobile devices is now a problem for copyright industries. According to CNNIC, in 2011, of all Internet users, 75.2 % used the Internet for "Web music," 63% used the Internet for "Web game," 63% used the Internet for "Web video," and 40% used the Internet for "Network literature."¹² CNNIC reported that by the end of 2011, "online music, online games and entertainment applications such as online literature slightly increased in the number of users, but usage has declined. In contrast, the number of network video users increased 14.6% over the previous year, reaching 325 million people, while the utilization rate increased to 63.4%."¹³

The harm caused by Internet piracy can perhaps be best understood in numbers by comparing the values of China's legitimate market for certain types of creative products with that of other countries. For example, the value of

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

⁸China's 78 percent software infringement rate means essentially that Chinese enterprises on average pay for about 1 out of 5 copies of software they use and then compete unfairly with U.S. businesses that pay on average for about 4 out of 5 copies of the software they use to run their businesses and improve productivity.

⁹Available at www.usitc.gov/publications/332/pub4226.pdf.

¹⁰Ministry of Industry and Information Technology of the People's Republic of China, *November 2011 Communications Industry Outlook*, December 21, 2011, at <http://www.miit.gov.cn/n11293472/n11293832/n11294132/n12858447/14293382.html>.

¹¹Michael Kan, *China's Internet Users Cross 500 Million*, PCWorld, January 16, 2012, at http://www.pcworld.com/article/248229/chinas_internet_users_cross_500_million.html.

¹²China Internet Network Information Center (CNNIC), *Statistics Report on the Development of Internet in China*, January 2012, at <http://www.cnnic.cn/research/bqxz/tjbg/201201/P020120118512855484817.pdf>, p. 28.

¹³CNNIC, *29th China Internet Development Statistics Report*, January 16, 2012, at http://www.cnnic.cn/dtygg/dtgg/201201/t20120116_23667.html.

total legitimate digital sales for music in 2010 in China was a mere US\$48.8 million, and total revenue (both physical and digital) was a mere US\$64.3 million. This compares to almost \$4.2 billion in the U.S., US\$178.4 million in South Korea and US\$68.9 million in Thailand — a country with less than 5% of China’s population and with a roughly equivalent per capita GDP. If Chinese sales were equivalent to Thailand’s on a per capita basis, present music sales would be almost US\$1.4 billion, and even that would represent under-performance and reflect significant losses to piracy. It is fair to say that China’s lack of enforcement against music piracy — particularly on the Internet, amounts to well more than US\$1 billion in subsidies to Chinese Internet companies who can provide their users with access to music without negotiating licenses therefor.

The following are some illustrative updates of piracy experienced by sector or type and some enforcement observations. Many of the sites noted below were also mentioned in IIPA’s filing in the USTR’s Special 301 Out-of-Cycle Review on Notorious Markets,¹⁴ by which the Special 301 Subcommittee requested examples of Internet and physical “notorious markets,” i.e., markets where “counterfeit or pirated products are prevalent to such a degree that the market exemplifies the problem of marketplaces that deal in infringing goods and help sustain global piracy and counterfeiting.”

Music Piracy: Online music piracy remains serious as unauthorized music files are still easily accessible via a variety of online music services including **music portal sites, video sites, P2P services, deep linking services, forums/blogs** and **one-click hosting sites** (sometimes referred to as cyberlockers).¹⁵ A wide range of newly released and/or pre-release content is posted at forums/blogs which then direct users to download or stream unauthorized music files saved in one-click hosting sites (cyberlockers). Functionality facilitating one-click sharing to a long list of “social networks” is also not uncommon in China. Micro-blogging sites like *Weibo* (China’s version of Twitter but having nearly 200 million users as of mid-2011, according to CNNIC) are being used for easy and simultaneous sharing of copyright content without authorization.

Deep linking services (like *Sohu/Sogou* and *Gougou*) collect links to infringing content and provide users the ability to engage in piracy through “deep linking,” by which users bypass the homepage of the site where the pirated illegal content resides and link to it directly. Further, *Xunlei* makes available unauthorized music files via a variety of online services including P2P file sharing clients, mobile applications, and a video streaming and download website. *Xunlei 7*, like the previous version *Xunlei 5*, adopts a file indexing technology that facilitates and actively encourages users to connect to peers and links from unauthorized sources for the purpose of downloading infringing music tracks. The search results pages are embedded in *Xunlei 7* and users are allowed to browse and download selected music files which can subsequently be shared/distributed by other *Xunlei* services such as *Xunlei Cyberlocker*, *Xunlei P2P* sharing and *Xunlei Kuai Chuan* (which cooperates with more than 100 social networks). For VIP members, music files can also be downloaded offline by using *Xunlei* offline download. Despite being sued by legitimate record companies, *Xunlei* has expanded its unauthorized online music services from its P2P file sharing client to its music video download and streaming website (*yinyue.xunlei.com*) and mobile applications like *Xunlei Kan Kan HD* (for iPad) and *Xunlei Cyberlocker HD* (for iPad). Court cases brought against *Sohu/Sogou* (an appeal in Beijing) and *Xunlei* (in Shenzhen) remain pending. Many other websites such as *1ting.com*, *xiami.com*, and one-click hosting sites such as *Dbank.com*, *Rayfile.com*, and *Namipan.com* have been implicated in music piracy activities in China. A wide range of recordings have also been found on web “forums,” such as *pt80.com* and *in-corner.com/bbs.5757qq.com*. These forums direct users to download or stream unauthorized sound recordings stored in Chinese hosting sites. An increasing number of pre-release albums have been shared by postings at forums which have registered users in the hundreds of thousands, decimating the market for those recordings. Although cease and desist notices have been sent to the administrators of the forums and cyberlockers identified, immediate takedowns of such “URLs” and/or postings are rare.

¹⁴See *supra* note 6.

¹⁵The software industry also reports the emergence of cloud pirate lockers, in which pirated software titles are stored by users using “cloud” services and making them available to others, thus harming legitimate software copyright holders.

Mobile piracy through music WAP (wireless application protocol) sites and mobile applications are quickly adding to the seriousness of online music piracy in China, since the number of users of such services has skyrocketed (recall over 350 million Chinese use the Internet on their phones, and well over 100 million have high-speed 3G connections).¹⁶ Mobile applications which provide music top charts, searches, streams, and downloads are common, but only a few of them are licensed. Some of the unauthorized mobile applications are search engines without any listings of music files, cyberlockers, file-sharing applications, or radio channels. The developers' anonymity adds to the difficulties in initiating effective anti-piracy actions. Sharing functions *via* email and social networking multiply the damage caused to the recording industry by unauthorized mobile applications. Examples of infringing WAP sites are *3g.cn* and *easou.com*.

Motion Picture/Television Piracy: China's overall piracy rate (especially Internet piracy) of motion pictures and television programs has seen improvement over the past year due to actions during the Special IPR Enforcement Campaign (October 2010 to June 2011).¹⁷ Nonetheless, Internet piracy (including streaming piracy and sales of hard goods online) remains the largest threat to the U.S. film and television industry in China. Given China's explosive growth of e-commerce, the **online sale of pirated hard goods** has become an increasing problem for the industry, comprising of websites and/or sellers targeting foreign buyers. On a positive note, largely through industry efforts and outreach, several high-profile e-commerce sites banned the sale of optical discs through their sites in 2011 and implemented anti-piracy best practices. **Streaming piracy** remains the most popular way for users to view/download illegal content on the Internet, even after the major government crackdown on sites hosting unauthorized copyrighted content.¹⁸ While major UGC and P2P sites have cleaned up most of their pirated content, P2P streaming applications (e.g., *Xunlei/Speed Thunder* and *QVOD*) have become very popular among Internet users to download illegal content. For example, *Xunlei.com/Kankan.com* (the two share the same URL and server) offers easily accessible links to piracy on its VIP service *via* a scheme called "offline download."¹⁹ Another popular application of streaming illegal content is through the *QVOD* software and P2P network (i.e., *kuaibo* streaming VOD system),²⁰ which makes it extremely difficult to track various sites' sources (some own foreign-based servers). In addition to motion pictures and television programming, other content (e.g., live sports telecasts) suffer from unlicensed programming retransmission, by which users or services on the Internet take protected telecasts and broadcasts and make them freely available, often simultaneously with the television broadcast.

Online Markets (Sale of Hard Goods Pirated Materials): The industries note a proliferation in China in 2011 of online marketplaces distributing and selling illicit copies of copyright material, or other products, such as circumvention tools to bypass technological protection measures used by right holders to protect their works. *TaoBao*, *Eachnet.com*, and others are examples of auction sites, business-to-business (B2B), and business-to-consumer (B2C) sites which allow infringers to operate anonymously and have been found to specialize in certain types of illegal merchandise (in addition to any legitimate offerings). Huge volumes of illegal CDs, DVDs and Blu-ray

¹⁶For example, the total value of recorded music sales and licensing in China in 2010 was US\$64.3million. Given the extremely high piracy rates, it is evident that significant losses accrue due to mobile piracy of copyright materials. Mobile broadband provides instant access to infringing copyrighted material, not only music, but also video, books, software and videogames. The recording industry notes that a wide range of unauthorized WAP sites and mobile applications, and other domestic mobile platforms offer infringing song files for streaming and download. Chinese-made mobile phones, e.g., Malata Group, now have built-in features linking the phone to infringing WAP sites such as *3g.cn*, *aitmp3.com*, *3Gwawa.net*, *wap.kxting.cn*, *wap.soso.com*, to allow mobile phone users to gain access to thousands of infringing song files hosted at remote servers.

¹⁷Legitimate online video websites have been adversely affected by the easy availability of pirated content.

¹⁸The Internet in China has been an environment where "anything goes" and huge numbers of foreign motion pictures and television programs have been made available illegally by commercial operators as well as amateurs. Streaming of entire bouquets of Pay TV channels is occurring. There are numerous instances of pirate streaming of U.S.-based channels, including HBO, ESPN, Discovery, CNN, the Disney Channel and Cartoon Network, onto the Internet in China. This programming is also available outside China, and China has become an international center for rebroadcast/retransmission piracy of motion picture and television content.

¹⁹*Xunlei.com* features a proprietary, high speed P2P file sharing system that distributes unauthorized copies of copyright content. The system incorporates the website's own desktop download manager. The format of these files is also uncommon and requires the *Xunlei.com* desktop video player for viewing. Users can also purchase VIP access which allows them to use *Xunlei.com* to automatically download files to *Xunlei.com* servers on their behalf. *Xunlei.com* is currently hosted in China by China Unicom.

²⁰*QVOD* is both an application and a P2P network. It can be used to share, download, and view files directly in the application itself. In addition, many rogue sites use the *QVOD* network to set up content streaming.

Discs are being sold on e-commerce sites such as *TaoBao*.²¹ There is also a significant amount of online book and journal piracy on *TaoBao*, but the industry reports that a number of publishers have been working with *TaoBao* to address the problem, and in December 2010, a ten-day campaign was launched by *TaoBao* to specifically target online book and journal piracy. The industry welcomes this cooperation and hopes this action will be sustained by *TaoBao* and can lead to *TaoBao* addressing piracy of other kinds of copyright materials such as films. In addition to *TaoBao*, sites such as *Alibaba.com*,²² *Aliexpress.com*, *GlobalSources.com*, *Made-in-China.com*, *DHgate.com*, and *Tradetang.com* remain among the top online marketplaces selling videogame circumvention devices, and *TaoBao*, *Alibaba.com*, *DHgate.com*, and *Eachnet* are also noted for B2B and B2C services providing infringing software.²³ These sites all pose enforcement challenges; while many have been receptive to taking down listings of infringing products, it is also important for them to “take down” sale advertisements, e.g., of pirate software, whether for download or for sale as a lookalike counterfeit (many of these advertisements can be found on *TaoBao* and *Alibaba*).

Online Journal Piracy: The existence of unlicensed online journal delivery services continues to plague scientific, technical and medical (STM) publishers. As the result of attention from the industry, some services have become more cautious, keeping a lower profile and shifting their profiles to ‘appear’ more legitimate, but the core issues remain the same. *KJ Med* is an example of a site (operating through a powerful state-run medical library giving it a further air of legitimacy) which provides and delivers unauthorized digital copies of millions of articles from leading academic, scientific, technical and medical journals on an illegal subscription basis to customers in libraries and hospitals throughout China, with neither the consent of, nor payment of subscription fees to, right holders. Despite the issue being a key agenda item in several years’ JCCT dialogues,²⁴ and despite some positive attention by both NCAC and the issuance in 2009 of the *Notice on Enhancing Library Protection of Copyright*,²⁵ the longstanding complaint against sites that provide unauthorized access to STM journal articles (in particular *KJ Med*) has not been resolved. In 2010, the Chinese government recognized the importance of resolving the *KJ Med* and at the November 2010 JCCT IPR Working Group meeting requested that the industry file its case anew with the NCAC. Publishers renewed their complaint against *KJ Med* before the NCAC in May 2011, and the case remains under further investigation. The industry hopes for a positive resolution in 2012 given the harm *KJ Med*’s service is causing STM publishers.

Videogame Piracy: The entertainment software industry continues to report steadily growing Internet piracy of videogames in China. P2P downloads of infringing video game files is fast becoming the predominant form of piracy along with websites that offer infringing videogame product that can be accessed from home PCs and from Internet cafés. In 2011, China placed third in the world in the number of connections by peers participating in the unauthorized file sharing of select Entertainment Software Association (ESA) member titles on public P2P networks.²⁶

Internet Cafés: While home/business Internet and mobile Internet usage has become the predominant way Chinese access content online, piracy in Internet cafés remains a concern, as such venues make available unauthorized videos and music for viewing, listening or copying by customers onto discs or mobile devices.

Updates on Internet Piracy Enforcement: IIPA was hopeful that high-level commitments in the 2010 JCCT (“to obtain the early completion of a Judicial Interpretation that will make clear that those who facilitate online

²¹*Taobao* has taken some positive steps to deter the sale of counterfeit goods through its e-commerce platform. However, these measures have done little to reduce the widespread availability and popularity of counterfeit DVDs and Blu-rays on their site. Right holders remain concerned that *Taobao* has not yet demonstrated the level of commitment to rid their site of counterfeits shown by other online marketplaces such as *Alibaba.com* and *Aliexpress.com*.

²²Alibaba should be commended for its cooperation with videogame right holders in the removal of infringing items.

²³The Business Software Alliance (BSA) notes identifying and reporting for removal more than 108,000 listings of infringing products on these sites.

²⁴The *KJ Med* issue was first raised with Chinese enforcement authorities in 2006. Following a number of transfers among several agencies, the case was lodged with the Beijing Copyright Administration Enforcement Department where it languished.

²⁵The *Notice* notifies libraries of their obligations under the Copyright Law, and calls for regular random inspections by NCAC and the local copyright administrations, and as appropriate, the imposition of administrative sanctions upon libraries found to have been engaged in unauthorized copying and dissemination of copyrighted works. Unfortunately, it is unclear whether the obligations outlined in this *Notice* have been carried out, including whether random inspections of library institutions have been conducted.

²⁶ESA’s reporting on P2P activity does not take into account downloads of these titles that occur directly from hosted content, such as games found on “cyberlockers” or “one-click” hosting sites, which appear to account each year for progressively greater volumes of infringing downloads.

infringement will be equally liable for such infringement”), the President Obama-President Hu Summit in early 2011, and the issuance of the Criminal IPR Opinions on the handling of criminal cases,²⁷ would lead to significant improvements in overall online protection of copyright. Some infringing websites were closed down during the Special Campaign. Since that Campaign ended in June 2011, there has been less activity, although an enforcement initiative of the NCAC, dubbed “Sword Net Action,” remains ongoing, with the latest action involving NCAC warnings to *UUSee*, *VeryCD* and *Xunlei* because “they failed to supply required copyright documentation for many of the online movies and TV dramas offered on their websites.”²⁸ NCAC reported in August 2011 that 191 websites are under “active supervision,” 75 sites have “been removed,” 18 sites have ceased using a “top 50 list” of videos, and 12 sites have stopped using a “top 50 list” for TV dramas.²⁹ In November 2011 NCAC held a briefing to discuss the maintenance of pressure on these sites, indicating some proactive government-to-industry outreach. In some respects, the increasing pressure appears to have led to some changes in how ISPs cooperate, as the motion picture industry reports more effective notice and takedown mechanisms in place and good compliance and cooperation, typically within a matter of hours following a takedown notice.³⁰

For other industries, needed voluntary cooperation by service providers remains largely inadequate. ISPs in China include major telecommunications companies (e.g., China Telecom, China Unicom, China Mobile), but these companies do not fully cooperate or facilitate strong copyright protection except with respect to websites/subsidiaries directly owned by them. The record industry reports that it regularly provides ISPs with notices and sends infringing services cease and desist letters, however, the takedown rate in 2011 among unauthorized online services dropped to less than 50%.³¹

The lack of voluntary cooperation for most industries is coupled with an incomplete legal and enforcement infrastructure, the failure to issue a promised Judicial Interpretation on online liability, an over-reliance by authorities on administrative enforcement, difficult burdens in civil, administrative and criminal enforcement, overall lack of transparency, and overall lack of deterrence. The current Copyright Law reform effort, and the Criminal Law reform effort that is just commencing, provide opportunities to address some of the gaps in coverage and foster more workable solutions to the myriad piracy issues noted above. Until that time, the Chinese Government must demonstrate the will to effect meaningful change.

With regard to administrative enforcement against Internet and mobile piracy, right holders report providing evidence to local NCAs, local NAPP offices, or local cultural task forces, with mixed results. In some case, the authorities coordinate with ISPs for shutdown of sites that do not have legitimate licenses to operate, or that contain a large amount of illegal content. In other cases, there is inaction and no transparency. For example, in 2011, the music industry reports that more than half of its complaints resulted in no enforcement and no response. As an example, in early 2011, a complaint was filed against an Internet forum *bbs.in-corner.com/bbs.5757qq.com* where

²⁷The JCCT plenary session ending December 15, 2010 and the subsequent summit meeting between President Obama and President Hu on January 19, 2011 resulted in important commitments aimed at addressing massive online piracy in China. As noted, China committed in the JCCT “to obtain the early completion of a Judicial Interpretation that will make clear that those who facilitate online infringement will be equally liable for such infringement.” On January 19, 2011, the U.S. “welcomed China’s agreement to hold accountable violators of intellectual property on the Internet, including those who facilitate the counterfeiting and piracy of others.” Just days before President Hu’s visit to the United States (January 11, 2011) the Chinese Government issued new *Supreme People’s Court, Supreme People’s Procuratorate and Ministry of Public Security Promulgated Opinions on Certain Issues Concerning the Application of Laws for Handling Criminal Cases of Infringement of Intellectual Property Rights* (“Criminal IPR Opinions” or “Opinions”). The Opinions confirm in Article 15 the criminal liability of ISPs knowingly providing internet service to infringers of IP rights, as long as they are deemed to have violated the Criminal Law. The Opinions are an internal document of the Supreme People’s Court, the Supreme People’s Procuratorate, and the Ministry of Public Security, so they should be codified in a new judicial interpretation or in the amendments to the Copyright Law or Criminal Law.

²⁸See *Video Portals Warned Over Illegal Content*, China Daily, January 12, 2012, at http://www.china.org.cn/business/2012-01/11/content_24380184.htm. The article notes that of 1,206 documents submitted by 18 websites including *Xunlei*, *UUSee*, and *VeryCD*, only 282 documents, or 23%, “met the administration’s guidelines for legal content.” *Xunlei* did not initially submit any documentation, citing “careless work” due to staff turnover. NCAC indicated the sites would be “blacklisted and charged if things do not get better in two months.” One of the notable enforcement achievements during the Special IPR Campaign was NCAC’s “copyright non-compliance list” which in January 2011 included *Xunlei*, *UUSee*, *VeryCD*, *Joy.cn*, *PPLive (PPTV)*, *Tudou* (Nasdaq: TUDO), *Baofeng*, *Funshion*, *Shanda Interactive* (Nasdaq: SNDA)’s *Ku6* (Nasdaq: KUTV), *Sina* (Nasdaq: SINA) and *Pipi.cn*. See *Xunlei Receives Warning Over Video Copyrights*, Securities Daily, January 4, 2011, at http://www.marbridgeconsulting.com/marbridgedaily/2012-01-04/article/52658/xunlei_receives_warning_over_video_copyrights.

²⁹See *China Official to Establish Copyright Active Regulatory Mechanism*, <http://www.itnews-blog.com/it78208.html>.

³⁰If suspected criminal activities are found, the industry notifies law enforcement agencies and presses for a criminal investigation.

³¹The industry notes that communications with several ISPs revealed that cease and desist notices sent by copyright owners were regarded as “spam” emails and no one is attending to notices or responsible for taking down infringing content.

newly released and some “pre-release” content was posted for download, causing substantial damage to the industry. The industry provided NCAC with sufficient evidence to act, but there was literally no response from the government despite repeated requests for updates.

Lack of transparency or accountability often leaves copyright owners subject to the whims of local agencies. Enforcement agencies in general do not provide transparent feedback to copyright owners regarding complaints filed and the performance of law enforcement agencies is not subject to scrutiny. Industry reports mixed relationships with the various local copyright administrations, with communications and relationships being good in some and non-existent in others (e.g., the Copyright Bureau in Guangdong is reported to have ignored complaints filed by right owners). Most of the time authorities in China do not take initiative to investigate or take *ex officio* action against online piracy, and when they do, in many instances there is no transparency. It is hoped China’s recent announcement that it is establishing a permanent State Council-level leadership structure and a mechanism to “hold local government officials responsible for effectively enforcing IP violations” may signal a change in the right direction.

Repeated administrative complaints have been filed against unauthorized online services by right holders, and while there have been some sites shut down, by the sheer numbers of sites still available, there appears to be little deterrence. For the purpose of implementing the 2009 Ministry of Culture (MOC) Circular dealing with music sites, MOC issued four enforcement notices to require music operators to take down songs for which content review had not occurred. Of 422 total websites identified by MOC in separate enforcement notices, 268 sites had been closed down (a 63.5% takedown rate).³² The music industry reports that actions were taken against sites such as *1ting.com*, *xiami.com*, and *Yicha.com*, but these did not result in closures (all the services remain in operation despite evidence of infringing activities), and only *1ting.com* was given an administrative fine. Other enforcement obstacles remain in place, including the following: 1) a non-deterrent administrative fine structure (e.g., there is no daily fine for continuing to infringe); 2) inadequate staffing and resources within local administrative agencies responsible for copyright to deal with the task of curbing online infringements;³³ 3) lack of cooperation at some of the provincial levels generally;³⁴ 4) general unwillingness of authorities or service providers to assist in identifying infringers’ locations and identities;³⁵ 5) lack of willingness to administer fines against ISPs which do not comply with takedown requests; 6) unwillingness among authorities generally to enforce against Internet cafés (notwithstanding some attempt by NCAC to regulate the use of motion pictures in such premises); and 7) lack of an effective criminal remedy for online infringement.³⁶

Courts have become more active in the past couple of years in criminal piracy cases involving the Internet. Previously reported cases, such as the *Tomatolei* case, stand out as positive highlights. Another positive highlight from 2011 was a criminal investigation into an infringing music website called *qishi.com* which in January 2011

³²The following is a recounting of MOC Enforcement Notices and the number of sites identified and taken down over time:

MOC Enforcement Notice	Number of Music Sites Identified in the Notice	Number of Music Sites Taken Down (as of January 5, 2012)
April 2010	117	72
December 2010	237	163
March 2011	54	28
April 2011	14	5

³³In addition, some government agencies simply do not employ their authorities, for example, the Communication Bureau has the ability to halt Internet access to any infringing websites which does not have an ICP record number, but the authorities seldom exercise this power.

³⁴Local protectionism (e.g., Shanghai, Shenzhen and Hangzhou) is an issue that prevents effective measures from being taken against pirate Internet sites. The industries report that coordination among enforcement authorities and industry regulators is lacking. Local telecom bureaus are not always cooperative in helping NCAC find evidence and shut down infringing sites. MIIT, SARFT, MOC, and GAPP have not provided clear guidance that serious infringements or repeated infringement should result in revocation of the relevant business licenses. As a result, large sites that have been fined several times by NCAC or even found infringing in the civil courts for infringements can still operate in China.

³⁵For example, 1) the MIIT website and domain name registration process allows for fake IDs to register, making it difficult for right holders to identify infringers, 2) there is no identification authorization process which, coupled with lack of cooperation from ISPs, makes it difficult to find uploaders, 3) authorities that do take enforcement actions are reluctant to share evidence they have collected with right holders to facilitate private remedies like civil lawsuits, and 4) courts are not equipped at present to provide quick and effective evidence preservation proceedings. The implementation of “genuine name/ID” registration (IP address) would have a positive impact on fighting Internet piracy, including video streaming, e-commerce platforms, music sites and others.

³⁶See *infra* discussion of thresholds issues. One piece of positive news is that the country’s new Criminal Procedural Law stipulates that evidence collected during an investigation by relevant government agencies can be used in a court hearing for prosecution. This is a positive change, given the fact that many of the criminal cases in China start with administrative actions involving evidence collection.

resulted in a sentence of five years imprisonment and a fine of RMB1.5 million (US\$227,000) imposed on the operator, which was upheld on appeal by the Chuzhou Intermediate People's Court in March 2011. According to the Public Security Bureau (PSB) officials handling the case, the judgment against the operator has been meted out. In addition, after several years' pursuit by right owners, in September 2010, the police arrested executives from *OpenV.com*, a "video-on-demand" (VOD) website that attracted a huge volume of traffic among Chinese Internet users and was reportedly backed by overseas funding. After several delays, the case was finally brought to trial in October 2011. This case is highly significant as the first criminal prosecution in China to involve the illegal distribution of copyright content on the Internet or a website through a VOD platform. IIPA praises the authorities for bringing this "first of its kind" criminal prosecution, but is deeply concerned about possible information that there has been political pressure to abandon the prosecution. Tough sentences should be meted out to the defendants for their massive scale copyright violations, and for the deterrent message they will deliver.

The motion picture industry reports supporting greater numbers of criminal investigations/prosecutions against copyright infringers between 2010 and 2011 than during any previous recorded year, including those against Internet streaming sites, Internet café operators, and AV shops selling illegal DVDs and Blu-ray Discs (BDs), and indeed, the increase in administrative actions during the Special Campaign resulted in greater numbers of administrative transfers to the PSBs for criminal prosecution. The *7t7t.com* and *Qishi.com* criminal referrals in 2010 were welcome signs. However, it appears that sentencing was reduced immediately after the Special Campaign, as illustrated by the *51wma.com* case where the operator of an illegal music website was sentenced to 6 months imprisonment with 1 year suspended sentence and a fine of RMB150,000 in August 2011. Other pending cases include the prosecution of the operators of *music98.net*³⁷ and *6621.com*.³⁸ Industry also reports that the typical duration of a criminal case in this area has now shortened to less than a year.

Considering the size and scale of the market in China, the total number of criminal cases remains too small in number to deter piracy, and other cases demonstrate problematic aspects of the Chinese legal system. Civil cases against *xunlei* (filed in 2009), the case against *Baidu* (the parties settled in July 2011), and *sohu.com/sogou.com* (filed in early 2010) have dragged on for years. In a recent administrative action against an unauthorized online service called *Xiami.com*, the Zhejiang Copyright Bureau imposed a "paper" (as opposed to electronic mail) notice requirement. No administrative fine was imposed, and this unauthorized site, which had more than 9.5 million visitors in August 2011, continues to operate. There also remains a lack of transparency in the criminal judicial system, as there is no reliable sources/statistics on court actions brought against copyright infringers in China.³⁹

Enterprise End-User Piracy: The business software industry continues to face unlicensed software use by enterprises – including private businesses, state-owned enterprises and government agencies – on a massive scale.⁴⁰ Piracy of U.S. business software in China not only diminishes sales and exports for U.S. software companies, but gives an unfair competitive advantage to Chinese firms that use this unlicensed software without

³⁷The PSB handling the case against *music98.net* informed right holders that transfer of the case to the local People's Procuratorate was pending receipt of proof of copyright ownership.

³⁸The operator of *6621.com* was detained in March 2011 but no update of the case has been made available from the authorities.

³⁹It has been suggested that a website for right holders and authorities could be set up to provide both case status information, including cases for which information was files by right holders as well as other administrative and criminal investigations, with relevant information including contact information. Helpful aggregate statistics regarding completed cases would include: for civil cases, the number of cases filed; injunctions issued; infringing products seized; infringing equipment seized; cases resolved including settlement); and the amount of damages awarded; for administrative cases, injunctions issued; infringing products seized; infringing equipment seized; cases resolved (including settlement); and the amount of damages awarded. Helpful information for criminal cases would include the number of raids; criminal injunctions issued; prosecutions commenced; convictions, and the amount of fines and/or jail terms (including whether the fines were paid and whether the jail term was actually served or was suspended).

⁴⁰BSA's 2011 software piracy statistics will not be available until after the filing deadline for this submission, but will be released in May 2012, at which time piracy rates and U.S. software publishers' share of commercial value of pirated software will be available at www.iipa.com. In 2010, the software piracy rate in China was 78%, representing a commercial value of unlicensed software attributable to U.S. vendors of US\$3.5 billion. These statistics follow the methodology compiled in the Eighth Annual BSA and IDC Global Software Piracy Study (May 2011), <http://portal.bsa.org/globalpiracy2010/index.html>. These figures cover packaged PC software, including operating systems, business applications, and consumer applications such as PC gaming, personal finance, and reference software – including freeware and open source software. They do not cover software that runs on servers or mainframes, or routine device drivers and free downloadable utilities such as screen savers. The methodology used to calculate this and other piracy numbers are described in IIPA's 2012 Special 301 submission at <http://www.iipa.com/pdf/2012spec301methodology.pdf>.

paying for it to produce products that come into the U.S. market and unfairly compete against U.S.-made goods produced using legal software.

A significant hurdle to effectively dealing with enterprise end-user piracy in China is the lack of criminal remedies against this form of piracy. While the Supreme People's Court (SPC) indicated in a 2007 JI that under Article 217 of the Criminal Law, unauthorized reproduction or distribution of a computer program qualifies as a crime, authorities remain unwilling to take criminal end-user cases. The Chinese Government should make a clear commitment to criminalize enterprise end user piracy, providing details on the timing, framework and approach, including issuance of a new JI by the SPC and the Supreme People's Procuratorate (SPP) and corresponding amendments to the Criminal Code and Copyright Law and case referral rules for the Ministry of Public Security and SPP as needed. One hurdle to bringing criminal end-user cases has been Chinese authorities' narrow interpretation of the "for-profit" requirement in Article 217. The 2011 Criminal IPR Opinions could be helpful in this regard, since they define in Article 10(4) the criteria of "for profit" as including "other situations to make profit by using third parties' works." Since the unlicensed use of software in enterprises involves reproduction and/or distribution, and since use of unlicensed software lowers costs and allows enterprises to "make profit," the Opinions appear to support criminalization of enterprise end-user piracy. Another key hurdle is meeting the applicable thresholds, i.e., calculation of illegal revenue or illegal profit, even if determined to be "for profit."

Without a criminal remedy, the only avenues for seeking redress have been the administrative and civil systems, which are under-funded and under-resourced, and which generally result in non-deterrent penalties. First, copyright authorities are reluctant to do raids against businesses suspected of using pirated software. IIPA was deeply disappointed with the lack of concrete results against end-user software piracy coming out of the Special Campaign, and we know of no progress or outcomes arising out of 23 administrative actions filed with NCAC during the Special Campaign against businesses using unlicensed software. Unfortunately, in 2010, software end-user complaints shifted jurisdiction from the local copyright administrations to the Law and Cultural Enforcement Administrations (LCEAs), leading to even fewer administrative actions. In 2011, BSA lodged six complaints against enterprise end-user piracy. Only four administrative raids were conducted in 2011.⁴¹

The situation is not much better with regard to civil enforcement. BSA collected leads for fifteen civil cases in 2011, seven of which were accepted by the courts (with five still pending). The civil system is marred with difficulties when it comes to end-user piracy actions, as the courts set excessively high evidentiary burdens for evidence preservation, and pre-trial evidence preservation order applications or applications for injunctions are normally rejected by the courts.⁴² In addition, where a civil order is issued, right holders and authorities often face on-site resistance against evidence preservation (e.g., deletion of infringing software while enforcement authorities are carrying out an inspection) and have only a limited amount of time to conduct software infringement inspections. Another key hurdle is the accounting method for damages, highlighting the need to significantly increase statutory damages.

Government and Enterprise Legalization of Business Software and Related Issues: The 2011 JCCT negotiations resulted in several specific commitments by the Chinese government pertaining to software legalization that build on commitments made by the Chinese government at the 2010 JCCT, the summit between President Obama and President Hu in January 2011, and the May 2011 Strategic & Economic Dialogue (S&ED). These include commitments by China to: 1) ensure that government agencies at all levels use only legitimate software and that all types of software used by government agencies are licensed; 2) devote increased resources to conducting software license audits and inspections of government agencies and publish the results; 3) complete software legalization by provincial governments by mid-2012 and by municipal and county governments by 2013; and 4) promote and

⁴¹Not all cases resulted in administrative fines, and fines remain generally non-deterrent. In many of these cases, there were no seizures of the unlicensed software and computers employing it. In 2010, BSA lodged 36 complaints against end-users, including 13 with the local authorities, on top of the original 23 complaints filed with NCAC, but only 10 administrative raids resulted.

⁴²The courts require copyright owners to provide preliminary evidence of infringement, which is difficult if not impossible since they are not in a position to check an alleged infringer's computers even for preservation of the evidence. The court has rejected applications for pre-trial evidence preservation orders or injunctions, claiming the preliminary evidence submitted is insufficient to prove infringing use of copyrighted software. This creates an impossible situation.

conduct enterprise software management pilot projects and publish progress reports.⁴³ These bilateral commitments have been accompanied by a number of directives from the Chinese Government implementing processes for software legalization in the Government and SOEs.

While these commitments and directives are welcome, it is of critical importance that the Chinese Government now follows through to ensure legal software use by implementing legalization efforts at all levels of government (central, provincial, municipal, and local), providing sufficient budgets for government purchases of legal software, instituting a process involving software asset management (SAM) best practices (including audits of what software government systems are actually running) and targeting all categories of software for legalization (including multimedia software and computer-aided design software, not just operating systems, office and anti-virus software). For SOEs, the government announced plans in 2011 to have the China Copyright Protection Center (CPCC) implement a pilot legalization program, including conducting random audits on a specified percentage of PCs in the enterprises. It is important that CPCC have adequate resources to accomplish this task in terms of funding, manpower and appropriate audit tools and that it utilize SAM best practices so this program can serve as the basis for an expanded SOE legalization effort. The Chinese Government must also follow through on its commitment in prior years to ensure that all computers produced or imported into China have legal operating systems.

Pre-Installation Piracy (Hard Disk Loading): An increasing problem in China is the sale of hard drives or other devices with pre-installed illegal content in large computer malls or electronic shopping centers (e.g., Hailong and Bainaohui in Beijing). To “sweeten the deal,” merchants provide “value-added” services to download software, illegal films and television programs, or other content (very often the audiovisual content comes from illegal websites offering infringing HD content). The practice is now causing significant losses of revenue from Blu-ray disc sales for motion picture companies and unlicensed use of karaoke videos for the recording industry, in addition to traditional hard-disk loading of software. The practice is clandestine and enforcement authorities are reluctant to prioritize enforcement against it. The Chinese Government should clarify criminal liability for “hard disk loading” and carry out deterrent enforcement efforts including criminal cases. Unfortunately, there have been very few cases, although at least one case is reportedly in the preliminary investigation phase by one local PSB.

Book (Including Textbook) and Journal Piracy: In addition to the online piracy issues described above, the U.S. publishing industry continues to suffer from physical piracy including unauthorized copying of academic textbooks, unauthorized printing of commercial bestsellers, print- or copy-to-order services, and the availability of pirated or counterfeit books through itinerant street vendors. Well-known university presses suffer from trademark infringement as well, with university names and seals reproduced on content bearing no relation to the pertinent university press. Recent indicators suggest the changing nature of textbook piracy in China. Previously centered around “textbook centers” found within university premises, the evidence shows that such centers are now being replaced by smaller, often private “copy shops” on or near university campuses. These shops engage in unauthorized copying of books to order (brought in by customers for copying) to having popular titles pre-printed and available for purchase, to the most serious and sophisticated arrangements where massive catalogues of thousands of titles in digital form are available for immediate printing-to-order. Pirated or counterfeit bestsellers remain available for sale openly on the streets of Beijing in a number of locations. Individual vendors are often mobile and do not carry large stocks. Wholesalers carry larger stocks, but typically the English language titles are only a relatively small proportion of their stocks. Previous attempts to disrupt the supply chain feeding the street and wholesale traders were frustrated by the lack of personnel, e.g., in the Beijing Copyright Bureau, to conduct coordinated or simultaneous raids on multiple targets at different levels of the chain.

⁴³Prior commitments by the Chinese government included: 1) treating software as property and establishing software asset management systems for government agencies, 2) allocating current and future government budgets for legal software purchases and upgrades (in implementing government legalization, IIPA notes that proper budget allocations should be made not only for the central government agencies but for provincial and sub-provincial levels), 3) implementing a software legalization pilot program for 30 major SOEs and 4) conducting audits to ensure that government agencies at all levels use legal software and publish the results (it is our understanding that the government software audit agreed to by the Chinese Government in the summit joint statement involves an audit of agency budgets and spending on software rather than an audit of whether government agencies are using properly licensed software; the latter of course is of critical importance).

The partnership of the Ministry of Education (MOE) with GAPP, NCAC and local authorities remains essential to tackling the ongoing textbook piracy issues. The industry has positive relations with the authorities, but finds their attention is diverted as soon as pressure (e.g., out of the JCCT or the Special Campaign) wanes. The situation is exacerbated by changes in personnel. A complaint to the Beijing Cultural Enforcement Division in late 2010 brought about two raids (on separate dates) against four retail and wholesale vendors of pirate books. Many limitations remain for addressing hard goods book and journal piracy in China, including a lack of resources in the administrative enforcement authorities, inability to react to time-critical information, inability to handle coordinated raids against multiple targets, lack of power and/or willingness to enter unmanned premises without very clear evidence of specific infringing copies being present in the premises at that time. Generally, a lack of technical capability and legal knowledge hampers enforcement efforts.

Illegal Camcording:⁴⁴ The Motion Picture Association of America reported that the number of forensic matches from illegal camcords of its companies' major motion pictures traced to China in 2011 dropped to nine (five audio and four video). While a notable improvement, this progress is due to increased vigilance of cinema operators, not necessarily improved law enforcement. The industry also reports that camcording piracy is a source of pirate films on major Chinese UGC sites and provides source material for infringing DVD masters. SARFT should immediately implement watermarking in theatrical prints and ensure that China Film Group/exhibitors step up efforts to deter illegal camcording. The Copyright Law amendment should be amended to add as a violation of law the use of, or attempt to use, an audiovisual recording device to make or transmit a copy of a cinematographic work or other audiovisual work, or any part thereof, from a performance of such work in an exhibition facility. Anyone committing this act should be subject to civil, administrative, and criminal remedies. There is evidence that such a statute is needed in China, as the first camcording case in China (in November 2008), involving a Chinese film, resulted in the three suspects being released by the police.

Other Hard Goods Piracy, Circumvention Devices: The industries unfortunately note resurgent physical piracy in China in 2011,⁴⁵ including: the manufacture and distribution of factory optical discs;⁴⁶ the burning of recordable discs either retail or industrial copying using disc drives or towers; production and/or sale of pirate videogames and circumvention devices used for games; the production in China (generally for export) of high-quality counterfeit software packages; the loading of pirate music on karaoke machines; and sales of "media boxes."⁴⁷ The piracy levels for video and audio, as well as for entertainment software in physical formats, continue to range between 90% and 95% of the market.⁴⁸ In May 2011, the recording industry obtained positive forensic examination reports from the "PRC Police Bureau for Disc Production Source Identification Center" implicating three optical disc plants. These reports were submitted to GAPP which reportedly initiated criminal investigations into the plants with the PSB. However, and as has happened so often in the past, the status of these cases is unknown to copyright owners despite repeated requests for updates. China remains a source country for manufactured counterfeit optical

⁴⁴Among the harms of illegal camcording in China is that it fuels rampant online piracy negatively impacting worldwide distribution and prevents the establishment of legitimate online distribution platforms. Camcording also threatens the continued growth of the Chinese theatrical box-office marketplace.

⁴⁵Physical piracy harms the legitimate markets for all IIPA members but in different ways. The recording industry estimated the value of physical pirate product at US\$391 million in 2011, with a 90% physical piracy level; this is not an estimate of total losses which greatly exceed this amount. For the independent film producers, physical piracy of DVDs remains a significant export constraint for independent producers and distributors, the majority of which are small- to medium-sized businesses. Independent producers partner with local authorized distributors to finance and distribute film and television programming. These authorized distributors find it nearly impossible to compete with pirates and report that both physical and Internet-based piracy have significantly contributed to the demise of what was left of the home video market in China. Producers and distributors confirm that DVD sales have been particularly impacted since pirated digital copies are offered for free online and with a similar quality viewing experience that a DVD can provide. Unable to compete with free, legitimate distributors often cannot commit to distribution agreements or they offer drastically reduced license fees which are inadequate to assist in financing of independent productions. Piracy undermines and may permanently damage legitimate distribution networks essential to reaching consumers and leaves little confidence for investment in intellectual property in China.

⁴⁶Previous IIPA submissions have described in greater detail the number of factories, production over-capacity, inter-changeable production methods (e.g., from music CD to DVD), and fraudulent practices (such as false marking of VCDs or DVDs as "Blu-ray").

⁴⁷Media boxes, which can be plugged directly to TVs, facilitate easy access to remote online sources of unauthorized entertainment content including music, movies and TV dramas. Such media boxes are not only sold in China but also in Malaysia, Singapore and Taiwan and are believed to have been manufactured in China.

⁴⁸On December 8, 2011, a shipment of pirate optical discs containing pirate movie and music DVDs was intercepted jointly by the Bureau of Customs and the Optical Media Board at the Port of Manila. The shipment, valued at approximately US\$800,000, was originally declared as "housewares" and "leatherwares," but x-rays revealed pirate optical discs bearing obliterated SID codes. The forensic examination revealed they were purchased in China.

discs (particularly music box sets), harming markets in Hong Kong, Macau, Singapore, the Philippines, Russia, and the United Kingdom, among others.

While some pirate distribution has gone underground, a noted problem remains shops in cosmopolitan areas in Shanghai and Beijing where pirated “AV” shops heavily target expatriate communities in China.⁴⁹ Recidivism is endemic. As an example, an “AV” shop and corner stand inside Beijing’s Silk Street Market to this day openly sells a large quantity of pirated optical discs, even after several “crackdowns” by law enforcement. The U.S. Government and industry have noted in the “Notorious Markets” filing several markets which remain active and open for pirate and counterfeit business, including China Small Commodities Market (Yiwu), Lo Wu Commercial Center (Shenzhen), Buynow PC Mall (a very large personal computer mall chain in China, operating 22 stores across the country, known for selling computers with illegal operating system software and other unlawfully pre-installed software), Silk Market (Beijing), and San Li Tun District (Beijing) (where most shops openly sell infringing movies and television programs). Test purchases made at Guangdong Audio Video Centre in 2011 also indicated that pirate audiovisual products can still be easily found, and the wholesaling centre in Guangzhou is replete with pirate audiovisual materials.

Public Performance Piracy: Another abiding problem in China involves the unauthorized public performance of U.S. motion pictures, music videos, and increasingly, music, which occurs mostly unchecked (and unpaid for) in hotels, bars (including “Karaoke” bars),⁵⁰ clubs, mini-theaters (like KTV rooms), and karaoke establishments. In addition, there are instances of unauthorized broadcast by cable and/or satellite of the same.

Pay TV Piracy/Circumvention Devices: While there are instances of Pay TV piracy occurring in China, the more serious problem is China’s role as the manufacturing and export/distribution hub for Pay TV circumvention devices and services. According to the Cable and Satellite Broadcasters Association of Asia (CASBAA), these take two principal forms: 1) “hacked” set-top boxes and smart cards; and 2) control word/encryption key distribution. In the first instance, circumvented devices, when attached to cable systems or satellite antennas, permit the unauthorized reception of Pay TV programs. There are reportedly millions of these boxes installed throughout China. In addition, it is reported that circumvention devices numbering in the hundreds of thousands have been exported to, and are damaging legitimate TV suppliers in, among others, Hong Kong, the Philippines, Malaysia, Vietnam, Indonesia, the Middle East, and Latin America. It is reported that the syndicates selling the boxes often take non-infringing “generic” boxes and load software on them which enables the unauthorized receipt of programming. In the second instance, since the encryption software within many set-top boxes relies on a decryption key (“control word”) which interacts in real time with software in the set top box to enable decryption of the signal, piracy syndicates extract the keys or “control words” from a legitimate box/smart card and use Internet servers to share them in real time with a multitude of other users, enabling those users to view the signal without authorization or remuneration to the broadcaster/content owner. The current Copyright Law and regulations prevent the circumvention of technological measures used by copyright owners to protect their works. The Copyright Law revision process should be used to further modernize protection by including prohibitions on trafficking in such hacking devices (or providing services as to them), the receipt and use of the signal unlawfully decrypted, and the onward distribution of unlawfully decrypted signals or even lawfully decrypted signals when such onward distribution is without authorization and done for commercial advantage.

Criminal Thresholds Issues: IIPA has long complained about the unreasonably high thresholds for criminal liability under the laws, ancillary regulations, and JI. The Criminal IP Opinions clarified many uncertainties and is discussed in greater detail below. Unfortunately, the thresholds remain too high to criminalize all piracy on a commercial scale as required by the TRIPS Agreement, and in practice, the thresholds are not being followed consistently by Chinese Government authorities. As a case in point, many law enforcement agencies in China fail to

⁴⁹The U.S. Embassies have been helpful in spreading the word throughout their Embassy communities and U.S. expatriates not to engage in the purchase of pirated or counterfeit merchandise. Such initiatives by the U.S. and other Embassies should be strengthened, and the Chinese Government can assist by posting notices in airports and ports indicating that the export of pirated or counterfeit material out of China, and the importation of such materials into most countries, is illegal.

⁵⁰In November 2010, the China Audio-Video Copyright Association brought more than 100 karaoke bar operators in Beijing to court, claiming they supplied unauthorized music to customers.

follow the “500 copy” threshold (as set forth in the April 2007 JI) to prosecute infringing shop owners. According to some in the industry, currently, the Chaoyang District of Beijing is the only judiciary district in China which regularly prosecutes illegal optical disc vendors according to the threshold.⁵¹ Unfortunately, other provinces and districts are not following the threshold.

With respect to Internet cases, it is extremely important that the authorities carry out the Criminal IP Opinions related to thresholds. They provide several criteria upon which the threshold for criminal liability can be met:

- illegal operation costs amount to over RMB50,000 (US\$7,585);
- disseminating over 500 copies of third parties’ works (the “aggregate quantity of others’ works being transmitted is more than 500 pieces”);
- disseminating third parties’ works with the actual number of clicks amounting to over 50,000 (“[w]here others’ works being transmitted has been actually clicked for more than 50,000 times”);
- disseminating third parties’ works in a membership system with the number of members amounting to over 1,000;
- if the amount or quantities listed in 1 to 4 categories above are not met, but more than half of the amount or quantities in two of the above categories are met;
- in case of other serious circumstances.

The second prong should be understood such that 500 different songs, tracks, or clips, or 500 copies of the same track or clip, or a combination of the two, will suffice for criminal liability. Thus, for example, 250 songs or copies made of a single song, in combination with 25,000 “clicks” of just one song, would be sufficient under the fifth prong, since “more than half” of the amount for two of the first four categories would have been met. The Copyright Law should specify that “copy” includes a download, so that the Opinions do not become an impediment for right holders in bringing criminal cases against copyright violators on the Internet. In addition, the decision as to whether the threshold is met should be vested with the Procuratorate, rather than with the MPS or PSB, since reports indicate MPS and PSB have refused to accept cases on the basis of onerous evidentiary requirements. MPS and PSB do appear, however, to be investigating the illegal gains of website operators and collecting evidence directly from advertising platforms and agencies, which is a positive sign.

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

Procedural Hurdles Against Foreign Right Holders in Civil, Administrative, and Criminal Proceedings: Some in industry have complained about discrimination between foreign and Chinese right holders. Hurdles involving notarization and legalization requirements for documents and powers of attorney, proving ownership or subsistence of copyright, and verifying documents created outside China, are extremely costly and burdensome. In China, the foreign copyright owner is required to submit not only the notarized and legalized power of attorney, but also a notarized and legalized copyright registration certificate and certificate of legal representative. All of these documents have to be translated by a qualified translation organization. Further, in some legal actions, the

⁵¹The motion picture industry regularly helps the authorities from this District with “title verifications” in order to prosecute such cases. The industry indicates an average of 10 prison sentences have been meted out annually against illegal audiovisual shop owners.

Chinese authorities are requiring software owners to obtain a certification of copyright in the software from the local copyright authority. In one case, a member publisher of the Association of American Publishers (AAP) brought suit against three different entities in China that were systematically republishing information from the publisher's proprietary database and related publications on a daily basis, and in direct competition with the publisher's own information service. Meeting the evidentiary burdens to prove the legitimate publisher's ownership of the infringed materials cost hundreds of thousands of dollars in legal fees. Unfortunately, the damages recovered were so small as to be non-deterrent, and represented only a fraction of the costs incurred by the publisher in bringing the actions.

Unavailability of Concurrent "Civil Claim" to a Criminal Prosecution: It has also been reported that there is a jurisdictional bar limiting foreign right holders from commencing a private "civil claim" against those being prosecuted for copyright crimes in local district courts. In the *51wma.com* case, despite the fact that the prosecutor initially invited sound recordings right holders to commence "incidental civil claims" against the defendant (the operator of an illegal music website) in the local district court, the Jiangsu Higher People's Court and the Suzhou Intermediate Court advised that jurisdiction to hear the civil claim rests with the Suzhou Intermediate Court because foreign right holders were involved. Therefore, it appears that foreign right holders cannot commence "incidental civil actions" (running together with the criminal proceedings) against a defendant at the local court level in practice. The law should be amended to allow foreign right holders to commence "incidental civil claims" against copyright offenders at the local level court.

COPYRIGHT LAW, REGULATIONS UPDATES

The Copyright Law of the People's Republic of China, subordinate regulations, judicial interpretations, various rules, and "opinions," provide the basis for copyright protection in China.⁵² In 2011, the Chinese Government launched a process to amend the Copyright Law, by which several groups, including two major universities (Renmin University and Zhongnan University) and the Chinese Academy for Social Sciences (CASS), have been asked to prepare drafts for NCAC to consider. IIPA views this process as an opportunity for the Government of China to take a leadership position throughout Asia and the world by adopting modern norms tailored to the challenges faced today by copyright creators, including Internet-based infringements (by addressing the proper role and responsibility of intermediaries or those indirectly involved with infringing activities), end-user piracy of business software, illegal

⁵²Currently, copyright is governed by the basic law, the Copyright Law of the People's Republic of China (as last amended in 2010) ("Copyright Law"). In October 2001, the Standing Committee of the National People's Congress adopted the "Decision to Amend Copyright Law of the People's Republic of China," thereby amending the 1990 Copyright Law of the People's Republic of China. Copyright Law of the People's Republic of China, Adopted at the Fifteenth Session of the Standing Committee of the Seventh National People's Congress on September 7, 1990, Amended in Accordance with "Decision to Amend Copyright Law of the People's Republic of China," Adopted at the Twenty-fourth Session of the Standing Committee of the Ninth National People's Congress on October 27, 2001. The Copyright Law was further amended in 2010 to make minor changes to come into compliance with a decision of a World Trade Organization Panel. See "The Decision of the Standing Committee of the National People's Congress on Amending the Copyright Law of the People's Republic of China, adopted at the 13th Meeting of the Standing Committee of the Eleventh National People's Congress on February 26, 2010, is hereby promulgated and shall go into effect as of April 1, 2010," in Order of the President of the People's Republic of China No. 26. Implementing Regulations were issued on August 2, 2002 (effective September 15, 2002). Implementing Regulations of The Copyright Law of the People's Republic of China Issued by Premier Zhu Rongji on August 2, 2002, effective as of September 15, 2002. The 1991 Implementing Regulations were thereby abolished. Since the 2001 revision, very few changes have been made to the basic law (the Copyright Law) and no changes have been made to the Implementing Regulations. The Copyright Law was amended by, among other changes, replacing the original Article 4 with the following: "Copyright owners should not exercise their copyrights in a manner that violates the Constitution or relevant laws, or harms the public interests. The country will supervise publication and distribution of the works in accordance with law." Copyright protection in China cannot be understood fully, however, without reference to other basic laws, and a web of ancillary regulations, rules, judicial interpretations, and opinions, all of which inform Chinese Government agencies having purview over various aspects of the copyright system in China, and the courts. Copyright protection in China has evolved since 2001 through the passage of other basic laws, such as the Criminal Law of the People's Republic of China (1997), which established crimes of copyright infringement in Articles 217 and 218, and through the issuance of other regulations, judicial interpretations, rules, and opinions. Among the most important of the ancillary laws for interpretation and understanding of the current Copyright Law are: 1) State Council Regulations for the Protection of the Right of Communication through Information Network (effective July 1, 2006) ("Network Regulations"); 2) Supreme People's Court Interpretation Concerning Some Issues Concerning Application of Law in Cases Involving Computer Network Copyright Disputes (Second Revision) (2006) ("Network JIs"); 3) NCAC Copyright Administrative Punishment Implementation Rules (effective June 15, 2009); and 4) Interpretations of the Supreme People's Court concerning the Application of Laws in the Trial of Civil Disputes over Copyright (2002). Criminal copyright protection has also evolved through the issuance of ancillary regulations, judicial interpretations, and opinions, including: 1) Interpretation by the Supreme People's Court and the Supreme People's Procuratorate on Several Issues of Concrete Application of Law in Handling Criminal Cases of Infringing Intellectual Property Rights (I) (2004); 2) Interpretation by the Supreme People's Court and the Supreme People's Procuratorate on Several Issues of Concrete Application of Law in Handling Criminal Cases of Infringing Intellectual Property Rights (II) (2007); 3) Supreme People's Court, Supreme People's Procuratorate and Ministry of Public Security Opinions on Certain Issues Concerning the Application of Laws for Handling Criminal Cases of Infringement of Intellectual Property Rights (issued January 11, 2011) ("2011 Criminal Opinions"); and 4) Opinions on the Timely Transfer of Suspected Criminal Cases Encountered in the Course of Administrative Law Enforcement.

camcording, and others. The following is a summary of IIPA's recommendations for changes to the Copyright Law of the People's Republic of China:

- **Technological Protection Measures (TPMs):** The structure of the Network Regulations should be carried into the Copyright Law of the People's Republic of China, with
 - 1) express prohibition of trafficking in (and servicing in) circumvention "technologies, devices, or components" as in Article 4 of the Network Regulations;⁵³
 - 2) coverage of all access controls and copy controls;
 - 3) adoption of objective criteria for proving the improper purpose of a device or service;
 - 4) ensuring exceptions are narrowly tailored;
 - 5) deleting the "knowingly" or "intentionally" standard of proof; and
 - 6) creating a structure by which circumvention or trafficking in (or servicing in) circumvention devices, technologies, or components can lead to criminal liability.

- **Internet Liability Including Liability of Intermediaries:** The legal principles in the Civil Law for joint tort liability or "contributory infringement liability" should be carried forward into the Copyright Law, with express clarification that the applicable knowledge standard includes constructive knowledge (notice and/or "red flag" knowledge),⁵⁴ as well as actual knowledge. The notice and takedown provisions from the 2006 State Council Network Regulations and the 2006 Supreme People's Court Network JI should be adopted in the Copyright Law, with certain improvements and clarifications.⁵⁵ Finally, the law should provide for effective and fair provisions related to ISPs regarding non-hosted infringements and dealing with repeat infringers. For example, there should be:
 - 1) confirmation that ISPs are liable for searching or linking activities under Article 23 if they know or have constructive knowledge (notice and/or "red flag" knowledge) of such linking activities, and clarification that the mere fact that an ISP takes down a specific URL or link to a work or other subject matter should not exempt it from liability for other instances of infringement of the same work or subject matter of which the ISP has actual or constructive knowledge (notice and/or "red flag" knowledge), about the occurrence on its network/platform;
 - 2) confirmation that ISPs are liable for network storage activities under Article 22 if they know or have constructive knowledge (notice and/or "red flag" knowledge), of such network storage activities;
 - 3) confirmation, in adopting Articles 22 and 23 of the Network Regulations, that knowledge or constructive knowledge (notice and/or "red flag" knowledge) on the part of an ISP with respect to linked material or hosted/"network stored" is an independent basis for liability (from a notice and failure to comply);⁵⁶
 - 4) confirmation of the criteria on knowledge (other evidence apart from the notice and failure to comply) or constructive knowledge (e.g., notice and/or "red flag" knowledge);
 - 5) confirmation that takedowns following notices⁵⁷ must be at longest within 24 hours,⁵⁸ but should be taken "immediately," consistent with the Beijing Copyright Bureau's Guiding Framework on the Protection of Copyright for Network Dissemination, and the law should provide that where the notice indicates the infringing work is being made available illegally in advance of its legitimate release (i.e., pre-release), the takedown window should be no longer than two hours from receipt of the notice;

⁵³Devices are covered in the Network Regulations, as are services ("[n]o organization or no person shall intentionally ... provide for other persons technological services designed for the purpose of circumventing or sabotaging technological measures"). However, this coverage apparently only applies to the extent a TPM protects the exclusive right of "transmission via information network." The Network Regulations broadly cover circumvention "technologies, devices, or components." These improvements should be carried over into the Copyright Law. See *State Council Regulations for the Protection of the Right of Communication through Information Network* (effective July 1, 2006), Art. 4 ("Network Regulations").

⁵⁴"Red flag" knowledge should be understood as having awareness of facts or circumstances from which infringing activity is apparent.

⁵⁵Industry reports that the "safe harbor" in China, established by Article 23(4) of the Network Regulations, and under which an ISP is immune from liability if it removes the links to the infringing work, performance, and audio or video products upon receiving notice from the right owner, creates a huge loophole for online infringers, and should not be carried into the new Copyright Law without improvements.

⁵⁶For example, under Article 23 of the July 2006 Regulations, it appears clear that ISPs are liable for linking to infringing materials, and Article 23 has been interpreted as such by the Court in the *Yahoo!CN* decision. But the *Baidu* decision casts doubt on whether Article 23 applies to deeplinking in the absence of actual knowledge.

⁵⁷It is also of critical importance to clarify that electronic mail notices are adequate.

⁵⁸The January 20, 2010 *Declaration on Content Protection* contains the principle that takedowns should be accomplished within 24 hours.

- 6) confirmation that ISPs that fail to immediately take down sites following compliant notices from rights holders are subject to administrative fines;
- 7) NCAC easing of the onerous evidentiary requirements necessary to provide a compliant notice;⁵⁹
- 8) either the swift issuance of a JI, or the clarification through amendments to the Copyright Law, to follow through on the commitment to “make clear that those who facilitate online infringement will be equally liable for such infringement.”

- **Temporary Copies:** The amendments to the Copyright Law should confirm that the reproduction right includes the right to control temporary digital storage of works and other subject matter, and that such transient reproductions are covered under the reproduction right. This could be accomplished, for example, by interpreting the term “reproduction” in Article 10(5) (or in a separate definition) to include copying of works and other subject matter “in any manner or form,” by “digital or non-digital means” (as was originally contemplated), and by adding the critical language “whether temporary or permanent.”⁶⁰ It should also be confirmed that this reference to reproduction will be applied in Article 38 (for performers) and 42 (for producers of sound recordings), *mutatis mutandis*.
- **Broad Right of Communication to the Public, Including Broadcasting, Making Available Right:** Articles 10(12), 38(6) and 42 should be amended to provide a full “communication to the public” right including the “broadcasting”, “public performance” and “making available” right for works, performances, and sound recordings.
- **Provide Adequate Rights in Broadcasts, Including Sporting Events:** 1) The current Copyright Law, in Article 3(6), should be amended to add the clause, “and other audiovisual works, including sporting events.” Certain conforming changes would also need to be made, e.g., to Articles 10(7) and 10(10). 2) Article 44 should be added to include a full communication to the public right, including a right of making available (i.e., a right to control broadcasts “over information networks”). In addition, a right to prohibit the unauthorized simultaneous retransmission of broadcasts over the Internet should be added, e.g., by including the language “any radio station, television station shall have the right to prohibit re-broadcasting or retransmission of any radio or television programs it broadcasts on the Internet without its consent.”⁶¹
- **Compensatory Damages:** Article 49(1) of the Copyright Law should be amended to include the possibility for “additional damages” to be awarded by the court, taking into account all relevant factors, including the defendant’s willfulness and recidivism, and multipliers for damages (e.g., treble damages) in case of recidivists.
- **Statutory Damages:** Article 49(2) should be amended to raise the maximum statutory damages to at least RMB1 million, with an “intentional” or “repeat” infringer subject to double or triple this amount or all losses of right holders, whichever is higher, as a maximum. In addition, a minimum of 10,000 Yuan should be specifically

⁵⁹Unfortunately, Article 14 of the Internet Regulations arguably appears to require detailed evidence, including detailed copyright verification reports, and, if so, that Article should be amended.

⁶⁰The regulations should also refer to copies “in any manner or form” and “in whole or in part.” To the extent the drafters are considering what exception or limitation may be appropriate as regards certain temporary copies, reference can be made to Article 5.1 of the European Union Information Society Directive, which provides in relevant part,

Temporary acts of reproduction ... which are transient or incidental and an integral and essential part of a technological process and whose sole purpose is to enable [either] a [lawful] transmission in a network between third parties by an intermediary, or ... a lawful use of a work or other subject-matter to be made, and which have no independent economic significance, shall be exempted from the reproduction right.[brackets added]

⁶¹ Article 44 should be amended as follows:

Article 44 A radio station or television station that broadcasts a sound recording may do so without the authorisation from, but shall pay remuneration to, the copyright owner, the performer and the producer. The right to receive remuneration enjoyed by copyright owners and performers may not be waived, and the rights shall be exercised by collective management organizations entrusted by the copyright owners and performers, or producers of sound recordings or video recordings.

The State Council or the administrative department of the State Council may formulate the specific measures for payment of remuneration if it is absolutely necessary.

provided per work, or preferably, per copy. Statutory damages should be available upon the election of the right holder. The law should provide that the market price of the work or other subject matter should be taken into account when determining pre-established damages.

- **Repertoire-wide Injunctions Should Be Available:** The Copyright Law should provide repertoire-wide injunctions to right holders as an effective remedy against large scale copyright infringement.
- **Criminal Liability Against Copyright Infringement Prejudicially Affecting Right holders:** The Copyright Law should be amended to clarify that copyright infringement which affects prejudicially the interests of copyright holders should be subject to criminal liability under Article 217 and 218 of the Criminal Law even if it is not for a profit-making purpose.
- **Prohibit Camcording of Audiovisual Works in Cinemas:** The Copyright Law should be amended to add as a violation of law the use of, or attempt to use, an audiovisual recording device to make or transmit a copy of a cinematographic work or other audiovisual work, or any part thereof, from a performance of such work in an exhibition facility. Anyone committing this act should be subject to civil, administrative, and criminal remedies.
- **Protection of Computer Programs:** 1) The State Council Regulations on the Protection of Computer Software should be fully integrated into the Copyright Law, so that software is protected fully under the Copyright Law and to avoid the need in the future for judges and administrative agencies to refer to both the basic law and ancillary regulations; and 2) The definition of computer program should be modernized so it is consistent with international treaties and best practices.
- **Functional Use of Computer Program:** The amendments to the Copyright Law should confirm that the functional use of a computer program should be deemed as a type of reproduction and thus unauthorized functional use of a computer program constitutes infringement of copyright, which may give rise to administrative, civil, or criminal liability. The Judicial Interpretation on Trial of Cases over Copyright Dispute issued in 2002 has confirmed the civil liability of unauthorized functional use of copyrighted computer program.
- **Provide Civil, Administrative, and Criminal Liability Against Unlicensed Use of Business Software:** 1) The Copyright Law should be amended to include confirmation that unlicensed use of software is the equivalent of unlawful reproduction under the Copyright Law, and therefore subject to civil and administrative liability under Article 48 of the Copyright Law, and criminal liability under Articles 217 and 218 of the Criminal Law, including the pre-installation by the distributors or use by any end users; infringement “for profit” should be clarified to include both direct and indirect economic benefit from the unlicensed use. 2) The SPC and SPP should issue a JI clarifying that end-user piracy of software is subject to criminal penalties and make corresponding amendments to the Criminal Code and the Copyright Law and case referral rules for the MPS and SPP as needed.
- **Provide Criminal Liability Against Pre-Installation of Unlicensed Software, Sound Recordings, or Other Copyright Material (Hard-Disk Loading):** The unauthorized loading of software, sound recordings, or other copyright material onto a computer should explicitly be made subject to criminal liability under Articles 217 and 218 of the Criminal Law.
- **Provide for a Reasonable Standard for Issuance of Ex Parte Orders, a 48-Hour Order Decision from “Receipt” of an Application, and Penalties for Refusal to Follow Such an Order:** 1) The evidentiary threshold for the acceptance of petitions for *ex parte* evidence preservation actions should be a “reasonable likelihood of infringement” standard, and petitions for evidence preservation should be reviewed and conducted by the same tribunal, preferably by the IP tribunal of handling courts, and it is critically important that case acceptance tribunals not serve complaints on defendants prior to the execution of evidence preservation measures. 2) Article 51 of the Copyright Law should be amended to provide that “the People’s Courts must decide on an application for evidence conservation within 48 hours after *its receipt*” [emphasis added], and

should be required to “issue formal written decisions or orders for rejection or approval of the applications.” In case of rejection, the applicants should be entitled to an appeal or petition against the court’s decision through a formal and timely proceeding. 3) The Copyright Law and Civil Procedure Law should ensure that defendants who refuse or resist cooperating in evidence collection and conservation shall be liable with availability at least of administrative and civil remedies. 4) Article 15 of the Copyright Administrative Punishment Implementation Rules should be amended to provide that “a respondent shall not resist or obstruct enforcement officials from entering the premises and evidence inspection,” on penalty of administrative remedies, or where such resistance is a crime, criminal procedures.

- **Extend Term of Protection:** Copyright protection in China in works and other subject matter should be extended to life of the author plus 70 years, or 95 years for works whose term is calculated from publication (or 120 years from creation, whichever is shorter).⁶²
- **Administrative Enforcement Issues:** 1) NCAC’s authority to prevent copyright infringement should be paramount and not limited by the “prejudices the public interests” or “serious” thresholds as set forth in Article 48 of the Copyright Law, Articles 36 and 37 of the 2002 Implementing Regulations, and as interpreted in the Administrative Punishment Rules. In the least, the thresholds should be significantly relaxed. Confiscation of “the materials, tools and instruments mainly used” to produce infringing copies should not be subject to the threshold for “serious” infringements as interpreted in the Administrative Punishment Rules. 2) The Copyright Law should be amended to expressly provide that during the handling of cases involving copyright infringement, evidence collected by the copyright administrative authority shall have equal effect with respect to evidence obtained under notarization. Article 2 (validity of evidence collected and acquired by the administrative enforcement authority during the handling of criminal cases involving infringement upon intellectual property rights) of the Opinions of the Supreme People’s Court, the Supreme People’s Procuratorate and the Ministry of Public Security on Some Issues concerning the Application of Law for Handling Criminal Cases of Infringement upon Intellectual Property Rights, should be added as an article under the Copyright Law. 3) Administrative enforcement of copyright should be headed by NCAC but with the resources of all the other agencies at its disposal. 4) The Copyright Law revision should be used as an opportunity to ensure right holders have a right to information and appeal of decisions (or non-decisions) related to right holder complaints seeking administrative enforcement, and to set a clear time limit for administrative enforcement after the filing of a complaint by a right holder. 5) Administrative remedies should be restructured so they can act as a deterrent, including by increasing the amounts of administrative fines, providing minimum fines, doubling fines for intentional infringements and recidivism, and providing transparency and accountability in law enforcement through publishing administrative penalty decisions, e.g., on a website, as well as clarifying the liabilities of law enforcement authorities for nonfeasance and misconduct. 6) Administrative punishment decisions against those who infringe copyright should be published and accessible to the public, such as publication via the website of the administrative authorities.
- **Provide a Berne-Compatible Presumption of Ownership and Subsistence of Copyright:** Article 11(4) of the Copyright Law should be amended to provide that “in the absence of evidence to the contrary, the citizen, legal person or other organization that puts his or its name to a work, as well as the producer explicitly listed in a film and television work, shall be deemed to be the author thereof, and copyright-related manuscripts, master copies, lawful publications, work registry certificates, copyright contract registry certificates, proof provided by authentication organs, contracts of acquisition of rights, as well as infringing reproductions obtained by way of

⁶²Extending term of protection will be good for China since: 1) it will avoid older Chinese works from entering the public domain; 2) it will help economically legitimate distributors, local businesses, cinemas, video retailers and other stores associated with the distribution of copyright works, as well as creators who depend on copyright protection for their livelihoods, and who could lose market share due to shorter copyright terms; 3) it will also avoid the unfortunate situation in which Chinese works and other subject matter would be discriminated against in the future, since those Chinese works falling out of protection in China might also fall out of protection in other countries by virtue of the “Rule of the Shorter Term” (while foreign works from countries enjoying longer terms would remain in protection in those countries). Finally, studies have shown that term extension correlates with greater creative activity, e.g., in the audiovisual area. In other words, longer terms may contribute to greater local creation of works, leading to more economic activity related to such works, and greater cultural diversity. We strongly believe copyright term extension is in China’s economic and cultural interests.

ordering, buying on the spot etc., by the parties or their entrusted persons and acquired objects, invoices etc, will constitute evidence of authorship.”

- **Apply the “Presumption of Fault” (Article 52) to Infringements Involving Communication to the Public, Making Available (i.e., Over Information Networks):** Article 52 helpfully indicates that for most infringements, if the one alleged to have infringed cannot show that there is a legal license to engage in the act, legal liability will result. Article 52 should be amended to add a provision that any person who fails to prove that his communication to the public or making available of works or other subject (e.g., by an information network) is duly authorized by the copyright owner shall be liable for any and all legal liability thereof.
- **Costs and Attorney’s Fees:** The Copyright Law should be amended to ensure that Articles 47 through 56 of the Copyright Law provide that costs of litigation and attorney’s fees are fully recoverable in addition to adequate compensation to redress the damage suffered by the right holder. In particular the law should clearly provide that such recoverable costs should be calculated separately from the damages. This will ensure that China can meet its requirements under Article 45.2 of the TRIPS Agreement (“The judicial authorities shall also have the authority to order the infringer to pay the right holder expenses, which may include appropriate attorney’s fees”).
- **Statutory Licenses, Including Article 23 of the Copyright Law and Article 9 of the Network Regulations, and Exceptions and Limitations:** 1) China should delete the Article 23 compulsory license provision or at least it must be confirmed in the amendments that Article 23 does not apply to foreign works or foreign subject matter. 2) Certain unclear or overbroad aspects of Article 9 of the Network Regulations should be clarified or further amended, particularly, coverage should be clarified such that it does not to apply to any copyrighted material of foreign origin (even if the rights are held by a Chinese entity), to avoid TRIPS incompatibility. 3) Exceptions and limitations (e.g., in Article 22 of the Copyright Law and Articles 6 and 7 of the Network Regulations) should be re-examined to ensure they fully meet TRIPS Article 13 and the Berne three-step test, and the three-step test should be expressly provided for in the revision to the Copyright Law, to ensure that blatant piracy activities (e.g., large, scale commercial operations involved in medical journal piracy, or state-run libraries offering document delivery services) cannot pass as acceptable under any existing exception in the law. Also, it should be confirmed that Article 22 cannot be relied upon to shield television producers who use long portions of films or TV shows on their programs or on the Internet without permission of the right holders.
- **Rights Management Information:** China should carry into the Copyright Law the RMI protections found in the Network Regulations (*cf.* Network Regulations, Articles 5, 18), adding the third prong for liability (for “distributing or importing for distribution RMI knowing or having reasonable grounds to know that the rights management information has been removed or altered without authority”), and providing for the possibility of criminal liability, e.g., under Article 225 of the Criminal Law for “illegal business operations.”
- **Confirm Remedies Against Signal Theft:** The Copyright Law revision should also include the prohibition (including civil, criminal, and where applicable, administrative remedies) against: 1) the trafficking or servicing in a tangible or intangible technology, device, or system, knowing (or having constructive knowledge) that the device or system is primarily of assistance in decoding an encrypted program-carrying satellite or cable signal without the authorization of the lawful distributor of such signal; 2) the receipt and use of (including viewing of the signal, whether private or commercial) a program-carrying signal that originated as an encrypted satellite or cable signal knowing or having reason to know that it has been decoded without the authorization of the lawful distributor of the signal; and 3) the further distribution (including to the public and in public places, or over the Internet) of a program-carrying signal that originated as an encrypted satellite or cable signal knowing (or having constructive knowledge) that it has been decoded without the authorization of the lawful distributor of the signal, or if decoded with authorization, the further unauthorized distribution (including to the public and in public places, or over the Internet) of the signal for purposes of commercial advantage.

Criminal Law and Related Ancillary Regulations, Etc.: IIPA has contended for many years that a credible criminal remedy in China (under Articles 217 and 218 of the Criminal Law and accompanying Judicial Interpretations)

is needed to effectively curtail piracy and related violations in all their forms. Remaining gaps include thresholds that are too high (in the case of illegal income) or unclear (e.g., in the case of the copy threshold), proof requirements that may leave some critical commercial scale infringements without a remedy (e.g., the requirement to show that the infringement is carried out “for the purpose of making profits” which is undefined and in certain circumstances it is difficult for law enforcement authorities or right holders to prove that the infringer is operating for the purpose of making profits), the failure to cover all piracy on a commercial scale as required by TRIPS Article 61, the failure to separately define criminal violations related to the WCT and WPPT (e.g., violations involving TPMs), the limited criminal accomplice liability with respect to imports and exports (with lower penalties available), and uncertainties with respect to repeat offenders (the 1998 JIs included repeat infringers but were inadvertently not included in the 2004 JIs). The January 2011 *Supreme People's Court, Supreme People's Procuratorate and Ministry of Public Security Promulgated Opinions on Certain Issues Concerning the Application of Laws for Handling Criminal Cases of Infringement of Intellectual Property Rights* set out some important elements for Internet and related criminal cases and help clarify and address other ongoing issues related to criminal liability in China.⁶³ Importantly, the Opinions appear to confirm criminal liability against a web service which does not directly receive revenues from the dissemination of copyright material, but which charges fees indirectly through “non-free advertisements.” This clearer understanding of “for the purpose of making profits” in the Criminal Law is welcome. What remains to be seen is how various hosted or non-hosted piracy situations will be regarded under Article 10 or 15 of the Opinions. For example, the second prong of Article 10 seems clearly aimed at infringements over user-generated content sites on which there is paid advertising. Article 15 would appear to reach one-click hosting sites over which infringement takes place (“network storage space”), infringing streaming sites (“communication and transmit channels”), web-hosting services, ISPs and payment processing companies. It is hoped the Opinions will also address IPR violations on auction websites dealing in hard goods piracy targeted toward foreign markets and services providing access to infringing content through deep links, and that the Opinions can address repeat infringers. To the extent they do not, coverage of such should be confirmed in other laws or regulations. It also remains to be seen how Article 10 (“[o]ther circumstances that make profits by taking advantage of others’ works”) will be interpreted. It is important to note that

⁶³IIPA does not at present possess a full English translation of the Opinions, but we have received summaries and refer to these herein. In addition to internal summaries, we draw points from Richard Wigley, *New Guidelines for Criminal Prosecutions of Online Copyright Infringement Provide Aid in Fight against Online Piracy*, China Law Insight, January 19, 2011, at <http://www.chinalawinsight.com/2011/01/articles/intellectual-property/new-guidelines-for-criminal-prosecutions-of-online-copyright-infringement-provide-aid-in-fight-against-online-piracy/>. See also Supreme People's Court, Supreme People's Procuratorate and Ministry of Public Security Promulgated Opinions on Certain Issues Concerning the Application of Laws for Handling Criminal Cases of Infringement of Intellectual Property Rights, Watson & Band, January 13, 2011, at http://www.watsonband.com.cn/news/detail?id=182&language=en_US. Salient features of the Opinions include:

- Article 10 of the Opinions reportedly provides that in addition to sale, “for the purpose of making profits” includes any of the following circumstances,
 - Directly or indirectly charging fees through such means as publishing non-free advertisements in a work or bundling third parties’ works [“binding a third party’s works with other person’s works”];
 - Directly or indirectly charging fees for transmitting [“disseminating”] third parties’ works via an information network or providing services such as publishing non-free advertisements on the site using infringing works uploaded by third parties;
 - Charging membership registration fees or other fees for transmitting [“disseminating”] others’ works via an information network to members; and
 - Other circumstances that make profits by taking advantage of others’ works [“Other circumstances that make profits by taking advantage of other’s works”].
- Article 15 expands the scope of criminal liability by including as subject to accomplice liability “providing such services as Internet access, server co-location, network storage space, [and] communication and transmit channels....”
- The Opinions provide specificity on the thresholds for criminal liability in the online environment. Specifically, Article 13 provides that “[d]issemination of third parties’ written works, music, movies, art, photographs, videos, audio visual products, computer software and other works without copyright owners’ permission for profit, in the presence of any one of the following conditions, shall be regarded as “other serious circumstances” under Article 217 of the Criminal Law:”
 - illegal operation costs amount to over RMB50,000 (US\$7,585);
 - disseminating over 500 copies of third parties’ works [“aggregate quantity of others’ works being transmitted is more than 500 pieces”]; (NOTE: The recording industry indicates that differing interpretations have emerged over time and in different provinces with respect to the “500 copy” threshold. It is hoped that the Opinions will confirm that 500 different tracks or clips (or 500 copies of the same track or clip, or a combination) will suffice).
 - disseminating third parties’ works with the actual number of clicks amounting to over 50,000 [“[w]here others’ works being transmitted has been actually clicked for more than 50,000 times”];
 - disseminating third parties’ works in a membership system with the number of members amounting to over 1,000;
 - if the amount or quantities listed in 1 to 4 categories above are not met, but more than half of the amount or quantities in two of the above categories are met;
 - in case of other serious circumstances.

The Opinions reportedly also clarify that the crime of IPR infringement takes places where 1) the infringing product is produced, stored, transported and sold, 2) the place where the server of the website which distributes and sells the infringing product is located, 3) the place of Internet access, 4) the place where the founder or manager of the website is located, 5) the place where the uploader of infringing works is located and 6) the place where the rightful owner actually suffered from the crime. This reported listing provides extremely helpful guidance to the courts, as it would include the point of transmission, the point of receipt, the location of the server, the location of the key defendants, and any place where onward infringement causes harm to the right holder.

the Opinions are not limited to the online environment (dealing with other IPR crimes), and it is hoped that, for example, enterprise end-user piracy of software, which is clearly a circumstance which results in increased profits for an enterprise by taking advantage of others' works, may be regarded as a crime under these Opinions. In the very least, the language lays the groundwork for such liability.

The Opinions also set out important clarifications with regard to thresholds for criminal liability. While it is yet to be seen how these new thresholds will be interpreted in practice, they appear to provide some flexibility and it is hoped they will ease the evidentiary burden to prove criminal liability in the online space. For example, whereas the previous numerical threshold was "500 copies" it now appears possible to prove a combination of elements, e.g., proof of "250 copies" combined with proof of 25,000 downloads, for criminal liability, or as another example, in the case of a membership site, proof of 500 members combined with proof of dissemination of "250 copies."

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

TRIPS/Berne Obligation to Pay for Broadcasts of Musical Compositions: China has long been in violation of its TRIPS/Berne Convention obligation to compensate copyright owners for the broadcast of musical compositions.⁶⁴ Finally, on November 10, 2009, the State Council publicly announced that commencing January 1, 2010, China's broadcasters must begin making payments to copyright owners of musical compositions (songwriters and music publishers, through performing rights societies). The *Measures on the Payment of Remuneration to the Copyright Owners of Audio Products* would correct this longstanding TRIPS/Berne Convention violation to compensate copyright owners for the broadcast of musical composition. However, such payments are wholly inadequate and the tariff would result in one of the lowest payment rates in the world. Broadcasters could either choose to pay rights holders based on very low percentage of a station's advertising revenue or pay RMB0.3 (US\$0.05) per minute for music played on the radio or RMB1.5 (US\$0.23) for TV. Advertising revenue for Chinese broadcasting was reported to be US\$10.16 billion in 2008.⁶⁵ Since music performing rights payments in most countries are calculated as a percentage of such revenue, and it is estimated that 15% of music heard on Chinese broadcasting is U.S. music, the payment scheme is clearly tens of millions of dollars below what would be a fair rate. IIPA has urged that the new tariff be retroactive, at least to the date of China's joining the WTO, but the new tariff is prospective only.

MARKET ACCESS AND RELATED ISSUES

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

Chinese market access restrictions include ownership and investment restrictions;⁶⁶ a discriminatory and lengthy censorship system (which further opens the door to illegal content); restrictions on the ability to engage fully

⁶⁴The recording industry also notes the desirability of a workable remuneration system for the public performance or other communication/broadcast of their recordings. With the increase in playing of recorded music in commercial premises as a primary form of commercial exploitation of music, public performance, communication to the public and broadcasting income is becoming a major potential source of revenue for record producers.

⁶⁵*On Screen Asia, China in Focus*, April 1, 2009, at <http://www.onscreenasia.com/article-4897-chinainfocus-onscreenasia.html>.

⁶⁶For example, Hong Kong and foreign companies may not invest in any publishing or importing businesses for audio-visual products in mainland China.

in the development, creation, production, distribution, and promotion of music and sound recordings;⁶⁷ and the continued inability to fully engage in the import and export, distribution, and marketing online of published materials in China. Furthermore, Chinese law continues to prohibit foreign enterprises and foreign-invested enterprises (FIEs) from participating in publishing activities in China. They also include the maintenance of a quota of 20 foreign films for which revenue sharing of the box office receipts between the producers and the importer and distributor is possible,⁶⁸ the inability to import (except through a Chinese-controlled monopoly) and distribute (except through a two Chinese-controlled duopoly) films for theatrical release, a screen-time quota for foreign theatrical distribution and foreign satellite and television programming, an onerous master contract imposing terms for foreign film distributors, blackout periods for films, local print requirements, foreign investment restrictions, restrictions on retransmission of foreign TV satellite channels, broadcast quota limitations, and onerous import duties, among many other barriers,⁶⁹ all of which close off the market for U.S. produced films and programming. An onerous ban on the manufacture, sale and importation of videogame consoles remains a major barrier. Entertainment software companies also continue to face lengthy delays in the censorship approval process, wiping out the very short viable window for legitimate distribution of entertainment software products. IIPA also notes a range of policies that China has developed under the banner of promoting “indigenous innovation” that have the effect of discriminating against foreign software and other technology products or compelling transfers of technology and intellectual property to China in order to access the market. These policies limit market access for software and other IIPA member products and undermine the IP development of U.S. and other foreign copyright industries.

The WTO case decision in 2009 will hopefully help address some issues with respect to access to the Chinese market for U.S. music, movies, and books, but other fundamental issues as to these products, and many issues for other industries (several of which are discussed below), remain unresolved.

WTO Case Implementation Needed Urgently: On December 21, 2009, the WTO Appellate Body issued its decision on the appeal by China of the WTO Panel’s report on certain Chinese market access barriers to the motion picture, recording and publishing industries.⁷⁰ This landmark WTO case requires China to open up its market for these industries in significant ways and hopefully begin the process of undoing the vast web of restrictions which hamper these industries not only from doing business in China, but in engaging effectively in the fight against infringement there. Specifically, the Appellate Body affirmed a WTO Panel ruling that requires China to:

- allow U.S. companies to import freely into China (without going through the government monopoly) films for theatrical release, DVDs, sound recordings, and books, newspapers, and periodicals. This is a significant market opening result.
- provide market access to, and not discriminate against, foreign companies wishing to distribute their books and periodicals, electronic publications, audiovisual materials and sound recordings, including through sound recording distribution services and electronic distribution products in China.⁷¹

⁶⁷For example, the recording industry notes that the MOC Circular dealing with online music contains a restriction on “exclusive licenses” of online music services. Currently, there are very few licensed services in China providing repertoire from non-local record companies. There should not be any problem for MOC to regulate these services and conduct anti-piracy actions against other infringing sites. Record companies should be free to choose their licensees.

⁶⁸The impact of the “quota system” in China on the independent segment of the film and television industry is particularly damaging because most often the independent film producers do not have access to legitimate distribution in China. For example, the recent WTO decision on intellectual property rights said that China could not solely extend copyright protection to works that are approved for distribution in China (i.e., pass censorship) as this inherently damages rights holders who cannot access “approved” distribution in China and whose works are simply not protectable under current Chinese Copyright Law. Similarly, the nontransparent censorship process in China and its multiple levels poses a significant market access barrier to the independents. Local distributors have reported the inability to obtain an official notice of denial from the censorship authorities.

⁶⁹See Motion Picture Association of America, *Trade Barriers to Exports of U.S. Filmed Entertainment, China*, October 2011.

⁷⁰*China – Measures Affecting Trading Rights And Distribution Services For Certain Publications And Audiovisual Entertainment Products*, WT/DS363/AB/R, December 21, 2009, at <http://www.wto.org>. The U.S. Government requested consultations in this case on April 10, 2007, supported by the China Copyright Alliance (a coalition consisting of MPA, IFTA, RIAA, IFPI and AAP).

⁷¹Specifically, China must fix its measures in ways which will: open its market to wholesale, master distribution (exclusive sale) of books and periodicals, as well as electronic publications, by foreign-invested companies including U.S. companies; permit sound recording distribution services, including electronic distribution, by Chinese-foreign contractual joint ventures, including majority foreign-owned joint ventures; allow the participation of foreign capital in a contractual joint venture engaged in the distribution of reading materials or audiovisual home entertainment products; ease commercial presence requirements for the distribution of DVDs; and do away with China’s 15-year operating term limitation on foreign joint ventures.

- discard discriminatory commercial hurdles for imported reading materials, sound recordings intended for electronic distribution, and films for theatrical release.⁷²

In ongoing consultations over implementation of the WTO decision, the United States should seek to ascertain what the Chinese Government is doing to address WTO-incompatible restrictions and take other market-opening steps, specifically including:

1) how Chinese laws have been changed to allow U.S. companies to import freely into China (without going through the government monopoly) films for theatrical release, DVDs, sound recordings, and books, newspapers, and periodicals, and in particular, any steps being taken to amend the Foreign Investment Catalogue to eliminate the prohibition on foreign investment in the import of films for theatrical release, DVDs, sound recordings, and books, newspapers, and periodicals;

2) steps being taken to provide a simple process for foreign enterprises to notify and exercise their publication importation rights, and confirm that certain parts of the Regulations on Administration of Publishing (for example, Article 42) do not create new requirements on foreign enterprises to exercise their importation rights as to publications;

3) how Chinese laws provide market access to, and do not discriminate against, foreign companies wishing to engage in wholesale, master distribution (exclusive sale) of books and periodicals, as well as electronic publications, and allow the participation of foreign capital in a contractual joint venture engaged in the distribution of reading materials or audiovisual home entertainment products;

4) how Chinese laws allow foreign-invested enterprises to engage in the distribution of imported reading materials;

5) how Chinese laws ease commercial presence requirements for the distribution of DVDs; and do away with China's 15-year operating term limitation on foreign joint ventures;

6) how Chinese laws discard discriminatory commercial hurdles for imported reading materials, sound recordings intended for electronic distribution, and films for theatrical release, and in particular, how the laws avoid: improperly and discriminatorily limiting distribution for imported newspapers and periodicals to "subscriptions"; limiting such materials and other reading materials to Chinese wholly state-owned enterprises; and limiting the distributor of such reading materials to a State-owned publication import entity particularly designated by a Government agency; and

7) how the recently-revised GAPP rules on imported subscription publications ease the ability for persons in China to subscribe to imported publications, including those in the so-called "non-limited category," and how an individual wanting to subscribe to an imported publication may submit a subscription application to the publisher or distributor directly.

It is well past the time for the market access WTO decisions to be meaningfully implemented, in order to provide redress to the publishing, audiovisual, music, and other industries, and open access to the Chinese markets for their goods and services. Specifically, the March 19, 2011 deadline for full implementation has long passed. IIPA views it as critical that the U.S. Government urgently take proactive steps to ensure full Chinese Government implementation of its commitments, as well as ceasing discrimination of foreigners in the distribution of music online

⁷²For example, China must not improperly and discriminatorily limit distribution for imported newspapers and periodicals to "subscriptions," and must not limit such materials and other reading materials to Chinese wholly state-owned enterprises, and may not limit the distributor of such reading materials to a State-owned publication import entity particularly designated by a government agency. China may also not prohibit foreign-invested enterprises from engaging in the distribution of imported reading materials.

and lifting the restrictive monopoly/duopoly for foreign theatrical film importation into and distribution in China (both discussed below).

Discriminatory Censorship Practice With Respect to Sound Recordings (and AV Works): For several years, IIPA has complained that U.S. (and other foreign) right holders in music have to go through a different, and discriminatory, censorship review process from Chinese right holders with respect to online music. While the WTO Panel and Appellate Body, in a technical finding, concluded that they lacked sufficient information to determine whether this discriminatory censorship regime with respect to online music violated China's GATS commitments, this was not a "green light" for the Chinese Government to continue its discriminatory censorship practices. China's discriminatory regime is unfair and highly suspect under WTO rules. Promulgation of the September 2009 Circular on Strengthening and Improving Online Music Content Examination only exacerbated and complicated the issue by putting into place a censorship review process premised on an architecture ruled to be in violation of China's GATS commitments, namely, that only wholly-owned Chinese digital distribution enterprises may apply for censorship approval.⁷³ The Circular violates China's WTO commitments under the General Agreement on Trade in Services (GATS) to provide nondiscriminatory market access for foreign suppliers of sound recording distribution services; it violates China's commitments on trade in goods under the General Agreement on Tariffs and Trade 1994 (GATT); and it violates China's Accession Protocol commitment to authorize trade in goods by any entity or individual. China must revoke or modify the Circular to avoid making the country subject to an immediate challenge at the WTO. A set of newly amended *Measures on the Administration of Importation of AV Products* (2011), introduced a new definition for the term "publication of audio-video product" to include dissemination via Information Network. As a result, the *Measures* impose an additional, duplicative, and possibly confusing layer of censorship on online music.

Import Monopoly and Distribution Duopoly for Films/Master Contract: While the WTO Panel and Appellate Body concluded that the China Film Group duopoly did not constitute a "measure," and cited the lack of evidence that a third distributor had been denied upon an application from operating in the Chinese market, the decisions equally make clear that if a *de facto* duopoly exists as to foreign films only, China would be in violation of its WTO obligations. The decisions confirm that, to be consistent with WTO rules, China must approve legitimate applications for other theatrical film importers and distributors in China, a key step that would significantly open up this market to competition, and additionally, would open up to competition and negotiation the underlying agreements upon which foreign films are now distributed in China. Furthermore, such approval of other importers and distributors of foreign films in China along with the corresponding importation rules and processes should be applied in a transparent, timely, non-discretionary and non-discriminatory manner.

Indigenous Innovation Policy: Over the past several years, China has been rolling out a series of policies aimed at promoting "indigenous innovation." The apparent goal of many of these policies is to develop national champions by discriminating against foreign companies and compelling transfers of technology. Of particular concern are policies that condition market access on local ownership or development of a service or product's intellectual property or aim to compel transfers of foreign intellectual property and research and development to China. A broad array of U.S. and international industry groups have raised serious concerns that these policies will effectively shut them out of the rapidly growing Chinese market and are out of step with international best practices for promoting innovation. IIPA shares these concerns and strongly believes that the best ways for China to further enhance its innovative capacity are to: further open its market to foreign investment; provide incentives to innovate by ensuring full respect for intellectual property rights including patents, copyrights and trademarks; avoid policies which establish preferences based on nationality of the owners of the intellectual property rights; and act forcefully and promptly to prevent misappropriation of such rights. The latest developments include the Chinese Government's announcement that they would be investing US\$1.7 trillion over the next five years in what are being dubbed "Strategic Emerging Industries" (SEIs). This initiative, on top of a Supreme People's Court Opinion on IP released in mid-December 2011 which seems to instruct lower courts to make decisions that assist domestic "cultural" industries, once again raise the specter of discriminatory policies.

⁷³The Circular also contains the discriminatory requirement of having an "exclusive license" for foreign sound recordings. This onerous and discriminatory requirement should be removed to allow foreign record companies to freely choose their licensees and the scope of their licenses in China.

The 2011 JCCT outcomes included a commitment by the Chinese Government to eliminate by December 1, 2011 any catalogues or other measures by provincial and municipal governments and autonomous regions linking innovation policies to government procurement preferences. This follows 2010 JCCT, 2011 Obama-Hu Summit, and May 2011 S&ED statements and commitments by the Chinese government to “delink” innovation policies from government procurement, including a clear commitment in the recent S&ED to “eliminate all of its government procurement indigenous innovation products catalogues.” We are hopeful that these developments will be permanent.

Software Procurement Preferences: The business software industry remains concerned that China’s efforts to legalize software use in government agencies and SOEs may be accompanied by mandates or preferences favoring the acquisition of Chinese software over non-Chinese software. This is inconsistent both with China’s efforts to join the WTO’s Government Procurement Agreement and with China’s commitment in its WTO working party report that the government “would not influence, directly or indirectly, commercial decisions on the part of state-owned or state-invested enterprises, including the quantity, value or country of origin of any goods purchased or sold” The Chinese government should, consistent with its WTO and JCCT obligations, refrain from instructing or encouraging government agencies or SOEs to implement preferences for Chinese software in carrying out its legalization efforts, and should communicate this policy to relevant government agencies at the central, provincial and local levels.

Local IP Ownership Requirements for Information Security Products Including Software: The Business Software Alliance reports that the “Multi-level Protection Scheme on Information System Security” (MLPS) sets major restrictions on procurements of software and other information security products for an overly broad range of information systems the government considers sensitive. Among other requirements, procurements of such products are limited to those with IP rights owned in China. This applies to procurements by the government and increasingly to procurements by SOEs and others in the public sector. IIPA is concerned that this Scheme defines “critical infrastructure” in too broad a way, thus restricting foreign cyber-security products from the Chinese market based on nationality of the owner of the IP.

Delays in Content Review of Entertainment Software Products/Ban on Consoles: The entertainment software industry continues to face lengthy delays of weeks or sometimes even months in the GAPP censorship approval process, wiping out the already-short window for legitimate distribution of entertainment software products. The Chinese Government also fails to immediately seize infringing copies of titles intended for release while they are still undergoing censorship review, resulting in inadequate protection and enforcement. In addition, an onerous ban on the sale and importation of videogame consoles remains a major barrier. The current ban on the sale and importation of electronic gaming devices (i.e., video game consoles), in effect since a 2000 *Opinion on the Special Administration of Electronic Gaming Operating Venues*, stymies the growth of the entertainment software sector in China and denies Chinese consumers the benefits of these technologies, including use of parental controls. The ban has also been extended to development kits used in the creations and development of video games. The ban impacts not only foreign game publishers, but also domestic Chinese developers, who are unable to obtain such kits given the prohibition on their importation.

Barriers for the Independent Film Industry: The independent film industry continues to experience limited access to the Chinese marketplace, especially for theatrical distribution since independent product is virtually never accepted for revenue-sharing under the existing 20 foreign film quota system. Nevertheless, even when films are imported and theatrically distributed in China (on a flat-fee distribution basis), both the financial return and the license fees for the underlying films are massively eroded by the lack of qualified theatrical distributors who can adequately support a nationwide theatrical release and the imposition of non-negotiable license terms which do not reflect a truly competitive marketplace with fair access for U.S.-based licensors. Additionally, China’s nontransparent censorship process for films creates uncertainty with commercial transactions and poses a significant market access barrier to independent film companies. Local distributors have reported the inability to obtain official written responses from the censorship authorities and have used a film’s censorship rejection as a way to avoid payment of license fees.

TRAINING AND PUBLIC AWARENESS

Once again in 2011, MPA and BSA were active in training and awareness programs throughout China. MPA China offers and/or participates in approximately 10 training sessions each year involving various government agencies and trade associations, which in this year included: 1) Annual Greater China Law Enforcement Seminar; 2) Judges Training on Internet Content Protection; 3) Training for Cultural Law Enforcement Agencies in Beijing and Shanghai; 4) Anti-Camcording Trainings for Theater Owners organized by CFDEA, and many other government and industry events, including a year-end training in November 2011 to alert theater professionals of the high risk for camcording during the year-end holiday movie season. Overall the industry reached over 300 Chinese Government officials throughout the year.

BSA conducted: 1) “audit tool trainings” in Shenzhen (for five judges from the local court in April 2011) and Qingdao (for ten officials from the Qingdao Copyright Administration at the end of October 2011), to promote the use of such tools in administrative and civil actions involving end-user piracy of business software; 2) the “Create Genuine Hub” program to promote legal software usage; 3) the launch of the Software Asset Management (SAM) Advantage Program; 4) a BSA-organized training for the Computer Program Centre of China (CPCC) on “SAM ISO Standard and SAM Processes” for the “NCAC SAM Pilot Program for 30 companies”; 5) a direct marketing campaign to educate enterprises on the legal risk of using pirated software; 6) assistance to five companies in Kunshan to successfully implement a pilot SAM program; and 7) an IDC program to launch the white paper, “Security Risks of Pirated Software.” In 2010 and again in 2011, BSA also organized over 300 enterprise legalization and SAM trainings in Beijing, Shanghai, Guangzhou, Shenzhen, Qingdao, and Nanjing, SAM training for 100 central SOEs and 80 financial companies in Shanghai, and provided SAM tools for a free trial for 10 financial companies.

Four training seminars were organized or co-organized by the recording industry and foreign copyright owners in Beijing, Fujian, Hubei and Shandong. More than 300 attendees included judges, prosecutors, law enforcement, academics, and Internet service providers, on a variety of topics such as criminal punishment of Internet piracy cases, copyright protection in the P2P environment, and the proposed copyright law amendments.

COSTA RICA

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

2012 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation:¹ IIPA again in 2012 recommends that Costa Rica be elevated to the Priority Watch List, primarily due to actions on the part of Costa Rica not to roll back existing protection for performers and record labels, and instead to replace a regime based on national treatment with a discriminatory one.

Executive Summary: Contrary to commitments that the Government of Costa Rica has made in past years to sound recording producers and artists that the full range of rights provided under international treaties would be available, President Laura Chinchilla has supported decrees that foreclose important sources of revenue to the industry, forcing many to make detrimental decisions about their investments in the country. The music industry's business model is transitioning from the sale of hard goods to the licensing of transmissions, and as a result removing existing rights to be remunerated for the transmission of music could not be more poorly timed. The music industry is also struggling to collect fees for the public performance of its music, as required by Costa Rican law and court decisions. Government efforts to coordinate IPR enforcement policy have been scant and produced few results. The government as a whole has failed to establish lines of communication with industry to resolve this and other needed reforms. As an FTA partner of the United States, Costa Rica should be implementing government-wide software legalization, as required by the Dominican Republic-Central America-United States Free Trade Agreement (CAFTA-DR), and generally be held to a high standard of effective copyright enforcement.

Copyright owners report two positive incremental developments in 2011: First, a unit specialized in IP within the local Prosecutor's Office has already begun work and is expected to be launched officially in 2012, a long-awaited development that copyright industries hope will lead to improved enforcement results. Second, pending legislation was passed to amend the Ley de Observancia, to provide criminal remedies for violations of neighboring rights. But major obstacles still remain in Costa Rica's court procedures that prevent effective and efficient copyright enforcement.

PRIORITY RECOMMENDED ACTIONS FOR COSTA RICA IN 2012

- Withdraw Bill No. 17,719, which implements reservations to international obligations that would result in denying compensation to U.S. performers and record labels, and creates a new exception to performance rights for commercial broadcasters, and retract the executive decree implementing this not-yet-adopted bill.
- Properly implement Costa Rica's remaining CAFTA obligation – to adopt Internet Service Provider (ISP) liability provisions – by amending the December 2011 executive decree to correct lengthy time periods by which ISPs forward notices to users for the unauthorized exchange of protected content over the Internet.
- Officially launch and support a new specialized IP Prosecutor's Office under the Attorney General.
- Implement in practice the software asset management practices in government agencies called for in the 2002 Decree and required by CAFTA-DR.
- Improve training of enforcement officials on criminal and civil copyright cases (including police, officials from the Judicial Investigation Office (OIJ), prosecutors and judges).

¹For more details on Costa Rica's Special 301 history, see IIPA's "History" appendix to this filing at <http://www.iipa.com/pdf/2012SPEC301HISTORICALCHART.pdf>, as well as the previous years' reports, at <http://www.iipa.com/countryreports.html>. For a summary of IIPA's 2012 global issues, see our cover letter at <http://www.iipa.com/pdf/2012SPEC301COVERLETTER.pdf>.



COPYRIGHT PIRACY IN COSTA RICA

Both physical and digital piracy in Costa Rica have caused such major losses that many in the content industries have been forced to leave the market. For example, only two international record companies still conduct operations through offices and staff employed in the country. Unfortunately, one of them has had to significantly reduce operations in 2011. Further cutbacks could be necessary in 2012. Local independent producers have practically disappeared because of the lack of real opportunities to sell recorded music profitably.

Hard goods piracy: The music industry reports that piracy of sound recordings and music continues to be rampant in Costa Rica, particularly in the form of optical disc (OD) piracy. The level of physical piracy in Costa Rica has increased to approximately 85% in the past year. Much of this OD piracy involves local CD-R burning. The downtown San Jose area, in particular, is the site of uncontrolled distribution and sale of burned CDs on the streets and in flea markets. Several groups are involved in the importation of blank media and equipment, but the local recording industry has not been able to develop a case yet. Local experts estimate that approximately 20 million units of CD-Rs and DVD-Rs enter Costa Rica annually.

Internet piracy: Internet piracy, as everywhere else in the region, is a growing problem in Costa Rica. It largely is concentrated on peer-to-peer (P2P) networks and via links to infringing content hosted on one-click hosting sites or “cyberlockers” posted on personal blogs and web forums. Internet piracy is particularly damaging because of its harm to the development of legitimate online distribution services. As Costa Rica continuously achieves wider access to the Internet, its attention to online enforcement will become more important. With more home and business users online, access to pirated products being sold for download or ordered in hard copy from the Internet will continue to rise. Internet cafés continue to offer a forum for consumers to download files containing unauthorized copies of copyrighted materials. For example, Internet cafés, especially in the capital city area, offer burning music CDs services to customers. In addition, music is downloaded from the Internet using P2P networks (such as eDonkey and ARES). Most of the digital market in Costa Rica involves “master-tones” and full tracks downloaded to smart phones and similar devices.

Currently there are no discussions between the content community and the ISPs regarding Internet piracy on their networks.

Business software piracy and lack of CAFTA implementation: The business software industry reports that the most devastating form of piracy in Costa Rica continues to be the use of infringing or unlicensed software by legitimate businesses and government agencies. Software legalization in government agencies should be an important public policy goal, for its own sake and to set a good example for the private sector. Yet it is a CAFTA obligation that has not been implemented. The Business Software Alliance (BSA) reports that it has not seen pirated software products on the streets. In recent years, the PC software piracy in Costa Rica has been among the lowest in Latin America.² This low level, however, is due more to cultural reasons than effective enforcement actions. Given the challenging financial times, there is a concern that more legitimate businesses may be tempted to use infringing software instead of purchasing legitimate product or licenses. Costa Rica produces and exports at least \$400 million worth of software per year, and there has recently been greater awareness by the government regarding protecting the IP industry for its overall economic health.

²BSA's 2011 software piracy statistics will not be available until after the filing deadline for this submission, but will be released in May 2012, at which time piracy rates and U.S. software publishers' share of commercial value of pirated software will be available at www.iipa.com. In 2010, the software piracy rate in Costa Rica was 58%, representing a commercial value of unlicensed software attributable to U.S. vendors of US\$33 million. These statistics follow the methodology compiled in the Eighth Annual BSA and IDC Global Software Piracy Study (May 2011), <http://portal.bsa.org/globalpiracy2010/index.html>. These figures cover packaged PC software, including operating systems, business applications, and consumer applications such as PC gaming, personal finance, and reference software – including freeware and open source software. They do not cover software that runs on servers or mainframes, or routine device drivers and free downloadable utilities such as screen savers. The methodology used to calculate this and other piracy numbers are described in IIPA's 2012 Special 301 submission at <http://www.iipa.com/pdf/2012spec301methodology.pdf>.

COPYRIGHT AND LEGAL ISSUES IN COSTA RICA

Recent reservations to two treaties and pending legislation affecting the recording industry: The main source of concern for the music industry in Costa Rica began with the government's August 2009 action to adopt reservations to the two international treaties protecting neighboring rights (Article 12 of the Rome Convention and Article 15.1 of the WIPO Performances and Phonograms Treaty (WPPT)). Those reservations effectively exempt broadcasters from performance rights payments to performing artists and record producers. The Ministry of Culture did not engage the copyright sectors to participate in these legislative initiatives that will have a significant impact on the market for rights holders. On May 3, 2010, President Oscar Arias signed Executive decree No. 36,014-MP-COMEX-J, implementing the reservations into Costa Rican law. Just days after President Laura Chinchilla took office, on June 17, 2010, her administration published the decree in the official gazette. This was despite the President's statements earlier that year that she intended to reverse the reservations. The music industry's business model is transitioning from sale of hard goods to the licensing of transmissions, making the removal of existing rights to be remunerated for the transmission of music particularly detrimental to prospects for investments made in the country in reliance on those rights. The Costa Rican Government should make every effort to ensure that performers and producers are being remunerated for the commercial exploitation of their music, and the United States should strenuously object to the introduction of practices that discriminate against U.S. interests.

In October 2009, legislation was introduced that, if adopted, would codify the contents of this Executive decree. Bill No. 17,719, which was presented to "regulate the promotion and broadcast of musical works and performances of Costa Rican artists and authors by broadcasters," remains at Congress and saw no major movement in 2011. The draft legislation amends Articles 78 and 82 of the 1982 Copyright Law in order to create a new exception to the communication to the public right of recording companies, artists and performers, in favor of traditional over-the-air broadcasters. In an environment in which the licensing of signals is largely replacing the sale of recorded music, the Government of Costa Rica should reverse these limitations, which will have a very prejudicial impact on Costa Rica's music community.

CAFTA implementation: Costa Rica has yet to fully implement its IPR obligations under the CAFTA-DR. In 2000, Costa Rica amended its 1982 Copyright Law to comply with certain obligations under the TRIPS Agreement and the WIPO Internet treaties (WIPO Copyright Treaty and WIPO Performances and Phonograms Treaty). To implement the copyright- and enforcement-related aspects of CAFTA, Costa Rica passed amendments to two separate laws – its Copyright Law (which was included in a broader intellectual property rights reform package) and its Law on Enforcement. The Copyright Law amendments, Law No. 8686 (2008), accomplished the following: extending the term of protection for works, performances and producers of phonograms; improving definitions; amending certain provisions regarding contracts and transfers; modernizing the scope of certain exclusive rights; and updating exceptions and limitations, all aimed at comporting with the CAFTA obligations.

Now that CAFTA-DR is in force in Costa Rica, the trade benefits Costa Rica has received under various U.S. programs have been phased out. During 2009, Costa Rica had \$1.17 billion in exports to the U.S. under the CAFTA-DR. Meanwhile, two important areas among Costa Rica's FTA obligations still need to be addressed.

Internet piracy measures: In 2011, Costa Rica implemented CAFTA provisions establishing limited liability of Internet Service Providers (ISPs) that take certain actions in response to copyright infringement committed by users of their networks and services. Decree 36,880-COMEX-JP, published in the official gazette on December 16, 2011, fulfills most of the requirements of such provisions. Nevertheless, the decree sets forth overly long time periods by which ISPs are to forward notifications sent by right holders, and in practical terms creates a serious obstacle for the enforcement of rights in the digital environment. As a matter of example, the decree allows an ISP up to 45 days just to forward a single notification to its subscriber. In the modern market for copyrighted works, the critical time for rights holders to recoup their considerable investment can be a matter of weeks before consumer interest begins to wane. If copyright owners must compete with free unauthorized copies that can remain online for over a month, that opportunity is lost.

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

The Law on Enforcement (*Ley de Observancia*): Amendments to the Law on Enforcement (Law No. 8656 of 11 August 2008 amending Law. No. 8039 of 12 October 2000) went into force in 2010. These provisions address a number of elements of the 2000 law, *Ley de Procedimientos de Observancia de los Derechos de Propiedad Intelectual*, that were not TRIPS-compliant and were impediments to effective enforcement. It also responded to a number of matters needed for CAFTA implementation, including *ex officio* authority for police investigations; protection and remedies against the circumvention of technological protection measures and rights management information; pre-established (or statutory) damages in civil judicial proceedings; criminal sanctions regarding encrypted program-carrying satellite signals; civil remedies including seizures, actual damages, court costs and fees, and destruction of devices and products; and provisions for injunctive relief, destruction of infringing materials and equipment, and border measures. In 2011, pending legislation was passed to amend the *Ley de Observancia* further, to clearly provide criminal remedies for violations of neighboring rights.

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

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

Apart from the lack of political will by prosecutors, several other legal deficiencies have contributed to the problems with poor copyright enforcement in Costa Rica through 2011. Additional issues not addressed in the CAFTA implementation packages, but long highlighted by the copyright industries, include the following:

- Public officials, not only injured parties, must be able to file criminal actions for IP violations ("*acción pública de instancia pública*"). This means providing police with full *ex officio* authority. Unfortunately, rights holders must still file a complaint (*denuncia*) in order to get a criminal prosecution.
- The objectionable "insignificance principle" ("*principio de lesividad e insignificancia*") was not removed from the Criminal Procedural Code so that it would no longer apply to intellectual property infringements.
- Businesses engaged in piracy operations should be closed.

COPYRIGHT ENFORCEMENT IN COSTA RICA

IIPA and its members report that while some aspects of the legal system function well, enforcement authorities in Costa Rica are not dedicating resources to the music piracy problem, leaving a number of copyright enforcement deficiencies in the Costa Rican legal and enforcement system. The national police and prosecutors are responsible for the anti-piracy actions in Costa Rica, but street operations against points of sale for illegally burned CDs are rare. There are no major operations against digital jukeboxes that contain illegal music files despite complaints filed on a regular basis by industry representatives in San Jose. The recent creation of a specialized IP unit within the Prosecutor's Office, which is to be launched officially in early 2012, is a very positive move to address the lack of focus or cooperation that has been a major obstacle for the copyright industries at the prosecutorial level. In past years, only some very limited anti-piracy actions were conducted, many of them with the cooperation of the municipality of San Jose. Going forward, police forces will need training to direct reports to the IP prosecutor's office.

In what appeared to be a positive development that was confirmed by local representatives of the recording industry, the Government of Costa Rica in 2009 published an executive decree creating an Interministerial Committee to oversee and implement the country's IPR enforcement policies. The Committee operates within the Ministry of Justice, and also includes the Ministry of Foreign Trade (COMEX), the Investigations Police, the Copyright Registry, and the Attorney General's Office. Unfortunately, the Committee has met only twice since its creation, and nothing has come from those meetings.

On the heels of outgoing Attorney General Francisco Dalanese and a history of ineffective policy, the new Attorney General appointed in 2011, Jorge Echavarría, made an effort to change the course set by his predecessor, meeting with public IP officials including the Copyright Register in the summer of that year. As a result, the Attorney General's Office announced that it would increase attention to IPR enforcement, provide additional resources for border enforcement, and prosecute copyright violations as organized crime. At this time, local prosecutors are conducting investigations of copyright infringements, rather than dropping the cases as they have in the past. However significant results have not materialized. The Attorney General's resolution has yet to penetrate the lack of coordination between the investigation police and the judiciary, leaving, for now, Costa Rica's growing piracy problems unaffected.

The Costa Rican judicial system, both criminal and civil, suffers from a lack of expertise and experience necessary to enforce the copyright and criminal laws. Training programs are necessary for prosecutors, judges and the police authorities. Local copyright industries have taken their own steps to establish a committee at the Professional Bar of San Jose, which aims to advise enforcement authorities of emerging and urgent problems. The Government has taken no other steps to improve the overall enforcement of IPR.

Police cooperation is positive but needs more resources: Some municipalities with their own police forces have raided and confiscated hundreds and sometimes thousands of music and video CDs from street vendors, but only in response to requests from rights holders rather than at a systemic level. These efforts do not go so far as to investigate the supply chain of the pirated and counterfeit merchandise, or to initiate prosecution.

The recording industry's relations with municipal police units remain positive; raids are taking place and infringing materials are being seized (these raids just do not go forward for prosecution). Two raids were carried out by the recording industry in 2011, resulting in the licensing of one company dedicated to the importation of digital juke-boxes containing hard discs with pirate copies of sound recordings. The local anti-piracy team did carry out some actions last year in markets and warehouses with the support of municipal police forces. Unfortunately, these actions have not had any impact on the piracy levels due to a lack of intensity in the raids. BSA is not aware of any pirated business software being seized in such raids.

The need for prosecutorial attention to copyright crimes: Prosecutors have historically had very negative attitudes toward pursuing copyright cases and lengthy delays are major impediments to effective criminal enforcement in Costa Rica.

Procedural delays in criminal cases might be avoided if it were not for the policy of the General Attorney's Office to require that piracy complaints be submitted to the prosecutor's office before being sent to police authorities. This policy results in many cases being dropped across the country. Further, court officials need to be able to order *ex parte* raids based exclusively on sufficient evidence offered by private plaintiffs, as allowed by the Criminal Procedural Code. The lack of *ex officio* provisions in the current law further impedes any anti-piracy activities. Rights holders continue to be stymied in bringing criminal complaints due to legal determinations of "insignificance of the crime," upon which cases are simply dropped.

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 participate actively during software piracy raids. Judges must grant court orders to do communications surveillance but are untrained in copyright investigations, impeding the collecting of information that will be admissible to prompt a raid. This practice violates plaintiffs' right to due process, and jeopardizes the success of the action by removing experts who could otherwise provide prosecutors with valuable technical assistance to determine whether an infringement has occurred. Criminal judges should accept the information and evidence offered by private plaintiffs, and order the raid if such information and evidence is sufficient, without requesting prior investigation reports, consistent with Costa Rican legislation.

Need for specialized IPR prosecutors: The copyright industries have supported the creation of a specialized Prosecutor's Office with nationwide jurisdiction so that criminal IP cases could move forward more swiftly and with more specialized expertise. Given the significant delays and observed lack of proficiency of prosecutors and judges, the creation of this special office remains a pressing priority. It has been reported that the Office has begun its work even though it has not been launched officially. The industries hope that the newly appointed Attorney General, Jorge Chavarria, will push forward legislation to allocate funds and publicly announce the creation of this office.

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

INDIA

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

2012 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: IIPA recommends that India remain on the Priority Watch List in 2012.¹

Executive Summary: India has the potential to be one of the world's leading markets for the creative industries – both foreign and domestic. The country produces the greatest number of films in the world (over 1,000 full-length feature films per year), boasts a creative and diverse music market, a prolific publishing industry (19,000 publishers producing 90,000 titles per year), and a vibrant software market.² Key economic studies (including by international organizations like UNCTAD and the Motion Picture Distributors Association) indicate that growth will continue. However, physical, online, and mobile piracy (through both mobile uploading/downloading, as well as mobile applications being used to infringe), circumvention of technological protection measures (TPMs), e.g., through the use of mod chips and game copiers, illegal camcording of movies from cinema screens, print and photocopy piracy, pay TV theft, and unlicensed use of business software, stifle the market and keep India's creative industries from reaching their potential.³ Existing and proposed market access and related barriers in India affect the film, business software, and entertainment software industries, further fueling piracy.

Industry reports some important enforcement activities and court decisions in 2011 that have helped curb piracy experienced in some states, and positive new initiatives by the central and certain state governments to promote the use of legal software in government agencies and enterprises. The Indian Government also took some measures to combat copyright infringement, including actions to disable access to certain notorious piracy websites in July, August, and December 2011. IIPA welcomes the Indian Government's announcement of an initiative to develop a national IPR policy and to engage with industry stakeholders in this process. It is critical that this effort lead to better coordinated, national government-level efforts to bolster IP enforcement. State Nodal officers have been established throughout India and should be encouraged to take more *suo moto* raids to deter physical piracy. Industry reported some breakthroughs in court cases, particularly in Delhi, in 2011, with some impressive settlement amounts and plea bargains. Nonetheless, the number of cases pending remains far too large, and other problems continue to hinder the effectiveness of judicial processes, especially outside Delhi. New IP courts with expert judges and trained prosecutors need to be established. The current copyright law underwent a modernization effort in 2011, although the legislative process unfortunately stalled in December 2011. The April 2011 Information Technology (Intermediaries Guidelines) Rules, 2011, further defined the role of intermediaries in dealing with online infringements (under the Information Technology Act, 2000), but did not make all needed adjustments. It is hoped the Copyright Bill 2010, amendments put forward in 2011, along with other additional improvements suggested in this filing, will be re-introduced soon. To achieve Prime Minister Manmohan Singh's call for India to experience a "decade of innovation," the Indian Government should swiftly pass and implement an improved law and seek continued momentum in enforcement to address the many piracy challenges identified herein.

Priority Actions Requested in 2012

Enforcement

- Create a national anti-piracy task force with goals to reduce piracy, *inter alia*, by working with state Nodal officers,⁴ providing them with significantly increased resources; provide more accountability and power to the

¹For more details on India's Special 301 history, see Additional Appendix available at <http://www.iipa.com/pdf/2012SPEC301HISTORICALSUMMARY.pdf>. Please also see previous years' reports at <http://www.iipa.com/countryreports.html>.

²For example, it is estimated that software and services industries alone accounted for nearly 5% of the entire Indian GDP in 2008, according to NASSCOM, while a recent industry report pegged the Indian film and television industry's total gross output at US\$20.4 billion, higher than the advertising industry. PricewaterhouseCoopers, *Economic Contribution of the Indian Film and Television Industry*, March 2010.

³For example, the legitimate music market in India has shrunk in recent years according to IMI (26% between 2006 and 2009).

⁴Nodal officers in the Indian State enforcement system are designated contact individuals relevant to intake and response.



recently constituted task force by FICCI under the aegis of the Ministry of Human Resource Development (MHRD).

- Reinvigorate “IP cells” within the state police, provide them with significantly increased resources, and establish specialized IP prosecutors, to be more effective in addressing piracy, including Internet/mobile device piracy.
- Encourage judicial reform, including establishing IP courts or panels with expert judges and prosecutors, which will help in accelerating the adjudication process in criminal and civil cases, and imposing deterrent fines and imprisonment, and civil remedies, including statutory damages.
- Develop a national-level database to track IP criminal cases.
- Increase the number of *suo moto* raids, including against corporate end-user software piracy, and empower government tax inspectors, including external and internal auditors, to check and account for genuine software licenses inside organizations, whether public or private.
- Mandate management officials of companies to account for and declare genuine software licenses in their books of accounts and financial statements, including by providing a regulation under the existing Companies Act.
- Promote and require the use of legitimate (original) books and scholarly journals at educational institutions.
- Empower customs to effectuate *ex officio* seizures, followed by destruction, of pirate goods.

Legislation

- Ensure the new version of Copyright Bill 2010 (as amended in 2011) contains WCT- and WPPT-consistent protections, does not restrict the ability to contractually transfer rights, and does not contain compulsory licenses or other provisions contrary to India’s international obligations.
- Adopt effective anti-camcording law.
- Deal with damaging “pre-release” piracy, with provisions comparable to those adopted in the U.S.
- Adopt statutory damages in civil cases; allow restitution to be awarded in criminal cases; and establish enhanced penalties for “pre-release” piracy.
- Provide that *ex parte* seizure orders should be granted to copyright owners as a matter of right in civil cases.
- Add a provision to the Copyright Law that refusal to comply with a court order shall result in a defendant being held in contempt.
- Adopt procedures allowing courts granting Anton Pillar orders in infringement cases to allow for preservation of evidence, and thereby minimize harm caused by defendant’s delay of proceedings as the evidence can be preserved by court appointed commissioners.
- Amend Indian tax laws to classify software piracy as a form of tax evasion and define corresponding tax violation rules in line with international best practices.
- Regulate production of optical discs including a licensing requirement, among other provisions.
- Provide tax benefits for associations involved in anti-piracy actions and capacity building.

Market Access

- Eliminate significant market access barriers including those highlighted herein which are imposed on the motion picture, entertainment software, publishing, and business software industries.

PIRACY AND ENFORCEMENT UPDATES IN INDIA

Overall, the piracy landscape is changing in India as Internet and broadband penetration widen, and thus online forms of piracy have become more prevalent. The ubiquitous use of mobile devices and the rapid expansion of mobile and console-based game playing have led to new opportunities for right holders but unfortunately also to new challenges, as evidenced by the spread of mobile device piracy and modification chips for circumventing TPMs used to protect console-based games. Losses are very difficult to calculate for most industries, but for example, the music industry estimates a total loss of over \$430 million in 2011 (the largest percentage of that attributable to mobile device piracy) and 95% music piracy online, while the business software industry reported that the rate of PC software piracy in 2010 was 64% (down from 65% in 2009) with a commercial value of unlicensed U.S. software in

2010 estimated to be almost US\$1.4 billion. A couple of additional studies have in recent years attempted to estimate or quantify harm due to piracy in India.⁵

Internet and Mobile Piracy: With the growth of Internet connectivity, and increasing mobile penetration Internet and mobile piracy have become key concerns for many in the copyright industries in India. Nielson reports 80 million Internet users in India as of November 2011, with 12.34 million broadband users, and 594.7 million mobile subscribers (but other estimates indicate the number is closer to 700 million), 240 million of whom now experience the Internet through their phone.⁶ The industries report increases in illegal downloading sites (such as *songs.pk*), P2P filesharing and BitTorrent, streaming sites, deep linking sites, blogs, forums, or social network sites being used to direct people to infringing files, illegal storage of massive amounts of copyrighted material through the use of one-click hosting sites (sometimes referred to as cyberlockers), and piracy through auction sites.⁷ For the business software industry, Internet piracy takes the form of auction sites and sites offering unauthorized copies of software for download.

For the motion picture industry, sites like *tamilwire.com*, *moviesmobile.net*, *bharatmovies.com*, *tamilthunder.com*, *bwtorrents.com*, *desitorrents.com*, *tamiltorrents.net*, *doregama.in*, *dctorrent.com*, *hindilinks4u.net* and many others cause significant harm. These sites play on the demand for local language dubs of U.S. films as well as Indian films. A study undertaken by MPDA has India among the top ten countries in the world for Internet piracy, as pirated films out of India appear on the Internet in an average of 3.15 days.⁸ Further, the Motion Picture Association of America (MPAA) indicates that during 2011, Peer Media Technologies reported that users initiated over 25 million downloads/uploads of unauthorized copies of major U.S. movie titles via certain P2P protocols in India.⁹ The entertainment software industry also reports a rise in online piracy in India, as India placed seventh in the world in 2011 in the number of connections by peers participating in the unauthorized file sharing of select Entertainment Software Association member titles on public P2P networks, up from eighth place in 2010. For the music industry, in addition to 95% piracy online, there are two problems of increasing concern. One is mobile device piracy, in which retail establishments sell or offer for free flash cards or other storage devices (or chips) for mobile phones preloaded with music to customers (sourced either from pirate or legitimate CDs or downloaded from pirate websites or through P2P filesharing services). In addition, increasingly, mobile applications – infringing applications, for example, operating on iOS and Android phones – are used to make available Indian and international music to mobile subscribers without authorization.

The legal and enforcement infrastructure in India is just beginning to come into place to address these challenges, but industry fears the response may not be as effective and expeditious as needed. There were several positive developments in 2011. First, industry has used John Doe orders (known locally as “Ashok Kumar” orders), commonly used in India to target individual sellers and cable TV operators, to have ISPs disable access to infringing materials. In July 2011, a local Indian film studio (Reliance) in the process of releasing a major Indian film (*Singham*) in the market, and following up on a similar request by another film studio (having released another major Indian motion picture earlier in the year), obtained an “Ashok Kumar” Order, allowing it to send cease and desist notices to

⁵According to a 2008 report, “The Effects of Counterfeiting and Piracy on India’s Entertainment Industry” published by the U.S. India Business Council and Ernst & Young, the Indian film industry lost an estimated US\$959 million and 571,896 jobs due to piracy.

⁶A report by comScore and the Telecom Regulator Authority of India (TRAI) suggests India had 11.21 million broadband users as of March 2011, and Nielson reports that the number increased to 12.34 million by November 2011. See Manan Kakkar, *Nielson India Shares Numbers About Internet Connectivity and Brand Reach*, ZDNet, November 29, 2011, at <http://www.zdnet.com/blog/india/nielson-india-shares-numbers-about-internet-connectivity-and-brand-reach/776>.

⁷The independent film and television segment of the motion picture industry (IFTA) reports that Internet piracy remains a significant export constraint for independent producers and distributors, the majority of which are small to medium sized businesses. Independent producers partner with local authorized distributors in India to finance and distribute their films and programming. These authorized distributors find it almost impossible to compete with pirates. Internet piracy also prevents the establishment of legitimate online distribution platforms and services for consumers, which independents can use to finance future productions.

⁸See Motion Picture Distributors Association (MPDA) (Prepared by PricewaterhouseCoopers), *Economic Contribution of Indian Film and Television Industry*, 2010, at <http://mpda.in/press/EconomicContribution.pdf>, at 10.

⁹A major U.S. movie is defined as a movie release in 1,000 or more theaters in the U.S. This estimate reflects only a subset of movie-related piracy activity occurring during the monitoring period, as it accounts only for initiated downloads or uploads of major U.S. films through the listed P2P protocols. It does not include: 1) downloads/uploads of unauthorized copies of movies that are not major U.S. releases, including local titles, through these P2P protocols; 2) downloads/uploads of unauthorized copies of any movies via other P2P protocols or through non-P2P technologies (e.g., websites); or 3) streaming of unauthorized copies of any movies via any technologies. Also, since local language title versions for scanning are not always available from established sources, and access to foreign language BitTorrent sites may fluctuate, results in certain countries are likely underrepresented.

disable access to its new film which was to be released two days later.¹⁰ Shortly thereafter the ISPs started some limited disabling of access to various notorious sites including *Megaupload.com*, *Mediafire.com*, and *Megavideo.com*.

Other successful industry actions included one initiated in 2010 by Alliance Against Copyright Theft (AACT) (MPA allied with the local Hindi film industry). In July 2011, the Mumbai Cyber Police arrested two suspected operators of the site *moviemax.in* in Gujarat, which was one of five locally based sites (among 99 notified to police), and the police have been helpful in ensuring those sites can be taken down as well, although industry has no confirmation as to the current status of the other four sites. One court case may also be helpful in defining the contours of liability for intermediaries in the online space and fostering greater cooperation among ISPs and other intermediaries. In *Super Cassettes Industries Ltd. v. Myspace Inc. & Another*,¹¹ decided in July 2011, the plaintiff was granted an interim injunction against the defendant whose social network was found to be secondarily infringing through allowing its “webspaces” or “places” to be used for sharing infringing materials. The local Indian record industry has been involved in this legal action, as well as other complaints filed with the Mumbai Cyber Cell against 23 other websites.

The record is less stellar when it comes to voluntary notice and takedown. As a result of overall lack of voluntary cooperation, it has been difficult for right holders to locate or identify infringers and Internet content providers (pirate websites). The Indian music industry, for example, notified authorities of more than 200,000 songs and operated hundreds of detections for pirated materials online in 2011, yet little has been achieved with regard to voluntary removal of infringing content hosted on servers, particularly those located overseas that are supplying the Indian market. The International Federation of Phonographic Industries (IFPI), the recording industry’s international affiliate, has been making requests for takedowns of overseas websites and content, but with only a 21.5% takedown rate in 2011, the problem has not been addressed effectively.¹²

Where investigations reveal websites have a nexus to or contact details in India, the music industry is bringing criminal complaints. In particular, the domestic recording industry is working intensively with the Mumbai, Delhi and Hyderabad police on Internet piracy issues. The film industry has also commenced criminal action against 99 pirate websites, seeking a remedy to disable access to these sites in India under the Copyright Act. *Moviemax* was one of these sites and two individuals suspected of operating the site were arrested in July 2011. Under the criminal laws of Maharashtra, the industry is hopeful that Magistrates there will issue interim site blocking orders (until final adjudication) to ISPs if the operators of the pirate websites fail to show at the criminal proceeding. With respect to mobile device piracy, the Indian music industry is bringing to the police more than 200 mobile device piracy cases per month. However, cases such as these are not high on the agenda of Indian police. Their Internet or mobile cases seem to focus principally on credit card fraud or false name and address cases. There persists in India a lack of knowledge regarding Internet and mobile piracy, and to address this, more training in various states is needed.

Retail Piracy, Circumvention of TPMs: Retail trade in pirated hard goods continues to harm the content industries in India. The predominant form of optical disc piracy in India is burned recordable discs,¹³ with content including music compilations in MP3 formats, pre-release music (primarily Indian titles and some international repertoire), motion pictures on VCDs, DVDs, and CD-Rs (most of which are available in major cities well before the local theatrical release of the title), and CD-ROMs and DVDs of business software, entertainment software and books/reference materials.¹⁴ Some imported discs and factory-produced discs from India have reportedly still been

¹⁰Similar enforcement was undertaken in August for the film *Bodyguard* and in December for *Don 2*.

¹¹*Super Cassettes Industries Ltd. v. Myspace Inc. & Another* (High Court of Delhi, July 29, 2011, IA No.15781/2008 & IA No. 3085/2009 in CS (OS) No. 2682/2008.

¹²The music industry reports takedowns in 1,811 cases out of 8,430 notices, or not even a 21.5% takedown rate.

¹³See *Accused Arrested in Mapusa Pirated CDs Case Out on Bail*, The Times of India – Goa, December 22, 2011, at http://articles.timesofindia.indiatimes.com/2011-12-22/goa/30546598_1_mapusa-police-cds-dydp-sammy-tavares (in which the shop “Suresh Music” at the Mapusa municipal market was raided, resulting in seizure of around 5,000 pirated CDs and a CD writer; the complaint was laid by famous *tiatr* artist Francis de Tuem, after finding a pirated CD of his latest *tiatr* titled *Illegal*, with the Mapusa police. See also *Pirated CDs Seized from House in Beemapally*, January 29, 2012, BuzzExpress, at <http://expressbuzz.com/cities/thiruvananthapuram/pirated-cds-seized-from-house-in-beemapally/358030.html> (reporting the seizure of massive numbers of DVD covers and hundreds of DVD-Rs burned with content, mostly pornographic, as well as burners; the accused was apparently able to produce 60 discs in a period of 3 seconds, which translates to many thousands of discs per hour).

¹⁴IIPA recently identified many markets known for their high volume of pirated DVDs, pirated software, and other counterfeit products. These include Richie Street and Burma Bazaar (Chennai); Bada Bazaar (Kolkata); Palika Bazaar (underground market in Delhi); Manish Market, Lamington Road, Fort District, Andheri Train Station, Thane Train Station, Borivli Train Station, and Dadar Train Station (Mumbai); SP Verma Road (Patna); GS Road (Guwahati); Sahid Narag (...continued)

detected in recent years.¹⁵ Publishers continue to report cases where many best-selling medical and technical textbooks are being loaded onto CD-ROMs and being sold for US\$5 or less. The pirate assembly of PCs (so-called hard-disk loading piracy) is also prevalent in India.¹⁶ There is almost no legitimate rental video market in India, since cottage pirate rental video stores dominate the market. Movie piracy hard goods remained available for open sale through street vendors who were most prominent in metropolitan areas like Mumbai, Delhi, Chennai, Kolkata, and Ahmedabad. The high rate of piracy of entertainment software in India is made possible by the widespread availability of circumvention devices used to bypass TPMs.¹⁷ Because India has yet to implement protection for TPMs consistent with the WCT and WPPT, vendors openly sell circumvention devices on the Internet, in retail stores and kiosks, or sell game consoles that are already modified.

Some industries experienced good support from Indian authorities, with law enforcement generally willing to conduct complaint-based raids and, e.g., running *suo moto* raids for the music industry. The music industry reports more than 1,400 raids during 2011, more than 570 of which were *suo moto* raids, while the number of piracy cases remaining in litigation stands at approximately 20,000. The motion picture industry reports good enforcement cooperation in some states such as Andhra Pradesh, and experienced some decline in DVD piracy at the street vendor level in certain cities such as Mumbai due to self-help enforcement activities by AACT and law enforcement. In 2011, AACT was involved in at least 376 raids, over 290 arrests, and seizures of over 730,000 pirate DVDs and 445 optical disc burners involving film industry products. Major hurdles remain the lack of anti-piracy teams among the Indian Government other than in Tamil Nadu and Kerala, the lack of dedicated prosecutors or police, and the fact that piracy continues to be in general a low-priority offense amongst enforcement authorities.

Signal Theft and Public Performance Piracy: Cable piracy is another problem which plagues the industry. Unlicensed films/titles are aired by local cable operators. At times even new releases are broadcast over cable networks. Cable operators in India routinely “underdeclare” the number of subscriptions for which they are being paid, so they pay right holders in movies and television content substantially less than they are rightfully owed. Given the size of the Indian market, the loss to the industry from such levels of underdeclaration is huge. These practices result in substantial losses in tax revenue to the Indian states, and several of the states have begun complaining loudly about losses. Public performance piracy (e.g., in hotels, bars, restaurants, retail establishments) is also widespread for the music and sound recording industry.

Corporate End-User Piracy of Business Software: The business software industry reports that end-user software piracy rates have gradually declined in recent years due to an increase in laptop shipments and tablets which come preloaded with branded software.¹⁸ There is also a decrease in the consumption of “white boxes” or assembled hardware, although as noted above, hard disk loading does remain an issue in some states. Moreover, companies appear to be gradually more concerned and diligent about ensuring that they use licensed software programs. A 2010 study conducted by IDC and sponsored by the Business Software Alliance (BSA), entitled Piracy

(...continued)

(Bhubaneswar), CG Road (Ahmedabad), and retailers on leading streets in Gujarat. See International Intellectual Property Alliance, *IIPA Written Submission Re: 2011 Special 301 Out-of-Cycle Review of Notorious Markets: Request for Public Comments*, 76 Fed. Reg. 58854 (September 22, 2011), Docket No. USTR-2011-0012, October 26, 2011, at http://www.iipa.com/pdf/2011_Oct26_IIPA_Notorious_Markets_Submission.PDF.

¹⁵There reportedly remain dozens of optical disc factories in India which have a capacity to produce millions of discs per year. To ensure all factories reproduce only legitimate discs, in recent years, industry presented draft optical disc legislation which would regulate the plants' activities, but a major company in India, Moser Baer, opposed the legislation and its inclusion of blank disc licensing. The music industry reports three factory cases which have been brought but are still pending.

¹⁶Calicut (Kerala), Belgaum (Karnataka), Gulbarga (Karnataka), Nagpur (Dhantoli), Tilak Road (Pune), Canada Corner (Nasik), Golani Market (Jalgaon), Nehru Place (Delhi), Naza Market (Lucknow), Agra, Ludhina Market (Ludhiana) contain a tremendous number of computer resellers, retailers and assemblers selling tens of thousands of computers pre-loaded with pirated operating system software. It has been estimated that between 70-90% of all computers sold in these markets have infringing software on their hard drives.

¹⁷The industry reports that “mod chip” to modify consoles for pirate game play are generally imported from the Middle East and China and sell for around Rs.200 (US\$4.39) to Rs.700 (US\$15.35) per chip.

¹⁸BSA's 2011 software piracy statistics will not be available until after the filing deadline for this submission, but will be released in May 2012, at which time piracy rates and U.S. software publishers' share of commercial value of pirated software will be available at www.iipa.com. In 2010, the software piracy rate in India was 64% (down from 65% in 2009), representing a commercial value of unlicensed software attributable to U.S. vendors of US\$1.37 billion. These statistics follow the methodology compiled in the Eighth Annual BSA and IDC Global Software Piracy Study (May 2011), <http://portal.bsa.org/globalpiracy2010/index.html>. These figures cover packaged PC software, including operating systems, business applications, and consumer applications such as PC gaming, personal finance, and reference software – including freeware and open source software. They do not cover software that runs on servers or mainframes, or routine device drivers and free downloadable utilities such as screen savers. The methodology used to calculate this and other piracy numbers are described in IIPA's 2012 Special 301 submission at <http://www.iipa.com/pdf/2012spec301methodology.pdf>.

Impact Study: Economic Benefits of Reducing Software Piracy, found that decreasing India's PC software piracy rate by ten points over four years would deliver US\$4.7 billion in GDP, \$512 million in tax revenues and nearly 60,000 new IT jobs. The benefits would be even greater if the 10 point reduction was achieved in two years, yielding \$6.1 billion in GDP and \$676 million in tax revenues.

The progress for the software industry in reducing piracy in India is due in part to Indian Government and industry efforts on raising awareness about the risks of using pirated software. Most notably, BSA and the Ministry of Communications and IT entered into a partnership to undertake joint efforts to reduce software piracy and conduct co-branded awareness programs for private enterprises and government departments to promote the use of legal software. A co-branded report was released highlighting this partnership in November 2011. These efforts will continue through 2012. There appears to be heightened judicial awareness about software IP issues as well. BSA filed 41 civil end-user piracy cases in 2011, out of which 34 were settled, with several BSA members filing their own individual cases in addition to these. BSA further reports continued good relationships with local enforcement authorities in 2011. The civil end-user enforcement program relies upon Anton Piller orders from the courts to preserve the element of surprise and ensure that evidence is preserved. In 2011, BSA successfully obtained 36 Anton Piller orders against corporate end-users.

Unfortunately, it remains the case that the enforcement authorities do not generally take any independent action on software piracy cases, due to inadequate familiarity with IP issues; lack of requisite training on how to conduct an end-user software piracy action; lack of technical knowledge of which software is pirated; an undermanned police force (e.g., the IPR cell in the Delhi Economic Offences Wing (EOW), dealing with a territory of about 200 square kilometers, has five officers); lack of special EOWs in many cities, and lack of clear jurisdiction of the various teams within an EOW. As an example of the problem, in the Delhi EOW, there are six or seven sections dealing with a range of economic offenses including cheating, fraud, cyber crime, and IPR. In particular, there exists a division between IPR actions and cyber crimes, and there are no clear guidelines about which EOW section should be addressing software piracy cases. Finally, IPR crimes are still considered to be of a low priority compared with perceived cyber security threats. More awareness and training programs for the benefit of enforcement agencies would be helpful, as would clarification of jurisdictional issues. There also remain some unique procedural problems for software right holders in terms of obtaining effective action against end-user software piracy. First, if any action is to be taken against an end-user target, the evidence being required by the authorities is extremely high, and right holders must usually gather this evidence on their own, since most police forces do not have the manpower or training to conduct surveys, check computers, and take them into custody. Although the Delhi High Court is extremely supportive in granting *ex parte* orders in civil actions in cases of software piracy and gradually the Chennai High Court is also demonstrating a willingness to openly grant such orders, obtaining clearly independent enforcement by state level law enforcement wings against software piracy is a significant challenge that does not receive adequate priority from the central or state governments.

Camcording Piracy: Camcording piracy has emerged in India as a harmful activity to both Hollywood and Bollywood (as well as Tollywood - Telugu films, and Kollywood - Tamil films).¹⁹ MPAA reports that in 2011, it identified 33 forensic matches of its members' films, up from 23 in 2009. Illegal camcording harms both U.S. and Indian films and the Indian Government needs to enact a measure to outlaw the practice. The cooperation of the Indian industry with U.S. industry will hopefully spur passage of anti-camcording legislation and more enforcement.²⁰ In 2011, there were two interdictions and two arrests of individuals illegally recording films in Indian cinemas. In November 2011, the police in Thane arrested an individual camcording *The Adventures of Tin Tin* on the opening day of its theatrical release in India. The industry reports some awareness activities on "source" piracy have been helpful, and that the cinema owners are showing slides in cinema halls and placing messages on tickets conveying that illegal camcording is not allowed.

¹⁹The independent film industry notes that camcording is particularly damaging in India because it has fueled physical and online piracy, negatively impacting worldwide distribution and preventing the establishment of legitimate distribution.

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

Pirate Printing and Photocopying of Books and Journals: Piracy of trade books, textbooks, professional books (scientific, technical, and medical), and scholarly journals continues to harm the publishing industry in India. Book piracy occurs in a variety of ways in the country: unauthorized photocopying, unauthorized compilations in the form of course packs, pirated re-prints of trade titles, and unauthorized and scanned copies of books (particularly in the scientific, technical and medical sectors) and the hosting of such copies on sites created and maintained by university students. Photocopying remains a severe problem for the academic and professional sectors of the industry, and continues on and around university campuses and in libraries, sometimes even condoned by the institutions. Wholesale copying of entire books is increasingly complemented or replaced by use of unauthorized compilations in the form of course packs, or “self instructional material” (SIM). These are used both for classroom teaching and distance learning, with the materials for the latter sometimes found in electronic form. Industry continues to wait, apparently in vain, for the Ministry of Human Resources and Development (MHRD) to issue a long-promised government order/circular to all educational and research institutions to combat illegal photocopying on university campuses. India-only editions, low-priced versions intended only for distribution in the Indian market, are being exported to Africa, the U.S., the United Kingdom and other European markets. The low-priced edition program was intended to benefit and meet the specific needs of the Indian market, but unfortunately, the export of such editions out of India is now adversely affecting more developed markets of the member publishers of the Association of American Publishers (AAP).

Enforcement Through State Cells in India Should be Enhanced Further Through National Coordination: The Indian Government, in its 2010 Special 301 Submission, indicated, “[e]nforcement Cells have been set by the state governments in their respective police headquarters. Nodal officers have been appointed by the state governments to handle IPR related offences.”²¹ However, there remains no Federal Government-led initiative to coordinate enforcement with and between the state governments. A national anti-piracy task force with goals to reduce piracy, *inter alia*, by working with state cells and Nodal officers should be established forthwith. The state cells, first established in 2002, are apparently starting to run more significant numbers of *suo moto* raids against piracy.²² The industries all report good working relationships with the state cell in Delhi, while one or more industries reports good working relationships and effective assistance from Tamil Nadu, Kerala, Punjab, Mumbai, Bangalore, Chennai, and Hyderabad.²³ BSA has urged specific states already having or considering having state specific anti-piracy legislation to ensure inclusion of software within the scope of the legislation, and submissions were made to state governments of Delhi, Punjab, Tamil Nadu, and Maharashtra in this regard. The State Government of Delhi has so far been the most receptive and indicated that software would be included in the legislation.

Civil and Criminal Courts Beginning to Show Some Signs of Improvement: The record in India in terms of the courts improved in 2011, likely due to increasing numbers of cases in which imprisonment was imposed (the music industry reported just over 200 prison sentences in 2011). The industry also reported that from January to November 2011, 175 music piracy cases settled through plea bargaining. These included awards totaling Rs.42 lakhs (US\$84,800) in two cases in Delhi, and a settlement for Rs.32 lakhs (US\$64,600) in one civil case. Of the criminal convictions, 84 resulted in fines, although most fines were in the US\$500 to US\$1,000 range. BSA reports that the criminal courts oversaw the first ever plea-bargained sentences in three BSA-led criminal matters pertaining to software piracy, resulting in fines. The Delhi High Court is improving and is perhaps the most copyright-cognizant bench in the country, leading the effort to fashion remedies to promote IP enforcement, such as John Doe orders.

²¹See Government of India, Ministry of Human Resource Development, Department of Higher Education, Copyright Office, *State-wise Nodal Officers for Enforcement of Copyright: List of the Nodal Officers nominated by States/UTs*, at <http://copyright.gov.in/frmStateWiseListNodalOfficers.aspx>. There was even an anti-piracy coordination cell launched in October 2010 by FICCI.

²²A 2009 raid involved the largest ever seizure of pirated academic and scientific, technical and medical (STM) books in India. During the last quarter of 2009, a raid in Delhi against a printer, binder and distributor producing pirated academic and STM books revealed 80,000 prints and 124 negatives of a single publisher’s titles on hand. This led to raids on two warehouses belonging to the distributor, leading to at least 160,000 more suspected pirated titles. The distributor/book seller appeared to be supplying pirated books to locations in Agra, Kanpur, Delhi, Gwalior, Bhopal, Indore, Kolkata, Cuttack, Bhubaneswar, Guwahati, Chennai, Hyderabad, Bangalore, Mumbai, Pune and Nagpur.

²³The Mumbai police have both a copyright cell, dealing with OD and other piracy, and a cybercrime cell which deals with software piracy. *Mumbai Police: Organization and Functions*, at http://www.mumbaiipolice.org/%5Cspecial%5Corg_fun5.htm. See *Other States: Anti-piracy cell for Punjab*, February 27, 2009, at <http://www.thehindu.com/2009/02/27/stories/2009022752740300.htm>. See *Anti-Piracy Raids Seize Close to 15000 Pirated Discs Mumbai Police Along With AA Khan and Associates Conduct Raids Across the City*, *Thaindian News*, May 13, 2010, at http://www.thaindian.com/newsportal/entertainment/anti-piracy-raids-seize-close-to-15000-pirated-discs-mumbai-police-along-with-aa-khan-andassociates-conduct-raids-across-the-city_100363186.html.

Notwithstanding these successes, problems remain. First, fines are invariably low with most falling under US\$1,000. Second, while the number of criminal convictions has gone up, the sheer number of piracy cases still pending (music piracy cases alone number more than 20,000) indicates that much more needs to be done to effect judicial reform and speed dockets. In addition, many courts outside Delhi remain of concern, due to the endemic delays in court proceedings, the lack of trained prosecutors, problems with retaining evidence, and failure to investigate up the chain. For these reasons, IIPA continues to urge the Indian Government to establish special IP courts throughout the country with expert judges and prosecutors.

COPYRIGHT LAW AND RELATED ISSUES

Copyright protection in India is governed by the Copyright Act, 1957 as amended last in 1999, and related laws and regulations.²⁴ Amendments to the Copyright Act have been considered for many years. In late 2011, the Copyright Bill 2010, with amendments proposed to the Bill in 2011,²⁵ was introduced into the Rajya Sabha, but it ultimately stalled there. There is no indication whether the Bill will be re-introduced as is or with further changes. IIPA and many other stakeholders submitted extensive comments to the 2010 Bill, and comments have also been provided on the Bill as consolidated (i.e., including the 2011 amendments). The Bill as amended in 2011 constituted an improvement over the previous draft,²⁶ although there remain some concerns. Of particular concern were: 1) provisions on the protection of TPMs against unlawful circumvention as well as trafficking in circumvention devices and services, 2) provisions restricting the ability of right holders to transfer rights; and 3) certain exceptions and limitations as well as expanded compulsory license provisions. In addition, the Bill did not properly address online infringement/Internet piracy or contain adequate measures promoting ISP responsibility and fostering cooperation with right holders to combat such infringements. The following outlines key issues remaining in the Copyright (Amendment) Bill 2010, as amended in 2011:

Inadequate Protection for Technological Protection Measures Against Unlawful Circumvention: The Bill left unchanged the previous draft amendments which sought to implement the anti-circumvention provisions (protection of TPMs) of the WCT and WPPT. While India has not yet ratified these treaties, the amendments have always been intended to address the WCT and WPPT issues to make India ready for such ratification. The proposed Section 65A remains of concern, and if enacted in its present form would be incompatible with the WCT and WPPT. The provision:

²⁴According to the explanation of the Indian Government in its 2010 Special 301 Submission, Chapter XIII of the Indian Copyright Act, 1957 provides for penalties for offences committed under the Copyright Act and empowers the police to take necessary action. These are the following:

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

Government of India. *Submission by India Under Special 301 for 2010*, February 26, 2010, at 5 (on file with IIPA). The Submission also indicates, "The provisions on IP protection in these laws are further supplemented by appropriate provisions for border measures in the Customs Act, 1962, the Intellectual Property Rights (Imported Goods) Enforcement Rules, 2007 and the Department of Revenue Notification No. 49/2007-CUSTOMS (N.T.) dated 8th May, 2007 notified under section 11 of the Customs Act, 1962." *Id.* at 9. The Submission indicates, "The Customs authorities are also empowered to take action on their own initiative suspending clearance of goods where they have prima facie evidence or reason to believe that the imported goods are infringing the IP rights of any right holder," and notes "In 2008-09, there were 28 cases of suspension of clearance of imported goods on account of IPR infringements. In 2009-10, the number of cases increased to 55."

²⁵"Notice of Amendments, The Copyright (Amendment) Bill 2010."

²⁶Among improvements accomplished by the "Notice of Amendments" are the following: 1) it resolves satisfactorily an issue raised in the previous draft related to authorship of cinematographic works, although it retains troublesome provisions on "first ownership" of such works, discussed below; 2) it resolves satisfactorily a proposed change that would have damaged the Indian national exhaustion (parallel imports) regime; 3) it narrows the availability of a loophole to the prohibition on unauthorized rental to "a non-profit library or non-profit educational institution" which is defined as "a library or educational institution which receives grants from the Government or exempted from payment of tax under the Income-Tax Act, 1961."

- does not cover access controls as is required by the treaties;
- covers only the “act” of circumvention and only when the person engaging in circumvention activities acts “with the intention of infringing” only the exercise of exclusive rights;
- does not prohibit the manufacture, importing or trafficking in circumvention devices or services and merely requires that person to keep a “record” of the names and addresses and other “particulars” of the person using such device or service to circumvent;²⁷
- does not define an “effective technological measure;”
- would permit circumvention to take advantage of any exception, such as fair dealing, contained in the Copyright Act (thereby almost completely eviscerating any protection);
- creates other overbroad exceptions;²⁸ and
- provides for only criminal and not civil remedies.

The Standing Committee in effect approved this provision as drafted, suggesting that the judiciary could evolve the law to ensure that access to works was facilitated (but not that trafficking would be deterred). IIPA has proposed some changes to the Bill to make it fully consistent with the WCT and WPPT.²⁹

Failure to Deal Adequately with Online Infringement or to Promote ISP Responsibility: A sound approach to this issue of dealing with online infringements and the role of intermediaries is contained in the Information Technology Act, 2000, which provides for power to intercept or decrypt information through any computer

²⁷With circumvention devices and services widely available globally on the Internet and from sources without any locus in India, a “record keeping” obligation can not come close to meeting the treaties obligation to provide “adequate legal protection and effective legal remedies” against circumvention of TPMs.

²⁸It is critical that any exceptions or limitations be narrowly tailored to avoid a scenario in which an exception effectively “swallows” the rule. . The currently drafted 65A(2)(a) is, therefore, not an appropriate starting place, since it exempts all acts of circumvention “for a purpose not expressly prohibited by this act” which would seem to subsume all limitations and exceptions. By contrast, the U.S. law provides narrowly tailored exceptions designed to facilitate specific uses , and also provides for a triennial rulemaking undertaken “to determine whether there are particular classes of works as to which users are, or are likely to be, adversely affected in their ability to make noninfringing uses due to the prohibition on circumvention of access controls.” Since 2001, only a few narrowly tailored classes of works have been identified. The EU approach is to ensure that “rightsholders make available” the “means of benefiting from” a certain narrow list of exceptions, and have special provisions related to private use, with appropriate safeguards in place with respect to limiting the number of copies that can be made and with regard to the Berne three-step test.

²⁹A proposed amendment to section 65A in the current Bill might look like this (bolded language is added to the current draft provision; struck out text would be deleted from the current proposal):

65A. (1) Any person who

(a) knowingly, or having reasonable grounds to know, circumvents an effective technological measure applied for the purpose of controlling access to any work, broadcast or performance or protecting any of the rights conferred by this Act; or

(b) manufactures, imports, distributes, offers to the public, provides, or otherwise traffics in devices, products, components, or technologies, or offers to the public or provides services, that:

(i) are promoted, advertised, or marketed by that person, or by another person acting in concert with, and with the knowledge of, that person, for the purpose of circumvention of any effective technological measure;

(ii) have only a limited commercially significant purpose or use other than to circumvent any effective technological measure; or

(iii) are primarily designed, produced, or performed for the purpose of enabling or facilitating the circumvention of any effective technological measure.

~~with the intention of infringing such rights,~~ shall be **liable for the remedies provided under Chapter XII as if it was an infringement, and** punishable with imprisonment which may extend to two years and shall also be liable to fine.

(2) Nothing in sub-section (1) shall prevent any person **from circumventing an effective technological measure in the following cases—**

~~(a) doing anything referred to therein for a purpose not expressly prohibited by this Act:~~

~~Provided that any person facilitating circumvention by another person of a technological measure for such a purpose shall maintain a complete record of such other person including his name, address and all relevant particulars necessary to identify him and the purpose for which he has been facilitated; or~~

~~(ba) doing lawfully authorized activities~~ anything necessary to **and for the sole purpose of** conducting encryption research using a lawfully obtained encrypted copy; or

~~(cb) conducting any lawful investigations~~ **carried out by government employees, agents, or contractors for the purpose of law enforcement;** or

~~(dc) doing lawfully authorized activities~~ anything necessary **and for the sole purpose of testing the security of a computer system or a computer network with the authorisation of its owner or operator;** or

~~(e) operator; or~~

~~(fd) doing lawfully authorized activities~~ anything necessary to **and for the sole purpose of identifying and disabling a capability to carry out undisclosed collection or dissemination of personally identifying information** ~~circumvent technological measures intended for identification or surveillance of a user;~~ or

~~(ge) taking lawfully authorized measures,~~ **carried out by government employees, agents, or contractors,** necessary in the interest of national security.

Effective technological measure means any technology, device, or component that, in the normal course of its operation, controls access to a protected work, performance, phonogram, or other protected subject matter, or protects any copyright or any rights related to copyright.

source on certain grounds mentioned therein.³⁰ The IT Act provides that local ISPs bear responsibility for infringements on their networks after they have been put on notice and have knowledge of infringement. In 2010, the Parliamentary Committee urged that the Copyright Bill be aligned with the principles laid out in the IT Act, recommending that a designated authority for managing copyright issues and piracy should be created with sufficient policing powers. In April 2011, the Information Technology (Intermediaries Guidelines) Rules, 2011³¹ were issued, making some important clarifications to the Information Technology Act, 2000 (21 of 2000), for example, setting takedown times for detected copyright infringements online to 36 hours. Unfortunately, the Rules seem to require “actual knowledge” for removal of infringing materials or links and do not appear to provide for red-flag notice (i.e., where the “intermediary” is aware of facts or circumstances from which an infringement is apparent). Also, since they carve out from the notice and takedown certain transient reproductions without regard to whether the transaction taking place is an authorized one, questions remain as to how effective the Rules along with the IT Act will be in addressing infringements in the non-hosted environment.³²

Taken in this context, the Copyright Bill (as amended by the “Notice”) was essentially a further modification of the Rules,³³ but did not deal comprehensively with the issue of online infringement and the role to be played by ISPs over infringements of third parties. First, as drafted, the provisions in the Bill created a blanket exemption. Second, the scope of activities covered was unclear, including “transient and incidental storage” undertaken “for the purpose of providing electronic links, access or integration,” which suggests some coverage of information location tools and facilitating access to infringing materials, which are some, but not all, of the activities for which an effective response is needed to online infringement. The only conditions on the application of the blanket exemption were if the “right holder” ... “expressly prohibit[s]” the provision of “such links, access or integration,” which suggests a notice, or if the “person responsible” (undefined) has knowledge or constructive belief (“is aware or has reasonable grounds for believing”) that “such storage is of an infringing copy.” The proviso now contains a takedown period lasting 21 days, but requires the right holder to obtain a court order within that 21 days to avoid “put back” of the infringing material. Now that the legislation has stalled, attempts should be made to improve the legislation, providing for expeditious remedies to remove infringing material, including provisions encouraging ISPs to cooperate with right holders in dealing with online infringements through fair and effective policies to deal with non-hosted infringements and repeat infringers. Clarity on such issues is indispensable to the fight against online piracy.

Extension to Foreign Works of, and Addition of New, Compulsory Licenses: The Bill extended two existing compulsory licenses, which are currently applicable only to Indian-origin works, to include all foreign works. The first, Section 31, involves a compulsory license to “republish,” “perform ... in public,” or “communicate ... to the public by broadcast” any work for which the right holder has “refused to republish or allow the republication of the work or has refused to allow the performance in public of the work, and by reason of such refusal the work is withheld from the public,” as well as any work for which the right holder “has refused to allow communication to the public by broadcast, of such work or in the case of a sound recording the work recorded in such sound recording, on terms which the complainant considers reasonable.” Section 31A, a limited “orphan works” provision, provided for a compulsory license to “publish” or publish a “translation thereof in any language” ... “unpublished Indian works” for which “the author is dead or unknown or cannot be traced, or the owner of the copyright in such work cannot be found.” The Bill extended this compulsory license to all “unpublished or published works” that are being “withheld from the public.” The extension of these compulsory licenses to foreign works appears to run counter to India’s Berne

³⁰The IT Act 2000 also provides the power, but not the duty, to monitor information through any computer source on certain grounds mentioned therein. IIPA does not support any duty to monitor computer systems or services.

³¹*Information Technology (Intermediaries Guidelines) 2011*, April 11, 2011 (on file with IIPA).

³²The Information Technology (Intermediaries Guidelines) Rules, 2011 provide that an “intermediary” (as defined in the Information Technology Act, 2000) is not deemed to be directly liable for certain “temporary or transient storage” regardless of knowledge or red-flag knowledge and without regard to the legality of the temporary or transient storage, or of the transaction taking place across its network. Specifically, Section 3(3)(a) essentially provides that a service provider shall not be directly liable for the “temporary or transient or intermediate storage of information automatically within the computer resource as an intrinsic feature of such computer resource, involving no exercise of any human editorial control, for onward transmission or communication to another computer resource.”

³³Section 52(1)(c) of the Bill (as amended) provided an exception for “transient and incidental storage of a work or performance for the purpose of providing electronic links, access or integration, where such links, access or integration has not been expressly prohibited by the right holder, unless the person responsible is aware or has reasonable grounds for believing such storage is of an infringing copy.” The amended Bill contained the language, “Provided that if the person responsible for the storage of the copy has received a written complaint from the owner of copyright in the work, complaining that such transient or incidental storage is an infringement, such person responsible for the storage shall refrain from facilitating such access for a period of twenty-one day or till [sic] he receives an order from the competent court refraining from facilitating access and in case no such order is received before the expiry of such period of twenty-one days, he may continue to provide the facility of such access.”

and TRIPS obligations. The Standing Committee was also concerned about the international implications of these provisions and recommended they be reviewed.

Two new compulsory licenses (Sections 31B and 31D) were proposed for the benefit of the disabled and for the broadcast of literary works, music and sound recordings, respectively. Section 31B fails to contain necessary protections to ensure that such works are limited solely to the disabled and that they otherwise fully meet the three-step test. The proposed change to Section 31B in the “Notice” makes the situation even worse, since it extends the availability of the compulsory license to “[a]ny person working for the benefit of persons with disability on a profit basis or for business....” The broadcast compulsory license in Section 31D is unprecedented, but was narrowed by the “Notice” so that now it covers only “communication to the public by way of a radio broadcast of a literary or musical work and sound recording.” It remains objectionable within that narrower scope.

Overly Broad Exceptions: The proposed changes to Section 52 in the Bill would have created a number of new and overbroad exceptions to protection, some of which are particularly dangerous in the networked environment. The Bill also leaves in place other exceptions which have troubling implications and India’s Berne and TRIPS compliance, especially if extended into the digital environment. These include: a) a new broad “private or personal use” exception (proposed Section 53(a)(1));³⁴ b) existing 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 (Section 52(1)(ad)); and c) an exception permitting the performance of films in educational contexts and in “clubs” (Section 52(1)(i)). These and certain other exceptions must be scrutinized in conjunction with India’s obligations under the Berne Convention and the TRIPS Agreement.

Assignment of Copyright (Sections 18 and 19): Several recent Indian court decisions concluded that musical works included in audiovisual works or in sound recordings are not subject to payment of public performance royalties, i.e., the public performance rights in such musical works are deemed assigned to the producers of sound recordings or the audiovisual works in which they are used. These court decisions deny right holders in musical compositions the ability to enjoy their exclusive rights and run counter to India’s compliance with its international obligations under the Berne Convention and the TRIPS Agreement. The Bill contained several changes which may have fixed the problems created by the court decisions. In Section 18(1), two new provisos indicate the author of a literary or musical work shall not be deemed to have assigned or waived “the right to receive royalties to be shared on an equal basis with the assignee of copyright” in two cases: 1) when included in a “cinematograph film” for all “utilization” other than “the communication to the public of the work along with the cinematograph film in a cinema hall”; and 2) when “included in the sound recording but not forming part of any cinematograph film.” Section 19(8) and (9) of the Bill would preserve the right of the author “to claim an equal share of royalties” as to: 1) “utilization” of “any work” in a cinematograph film in any form other than “for the communication to the public of the work, along with the cinematograph film in a cinema hall”; and 2) “utilization” of “any work” in “a sound recording which does not form part of any cinematograph film.”

Mere inclusion of works in an audiovisual work or sound recording should not deem assigned or waived the rights of the authors of those works, or deny them the ability to negotiate and receive payments for the utilization of those works, e.g., public performances of musical works, or the exercise of other exclusive rights. At the same time, the new provisions should not limit the ability of right holders to freely engage in contractual relationships with the authors of literary or musical works. We are also concerned about the attempt to ascribe the exact percentages or amounts to be paid to such authors, such as the Section 18 proviso that the royalties be shared with the assignee “on an equal basis,” or the Section 19 mandate of “an equal share.” This text is unclear, as it does not specify the basis on which an “equal share” is calculated. These provisions would also undermine the freedom of contract and the

³⁴The industries are concerned that the proposed exception in Section 52(1)(a)(1) could be interpreted in overly broad ways, for example, to permit the making of camcorder copies in theaters under the pretext of the copies being made for private and personal use. It appears that HRD has attempted to alleviate industry concerns that the exception for private use could be read to permit video recording or camcording in theaters by further limiting the exception for private use to “private and personal use.” However, this does not alleviate the foreseeable difficulties with such an exception as a broad exemption can completely undermine the anti-piracy efforts currently being undertaken by the film industry to stop camcording in theatres. A private use exception, even one further limited to “private and personal use,” must still comply with 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, we strongly urges the HRD to further revise this Section to explicitly incorporate the three-step test into the law and remove any potential for such broad interpretations.

flexibility of parties to negotiate other agreements on royalties' distribution which could be more beneficial or appropriate under the circumstances. Finally, the scope of application of this provision is unclear, and as it is not specifically limited to works created after the effective date of the law, may upset existing freely-negotiated contractual relationships, and may hinder the ability of right holders in such films or sound recordings to distribute their works without fear of disputes over conflicts between such arrangements and the statutory mandates.

Other parts of the Bill unfortunately provided for significant limitations on assignments of works. Under the proposed amendments, assignments are deemed invalid as to "any medium or mode of exploitation of the work which did not exist or was not in commercial use" at the time the assignment was made unless that medium or mode was "specifically" mentioned in the assignment. This change would have precluded "all rights" assignments which historically have been treated by both authors and publishers/producers as the norm in the business, wreaking havoc with existing distribution arrangements, in particular with respect to digital distribution. To the extent the provisions apply retroactively, they would also undoubtedly be subject to constitutional challenge. The software industry is also concerned about this provision, which would severely limit the scope of a possible assignment of copyright in any work including software; given technological advances, it is not realistic to expect that the modes and media of exploitation can be fully spelled out in a contract as this provision would require.

Ownership Issues (Section 17): Certain changes to India's ownership provisions threatened to undermine the rights of filmmakers and other right holders and their longstanding commercial arrangements. For example, a new Section 17(f) was proposed, by which the "film director" and "producer" are to be considered "joint first owners" of the copyright for films produced after the effective date of the new law (once enacted).³⁵ Under the current law, and in line with the well regarded best practice, the producer, as the one providing "valuable consideration" for the production of the film, is deemed the "first owner of the copyright therein." This new provision could have seriously undermined the ability of a film producer to pull together all the elements that need to be incorporated in such film and severely hamper the distribution of that film since separate license agreements would need to be made with each such author for each specific use to which the film is put. In addition, the second proviso to a new subsection (g) states, "in case of any work incorporated in a cinematograph work nothing contained in clauses (b) and (c) shall affect the right of the author in the work referred to in clause (a) of sub-section (1) of section 13." Clause (b) establishes default ownership rules for certain works (photographs, artistic works), and clause (c) is India's work for hire rule for non-publications (i.e., not a work being published in a "newspaper, magazine or similar periodical"). This clause therefore would seem to create a new default for the authors of "original literary, dramatic, musical and artistic works," and would seem to nullify the work for hire provision.

India Should Adopt an Anti-Camcording Provision: With the increase in illegal camcording of movies in theaters in India, the Indian Government should adopt national legislation making it unlawful to use an audiovisual recording device (such as a video camera or other device) to make (or attempt to make) a copy, in whole or in part, of a motion picture while inside a theater, and to prohibit the unlawful onward distribution or transmission (e.g., wireless upload to the Internet) of the camcordered copy. The U.S. has such a federal statute, and several other countries have statutes or are considering bills prohibiting illegal camcording.

Unclear Protection for Temporary Copies: It appears that the reproduction right under the Copyright Act is intended to cover temporary copies, such as those made in the random access memory of a computer or other electronic device. The IT Act and the Information Technology (Intermediaries Guidelines) Rules, 2011 appear to confirm such coverage, in that they provide an exception with respect to a narrow subset of temporary or transient reproductions. For the sake of clarity and certainty the Copyright Bill should state this expressly (e.g., in the statutory definition of "reproduction"). The Copyright Bill defined the reproduction right to include copies "stored" in a computer, and contains a "transient and incidental" copy exception, implying that such temporary copies fall under the reproduction right. Sections 52(b) and (c) provide for exceptions from the exclusive right of reproduction for the

³⁵It is also noteworthy that Section 26 of the Bill extends the term of copyright in cinematograph films from 60 to 70 years, but that only the principal director may enjoy the extended term, and according to Section 17(g), for films produced before the effective date of the Bill, the additional ten years of protection would be available only if the director entered into an agreement with the producer or copyright owner. This provision could create disruption in existing agreements between directors and producers or copyright owners, depending on how the Indian law is applied (e.g., it is unclear how the additional 10 years is to be considered in India in cases of foreign works whose country of origin has at least a 70 year or longer term (e.g., the U.S. 95 year term).

transient and incidental storage of works in certain circumstances, and applying the *a contrario* principle it would appear that all such copies, including those not subject to such exceptions, are protected as reproductions. We note that under Article 9(1) of the Berne Convention, Article 9.1 of the TRIPS Agreement, Article 1(4) of the WCT and Articles 7 and 11 of the WPPT, the right of reproduction covers all acts of reproduction “in any manner or form.” The Bill correctly refers to the storage of works in digital form in an electronic medium as an act of reproduction, as provided in these Articles and in the Agreed Statement to Article 1 of the WCT and Article 11 of the WPPT. Rather than rely on the language in the exceptions for implying the full scope of the reproduction right, it would be preferable not to leave this issue to judicial interpretation of the new provisions but to clarify the issue by including a specific definition of the right of reproduction that would refer to the storage of works in an electronic medium and include reference to transient, temporary and incidental reproductions directly.

Other Issues: The Indian Government should also achieve the following in amending its copyright laws and related regulations that would be beneficial to foreign and Indian right holders alike:

1) **deal with damaging “pre-release” piracy**, with provisions comparable to those adopted in the U.S. (the Family Entertainment and Copyright Act of 2005, containing effective civil and criminal provisions to deter online pre-release piracy),

2) **adopt statutory damages**, since proving actual damages, e.g., in end-user software piracy cases, can be difficult, and in order to expedite the slow civil judicial processes and provide much-needed deterrence to a civil regime which relies almost completely on interim injunctions and Anton Piller orders to deal with piracy,

3) provide that **seizure orders** should be granted to copyright owners as a matter of right in civil cases (they are currently discretionary),

4) add a provision to the Copyright Law that **refusal to comply with a court order shall result in a defendant being held in contempt**; at present, the only option a copyright owner has in the case of refusal to comply with a court order is to initiate contempt proceedings, which can lead to significant court delays and may not result positively,

5) **amend Indian tax laws to classify software piracy as a form of tax evasion** and define corresponding tax violation rules in line with international best practices. This could be done by, among other things, amending tax laws to a) specifically require that service tax paid on computer software be included in the service tax returns filed by registered companies and b) empowering service tax inspectors to audit companies based on their service tax returns and their disclosure of software expenses (if a regulation under the Companies Act requiring such disclosure is implemented, as recommended above),

6) **allow for restitution in criminal cases**, and

7) **adopt an effective optical disc law**, since India has a reported 36 optical disc factories. FICCI has been engaged in the drafting process and the copyright industries have weighed in. Adopting an effective OD law has long been delayed by the controversy over coverage of blank discs.

MARKET ACCESS ISSUES

As described in detail in previous IIPA submissions, many market access barriers hinder copyright owners’ abilities to participate fully in the market in India. Below are just some of many barriers the creative industries face in India. Other barriers are set forth in documents such as the FICCI “Key recommendations for Media & Entertainment Sector presented to the Finance Ministry” (February 2011), and in general, we concur with FICCI’s findings therein.

Motion Picture Barriers, Including Services Taxes and Discriminatory Entertainment Taxes: The U.S. motion picture industry faces numerous market access barriers, including: 1) bans on exclusivity in the Pay TV sector and restrictions on the same in the Direct-to-Home (the reception of satellite programs with a personal dish in an

individual home) market; 2) price controls on Pay TV channels and “bouquets” of channels; 3) foreign ownership restrictions; 4) the imposition of a 10.3% service tax assessed against the “transfer” of intellectual property rights which amounts to double taxation; 5) inordinately high and discriminatory entertainment taxes on theatrical admissions, including unconstitutional taxes based on the language of the film;³⁶ 6) price fixing on tickets in South India as well as quotas on the number of screenings per title per day; 7) onerous regulations on uplink and downlink of satellite signals beaming into India;³⁷ and 8) disruptive content control rules for television.³⁸

- **TRAI Bans Exclusivity, Includes “Must Provide” in the Pay TV Sector; MIB Also Restricts “Direct-to-Home” Business:** A 2007 Telecom Regulatory Authority of India (TRAI) regulation creates a potentially Berne- and TRIPS-incompatible ban on exclusivity (prohibiting broadcasters from granting exclusive contracts with any distributors)³⁹ combined with a “must provide” requirement (obligating broadcasters to provide channel programming to all requesting distributors on a nondiscriminatory basis). The exclusive contract prohibition, along with “must provide” requirements, eliminates all potential for competition and any incentive to develop programming or buy any “rights.” The industry has made numerous submissions to the Indian Government, opposing restrictions in the functioning of India’s cable and satellite market, arguing that the draft regulation would remove private parties’ ability to negotiate standard free market transactions and would ultimately limit the quality and quantity of legitimate content available to consumers. This regulation eliminates all potential for competition and any incentive to develop programming or buy any “rights” and should be deleted or significantly altered.
- **MIB Restrictions on DTH Market:** The Ministry of Information and Broadcasting (MIB) has also taken similar restrictive steps with respect to the Direct to Home (DTH) market. Specifically, it issued Guidelines to include, among other things, prohibitions against DTH operators from entering into exclusive contracts with any broadcaster; and prohibitions against DTH operators carrying signals of any broadcaster who has entered into any exclusive contracts with any distribution medium and/or against whom any litigation is pending in such regard. These regulations and guidelines limit choice and undermine anti-competition laws.
- **Price Controls on Pay TV Sector:** TRAI has also introduced price caps for pay channels and “price bands” for bouquets in areas with set-top-boxes. TRAI says they will relax the price controls once other television platforms are widely adopted (e.g., satellite TV, Internet Protocol TV). Such rate regulation is stifling to the growth of this clearly competitive industry sector, and TRAI should make a strong commitment to relax price controls.
- **Foreign Ownership Restrictions:** Foreign ownership/investment in cable television systems is limited to 49%. There is also a 20% sectoral cap on DTH platform ownership by foreign companies, while total direct and indirect foreign ownership of a satellite platform cannot exceed 49%. IIPA opposes such ownership restrictions, which ignore the fact that significant capital infusion, which may be accessed from international markets, is necessary to further develop the television industry in India. A task force in the Ministry of Information and Broadcasting (MIB) was set up to re-examine the foreign ownership caps in broadcasting, particularly in electronic commerce, but there have been no reports of its conclusions.
- **Service Tax on Transfer of IPR:** A service tax imposed by the Ministry of Finance against the transfer of intellectual property rights went into effect in July 2010. There is an amended Negative List issued by Central Board of Excise and Customs which lists items which are not subject to service taxes, but the temporary transfer

³⁶Any film not produced in the same language that is predominately spoken in that state is charged a higher tax. The Supreme Court has ruled this to be unconstitutional, but states are still engaged in the practice.

³⁷Under 2005 Guidelines, foreign broadcasters are required, among other things, to set up offices in India, licensed by the government, and pay prescribed fees per channel beaming into India.

³⁸In August 2006, the Ministry of Information and Broadcasting issued a notification to broadcasters that only films rated “U” can be broadcast on TV channels, reportedly in response to public concern over increasingly offensive scenes shown on television. In addition, the Mumbai High Court issued a judgment that same month requiring broadcasters to recertify all films through the Central Board of Censors to ensure that only “U” rated films are aired. These decisions, unfortunately made without industry consultation and without supplementing Censor Board resources, have introduced uncertainty and disruption in the marketplace.

³⁹Additionally, the MIB amended the Direct to Home (DTH) Guidelines to include, among other things: prohibitions against DTH operators from entering into exclusive contracts with any broadcaster; prohibitions against DTH operators carrying signals of any broadcaster who has entered into any exclusive contracts with any distribution medium and/or against whom any litigation is pending in such regard.

of copyright is not included in the Negative List. The service tax against the transfer of intellectual property rights should be included in the Negative List. Under the service tax policy, the Indian distributor of foreign films must pay the service tax on payments made to the offshore film producers at the rate of 10.3%. The service tax raises the total amount of both central and state indirect taxes to between 30 to 60% and amounts to double taxation by both the state and national governments. Constitutional challenges were filed by local Hindi studios in July 2010 and Motion Picture Association members in September 2010 in the Delhi and Mumbai High Courts and remain pending.

- **Entertainment Taxes:** Entertainment taxes vary widely among Indian States, ranging from 15 to 40% in some key markets, and from 40 to 70% in other States. The average tax rate, computed on a country-wide basis, is estimated to be between 27-36%, and constitutes a significant disincentive to investment in the industry, including in the much needed area of cinema construction. The film industry, including the MPAA's India group, in association with the Film Federation of India, continues to encourage the Federal and various State governments to rationalize the high taxation levels and the Government of India has also stepped in to persuade various State governments to impose a uniform entertainment tax not exceeding 60%. Citing revenue considerations, however, most states are reluctant to conform. In addition, at the request of their local state film industry representatives, some states discriminate between local and non-state originated films, charging nothing (or even offering incentives) for local films, while assessing higher rates for non-state originated films.

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

Double Taxation of Business Software: The packaged software industry in India continues to be doubly-taxed – attracting service tax at the central level and value-added tax at the state level due to a discrepancy between central and state level policies of treating software as a service or a good. The Finance Ministry has announced that taxation of packaged software will be clarified during the 2011 budget session of the Parliament.

Technology and Procurement Mandates: The Indian government is in the process of developing a number of policies that raise concerns they will be implemented in a manner that provides significant benefits and preferences, and potentially mandates, for products utilizing a particular technology or that have IP owned and/or developed in India. This includes the National Electronics Policy, the National IT Policy and the National Telecom Policy. IIPA believes that an open and competitive market is an essential component of a world-class IT sector and to fostering IP development. The Indian government should avoid policies that restrict market access through technology mandates or stringent procurement preferences.

TRAINING AND PUBLIC AWARENESS

IIPA member associations continued to conduct training in 2011. BSA conducted capacity building workshops for India Customs entitled "Software Counterfeiting & Piracy and Product Identification," covering all the five major ports, namely, Delhi, Mumbai, Kolkata, Chennai, and Bangalore. BSA also participated in a CII capacity building program called for IPR border enforcement officials sponsored by the National Academy of Customs, Excise & Narcotics (NACEN), presenting the software industry perspective. BSA further collaborated with the MHRD Chair on IPR at National Law University, Jodhpur on an "IPR Sensitization Program for Senior Police Officials and Public Prosecutors." BSA conducted a workshop on the topic "Investigations & Challenges in Software Piracy" at the Rajasthan Police Academy (RPA), Jaipur, and Biju Patnaik State Police Academy, Odisha, Bhubaneswar - sponsored by the Bureau of Police Research and Development (BPR&D). BSA has also been involved in several workshops and programs to implement software asset management (SAM) in several of the states (Karnataka,

Andhra Pradesh, and Maharashtra) in 2010 and early 2011. BSA plans to be further involved in such training activities in 2012, including work with enforcement agencies, the judiciary, and including building greater partnerships with State and Central Government agencies to build capacity and raise awareness on software piracy issues. The motion picture industry was involved in training in several ways, and notes that in 2011, over 400 judges were trained, and MPAA's local program specifically engaged in training of 800 cinema managers in the "Make a Difference" program. The music industry also offered training programs to police personnel in Andhra Pradesh, Punjab, West Bengal, Kerala, Tamil Nadu, Maharashtra, Delhi and Mumbai. The publishing industry participated in a series of workshops for Customs officials at various ports, providing training on how to identify counterfeit or India-only (low-priced) editions destined for export (or in some cases, importation into India). Publishing sector representatives also regularly participate in workshops that provide training for other law enforcement personnel.

GENERALIZED SYSTEM OF PREFERENCES

The GSP program, designed to promote economic growth in the developing world by providing preferential duty-free entry for products from designated beneficiary countries and territories, expired on December 31, 2010, but on October 21, 2011, President Obama signed legislation to reauthorize the program through July 31, 2013. GSP trade benefits became effective 15 days after the President signed the bill (November 5, 2011) and apply retroactively from January 1, 2011. India has been a major beneficiary of the GSP program. During the first eleven months of 2011, more than US\$3.4 billion in imports to the U.S. from India enjoyed duty-free treatment under the GSP Program, or more than 10.2% of India's entire imports into the U.S.⁴⁰ Among the criteria the President must take into account in determining whether a country should continue to be designated as a GSP beneficiary country are "the extent to which such country is providing adequate and effective protection of intellectual property rights," and "the extent to which such country has assured the United States that it will provide equitable and reasonable access to the markets ... of such country." 19 USC 2462(c)(4) and (5). India needs to endeavor to meet these criteria under the statute to remain eligible to receive favorable treatment under the GSP Program.

⁴⁰During 2010, almost US\$3.5 billion in imports to the U.S. from India enjoyed duty-free treatment under the GSP Program, or more than 11.75% of India's entire imports into the U.S.

INDONESIA

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

2012 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: IIPA recommends that Indonesia remain on the Priority Watch List in 2012.¹

Executive Summary: Indonesia remains a market dominated by pirated material in physical form and supplied or distributed online. Indonesia also retains some of the most restrictive market access barriers in the region, closing off opportunities to the creative industries to supply legitimate product into the country. Unfortunately, the situation did not improve in 2011, notwithstanding some good relationships between right holders and Indonesian authorities. Raiding was down across the board according to industry reports, and significant raiding reportedly did not occur against very high levels of mall and retail piracy² until November and December 2011. The court system remains largely non-deterrent (with the exception of one hard-goods piracy case resulting in a conviction and jail sentence) and largely non-transparent. Internet and mobile penetration continued to deepen in 2011, but Indonesia did little to address the growing concerns of online and mobile piracy. To our knowledge, there has never been an Internet piracy case investigated or brought by the Indonesian Government. It is critical that Indonesia develop the policies and practices necessary to enforce IP rights in these environments.

Market access restrictions remain significant. While industry appreciates the Indonesian Government's responsiveness to the film industry's concerns about royalties being included in duty assessments, Indonesia Customs subsequently increased its customs duty valuation on imported film prints using a fixed tariff on a per-minute basis which is significantly higher than the effective previous amounts and is inconsistent with the WTO Customs Valuation Agreement and other international norms. The Film Law includes a film quota that, if implemented, would make it extremely difficult for foreign filmmakers to operate in the market. A requirement to print films locally for theatrical distribution remains on the books, and while its implementation has been postponed several times (including again until January 2013), the threat of this local replication requirement continues to disrupt foreign-produced motion pictures' distribution release timing and planning and damages the local distribution network. There remains a ban on investment and distribution in audiovisual products which hits the motion picture, television, and music industries extremely hard and further narrows market access for the entire audiovisual sector. A new Decree issued in October 2011 has virtually destroyed a window of revenue for the music industry, by banning its sale of ring-back tones. The specter of a single Government-mandated collective licensing window continues to give industry serious pause. As a result of deficiencies in its IPR regime and ongoing market access issues, on December 30, 2011, IIPA submitted a request that the eligibility of Indonesia as a GSP beneficiary country be reviewed, specifically, whether Indonesia is providing adequate and effective copyright protection for U.S. copyright owners, and equitable and reasonable access to the markets of Indonesia. IIPA believes that Indonesia is not meeting these standards and requested in its GSP Petition that the U.S. Government work with the Indonesian Government on means to address these deficiencies, and, if Indonesia fails to adequately address these concerns, suspend or withdraw GSP benefits, in whole or in part.

The Indonesian Government's previous statements indicating its intent to provide high levels of IPR protection,³ and the October 31 Cabinet reshuffle, by which Minister Mari Pangestu became the head of a new

¹For more details on Indonesia's Special 301 history, see Additional Appendix available at <http://www.iipa.com/pdf/2012SPEC301HISTORICALSUMMARY.pdf>. Please also see previous years' reports at <http://www.iipa.com/countryreports.html>.

²The music industry reports piracy levels approaching 90-95%.

³In February 2011, then Trade Minister Mari Pangestu included the following in a letter to USTR Ambassador Kirk:

Indonesia's continued growth and competitiveness rely upon thriving sectors that create jobs and exports. One of the sectors is creative industry. This sector needs a strong and effective IP protection as it provides incentives for creativity and innovation. It is essential

(...continued)



Ministry of Tourism and Creative Economy,⁴ express and signify the positive aspirations of the Indonesian Government. It is hoped these aspirations can be realized by improvements in the priority areas highlighted just below.

PRIORITY ACTIONS REQUESTED IN 2012

Enforcement Issues

- Bring and conclude more high-profile deterrent criminal piracy cases, including against Internet and mobile piracy, distributors, warehouses, factories, and high-profile cases involving enterprise end-user piracy of business software.
- Follow through on the National IP Task Force's "Campaign" to take deterrent action against all forms of piracy, and establish a National IP Task Force website tracking prosecutions completed, including parties, legal bases of the prosecution, penalties assessed, and evidence found during the raid. In particular, Ensure Directorate of Special Crimes ('Ditreskrimsus') and "Type A" Police Commands run sustained IPR police investigations with deterrent results.
- Commit to expand Commercial Courts in Medan, Jakarta, Semarang, Surabaya and Makassar to adjudicate copyright cases, and establish special IP courts for criminal cases, with trained judicial officers.

Legislative Issues

- Modernize the Copyright Law (2002), to, among other things,
 - maintain *ex officio* enforcement authority,
 - establish landlord liability and ensure that business licenses of stores and distributors engaging in infringement are revoked,
 - provide minimum criminal penalties for copyright infringement, including end-user piracy of business software,
 - ensure effective measures are in place to combat online infringements by introducing notice and takedown procedures and taking steps to encourage the active cooperation of Internet service providers with rights holders to prevent the use of networks for the commission of infringing acts, including but not limited to establishing fair and effective processes for dealing with non-hosted infringements and repeat infringers,
 - outlaw illegal camcording,
 - provide WIPO Copyright Treaty (WCT) and WIPO Performances and Phonograms Treaty (WPPT) compatible rights (including the public performance, public communication and making available rights) for works and sound recordings,
 - fully implement the WCT and WPPT,
 - extend terms of protection for works and related rights to follow the international trend in this area, and
 - introduce an exclusive right of importation to ensure that pirated products do not get across the border masking as genuine products from other countries.
- Reject proposals for a single licensing window through a mandated national collective management organization. Right owners and collective management organizations should be free to make commercial decisions on collective licensing.
- Ensure copyright infringement is considered a predicate offense under anti-organized crime laws that permit the government broader criminal investigation authority, including the ability to seize/freeze assets, etc.
- Make optical disc regulations more effective by 1) making inspections routine, unannounced and off-hours; 2) ensure the availability of effective and consistent enforcement against SID Code violations, including gouging off

(...continued)

therefore that the Government provides high level of IP commitments and effective enforcement for our own benefits and for the sake of Indonesia's sustainable growth. Please be assured that the Government of Indonesia will maintain effective IP protection and enforcement nationwide.

Letter from Mari Pangestu, Minister of Trade of the Republic of Indonesia, to "H.E. Ambassador Ron Kirk," *Indonesia 2010 [sic] Special 301 Submission*, February 14, 2011 (available at regulations.gov).

⁴Risti Permani, *Developing a Creative Economy*, The Jakarta Post, November 1, 2011 (in which Minister Pangestu noted "creative economy sector in Indonesia contributed about Rp 140 trillion (US\$15.73 billion) to the state and thus the sector should be seriously managed").

or non-use of source identification codes; 3) providing transparency in raids and results; 4) covering imports of raw materials; 5) ensuring that the Department of Industry collects exemplars; and 6) ensuring exemplars collected by the Ministry of Industry will be provided for forensic examination to be conducted by the Police's forensic laboratory ("PusLabFor").

Market Access and Related Issues

- Ensure that import duties for audiovisual works are fully consistent with WTO rules, i.e., that they are calculated on a per-meter basis against the carrier medium, in line with standard international practice.
- Immediately and permanently remove the requirement to locally replicate all theatrical prints and home video titles released in Indonesia.
- Repeal Film Law that creates market access barriers to foreign audiovisual producers by imposing film quota, strict censorship requirements, and other restrictions on film industry.
- Amend the blanket prohibition on foreign company participation in, or even investment in, importation, direct distribution, exhibition, or retailing.
- Ease the recently introduced restriction on ring-back tone sales.

PIRACY AND ENFORCEMENT UPDATES IN INDONESIA

IIPA's previous reports describe in detail various piracy and enforcement issues and the harm caused to the U.S. content industries. Piracy rates remain unacceptable and extremely high in Indonesia, at 87% unlicensed PC software usage, and even higher for other industries (mall/retail piracy reportedly stands at 90% piracy, while the music industry reports an overall loss of 95% of the market in Indonesia due to piracy of all kinds – physical, Internet, mobile).⁵ The following provides updates on ongoing and emerging issues.

Court System Lacks Transparency and Deterrence in Most Cases, and Fails to Address Online Piracy: A major hurdle over the years for copyright owners in Indonesia has been the failure of the court system to effectively deter piracy. Most cases brought involve small-scale distribution of pirated materials in the physical environment; very few involve major source piracy, such as warehouses, or cases against ringleaders causing the most damage up the supply chain.⁶ No cases or investigations to our knowledge involve piracy occurring over the Internet or through mobile networks. Industry reports that of the raids and investigations that do ensue, only a few are brought before the courts. There is a lack of transparency on case proceedings and results. In cases that proceed to a conviction, most result in extremely low and non-deterrent criminal fines. One exception was a case against replicators/duplicators of pirate CDs, VCDs, and DVDs who were sentenced in February 2011 to a fine of IR3 million and three years in prison, although the status of the case is unknown.⁷ In another case, a Public Prosecutor in Lubuk Sikaping, Padang eventually (after a complaint to the National Public Prosecutor) brought a case against a suspect selling unlicensed music, seeking three years imprisonment. It was only due to the persistence of the industry that this case was brought, and only after significant delay; we have no information due to general lack of transparency on the case which was brought more than a year ago.

⁵A recent survey by Hong Kong-based Political and Economic Risk Consultancy (PERC) of 1,285 expatriate managers found that Indonesia scored worst, behind Vietnam and China, among all Asian countries in terms of protecting IPR. See *Indonesia No.1 in Copyright Piracy in Asia*, Daily Indonesia, August 29, 2010, at <http://www.dailyindonesia.com/news/top/2010/08/indonesia-no1-in-copyright-piracy-in-asia.php>.

⁶In its submission in this docket in 2011, the Indonesian Government reported some 135 cases of copyright infringement that were investigated by the Indonesian National Police (INP), 4 cases in the entire country investigated by DGIPR, only 28 for which the files were completed and were "soon to be proceeded to court." The cases against optical discs are somewhat more positive, with 107 cases and detections of over 200,000 discs and 142 "duplicators." It is not made clear whether this represents seizures. Attorney General cases are not fully broken out between copyright, trademark and patent cases so it is difficult to evaluate this date; of over 100 cases, only 4 had been decided in 2010. There were reportedly 44 surprise inspections on "optical disc producers" which we assume are the factories, but this is not specified. See Ministry of Trade of the Republic of Indonesia (Dr. Mari Pangestu), *Intellectual Property Rights System of Indonesia: Progress and Achievements in 2010*, February 14, 2011, available at regulations.gov, Tables 1-5. There

⁷Judgment No. 2537/Pid.B/2010 dated 28 February, 2011 against Ng Tek San, The North Jakarta District Court, February 11, 2011.

IIPA recommends establishing a National IP Task Force website to track case results.⁸ IIPA understands that special IP courts have been established under the jurisdiction of five commercial courts in Medan, Jakarta, Semarang, Surabaya and Makassar and that they are handling copyright cases. IIPA also understands that the Attorney General Letter No. SE-003/A/JA/02/2009, 26 February 2009 has categorized IP cases as “Important Cases” “in order to accelerate case prosecutions.”⁹ Nonetheless, with little transparency (the government notes that the number of cases went down between 2009 and 2010, only a few were transferred to the court, and a few were sent back “to be completed”), there is no way right holders and industry can assist with these cases, and furthermore, these cases cannot begin to have the deterrent effect needed to reduce piracy levels in the country. We also urge the Attorney General’s office to initiate and aggressively pursue far greater numbers of cases involving Internet and mobile piracy, as well as important enterprise end-user software piracy cases.

Berne and TRIPS-Compatible Presumptions Not Being Afforded: Industry has reported that court processes are sometimes hampered by defendants simply placing in issue the copyright ownership of the infringed work or sound recording, and reversing the presumption without any proof to the contrary. Indonesia’s Berne Convention obligations (as well as TRIPS obligations) require it to provide a presumption of copyright ownership, and that presumption cannot be rebutted unless the defendant shows proof to the contrary. Defendants should be asked to rebut the presumption, for example, by showing that they have a requisite license to conduct the relevant activities.

Ex officio Authority for Police Must be Maintained, While Directorate of Special Crimes Directorate of Investigation Must be Activated: It remains critical in Indonesia that police retain flexibility to run raids on an *ex officio* basis.¹⁰ In many instances, *ex officio* action by the government is the only practical remedy available to independent and small rights holders, as well as right holders in general. Any proposal for an amendment which would remove such authority should be rejected. At the end of 2010, a new Directorate of Special Crimes (‘Ditreskrimsus’) was established to manage all economic crimes, including IPR infringements. In addition, some regional police commands have restructured their internal crime investigation departments, with some classified as ‘Type A’ Police Commands (headed by a two-star police general) separating economic crimes, including IPR infringement, from general or conventional crimes. IIPA views these developments positively, as an opportunity to empower and train specialized IP police units, and they should now exercise their authority to combat online, mobile and physical piracy as well as enterprise end-user piracy of business software.

Enterprise End-User Software Piracy Causes Significant Losses, But Enforcement Cooperation Improved: The widespread use of unlicensed software by businesses and other organizations causes the greatest harm to the business software industry in Indonesia. The enterprise end-user software piracy rate in Indonesia remains high.¹¹ Lowering software piracy would bring significant benefits to the Indonesian economy.¹² The Business Software Alliance (BSA) reports that its relationship with enforcement authorities remained good in 2011. In 2011, police continued to take some *ex officio* raids against software piracy, and raids initiated by police against enterprise

⁸All case records are manually written into a log book in each District Court, making it difficult to identify outcomes in particular cases, obtain copies of court decisions, contact public prosecutors requesting updates, and ultimately, leverage publicity on cases of copyright infringement and get the message into the public domain that copyright infringement is a serious violation of the law with serious legal consequences.

⁹The Attorney General has stipulated the following, as examples: 1) for IP infringement where the evidence of pirated CDs are less than 5,000, the cases are directly handled by the District Attorney; 2) for IP infringement where the number evidence of pirated CDs in the range of 5,000-10,000, the cases are directly handled by the High Attorney; and 3) for IP infringement where the evidence of pirated CDs are more than 10,000 (bulk production), the cases are directly handled by the Attorney General. Reports are to be submitted directly to the Attorney General. See Ministry of Trade of the Republic of Indonesia (Dr. Mari Pangestu), *Intellectual Property Rights System of Indonesia: Progress and Achievements in 2010*, *supra* note 6.

¹¹BSA’s 2011 software piracy statistics will not be available until after the filing deadline for this submission, but will be released in May 2012, at which time piracy rates and U.S. software publishers’ share of commercial value of pirated software will be available at www.iipa.com. In 2010, the software piracy rate in Indonesia was 87% (one of the highest in the world), representing a commercial value of unlicensed software attributable to U.S. vendors of US\$727 million. These statistics follow the methodology compiled in the Eighth Annual BSA and IDC Global Software Piracy Study (May 2011), <http://portal.bsa.org/globalpiracy2010/index.html>. These figures cover packaged PC software, including operating systems, business applications, and consumer applications such as PC gaming, personal finance, and reference software – including freeware and open source software. They do not cover software that runs on servers or mainframes, or routine device drivers and free downloadable utilities such as screen savers. The methodology used to calculate this and other piracy numbers are described in IIPA’s 2012 Special 301 submission at <http://www.iipa.com/pdf/2012spec301methodology.pdf>.

¹²A 2010 study done by IDC for the Business Software Alliance found that decreasing Indonesia’s software piracy rate by ten points over a four year period would add US\$2.43 billion to GDP, generate US\$124 million in additional tax revenues and create 1,884 new IT jobs. The benefits would be even greater if the 10 point reduction was achieved in two years, yielding \$3.18 billion in added GDP and \$162 million in new tax revenues.

end-user software piracy based on BSA complaints. In all, the police initiated 70 end-user piracy raids in 2011. As a recent example, on December 1, 2011, the South Jakarta District Police carried out retail raids on four stores in Ambassador Mall, confiscating more than 3,000 pieces pirated business software. The law is not the problem (Indonesia's law contains an excellent provision criminalizing end-user software piracy (Article 72(3)) which should be replicated elsewhere); implementation remains the key hurdle.

Retail Piracy, Mall Piracy, Including Physical and Mobile Device Piracy Remain Rampant, With Seizures Down in 2011: Indonesia's notorious markets¹³ remain replete with retail piracy in kiosks and malls including factory and burned-to-order CDs, VCDs, DVDs, and CD-ROMs of music, movies (including pirate movies in or claiming to be Blu-ray), business software, videogames, and published materials. Also problematic are mobile device piracy (loading illegal copyrighted files onto various mobile devices or carriers) and hard disk loading, in which computers are loaded with the latest software or other copyright materials – all of it unauthorized – at the point of sale of the hardware. Some industry sectors report hard goods piracy as comprising an extremely high level – upwards of 90-95% – of the retail/mall marketplaces for creative content. Jakarta and surrounding areas remain the base for production of piracy, and therefore are also the retail bases and distribution hubs for the country. All indicators suggest that criminal syndicates support illegal production and distribution, with burned recordable discs well outnumbering factory discs due to the lower expense and the fact it can be done out of the home. Enforcement officials are reportedly reluctant to conduct regular enforcement actions because of the presence of organized criminal gangs. Discouragingly, enforcement was spotty in 2011, with most raids conducted by Indonesian National Police (INP) and IPR investigators in November and December 2011, leading to much smaller numbers in terms of overall seizures of hard goods piracy (CDs, VCDs, and DVDs). The Government of Indonesia should introduce landlord liability for the infringing activity of tenants, and should ensure that the business licenses of stores and distributors engaged in infringement are revoked.

Book Piracy: Piracy of published materials in Indonesia, especially academic books and journals, continues to be a major concern. While commercial-scale photocopying (mainly on and near university campuses) remains the primary challenge, print piracy and unauthorized translations are also problematic. Most copy centers provide catalogs to facilitate the business of copying academic texts for students, with shops operating on a "print to order" basis upon customer demand, thus avoiding the stockpiling of illegal copies. The Government of Indonesia should take swift effective actions against illegal photocopying, print piracy, and unauthorized translations. As one step, the Indonesian government should work with right holder groups to tackle this problem effectively and take steps to legitimize the use of published materials at schools and universities.

Internet Piracy and Wireless Mobile Piracy: Internet usage in Indonesia reached 39.6 million users as of December 2010, or 16.1% of the population, and has grown steadily over the past several years. Broadband penetration has been slower, mainly due to infrastructure difficulties, and by mid-2011, was just over two per cent of the population (5 million).¹⁴ Wireless broadband is increasingly popular among the youth market, and the mobile subscriber base has exploded in recent years – now over 180 million as of March 2011. As a result, online and mobile piracy has become a problem,¹⁵ including direct download sites and illicit P2P file sharing, mainly from servers located outside Indonesia. Some of the most notorious piracy websites in the world are servicing the Indonesian market.¹⁶ The evasive behavior of online pirate services in Indonesia, switching online locations and website names

¹³Major cities including Jakarta, Padang, Java Island, Semarang, Medan, Makassar, Bandung, and Surabaya have hotspots replete with pirate materials. Notorious markets in 2011 included Harco Glodok, Ratu Plaza, Pinangia Plaza, and Ambassador Mall/ITC, and Mangga Dua Mall. Other notorious spots in the Jakarta area include Glodok Penampungan, Jalan Pinangia, and Glodok Jakarta. Harco Glodok was listed by USTR as a "notorious market" in its Out-of-Cycle Review of Notorious Markets, published December 20, 2011.

¹⁴Point-Topic, *Indonesia Broadband Overview*, November 2, 2011, at <http://point-topic.com/content/operatorSource/profiles2/indonesia-broadband-overview.htm>.

¹⁵The independent film and television segment of the motion picture industry (IFTA) reports that online piracy remains a significant export constraint for independent producers and distributors, the majority of which are small to medium sized businesses. Independent producers partner with local authorized distributors to finance and distribute their films and programming in Indonesia. These authorized distributors find it almost impossible to compete with pirates. Producers and distributors confirm that DVD sales have been particularly impacted since pirated digital copies are offered for free online and with the same quality viewing experience as a DVD. Unable to compete with free, legitimate distributors are unable to commit to distribution agreements or offer drastically lower license fees which are inadequate to assist in financing of independent productions.

¹⁶For example, *Sohu.com*, ranked 9th in China and 44th globally in terms of Internet traffic, and *Sogou.com*, ranked 25th in China and 123rd globally, provide search functionality for infringing music files to the Chinese-speaking community in various countries in Asia, including Hong Kong, Taiwan, Singapore, Malaysia, (...continued)

to avoid detection, using other fraudulent practices, and using offshore servers, has created hurdles to effective enforcement. Without a legal infrastructure in place fostering responsibility of service providers for helping deal with online infringements, e.g., through a statutory notice and takedown procedure in the hosted environment and ways to deal with non-hosted infringements in a fair and efficient manner, right holders lack an effective remedy against online infringement. Perhaps the most egregious effect of rampant online piracy is the dampening of the growth and evolution of a legitimate digital marketplace which benefits consumers, local and foreign right holders as well as the local distribution infrastructure. The record industry notes international illegal sites such as *4shared.com* and others that are marketed toward the Indonesian population, notwithstanding that their servers are offshore. Services like the notorious *Sogou* (and its parent company *Sohu*) are also harming the Indonesian market.¹⁷

While some discussions ensued between right holders and Internet service providers, the ISP community maintains they are not associated with infringing activity, and therefore, should not be held liable. While ISPs have no mandatory legal requirement under current law to address infringing activities on their networks, steps should be taken to encourage more active, voluntary cooperation of ISPs with right holders to prevent the use of their networks for infringement, including but not limited to establishing fair and effective processes for dealing with non-hosted infringements and repeat infringers. ISPs recently participated in a focus group meeting with right holders hosted by the Indonesia ISP Association (APJII). Issues such as the use of offshore servers were agreed to pose challenges under the current laws (for example, such activity is not covered under the Cyber Law). In July 2011, the Ministry of Information and Communication announced that it would be seeking to block websites that distribute pirated files, indicating its focus on *4shared*, which it said is a high-capacity website that provides videos, music and graphics, violating government regulations on copyright. The Minister also indicated that as part of the “Hail Our Music” initiative, music industry and ISPs would cooperate to seek closure of the most notorious sites (most of which are local services).¹⁸ In September 2011, the Government reportedly held talks with ISPs about their significant role in digital transactions. IIPA calls upon the Indonesian Government Ministry of Communication and Information to continue helping to devise a strategy among all stakeholders to deal with growing Internet and mobile piracy. It is also important to devise strategies to deal with fraud occurring over the Internet, such as the use of fake names, addresses, or identities, as there remain weaknesses in the administrative enforcement system in this regard (e.g., one may reportedly easily register a website by using a fake identification).

MARKET ACCESS AND RELATED ISSUES

Customs Valuation of Film Imports: The historical valuation of film imports is made on a per-meter basis against the carrier medium, in line with standard international practice. This past year, Indonesian Customs unfortunately went down a different path before realizing the negative impact that it would have on the local economy. Indonesian Customs initially implemented a radical revaluation of import duties on 35mm film under its 1995 Customs Law (as amended)¹⁹ which would have cost the local and foreign film industries millions per year in additional taxes. This year, they relented from this previous valuation, but then issued Decree No. 102, imposing a new scheme of value-added tax (VAT) for imported film prints using a fixed tariff on a per-minute basis which is significantly higher than the effective previous amounts, and which is inconsistent the WTO Customs Valuation

(...continued)

Macau, Thailand and Indonesia, causing substantial damage to the music markets there. More than 260 other websites are known to provide links to unauthorized Indonesian sound recording files which subsequently locate overseas cyberlockers, including *4shared.com*, *mediafire.com*, and *ziddu.com*. *4Shared.com* is a popular “one-click hosting” site or cyberlocker site, has a current Alexa ranking of 73, and is operated by a company based in the British Virgin Islands. *4Shared*’s service incorporates search functionality, a complete contradiction to any claims that the service is designed for private “locker” use. The site includes a dedicated “music” section and has featured messaging encouraging users to upload their favorite songs and share them with friends.

¹⁷*Sohu/Sogou* was listed by USTR as a “notorious market” in its Out-of-Cycle Review of Notorious Markets, published December 20, 2011.

¹⁸See Tomi Tresnady, *Hari Ini*, *Kemenkominfo Tutup 20 Situs Musik Ilegal*, *Okazone*, July 27, 2011, at <http://music.okazone.com/read/2011/07/26/386/484624/hari-ini-kemenkominfo-tutup-20-situs-musik-ilegal> (citing 20 websites noted at a meeting between MOCI and the music industry).

¹⁹Under that Law, Customs was demanding payment of customs duties on the contractual amounts paid by the importer for the exclusive rights to commercially exploit the underlying content contained on the carrier medium (so-called license fees for often exclusive “distribution rights”), i.e., the content of the film.

Agreement and other international norms.²⁰ The Government should reverse this scheme and resume valuation based solely on the carrier medium, in line with the accepted international methodology.

Local Printing Requirement: The Government of Indonesia Ministry of Tourism and Creative Economy (MTCE) just suspended MOCT Ministerial Decree No. 55 (2008) requiring the local replication of all theatrical prints and home video titles (e.g., DVDs) released in Indonesia until January 1, 2013. The Decree should be formally and permanently eliminated as soon as possible. The regulation, if implemented, would harm local interests in several ways: 1) it would have serious negative consequences on the long-term viability of Indonesia's film industry, 2) it would threaten any incentive for the continued development of local cinemas, 3) it remains opposed by Indonesian filmmakers due to their own concerns about the quality of local labs matching that of overseas facilities, and 4) it could jeopardize arrangements local filmmakers have for post-production work overseas. Far from boosting the local industry as a whole, the Regulation would appear to be aimed at benefiting only the local duplication facilities, and ends up and harming other industry stakeholders. The Regulation also negatively affects foreign motion picture companies' release and distribution schedule for the country, and raises concerns over existing local facilities' ability to handle its volume and quality output requirements as well as lab and duplication facility security issues.²¹

Film Law Imposes Quota and Strict Censorship Requirements: In September 2009, the Indonesian Parliament enacted a new Film Law. This Law could seriously limit foreign participation in various film businesses in ways that are inconsistent with the U.S.-Indonesia Letter Agreement on Market Access for Films and Videos. The Law is so ill-conceived that even local Indonesian filmmakers came out vehemently against it upon passage.²² The Law includes a 60% local content (screen) quota for local exhibitors that would, if enforced, severely limits local industry's exposure to the expertise and skills of foreign-based producers, harms local theaters, and fosters piracy of films excluded by the quota but for which there is consumer demand. The Law would also aim to limit the number of imported films. Industry has been assured that the 60% quota will not be enforced to its fullest extent and that the Law is "not intended to restrict" foreign films in Indonesia, but this questions the rationale behind the Law's passage. The Indonesian Film Society (*Masyarakat Film Indonesia*) has sought a constitutional review of the Law which may lead to a judicial review. Implementing Regulations should at least recognize international best practices including the ability of right holders to determine whether, how, and where their works are made available. IIPA also objects to Article 44 of the law which bans dubbing of imported films. Dubbing of imported films into a local language is a commercial decision that should not be unduly regulated.

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 many copyright products in Indonesia. The motion picture and music sectors are particularly hard hit by this ban. Presidential Decree 118 of 2000 remains in force and stipulates that all importation and distribution of films and video products is restricted to wholly-owned Indonesian companies. An annexure to the Decree lists those media sectors closed to foreign investment, including 1) radio and television broadcasting service providers, radio and television broadcasting subscription service providers, and print media information service providers, and 2) film making businesses, film technical service providers, film export and import businesses, film distributors, and movie house operators and/or film showing services. The Broadcast Law allows foreign ownership up to a 20% cap, and IIPA understands that the Broadcast Law overrides the Presidential Decree. IIPA notes the longstanding promise made by the government of Indonesia that it would open investment in media companies to foreigners as soon as the Indonesian market was opened to the direct distribution of any other foreign goods (which occurred many years ago). Broader investment in the distribution structure would benefit local and foreign-based producers alike in creating more legitimate channels over which to distribute films.

²⁰Regulation of the Minister of Finance Number 102/PMK.011/2011 Concerning Other Value as the Tax Imposition Base on Utilization of Intangible Taxable Goods From Outside the Customs Area Within the Customs Area in the Form of Imported Feature Films and Delivery of the Imported Feature Films, and Imposition Base of Article 22 Income Tax on the Activity of Importing the Feature Films, July 13, 2011, at http://www.depkeu.go.id/Eng/Data/Regulation/102_PMK.011_2011.pdf.

²¹With respect to home video, the Decree would serve as a barrier as there is unlikely to be any capability to replicate Blu-ray locally in the near future.

²²Liz Shackleton, *Indonesian Filmmakers Condemn New Film Law*, September 10, 2009, at ScreenDaily.com. According to the new legislation, violating the rules could result in a prison sentence of up to five years and a maximum fine equivalent to about US\$500,000.

New Decree Has Destroyed Ring-Back Tone Market: In 2011, we saw yet another example of the Indonesian Government impeding right holders and ironically, hindering the ability of a new business model to emerge that could benefit local musicians, artists, and recording labels. The Information and Communications Ministry, on October 18, 2011, issued Decree (BRTI) No. 177/2011 which was aimed at phone credit fraud (e.g., phone cards which deduct significant amounts prior to first use), but has virtually destroyed the mobile phone ring tone market. Ring tones and ring-back tones provide significant market opportunities for recording artists, both Indonesian and foreign. In the Decree, BRTI instructed telecommunications companies to: 1) stop offering content through SMS broadcast/pop-screen/voice broadcast until a time to be later determined; 2) deactivate/unregister as of the date of issuance (October 18, 2011) each Premium Message Service, including but not limited to SMS/MMS premium subscriptions, ring tones, games, or wallpaper services. As a result of the Decree, all “pay SMS” messages (including those in which ring tones and ring-back tones are purchased) were made illegal. Ring-back tones were a significant market in Indonesia. The recording industry in Indonesia estimates it has lost almost 95% of the ring-back tone market due to this new and unprecedented restriction, on top of illegal ring tone and ring-back tone businesses. While the government claims the process of selling ring-back tones will be able to recommence once the fraudulent practices are undercut, the damage has been done. In addition to repealing this damaging Decree, IPR investigators and the Police should immediately initiate investigations into identifying parties involved in illegal ring tone and ring-back tone operations.

COPYRIGHT LAW AND RELATED ISSUES

Copyright Law Revision Process Stalled: Copyright protection in Indonesia is governed by the Law of the Republic of Indonesia, Number 19 Year 2002 Regarding Copyright (effective July 29, 2003).²³ Indonesia joined the WCT on June 5, 1997 (in force March 6, 2002) and the WPPT on February 15, 2005.²⁴ IIPA understands that the copyright revision process that was underway in 2010 is now on hold. IIPA encourages the Indonesian Government drafters to make necessary changes to modernize the statute and fully implement Indonesia’s treaty obligations, while duly enforcing the current law (which is adequate to address physical, online, and mobile piracy as well as end-user piracy of business software). In particular, the Government should ensure that any proposed changes are open for public consultation and comment, and notes the following key points for any amendments which come forward (including some longstanding issues):²⁵

- **Retain *ex officio* Authority:** IIPA recommends retaining *ex officio* raids but imposing a transparency requirement to avoid abuse of power by police officers or the problem of “case broker” payoffs. The recording industry group ASIRI has in trainings on the Copyright Law raised the chief concern that *ex officio* authority must be maintained.²⁶
- **Provide Minimum Criminal Penalties for All Forms of Copyright Infringement on a Commercial Scale:** The current Copyright Law provides minimum criminal penalties only for the production or manufacture of pirated

²³*Undang-Undang RI No. 19 Tahun 2002 Tentang Hak Cipta.* In addition, the Government of Indonesia is quick to point out that a *Fatwa* also exists indicating that infringement is forbidden by Islamic law. The Indonesian Ulema Council (*Majelis Ulama Indonesia/MUI*) has released a religious decree (*fatwa*) emphasizing that —any kind of IPR infringement, including but not limited to, using, disclosing, producing, utilizing, selling, importing, exporting, distributing, giving out, providing, publishing, reproducing, copying, counterfeiting, and hijacking others’ IPR illegally is *haram*, or legally forbidden by Islamic law. (MUI Decree No. 1/MUNAS VII/MUI/15/2005 concerning IP Protection). In a country with the most populous Moslem in the world, the MUI has been playing an instrumental role in public daily life and *fatwas* originating from this institution will be observed obediently.

²⁴Regulations dealing with “rights management information” were finalized in 2005, but implementing regulations regarding technological protection measures (TPMs) (as covered in Article 27 of the Copyright Law) are still missing and are needed to fully implement the WCT and the WPPT. An April 2003 Report issued by the Indonesian government indicated, “[t]he Law No. 19 does not provide detailed provisions on the safeguard of technological measures. Rather, such provisions have been accommodated by Law Number 14 of 2001 regarding Patents.” However, no articles in the Patent Law deal with protection of TPMs.

²⁵IIPA has in previous submissions commented in detail on the Copyright Law (2002), and provides herein only highlights of significant changes needed in the new amendments. Other issues previously mentioned include: 1) providing TRIPS-compatible protection for pre-existing works and related rights, 2) limiting the private copy exception to a single lawfully obtained copy, and 3) fixing the adaptation right which is curtailed in Indonesia Law in a Berne-incompatible way.

²⁶On November 22, 2010, ASIRI arranged a focus group discussion attended by professionals, lecturers, IPR experts, producers, the CMO for composers and music publishers, a regional police officer and IFPI. On December 6, 2010, a follow-up discussion was held with at least 100 attendees including lecturers, music producers, professionals, and students.

goods (see Article 72(1) of the Copyright Law), but should be provided against sellers of pirated goods and other forms of piracy, e.g., enterprise end-user software piracy, and the Law should increase maximum penalties.²⁷

- **Provide for Landlord Liability:** Landlords that do not directly infringe but know of infringement or are aware of circumstances from which infringements by tenants are apparent, and financially benefit from such infringement, should be held liable in Indonesia. This would ensure that all mall owners would be responsible for ridding their premises of piracy. Articles 55 and 56 of the Penal Code should provide guidance, as they hold criminally liable one who forces others to commit or jointly commit a criminal act (Article 55(1)) or one who provides an “opportunity” or “intentionally ‘persuades’ others” to commit a criminal act.
- **Deal Effectively With Online Infringement:** Given the recent growth of Internet, broadband, and wireless mobile broadband connectivity in the country, any amendments should aim at removal of online and mobile infringements, promoting service provider responsibility and fostering cooperation with right holders. The law should ensure expeditious removal of infringing content, including statutory notice and takedown as well as effective and fair policies in place by ISPs for dealing with repeat infringers. Draft Article 39 had reportedly taken up the issue of ISP liability, but was deleted in the latest Bill (from November 2011).²⁸ The law should also ensure assistance to right holders in identifying and removing infringing content and P2P piracy. The law should avoid blanket immunities and ensure that injunctive relief is always available. While the Indonesian Government has enacted a Cyber Law,²⁹ Article 27 does not impose a measure comparable to that in the Council of Europe Cybercrime Convention related to copyright infringement through use of a computer.³⁰
- **Include Anti-Camcording Piracy Provisions and Consider Standalone Provisions:** The amendments should define the act of using (or attempting to use) an audiovisual recording device in cinemas to camcord, record, or transmit a film, in whole or in part, as a *strict liability* criminal offense. The APEC Ministers and Leaders, including from Indonesia, recently agreed on “Effective Practices for Addressing Unauthorized Camcording,” and the steps recommended therein should also be taken.³¹
- **Include Anti-Circumvention Provisions:** Indonesia joined the WCT and WPPT, but has not implemented Article 27 of the Law on technological protection measures (TPMs), which are measures that prevent the unauthorized access to, or exercise of exclusive rights in, works and other subject matter. The WCT and WPPT require adequate and effective protections against the circumvention of TPMs used to protect against unauthorized access to, or unauthorized exercise of copyright in, works. Protections should cover the trafficking in circumvention technologies, devices, or components as well the act of circumventing a TPM (and services related to both).
- **Establish Statutory Damages:** The TRIPS Agreement permits WTO members to adopt a system of pre-established damages. In cases where it is difficult or impossible to determine actual damages, whether involving pirate distributors or cases in which the infringer achieved an unjust enrichment (e.g., enterprise end-user software piracy), it is important for right holders to be able to elect, in advance of final judgment, to receive pre-established damages equivalent to compensation for the injury suffered by the right holder.
- **Confirm WCT- and WPPT-Compatible “Making Available” Right**

²⁷The Indonesian Government indicated they are proposing raising the maximum fine from Rp. 500 million to Rp.1 billion.

²⁸The Draft Bill is still reportedly with the Indonesian Government and has not yet been delivered to their House of Representatives. The Program to revise the Bill has been removed from the list of National Legislation Programs 2012 since the Government has changed the original deadline.

²⁹Law of Indonesia No.11 of 2008 Concerning Electronic Information and Transactions.

³⁰The Council of Europe Cybercrime Convention contains, in Article 10, “Offences related to infringements of copyright and related rights,” an obligation to “adopt such legislative and other measures as may be necessary to establish as criminal offences under its domestic law the infringement of copyright [and related rights] ... where such acts are committed wilfully, on a commercial scale and by means of a computer system,” and Article 11 contains the obligation to “establish as criminal offences under its domestic law, when committed intentionally, aiding or abetting the commission” of Article 10 offenses.

³¹*Effective Practices for Addressing Unauthorized Camcording*, 2011/AMM/014app05, 23rd APEC Ministerial Meeting, Hawaii, United States 11 November 2011. The document notes,

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

- **Provide Rights for Producers of Sound Recordings, Consistent With WPPT:** Producers of sound recordings must be granted exclusive rights to control the dissemination of their products over the Internet. These include an exclusive communication to the public right including all forms of wire and wireless transmissions (including broadcast), including an interactive “making available” right, as well as exclusive distribution and public performance rights. Producers also need the ability to authorize or prohibit importation into Indonesia of copies of phonograms, and the right to control the distribution of copies of phonograms.
- **Importation Right:** The law should provide right holders the ability to authorize imports. This will ensure that pirated products do not get across the border masking as parallel imports of genuine products from other countries.
- **Avoid Single Window Licensing:** The Indonesian Government should scrap any plan to mandate collective licensing across copyright categories, and set a joint tariff rate through the establishment of a “National Collective Management Organization.” Experience has shown that licensing markets function effectively where right holders remain free to find the most efficient way to administer their rights and engage in face to face negotiations to secure authorized distribution of the copyrighted property. Freeing the market from any restrictions means that competition between different players is maintained, and market powers can determine the best solutions for both right holders and users. To ensure that these conditions exist in Indonesia, right holders should be allowed to determine for themselves if and which collecting society to join and entrust their rights, and whether or not to collect copyright remuneration jointly with other right holders. Collective Management Organizations (CMOs) should be permitted to operate in a commercial manner, free from interference from the government. Further, there should not be any mandatory process for tariff pre-approval which is bound to disrupt royalty collection and prejudice right holders by requiring them to bear unnecessary costs associated with rate-setting procedures and by denying from them the ability to collect royalties that are set in free and open market conditions. The local record industry group ASIRI held a seminar in late 2010 to explain why right holders should not be forced into collective management schemes, including single licensing windows.
- **Modernize Term of Protection:** Term of protection should be provided consistent with international trends and U.S. standards (e.g., life of the author plus 70 years, or in the case of works whose term is calculated based on the date of publication or for which authorship is corporate, 95 years).
- **Availability of Interlocutory Injunctions:** IIPA members have long awaited an amendment making available interlocutory injunctions (‘Anton Piller Orders’) against IPR infringers. If not dealt with in the amendment, an implementing regulation should be implemented by the Supreme Court on an urgent basis, to allow right holders to file for injunctions with the Commercial Courts.

Strengthen Organized Crime Statute: It has been established that criminal syndicates behind pirate enterprises which manufacture and distribute optical discs are also involved in many other forms of crime such as trafficking in persons, illegal logging and illegal gambling. As such, the government of Indonesia needs to ensure that copyright infringement is included as a predicate crime for remedies under its organized crime law, e.g., as grounds for broader criminal investigations, seizure, freezing of assets, etc.

Optical Disc Regulations Should be Strengthened and Made GATT/WTO-Consistent: The Optical Disc Regulation (2005),³² a Ministry of Trade Regulation on the import of machines and raw materials,³³ and another Regulation on reporting by registered producers,³⁴ were enacted and issued to address rampant optical disc piracy. The Regulations need to be updated to: 1) prohibit the unlawful use of or manipulation of source identification (SID) code, including gouging off SID Codes and/or total non-use of SID codes; 2) provide for centralized licensing of

³²Government Regulation Number 29 of 2004 Concerning High Technology Production Facilities for Optical Discs” (in force April 5, 2005). This Regulation requires reporting of annual production of optical discs to the Minister of Trade.

³³Regulation of the Minister of Trade No. 11/M-DAG/PER/3/2010 regarding the Importation Requirements on Machine, Machine Apparatus, Raw Materials, Empty Optical Discs and Preloaded Optical Discs. This Regulation requires importers of optical discs to provide an annual reporting to the Directorate General of Foreign Trade of the Ministry of Trade.

³⁴Ministerial 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.

production of prerecorded or blank optical discs; 3) remove the requirement that imported, pre-recorded discs be marked with identification code, which violates GATT/WTO rules and could have other negative ramifications; 4) adequately cover stampers and masters; 5) expressly cover (imports and) exports of discs, equipment and raw materials; 6) expressly authorize forcible entry in an inspection in case a suspect target refuses entry; 7) require the government to keep records of “permits” and raids run; and 8) expressly impose corporate liability on individuals. The Regulation on import reportedly covers optical disc production machinery, raw materials (optical grade polycarbonate) and, unfortunately, finished discs (in addition to blank discs). This importation Decree is not working as intended in that it allows anyone to import polycarbonate, whereas under the OD Regulation, only those industries directly related to the optical disc industry were permitted to import polycarbonate. The Government of Indonesia should give assurances that this Regulation will not be used as a tool to keep legitimate copyright owners or authorized distributors from importing discs into Indonesia.³⁵ In addition, a fatal flaw of the regulatory framework is that it does not provide clear enforcement authority or grounds for routine inspections on manufacturers’ or importers’ premises. Spot, unannounced, inspections are needed.

GENERALIZED SYSTEM OF PREFERENCES

The GSP program, designed to promote economic growth in the developing world by providing preferential duty-free entry for products from designated beneficiary countries and territories, expired on December 31, 2010, but on October 21, 2011, President Obama signed legislation to reauthorize the program through July 31, 2013. GSP trade benefits became effective 15 days after the President signed the bill (November 5, 2011) and apply retroactively from January 1, 2011. Indonesia has been a major beneficiary of the GSP program. During the first eleven months of 2011, almost US\$1.8 billion in imports to the U.S. from Indonesia enjoyed duty-free treatment under the GSP Program, or 10.2% of Indonesia’s entire imports into the U.S.³⁶

Among the criteria the President must take into account in determining whether a country should continue to be designated as a GSP beneficiary country are “the extent to which such country is providing adequate and effective protection of intellectual property rights,” and “the extent to which such country has assured the United States that it will provide equitable and reasonable access to the markets ... of such country.” 19 USC 2462(c)(4) and (5). IIPA believes that Indonesia is not meeting these standards. Thus, on December 30, 2011, IIPA submitted its request that the eligibility of Indonesia as a GSP beneficiary developing country be reviewed, and that its GSP benefits be suspended or withdrawn, in whole or in part, if requisite improvements are not made by Indonesia to remedy deficiencies which have adversely affected U.S. copyright owners. IIPA has requested that the U.S. Government work with the Indonesian Government on means to address these deficiencies and, if Indonesia fails to adequately address these concerns, suspend or withdraw GSP benefits, in whole or in part.

Specifically, Indonesia does not meet the GSP eligibility criteria due to 1) lack of adequate and effective intellectual property rights protection and enforcement (including court enforcement) which has resulted in extremely high levels of physical and online piracy (it is estimated that 87% of PC software is unlicensed, while piracy rates for other industries are even higher); and 2) a lack of equitable and reasonable access to the Indonesian market, through, among many barriers, a requirement to locally replicate all theatrical prints and home video titles released in Indonesia, a customs valuation method for audiovisual products that is inconsistent with the internationally accepted practice, the ban on foreign company participation in, or even investment in, importation, direct distribution, exhibition, or retailing in many copyright products in Indonesia, and a Film Law that includes a 60% local content quota for local exhibitors, strict censorship requirements, a prohibition (in Article 44) on the dubbing of imported films, and other restrictions on film industry.

³⁵The Government of Indonesia reported in its 2011 Special 301 submission the existence of 34 “legally registered OD manufacturers in Indonesia in 2010; comprising of 26 filled optical discs manufacturers, 3 empty optical discs manufacturers, and 5 stamper companies.” The Government noted that among the 44 inspections of plants conducted in 2010, 15 plants were found to have “disobeyed” the Regulations, with one company “suspended/frozen” due to “indication of piracy and no production code,” and two companies “suspended” due to “expired registration.”

³⁶During 2010, more than US\$1.85 billion in imports to the U.S. from Indonesia enjoyed duty-free treatment under the GSP Program, or almost 11.4% of Indonesia’s entire imports into the U.S.

It is essential to the continued growth and future competitiveness of these industries that our trading partners, including Indonesia, provide free and open markets and high levels of protection to the copyrights on which this trade depends. Unfortunately, piracy and lack of equitable and reasonable market access in countries like Indonesia harm U.S. creators and contribute to the maintenance of an imbalanced playing field. Countries like Indonesia cannot expect to continue to receive trade preferences if they do not live up to their end of the bargain by providing adequate and effective protection for the intellectual property rights of U.S. creators, and/or if they fail to afford equitable and reasonable market access to U.S. creative products and services.

TRAINING AND PUBLIC AWARENESS

We thank the U.S. Government for its continued engagement through the Indonesia-U.S. Comprehensive Partnership plan “to promote better protection and enforcement of intellectual property rights,” through the Trade and Investment Framework Agreement, and through the ICITAP program.³⁷ We also recognize efforts of the Indonesian Government, including its recognition of the importance of training and public awareness.³⁸ In 2011, as in previous years, the copyright industries conducted and participated in various training and public awareness activities in Indonesia. BSA regularly works with Indonesian police conducting capacity building and education on software licensing and enterprise end-user software piracy, technical aspects in conducting raids, and evidence seizure/preservation methods. The Indonesian Police have also agreed to the publication of advertisements and posters bearing strong messaging against software piracy. In 2011, BSA provided capacity building for police investigators. BSA also partnered with the Directorate General of Intellectual Property Rights (DGIPR) to re-launch the Piagam HKI (Copyright Program) program and a new campaign website which offered a BSA-Police certification to companies that verified their software. The local recording industry group, ASIRI, remained active in training courses for Indonesian Police Department cadets. Regular training workshops (once a month) are provided to the Police Department in which 25 new Police Investigators hear about effective IPR investigation skills from industry representatives. The industry suggests that in 2012 regular technical training be provided to IPR investigators, police investigators, and prosecutors in the investigative process. The motion picture industry has focused its recent activities on public awareness of the importance of strong copyright protection to the development of the local film industry.³⁹

³⁷The “International Criminal Investigative Training Assistance Program” (ICITAP) commenced in October 2006, comprising an anti-piracy enforcement initiative and an optical disc piracy initiative. The program has led in the past to some concrete positive results in terms of facilitating better enforcement against copyright infringements. It has also helped build capacity, mentored, and provided technical assistance to optical disc factory inspection teams that include officials from the Department of Industry (DOI), Police, Customs, the Department of Trade and the DGIPR.

³⁸The Government has noted its attempts to implement the “Presidential Instruction on the Development of the Creative Economy,” under which some 27 ministries and regional governments are tasked to “socialize the importance of IPR and appreciation towards IPR,” including “campaigning the importance of creativity and IPR as the main source of competitiveness in the creative economy era,” “enforcing efforts to bring to an end the piracy of creative products,” “formulating and implementing IPR policy in a consistent manner,” “laying the foundation for business interaction between companies and creative workers by establishing the standards for a business contract that clearly specifies the importance and respect of IPR,” and “conducting IPR public education, including organizing annual exhibition of Indonesia’s Creative Product since 2008.”

³⁹For example, in late 2009 MPA hosted (with the Indonesian Embassy) a screening in Washington of the Indonesia movies *Garuda di Dadaku* and *Naga Bonar Jadi*. MPA also supported the ‘Democracy Video Challenge,’ in which one Grand Prize Winner (from more than 1,600 young artists from 110 countries) came from Indonesia. MPA provided support for the Asia-Pacific Screen Awards (APSA). On August 9, 2010 (and in conjunction with the local film body Balinale), MPA held a Film Forum & Workshop in Jakarta, attended by over 50 Indonesian filmmakers and students who learned about film industry development and infrastructure. In October 2010, MPA supported Balinale on the Bali Film Festival, securing a number of U.S. movies including *Eat, Pray, Love*.

RUSSIAN FEDERATION

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

2012 SPECIAL 301 REPORT ON COPYRIGHT ENFORCEMENT AND PROTECTION

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

Priority Recommendations in Russia – Key Legal Reform and Enforcement Actions: Here is a list of IPR legal reform and enforcement priorities that IIPA recommends to the Government of Russia for 2012:

- Undertake effective actions against Internet piracy – including:
 - (a) takedowns of unlicensed streaming services including social networks, pay-per-download websites and actions against cyberlockers, BitTorrent sites, and Internet cafes, with criminal and/or administrative actions commenced (and deterrent penalties) against owners and operators of such sites, regardless of whether the servers are located in Russia or elsewhere; and
 - (b) properly staffing and resourcing a special IP Unit in Department K, and, confirming the Department's jurisdiction over copyright infringement cases.
- Amend the Civil Code, Part IV, to:
 - (a) fully implement the WIPO digital treaties – the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT);
 - (b) implement notice and takedown procedures for websites hosting illegal material;
 - (c) provide legal norms that create incentives for Internet Service Providers (ISPs) to cooperate with right holders in fighting infringement taking place over their networks or platforms, including *inter alia*: (i) legal incentives for ISPs to cooperate with rights holders to effectively deal with Internet piracy; (ii) rules that clarify the illegality of providing services that are intended to promote the infringement of copyright and related rights; and (iii) injunctive relief and a duty on ISPs to provide information to law enforcement agencies and rights holders.
 - (d) implement effective measures to address websites that are hosted outside of the jurisdiction of Russia or where the domain owner and/or website administrator are foreign entities, or where the website is registered outside of Russia, and, establish liability for domain name owners and/or website administrators regardless of the location of the servers.
 - (e) ensure that an unauthorized online distribution, communication or making available is considered an act of infringement, regardless of whether it is undertaken for profit-making purposes or other commercial benefit or advantage.

¹For more details on Russia's Special 301 history, see IIPA's "History" appendix to this filing at <http://www.iipa.com/pdf/2012SPEC301HISTORICALCHART.pdf>, as well as the previous years' reports, at <http://www.iipa.com/countryreports.html>. For a summary of IIPA's 2012 global issues, see our cover letter at <http://www.iipa.com/pdf/2012SPEC301COVERLETTER.pdf>.



- Strengthen copyright liability under the Administrative Code by:
 - (a) eliminating the for-profit requirement in Article 7.12 of the Code of Administrative Offences, and by establishing additional deterrent penalties, such as: (i) higher fixed fines for violations by legal entities and individuals; (ii) fines proportionate to corporate revenues (e.g., as is done for anti-monopoly violations); or (iii) penalties to disqualify, for one to three years, managers of legal entities; and
 - (b) ensuring that the Federal Anti-Monopoly Control uses its enforcement authority to take effective administrative actions against services that distribute protected materials without the proper authority to do so, such as, vKontakte and odnoklassniki.ru.
- Bring deterrent levels of criminal actions against retail chains that sell pirated entertainment software, movies and music, businesses using unlicensed software, and organized criminal syndicates involved in piracy.
- Ensure that state approved monopolies for the collective administration of rights operate in a fair and transparent manner and that copyright owners maintain the right to exercise their rights with respect to Internet distribution as they deem appropriate, free from compulsory licensing or other limitations on the free exercise of rights.
- Undertake effective enforcement against illegal camcording of motion pictures.
- Establish a uniform methodology by the Investigative Committee of the Ministry of Internal Affairs (MVD) and the General Prosecutor's Office, on the investigation and prosecution of copyright and related rights infringements to ensure that prosecutors can properly investigate administrative and criminal actions, and to ensure a consistent and uniform approach to these cases throughout the country (particularly, for Internet and software end-user cases).
- Amend the Criminal Code to establish criminal liability against legal entities, including for IPR crimes.
- Adopt optical disc (OD) regulations and proper enforcement actions against these and other production facilities of hard copy materials.

Executive Summary of IPR Issues: Russia will complete its accession to the World Trade Organization in 2012, after the Duma ratifies a final package of legislative measures. At the moment of Russia's formal accession, it is obligated to be in full compliance with the TRIPS Agreement (along with the detailed obligations spelled out in the Working Party Report). While Russia has already made many important IPR legal reforms in anticipation of WTO accession, and to comply with its other multilateral and (U.S.) bilateral IPR commitments, there remain many critical steps for full treaty and trade agreement compliance, and most importantly, to effectively address digital piracy in Russia. It is expected that the Russian Government will move expeditiously to address these matters in conjunction with its WTO accession.

For the past several years, the business software industry has been the only copyright industry that has experienced an overall positive trend in Russia. The software industry has seen piracy rates decline significantly in the past several years (a 22% drop from 2004 to the current rate of 65% in 2010), due to criminal and civil enforcement efforts directed against end-user software piracy and progress made on legalization of software purchased by the government.

For the majority of copyright industries – motion picture, music, entertainment software, and book publishing – 2011 was another year of disappointment in Russia. This was principally due to a lack of focus by Russian authorities on the very serious threat of Internet and other digital forms of piracy. The number of criminal raids, and police activity in general, declined significantly in 2011 from previous years, in large measure due to the reorganization of the police force, and a drop in resources (including a police force reduction of 20%). While hard

goods piracy remains a serious concern for some industries, Russia's laws are generally adequate for addressing this problem (although some gaps, such as optical disc regulations remain). However, this is in stark contrast to the online piracy situation where Russia's legal regime is wholly inadequate and needs modernization. Even more threatening to the copyright industries are proposed amendments to the copyright law to: (a) clearly exempt from copyright liability all third parties – including ISPs even if a piracy problem resulted from the ISPs' own design and making; and (b) excuse almost all online infringing activity as "private" copying.

Overall, Russia's enforcement remains deficient for most of the copyright industries – in particular, its criminal enforcement and lack of administrative actions or deterrent level administrative penalties against commercial enterprises that operate as distribution hubs for infringing content. To curb piracy, it is essential that the Government of Russia pursue an increased number of criminal and administrative actions, and strengthen administrative penalties, particularly against large-scale enterprises, and that prosecutors seek (at the Investigative Committee of the Ministry of Internal Affairs, MVD), and judges administer, deterrent criminal penalties.

The record industry is particularly concerned about the continued operation of infringing music services, such as the one operated by vKontakte, as well as various pay-per-download services that have taken the place of the infamous allofmp3.com. Peer-to-peer piracy is a major concern in Russia, as it is globally, although it is presently dwarfed by the problems associated with hosted content at sites such as vKontakte and odnoklassniki.ru; these and the many other illegal music services noted in this filing, combine to prevent the development of a legitimate online market place. The music industry is also concerned with the lack of transparency and governance issues in connection with VOIS, the state accredited collecting body for record labels and performers, and calls upon the Government of Russia to use its oversight authority to ensure that foreign right holders are being fairly represented and treated, in accordance with commitments that it made to the United States Government and other of Russia's trading partners who had expressed concern with the accreditation process and decisions.

The rapid rise of unauthorized access to journals online is stunting the growth of legitimate markets and investment. Further, Russia continues to have a very serious camcording problem, one of the worst in the world, affecting worldwide markets.

Russia is a beneficiary of the General System of Preferences (GSP) program. In the first eleven months of 2011, more than US\$521.9 million in imports to the U.S. from Russia enjoyed duty-free treatment under the GSP program (and more than US\$578 million in 2010).

COPYRIGHT ENFORCEMENT IN RUSSIA

Internet Piracy Enforcement: Internet and wireless access by Russian citizens is growing rapidly; according to the ITU, there were 59.7 million Internet users as of June 2011 in Russia – which represents 43% of the population, making Russia the number two country in Internet usage in Europe after Germany. The 2006 U.S.-Russia IPR Agreement obligates Russia to combat the growing threat of Internet piracy "with the objective of shutting down websites that permit illegal distribution of content protected by copyright or related rights" (and especially for websites whose servers are situated in Russia) and "to investigate and prosecute companies that illegally distribute objects of copyright or related rights on the Internet."

One recommendation to significantly improve Internet enforcement, is to centrally coordinate law enforcement actions, including both administrative and criminal efforts. In addition to increasing the number of IPR cases and conducting expeditious investigations, another recommendation, is to have relevant administrative agencies (e.g., the Federal Anti-Monopoly Control) targeting large-scale illegal distribution enterprises. One key priority would be actions against the large commercial enterprises that are now responsible for most of the illegal distribution of music in Russia (since these enterprise operate without licenses from music rights holders).

In addition, prosecutors should coordinate their efforts with the police (as should the Investigative Committee of MVD, the Federal Security Service of the Russian Federation (FSB), and Customs, now that they all can initiate criminal cases). After January 2011, the General Prosecutor's Office can only supervise, but not initiate, criminal cases. Still, the General Prosecutor's Office and the Investigative Committee of MVD can develop an updated and detailed methodology for investigations of copyright infringements which would help to increase the quality, effectiveness and consistency of IPR enforcement activities. A new such draft methodology was being prepared in 2011, but unfortunately, this work has now been suspended indefinitely.

A fundamental enforcement shortcoming is the lack of authority and jurisdiction to act against copyright infringement crimes occurring on the Internet, whether through administrative or criminal means. The Code of Administrative Procedure fails to provide sufficient clarity on the ability to bring actions against commercial actors involved in the massive distribution of infringing material where there is no direct fee charged by the enterprise for the infringing materials, and Internet piracy is a very low priority for the MVD's Department K (the department with responsibility for combating technological crimes and Internet fraud, but not, explicitly, Internet copyright piracy). Although Department K has equipment and expertise, there is not a single person in the department assigned to the sole task of combating IP crime – which is why IIPA continues to recommend the proper staffing, equipping and resourcing of a sub-unit within Department K to deal exclusively with IPR Internet cases, and to ensure its officers are trained with detailed methodologies to combat these copyright crimes, especially for the maintenance of evidence. At present, jurisdiction for Internet piracy is ill-defined. For example, combating copyright violations on the Internet such as the dissemination of music through illegal pay-per-download sites and illegal peer-to-peer services, does not clearly fall within the current jurisdiction of the Computer Crimes Department (Department K) within the MVD, even though they have occasionally taken action. So, Department K's authority and responsibility to act in cases of online infringement should be clarified and strengthened.

In addition to the pay-per-download and other hosted sites, Russia is home to a number of major BitTorrent indexing sites such as rutracker.org, launched in response to the takedown of torrent.ru (rutracker.org has an estimated four million users and a worldwide Alexa website ranking of 275). One particularly problematic site is GameTorrent, a BitTorrent tracker and online pirate discussion forum that is owned by a Russian national, but currently hosted in Estonia; neither ISPs nor website owners respond to takedown requests for this site. In 2011, Russia was fourth in the world in the number of connections by peers participating in the unauthorized file sharing of select Entertainment Software Association (ESA) member titles on public peer-to-peer networks – a dramatic increase from its tenth place ranking in 2010. ESA also reports that Russian service providers either host or provide proxy services to a number of the world's largest and most popular linking sites, including warez-bb.org. The motion picture industry (MPAA) citing "Peer Media Technologies" reported that during 2011, users initiated close to 31 million downloads and/or uploads of unauthorized copies of major U.S. movie titles via certain peer-to-peer protocols in Russia.²

Russia is also home to the world's two most prolific criminal release groups. The pirates obtain their source infringing copies by camcording films from local theater screens and then uploading these illegal camcords onto the Internet (and sell hard copies as well). Russia was the source of 77 illegal camcords in 2011. Pre-release DVDs of major film titles often appear on the Internet (and then in pirate hard copies sold online or in markets), within a few days after the authorized theatrical release. The illicit camcords sourced from Russia are of exceptional quality and are thus in high demand by international criminal syndicates for Internet uploading. During 2011, there were 32 film-based raids, mostly in Moscow. However, these interdictions resulted in the commencement of only one criminal case, which the prosecutor then declined to accept; there is thus no current deterrence to ongoing criminal activity.

²A major U.S. movie is defined as a movie released in 1,000 or more theaters in the U.S., so these numbers reflect only a small subset of movie-related piracy activity (since it excludes non-major releases, including local titles, other peer-to-peer protocols, and non-peer-to-peer means of dissemination, such as websites, and streaming via other technologies).

vKontakte, the most popular online social network in Russia (93 million registered members worldwide) is the largest single distributor of infringing music in Russia and also a hotbed for online piracy of movies and television programming. It is also one of the largest illegal distributors of music in the world (and is listed as one of the top 40 most visited websites worldwide). It has a functionality specifically designed to enable members to upload music and video files, which includes hundreds of thousands of unlicensed copyright works (films and television programs) and recordings. It is available in many languages, including English, and has a dedicated content search engine that enables other members to search and instantly stream infringing content; plus, some third party software developers have distributed “apps” to enable non-members to search and download the content available on the site. While vKontakte will generally takedown specific content when notified, that is an inappropriate enforcement mechanism for a problem of vKontakte’s own making. Although vKontakte has a dedicated music feature, it has no licenses to distribute musical content – it either must eliminate this service, or license it properly. In January 2012, Gala Records, a Russian record label won a civil case against vKontakte for copyright infringement. Now that the Copyright Law has been properly interpreted to impose liability on vKontakte, enforcement authorities should use this decision as a springboard for criminal and/or deterrent administrative actions. Besides vKontakte, there are a number of other Russian-based sites targeting users outside of Russia. For example, Video2k.tv, launched in 2011, has quickly risen to the top ranks of linking websites. In one webmaster forum, a representative of Video2k.tv posted a graph indicating the website was loading between 2.5 and 5.3 million pages per day. Video2k.tv presently holds over 35 domains ranging from Video2k.asia to Video2k.ws. Illegal music payment sites hosted in Russia include GoldenMp3 and Mp3ninja.

Overall responsiveness to takedown notices in Russia is mixed. Some ISPs cooperate and take down pirate materials once identified, but many ISPs are not willing to cooperate absent a court order, even with clear evidence of piracy. This is why ISP cooperation and clear third party liability, are essential. ESA reports, for example, only one hosted site (narod.ru) regularly complied with its takedown requests, while other sites ignored such requests. The motion picture industry reports that the largest five or six ISPs did generally cooperate and respond to RAPO cease and desist letters, but that most of the smaller ISPs did not respond (and made clear they would not do so absent a court order).

The recording industry reports that paid download sites remain an important source of piracy in Russia along with the peer-to-peer services, and cyberlockers. Although the most notorious website, allofmp3.com, was taken down (in 2007), and has not resurfaced at that Internet address, there are now in excess of thirty copycat sites based on the same business model as the original allofmp3.com. The user-interface of these sites looks very professional and can easily deceive users into believing the sites are legal (they offer “give away” incentives to attract more users; some sell albums for as little as US\$1). Some of the sites use up to thirty different domain names (but the same user interface). The pay-per-download websites remain a problem for the music industry. The Russian Government should take down the sites, and criminally prosecute the site operators. Other important pirate sites (that are not pay-per-download sites) include: zaycev.net, rutracker.org, best-mp3.ru, hotcharts.ru, musicstorm.org, muzoff.ru, primemusic.ru, poiskm.ru, mp3wall.ru, video.mail.ru, my.mail.ru, prostopleer.com, nnm.ru, rutor.org and tfile.ru. The online pirate sites have devastated the legal online music market. Thus, despite the availability in Russia of a variety of legal music services, for example Beeline, Deezer, Fidel, iviMusic, Megafon, Mp3.ru, MTS, Muz.ru, Nokia Music, Tele2, Yandex Music and YouTube, total online revenue (for recorded music) in 2010 was a meager US\$34 million. Music revenue per broadband household in Russia was only US\$11.10. In context, the next worst performing major markets in Europe, Italy and Spain, had revenues of US\$24.60 and US\$23 per broadband subscriber, respectively. In France, the figure is US\$58.80, and in the U.K. it is US\$97.50. Revenue in the United States per broadband household is US\$82.60. Thus, if Russia’s 15,700 broadband households consumed music at the depressed level of Spanish users, revenue in Russia would be ten times the present value; or, similarly using Poland, for the sake of comparison (a country with a similar GSP to Russia), the revenue figures would also be over ten times the present value. In 2010, the total value of the physical and online recorded music market in Russia was US\$101 million, compared to US\$188 million in 2006, so the situation is getting even worse.

As noted, IIPA remains very concerned with the lack of transparency and governance issues in connection with VOIS, the state accredited collecting body for record labels and performers. VOIS has not demonstrated compliance, thus far, with international standards in terms of accountability and transparency. In order for U.S. right holders to be properly represented in Russia, and to establish legal digital music services, it is essential that VOIS operates in a transparent manner that reflects the interests of the broader community for which it is now responsible, requiring an integration of non-VOIS members into their governing bodies, and with reasonable agreements between the respective societies. The Government of Russia must take an active role to ensure this happens.

The independent segment of the film and television industry (IFTA) reports that online and physical piracy remain a significant export constraint for independent producers and distributors, the majority of which are small to medium-sized businesses. Independent producers partner with local authorized distributors to finance and distribute films and television programming. These authorized distributors find it nearly impossible to compete with pirates and report that piracy in Russia has reached disastrous levels. Independent producers and distributors confirm that DVD sales have been particularly impacted since pirated digital copies are routinely offered for free online and with the same quality viewing experience that a DVD can provide. Unable to compete with free, legitimate distributors cannot commit to distribution agreements, or alternatively, offer drastically reduced license fees which are inadequate to support the financing of independent productions. As a result, piracy severely undermines and may permanently damage legitimate distribution networks essential to reaching consumers in Russia and leaves little confidence for investment in intellectual property. Revenue from these distribution services, which is licensed country-by-country, is critical to financing the development of new creative works worldwide. Since Internet piracy in one territory, affects other markets instantly, this type of infringement not only undercuts anticipated revenue from the distribution of a particular asset, it also harms the ability of independent producers to secure financing for future productions. The independent production sector cannot easily shift to new business practices that might otherwise limit piracy. For example, worldwide same day release (referred to as “day-and-date” release) may prove an effective method to curb or delay piracy for the major studios, which control their own worldwide distribution, but for independents, whose national distributors release on their own schedule, this technique is impossible.

In August 2010, enforcement actions were undertaken by Russian enforcement authorities against filehoster.ru – an infringing cyberlocker and a BitTorrent site. However, following staffing changes at Department K the investigation into that case was, unfortunately, ended. MPAA reports that in October 2011, the case against Interfilm.ru was reopened and the public prosecutor charged two of the administrators of Interfilm.ru under Article 146 of the Criminal Code; the case has been referred to the Timiryazevky District Court. The Prosecutor told the media, in announcing the case, that damages to the film industry were US\$1.24 billion. Also in 2011, MPAA reported that the Economic Crime Police and Department K raided Sib-Port.ru, confiscating equipment and arresting three of the site’s owners.

The business software industry (BSA) reported twenty-two raids against Internet users or services in 2011 (compared with 14 in 2010, and 25 in 2008), which resulted in the commencement of six criminal cases (compared with 15 in 2008), and three convictions (the same as in 2010).

Criminal Enforcement in General: Criminal enforcement in Russia is a priority for IIPA and its members. Most criminal enforcement activity by the government in 2011 was geared toward physical piracy and little, if any, toward digital piracy enforcement. As a result, few criminal cases (including for example, the 2009 Interfilm.ru case), have been pursued against illegal website operators. IIPA recommends that Russian authorities step up efforts to investigate Internet piracy of business software, entertainment software, books, music, and film material, by a variety of technical means, and increase the number and disposition of effective criminal investigators.

In 2011, the Russian police continued to take actions against copyright infringers, including against street vendor piracy (which remained constant from 2010, after years of decline), and companies involved in the installation and use of pirated software. However, the overall number of raids, seizures, and especially criminal cases commenced, was down from the number of cases undertaken only a few years ago. As in recent years, there were

some deterrent sentences and prison terms applied by the Russian courts, including a handful aimed at serious repeat offenders. One major case undertaken by authorities in cooperation with the Russian-Anti Piracy Organization (RAPO) in 2011, was the raid of a mid-size replication plant, and the seizure of over 10,000 discs, including motion picture and entertainment software materials. A criminal case is pending, awaiting the results of forensic experts. Between May and September 2011, RAPO, along with law enforcement authorities, engaged in a concerted campaign against DVD distributors in Moscow, St. Petersburg, Novosibirsk, and Rostov-on-Don. During this campaign, 246 searches were conducted, 46 kiosks were closed, 6.3 million counterfeit DVDs were seized, and 107 criminal and 69 administrative cases were initiated. As part of this campaign, FSB, in cooperation with RAPO, seized 1.5 million pirated DVDs in two warehouses at a closed military plant in Moscow in June 2011; a criminal case was initiated against the two owners. Additionally, FSB, in cooperation with RAPO, raided two warehouses and four retail shops in Tula in June 2011, seizing 500,000 pirated DVDs; two criminal cases were initiated against the owners of the warehouses and retail shops. In October 2011, RAPO, working with enforcement authorities, participated in the largest known seizure in Russia (which was widely covered in the press): in Krasnoyarsk, Siberia, authorities seized two million pressed counterfeit discs, including a number of pre-release titles, from a warehouse.

There were also a considerable number of administrative and criminal penalties imposed against illegal hard copy vendors. The motion picture industry noted several markets, including Gorbushka, Savelovskiy, Sherbakovsky, Luzniki, and Radio that no longer contain pirate DVDs, and only sell legitimate DVDs. Further, the local motion picture industry (Motion Picture Association, MPA) reported very good cooperation with law enforcement authorities in organizing raids against problematic kiosks. One St. Petersburg court sentenced the two co-owners of Media Records to (3 and 3 1/2 years) imprisonment, and fined them US\$115,000 in damages; this case commenced after a replication plant raid (in 2010) by the Economic Crime Police and RAPO and the seizure of three replication lines, stampers, and over 200,000 illegal discs. Although the Entertainment Software Association (ESA) reports that frequent police patrols have resulted in a decrease in the number of small vendors selling infringing game product in many other Moscow markets, sales of pirated games at the Gorbushka market, and at the Yunoa market in St. Petersburg, remain a significant problem. Some copyright industries, such as the motion picture industry, have seen a decline of 5% to 10% in hard goods piracy in the past two years, in major cities, including Moscow, St. Petersburg, Rostov-on-Don, and Novosibirsk. The Entertainment Software Association (ESA) also reported a slight decline in the number of illegal hard goods replicated in Russia.

While the business software industry reported an increase in the number of raids, most of the other industries reported substantial declines in the number of raids, likely due to the severe cuts in police resources. All the copyright industries are concerned that the proportion of raids to the initiation of cases, and to criminal verdicts is very disproportionate. For example, the Business Software Alliance (BSA) reported the number of raids increased (with most focused on “channel” raids against CD-sellers and hard disk loaders), but the number of criminal cases initiated declined substantially. There were significantly fewer criminal cases in 2011 (63) than in 2008 (154) and 2007 (200) against end-users, and in “channel” cases (pre-installed hard disk piracy) – 427 in 2011 versus 496 in 2009 and 491 in 2010. BSA reported that there were only 19 verdicts in 2011 involving end-user piracy compared to 41 in 2010 (and 83 in 2007), 180 involving “channel” piracy compared to 325 in 2010, and three involving Internet piracy (the same number as in 2010, but down from seven in 2008). The Government of Russia (MVD) usually provides detailed annual statistics on intellectual property cases, and investigations commenced; however, the 2011 report was not available before the Special 301 filing deadline.

The local motion picture industry (MPA) reports that enforcement activity in the past few years, especially in Moscow and St. Petersburg, has remained relatively consistent. According to “Film Business Today” (Russia), box office receipts in Russia and the other Commonwealth of Independent States (excluding Ukraine) set a new record in 2011 – US\$1.16 billion (an 11.74% increase from 2010).

One member of the Entertainment Software Association (ESA) reported an increase in the number of criminal actions initiated (15 total) in 2011 from 2010. However, an ongoing problem is the reluctance on the part of police to pursue *ex officio* actions against major distributors and manufacturers of pirated entertainment software

products. Instead, the police continue to initiate enforcement actions against low-level targets, such as game club owners and individual sellers; these actions generally result only in small to medium quantities of pirated product being seized (10 to 250 discs). The police are not enforcing against major infringers, most notably the owners of retail chains that sell infringing products or the manufacturers of pirated product in St. Petersburg, Rostov and Krasnoyarsk.

All the copyright industries are being harmed by commercial-scale piracy, which can only be addressed through enhanced administrative actions (and penalties), and criminal measures. Civil measures are not capable of providing the requisite level of deterrence. Civil enforcement inadequacies include: remedies usually limited to the seizure of specific repertoire that is the object of a lawsuit in any specific instance; the failure to award preliminary injunctions, or to freeze assets and evidence; low damage awards, which, like all awards, are also very difficult to enforce; burdensome evidentiary requirements, including rights ownership information; the absence of personal liability for the directors of infringing companies or enterprises (which is the only way to bring proceedings in cases where bogus companies operate); and the absence of the notion of contributory liability under the Russian civil law system dealing with copyright infringements.

An intensification of criminal investigations and criminal convictions against principals of organized commercial pirates is sorely needed, especially directed at Internet and optical disc operations. Criminal procedure changes which placed copyright infringement cases into the category of serious crimes have enabled – at least in theory – Russian law enforcement agencies to conduct thorough and comprehensive investigations of copyright infringement activities against owners and operators of piratical operations. However, deterrent criminal penalties are rarely, if ever, imposed against owners of commercial Internet operations. One practical problem that has surfaced recently is that police and prosecutors have had difficulty applying the criminal law thresholds to Internet crimes which has resulted in very few such cases commencing and even fewer ending in court rooms. The recent increase in the criminal threshold without special consideration of its application to Internet offenses, as was done in the United States (in the Net Act), could exacerbate this problem; this further underscores the importance of also using administrative authority in digital piracy cases. Deterrent criminal penalties are still not being imposed against optical disc plant owners or, with few exceptions, against plant operators (no plant owner has ever been convicted and only a handful of plant managers or employees).

The lengthy criminal investigative process must also be examined and redressed, particularly at the provincial level. As the government continues to rely on its own experts in investigating, examining and prosecuting IP violations, it should take measures to increase the number of experts and consider the appointment of a specialized unit of investigators and prosecutors, adequately trained and provisioned to effectively address IP crimes. Due to the lack of adequate staffing and the high volume of work, examinations of products seized take months. Enforcement is also hampered, and trials delayed, by the requirement that exemplars be collected only by state officials (or jointly with right holders), and by a statutory reliance on government expert reports. Delays also result from a lack of subject matter expertise in some cases, as well as a reluctance to use or rely on rights holder expertise on forensic matters (and worse, some local authorities refuse to share any information on cases with rights holders at the investigative stage, impeding the success of these cases). These arcane and outdated rules relating to expert evaluations create unnecessary delays and costs in litigation. Industry experts should be fully integrated into the judicial process, so we recommend that the rules be modernized for greater efficiency. One way to accomplish this would be for the Supreme Court to issue new guidelines on the admissibility of the testimony of private experts. The problems are further exacerbated by ongoing reforms of the investigative bodies. ESA reports delays in examination reports from government experts, due to a lack of technical expertise; they estimate that the average time for a case (a forensic examination) is a year and half. In one instance involving 19,000 pirate discs from 2009, the forensic examination is still ongoing. In one case from 2007 (involving 800 pirate discs), the case was suspended in 2011 for failing to properly identify the infringer.

Improvements should also be made with respect to court procedure. The criminal procedures generally require that a rights holder request the destruction of the seized goods (or move for recovery of damages) in a

separate proceeding before the Arbitration Court (court of general jurisdiction) – which unnecessarily lengthens the process and makes enforcement even more difficult.

Another recommended measure is the appointment of IPR special prosecutions, investigators, and police officers at both the federal and regional levels throughout Russia. The appointment of specialized IPR investigators could, if utilized correctly, significantly increase the efficiency of IPR criminal investigations. The copyright industries are willing to continue their assistance in this regard with training programs for judges and other law enforcement officials. IIPA recommends that the Investigations Committee in MVD should continue to work with IIPA members on future training programs. IIPA recommends that the General Prosecutor's Office (along with the MVD-IC) appoint a government liaison with IP right holders to more effectively bring criminal investigations and trials to successful conclusions. The approval in November 2011 of a specialized IP court in Skolkovo (the innovation center), to be implemented in February 2013 (with 30 trained judges), is a positive step (and even more so if these courts are eventually created in other cities and regions across Russia).

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

Raids Against Businesses Using Pirate Products: The Business Software Alliance (BSA) reports the overall quantity of end-user raids against businesses remained high, in fact, increased back to 2007 levels after several years of decline. However, as already noted, the number of the raids, while high, is disproportionate to the number of criminal cases initiated and verdicts rendered (and raids in many federal districts resulted in no criminal investigations proceeding). In 2011, there were 554 raids, up from 436 raids in 2010 (but down from 589 in 2007), but only 63 cases initiated and only 19 leading to verdicts, compared with four times those numbers in 2007. As in recent years, enforcement of IPR is inconsistent, with some cities and regions, such as St. Petersburg and the Siberian region, only starting to develop enforcement activities. The continued inconsistency in the number and quality of raids stems from the lack of a uniform methodology promulgated by the Investigative Committee of the MVD, and the General Prosecutor's Office in relation to implementation of Article 146 of the Criminal Code, although efforts to update the methodology began in 2010. In 2011, police ran more raids against chain retail stores (1,161, up from 1,098 in 2010, and 740 in 2008). A majority of the raids against businesses using illegal software never result in the initiation of an investigation (even where the evidence is strong). Investigators often do not consider evidence collected by police during raids as sufficient, but they have been unable or unwilling to provide police with guidelines for evidence collection. Thus, criminal cases are frequently suspended by investigative authorities or terminated by prosecutors.

The business software industry reported that one of the reasons for the significant drop in piracy rates in recent years, has been the effectiveness of end-user enforcement activities overall, which has resulted in a broadening of public awareness (for businesses especially) about legal versus illegal activities, and the resulting legal licensing of software at many companies and government entities. In 2011, BSA successfully used civil enforcement actions in six out of seven cases filed. In addition, BSA continued to report good cooperation with the police and investigators. BSA reports that the piracy rate for software deployed on personal computers in 2010 was 65%, down from a level of 87% in 2004; the commercial value of unlicensed software use attributable to U.S. vendors in Russia has increased significantly during that time from US\$1.4 billion in 2005 to US\$2.8 billion in 2010 (BSA will release its 2011 data in May 2012).

Effective January 10, 2009, a Federal Law on Police Activities was amended and it is reported that the police are undertaking *ex officio* investigations using that law. A new law on police enforcement powers took effect on

March 1, 2011. For the copyright industries the key is that these laws properly enable police to undertake raids and to secure evidence, especially against commercial enterprises.

Raids at Storage Facilities and Piracy at Retail Outlets: Several copyright industries continue to report that raids, while undertaken, are not ultimately successful in stopping criminal activity because of: (a) the absence of criminal liability for corporate entities; (b) the failure of the police to comply with the Criminal Procedure Code; and (c) the general reluctance of prosecutors to recommend the initiation of criminal cases. Amendments to the Criminal Code to allow corporate entities to be held criminally liable would help to correct this problem.

There were a considerable number of important raids against pirate warehouses (and large numbers of seizures) in 2011, particularly in Moscow and St. Petersburg. As one example, in August 2011, the Federal Security Service along with RAPO, raided a warehouse in Moscow, seizing 1.2 million illegal DVDs (including a large number of pre-release titles). A criminal case (per Article 146 of the Criminal Code) was initiated, along with the arrest of two owners and 23 workers.

According to the Entertainment Software Association (ESA), video game retail piracy remains significant in Russia, with pirated products still widely available on the street, in underground venues and at markets. Thus, hard copy piracy – factory replicated pirate product – remains predominant, though on a slight decrease as Internet piracy levels are increasing at a rapid pace. Pirate product, while not found in the major retail chains in Moscow, is being openly sold in other large cities, such as St. Petersburg (by two of the three largest retailers), Rostov and Krasnoyarsk. ESA reported that there were only four criminal verdicts rendered in entertainment software cases in Russia in 2011 (including fines, community service, and a suspended sentence, but no jail sentences). Pirate distributors of hard copy material remain well versed in circumventing government regulation and enforcement. For instance, government regulation requires that information on game packaging identify the source of the product, such as the place of manufacture and all authorized distributors. ESA member company investigations reveal that such information is typically falsified and the companies/distributors named are non-existent.

Raids Against Optical Disc Plants: Although optical disc piracy is no longer the highest priority for IIPA members in Russia, large quantities of discs are still being produced there without licenses. Enforcement against optical disc production is still not effective as evidenced by the continuing operation of many raided plants. It is estimated that 2 optical disc plants were closed in 2011. However, it is more difficult now to gauge the number of plants in operation in Russia because there are many that have licenses; RAPO reports that there are about 25 now in operation.

The continued lack of clear authority for optical disc licensing and inspections in 2011 remains an ongoing set-back in the enforcement of optical disc production and distribution regulations in Russia. Even though optical disc piracy is less of a problem than digital piracy, it persists as a problem for some industries. The lack of regular surprise inspections of all the production facilities exacerbates Russia's optical disc piracy problem, and is not consistent with Russia's 2006 IPR Agreement obligations. There are key legislative reforms still needed to improve optical disc enforcement. Russia has not yet enacted a sound optical disc licensing, revocation, and recordkeeping regime as described in the IPR Agreement – this essential IPR Agreement obligation had a June 1, 2007, deadline and is key to addressing many of the current OD piracy problems – both the manufacturing and distribution of pirate material. Proper optical disc regulations would include: (a) stricter controls on the importation of polycarbonate and machinery; (b) mandatory seizure and destruction of machinery used to produce pirate materials (regardless of the ownership of the machinery, and the relationship of the "owner" of the machinery to the infringement); and (c) the introduction of criminal penalties for the owners of such plants. Plant inspections must be undertaken regularly and exemplars tested jointly with right holders. In addition, any plant licensing regime should extend in scope to the operators of telecine machines and mastering laboratories used to pirate audiovisual works.

Administrative Enforcement: The Administrative Code (Article 7.12) provides a range of fines on natural persons (1,500 to 2000 rubles), the owners or managers of legal entities (10,000 to 20,000 rubles) and on legal

entitles themselves (30,000 to 40,000 rubles), as well as permitting the confiscation and destruction of pirated product. Administrative cases are filed by the police or by agencies, but the levying of fines is done by courts of general jurisdiction (for natural persons) and arbitration courts (for legal entities). Imposing significant administrative fines on legal entities, for example, for the distribution of infringing content or the illegal use of software, would have a deterrent effect (and could be imposed in instances when criminal cases end for failing to meet the high evidentiary burdens). Unfortunately, current administrative procedures are inadequate because of the very low level of fines and the inability to reach commercial enterprises that distribute infringing content (especially when there is no direct payment for such infringing content, but only, for example, advertising revenue, such as at vKontakte). When administrative actions have been undertaken, they have resulted in the imposition of wholly inadequate penalties. BSA reported only eleven administrative court decisions against infringing end-users and only one against channel pirates in 2011. This is compared with the 40 administrative court decisions that were resolved in 2007 and 2008 – 35 and 37, respectively, against end-users, and five and three against channel pirates. Over the past few years, the average administrative fine imposed has been between 4,754 and 6,339 rubles (approximately, US\$150 to US\$200) per case, which is much too low to be a deterrent.

DEFICIENCIES IN THE RUSSIAN LEGAL REGIME

Overview of Legal Reforms: As detailed in previous filings, Russia has made progress on legal reforms as it moved toward WTO accession. For example, it added *ex officio* authority to the Customs Code (in force on December 29, 2010) to permit the interdiction of suspected counterfeit and pirated product. Another positive step was the removal of camcording from the scope of the private copy exception, allowing for enforcement against illicit camcording in theaters. In addition, we note the revisions to Article 146 of the Criminal Code that were enacted on December 7, 2011 as part of a larger reform of the Criminal Code raised the monetary threshold for the first level of criminal copyright cases from 50,000 to 100,000 rubles. While this represents a significant increase, we appreciate that the final bill scaled back the initial proposal to raise the threshold to 250,000 which would have severely undermined enforcement for many Russian and foreign copyright industries.

However, as noted in the priority list at the outset of this filing, there are still many key missing pieces to having an effective legal regime – especially for effective Internet enforcement, where the current legal framework cannot address the problem. The Civil Code, Part IV, in force in 2008, made some improvements, but left many reforms either incomplete (implementation of the digital treaties), or inadequate (ISP liability and the other list of deficiencies noted in previous IIPA filings). A November 2010 draft set of amendments prepared by the Center for Private Law, had some very troubling provisions pertaining to: (i) the liability of ISPs (Article 1253(1)); (ii) technological protection measure exceptions (Article 1299(4)), and (iii) broad exceptions (Articles 1274 and 1275). The proposed September 2011 draft would not fix any of these key problems.

In addition, since its adoption, IIPA and its members have commented on three major overarching concerns with the new Civil Code: (a) the lack of clarity; (b) administrative law principles throughout the Civil Code that likely cannot be enforced by civil or criminal procedures; and (c) the absence of rules that clarify the illegality of providing services that are intended to promote the infringement of copyright and related rights. This latter issue is a principal challenge for IIPA: for Russia to define ISPs, encourage cooperation on Internet piracy with rights holders to effectively deal with Internet piracy – in civil and criminal law, and to adopt secondary liability provisions. If Russia is to foster legitimate electronic commerce and if the rule of law is to apply to the online world, Russia must develop a balanced system of liability provisions that incentivizes ISPs to cooperate in addressing Internet piracy. It was encouraging when Deputy Prime Minister Igor Shuvalov announced in January 2011 that the Government of Russia wanted to develop Internet regulations to guarantee compensation and effective enforcement for rights holders, and to ensure the ISPs operate in a responsible manner. Unfortunately, to date, those provisions have not been adopted. Further, it is critical that Russia amend its regime to allow for injunctive relief, especially for Internet matters.

Two existing hurdles to effective civil and criminal enforcement are: (a) the failure of courts and police to apply statutory presumptions of copyright ownership; and (b) overly burdensome evidentiary requirements to prove

title – requiring a “full” chain of title for each recording in every investigation which is especially problematic for foreign rights holders with translation, notarization and other costs. For the music industry, the criminal threshold, now raised to 100,000 rubles, equals 4,000 songs based on the current calculation methodology; this presents a virtual bar to commencing most criminal investigations and denies critical enforcement remedies.

For a detailed list of IIPA’s comments on the Civil Code, and the other relevant laws, see <http://www.iipa.com/rbc/2010/2010SPEC301RUSSIA.pdf> at page 138. In addition to those already mentioned we continue to recommend steps to ensure that treaty required remedies for IPR infringements found in the Criminal Code, the Criminal Procedure Code, the Administrative Code and the Customs Code should continue to apply in light of the adoption of the 2008 Civil Code and the repeal of the copyright law. Last, we recommend that Article 1252(5) of the Civil Code, which currently includes remedies for the seizure and destruction of materials and equipment used in infringements, be improved by deleting the exception for the sale of materials by the state for “income,” and by parallel changes in the respective procedural codes.

On March 26, 2009, the Supreme Court and the Higher Arbitration Court adopted a joint Plenum Resolution (“On issues relating to the introduction of Part IV of the Civil Code”) – to clarify the application of Civil Code, Part IV. Unfortunately, the resolution left many issues unresolved including: the “use” of software which is misinterpreted by judges as being not a violation of Copyright Law (when unauthorized); the determination of damages relating to the cost of (software) works; the use of works on the Internet and the “making available” right (including the calculation of thresholds in cases where there is no equivalent of a similar legitimate license); the application of provisional measures; and, the application of civil search procedures (especially important for software piracy cases).

THAILAND

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

2012 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: Thailand should be maintained on the Priority Watch List.¹

Executive Summary: The copyright community continues to experience difficulties associated with piracy and other barriers to market access in Thailand, exacerbated in recent years by the inability to put into place needed legal norms to address these problems. Industry maintains strong relationships with the Department of Intellectual Property (DIP) (and appreciates the Director General's decision to devote resources to a liaison system); the Department of Special Investigation (DSI); the Economic Crimes Division (ECD) of the Royal Thai Police;² the Technological Crime Suppression Division (TCSD) of the Royal Thai Police;³ and the Office of the State Attorney. We have also obtained favorable results at the IP and IT Courts. Despite these good working relationships, piracy in Thailand remains serious.⁴ There are reports of new damaging digital hard drives at malls selling at very low prices and filled with hundreds of movies. Internet and mobile device piracy are proliferating, and only modest progress has been made against enterprise end-user piracy of software. Despite our previous suggestions, DIP remains without enforcement authority and TCSD remains under-resourced.

Thailand will continue to fall behind its regional neighbors if it continues to delay passage of amendments to its Copyright Act, including provisions prohibiting camcording in a cinema and imposing landlord liability. The Council of State's decision to outlaw camcording as part of the Copyright Act could be workable as long as illegal camcording is a possession violation separate from infringement, and subjects the perpetrator to cinema owner and police interdiction and immediate seizure of equipment. The Royal Thai Government's decision that the current criminal laws adequately address landlord liability is unfortunate, as right holders and the Government need a civil, administrative, and criminal remedy to combat those who benefit from, control, or contribute to, the infringement of others. We are mindful that the new Royal Thai Government faces many challenges, including most immediately providing relief and recovery efforts from the devastating flooding that hit the Chao Phraya and Mekong River basin, including Bangkok and surrounding neighborhoods. We nevertheless hope that, under the leadership of the new Prime Minister,⁵ the Deputy Minister of Commerce, and the leadership of DIP, our concerns may be addressed in the coming year.

PRIORITY ACTIONS REQUESTED IN 2012

Enforcement

- Investigate and prosecute greater numbers of significant piracy cases, with deterrent fines and custodial sentences.

¹For more details on Thailand's Special 301 history, see Additional Appendix available at <http://www.iipa.com/pdf/2012SPEC301HISTORICALSUMMARY.pdf>. Please also see previous years' reports at <http://www.iipa.com/countryreports.html>.

²See www.ecdpolice.com.

³See www.tcscd.in.th.

⁴For example, IIPA and industry has noted Panthip Plaza, the Klong Thom, Saphan Lek, Baan Mor Shopping Area, Patpon and Silom Shopping Areas, Mah Boon Krong Center, and the Sukhumvit Road Area Bangkok as "notorious markets" in a recent Out-of-Cycle Review submission with USTR, and USTR in turn named the "Red Zones" (including "Panthip Plaza, Klong Thom, Saphan Lek, and Baan Mor shopping areas, among others." See United States Trade Representative, *Out-of-Cycle Review of Notorious Markets*, December 20, 2011, at http://www.ustr.gov/webfm_send/3215; International Intellectual Property Alliance, *IIPA Written Submission Re: 2011 Special 301 Out-of-Cycle Review of Notorious Markets: Request for Public Comments*, 76 Fed. Reg. 58854 (September 22, 2011), Docket No. USTR-2011-0012, October 26, 2011, at http://www.iipa.com/pdf/2011_Oct26_IIPA_Notorious_Markets_Submission.PDF.

⁵The Royal Thai Government indicates in a recent report that the Prime Minister will continue to chair the "National Committee on the IPR Policy" and that its subsidiary body, the "Sub-Committee on the Prevention and Suppression of IPR Violation" will also continue to function. See IP Promotion Office, Embassy of the Government of the Kingdom of Thailand, *Fact Sheet on Thailand's IPR Situation*, November 2011 (on file with IIPA).



- Significantly increase resources for anti-piracy by developing a National Enforcement Plan with specific piracy reduction targets to meet on an annual basis and accountability by enforcement authorities. Ensure effective enforcement against online infringements.
- Ensure active cooperation of Internet service providers (ISPs) to prevent online infringement, including effective and fair policies to deal with non-hosted infringements and repeat infringers and measures to address Thai nationals using servers outside of Thailand.
- Close notorious piracy markets (“Red Zones” and “Yellow Zones”), hold mall owners accountable, and conduct progress surveys to demonstrate overall decrease in numbers of vendors throughout the country.
- Expand enforcement authority to DIP.
- Effectively interdict counterfeit/pirated books bound for export, in addition to the existing book and photocopy piracy issues.
- Increase government support and collaboration on public awareness campaigns focused on enterprise end-user software piracy to help businesses use licensed software to improve their competitiveness and reduce operational and security risks, including promoting adoption of software asset management best practices.
- Implement public sector software asset management policies to set an example for the private-sector to follow.

Legislative

- Enact legislation to ban unauthorized camcording of movies in theaters. Ensure illegal camcording is a separate violation of law, subject to interdiction by cinema employees and the police and immediate seizure of the machinery used in violating the law.
- Enact copyright amendments to fully implement the WIPO Copyright Treaty (WCT) and WIPO Performances and Phonograms Treaty (WPPT) (and join those treaties), including amendments to address Internet piracy and promote ISP responsibility, and protection against the circumvention of technological protection measures, among other changes.
- Enact landlord liability provision, such that there will be adequate civil, administrative, and criminal measures associated with those who lend their premises to those who engage in commercial infringement of copyright.
- Fully implement the Cabinet Resolution on legal software use, procurement, and installation in the public sector.
- Issue sentencing guidelines and adopt minimum sentencing that provides a real deterrent to infringement.
- Make copyright piracy a predicate offense in organized crime statute that triggers remedies to deal with organized crime, including freezing of all assets related to piracy.
- Amend the Evidence Law to allow the admission of digital evidence before the court.
- Issue clarification that copy exceptions in the Copyright Law comply with TRIPS Article 13 and do not allow whole copying of books without permission and payment.

Market Access and Related Issues

- Fix (or withdraw) the problematic Film Act, which has not yet been implemented, and which imposes screen quota and uncertain censorship and ratings system.
- Relax the ban on investment/ownership in terrestrial broadcast networks.
- Reduce the film import tax from 5 Baht to 0 Baht.
- Reduce the hard goods import tax which is currently a staggering 30%.
- Relax television advertising restrictions.

PIRACY AND ENFORCEMENT UPDATES IN THAILAND

IIPA’s previous reports document in detail various piracy and enforcement issues in Thailand and the harm caused to the U.S. content industries. For most of those issues, there has been no significant change (that some of these issues are not mentioned below does not signify that they have been resolved). The following provides updates on ongoing or newly emerging issues. Significantly, we note the damaging effect piracy has had on local Thai creators and creative industry. For example, virtually all of the 57 Thai movies released in 2010 were pirated, and such pirated goods were made available only a day or two after the release date and while the trend in 2011 was down, 33 illegal copies of Motion Picture Association of America (MPAA) member company movies were sourced to

illegal camcords in Thailand. Two giant local music companies, RS and GMM Grammy, have indicated they will shift resources away from the music business and adjust expected revenues as a result. Anecdotally, IIPA reports fewer music releases each year in Thailand, and flat revenues in 2010 and 2011, in part due to physical and online piracy.

The Royal Thai Government continues to provide aggregate statistics of enforcement activities for which we are grateful, but we note that these statistics do not differentiate between types of IP infringements so it is impossible to begin to gauge these actions' effect on piracy, nor do they provide any insights into judicial (including criminal) enforcement or any level of deterrence achieved as a result of these enforcement activities.⁶ DIP (under the leadership of the Director General) has reportedly infused a budget of Bt8.3 million (US\$266,000) for the establishment of a 'piracy suppression information system' linked between related enforcement authorities, i.e., the Police, Customs, DSI, the Office of the State Attorney and the IP and IT Court, in order to serve as a connection between all related agencies in analyzing piracy information in the country. This would be a positive step.

Lack of Deterrent Criminal Remedies: In order to more effectively address the endemic piracy problem in Thailand, a credible, deterrent criminal remedy must be available. While a significant number of raids continues to occur, very few of them achieve meaningful results which would, when publicized, have a deterrent effect on piracy activities in the country. The Royal Thai Government noted 4,499 IP raids and 457 Customs raids, but indicates nothing about criminal remedies imposed against those raided, investigations up the organized crime chain, or deterrent outcomes. The industries' own numbers are telling as anecdotal evidence of the problem of lack of deterrence. The music industry reported that as of November 2011, 218 music copyright piracy actions had occurred, including 141 retail raids, 7 warehouse raids, and 13 actions involving websites available for file sharing/downloading.⁷ There were also 3 cases involving mobile device piracy. The 148 retail and warehouse raids led to 126 arrests and some seizures.⁸ There were also 57 raids involving website sales of physical pirated CDs, including 47 notices and 10 raids, resulting in a further 10 arrests. Of the 126 criminal cases commenced, there were reportedly 36 convictions including guilty pleas, 2 of which resulted in a fine and imprisonment (both suspended sentences), 26 of which resulted in fines, and 7 of which failed to result in any sentence due to the defendants fleeing. Ninety cases remain pending. The fines are generally non-deterrent, ranging from Bt26,000 (US\$870) to Bt320,000 (US\$10,700), with an average fine of Bt84,900 (US\$2,830). Overall, the record of criminal raids and cases brought in 2010 and 2011 is not particularly heartening, and the penalties being imposed in Thailand do not indicate there has been any deterrent effect on pirates or that recidivism has been curtailed.

Camcorder Piracy Traced to Thailand Continues to Harm Film Market: The problem of camcording of full-length films in movie theaters in Thailand soared in 2010 and remained a major concern of the industry in 2011.⁹ Illegal copying of a film in a movie theater is already an infringement under the current Copyright Law, but an effective standalone remedy is needed to address this concern. While the trend of illegal camcording somewhat moderated in 2011, illegal copies of 33 of MPAA members' films were sourced to Thailand. Most of these were audio recordings, in high demand by criminal syndicates replicating infringing, Thai-dubbed optical discs. Passage of an anti-camcording law is sorely needed. This need was recognized by Minister Ponlaboot in April 2011 when he stated that the government will take action against criminals engaged in camcording to ensure that the Thai film community continues to expand, and was again recognized by the former Deputy Minister of Commerce in December 2011. In the meantime, the lack of specific *sui generis* legislation should not halt Royal Thai Government authorities from

⁶See *Fact Sheet on Thailand's IPR Situation*, *supra* note 5, indicating that during January to September 2011, the Royal Thai Police and the DSI conducted 4,499 raids resulting in seizure of more than 2.2 million infringing items, while Customs carried out 457 raids seizing more than 240,000 infringing items. These are not broken down by type of IP infringed.

⁷Of the 13 Internet piracy cases, 4 cases were settled, 2 cases are in the hands of the Public Prosecutor's office, and 7 cases are in the litigation process of the Police Bureau.

⁸The industry notes seizures of 25,480 discs seized (CDs, CDRs, VCDs, VCD- Rs, Mp3discs, Mp3-Rs, DVDs ,DVD-Rs) worth Bt52.6 million (US\$1.6 million). Here it should be noted there is a disconnect between these industry numbers and the numbers reported by the Royal Thai Government, which may be in part due to the fact that the Government's statistics address other forms of IP.

⁹Camcording is particularly damaging in Thailand because it fuels rampant online piracy negatively impacting worldwide distribution and prevents the establishment of legitimate online distribution platforms for all films including major and independent film producers. Camcording also threatens the continued growth of the Thai theatrical box office marketplace.

taking immediate action to address this problem. DSI has enlisted industry's support to help identify the primary camcorder syndicate groups responsible for the majority of illegal camcording, but unfortunately, the Royal Thai Police have not consistently cooperated in investigations into illegal camcording, and there are reports of investigations and/or raid schedules being leaked in 2011. There is an intricate connection between camcording piracy and Internet piracy in Thailand, as increasing broadband Internet and 3G connections mean faster uploads of illegally camcordered movies to the Internet which are then available to the world through peer-to-peer (P2P) and linking sites, becoming pirated hard goods within a matter of days.

Internet Piracy Problem Worsens in Thailand, Despite Some Good Cooperation From TCSD: The problem of Internet piracy has become increasingly complex and alarming in Thailand as broadband and mobile 3G services (in large cities mainly) become more widely available.¹⁰ Faster speeds, growing infrastructure, and lower Internet subscription fees,¹¹ mean roughly 18.3 million Thai had access to the Internet as of early 2011, or 27.4% penetration, with (fixed line) broadband penetration of at least one million as of June 2010,¹² and Thailand ranking second in the world (according to Point-Topic) in overall growth of broadband subscribers between Q1 of 2010 and Q1 of 2011.

Internet piracy takes on many forms in Thailand. BitTorrent indexes and tracker sites (acting as an intermediary for BitTorrent distributors and downloaders) have become more pervasive in Thailand, facilitating increasing levels of unlawful distribution of copyrighted files.¹³ There are more than 100 BitTorrent tracker sites operating in Thailand, from sites offering hundreds or thousands of illegal files, to sites offering hundreds of thousands of illegal files.¹⁴ Public and private web bulletin boards ("Webboards"/forums which can be free or paid membership services), some of which are supported by advertising, and illicit use of social networking sites, blogs and one-click hosting sites (sometimes referred to as cyberlockers) are just a few of the additional ways Internet piracy is spreading in Thailand. Industry also reports that ISPs have colocation facilities which are now being used to store massive amounts of pirated content. Rental fees for colocation are low, leading people to choose this option to download data files more efficiently, and since users often do not identify their true identities when renting colocation services, enforcement becomes more challenging. Online piracy of software occurs mainly through online stores selling hard goods pirated software accompanies by the online availability of "key generators" for circumvention which are offered for free download. Online piracy levels for music are now estimated at around 90% for many industries. Some of the most notorious piracy websites in the world are servicing the Thai market.¹⁵ In a demonstration of present inter-connectedness and the need for the global community to respond to rampant theft, a site based in the British Virgin Islands (*4Shared*)¹⁶ erodes the market in Thailand by providing access to infringing Thai and U.S. (and other international) music to the estimated 50 million Thai that visit the site.

IIPA appreciates the cooperation of the TCSD in 2011, which supported the preparation and execution of enforcement against 13 unauthorized websites making available illegal content for file sharing. TCSD has also begun sending takedown notices to targeted unauthorized websites targeted to Thai people (even if servers are located

¹⁰Statistic reveals that there are active 20 internet service providers (ISPs) in Thailand.

¹¹Many ISPs and telecommunication operators offer a variety of payment plans to meet the needs of their customers, e.g., pay per data retrieved, pay per real-time usage, and monthly or yearly subscriptions.

¹²Point-topic indicates this number is conservative, however, reporting that only Thailand's largest broadband Internet provider, True Corporation Public Company Limited (formerly Telecom Asia), had 1 million subscribers itself as of mid-2010. See Point-Topic, *Thailand Broadband Overview*, November 22, 2010, at <http://point-topic.com/content/operatorSource/profiles2/thailand-broadband-overview.htm>.

¹³In Thailand, tracker sites consist of general trackers which are open to any user, and exclusive trackers which accept members for a fee or are based on the amount of torrent files uploaded. The content available in these tracker sites consists of mostly unauthorized files as well as pornography files.

¹⁴Those sites offering memberships often allow their members to download significant amounts of pirated content by paying a membership fee from Bt200 (US\$6.50) up to Bt3,000 (US\$97) per month depending on the type of membership. Payments are made through the site, for example, through pre-paid cards or "TRUE Money" cards sold at convenience stores.

¹⁵For example, *Sohu.com*, ranked 9th in China and 44th globally in terms of Internet traffic, and *Sogou.com*, ranked 25th in China and 123rd globally, provide search functionality for infringing music files to the Chinese-speaking community in various countries in Asia, including Hong Kong, Taiwan, Singapore, Malaysia, Macau, Thailand and Indonesia, causing substantial damage to the music markets there.

¹⁶*4Shared.com* is a popular one-click hosting site (cyberlocker), with a current Alexa ranking of 73. It is operated by a company based in the British Virgin Islands and its service incorporates search functionality – a complete contradiction to any claims that the service is designed for private "locker" use. The site includes a dedicated "music" section and has featured messaging encouraging users to upload their favorite songs and share them with friends.

outside Thailand), and that harm local Thai creators as well as disrupt the market for U.S. (and other foreign) right holders. We ask for the same from the ECD whose personnel by comparison lack knowledge on digital piracy and thus have been reluctant to date to focus on Internet piracy. Some IIPA members note that some larger and more established ISPs are responsive to member notices about online infringement, and voluntary takedown rates remain fairly good.¹⁷ For example, some ISPs blocked access to targeted websites almost immediately upon receiving a cease and desist letter from the industry. Some ISPs have assisted in searching for illegal files kept on their rented (colocation) servers. However, since there is no law related to ISPs specifically in the copyright context, some ISPs that provide colocation services ignore notices and fail to cooperate, requiring the involvement of TCSD (which obtains an Order).

Based on requests from industry (including IIPA suggestions in previous submissions), it appears the Royal Thai Government has facilitated discussions between right holders and ISPs. While these ended up being mostly listening sessions, it is hoped that these meetings will lead the Royal Thai Government to foster cooperation by ISPs, including notice and takedown, and an appropriate legal framework, including effective and fair measures to deal with repeat infringers in the hosted and non-hosted environments.

Mobile Device Piracy Worsening: Mobile penetration surpassed 100% during 2011, to 72 million subscribers as of early 2011. Right holders report that mobile and mobile device piracy have grown more serious in 2011 in Thailand. Many shops engage in the illegal business of providing unauthorized copies of content onto mobile devices, MP3 players, and the like. Mobile device piracy can be found in any department store or open market. Thai music is among the more popular content people embed or download onto their mobile devices. Book and journal publishers have in the past reported occurrences of downloading reference books and dictionaries in a similar manner. Thai law enforcement officials remain behind the curve on mobile piracy, with some even questioning whether the mobile download services provided by the stores can be considered copyright infringement. To date, they have refused to go after stores that illegally download content from the Internet and then distribute it to customers. Such copying and file-transferring clearly constitutes copyright infringement, and must be dealt with severely or the problem of mobile device piracy will grow more damaging.

Lack of Deterrence, Evidenced by “Red Zone” Piracy, OD Piracy, and Street Stalls: The “Red Zone” malls remain in full operation. These include Panthip Plaza, the Klong Thom, Saphan Lek, Baan Mor Shopping Area, Patpon and Silom Shopping Areas, Mah Boon Krong Center, and the Sukhumvit Road Area Bangkok, which remain notorious markets for openly selling pirated and counterfeit goods. The situation in the malls largely failed to improve in 2011, with many vendors openly selling infringing copies of copyright content, including films (pirated DVDs are still easily available, especially local dubbed versions which are sourced back to illegal camcording),¹⁸ music, software, games,¹⁹ published materials. Vendors engage in other crimes as well, e.g., selling child pornography. USTR has listed the “Red Zones” as “notorious” piracy markets.²⁰ Pirated goods are also available in other cities such as Chiangmai and Pattaya.

¹⁷In 2010, the local entertainment industry group TECA reported 717 takedowns out of 896 notices, an 80% takedown rate.

¹⁸Piracy has varying negative effects on different industry sectors. As one example, the independent segment of the film and television industry (IFTA) reports that physical piracy of DVDs remains a significant export constraint for independent producers and distributors, the majority of which are small- to medium-sized businesses. Independent producers generally partner with local authorized distributors to finance and distribute film and television programming. These authorized distributors find it nearly impossible to compete with pirates and describe the marketplace in Thailand as stagnant due to the heavy instances of piracy. Producers and distributors confirm that DVD sales have been particularly impacted since pirated digital copies are offered for free online and with a similar quality viewing experience that a DVD can provide. The independent production sector is also limited in its ability to shift to technology-enabled new business practices that might limit piracy. For example, independents use national distributors who release films on their own schedule, and thus piracy-avoiding strategies like worldwide “day-and-date” release are impossible. Unable to compete with free, legitimate distributors often cannot to commit to distribution agreements or they offer drastically reduced license fees which are inadequate to assist in financing of independent productions. Piracy undermines and may permanently damage legitimate distribution networks essential to reaching consumers and leaves little confidence for investment in intellectual property in Thailand.

¹⁹Piracy of entertainment software remains prevalent in Thailand, whether through sales of burned, factory pressed or imported optical discs or cartridge-based games and use of pirated games in unlicensed Internet game rooms or cafés. Malls and street hawkers serve as retail channels for pirated entertainment software products. Like the music industry’s experience, to evade authorities, vendors often store their pirated product in a separate location, and display only game covers or empty boxes in their stands, using runners to liaise with others carrying pirated discs in bags around a mall or on the street.

²⁰The Royal Thai Government also maintains “yellow zones,” which are targets to be aware of for possible piracy activities.

There remain a significant number of “burning” operations, as well as sales of imported DVDs and CDs,²¹ and locally pressed discs available in Thailand. Burning of MP3 compilation CDs with music remains popular, but more recently, such discs are either burned to order (i.e., hawkers show only inlay cards and sleeves on shelves without product inside), use children as “mules” selling pirated CDs, set up self-service sales with a money box, or opening virtual stores on Internet websites in place of physical stalls. Burning CDs is quite popular among vendors due to the low cost of production, the ease of manufacture, and the lack of legal controls over CD-R writers. It would be important to add CD-R burners to the Optical Disc regulation, so that this problem can be brought under control. There are many fewer locally pressed CDs than in the past, due to enactment of the Optical Disc regulation; such discs are double the price of burned discs and are generally back catalog music titles. Street stalls sell a mix of products ranging from movies, TV series, music and games. Physical sales in street stalls can be found in many remote areas as well as some tourist attraction areas like Pattaya, Hua Hin, Chiangmai, Samui Island, Haad Yai and Phuket Island where tourists buy physical burnt CDs, use them, and then throw them away.

Enterprise End-User Software Piracy Level Remains High, and Industry is Harmed by Hard Disk Loading and Circumvention of TPMs: The primary concern of the business software industry is the use of unlicensed or pirate software by enterprises.²² Reducing PC software piracy would have a net positive effect on Thailand’s economy. A 2010 study done by research firm IDC for the Business Software Alliance (BSA) estimated that decreasing Thailand’s software piracy rate by ten points over a four-year period would add US\$1.3 billion in GDP to Thailand, produce an additional \$73 million in tax revenues and create 2,175 new high-wage IT jobs. The gains would be even greater if the piracy rate was reduced by 10 points over 2 years, which would yield US\$1.7 billion in GDP and \$96 million in tax revenues. Other piracy phenomena harming the business software industry include hard disk loading of illegal software onto computers at the point of sale, the use of illegal software programs to circumvent technological protection measures (TPMs) used to protect legitimate business software, and the failure to fully implement the existing Cabinet Resolution on legal software use, procurement, and installation in the public sector.

The business software industry continued to receive positive support from the Royal Thai Government including ECD for end-user software piracy actions. ECD has good knowledge and understanding of software piracy and not only enforces IP laws but also conducts educational programs on the use of legal software. Unfortunately, the number of raids decreased significantly in 2011, with only 33 raids run against software piracy by enterprise end-users, compared with 152 raids in 2010. There have been a couple of criminal cases in recent years, with some positive outcomes.²³

Book Piracy, Including Production for Export and Unauthorized Photocopying: The book and journal publishing industry continues to face the following problems in Thailand: print piracy, illegal photocopying, unauthorized translations, and online piracy, though the latter is not yet a significant threat. Of these, unauthorized photocopying of educational materials, in and around universities, remains the predominant form of book piracy in Thailand. Copy shops continue to copy books for students, increasingly on a “made to order” basis to avoid keeping infringing stock on site. Lecturers are culpable too, compiling “course packs” of works without permission from the publisher, with some producing unauthorized translations of works, inserting the translated material into the

²¹Imported CDs are generally more expensive and most come from China. Imported CDs make up around 15-20% of the pirate music market.

²²BSA’s 2011 software piracy statistics will not be available until after the filing deadline for this submission, but will be released in May 2012, at which time piracy rates and U.S. software publishers’ share of commercial value of pirated software will be available at www.iipa.com. In 2010, the software piracy rate in Thailand was 73%, representing a commercial value of unlicensed software attributable to U.S. vendors of US\$427 million. These statistics follow the methodology compiled in the Eighth Annual BSA and IDC Global Software Piracy Study (May 2011), <http://portal.bsa.org/globalpiracy2010/index.html>. These figures cover packaged PC software, including operating systems, business applications, and consumer applications such as PC gaming, personal finance, and reference software – including freeware and open source software. They do not cover software that runs on servers or mainframes, or routine device drivers and free downloadable utilities such as screen savers. The methodology used to calculate this and other piracy numbers are described in IIPA’s 2012 Special 301 submission at <http://www.iipa.com/pdf/2012spec301methodology.pdf>.

²³In one end-user criminal case that went to trial there was a conviction in 2010. In this particular case, the value of the infringement was BHT2,689,400 (US\$90,000) and the sentence was a fine of BHT75,000 (US\$2,500) levied against both the managing director and the company, with a 3 month prison term against the manager, suspended for 1 year. A civil case was then filed in November 2010, and the court rendered its judgment on February 16, 2011. The court ordered that the two defendants (company and director) were jointly liable to pay Bt1,000,000 (US\$32,300) plus interest and must pay a court fee of Bt82,780 (US\$2,700).

compilation, and claiming authorship. Other pirated materials include novels, travel guides, history books and foreign language newspapers. Various private institutes in Thailand provide illegally reprinted Test of English as a Foreign Language (TOEFL) materials to their students. In recent years, the industry alerted Thai authorities to the problem of counterfeit/pirated books being produced for export,²⁴ which were of considerable concern as the counterfeit books were finding their way into the U.S. market. In 2010, some progress was made with the Royal Thai Government forming a Committee to specifically address the export of counterfeit books. Unfortunately, that effort did not lead to a successful outcome, despite law enforcement members of the Committee interviewing several individuals suspected of involvement. With Bangkok slated as the “World Book Capital 2013,” it behooves the Royal Thai Government to undertake measures not only to promote literacy among its youth population but also respect for copyright as the foundation for literary creation. It can only do so effectively by undertaking increased enforcement efforts to curtail rampant unauthorized commercial photocopying occurring on and around university campuses.

Signal Piracy (Cable and Satellite), Public Performance Piracy: Piracy of cable and satellite broadcasting signals in Thailand, which involves the unauthorized transmission or retransmission of U.S. programming over systems from original cable or satellite transmissions, remains a major problem, especially outside of Bangkok. Efforts to deal with rampant Pay-TV piracy in Thailand have been frustrated by the regulatory vacuum and gaps in NTC’s authority. There is no provision for licensing satellite channels, and therefore no effective government supervision of the content they broadcast. There has been no movement on licensing Thai-origin channels either, and thus, the number of such pirate channels is increasing. The industry group Cable and Satellite Broadcasters Association of Asia (CASBAA) reports that Thailand is the only sizeable jurisdiction in Asia that fails to exert reasonable controls on the satellite and cable TV channels originating within its territory, and these channels are infecting other markets through satellites over Asia.²⁵ In addition to signal theft, public performance piracy continues to be a problem with many hotels outside Bangkok retransmitting unauthorized videos over in-house movie systems and bars in tourist areas openly exhibiting films without authorization. A growing number of bars and restaurants have also added “private” rooms to screen motion pictures illegally.

Disturbing New Trend – Hard Disk and External Device Piracy: A new form of piracy has emerged in Thailand by which pirate vendors are selling hard disk equipment containing approximately 200 high definition movies. These hard disks sell for roughly US\$100 and an after-service provides the ability to update the hard disk with the latest movies for US\$30. These boxes are available in many of the notorious malls like Panthip Plaza. Similarly, vendors will sell USB drives with significant memory capacity filled with pirated content.

COPYRIGHT LAW UPDATES/RELATED ISSUES

IIPA remains deeply disappointed that significant energy spent to try and modernize the Copyright Act, B.E.2537 (1994) and add needed provisions to combat mall piracy and illegal camcording has not resulted in successful passage of any meaningful legislation. Now, with Internet and mobile device piracy proliferating, massive storage devices being made available replete with pirated content at the malls, and activities such as local recordable “burning” of content becoming the norm in the physical piracy space, Thailand’s legal infrastructure has fallen woefully behind. IIPA understands that in December 2011, an official from the Ministry of Commerce announced that his Ministry would advocate to the Cabinet for passage of camcording legislation, amendments to the Copyright Act, and landlord liability provisions, indicating the aspiration to move quickly on 1) draft camcording legislation that would penalize illegal copying in a theater and would empower officers to conduct *ex officio* action; 2) draft amendments to the Copyright Act that would provide more severe penalties against Internet piracy; and 3) provisions on landlord liability, penalizing land owners or lessors renting premises for pirated or counterfeit sales. IIPA is hopeful that the new government can follow through on these aims urgently.

²⁴The Thai based-producer and exporter of these pirated books has run a sophisticated operation and network of consignees, using several companies as fronts for the export activities.

²⁵The cable industry reported 1.64 million illegal hookups in the country out of more than 2.5 million total hookups in Thailand, a more than 2-to-1 ratio between illegal and legal hookups, as of early 2011.

The following outlines immediate steps which should be taken to remedy the current situation:

- **Passage of Copyright Amendments/Anti-Camcording Legislation:** We understand the copyright amendments were sent back to DIP by the Council of State, requesting that they fold an anti-camcording provision into the draft. DIP has reportedly completed its draft, and the Bill was approved by the Cabinet, but the general election in 2011 halted progress on that bill. The Council of State's decision to have DIP draft and fold a remedy outlawing camcording into the amendments to the Copyright Act could be workable, as long as the provision drafted makes it clear that illegal camcording is a separate possession violation, and makes the perpetrator subject to cinema owner and police interdiction and immediate seizure of equipment.²⁶ The draft must also include: 1) a definition of "communication to the public" to ensure Thailand provides a WCT- and WPPT-compatible right, including the right of "making available to the public of works in such a way that members of the public may access works from a place and at a time individually chosen by them"; 2) an amendment of the definition of "reproduction" to unambiguously cover temporary reproductions; 3) a prohibition on the circumvention of technological protection measures (TPMs) (defined to include both measures controlling access to works as well as measures controlling the exercise of exclusive rights), or the trafficking in (or providing services in) circumvention technologies, devices, or components; 4) inclusion of provisions concerning ISP liability, including notice and takedown and fair and effective procedures to deal with repeat infringers in the non-hosted environment. There are other provisions in the draft law which need to be tailored to the needs of specific industries, or provisions that need to be clarified that are not currently addressed.²⁷ IIPA hopes for swift passage of an adequate bill and would be interested in reviewing the latest draft.
- **Landlord Liability:** A landlord liability provision outlawing one who "provides physical or digital spaces for infringing activities" was included in the Draft Amendment to the Copyright Law as of March 2010 but unfortunately in 2011, DIP was informed by the Thai Trade Representative that the provision was "redundant with the existing contributory offense of the Criminal Code." This turnabout is highly unfortunate, as right holders and the Royal Thai Government should have civil, administrative, and criminal remedies and procedures at their disposal to combat those who benefit from, control, or contribute to the infringement of others. While IIPA had understood that there were criminal test cases which could have proven that landlords could be held indirectly liable under current Thai law, we are unaware of the results of such cases.²⁸ Such test cases, even if successful, should not substitute for a strong civil landlord liability provision, since it is the dual threat of criminal and civil liability that may create deterrence against mall piracy which remains ongoing throughout these legal and legislative processes. The original landlord liability provision should be re-added to the copyright law amendment prior to passage. We are pleased to hear that the Ministry of Commerce still has the aspiration of moving a landlord liability provision through.
- **Computer Crime Law:** The Department of Intellectual Property has reportedly proposed that the Ministry of Information, Communication and Technology amend the Computer Crime Act by including intellectual property infringement as an offense under the law. The inclusion of the intellectual property infringement into the Computer Crime Law would be extremely helpful to start the process toward establishing a proper legal framework to protect copyright on the Internet and prevent online and mobile device infringements.

²⁶To the extent necessary, conforming amendments should be made to the Cinema and Video Act, 2008 to outlaw possession of an audiovisual recording device in a theater and to enable theater owners to legally seize devices and detain persons possessing such devices.

²⁷There is a proposal to amend Section 66 of the Copyright Act, B.E. 2537 (A.D. 1994) (as amended through 1995). If this is done, corporate end-user software piracy should remain as a compoundable offense or be carved out from the category of offenses considered non-compoundable.

²⁸The Royal Thai Government's Out-of-Cycle Review submission indicates that in October 2010, they requested the Office of the Attorney General to opine on whether the current Penal Code supports landlord liability, in which case, according to them, "the police will be provided with the legal authority to intensify prosecution efforts against [secondary] infringers immediately." They also have indicated that "the Revenue Department and the Department of Business Development will continue to monitor tax records and balance sheets of the allegedly infringing landlords in order to keep them in check."

- **Customs Law:** The Ministry of Finance has recently approved amendments to the Customs Act to empower Royal Thai Customs to seize transshipments containing pirated goods. The draft Bill has reportedly been approved by the Cabinet and sits with the Council of State.
- **Evidence Law:** IIPA recommends that the Royal Thai Government amend the Evidence Law to allow the hearing and testimony of any digital evidence. Conforming changes should be made to any procedural rules of evidence in the various enforcement authorities so that they too will have clarity with respect to digital evidence.

Section 32 and Fair Use Guidelines: IIPA also continues to call for a narrowing or clarification of Article 32(6) and (7) of the Law, which provides an exception to copyright protection which has been interpreted to allow wholesale copying of academic materials. Thailand should take steps to narrow the relevant provisions to ensure compliance with international norms. DIP has issued three guidelines on fair use in recent years, namely, the “Fair Use Guidelines for New Report,” the “Fair Use Guidelines for Education,” and the “Fair Use Guidelines for Software.” The DIP has indicated that these guidelines are intended to serve as manuals for users of copyright works, e.g., the education guidelines are intended “to reduce risk of copyright infringement in books and other copyright works.” IIPA is appreciative of recent efforts, such as sending officers to lecture on book copyright to teachers and librarians, and to explain its guidelines to universities. We request the Royal Thai Government afford affected stakeholders, such as the publishers and software industry, the opportunity to provide input into the development of such guidelines given their experience in helping formulate similar rules in other countries. A Supreme Court decision (No. 5843/2543 [2000]), on appeal of a criminal copyright case brought against a photocopy shop, did provide some clarification of the research or study exception under Section 32. The Court held that the defendant’s activities, photocopying books and producing unauthorized compilations of excerpts for commercial purpose, did not qualify as exempt acts under Section 32.

Organized Crime Prevention Legislation: It has long been the case that piracy operations have been connected to organized crime, run by those attracted to the low-risk, high profit nature of piracy in Thailand. Unfortunately, IP violations have still not been included in various organized crime statutes, such as the Money Laundering Prevention and Suppression Act B.E. 2542 (MLPSA), notwithstanding the Royal Thai Government’s stated intention to include it in amendments.²⁹ IIPA urges the Cabinet to add copyright piracy as a predicate offense for the MLPSA. The Royal Thai government should also address the issue of organized criminal syndicate involvement in piracy and counterfeiting operations by adopting more generalized anti-organized crime legislation, including copyright infringement as a predicate offense for remedies such as freezing of assets.³⁰

Remaining Problems with the Optical Disc Manufacture Act: IIPA has previously analyzed the Optical Disc Manufacture Act which went into effect on August 29, 2005, and specifically offered changes to improve the law.³¹ IIPA understands that DIP revised regulations to ease the burden of copyright owners in applying for the copyright owner’s code in a way acceptable to industry. This marks a major improvement. IIPA also understands that the Law is in the process of being amended, and would suggest the following improvements: 1) notwithstanding the easing of the “copyright owner’s code” requirement through regulations, the obligation in Sections 8 and 12 should be stricken from the Law;³² 2) the Law should add a requirement that a plant obtain a license prior to beginning production of optical discs, including a fixed license term and renewal process (and the exception to the notification

²⁹ Nont Horayangura and Say Sujintaya, *Committee Rejects IP Offences on Public Interest Grounds*, September 28 2004, at <http://www.worldcopyrightlawreport.com/Article/?r=435&c=3003050>. Under the MLPSA, generally it is a crime to transfer, convert or receive the transfer of funds or property arising from certain criminal acts including hiding or concealing the source of funds. Violators are liable to imprisonment of a maximum of ten years and a fine of up to BHT200,000 (about US\$58,000).

³⁰DIP was entrusted in April 2008 to revise the Prime Minister’s Office Decree on the Enforcement of IPR Related Laws such as the Revenue Code, Factory Law, Drug Law and Import-Export Law so that more agencies will cooperate in IP investigations. It is unclear how the change in government has affected the DIP mandate to revise the Decree, but such revisions could be helpful in establishing links between piracy and other punishable offenses.

³¹*Act of the Production of OD Products*, B.E. 2548 (2005, effective August 29, 2005).

³²By requiring an application for and affixation of a code to all legitimate discs, Thailand may have inadvertently created a formality that violates Thailand’s international obligations. This kind of copyright owners’ code application process is a flaw that could, if it results in interference with the exercise of copyright, call into question compliance with the Berne Convention’s “no formality” principle. The industries find the code burdensome and problematic and call for its deletion from the law.

requirement in Section 5 for “production or a commission to produce for an educational purpose, for the public interest, or for the conservation of culture” should be deleted from the current Act); 3) the Law should provide for an automatic permit for export of discs and import/export of machines, stampers/masters and polycarbonate; 4) the Law should provide for seizure, forfeiture, and/or destruction of discs, stampers/masters, or machinery found in violation of the statute infringing copyright or trademark; and 5) the Law should provide for mandatory minimum fines and imprisonment in case of violations.

MARKET ACCESS ISSUE UPDATES IN THAILAND

Problematic Film Act Potentially Imposes Screen Quota and Uncertain Censorship and Ratings System: The Motion Pictures and Video Act B.E. 2550 (2008) (effective July 1, 2008, but not yet implemented) imposes quotas and potentially onerous censorship and ratings provisions. Section 9(5) allows the Film Board to establish a ratio between the number of local and foreign films, film/screen time quotas, at a time when there are 704 screens in Thailand (for context, approximately 57 local Thai films were issued in 2010, accounting for around 25% of all films released). The number of screens in Thailand is more than enough to have a free market for theatrical releases, and Thailand’s restrictive measure comes at a time when most other countries are removing quotas, not putting them into place. These restrictions could, if imposed, have a significant negative effect on foreign film distribution in Thailand.

The Act also imposes onerous ratings requirements on films, music videos and live performances, and censorship requirements³³ on films, audiovisual products, music used for karaoke, and videogames.³⁴ The concerns over this ratings and censorship regime include: 1) the time frame for obtaining ratings or censorship approval, which is too long (15 days), allowing pirates (who of course do not adhere to the law’s requirements) to gain a head start; 2) the costs associated with rating or censorship, again, giving pirates an additional cost advantage in the market; 3) the severe consequences for failure to comply with the ratings and censorship system, of criminal liability including both jail time and a fine; and 4) the fixation requirement, i.e., that the relevant rating or censorship code be “fixed” onto the container of films or audiovisual products as well as on the packages, and that the right holder “embed” the rating or censorship code into the content of films and audiovisual products so that the rating or censorship code appears on the screen or any media when broadcasted or displayed. The government should reevaluate this ill-conceived and outmoded legislation.

One further part of the Film Act places responsibility on Internet cafés, distributors (shops or stalls) of films and audiovisual products, theaters, as well as Karaoke operators, to acquire a “license to operate the business” in advance, with violators subject to criminal liability of up to BHT1 million (US\$30,000) or up to two years in jail. Industry has noted optimistically that the new law could be used to curb piracy in street stalls, shopping malls and complexes and even in Internet cafés in parallel with Copyright Law. If implemented, such restrictions would have a significant impact upon the theatrical sector as local productions of total films released.

Ban on Investment/Ownership in Terrestrial Broadcast Networks: Foreign ownership/investment in terrestrial broadcast networks is prohibited. Proposed changes in the law would still severely limit such investment to a 25% share. Such restrictions impede the development of legitimate content in Thailand, and should be relaxed.

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

The Royal Thai Government Should Reduce The Current 30% Hard Goods Import Tax.

³³In previous reports, IIPA has noted that “strict censorship guidelines in home video products have an adverse effect on the importation of DVDs, due to the costly nature of having to delete such scenes from the DVD master simply for the Thai market.”

³⁴The changes in the Film Act come at a time when Thai filmmakers, directors and producers are seeking greater deregulation, i.e., the switch from the strict censorship regime to a more audience- and filmmaker-friendly ratings system, and are seeking to cut import taxes on film stock, cameras and other equipment, which must be imported, and for which the duties are extremely high.

Television Advertising Restrictions: Advertising is now permitted under the Act on Broadcasting and Television Operation Business, enacted in 2008, but is limited to a daily average of five minutes per hour for each channel, or a quota of six per minutes in any single hour.

TRAINING AND PUBLIC AWARENESS

Copyright owners once again organized and/or participated in numerous anti-piracy trainings, regional IP seminars, and public awareness activities in 2011 in Thailand. The entertainment industry group TECA and IFPI delivered and/or participated in many trainings and seminars (including government-led trainings, and those organized by international organizations like WIPO) for related government agencies regarding Internet age investigation techniques, the future of the local Thai music industry, and updates on various copyright issues.³⁵ MPAA engaged in ongoing “Make a Difference” trainings to show cinema staff how important their role is to stop camcording, identifying illegal camcording, and identifying steps to take (e.g., who to contact) when illegal camcording is detected and the perpetrator has been confronted. Internet piracy training sessions were also held with ECD and the Cyber-Crime Police focusing on investigative techniques. Several other trainings and meetings were held with the special branches of the Royal Thai Police and IP & IT Court judges and Public Prosecutors. MPAA initiated several programs together with the DIP and the Thai Film Federation and academic institutions on IP education campaigns. In celebration of World Intellectual Property Day, representatives from across the Thai film community appeared in a video trailer to thank fans for choosing to watch movies in theaters and on legitimate copies at home. This trailer features cinema ushers thanking the audience for not camcording, highlighting the problem of illegal recordings sourced from Thai cinemas.

BSA organized and/or collaborated on software license compliance seminars (where local authorities had the opportunity to directly communicate with businesses on the impact of software copyright piracy on the country and request for software license compliance) as well as educational programs on software IP protection. Industry also participated in Royal Thai Government events at which sizeable numbers of pirated products were destroyed; these events presented opportunities to educate the public about the harm caused by piracy.³⁶ IIPA and several industry members participated in a regional ASEAN-USPTO-USDOJ Workshop on Copyright and Effective Practices Against Digital and Internet Piracy in late March 2011 in Bangkok. The Royal Thai Government also organized several public awareness events including a World IP Day event on April 26, 2011, an IP Fair 2011 in September 2011, which was expected to draw close to 100,000 people over a three-day period and was designed to promote

³⁵The following is a non-exhaustive list of some of the programs TECA was involved in during 2011:

- “The Suppression of IP Infringement in Digital Age,” February 28, 2011. The purpose of this Ministry of Commerce/DSI seminar was to educate police officers on the importance of intellectual property protection as well as discuss the current situation of piracy. There were around 70 private sector attendees mostly from ISPs, telecommunication companies, and copyright companies/associations and 200 police officers with commissioned ranks and higher, sub-inspectors under the Central Investigation Office and the Metropolitan Police Bureau also attending the seminar. Another 200 police officers from Provincial Police Bureaus Regions 1 and 8 attended the Seminar as well. IIPA also presented at this seminar.
- “New Era of Thailand’s Music Industry,” March 30, 2011. This seminar was organized in response to the question of whether the Thai music industry would be collapsed and lose to K-Pop (Korean Pop). The seminar was organized by DIP, TECA, and Bangkok University. Universal Music Thailand and TECA gave presentations at the seminar. The seminar brought in more than 400 attendees mainly from music industry.
- Short Film Making Competition, August- October 2011. MPA, the Thai Film Association Federation, and TECA organized and launched the “Anti-Piracy Short Film Competition.” The project was to raise awareness about copyright protection to young people and students. An award was given to the winner who was sent to a 3-day Seminar on Film Making in Beijing in November 2011. The first runner-up and the second runner-up got prizes of Bt10,000 and Bt5,000 Baht.
- Three Special Lectures on “Entertainment Industry in a Changing World,” June 7, June 29, and August 2, 2011. At these events, TECA, in cooperation with the MPA, provided update information on the entertainment industry locally and globally, and to have judges, prosecutors, or officers keep track with the advent of digital technology which affects consumers’ behavior with regard to copyright products. There were around 50 judges, both career and associate, attending the first session, around 60 public prosecutors attending the second session, and around 50 officers attending the third session.

³⁶The first destruction ceremony took place on June 30, 2011. DIP in cooperation with the Royal Thai Police, Royal Thai Customs, DSI and intellectual property right owners, attended the event in Phuket Municipality. Counterfeits and pirated goods weighing approximately 90 tons were destroyed, with an estimated value of the seizures being Bt58 million. The second destruction ceremony took place on August 29, 2011. DIP in cooperation with the Royal Thai Police, Royal Thai Customs, DSI and intellectual property right owners, attended the event in Phuket Municipality. Counterfeits and pirated goods weighing approximately 120 tons were destroyed, with the potential value of the goods they indicated amounted to Bt3.1 billion (US\$100 million). The third destruction ceremony took place on August 23, 2011, where Maesai Customs, Chiangrai destroyed counterfeit and pirated music and movie CDs, counterfeit clothing, bags, watches, and cell phones valued at Bt16 million (US\$500,000).

IPR awareness, and a campaign event in September 2011 called “Stop fakes – buy original,” including a seminar on “IP Respect - Solution for Thai Business,” and a fashion show to provoke the IP awareness.

GENERALIZED SYSTEM OF PREFERENCES

The GSP program, designed to promote economic growth in the developing world by providing preferential duty-free entry for products from designated beneficiary countries and territories, expired on December 31, 2010, but on October 21, 2011, President Obama signed legislation to reauthorize the program through July 31, 2013. GSP trade benefits became effective 15 days after the President signed the bill (November 5, 2011) and apply retroactively from January 1, 2011. Thailand has been a major beneficiary of the GSP program. During the first eleven months of 2011, more than US\$3.46 billion in imports to the U.S. from Thailand enjoyed duty-free treatment under the GSP Program, or almost 15.1% of Thailand’s entire imports into the U.S.³⁷ Among the criteria the President must take into account in determining whether a country should continue to be designated as a GSP beneficiary country are “the extent to which such country is providing adequate and effective protection of intellectual property rights,” and “the extent to which such country has assured the United States that it will provide equitable and reasonable access to the markets ... of such country.” 19 USC 2462(c)(4) and (5). It is essential to the continued growth and future competitiveness of these industries that our trading partners, including Thailand, provide free and open markets and high levels of protection to the copyrights on which this trade depends. Countries like Thailand should not expect to continue to receive the benefits of trade preferences if the government does not live up to its end of the bargain by providing adequate and effective protection for intellectual property rights of U.S. creators, and/or if it fails to afford equitable and reasonable market access to U.S. creative products and services.

³⁷During 2010, more than US\$3.6 billion in imports to the U.S. from Thailand enjoyed duty-free treatment under the GSP Program, or more than 15.9% of Thailand’s entire imports into the U.S.

UKRAINE

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

2012 SPECIAL 301 REPORT ON COPYRIGHT ENFORCEMENT AND PROTECTION

Special 301 Recommendation: IIPA recommends that Ukraine be elevated to the Priority Watch List in 2012, as a result of very severe enforcement problems, as well as numerous longstanding legal deficiencies.¹ In addition, in December 2011, IIPA filed a petition with the U.S. Government recommending the eligibility of Ukraine as a Generalized System of Preferences (GSP) beneficiary developing country be reviewed, and that its benefits be suspended or withdrawn absent immediate IPR improvements. IIPA also recommends that the U.S. Government should conduct an Out-of-Cycle (OCR) review of Ukraine in order to accelerate the implementation of the 2010 Action Plan by no later than mid-2012.

Executive Summary: Piracy rates in Ukraine are among the highest in Europe, including for both hard copy and digital copyright piracy. For IIPA members, Ukraine is a key country in the region for the enforcement of intellectual property rights (IPR) because it exports piracy, especially digital piracy, into both European Union markets and other countries in the Commonwealth of Independent States (CIS). For example, there are several notorious websites hosted in Ukraine by Ukrainian Internet service providers (ISPs) that, while identified to Ukrainian enforcement officials, have continued to act with impunity. In 2010, the governments of the U.S. and Ukraine developed an IPR “Action Plan” intended to target digital piracy. Not only has the plan never been implemented, but some actions have been undertaken by Ukrainian officials that are contrary to the proposed plan, and would weaken, not strengthen enforcement.

In short, Ukraine is not providing effective criminal enforcement, nor is there a proper legal framework in place for enforcement, as Ukraine is obligated to do under its treaty (including WTO/TRIPS) and bilateral commitments. Instead, Ukraine has established itself as a “safe haven” for criminal syndicates involved in copyright piracy, in particular, for digital piracy of business and entertainment software, recorded music, films and books. Ukraine is now one of the few countries in the world (along with Russia) with pay-for-download piracy of music and film, as well as the source of some of the world’s top BitTorrent systems. Plus, the government needs to resolve the dire situation of “rogue” collecting societies and take enforcement steps against these unauthorized societies (while also halting the investigations and harassment of legal collectives). As a consequence of its many shortcomings, legitimate online marketplaces cannot develop for copyrighted materials in Ukraine, and, by exporting piracy, Ukraine is harming legitimate marketplaces elsewhere. Moreover, Ukraine remains a global hot spot for high-quality illegal camcords of films that are uploaded to top sites and distributed across the Internet.

Ukraine’s many open air markets and street stalls remain replete with illegal copies of recorded music, films, entertainment and business software. Irregular and insufficient criminal and border enforcement is a further reason that pirate physical material is flowing freely into and out of Ukraine. In the case of business software, various ministries within the Government of Ukraine (especially the Ministry of Interior, the offices of State Tax Inspection, and the Prosecutor’s Office) are blatantly using unlicensed software. This sets a poor example for the business sector, where illegal software use (i.e., end-user piracy) is practically the norm. In sum, a roadmap for effective enforcement already exists – the full implementation of the Action Plan, which was developed first by a formal document presented by the U.S. Government in October 2010, and approved and signed by the Government of Ukraine in February 2011 (the plan became “effective” October 2010). The plan was actually a formal summary of obligations made by the Government of Ukraine over the past several years, especially to address Internet piracy.

¹For more details on Ukraine’s Special 301 history, see IIPA’s “History” appendix to this filing at <http://www.iipa.com/pdf/2012SPEC301HISTORICALCHART.pdf>, as well as the previous years’ reports, at <http://www.iipa.com/countryreports.html>. For a summary of IIPA’s 2011 global issues, see our cover letter at <http://www.iipa.com/pdf/2012SPEC301COVERLETTER.pdf>.



IIPA Priority Recommendations in Ukraine – Key Enforcement Actions and Legal Reforms: Among the many issues and recommendations noted in this report, here is a list of priorities that IIPA recommends to the Government of Ukraine in 2012:

Criminal Enforcement

Criminal enforcement is a key IIPA-member priority because it can, if undertaken correctly, address myriad piracy problems. To be effective, criminal enforcement requires: (a) coordination by key agencies – including, the Ministry of Internal Affairs and General Prosecutors Office; (b) a significant increase in the number of raids and prosecutions; and (c) additional resources, especially for IPR police enforcement personnel (bringing the force up to a minimum of 260 officers). IIPA recommends that effective criminal enforcement, including prosecutions and deterrent sentencing, should be directed at:

- Owners of the numerous pay-per-download and BitTorrent sites. Criminal enforcement authorities should be using existing laws to take down illegal websites dedicated to pirated music, film, business and entertainment software and/or printed materials (and including sites relying, in bad faith, on the false rogue collecting society licenses).
- Principals of the rogue collecting societies that claim to offer “licenses” to both online and physical businesses, that they do not have the authority to grant.
- Organized crime syndicates, applying criminal prosecutions and deterrent sentences, not, as has been done to date, relying on non-deterrent administrative penalties. Targets should include the syndicates operating websites and peer-to-peer operations, hard-copy distribution centers, camcording operations, and optical disc media production facilities (including CD-burning operations).
- Owners and operators of open air and street market piracy, especially the piracy occurring at large outdoor markets and in the streets at or around underground stations, and near local shops and supermarkets.
- Retail chain owners that are selling pirated entertainment software products bearing illegitimate holograms at retail chains. These actions should include: long-term closures of illegal businesses, and follow-up raids at stores, kiosks and warehouses. Law enforcement authorities should – using search warrants – enter sales premises and suspected warehouses to seize illegal material, even if such premises/warehouses are closed.

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

There are several administrative and customs law enforcement efforts that we recommend as priorities, including:

- An emphasis on corporate end-user piracy enforcement targeting large-scale infringers (in lieu of the current targets which are small companies and individuals), and as applicable, also using criminal enforcement against large-scale infringers.
- Allocation in each ministry (in 2012) of funds dedicated to full software legalization and the creation of an effective software asset management policy and practice (including audits). Further, we recommend: (a) the development of (and public statements about) an action plan for software legalization; (b) identifying both the steps to be taken to implement the resolution of the Cabinet of Ministers (designating the individuals responsible in the process); and (c) placing the plan’s implementation under the Prime Minister’s supervision.
- Moving aggressively against infringing cable transmissions and retransmissions, public performances, and TV and radio broadcasting with administrative (and where, applicable, criminal) actions.

- Using the *ex officio* authority (in place since 2007) to improve border controls, especially along the Russian border, focused on railroad traffic.

Legal Reforms

A Copyright Law amendments bill (Bill #6523) was introduced in the Verkhovna Rada in June 2010 and passed its first reading in February 2011. If enacted (with additional proposals submitted by rights holders to the Parliamentary committee) it would improve the Copyright Law (and other IPR laws of Ukraine) with amendments regarding temporary copies, damages, the imposition of takedown notices and third party (ISP) liability as well as excluding camcording from the scope of the private copy exception. There are some further amendments needed (i.e., the proposals submitted) at the next reading; but, overall, IIPA supports this legislation. Here is the list of the key legal reforms that IIPA recommends:

- Full implementation of the WIPO digital treaties – in the Copyright, Industrial Property, Criminal and Criminal Procedural Codes. Ukraine acceded to the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT) in 2002.
- Adopting amendments to the Law on Telecommunications to promote a fair and effective response to online piracy, including: (i) legal incentives for ISPs to cooperate with rights holders to effectively deal with Internet piracy; (ii) rules that clarify the illegality of providing services that are intended to promote the infringement of copyright and related rights; and (iii) injunctive relief and a duty on Internet service providers (ISPs) to provide information to law enforcement agencies and rights holders. Additionally, Copyright Law amendments be enacted to ensure that an unauthorized online distribution, communication or making available is considered an act of infringement, regardless of whether it is undertaken for profit-making purposes or other commercial benefit or advantage.
- Amendments to Article 176 of the Criminal Code (and separately, in the Civil Code) to ensure the availability of criminal remedies against online piracy of all works and sound recordings; and, to establish in the Criminal Procedure Code, clear rules for prosecuting infringers.
- Amendments the Copyright Act and Criminal Code to make camcording illegal by excluding camcording from any “private use” exception, and criminalizing this activity. Additionally, amendments to the Law on Cinematography to repeal the requirements of local production of film prints.
- Implementing the 2003 resolution of the Cabinet of Ministers regarding legalization of software in state agencies.
- Amending the Copyright Law and the Civil Code to ensure that all relevant right holders are entitled (in law and practice) to operate effectively through the collecting bodies of their choice in the licensing of broadcasting, public performance and other communications to the public.
- Abolishing the hologram stickering system (or, at the very least, fixing it so that it cannot be used by infringers to make pirate product appear legitimate).

COPYRIGHT ENFORCEMENT IN UKRAINE

Internet piracy in Ukraine in 2011: Ukraine Internet penetration is growing fast – it is now estimated that 33.9% of Ukraine’s population, or 15.3 million people are on the Internet according to the International Telecommunications Union (a U.N. agency) as of March 2011; this places Ukraine as the 9th largest user of the Internet in Europe. All of the copyright industries – music, film, book and music publishing, entertainment software and business software – report very weak Internet enforcement, coupled with an especially sharp increase in the rate of illegal peer-to-peer hosting and website-based Internet piracy, including BitTorrent sites (some of the world’s largest), located in Ukraine, for target audiences primarily in the countries of Western Europe and the United States. There are numerous open and notorious sites including, for example: demonoid-me (940,000 visitors each month;

the site offers over 75,000 unauthorized movies and nearly 47,000 unauthorized television programs). Ukraine has many free and pay-per-download music and video websites, as well as streaming services, some aimed at an international audience. One particularly severe case of blatant and open piracy is the filesharing site EX.ua, which (according to a 2010 survey) is responsible for half of all the users who upload and download illegally in Ukraine, and whose popularity is growing. On January 31, 2012, EX.ua was raided by police; for two years rights holders have gathered and provided enforcement authorities with evidence of ongoing infringing activity by this site. On January 31, the site was briefly taken down, but it is currently back in operation.

In many cities and towns outside Kiev – especially where internet bandwidth is relatively slow – a problem exists with so-called “LAN” (Local Area Networks) sites. These are high-speed FTP sites that store massive amounts of content, most of it consisting of infringing movies, music and videogames. Local users can get access to these LAN networks by paying a fee and can then download as much content as they wish; there are no constraints on bandwidth limitations (as they might encounter when visiting infringing sites abroad). In 2011, the police did commence some investigations, and a few resulted in prosecutions of LAN operators (14 LANs had their operations taken down). In total, UAPA, the anti-piracy organization, reported that they worked with the police on 17 Internet investigations in 2011, of which 15 resulted in criminal proceedings commencing (although there are no reports on the disposition of these cases). According to a 2011 Entertainment Software Association (ESA) study, Ukraine is in the top 20 countries worldwide in terms of the number of detected connections from peers participating in unauthorized file sharing (taken from a sampling of ESA titles on peer-to-peer networks).

The recording industry reports that paid download sites like mp3fiesta.com remain a major source of piracy in Ukraine (some selling whole albums for US\$1). These sites use the same business model as the original Russian allofmp3.com site, with professional looking interfaces capable of deceiving unfamiliar users into believing they are legal sites. Some of these websites offer incentives such as free give-aways in return for users making monetary “deposits” onto the sites.

The independent segment of the film and television industry (IFTA) is especially concerned with the impact of Internet piracy because of its harm to legitimate online distribution services – harming consumers and rights holders alike. Revenue from these services, which is licensed country-by-country, is critical for the independents to finance the development of new creative works worldwide. Internet piracy is instantly exported into other markets, spreading high piracy rates; this not only undercuts anticipated revenue from the distribution of a particular film (including licensing fees such as theatrical, DVD and television rights), it also harms the ability of independent producers to secure financing for future productions.

In addition to infringing hosted content available for download, another common type of Internet piracy is via mail order – with orders placed online and delivered by mail, according to the Business Software Alliance (BSA). One common example involves the reselling of software in violation of licensing agreements, for example, software obtained using privileged licenses for a finite set of users which is then resold to the public on the Internet.

There are currently two major hindrances to effective enforcement against Internet piracy: (1) the absence of any third party (ISP) liability in the existing law; and (2) the inability of right holders or enforcement authorities to collect information about suspected infringing website owners. In fact, not only is there no clear third party liability that could lead to cooperation between rights holders and ISPs, but the Law on Telecommunications (Article 40, paragraph 4 on the “responsibility of operators”) bluntly states that ISPs “do not bear responsibility for the content of the information transmitted through their networks.” Additionally, Article 38 states that ISPs can disable end-users from the Internet, or block access to (i.e., take-down) infringing websites only with a court order. In the past, the ISP association (IAU) – citing this statutory language – has taken the position that rights holders need to go after illegal websites directly, without ISP assistance or cooperation. Many of the websites offering pirated copyright materials are thriving in part because of the support of local ISPs (there are over 400 ISPs in Ukraine and over 150 sites offering pirated CDs and DVDs). The copyright industries have, for years, been seeking private agreements (with governmental assistance) with ISPs to work cooperatively to take-down illegal websites and slow illegal peer-to-peer

traffic. The Government of Ukraine has made no effort to move this process forward and makes it clear that IPR enforcement, especially on the Internet, is not a priority. Some ISPs will delete links upon request (MPAA estimates that in 2011, about 20% of the ISPs responded to takedown letters); but, most refuse rights holders requests and demand court orders. It has been over three years since IAU agreed to work more forcefully with right holders to reach a mutually acceptable solution to help stem Internet piracy, but these efforts stalled, which is why IIPA recommends that the Government of Ukraine must get involved to broker a private agreement, and, at the same time, adopt some key Internet enforcement legal reforms.

Despite claims from the Government of Ukraine that adequate *ex officio* authority exists under current law, police continue to claim they are unable to instigate criminal operations against online piracy unless a rights holder first files a claim for damages. When criminal investigations are undertaken, police efforts are often stymied by a lack of cooperation from ISPs, which often refuse to provide available information on their infringing users. In December 2009, amendments to the Law on Telecommunications (draft # 3271) were proposed but ultimately defeated; they were intended to assist the police in conducting Internet crime investigations by providing subscriber information. The business software industry, for example, reports that legislative deficiencies and lack of cooperation with the ISPs thwart any attempts to focus on enforcement against Internet piracy. Thus, in general, the copyright industries report that the lack of clear prosecutorial and court procedures for Internet-related cases is a block on effective enforcement and that existing procedures are too difficult to be used effectively. Another impediment: procedures require that prosecutors identify the exact name of a website owner and the local network user(s) prior to commencing a case. IIPA recommends the adoption of guidelines and more effective procedures for police, prosecutors and judges for these crimes.

Hard copy piracy: The widespread availability of illegal material in open-air markets persists, in such places as: Petrovka (in Kiev), Mayak (in Donetsk), the “7-Kilometer” open market (in Odessa), and Barabashovo (in Kharkov), and, in other locations and cities. There has been little change in this problem in the past few years. The hard goods piracy problem is also prevalent in some retail chains, many of which openly sell pirate product alongside legitimate product. Often times these pirated goods bear wrongly issued holograms which legitimizes the product and makes enforcement challenging.

It was reported that the police undertook about 280 raids against open markets and street stalls in 2011. Some industries report a (slight) decline in hard copy piracy, as Internet piracy grows rapidly. Still, the size and scope of open market piracy in Ukraine is widespread. The Motion Picture Association (MPA) reports, that for example the “7-Kilometer” market in Odessa has 80 to 90 stalls selling pirate audiovisual product, the Mayak market in Donetsk and the Petrovka market in Kiev each have 200 such stalls, and the Barabashovo market in Kharkov has about 60, but because it is near a railway crossing point into Russia, serves as a distribution point within Ukraine, for Russian made optical disc media. The points of sale – the markets and street vendors – are occasionally raided, but these sites are rarely permanently shut-down, and operators rarely criminally prosecuted.

For the Entertainment Software Association (ESA), piracy at Internet and cyber cafés or “game clubs” continues unabated, with pirated and/or unlicensed versions of videogame software in wide use. Most of the hard copy piracy is produced in plants for PCs on discs and is manufactured in Ukraine, without licenses and absent any royalty payments to rightful owners. The problems persist despite efforts by police to initiate actions and raids, including seizures at retail outlets, warehouses, and Internet cafes. One on-going problem is post-raid investigations (which are unduly lengthy, costly, and non-transparent) and prosecutions – very few cases get to trial. Instead, it is common for cases to be simply dismissed or terminated without explanation, even when high volume seizures are involved.

The camcording of motion pictures, and the quick transference of these illegal copies on the Internet, is a major problem for the motion picture industry. The camcording problem in this hot spot is driven by criminal syndicates operating in Ukraine and Russia. As a consequence, illicit camcording shifts quickly between the two countries resulting in hard copy and Internet piracy. Illicit camcords sourced from Ukraine are quickly uploaded to the

Internet and burned to optical discs for distribution. Amendments to the Copyright Law (Bill #6523) and the Criminal Code are necessary to effectively enforce against illicit camcording. According to IFTA, DVD sales in Ukraine have been particularly hurt by piracy, with digital copies (often sourced from illegal camcords) being routinely offered for free online (and sold in hard copies). Unable to compete with free, legitimate distributors in Ukraine are not able to commit to distribution agreements, or alternatively offer drastically lower license fees which are inadequate to assist in financing of independent productions.

Rogue collecting societies: While the law in Ukraine provides for remuneration rights for the broadcasting or other public performances of musical works and sound recordings, it is estimated that over 90% of the broadcast and public performance market places are unlicensed. This problem has been significantly worsened by the Government of Ukraine which has prevented state broadcasters from complying with the law's licensing obligations. In addition, the Government of Ukraine has not undertaken proper actions against known pirate websites and other infringers, nor against collecting societies like Oberih and Avtor which purport to grant "licenses" for which they do not have rights. Instead (and incorrectly), the Government of Ukraine has directed its investigators, and IPR enforcement resources, on the operations of legitimate rightsholder organizations.

The proliferation of rogue collecting rights societies – such as Oberih and Avtor – which falsely claim "licenses" to repertoire, and the inability for legal societies to properly operate in Ukraine, remain a major problem for the recording industry. In 2009, the Ministry of Education and Science (with approval from the Ministry of Justice) issued an executive order (Order #1175) for the accreditation of collecting societies, but providing that there could be no more than one authorized collecting society for each copyright sector – thus, one for broadcasting rights, one for public performances, etc.. The executive order delegated the authority to implement the accreditation of organizations to the State Department of Intellectual Property (SDIP) – now re-named the State Intellectual Property Service; the executive order also noted that the authorization of any particular organization would be based on the majority of the national and international repertoire represented. Two legitimate organizations – the Ukrainian Music Alliance (UMA) – broadcasting – and the Ukrainian Music Rights League (UMRL) – public performances – legitimately represent over 80% of the domestic and international repertoire for music. They were both properly accredited by SDIP. Despite various attempts by non-representative organizations to cancel the results of accreditation (three years ago), IIPA supports this accreditation and the reform brought on by Order #1175. In order for authorized collecting societies to function efficiently, we recommend that the regulatory framework increase their authority, including the possibility of inspections, representation in court, and cooperation with law-enforcement agencies, and that only organizations with a majority of relevant repertoire of material be authorized.

One positive step was the launch, by prosecutors, of a criminal investigation into the activities of Oberih, the rogue collecting society. Unfortunately, it has taken far too long to conclude an investigation in this case of clear-cut piracy. IIPA calls upon the enforcement officials to quickly conclude their investigation and to properly prosecute those responsible for Oberih's illegal operations (in addition to taking action against other rogue collecting societies, such as UPO Avtor, which license pirate websites). Prosecutors have never communicated the status of the Oberih investigation to rights holders; U.K. police have recently sent evidence to the Ukrainian police (via Interpol), in order to open a criminal investigation on Avtor.

Software legalization: In the case of business software, various ministries within the Government of Ukraine (especially the Ministry of Interior, the offices of State Tax Inspection, and the Prosecutor's Office) are blatantly using unlicensed software; the government should be leading by example, in a country where illegal software use by businesses (i.e., end-user piracy) is practically the norm. In 2003, the Cabinet of Ministers 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. Over eight years ago, the government issued a new regulation to implement legalization – assigning all procurement authority for software products to one entity, SDIP (now SIPS), in order to try to eliminate the use of pirated software products in the public sector. However, since then, implementation of the program by the government, the largest consumer of illegal

software in Ukraine, has been very slow. Piracy rates in Ukraine are very high for business software, with PC software piracy rates exceeding 80% in each of the past five years.² The IIPA's recommendations on the steps the Government of Ukraine should take to address this problem are set out in our priorities section above. In sum, the Government of Ukraine (including the Rada) does not treat piracy, including business software piracy (by the government or businesses) as a priority problem to be corrected. There are many enforcement failings, including weak or non-existent regulations for inspection orders (raids), and evidentiary and prosecutorial procedural and resource failings as well (including engaging the Tax Inspections, as well as Customs officials in software audits and prosecutions). The pending draft Copyright Law – with some further improvements as recommended by the business software community – could correct these problems.

Hologram stickering: All of the copyright industries – music, film, entertainment and business software companies – report persistent problems with the administration of the current hologram stickering system which was adopted in 2000. In short, the system has failed as an enforcement tool, and should either be abolished or completely revised. As a result of ineffective oversight by Intelzakhist, the body responsible for administration of the hologram system, holograms are often issued on the basis of false contracts and licenses. Unauthorized music compilations of 100+ tracks in mp3 format on each CD (featuring “the best hits” of well-known artists) are widely available with holograms. Unauthorized videogame discs (such as discs with Xbox games) bearing holograms are found in many retail outlets throughout the country. In sum, the system has done considerably more harm than good to the interests of legitimate copyright owners while it has permitted suspect companies (based on false contracts and unverified licenses) to receive thousands of holograms for foreign releases (music, film, entertainment and business software) for which they have no licenses, despite objections from the legitimate licensees. This makes the pirate product *de facto* “authorized” by the state for distribution which means it cannot be (or is not) seized by law enforcement officials.

For some industries, one out of every two illegal products seized is labeled with a false hologram, and for others (for example, the motion picture industry), all illegal copies seized had false holograms. Were the hologram requirement effectively administered it could potentially benefit rights holders. However, in practice, the hologram requirement actually benefits those engaged in the distribution of pirated product. Consequently, IIPA recommends an immediate moratorium on the hologram regime. While IIPA favors abolishing the system entirely, at the very least, IIPA urges a complete revision of the law to bring transparency to the hologram sticker administration procedures (along with proper enforcement). One “fix” would require SDIP (now SIPS) to publish on its official website information about all current applications for stickers, and to indicate both the names of the applicants as well as the names of all works (CDs and DVDs) seeking labels – this would assist right holders in tracking applications.

Broadcast and public performance piracy: Broadcast television piracy is a major problem for the motion picture, music publishing and recording industries – both with regard to regional and nationwide broadcasts. Broadcasting, cable retransmission, and public performance piracy is estimated to be over 90%. Despite the fact that the Ukrainian Copyright Act provides for broadcasting and public performance rights, and collecting societies are in place, the overwhelming majority of users in Ukraine – cable operators and TV stations (including the largest state-owned broadcaster), restaurants, bars, shopping malls, sports clubs, etc. – refuse to pay royalties to the relevant authorized collecting societies. IIPA continues to recommend that the Government of Ukraine create a database, inspect commercial users, set a goal to bring these 90+% piracy levels down below 50% in one year (by relying on regional police economic crime units and state IP inspectors), and subject unauthorized users to administrative and

²BSA's 2011 software piracy statistics will not be available until after the filing deadline for this submission, but will be released in May 2012, at which time piracy rates and U.S. software publishers' share of commercial value of pirated software will be available at www.iipa.com. In 2010, the software piracy rate in Ukraine was 86%, representing a commercial value of unlicensed software attributable to U.S. vendors of US\$314 million. These statistics follow the methodology compiled in the Eighth Annual BSA and IDC Global Software Piracy Study (May 2011), <http://portal.bsa.org/globalpiracy2010/index.html>. These figures cover packaged PC software, including operating systems, business applications, and consumer applications such as PC gaming, personal finance, and reference software – including freeware and open source software. They do not cover software that runs on servers or mainframes, or routine device drivers and free downloadable utilities such as screen savers. The methodology used to calculate this and other piracy numbers are described in IIPA's 2012 Special 301 submission at <http://www.iipa.com/pdf/2012spec301methodology.pdf>.

criminal prosecutions. The law should, additionally, be clear that wholesale blatant copyright and related rights infringements could lead to station broadcast license suspensions or cancellations from the state.

Criminal enforcement: The most significant shortcoming in the Ukraine enforcement regime has been the absence of effective criminal prosecutions and deterrent sentencing which are necessary to combat digital and hard-copy piracy. Despite 2006 amendments to the Criminal Code (Article 176) to significantly lower the previously too-high threshold for criminal prosecution, the current threshold is still high. The threshold is now 10,730 UAH or US\$1,336 (as of January 2012, including minimum wage adjustments) which serves as a bar to effective criminal enforcement and results in less effective administrative actions in lieu. This is particularly true for online piracy matters where the valuation of damages (by law enforcement agents, prosecutors and the courts) is too difficult to calculate absent an official methodology; this prevents the initiation of criminal investigations and prosecutions against online piracy. Additionally, enforcement officials have applied the threshold on a per-rights holder basis, which means that when illegal material is seized, if the material for each rights holder does not exceed the threshold, the criminal case does not proceed. There are other procedural problems as well, including: (a) the use of expert evidence; (b) treatment of repeat offenders; (c) needed changes in the Criminal Code or Criminal Procedure Code to avoid delays and case dismissals; and (d) the lack of guidelines for judges on sentencing and developing expertise in IPR cases (IIPA recommends that the highest specialized court in civil and criminal cases issue guidelines for judges in this regard). Provisions do exist in the Ukrainian Criminal Code (e.g., Article 28) for prosecuting organized groups or criminal organizations, including for IPR offenses, but these provisions have been under-utilized by prosecutors. One lingering enforcement problem (in criminal and civil cases) is the required proof of ownership (including a complete chain of title), and the denial of standing to licensees (especially of foreign record companies) in court.

Enforcement efforts are further hampered by a lack of resources. The Government of Ukraine established a specialized unit for intellectual property rights crimes within the Economic Crime Division in the Ministry of the Interior. This was a positive step, but with only about 100 officers serving in that division for the entire country, there are simply too few officers to conduct effective and systematic actions to deter piracy; IIPA recommends that this number should be increased. In 2009, a Cyber Crime Unit was also created within the Ministry of the Interior; in 2011, it commenced its work on IPR (including copyright) enforcement. IIPA continues to recommend that there should be a team of officers dedicated exclusively to copyright and related rights violations, and these officers should be provided with effective training (including IT skills), equipment, high-speed broadband connections, etc. (with IIPA members willing to help train these officials, as many IIPA members, including BSA, MPAA, RIAA and others have done over the years). Similarly, the current number of state IP inspectors in SDIP (SPIS) empowered to combat various IPR infringements throughout the 25 regions of Ukraine is inadequate and should increase to 25 at a minimum, so that each region has at least one dedicated inspector. In populated cities such as Kiev (2.5 million people), Kharkyv (1.5 million), and Dnypropetrovsk, Odessa and Donetsk (1+ million, each), to be effective, IIPA recommends a team of at least three inspectors as the minimum number available. Unfortunately, contrary to the Action Plan commitment to increase the number of State IP inspectors, their numbers have been significantly reduced. Other agencies – Tax Administration and the Security Service – are, unfortunately, not actively engaged in IPR enforcement. A resolution of the plenum (judges of the highest court) on proper IPR criminal procedures, as a way of guiding lower courts, would be helpful as well.

Raids, Seizures and Other Enforcement Actions in 2011: According to the Government of Ukraine, in 2011, it seized 700,000 optical discs (down almost 65% from 2010); there were a total of 800 criminal investigations commenced (compared with 960 in 2010), and administrative measures were applied in about 3,000 cases (down from 4,700 in 2010). The administrative actions were mostly undertaken against stores, kiosks and other street piracy. Unfortunately, these actions were not coupled with severe enough penalties to deter these crimes.

The business software industry (BSA) reported in 2011, that there were 303 *ex officio* raids – 62 relating to CD sellers, 203 to end-users, 34 to hard disc loaders and only four to Internet piracy. These raids resulted in 230 criminal cases commencing (a slight increase from 2010); of these, 58 cases were sent to the courts for their

consideration (a slight decrease from 2010). As in recent years, almost all requests for assistance by rights holders for raids against suspected targets were denied by law enforcement agencies.

ESA, like other copyright industries, reports continued frustration with the pace at which investigations are undertaken and the rarity with which cases reach trial. Officers often refuse to proceed with investigations or to transfer cases in a timely manner to prosecutors, even when high volume seizures are involved. In some instances, ESA member companies did agree to support cases (as complainant), at the request of prosecutors, only to incur great expenses, and were provided with little or no information about progress of the case. In rare instances in which cases do make it to court, there is a high likelihood that judges will dismiss the case. The hurdles that the copyright industries face in Ukraine are ineffective investigations and prosecutions and non-deterrent sentencing for the few cases that do reach trial. For example, BSA reports that only 15% to 20% of filed criminal cases end up in court and of those, only a very small percentage result in convictions, much less any sentence. Ukrainian tax authorities will exercise enforcement authority, and initiate cases, usually against retail pirates (as administrative actions).

The anti-piracy organization (UAPA) reported that it worked with the police on 73 hard copy cases in 2011, assisting in the seizure of 205,000 optical discs, but, that all of the cases resulted in suspended sentences or probation. As noted, MPAA reported 14 LANs were taken down in 2011.

Optical Disc Piracy and Enforcement: There is currently no evidence of large-scale industrial production of pirated optical discs in Ukraine – at least not of music and film material; but, other forms of optical disc piracy involving CD-R and DVD material, in particular, persist. However, some legal plants producing CDs and DVDs have been able to obtain unauthorized holograms which are then sold, without authorization, in Ukraine.

The June 2000 Joint Action Plan not only detailed plant licensing and inspection requirements, but also the adoption and implementation of criminal and administrative penalties, which could and should be used effectively against all forms of pirated product. A multi-agency order signed into law in November 2009 (with the approval of the Police, Customs, Tax, the Ministry of Culture, the Security Service, the Ministry of Education, as well as representatives of Microsoft-Ukraine, the BSA, the Music Association and UAPA) to improve IPR protection, has been wholly ineffective.

Regulation and control of the plants that does exist is still not effective, especially for industry sectors not present or unable to provide sufficient resources in Ukraine, and thereby unable to assist the authorities with inspections. There are, at present, eight optical media disc plants (producing CDs, DVDs or both) in operation in Ukraine.

Ineffective Border Enforcement: Customs officials were granted *ex officio* authority to properly conduct enforcement investigations (in amendments to the Customs Code in 2004 and 2006). With this *ex officio* authority (Article 203-1) customs officials can seize illegal material at the border without a court order. Unfortunately, Customs authorities are not sufficiently engaged in enforcement measures and thus are under-utilizing their authority, with the exception of some minor seizures by customs authorities of illegally produced CDs and other pirated materials over the past several years; cooperation with right holders could be improved as well. The State Customs Service of Ukraine (SCSU) is the agency responsible for stopping importations. IIPA recommends an expansion of the specialized intellectual property rights unit within the Customs Service (and that it not rely on a centralized bureaucracy), and that it be provided with sufficient resources to effectively stop illegal material at the border.

Ukrainian law provides for the payment of a levy on blank media (e.g., CD-Rs) to compensate for private copying; the levies are to be paid to UMA, a collecting society of right holders. Unfortunately, the SCSU is not, in practice, stopping imports for non-payment of the levy. Moreover, SCSU has no legal obligation to collect and share data on its collection of imported blank media. Under the Copyright Law, the non-payment of private copying levies does not constitute an infringement of copyright and related rights (although Bill #6523 would correct this problem).

But, until the law is amended, there is no viable mechanism for enforcement of the law, and widespread violation thereof, undermining the rule of law.

LEGAL REFORMS

In the “legal reform” section above, IIPA notes its legislative priorities for effective enforcement and full TRIPs compliance (now that Ukraine is a member of the World Trade Organization). A history of the key legal reforms made by Ukraine in the past few years is available on the IIPA website at <http://www.iipa.com/rbc/2010/2010SPEC301UKRAINE.pdf>.

The Copyright Law and related IPR amendments in 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 (as amended) fixed several major deficiencies, but a number of problems remain, especially in the sphere of Internet enforcement, and, the collective management of rights. The accreditation of non-representative collecting societies remains a major problem for the music industry, because it allows rogue societies to undertake collections on behalf of all music rights holders (including foreign rights holders) when they do not control any “volume of rights” by legitimate negotiated direct agreement with rights holders. The order of the Ministry of Education and Science (Order #1175) which was intended to address this problem is an administrative fix that cannot substitute for the needed Copyright Law amendments on this matter.

One positive note: in June 2010, the Supreme Court – in a resolution – declared that the storage of illegal copies of software in a computer memory could be a copyright infringement. Neither the Copyright Law of Ukraine nor the Criminal Code clearly provide that the use of illegal copies of software is an infringement – this should be corrected (which Bill #6523 would do). According to the current wording of Article 1 of the Copyright law, the installation, duplication and sale of unauthorized software is a violation of the copyright law, but the use or storage of such copies is not.

There are three other important recommended amendments to the Copyright Law (contained in Bill #6523): (1) Article 52 to allow licensees of foreign music companies to be treated equally to local right holders; (2) an amendment making either the non-payment of music rights royalties or of private copying levies, an infringement of copyright and/or related rights; and (3) adding statutory damages and/or a system of enhanced damages in order to adequately compensate right holders and deter further infringement (Article 52 – to double actual damages).

Anti-Camcord Legislation (Copyright Law amendments): The illicit recording of a movie in a theater remains the single most prolific source of movie piracy in Ukraine which is why an amendment is needed. The Copyright Law reform (Bill #6523), currently under consideration by the Verkhovna Rada, includes an anti-camcording amendment that would specifically exclude camcording from the scope of the Copyright Law’s private copy exception. The law, if enacted, would prohibit the reproduction of audiovisual works during their exhibition in theatres and at other premises intended for public consumption. The motion picture industry (MPAA) appreciates the Government of Ukraine’s attention to this matter and urges expedited passage of this important legislation.

Criminal Code and Criminal Procedure Code: The Criminal Code was completely revised in the past several years, including amendments in 2007 (May 31, 2007); but, the threshold for criminal responsibility under Article 176 remains high.

Amendments we recommend include: fixing Article 176 of the Criminal Code to clearly apply to all forms of piracy (i.e., on the Internet), not only (as it clearly does now) to hard-copy piracy. Second, any amendment to the Criminal Code should ensure that repeat copyright infringement (within 12 months) would automatically lead to a criminal, and not solely an administrative, prosecution. Last, relevant criminal sanctions should be included in the code for intentional infringements related to the obligation to pay music rights royalties.

As noted, police practice under the Criminal Procedure Code must also be fixed so that police exercise their authority to act *ex officio* to initiate criminal intellectual property cases. Ukrainian criminal procedures in practice (although not required by the code) currently require right holders to file complaints to initiate actions which acts as a bottleneck to successful enforcement. Police should 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 seized products and equipment for use at trial.

WIPO Digital Treaties: In 2001, Ukraine acceded to the two “digital” treaties – the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonogram Treaty (WPPT), in force in March and May 2002, respectively. The Copyright Law of 2001 included amendments intended to implement these treaties. Unfortunately, the amendments fell short of complete and effective implementation, especially with regard to technological protection measures (requiring proof of “intentional” circumvention, which could prove a major impediment to protection). Ukraine needs to fully implement the treaties with amendments to its copyright law, as well as ensuring that the law is correctly applied. One concern remains: the attempts to reverse one (proper) implementation measure (Resolution No. 71 – January 18, 2003) which ensures the proper enforcement of cable retransmission rights.

Administrative Remedies: As part of the Joint Action Plan in 2000, Ukraine agreed to adopt and implement appropriate administrative remedies to deter piracy (in addition to criminal penalties). While proper administrative remedies now exist, they are not being used effectively to remove the business licenses of infringing retail stores, kiosks, and other smaller scale pirates. Further amendments have been proposed, but never adopted, to increase the maximum fines, which IIPA recommends. Administrative courts should be able to hear infringement cases even in the absence of the infringer – such delays, and the deadlines, lead to many unnecessary case dismissals. One major enforcement hurdle in the Administrative Code of Ukraine (Article 51.2) is the requirement to prove intent of the infringer; intent, while relevant in criminal proceedings, has no relevance in administrative sanctions, and should be deleted from the code (which Bill #6523 would do).

Customs Code: The Customs Code of Ukraine (amended in 2006; effective March 2, 2007) provides clear *ex officio* authority (Article 257) to customs officials. But, for suspected illegal material, a monetary threshold remains. Also, for optical discs, a maximum of 20 discs can be imported or exported for personal use under the Optical Disc Law. The 2004 Customs Code narrowed the applicable sanctions to acts meeting a “commercial purpose” threshold which limited the code’s effectiveness. Amendments in 2006 replaced the “commercial purpose” criteria; the sanctions now apply to “goods destined for manufacturing or other business activity.” The notification and registration requirements, and the fees, were not repealed by the 2006 amendments. While some administrative improvements have been made in recent years, IIPA recommends the abolishment of the registration system altogether because it is an unnecessary maze of regulations which interferes with effective border enforcement.

Market Access: There are three serious market access issues that the motion picture industry is confronting. The first, is the set of rules governing the compulsory manufacturing of film prints and digital encryption keys. Under current law (in effect March 18, 2010) film prints must be produced locally; the rule requires local film print production for the issuance of a state distribution certificate. The rules are so unclear, however, as a result of other, conflicting laws, that movie distributors are uncertain about the rules, and the State Film Agency continues to issue distribution visas irrespective of a print’s place of production. The local production rule was reiterated by the State Film Agency in March 2011; it is applicable to analog and digital prints.

The second market barrier is the set of rules governing foreign ownership and investment restrictions. Ukrainian laws prohibit the direct ownership or establishment of television stations by foreign companies, and foreign investment is limited to 30% in these enterprises. There are also (apparently) domestic broadcast quotas (no less than 30%) as well and requirements for Ukrainian language usage on television programming.

The third market barrier is the customs valuation rules that customs authorities declared in November 2009. Rather than assessing duties on the underlying carrier medium, the new rules assess valuations based on projected royalties. Since the new rules went into force, several cases have resulted, and their rulings only add to the current uncertainty. There were three cases in 2011 (one in July, two in November) which ruled that royalties should not be used in customs valuations; the Government of Ukraine should fix and clarify the rules.

Generalized System of Preferences: In the first eleven months of 2011, almost US\$44.4 million in imports to the U.S. from Ukraine enjoyed unilateral duty-free treatment under the GSP program. In 2010, over US\$39.1 million in imports received GSP benefits. On December 29, 2011, IIPA filed a petition with the U.S. Government recommending the eligibility of Ukraine as a GSP beneficiary developing country be reviewed, and that Ukraine's GSP benefits be suspended or withdrawn, in whole or in part, if requisite improvements are not made by Ukraine to remedy its IPR deficiencies, because Ukraine currently does not comply with the "adequate and effective protection" obligations of the GSP program.

BRAZIL

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

2012 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: IIPA recommends that Brazil remain on the Watch List in 2012.¹

Executive Summary: There has been some progress in Brazil's long-running struggle with widespread copyright piracy in the physical environment; but the main battlefield is shifting to the online dimension. In the "City Free of Piracy" initiative in Sao Paulo, a coordinated public-private assault on the production and sale of discs containing pirate music, movies and videogames has achieved some impressive results that call for emulation in other cities. But much of the piracy in these sectors is migrating to the Internet, and there Brazilian authorities have yet to implement the measures needed to mount an effective response. Even in the hard goods arena, systemic bottlenecks in investigation, prosecution and the courts add up to an enforcement system that fails to deliver deterrence. Online piracy flourishes essentially unchecked, because criminal enforcement against it has essentially halted, while the other players in the Internet ecosystem cooperate only passively or not at all. As a result, Brazil is home to a number of notorious Internet marketplaces linking to offshore pirate repositories; peer-to-peer (P2P) connections used to commit piracy; and service providers who look the other way as their facilities are systematically utilized for infringement. In this hostile environment, it is difficult for services for legitimate delivery of copyrighted works online to gain traction, even as broadband penetration increases rapidly. Meanwhile, piracy of books and business software persist as serious offline problems; source piracy of motion pictures through illicit camcording continues unchecked; and the delays and backlogs that plague criminal enforcement are endemic in the civil courts as well. Finally, recent changes to the structure of the government's main national anti-piracy coordinating body (CNCP) demand close monitoring to ensure its focus on concrete steps to fight piracy is maintained.

Brazil's outdated legal regime bears much of the responsibility for this state of affairs. Because the law does not adequately prohibit circumvention of technological measures used by copyright owners to control access and copying, and because of exorbitant taxes and duties on legitimate imported videogame consoles, nearly all the devices in Brazil have been modified to play pirate games, and the legitimate market for those games has been decimated. The copyright law lacks clear liability rules for the online environment, and thus there is little incentive for providers to work with right holders to clean up the digital marketplace. Proposed revisions to the copyright law would take some modest steps forward on some of these issues (but, unfortunately, some steps backward on technological protections). The draft revised copyright law needs significant improvements and its prospects are unclear, as it has not even entered the formal legislative process. Meanwhile, an overall "law of the Internet" proposal that has been sent to Congress completely overlooks the role of copyright protection in delivering a healthy and viable Internet marketplace in creative works to the Brazilian consumer, and actually risks impeding any copyright enforcement efforts that do take hold. To make needed progress to address all forms of piracy and bolster the growth of its creative industries, Brazil should be encouraged to enact improved provisions to modernize the Copyright Law; enact long overdue reforms to the enforcement system; reduce market access barriers; and ensure that any Internet legislation reflects respect for intellectual property rights.

¹For more details on Brazil's Special 301 history, see IIPA's "History" appendix to this filing, at <http://www.iipa.com/pdf/2012SPEC301HISTORICALCHART.pdf>, as well as the previous years' reports, at <http://www.iipa.com/countryreports.html>. For more on IIPA's global issues, see IIPA's 2012 Cover Letter to this 301 submission at <http://www.iipa.com/pdf/2012SPEC301COVERLETTER.pdf>.



PRIORITY ACTIONS REQUESTED TO BE TAKEN IN 2012

Enforcement

- Build on the success of the “City Free of Piracy” initiative in Sao Paulo to implement similar coordinated and sustained attacks on hard goods piracy in other major cities.
- Ensure that the CNCP is structured and operated to maintain a priority focus on concrete steps to fight piracy, and that it receives enhanced resources to do that.
- Set up new roundtable negotiations between right holders and the ISP industry aiming to achieve a cross-industry agreement to combat Internet piracy in Brazil.
- Launch criminal enforcement actions against those engaged in major online piracy activities or knowingly providing the means for doing so.
- Effectively enforce the Penal Code to address illicit camcording in theaters.
- As steps toward a deterrent enforcement system, prioritize a national program to train judges, prosecutors, and police officers on IPR law and enforcement measures; implement judicial policies that expedite criminal copyright investigations; and establish specialized IPR courts with copyright responsibilities in key jurisdictions.

Legislation and Regulation

- Further revise the Copyright Law reform legislation to correct fundamental problems, including by narrowing any new limitations and exceptions, and bringing provisions on technological protection measures (TPMs) and online piracy into line with global best practices.
- Ensure that the Internet “Marco Civil” bill reflects the critical role of copyright protection in promoting the healthy growth of e-commerce, including by avoiding any pre-emptive impact on copyright enforcement and by authorizing right holders, Internet service providers (ISPs) and consumers to enter into constructive and cooperative voluntary agreements and procedures to combat online piracy.
- Enact legislation to facilitate copyright prosecutions and to clarify forfeiture and destruction remedies.
- Reduce high tariffs and taxes placed on videogame products.

Brazil is a major beneficiary country of the U.S. Generalized System of Preferences program (GSP), which provides preferential access to the U.S. market for certain countries that provide “adequate and effective” protection to U.S. copyrighted materials. During the first 11 months of 2011, almost \$1.9 billion worth of Brazilian goods entered the U.S. under the duty-free GSP code, about 7% of Brazil’s total exports to the U.S.

COPYRIGHT PIRACY IN BRAZIL

Internet piracy is a major challenge for all copyright-based industries doing business in Brazil. Piracy involving hard goods – mostly CDs and DVDs carrying pirate content, but also devices that circumvent access controls – continues to be a key concern for several sectors. The business software industry continues to combat high rates of end-user piracy by corporations and other enterprises. The book publishing industry continues to confront widespread unauthorized photocopying of educational materials.

A study conducted for the Motion Picture Association of America (MPAA) in April 2011 by IPSOS and Oxford University helps to quantify the overall impact of piracy in Brazil on the audiovisual sector.² It estimated that piracy caused direct losses of R\$ 3.5 billion (US\$2 billion) to Brazil’s Gross Domestic Product, with overall losses to the economy totaling R\$ 7.3 billion (US\$4.16 billion). The study estimated that this illegal activity cost R\$1 billion

²Economic Consequences of Movie Piracy: Brazil,” January 2011 (on file with IIPA).

(US\$ 570 million) in foregone tax revenues, and counted 92,000 jobs either not created or lost due to piracy. These figures constitute the second largest economic impact of piracy among the ten countries studied in the research.

Another study, prepared by the market research firm IDC for the Business Software Alliance (BSA), found that decreasing Brazil's software piracy rate by ten points over a four-year period would add US\$3.9 billion to GDP, generate US\$888 million in additional tax revenues and create 12,333 new IT jobs. The benefits would be even greater if the 10 point reduction were achieved in two years, yielding over \$5.2 billion in added GDP and nearly \$1.2 billion in new tax revenues.³

With regard to videogames, the market for pirate games, whether delivered online or via hard goods, has been enabled by the absence of enforceable legal remedies against game copiers, mod chips, and similar devices that circumvent technical measures used by game publishers and game console manufacturers to prevent piracy. As a result, most game consoles in use in Brazil (as many as 95% according to local industry representatives) have been modified to enable the use of pirated copies of games, and such games dominate the market.

Internet piracy. Internet access continues its explosive growth in Brazil, with double-digit increases in the level of broadband penetration in each of the past three years.⁴ But the development of a robust legitimate online marketplace in delivering copyrighted materials to these users continues to be stunted by the prevalence of online piracy. The Internet is certainly the fastest-growing piracy venue in Brazil, and has become the primary piracy challenge for several industry sectors.

Internet piracy problems in Brazil involve two main distribution channels. The faster-growing medium involves sites that link to infringing distribution hubs (sometimes called "cyberlocker" services), nearly all of which are located outside Brazil. (Brazilian websites that directly host pirate content remain relatively rare.) Link sites to infringement hubs account for the majority of the online pirate music and videogame markets, and an estimated 95% of the Internet piracy cases involving audio-visual works like movies and TV programs. Sites such as 3000filmes.com and baixedetudo.net are flagrant examples of sites that aggregate links to pirate movies (including via streaming)⁵ and music, with the latter also engaged in distributing hacked or cracked software codes or programs. Although some music linking sites, like baixedetudo (which translates to "download everything") and degracaemaisgostoso.org ("free is much better") have now moved their hosting out of Brazil to try to evade enforcement, and while the files to which they link are generally stored on offshore hosting sites such as 4Shared and Depositfiles, the sites themselves are available only in the Portuguese language and clearly target the Brazilian market almost exclusively. Baixedetudo has more than 1.2 million unique visitors per month, and is part of a "web ring" with 10 other blog sites, some of which specialize in links to other content such as films or software. Degraçaemaisgostoso boasts nearly 1.8 million unique visitors per month and is growing at an 80% annual rate. Many websites also offer links to infringing game files in downloadable form, and such links also continue to be propagated massively through social networking communities such as Orkut.

The second channel for Internet piracy is file sharing via illicit peer-to-peer (P2P) networks. While there is still file sharing of music and audio-visual works in Brazil, this medium stands out as a growing online piracy threat for the entertainment software industry; pirated games are widely available in Brazil on P2P networks. BitTorrent remains overwhelmingly the most popular P2P network, followed by eDonkey and Ares. Indeed, in 2011, Brazil ranked second in the world in the number of connections by peers participating in unauthorized file sharing of select Entertainment Software Association (ESA) member titles on public P2P networks, moving up from fourth on the list in 2010 by surpassing China and Spain in this category. ESA research also identified Brazilian companies as three of the top ten ISPs worldwide in terms of the number of subscribers participating in peer connections to swarms where

³See http://portal.bsa.org/piracyimpact2010/cps/cp_brazil_english.pdf.

⁴See <http://www.budde.com.au/Research/Brazil-Telecoms-Mobile-Broadband-and-Forecasts.html>.

⁵For example, 3000filmes.com, hosted in Brazil, embeds and links to video players offering instant streaming access to over 2900 unauthorized titles of first-run motion pictures and TV content stored on offshore infringing distribution hubs such as videobbb.com and megavideo.com.

ESA member titles were illegally shared: Tele Norte Leste Participacoes S.A. (which ranked third in the world); Brasil Telecom S/A – Filial Distro Federal; and Telecommunicacoes de Sao Paulo S.A. – Telesp, debuting on this notorious “Top Ten” list at number 7. MPAA notes that Peer Media Technologies reported that during 2011, users initiated over 26 million downloads/uploads of unauthorized copies of major U.S. movie titles via certain P2P protocols in Brazil⁶.

Other forms of networked dissemination of pirate products in Brazil include the use of online auction sites to advertise recorded pirate videogames that are delivered through the mail; LAN Houses and Internet cafes where pirated games are commonly downloaded; and the use of the Internet as a means of advertising illegal business software, along with the unauthorized electronic distribution of such software.

Taken together, these forms of online piracy have crowded out efforts to develop legitimate online distribution channels for copyright works in Brazil. This is of particular concern to the independent segment of the film and television industry, represented by the Independent Film & Television Alliance (IFTA). Revenue from these services, which are licensed country-by-country, is critical for the independents to finance the development of new creative works worldwide. Since Internet piracy instantly exports troubled marketplaces and high piracy rates to other markets, this type of copyright infringement not only undercuts anticipated revenue from the distribution of a particular asset, it also harms the ability of independent producers to secure financing for future productions.

Hard goods piracy. Even as more of the piracy problem shifts to the Internet, pirate hard goods remain an enormous problem in Brazil. Large-scale distribution networks involve thousands of street vendors; established facilities (such as gas stations) which blanket the major highways; and stalls in camelodromos (street markets). Hundreds of millions of blank media discs (CD-Rs and DVD-Rs) enter Brazil each year from ports throughout the country, mainly from Paraguay, China, Hong Kong and Taiwan, and are used to burn pirate musical recordings, movies, and entertainment software.

ABES, the Brazilian anti-piracy organization for the entertainment software sector, reports that physical piracy of entertainment software remains quite prominent in Brazil's two largest markets, Sao Paulo and Rio de Janeiro, and is also prevalent in Minas Gerais, Pernambuco, Brasilia, and other states. For instance, the Galeria Page, in downtown Sao Paulo, houses over 170 vendors, many of whom sell pirated games, game circumvention devices and modified consoles (i.e., consoles with circumvention devices pre-installed). In Rio de Janeiro, the Camelódromo Uruguaiana features dozens of such vendors, especially on weekends, although the pirate activity has subsided somewhat in recent months due to aggressive enforcement. In the capital city, the large open air market Feira Do Paraguai has been the venue for sales of pirated games for many years. Pirate games are generally sold on discs (even for games published for platforms that use other media, such as Nintendo DS cards). Most of the pirate discs are produced by local disc-burning operations, which source their master copies either from counterfeit imports or, increasingly, from downloads of versions of pirated games on the Internet. In some specialized markets, like Santa Ifigenia Street in Sao Paulo, pen drives loaded with huge quantities of pirate games are increasingly prevalent.

Santa Ifigenia Street is also a leading venue for sales of circumvention devices, such as game copiers and mod chips for consoles such as PS2, Nintendo Wii and Xbox, and the R4 modification for Nintendo DS units, at prices as low as US\$39-59. Typically, sellers also include a memory card with 50-150 game titles that were illegally downloaded from the Internet. As noted above, these devices are the gateway to game piracy, since without them users are unable to play pirate games on these platforms. Game copiers and mod chips generally are produced in Asia and many are flown into Brazil from abroad, along with some high-end counterfeit games and cartridge products. There is also a steady flow of modified consoles entering Brazil from Paraguay, most of these modified in modding operations in Ciudad del Este.

⁶A major U.S. movie is defined as a movie released in 1,000 or more theaters in the U.S., so these numbers reflect only a small subset of movie-related online piracy activity (since the study excludes non-major releases, including local titles; other peer-to-peer protocols; and non-peer-to-peer means of dissemination, such as websites, and streaming via other technologies).

Hard goods piracy in the music sector is less visible than before, as more and more music piracy shifts to the Internet. However, major retail centers for pirate CDs persist in the streets and flea markets of Sao Paulo, Sao Paulo State, Rio de Janeiro, Belo Horizonte and Recife.

MPAA reports that while hard goods piracy remains a serious problem, it represents a declining trend, as illegal downloads and streaming from the Internet grow in prevalence, and as the scale and effectiveness of enforcement against hard goods piracy improves. The highest level of hard goods piracy is found in major cities like Sao Paulo, Rio de Janeiro, Salvador, Recife, Foz de Iguacu, and Vitoria, and specifically in many of the same large pirate black market venues cited by ABES for videogame piracy, such as Galeria Page, Feira do Paraguai, and Mercado Popular de Uruguaiana. Most of the pirate audiovisual products are burned CD-Rs or DVD-Rs, with the content sourced from illicit camcording of movies in theaters, and locally reproduced in hundreds of facilities of varying sizes throughout the country. Pirated film products also enter from Paraguay, and smugglers are moving to Guaira, Ponta Porã and Corumbá. Street sales of pre-release pirate DVDs (before the release of legal DVD and during theatrical release window) are especially damaging to legitimate businesses, including local movie theaters, video rental stores, and the home entertainment market.

IFTA confirms that hard goods piracy remains a significant export constraint for independent producers and distributors, the majority of which are small- to medium-sized businesses. Independent producers partner with local authorized distributors to finance and distribute films and television programming worldwide. DVD sales in Brazil have been negatively impacted since pirated digital copies are offered for free online and with the same quality viewing experience as a DVD can provide. Unable to compete with free, legitimate DVD distributors are not able to commit to distribution agreements, or offer drastically lower license fees which are inadequate to assist in financing of independent productions. The independent production sector is limited in its ability to shift to technology-enabled new business practices that might limit piracy. For example, because national distributors release independent films on their own schedule in each country, producers of these films are unable to time releases in a way that would limit incentives for pirates to flood pirate product into markets where titles are not yet legitimately available. Brazilian as well as international film producers and distributors are adversely impacted by the damage from piracy and the shrinking of the local distribution channels.

Business software piracy. BSA reports that while gradual progress has been made, software piracy in Brazil continues to include unlicensed software use by businesses and other enterprises; illegal reproduction and duplication of software programs (both for commercial and non-commercial ends); hard-disk loading of illegal software by computer resellers; and the manufacture and/or sale of counterfeit software products. Digital piracy has grown consistently in Brazil due to the growth of broadband penetration as well as the increase in the possession and use of home computers by the Brazilian population in general.⁷

Book Piracy. The primary form of book piracy in Brazil continues to be unauthorized photocopying of entire textbooks, individual chapters, lessons and study materials, resulting in significant harm to international and Brazilian publishers alike. Many universities tacitly or actively condone copying of *apostilas* (teachers' notes or folders), and anthologies made up of chapters from various books copied illegally, both in English and Portuguese. The most immediate concern of academic publishers in Brazil is the problem of university administrative rules that purport to authorize high-volume infringements of foreign works, including by commercial, for-profit copy centers. (See

⁷BSA's 2011 software piracy statistics will not be available until after the filing deadline for this submission, but will be released in May 2012, at which time piracy rates and U.S. software publishers' share of commercial value of pirated software will be available at www.iipa.com. In 2010, the software piracy rate in Brazil was 54%, representing a commercial value of unlicensed software attributable to U.S. vendors of US\$1.44 billion. These statistics follow the methodology compiled in the Eighth Annual BSA and IDC Global Software Piracy Study (May 2011), <http://portal.bsa.org/globalpiracy2010/index.html>. These figures cover packaged PC software, including operating systems, business applications, and consumer applications such as PC gaming, personal finance, and reference software – including freeware and open source software. They do not cover software that runs on servers or mainframes, or routine device drivers and free downloadable utilities such as screen savers. The methodology used to calculate this and other piracy numbers are described in IIPA's 2012 Special 301 submission at <http://www.iipa.com/pdf/2012spec301methodology.pdf>.

discussion below under legislation.) This phenomenon contributes to an overall climate of disregard for copyright in the academic context among universities in particular, and among government authorities more generally.

Camcorder piracy. Ninety percent of all pirated movies originate as illegal camcorders. Unauthorized in-theater audio camcording spiked in Brazil beginning in 2008 and continued to increase in 2011. MPAA identified 35 member company films stolen from Brazilian theaters in 2011. The majority of these were audio captures, which are married with high-quality video captures made available online. This infringing product is then disseminated across the Internet and burned onto DVD-Rs which are then distributed to Brazil's many black markets. While there was one enforcement action brought in 2010, MPAA is not aware of any such actions in 2011.⁸ IFTA reports that camcording in Brazil fuels rampant online piracy, negatively impacting worldwide distribution and preventing the establishment of legitimate online distribution platforms.

Piracy at the border. Brazil's extensive border is very vulnerable to smuggling of all sorts of goods, from drugs to DVDs. The tri-border area with Paraguay and Argentina remains an important focus of piracy.

COPYRIGHT ENFORCEMENT IN BRAZIL

Enforcement Overview

The challenges of enforcement against piracy in Brazil have been extensively detailed in past IIPA filings. While much of the picture remains the same for 2011, there has been some measurable progress in enforcement against hard goods piracy, as exemplified by a record number of seizures, an increased number of court convictions, and some exemplary coordinated enforcement programs which need to be emulated across the country. But a number of fundamental problems have not been adequately addressed, including the need for more law enforcement resources; staggering court backlogs; and the failure to deliver deterrent penalties, which enables pirates to continue to treat the enforcement regime as a manageable cost of doing business. And until the government begins to engage the growing menace of online piracy, the prospects, for all copyright sectors, of establishing robust e-commerce marketplaces in Brazil for copyright materials will remain bleak.

As IIPA has detailed in past reports, the CNCP (the National Council to Combat Piracy and Intellectual Property Crimes) is the main governmental entity responsible for the central coordination and implementation of Brazil's national anti-piracy campaign, and (despite some limitations) has been an important instrumentality for improving the enforcement of intellectual property rights in Brazil. CNCP was formed following the issuance of a report by the Brazilian Congress demanding reforms to attack piracy. Its adoption and implementation of multi-pronged action plans to address piracy and counterfeiting led to positive developments that were the basis for the U.S. decision, with IIPA support, to close a years-long GSP investigation of Brazil in 2006. A key to the effectiveness of the CNCP is its structure, which has allowed for robust participation by many of the copyright industries (e.g., ABPD, MPA and ABES) in seeking practical solutions to piracy problems. IIPA is deeply concerned about the recent Resolution published by the Minister of Justice reorganizing the CNCP and removing these organizations as formal members. This Resolution was just issued and we are seeking additional information about its impact. But it poses a real risk that the CNCP will lose focus on pursuing concrete steps to combat the copyright piracy that undermines the Brazilian market. It is essential that the CNCP be structured in a way that gives priority to the goal of enhancing legitimate opportunities for creators through robust educational and enforcement programs against piracy. This goal is best advanced through the high level of participation and cooperation with industry groups that has characterized the CNCP through most of its existence. We will closely monitor developments and urge the Ministry of Justice to take the necessary steps to ensure that CNCP continues to work closely with industry.

⁸MPAA appreciates the Minister of Culture's statement confirming that camcording is covered by the Penal Code. This formal opinion has been useful to MPAA in seminars and workshops with public officials.

Enforcement Against Physical Piracy: Signs of Progress, but Many Challenges Remain

During the first 11 months of 2011, more pirate DVDs were seized by the authorities in Brazil than in any other country in the world: almost 23 million units. Another statistic reported by MPAA may be even more encouraging: the number of piracy convictions obtained rose from 501 in 2010 to 704 in 2011 (through the end of November). Enforcement efforts were more focused on the larger and more important pirate channels (e.g., production labs and warehouses), and while this strategic shift led to somewhat fewer raids, it may have been more effective than the more scatter-shot efforts of the past. In the entertainment software sector, ABES reported similarly encouraging results: 680 raids were carried out, resulting in seizure of nearly 3.2 million units of pirate product, an 81% increase.

Multiple industry sectors hailed the results of the City Free of Piracy project carried out in the City of Sao Paulo. Under the coordination of Dr. Edson Ortega, the Secretary of Urban Security, several long-time hard goods piracy hot spots in the city, such as 25 de Marco Street, and Avenida Paulista, saw stepped up enforcement action. More than a dozen major malls were raided, and about 2000 stores closed. Significantly, most of these stores have remained closed, through coordinated enforcement of a number of laws that the stores were violating. Municipal, state and federal police, prosecutors, and customs agents worked together effectively in this project, aided by the joint partnership between the City and the Military Police of Sao Paulo State. The impact of the project was not limited to retail hard goods piracy however. BSA reports that it also increased awareness of business end-user piracy problem in that city, as well as in others where similar coordinated efforts are underway (e.g., Brasilia, Curitiba, Belo Horizonte). The Sao Paulo campaign, in particular, is a good example of effective enforcement that needs to be replicated in cities around the country.

The working relationship between copyright industry anti-piracy organizations and the Brazilian authorities in the field of physical piracy has never been better. This extends from the top to bottom of the enforcement regime. All the major copyright industry groups participate actively in the CNCP, which undertook stepped-up efforts in 2011, particularly against street level piracy. This underscores the importance of ensuring that the CNCP is structured to maintain this focus on actual enforcement activities. Besides the good coordination that all sectors enjoyed with the Sao Paulo authorities, ABES notes a markedly improved relationship with the DRCPIM (Specialized Police Station of Rio de Janeiro) and continued good cooperation with border enforcement officials in Foz de Iguacu.

Despite these encouraging signs, many critical bottlenecks and deficiencies in Brazil's enforcement system remain to be addressed. While the number of actual prosecutions and even criminal convictions increased in 2011, it remains the case that the great majority of persons arrested never face criminal prosecution. Even for those who are charged, cases are usually dropped or suspended indefinitely. Due to huge case backlogs and other systemic problems, even those cases that are prosecuted to a verdict take three to four years before sentencing, and deterrent penalties are rarely imposed. Among the main deficiencies, which have been described in detail in past IIPA reports:

- The police do not have deadlines to complete investigations and deliver results to prosecutors. As a result, investigations may take up to five years, with the interested rights holders having to push the process every step of the way. Among other detrimental impacts, the requirement to store all seized goods throughout the long pendency of the case drains away resources that could be better applied to running more enforcement operations.
- Criminal case experts can only be appointed by a judge, and there are too few experts in the country. To expedite preliminary investigations conducted by the police, Brazilian law should be amended to permit the private sector to appoint experts. The process of identifying and verifying low-quality pirated products is not difficult and should not require highly trained experts. The appointment of specialized IPR experts at the "*Instituto de Criminalistica*" (CSI Institute of Brazil) with the capacity for full-time dedication to piracy cases would also help address the problem.
- Prosecutors and judges lack specialized training in IPR cases, and there is no effective national program to train them. Although currently most training for judges, prosecutors and police officers is organized and

financially supported by the affected industries, CNCP has been active in stimulating, promoting and participating in such events at the national, regional, and state levels, but these efforts must be expanded considerably.⁹

- Creating a specialized court for copyright matters, at least in a few major jurisdictions such as Rio de Janeiro and Sao Paulo, would improve judicial expertise and help expedite case processing. The Industrial Property Law (Law No. 9279, which entered into effect in May 1997) authorized the judiciary to create specialized IPR courts, but this authority has never been exercised with respect to copyright.
- Finally, criminal penalties imposed on pirates are too frequently suspended. Since prosecutions take so long to reach final disposition, a defendant who may have been caught multiple times is treated as a “first offender” so long as none of the prosecutions is complete; and a suspended sentence for a first offender is treated as almost an inalienable right in the Brazilian legal system, so long as the defendant agrees to provide minimal monetary compensation to the victim.¹⁰

In sum, from initiation of the case through its conclusion, Brazil’s criminal justice system does not adequately deter copyright piracy. The same is certainly true of Brazil’s civil judicial system, on which BSA relies extensively. BSA’s enforcement campaign is based on a cease and desist letter procedure aimed at legalizing use of business software, escalating to the filing of civil lawsuits against specific companies that will not agree to purchase required licenses. BSA initiated 291 civil actions in 2011. While this enforcement campaign is effective in its overall goal – to encourage businesses to legalize their software use – its effectiveness is significantly undermined by the protracted nature of civil litigation in Brazil, which BSA identifies as its primary enforcement bottleneck. Due to court backlogs, it can take up to four years for a civil case to come to trial in the first instance, and up to 15 years to reach a final decision in a civil infringement case, due to repetitive appeals. Furthermore, far too many judges lack adequate training and experience to handle copyright infringement cases. It is not surprising that the regions of the country where the end-user software problem is most acute – notably the north and northeastern regions – also lack a solid cadre of well-trained judges and law enforcement officials.

Brazilian courts continue to require extremely high fees for forensic experts who conduct searches and seizures in civil cases and analyze the results, and for bonds. On average, BSA has paid up to US\$5,000 for experts’ fees and up to US\$25,000 as bonds, but in some cases, courts have demanded multiples of these sums, and BSA has had no option but to terminate the cases. This situation has remained unchanged since 2005. BSA supports legislative reform to permit sampling and private sector assistance in the forensic work.

For cases that succeed in running this gauntlet, satisfactory judgments can be obtained; but often courts simply order companies to pay the license fee they would have had to pay in the first place for the software they have been using without authorization, without any additional penalty. This lacks any deterrence and encourages companies to wait until they are sued before legalizing their software use.

BSA recommends that authorities make more use of the “fiscal crime” provision in the 1998 Software Law. Under that law, tax evasion that frequently characterizes acts of software piracy can be pursued by the tax authorities as a public action, independent of BSA’s civil actions against software piracy. Such tax evasion cases would have the potential for a significant impact on lowering software piracy in Brazil, especially by medium-sized and large companies.

⁹In 2011, several industry associations collaborated with CNCP on a major training “Road Show” for enforcement agents, visiting 5 cities and training over 1800 officers. ABES also participated in a CNCP-sponsored international seminar for judges and prosecutors in Foz de Iguacu. Major educational efforts separate from CNCP include an ongoing Legal School Program, sponsored by the American Chamber of Commerce, that works with thousands of students from public and private schools across the country, to explain the concepts of content protection and its importance for Brazilian society. BSA counsel also participated in a number of training course organized by bar and bench organizations in Rio de Janeiro and in Mato Grosso State.

¹⁰ The software industry faces a similar problem. Because the minimum penalty under Brazil’s separate software law is only one year, criminal infringement cases brought by the software industry are subject to automatic suspension of prosecution under Law 9099.95. Increasing the minimum penalty would eliminate this automatic suspension and ensure that more software piracy cases are actually prosecuted.

Internet Enforcement

In contrast with the progress being made on enforcement against offline piracy, Brazilian authorities continue to take virtually no enforcement actions in the fastest growing marketplace for copyright piracy in Brazil – the Internet – even though the police have by now developed considerable experience in investigating other aspects of Internet crime.

Effective enforcement against the growing problem of Internet piracy in Brazil will require positive and active cooperation among right holders and Internet service providers (ISPs). This cooperation is forthcoming in some areas. Purely on an informal basis, some ISPs are responsive in a reasonably prompt fashion to requests from right holders to remove individual links to pirate sites; to take down individual unauthorized files they may be hosting;¹¹ and to delete advertisements for infringing copies. But clearly this piecemeal and passive response is not by itself sufficient to cope with the rapid growth in online piracy of all sorts of copyrighted materials, as outlined above. Furthermore, this cooperation does not extend to working together to fight the pervasive piracy of all forms of copyright material carried out via P2P services. Brazilian laws and regulations provide no incentive for ISPs to pass on notices to their subscribers who misuse their access to engage in P2P piracy, nor to effectively deal with repeat infringers. Consequently, ISPs do nothing, and this channel for piracy proliferates unchecked.

Clearly, the missing piece of this puzzle is active government involvement to bring ISPs and right holders together to find effective means to deal with the most serious forms of online piracy, and to prevent its further growth. As long ago as 2008-9, the CNCP identified as a priority for its future activities the area of Partnerships and Cooperation with Internet Service Providers. The goal was to create mechanisms with the ISPs to prevent the distribution of pirate products over the Internet. Unfortunately, there has been no real progress to report on this important project; indeed, some other government agencies have impeded the search for cooperation.¹² The uncertain status of legislation on Brazil's proposed Internet regulation may also provide a rationalization for government inaction on this priority. In 2010, a legislative draft for Internet regulation (discussed below) seemed to discourage or even prohibit the limited voluntary actions ISPs are now taking to remove access to pirated hosted content after right holder complaints. Whatever the explanation, it is clear that the mandate to convene an inter-industry roundtable is a major piece of unfinished business for whatever government entity is in the best position to provide incentives for the partnership and cooperation that is needed to effectively combat online piracy. IIPA hopes the Brazilian Government will revive this initiative, and send a clear signal that effective cooperation against the piracy that now blights the online marketplace is in the best interests of Brazil's economic, technological and cultural development. Of course, the prospects for success ultimately may depend on positive changes in the legislative environment, as discussed below.

The situation should be different with regard to criminal enforcement against serious online copyright crimes. Legislation on the books today would provide a framework for this, and Brazilian enforcement authorities have considerable experience in investigating online crimes in other areas. In the past, some criminal cases were pursued against Internet pirates selling pirated DVDs and those offering the sale of pirated movies via social networks such as ORKUT. However, progress in this area has essentially halted. In view of the significant damage that pirates inflict on Brazil's economy and culture, police authorities must accord a much higher priority to criminal investigations of online piracy. In particular, authorities should take *ex officio* actions against facilities that knowingly offer public access to unauthorized peer-to-peer programs, or that clearly and intentionally build their business on providing links to clearly infringing materials.

¹¹As noted above, hosting sites based in Brazil are not the major sources of the online piracy problem there.

¹²In 2009, when the Ministry of Justice asked several agencies for comments on a proposal for a "warning system" through ISPs to customers whose IP addresses were identified by rights holders as "heavy uploaders" of film and music content, the consumer protection agency (DPDC) opposed it on the stated grounds that an ISP sending warnings to their customers at a third party's request would violate the subscriber's right to privacy, and the proposal was derailed. At the Ministry of Justice's request, the DPDC (which reports to Justice) was asked to reconsider its position, but to date its opinion remains unchanged.

LEGISLATION AND REGULATION IN BRAZIL

Copyright Law Reform. In March 2011, a revised version of draft Copyright Law reforms was released by the Ministry of Culture for public comment. IIPA submitted detailed comments on this proposal on May 27, 2011, which welcomed Brazil's efforts to modernize its copyright law. The revised draft contained a number of improvements over the earlier version. It narrows some of the excessively broad proposed exceptions to copyright protection; and it clearly establishes a liability regime applicable to the online hosting of infringing content, which would increase the incentives for providers of such services to cooperate with right holders, such as through a notice and takedown system. However, a number of significant problems remain unresolved. Some of the more important include:

- The draft proposal fails to close significant gaps in Brazilian law's safeguards for **technological protection measures** (TPMs) used by copyright owners to control access to or copying of their works. As noted above, the shortfalls in Brazilian law on this topic have led to a virtually unregulated market in game copiers, mod chips and other circumvention technologies. Since most videogame consoles now in use in Brazil have been modified with such devices, the videogame market is completely dominated by pirate product, which can be played on these modified consoles. In order to bring its law up to global minimum norms, Brazilian law should protect both access controls and copy controls; should prohibit not only the act of circumvention of TPMs, but also trafficking in circumvention devices and services; and should include criminal remedies for making or distributing circumvention technologies. The draft law would worsen the situation, by weakening even the inadequate laws currently on the books with a broad exception for any act of circumvention carried out for the purpose of exercising any limitation on copyright (the uncertain scope of several of these limitations exacerbates this problem). The draft law would also impose a new tort liability on right holders if the TPMs they use are later found to inhibit the use of such limitations. While the revised draft provides an exception to the latter liability for TPMs that are "essential to the purchase or licensing of works in digital media," that exception is not specific enough to ameliorate the crippling level of uncertainty that the liability provisions would impose on the decision to employ TPMs. Brazil's aspirations to grow digital commerce are not well-served by laws that are hostile to TPMs usage.
- Several of the **exceptions to copyright protection** in the revised draft bill remain so broad, or so vaguely defined, as to run afoul of international norms to which Brazil has agreed. In particular, the broadly worded exception for "portability or interoperability" (proposed Article 46(II)); the numerous undefined terms in the exception for facilitating access by the disabled (proposed Article 46(IX)); and the "catch-all" exception that now appears in proposed Article 46, paragraph 2, should all be re-examined to ensure they will meet global standards and avoid unnecessary harm to legitimate licensing markets. Additionally, it should be clarified that Brazil's Software Law still governs the issue of limitations and exceptions to copyright protection for computer programs.
- The exclusive "**making available**" **right for sound recordings** should be explicitly recognized in Brazil's copyright law, rather than simply being inferrable from a general "use" right. "Making available" on an interactive basis is the 21st century equivalent of distribution, and the rights of producers and performers to control this central aspect of digital commerce should be spelled out.
- The revised draft's provisions on **online piracy**, while taking an important first step toward encouraging cooperation with respect to hosted content, fail to tackle other critical aspects of the pervasive and growing online infringement problem in Brazil, in which, as noted above, domestically hosted infringing content plays a relatively minor role. So long as a comprehensive legislative response to this problem is not undertaken, one that addresses online theft through linking and P2P services as well as through domestic hosting, the healthy growth of the online marketplace for copyrighted works will continue to be stunted in Brazil. A key element of the comprehensive approach that is needed is dismantling of any legal impediments to voluntary cooperative arrangements among right holders and service providers that would provide more effective and comprehensive tools for dealing with online infringement. The notice-and-takedown system proposed in the revised draft's Article 105-A, while welcomed, also needs improvement to meet global best practices,

notably to incorporate the requirement that a provider implement policies to prevent abuse of its services by repeat infringers, as a condition for claiming limitations on liability.

The next steps toward copyright law reform and modernization in Brazil are somewhat unclear. Press reports indicate that following some further revisions to the draft law, it has been forwarded to the President for a final analysis, and is expected to be presented to Congress soon. IIPA urges USG to continue to engage with Brazilian authorities to encourage the enactment of a law that enhances the protection of copyright and neighboring rights, and thus promotes production of new original works, in the face of technological developments that have effectively eroded the ability of right holders to enforce their rights.

“Marco Civil” Internet Legal Framework. This proposal, to “establish principles, guarantees, rights and obligations on the use of the Internet in Brazil,” moved forward in 2011. In August 2011, it was formally submitted, in a revised form, to the Congress (Draft Law 2126/2011), where it is now under study by a special committee of the House of Deputies. From IIPA’s perspective, the revised version retains the fundamental flaw of the earlier draft we reviewed in 2010: it omits any recognition of the importance of protecting copyright in the online environment as an essential ingredient for the healthy growth of electronic commerce. While this omission is troubling on a number of grounds, it raises specific questions about whether enforcement against online piracy under Brazilian Copyright Law, (either in its current form or as it may be amended) would be trumped by the broad standards in the Internet law, or whether the adoption of the latter law would be without prejudice to enforcement of the current or amended copyright law. The Internet bill draft presented to Congress compounds the problem, by eliminating the provision in the earlier draft that contemplated a notice-and-takedown system, at least for infringing hosted content. In its current form, Art. 15 of the Internet bill provides blanket immunity to all “providers of Internet applications” unless they disobey a specific takedown order issued by a court; and Article 14 immunizes all “providers of Internet connections services” even in that circumstance. Such immunities are far more sweeping than can be justified in the case of online content that infringes copyright, especially since they lack any conditions to cooperate in dealing with those who employ Internet access to commit copyright theft.

As noted elsewhere in this submission, the release of the draft Internet legal framework bill was perceived in many quarters as a statement discouraging voluntary cooperative anti-piracy measures, and thus cast a pall over efforts for candid discussion of such voluntary measures. IIPA is quite concerned that further action on the draft Internet bill, without substantial amendment, would create serious impediments to effective copyright enforcement in Brazil’s Internet marketplace. The Brazilian government should be urged to develop a more balanced legal framework for the Internet and e-commerce that includes an appreciation of the importance of copyright protection as a critical framework element.

University Administrative Rules Impacting Publishers. Academic publishers in Brazil remain concerned over the continued influence of Resolution No. 5213/2005, an administrative rule implemented by the State of São Paulo University (USP). This rule allows (1) reprographic copying of portions of books by commercial, for-profit copy centers, and (2) copying of foreign works that are “not available in the Brazilian market” without a license. “Not available in the Brazilian market” is not defined, but reports indicate that this criterion has been interpreted to mean 1) where a book is not written in Portuguese, and 2) is not for sale in the nearest bookstore. In practice, it has allowed the copying of a work or book in its entirety – a practice that exceeds what is allowable under international norms. Several years ago, publishers presented a formal request for revocation of this rule to USP, but were rebuffed, the argument apparently being that the rule is “constitutional” as it grants access to education and knowledge. The rule established a terrible precedent and should be revoked, or at a minimum, revised to conform to international standards.

Proposed legislation related to enforcement. For the past several years, copyright industries and the CNCP have worked to develop and introduce legislation to strengthen Brazilian measures and penalties for copyright infringement. The launching of the Congressional Anti-Piracy Caucus in the Brazilian legislature in June 2011 is a positive step for these efforts. The Caucus’ 249 members represent nearly half the entire Congress. IIPA commends

their initiative and urges them to press for enactment of long-overdue enforcement reforms as soon as possible. The details of several pending proposals were outlined in IIPA's 2010 Brazil report.¹³ We understand that some or all of these various bills may have been consolidated, which would mark an important step forward toward effective legislation.¹⁴

MARKET ACCESS AND RELATED ISSUES

High tariffs and barriers on entertainment software: Brazil's high tariffs and taxes on videogame products continue to plague the entertainment software industry and serve as a significant barrier to market entry and as a spur to the pirate market. Cumulatively, tariffs and taxes can nearly triple the price of a legitimate copy of videogame software, compared to a smuggled copy that reaches the consumer without paying these fees.

Foreign ownership restrictions and content quotas bills on the audiovisual sector (PLS 210/07 and PL 29/07-PLS 116/10): The recently enacted Law 12.485 has some positive features (it opens up the Pay TV market to telephone companies, thus expanding the number of platforms on which consumers can enjoy legitimate content); but it also contains a number of harmful elements. It imposes local content quotas for pay television to be enforced by ANCINE, the national film agency, and it delegates to ANCINE unprecedented powers to limit advertising and to direct business activities. MPAA is concerned that local content quotas will limit what consumers experience and push consumers towards illegitimate sources of content. Two lawsuits have been filed challenging the constitutionality of the law. The law is in effect, and implementing regulations prepared by ANCINE and ANATEL (the national telecommunications agency) are in public consultation. Careful scrutiny is required to minimize this law's adverse impacts.

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. Good software asset management practices can best be achieved through active public-private sector partnership.

¹³They included Bill 5057/2009 on forensic and destruction of illegal products; Bill 8052/11, authorizing the destruction of seized pirate product, rather than requiring all of it to be stored until the case concludes; and Draft law 2729/03, which aggregates many needed improvements through amendments to five different statutes.

¹⁴Taken together the various bills would allow criminal judges to appoint private sector experts; increase government resources allocated to fighting software piracy; authorize an expert report to be based on sampling of the goods seized; authorize the destruction of seized pirate product and forfeiture of equipment used to produce it, eliminating the requirement that all seized goods be stored throughout the pendency of a case; criminalize the advertisement of pirated products, the distribution of instructions on how to manufacture counterfeit goods, and the purchase of pirated goods intended for resale; increase the minimum penalties for IPR infringements to avoid automatic suspension of prosecutions under the Software Law; and provide prosecutors with the authority to pursue criminal actions in the absence of a rights holder action.

BRUNEI DARUSSALAM

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

2012 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: Brunei Darussalam should be placed on the Watch List.¹

Executive Summary: Brunei has the eighth highest per capita income in the world (purchasing power parity of \$51,600 as of 2011, and higher than the United States),² but unfortunately the country still hosts dozens of retail outlets offering for sale pirated movies, music and software on optical discs. The music industry celebrated the cleaning up of the retail market in 2009 and brought several test cases. Unfortunately, music piracy has re-emerged and the test cases have not been resolved. Further, with an Internet population estimated at over 80 percent (according to the World Bank), the problem of Internet piracy has grown with illicit P2P filesharing (and other forms of online piracy) becoming more prevalent. Service providers have been doing little to cooperate with right holders to ensure people are using legitimate product, while the absence of any enforcement or legal framework compounds the problem. Although music in the form of “Ring Back Tone” subscriptions, ringtone and full song downloads are widely and commercially available both over cellular communication networks and over the counter, there are presently no known license agreements in place for such digital music exploitation. IIPA requests that the market be cleared of pirate product to facilitate a legitimate copyright marketplace.

PRIORITY ACTIONS REQUESTED IN 2012

- Set up an IP office that takes responsibility for the piracy situation in Brunei, since currently, there is no Bruneian Government agency that is formally accountable.
- Have Commercial Crime Unit (CCU) run a new sweep of the pirate retail markets in Brunei on an *ex officio* basis.
- Impose an additional condition under the Miscellaneous Licences Act (Chapter 127 – Act No. 6 of 1979) that all retailers commit not to deal with pirated optical discs or infringing digital music. The Bruneian Government should have the authority to terminate a trading license based on an official report or Statutory Declaration from right holders that this commitment is not being fulfilled.
- Royal Brunei Customs should clean up the pirate retail markets on an *ex officio* basis given that the burden of proof that duties have been paid is on the pirate retailers. As import duties must be paid on all imported optical discs, Customs may seize all imported optical discs for nonpayment of such duties under the Brunei Customs Import Duties Order, 2007 (Notification No. S45).
- Amend the current Copyright Order 2000 to provide for more deterrent penalties, and amend the Anti-Money Laundering Act (Cap 209) so that copyright offenses fall within its ambit.
- Encourage the cellular communications and Internet service provider companies to take steps to address copyright infringement taking place on their platforms and networks.
- Establish fair and effective enforcement practices for the Internet, including amendments to the Electronic Transactions Order (2000), to promote service provider cooperation with right holders to address cases of online infringement.
- Initiate education programs to apprise students and businesses of their obligation to respect intellectual property rights, including support from the Ministry of Education for programs in the schools to promote IP awareness.

¹For more details on Brunei’s Special 301 history, see Additional Appendix available at <http://www.iipa.com/pdf/2012SPEC301HISTORICALSUMMARY.pdf>. Please also see previous years’ reports at <http://www.iipa.com/countryreports.html>.

²See *World Factbook, Brunei*, at <https://www.cia.gov/library/publications/the-world-factbook/geos/bx.html>.



PIRACY AND ENFORCEMENT UPDATES IN BRUNEI DARUSSALAM

IIPA's previous reports describe in detail various piracy and enforcement issues and the harm caused to the U.S. content industries. While the physical piracy rate for music is relatively low at 30%, other piracy levels are near 100%, and in 2010, 66% of PC software piracy was unlicensed, while the commercial value of unlicensed software attributable to U.S. vendors in Brunei was US\$10 million in 2010 (up from US\$8 million in 2009).³ The following provides updates and new issues that arose throughout 2011 and early 2012.

Retail Piracy: Piracy in Brunei was virtually 100% just a couple of years ago, but in 2009, an anti-piracy campaign involving the Royal Brunei Police Force (RBPf), Attorney General's Chambers (AGC) and the local recording industry group had successfully eradicated 90% of music piracy from the retail markets.⁴ Unfortunately, piracy has returned to Brunei.⁵ A Survey by the Recording Industry of Malaysia (RIM) in October 2011 revealed that there were about 50 retail outlets offering for sale pirated movies, music and software in the form of DVDs, VCDs and CDs. Pirated music optical discs are once again openly being offered for sale in retail outlets. As noted, some raids in 2009 led to test cases, and three more raids were conducted in 2010 based on complaints from the music industry, but to date, only one of those cases has been filed in court. The Brunei Court is unfortunately quite slow in hearing copyright cases, and reports indicate that hearings in straightforward piracy retailer cases begun in 2010 still have not been resolved. The major problem is the intermittent scheduling (the Court only hears witnesses for two to three hours per day on average).

Enforcement Hurdles: Certain factors hinder the positive development in cases brought subsequent to raids.

- There is no provision in Bruneian court procedure for affidavit evidence to be accepted in the Court, and thus, copyright owners are being asked to travel to Brunei to provide evidence and testimony in person, even in cases of small pirate retailers.
- Statutory declarations are similarly not admissible.
- The penalty structure is extremely low (both in terms of imprisonment and fines), so even in successful cases, there will be no deterrent effect.
- There are no provisions for statutory damages.
- Bruneian Police have no powers of warrantless arrest even in cases of commission of the crime in the presence of the officer.
- The Customs Authorities refuse to act on *ex officio* basis.
- The authorities are not willing to terminate the trading license of pirate retailer based on complaint from right holders.

Now that right holders for music have set up, effective 2011, a local organization "BRUCOP Pte. Ltd." to assist the competent authorities, it is hoped this will ease the negative effects of some of these hurdles, but in any event, they should be dismantled so that Bruneian authorities can effectively enforce against piracy and protect copyright owners.

³BSA's 2011 software piracy statistics will not be available until after the filing deadline for this submission, but will be released in May 2012, at which time piracy rates and U.S. software publishers' share of commercial value of pirated software will be available at www.iipa.com. In 2010, the software piracy rate in Brunei was 66% (down from 67% in 2009), representing a commercial value of unlicensed software attributable to U.S. vendors of US\$10 million (up from US\$8 million in 2009). These statistics follow the methodology compiled in the Eighth Annual BSA and IDC Global Software Piracy Study (May 2011), <http://portal.bsa.org/globalpiracy2010/index.html>. These figures cover packaged PC software, including operating systems, business applications, and consumer applications such as PC gaming, personal finance, and reference software – including freeware and open source software. They do not cover software that runs on servers or mainframes, or routine device drivers and free downloadable utilities such as screen savers. The methodology used to calculate this and other piracy numbers are described in IIPA's 2012 Special 301 submission at <http://www.iipa.com/pdf/2012spec301methodology.pdf>.

⁴The Government of Brunei, in its 2010 Special 301 Submission, highlighted this development eradicating music piracy, but did not provide much evidence for steps taken to strengthen the enforcement hand of the government, e.g., by passage of copyright amendments to add *ex officio* enforcement authority. See Brunei Darussalam, *Intellectual Property Rights in Brunei Darussalam in 2009*, February 2010, filed with regulations.gov (on file with IIPA).

⁵Despite recent raids by the Royal Brunei Police, the pirate retailers remain in operation and have grown stronger. For example, the biggest pirate 'emporium' known as Yajuta or w.w.w.video has since opened two more outlets selling 100% pirate music discs.

Growing Internet and Mobile Piracy: More than 85% of Bruneians use the Internet in Brunei (341,000 Internet users out of nearly 400,000 inhabitants in the country), according to the Bruneian Authority for the Info-Communications Technology Industry (AiTi).⁶ As a result, the problem of Internet piracy has grown, with virtually 100% piracy of digital music used in Brunei, including downloads and ringtones. As of 2010, the estimated mobile penetration was well over 100 percent, at 430,000 mobile subscriptions.⁷ The Bruneian Government should ensure that with the development of broadband comes an increased awareness of the need to protect copyright in the online space. To date, Brunei Internet service providers have not cooperated with music right holders, in part likely due to the fact that they are quasi-government entities related to AiTi. In addition to unlicensed use by Brunei's two cellular communications companies, it is estimated that approximately 30 mobile phone retailers are providing illegal music downloads.

COPYRIGHT LAW UPDATES AND RELATED ISSUES

Copyright Ordinance and Related Legislation: The Emergency Copyright Ordinance (2000), modeled on the 1988 UK Act, took effect May 2000. The Ordinance provides some tools to combat copyright piracy, including civil and criminal remedies and the confiscation and destruction of infringing equipment and materials. The Ordinance also addresses key Internet issues (such as those in the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty), like temporary copies, a WIPO treaties-compatible definition of "communication to the public" including an interactive "making available" right, and prohibitions against trafficking in devices which circumvent technological protection measures (TPMs), although the TPM provisions do not fully implement the WCT and WPPT requirements. However, the law does not provide authorities with *ex officio* raiding powers, and thus, Brunei remains stuck in a complaint-based system. A draft amendment in 2010 would have provided the Attorney General's Chambers with *ex officio* authority, but it is believed this legislation has stalled. The copyright laws should also be updated to provide, *inter alia*:

- statutory damages (e.g., US\$500 or more per infringing copy),
- landlord liability,
- heavier criminal fines and penalties,
- modernized provisions regarding the sufficiency of affidavits or statutory declarations in court,
- presumptions of subsistence and ownership in line with international treaties and best practices, and
- term extension to 70 years from the life of the author, or 95 years for sound recordings or other works calculated on the basis of publication.

The maximum criminal penalty under the current Copyright Order is two years imprisonment or a B\$5,000 (US\$3,800) fine, or both. In addition, an amendment should be made to the Anti-Money Laundering Act (Cap 209) so that copyright offenses fall within its ambit, since committing a predicate offense under has a deterrent maximum sentence of five years imprisonment.

Measures to Address Internet Piracy: Brunei's laws do not adequately address online infringement, whether hosted or non-hosted. 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

⁶AiTi, *ICT Indicators 2006-2010*, at http://www.aiti.gov.bn/index_backup/statistics.html.

⁷Amir Noor, *Mobile Trump PCs in Internet Use*, The Brunei Times, February 3, 2010, at <http://www.bt.com.bn/news-national/2010/02/03/mobiles-trump-pcs-internet-use>. There were more than 400,000 mobile subscribers at the end of 2008 based on estimates provided by the two major cellular communications companies in Brunei. Lost mobile revenue to the music industry, based on an estimated 7.5% of total mobile subscribers purchasing monthly ring back tone subscriptions for 2008, was US\$700,000. RIM also remains unaware of any legal site offering Malay or international repertoire for sale. A new project to provide broadband via underwater cabling will bring greater connectivity in the future. Hadi Dp Mahmud, *Wider Broadband Wireless Access Soon*, The Brunei Times (online), November 25, 2008.

materials, or a “written law or by a court to remove, block or deny access to any material.” The Order does not create adequate incentives for service providers to cooperate with right holders in upholding their digital rights. The Order should be amended to make service providers more accountable for infringements transmitted over their networks where they have actual knowledge that infringement is taking place, or are aware of facts or circumstances from which the infringing conduct is apparent, and they fail to act responsibly. The law should also provide mechanisms to foster cooperation, including notice-and-takedown, and effective and fair mechanisms with respect to repeat infringer policies and non-hosted infringements.

TRANS-PACIFIC PARTNERSHIP (TPP)

On December 14, 2009, the United States Trade Representative formally notified Congress of President Obama’s intention to negotiate with Trans-Pacific Partnership (TPP) countries with the objective of shaping a high-standard, broad-based regional agreement.⁸ On November 12, 2011, the Leaders of the nine Trans-Pacific Partnership countries⁹ announced the achievement of the broad outlines of an agreement, and negotiations are proceeding with a goal toward completion sometime in 2012. IIPA has submitted public comments to the U.S. government’s Trade Policy Staff Committee which describe in greater detail the hoped-for results of a TPP negotiation, including a high-level IP chapter, including high-level substantive copyright protection, high-level enforcement standards, provisions ensuring the free flow of electronic commerce products and services, and obligations to open markets to trade in copyright goods and services.¹⁰ In particular, enhancement of copyright standards and enforcement consistent with those agreed to by current FTA partners and drawing upon other FTAs,¹¹ and an expansion of these protections to other countries in the region will contribute to U.S. job growth, an increase in exports, and economic recovery in line with the Administration’s goals. To demonstrate its commitment to a strong TPP, and that it is deserving of the benefits of an open U.S. market as a result of a free trade agreement with the United States, the Government of Brunei should take needed steps to ensure that it overcomes the piracy issue and that it will support a strong substantive and enforcement IP chapter in the TPP.

⁸See United States Trade Representative, *Trans-Pacific Partnership Announcement*, December 14, 2009, at <http://www.ustr.gov/about-us/press-office/press-releases/2009/december/trans-pacific-partnership-announcement>.

⁹The nine TPP negotiating countries are Australia, Brunei Darussalam, Chile, Malaysia, New Zealand, Peru, Singapore, Vietnam, and the United States –

¹⁰International Intellectual Property Alliance, *Public Comment Concerning the Proposed Trans-Pacific Partnership Free Trade Agreement with Singapore, Chile, New Zealand, Brunei Darussalam, Australia, Peru and Vietnam*, 74 Fed. Reg. 66,720 (December 16, 2009).

¹¹We note that President Obama signed the Korea-U.S. (KORUS) free trade agreement on October 21, 2011, and that agreement provides a strong starting point for an enhanced TPP agreement consistent and co-extensive with previous FTAs.

COMMONWEALTH OF INDEPENDENT STATES

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

2012 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

IIPA recommends that the following five Commonwealth of Independent States (CIS) countries – Belarus, Kazakhstan, Tajikistan, Turkmenistan and Uzbekistan – should be placed on the Watch List for 2012. All but Kazakhstan were on the Watch List in 2011; Kazakhstan was not listed in 2011, and we believe should be elevated to the Watch List for 2012. All five countries are failing to comply with existing copyright treaty or trade agreement bilateral and/or multilateral obligations to provide adequate and effective protection and enforcement. In each country report we specify the details of the deficiencies.

Each of the five countries, of course, has its own copyright laws, treaty accessions and ratifications, and bilateral trade agreement obligations with the United States, and its own variances in other issues. However, IIPA has combined the reports of these five countries into a single report because the overwhelming majority of issues in each country are based upon similar bilateral trade agreements (negotiated and signed separately) with the United States in the mid-1990s, and, they have similar legal reform and enforcement scenarios. The U.S. trade agreements conferred Normal Trade Relations (then known as “Most Favored Nation”) on each country in exchange for a series of legal reforms, treaty accessions, and ratifications which have, to date, not been met.

The details of the recommended legal reforms, treaty accessions and ratifications, and enforcement obligations for each of the five countries – **Belarus, Kazakhstan, Tajikistan, Turkmenistan and Uzbekistan** – are set out below in the individual country reports.



BELARUS

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

2012 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: IIPA recommends that Belarus remain on the Watch List in 2012.

Priority actions requested to be taken in Belarus in 2012 – Key Legal Reforms: There are a number of serious legal deficiencies that are preventing effective enforcement in Belarus. The IIPA recommends the following changes to the Government of Belarus as legal reform priorities:

- Amendments to the Criminal Code to provide criminal penalties for first-time IPR violations. Currently, criminal penalties only apply to IPR violations after there has been an administrative violation and an exhaustion of administrative remedies.
- Amendments to the Copyright Law (1998) to fully implement the WIPO digital treaties (WIPO Copyright Treaty, WCT and the WIPO Performances and Phonograms Treaty, WPPT). Such amendments would include:
 - a) Revising the current anti-circumvention and copyright management information provisions which are not now fully compatible with the WIPO digital treaties because they do not provide “effective legal remedies” (e.g., in accordance with Article 11 of the WCT). In particular, the law needs to cover prohibitions on the manufacture, importation, sale, distribution, or other trafficking in devices or services that are aimed at circumventing technological protection measures, as well as outlawing acts of circumvention. Furthermore, the definition of “technical measures” does not cover access controls.
 - b) Protecting “copyright management information” that is attached to or accompanies a work or sound recording. Such provisions should protect against the alteration, removal or falsification of this information.
- Amendments to the Criminal Code to: (a) adopt a “significant amount of use criteria” calculated on the basis of the price of legitimate product, instead of the existing too high threshold based on “large-scale damage” for IPR crimes; and, (b) lowering the actual amount of the current threshold (in Article 158) to commence liability, which is now BR12.1 million (US\$1,400).
- Amendments to the Criminal Code (or Criminal Procedure Code) to permit the confiscation and destruction of manufacturing equipment used to produce pirated material.
- Amendments to the Criminal Procedure Code to provide the proper *ex officio* authority for police officials to initiate copyright criminal cases and investigations.
- Amendments to the Administrative Code to provide *ex officio* authority to administrative officials to commence investigations and cases. At present, a statement from a right holder is required to commence an administrative case. The administrative remedies are applicable for violations of copyright and neighboring rights, including acts of illegal retail sale and distribution.
- Amendments to the Customs Code to grant the proper *ex officio* authority to border officials to seize illegal material and to commence their own investigations and criminal cases.
- Amendments to the Civil Code to provide the proper *ex parte* search provisions for effective enforcement against end-user pirates.

- Amendments to the Copyright Law (1998) to provide clear protection for pre-existing works and sound recordings. Belarusian officials have insisted that this protection already exists, at least for works (Article 42 of the 1996 law and Article 3 of the 1998 law make international treaties such as the Berne Convention self-executing in Belarus). While this may be correct, the law should be clarified by statutory amendment or decree to avoid any confusion on the part of police, prosecutors, and judges tasked with enforcement of these rights.

Summary of U.S. – Belarus IPR Issues: In January and February 1993, Belarus and the United States exchanged letters to implement a bilateral Trade Agreement which detailed mutual obligations to improve the protection and enforcement of intellectual property rights. That agreement entered into force on February 16, 1993. It has been nearly 19 years, and still Belarus has not adequately implemented the IPR obligations in that agreement.

In April 2011, the U.S. Trade Representative – while retaining Belarus on the Watch List – noted that the U.S. remained “concerned about the delayed implementation of the IPR commitments Belarus made under the United States-Belarus Trade Relations Agreement of 1993” and that Belarus needed to “amend its copyright law to implement the obligations of the WIPO Internet Treaties.” The statement additionally noted that “Belarus should provide enforcement officials with authority to effectively investigate cases, seize infringing goods, and prosecute IPR cases without waiting for a right holder to file a complaint. Furthermore, Belarusian law does not provide adequate scope for *ex parte* searches. The United States urges Belarus to take further steps to improve its protection and enforcement of IPR.”

Belarus is a member of all of the relevant IPR treaties, including the Berne Convention (1997), the WCT (2002), the WPPT (2002), and the Geneva Phonograms Convention (2003). It was not until 2002 that Belarus joined any neighboring rights treaty – joining both the Geneva Phonograms and the WPPT that year. However, the delay of many decades (Geneva was put into force in 1971), allowed a large back-catalog of unprotected sound recordings to flourish in the marketplace, making enforcement that much more difficult, even today. In addition, Belarus has not fully implemented the digital treaties, nor adopted basic digital piracy enforcement steps, such as “notice and takedown” procedures.

In the past, IIPA and USTR reported on the troubling problem of optical media production facilities migrating into (and out of) Belarus from neighboring countries; in the past three years, we have had no reports of such cases.

IIPA continues to urge the Government of Belarus to improve its border enforcement – to prevent any optical disc or other hard-copy production plant or equipment from Russia (or other neighboring countries) from relocating to Belarus, as well as to stop the importing and exporting of illegal optical media discs (CDs, DVDs, CD-ROMs, CD-Rs, etc.). IIPA is aware of one optical disc plant (opened in October 2004) in Belarus. The Vigmoplast optical disc replication plant is operating near Minsk; it has two lines and an estimated plant capacity of seven million discs a year. We understand that it was assigned a source identification (SID) code.

Legal Reform Deficiencies: In 1996 (in force, June 18, 1996), Belarus enacted a new law on copyright and neighboring rights; amendments were adopted in 1998. The 1998 amendments were intended to, among other things, partially implement the WIPO “digital” treaties (WCT and WPPT). To our knowledge, no further amendments have been adopted. The 1998 amendments to the Copyright Law added provisions relating to anti-circumvention devices and services, and the removal or alteration of rights management information (Article 39.5). The remedies for anti-circumvention and rights management information protection include injunctive relief, monetary damages, and seizure of devices. Related Criminal Code provisions were adopted in 2000. The provisions (Article 201) include sanctions of up to five years imprisonment for repeat offenders of copyright and neighboring rights violations. As noted above, there are nine IIPA priority legal reforms that we recommend.

Enforcement: Under Article 40 of the Copyright Law (1998), civil penalties for copyright or neighboring rights violations include injunctive relief, damages (including lost profits), seizure and impoundment of infringing

copies, as well as statutory penalties of between 10 and 50,000 times the minimum wage. Belarusian officials point to the Civil Code (1999) as providing additional remedies for IPR violations.

In general, levels of piracy remain extremely high, and enforcement remains virtually nonexistent in Belarus. Several years ago, Belarusian officials reported that the Council of Ministers (an Inter-Ministerial Committee) had adopted a program for IPR protection focusing on legislative reforms (including copyright, patent and trademark laws), but there have been no further reports of any copyright activity by this Committee. Trademark reforms were adopted in 2010. IIPA continues to recommend a focus on legal reforms, as well as on enforcement, including steps against digital piracy, and against hard copy piracy – running raids and seizures, commencing criminal cases against commercial pirates, and using administrative remedies to curtail street piracy.

As Belarus moves to accede to the World Trade Organization, it needs to bring its laws into full compliance with the WTO/TRIPS obligations by adopting the revisions noted above and by improving on-the-ground enforcement. IIPA continues to recommend government action against any known production facilities, monitoring optical disc production in particular (at the one known plant), and using the criminal law remedies.

There are no comprehensive enforcement statistics for 2011. In recent years, the industries reported a trend of raids by the enforcement agencies (a positive step), but these raids were aimed only at small-scale retailers of illegal material. Raids against small-scale retailers have little deterrent effect on the overall piracy problem. Furthermore, the administrative fines imposed, even against these retailers, have generally been insignificant.

KAZAKHSTAN

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

2012 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: IIPA recommends that Kazakhstan be placed on the Watch List in 2012.

Priority actions requested to be taken in Kazakhstan in 2012 – Key Legal Reforms: There are several needed legal reforms – all tied to improving enforcement – that remain in Kazakhstan. IIPA recommends that the Government of Kazakhstan should adopt the following changes:

- **In the Civil Code:** provide proper *ex parte* search provisions for effective enforcement against end-user pirates and, clarify the rules for computing damages in civil infringement cases.
- **In the Copyright Law:** adopt the necessary amendments to fully implement the WIPO digital treaties (WCT and WPPT). IIPA has, in the past, provided extensive comments to the government on the necessary treaty compatible amendments – especially focused on improving enforcement against Internet piracy. In fact, “digital piracy” is not defined in any of the IPR laws, which according to some industries, makes enforcement very difficult. At the top of the list of priorities for digital treaty implementation, IIPA recommends that Kazakhstan adopt provisions that protect the use of technical protection measures applied by rights holders to works and sound recordings.
- **In the Customs Code:** provide *ex officio* authority for customs officials to seize illegal material and to commence their own investigations and criminal cases.
- **In the Criminal Code (or Criminal Procedure Code):** provide for the confiscation and destruction of manufacturing equipment used to produce pirated material. Currently, there are provisions permitting the destruction of goods only upon a court order.
- **In the Administrative Code:** provide *ex officio* authority for administrative officials to commence investigations and cases. The Administrative Code (Article 129), as amended in 2005, lowers the threshold for bringing cases. However, only the Ministry of Justice (Copyright Office), and not the police, can bring charges for such offenses. IIPA recommends that the existing police *ex officio* authority be broadened to include administrative violation as well.
- Adopt a proper regulatory scheme, including criminal penalties, for the production and distribution of optical disc material and equipment.

Summary of U.S. – Kazakhstan IPR Issues: Kazakhstan has made several notable legal reforms over the past several years, in part, to comply with its commitments under the 1992 U.S.-Kazakhstan Trade Agreement (in force, February 18, 1993). However, as a result of a “moratorium” on government anti-piracy activity, at least one copyright industry reports a noticeable decline in the number of enforcement actions – such as raids by the financial police, the regular police forces, and the Justice Ministry officials – in the past several years. In sum, copyright enforcement is a low priority of prosecutors and law enforcement officials, in addition to being impeded by excessive procedural and bureaucratic delays. Several deficiencies, noted above, remain in the Kazakh legal regime, including a high burden of proof in criminal cases, and an absence of proper resources – which have contributed to weak criminal enforcement.

In 2005, Kazakhstan made significant improvements in its IPR enforcement regime with the adoption of a package of IPR reforms. Additional reforms and enforcement activities are necessary, however, to address the

growing threat of Internet piracy, the on-going problems with hard copy (optical disc) piracy at street markets (in Almaty, Shymkent and Atyrau, in particular, and elsewhere across Kazakhstan), and, for the software industry, to stop the prevalent sale of pre-installed pirated software on computers. Reports persist that organized crime syndicates are responsible for the high piracy levels; enforcement against this problem can only be addressed with effective criminal measures. The development of a modern IPR regime in Kazakhstan will benefit local as well as foreign rights holders. The software and recording industries consider Kazakhstan one of the most promising marketplaces of the C.I.S. region, behind only Russia and Ukraine.

The Copyright Law was amended in 1996, and further amended in 2004, 2005 and 2007. IIPA understands that further revisions are being contemplated to the Copyright Law (drafts circulated in 2010), as well as revisions to the Customs Code (to provide *ex officio* authority). These, and other IPR issues on legal reforms and enforcement of IPR, have been discussed in the past several years with the U.S. Government in bilateral talks with Kazakh officials as part of World Trade Organization (WTO) accession.

The 2004 amendments provided the long-sought explicit protection for pre-existing foreign works and sound recordings. Kazakhstan joined the Berne Convention (1999); the Geneva Phonograms Convention (2001); and, it joined the two WIPO “digital” treaties, the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT), effective in 2004.

Legal Reform Deficiencies: The 2004 amendments to the Copyright Law of 1996 provided a flat 50-year window of pre-existing protection for foreign works and sound recordings. Thus, pre-1954 works and sound recordings remain in the public domain. The 2004 amendments took over 10 years to adopt, which, in the interim flooded the market with (now illegal) back-catalog material. This remains a major enforcement problem that Kazakhstan has not properly addressed. Other changes made in 2004 included laws to facilitate electronic commerce and Internet technology, and to, at least partially, implement the WIPO digital treaties, as well as E.U. directives.

In 2005, (effective November 26, 2005), additional amendments to the Copyright Law of 1996 were adopted, as well as amendments to the Criminal Code, the Criminal Procedure Code, the Civil Code, and the Administrative Code. Perhaps the key amendment in 2005 was the change to Article 184 of the Criminal Code, which repealed the previously undefined “huge damage” threshold for criminal cases and replaced it with a threshold based on the harm done or value of the works or recordings exceeding 100 times the government set monthly wage (or for more serious crimes, 500 times that amount). The 2005 amendments repealed the requirement that there be proof of “financial gain” for criminal charges to rest – this was a major improvement. Other positive steps (also in 2005) were the changes made in the commercial and licensing laws to ban the sale of copyrighted material at street kiosks, requiring instead that this material be sold in retail stores. In December 2007, the Supreme Court issued a decree pertaining to the implementation of certain provisions of the existing Copyright Law. One significant deficiency that should be addressed is the lack of clarity in the current (civil) code about the computation of damages in civil copyright infringement cases.

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. In the recent past, IIPA provided the Government of Kazakhstan with “model” enforcement provisions for its consideration as it moves toward WTO accession reforms. IIPA urges the Government of Kazakhstan to use the IIPA draft and to consult with local copyright industry representatives, to adopt these enforcement revisions in 2012.

The Customs Code was completely revised in 2003. However, those changes did not include the necessary *ex officio* authority to seize suspected infringing material at the border as required by the TRIPS Agreement, which as noted, is a critical missing element in the enforcement regime against hard-copy piracy. The 2003 amendments also added a complicated registration system for copyright right holders seeking enforcement at the border, which further weakens the system. IIPA continues to recommend that this registration system be repealed. Kazakhstan, Russia

and Belarus joined a Customs Union (in force July 2010). As part of that Customs Union, a complicated duty valuation system based (unfairly) on royalties rather than, as in most countries, on the value of the underlying carrier media (i.e., the discs) went into force. IIPA recommends that Kazakhstan (and the Russia/Belarus customs union) repeal these unfair tariff rates to allow for copyright industries to invest in the local market.

Enforcement: The Government of Kazakhstan has made strides to improve its enforcement regime, with its noted legislative reforms and with ongoing police activities. However, for the past four years, there has been a decline in the number of police raids and seizures, and in prosecutorial activity as well. Thus, there were few criminal cases for IPR offenses (an on-going trend, even according to Kazakh government statistics). IIPA knows of no criminal convictions in 2011 in the music, film, or entertainment software industries. The last such notable conviction was in 2008, in a criminal case involving a distributor of pirated software (and pornography). The copyright industries report in recent years that even though there were some additional cases brought to courts, the majority of pirates were not brought to justice due to administrative burdens, prosecutorial inexperience and delays, the low priority given IPR offenses, and an overall ineffective judicial system. As in recent years, some of the industries report good cooperation with and enforcement activity by the financial police, the internal affairs police, and with the various public prosecutors in some cities in particular (Almaty, Karaganda and Astana).

Enforcement is undertaken by a variety of agencies, including the Copyright Agency within the Ministry of Culture (16 departments) and various enforcement agencies. These agencies have assisted with some raids, in recent years, including against software pirates. A special IPR Department was created within the Finance Police (with national authority), but problems interpreting the law, in particular the threshold for criminal and administrative action, have hampered their enforcement activities. In recent years, the copyright industries signed a Memorandum of Understanding with the Government of Kazakhstan. There have also been training programs conducted throughout the country. IIPA continues to encourage the government to act, especially against criminal operations, and to improve its overall enforcement with deterrent penalties.

The Business Software Alliance (BSA) reports that there have been, in recent years, reductions in the types of open and notorious piracy that existed about five years ago, because those who sell software or computer equipment and devices now generally understand that there are criminal, administrative, and civil penalties for such activities. Piracy is now focused on end-user and Internet piracy. This migration of piracy, especially to the Internet, and, a decrease in criminal enforcement efforts (especially a decline in police and prosecutorial activity last year), have kept piracy rates high. The Business Software Alliance reports that in 2010, the piracy rate for business software in Kazakhstan was 76%, and the commercial value of unlicensed software attributable to U.S. vendors was \$48.9 million.¹

In the past, BSA has reported on some raids undertaken against optical disc (CD) and hard-disc software pirates, and, even one against an Internet pirate, as well as the commencement of civil actions. The Criminal Code (Article 184(2)) has had limited impact in some instances, because it has been applied to the manufacturing and sale of illegal copies, but has not extended to contemplated but not completed sales; additionally, many cases have been dismissed or delayed unnecessarily.

¹BSA's 2011 software piracy statistics will not be available until after the filing deadline for this submission, but will be released in May 2012, at which time piracy rates and U.S. software publishers' share of commercial value of pirated software will be available at www.iipa.com. These statistics follow the methodology compiled in the Eighth Annual BSA and IDC Global Software Piracy Study (May 2011), <http://portal.bsa.org/globalpiracy2010/index.html>. These figures cover packaged PC software, including operating systems, business applications, and consumer applications such as PC gaming, personal finance, and reference software – including freeware and open source software. They do not cover software that runs on servers or mainframes, or routine device drivers and free downloadable utilities such as screen savers. The methodology used to calculate this and other piracy numbers are described in IIPA's 2012 Special 301 submission at <http://www.iipa.com/pdf/2012spec301methodology.pdf>.

In the past several years, a new form of piracy surfaced pertaining to the sale of pirated stickers of the required certificates of authenticity that must be placed on some IP products, such as software. The Government of Kazakhstan needs to address this form of piracy.

While the U.S. copyright industries have been sustaining millions of dollars in losses in Kazakhstan, more than US\$80.29 million in imports to the U.S. from Kazakhstan enjoyed duty-free treatment under the GSP program during the first eleven months of 2011 (and more than US\$60.7 million in 2010). In April 2006, as a result of improvements in Kazakhstan's IPR legal regime, the U.S. Government concluded its GSP review of IIPA's petition of Kazakhstan. IIPA asks the U.S. Government to continue to closely monitor Kazakhstan's GSP obligations vis-à-vis its IPR legal and enforcement regime.

IIPA suggests that police and administrative activity can, if used correctly, be a very positive first step. IIPA recommends that stepped-up seizure and confiscation of illegal copyright materials should be undertaken, as well as the closure of shops and businesses conducting illegal business using the licensing law.

There are two known optical disc production facilities reported in Kazakhstan at present (the latter opened in August 2005). Each of the two plants has a single production line. The total plant capacity of the two plants is 11.6 million discs per year. Both plants now have IFPI-issued SID (source identification) codes (August 2002; August 2005) and have provided exemplars (examples) of discs manufactured at the plants to be used for forensics evidence. To date, there is no forensic evidence of illegal production at either optical disc plant. Still, IIPA recommends the adoption of optical disc regulations to properly monitor the production and distribution of material and equipment at these and any future plants, including tying illegal commercial production to criminal penalties. The absence of such a system, the lack of overall strong enforcement, and the infrastructure in Kazakhstan, are an invitation for plants and organized crime syndicates to move their operations into Kazakhstan from neighboring countries, such as Russia.

TAJIKISTAN

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

2012 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: IIPA recommends that Tajikistan remain on the Watch List in 2012.

Priority actions requested to be taken in Tajikistan in 2012 – Key Legal Reforms: There are a number of serious legal deficiencies in Tajikistan that make the IPR regime in Tajikistan inconsistent with international obligations, including the need for full implementation of the WIPO digital treaties. IIPA recommends the following legal reforms to improve the IPR regime in Tajikistan:

- Amending the Copyright Law to: (a) comply with the WIPO Copyright Treaty (WCT) and the WPPT – including basic protections for copyrighted materials on the Internet – an exclusive right of making available to the public for authors (i.e., a communication to the public right consistent with the WCT, Article 8), and for phonogram producers (i.e., consistent with the WPPT, Article 14); protection for the use of technical protection measures applied by rights holders to works and sound recordings; effective legal remedies against those who engage in acts of circumvention or distribute circumvention devices; (b) provide clear protection for pre-existing works and sound recordings for a minimum of 50 years (and preferably, 70 years); and (c) delete the onerous contract regulations.
- Amending the Civil Code to provide the proper *ex parte* search provisions for effective enforcement against end-user pirates.
- Amending the Criminal Code to cover all IPR violations of “works” and “neighboring rights.”
- Amending the Criminal Code to adopt a threshold for a criminal violation calculated on the basis of the price of legitimate product, instead of a threshold based on an undefined “large-scale damage” for IPR crimes, and set that threshold at a low actual level. The current Criminal Code (Article 156) provides for copyright and neighboring rights sanctions, but only where there is “significant harm” to the right holder.
- Amending the Criminal Code to set the penalties for IPR violations to deterrent levels (for example, to 500 times the minimum wage).
- Amending the Criminal Code (or Criminal Procedure Code) to permit the confiscation and destruction of manufacturing equipment used to produce pirated material.
- Amending the Criminal Procedure Code to provide the proper *ex officio* authority for police officials to initiate copyright criminal cases and investigations.
- Amending the Administrative Code to provide *ex officio* authority to administrative officials to commence investigations and cases.
- Amending the Customs Code to grant the proper *ex officio* authority to border officials to seize illegal material and to commence their own investigations and criminal cases.

Summary of U.S. – Tajikistan IPR Issues: In 1993, Tajikistan and the United States concluded a bilateral Trade Agreement which detailed mutual obligations to improve the protection and enforcement of intellectual property rights. That agreement entered into force on November 24, 1993. Tajikistan has never fully implemented the IPR obligations in that agreement.

In April 2011, the U.S. Trade Representative – in retaining Tajikistan on the Watch List – noted that Tajikistan “has yet to fully implement its IPR commitments under the 1993 United States-Tajikistan Trade Agreement.” The U.S. Government noted progress in 2010, when Tajikistan ratified the WIPO Performances and Phonograms Treaty (WPPT); Tajikistan had already acceded to the WIPO Copyright Treaty in 2009. But the U.S. Government noted its concerns over the lack of proper “*ex officio*” authority in the area of border and criminal enforcement.”

Accession to the WPPT in 2010 (in force, August 24, 2011), and the WCT in 2009 (in force, April 5, 2009) was positive news. Unfortunately, Tajikistan has not clearly indicated its intention to provide protection for pre-existing works and sound recordings, as those treaties, the Berne Convention, and the Bilateral Trade Agreement, require. It is hoped that the Government of Tajikistan will either clearly identify this protection (in existing law), or quickly amend its law to provide such protection for works and sound recordings.

Legal Reform Deficiencies: In 2000, Tajikistan adhered to the Berne Convention. However, the Tajik Copyright Law (in force, December 17, 1998) falls short of full compliance with the Berne Convention and other international norms. There are many deficiencies in the Copyright Law, noted above, including: (1) the over-regulation of the terms and conditions of authors’ contracts; and (2) provisions that provide only for a right of remuneration for producers of sound recordings for the public performance, broadcasting, or communication of a phonogram to the public by cable.

The Customs Code (last revised in 1995) does provide liability for the transfer of illegal goods, including intellectual property material, through the border. A 2002 resolution (No. 185 of the Cabinet of Ministers) established border control rules for goods, including IPR works, and it implemented a customs registry for IPR works requiring a right holder to file a statement and set of documents for border enforcement. These regulations are cumbersome and an ineffective tool that IIPA recommends should be repealed.

There has not been a single criminal IPR case reported under the existing laws. Nor has there been a single case reported under the Administrative Code. The Administrative Code, last revised in 1999 (Article 158-2), provides levies, fines, and seizure of illegal copyright and neighboring rights material. The copyright industries have no reports concerning enforcement activity in Tajikistan.

On December 10, 2002, the U.S. and Tajik Presidents signed a joint statement reaffirming the relationship between the two countries and “recognizing the importance of . . . the rule of law” as well as pledging to work together on economic and political reforms. IIPA recommends that the Government of Tajikistan affirm this statement by meeting its obligations and amending its relevant IPR laws and engaging in effective enforcement. The U.S. Government and Tajik Government signed a Trade and Investment Framework Agreement (TIFA) on June 1, 2004 to enhance trade and investment between the two countries, and have since held talks in the context of the TIFA, to further improve trade relations.

According to the recording industry (International Federation of the Phonographic Industry, IFPI), there are currently no known optical media plants in Tajikistan.

TURKMENISTAN

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

2012 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: IIPA recommends that Turkmenistan remain on the Watch List in 2012.

Priority actions requested to be taken in Turkmenistan in 2012 – Key Legal Reforms: The basic copyright and related laws, enforcement provisions, and treaty accessions for a modern IPR regime are absent in Turkmenistan. As a result, the IIPA recommends the following IPR legal reforms in Turkmenistan:

- Adherence to the Berne Convention.
- Adherence to Geneva Phonograms Convention.
- Adherence to the WIPO digital treaties – the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT).
- Adoption of a Berne, WTO TRIPs and WIPO digital treaties (WCT/WPPT) compliant Copyright Law to protect works and sound recordings. This includes, as a priority, the need to adopt provisions that protect works in the digital era – such as the use of technical protection measures applied by rights holders to works and sound recordings. The law should also protect pre-existing works and sound recordings for a minimum of 50 years (and preferably, 70 years). The Civil Code should be repealed or scaled back upon adoption of a Copyright Law to avoid confusion and misinterpretation of rights and remedies as between two “competing” laws.
- Amending the Civil Code to provide the proper *ex parte* search provisions for effective enforcement against end-user infringers.
- Amending the Criminal Code to raise the penalties for IPR violations to deterrent levels (for example, to 500 times the minimum wage).
- Amending the Criminal Code to adopt a threshold for a criminal violation calculated on the basis of the price of legitimate product, instead of a threshold based on an undefined “large-scale damage” for IPR crimes, and, to set that threshold at a low actual level. Article 153 of the current Criminal Code does provide sanctions for copyright and neighboring rights violations, but only in cases of “significant harm” — a threshold that is too vague, and likely too high in practice to provide any effective enforcement.
- Amending the Criminal Code (or Criminal Procedure Code) to permit the confiscation and destruction of manufacturing equipment used to produce pirated material.
- Amending the Criminal Procedures Code to provide the proper *ex officio* authority for police officials to initiate copyright criminal cases and investigations.
- Amending the Administrative Code to provide *ex officio* authority to administrative officials to commence investigations and cases.
- Amending the Customs Code to grant the proper *ex officio* authority to border officials to seize illegal material and to commence their own investigations and criminal cases.

Summary of U.S. – Turkmenistan IPR Issues: In 1993, Turkmenistan and the United States concluded a Bilateral Trade Agreement which detailed mutual obligations to improve the protection and enforcement of intellectual property rights. That agreement entered into force on October 25, 1993. Nineteen years later, Turkmenistan has not implemented the IPR obligations in that agreement.

In April 2011, the U.S. Trade Representative – in retaining Turkmenistan on the Watch List – noted its encouragement about the Turkmenistan Parliament’s “recent announcements” about plans to join the Berne Convention and the Geneva Phonograms Convention in 2011. Unfortunately, Turkmenistan has yet to join either treaty, and thus, has not implemented the basic IPR provisions of the 1993 U.S.-Turkmenistan Trade Agreement (Bilateral Trade Agreement). Additionally, the April 2010 USTR statement noted the “reports” that Turkmenistan would enact a new copyright law in 2011. IIPA is unaware of any such reforms. The USTR statement went on to note that Turkmenistan should adopt “comprehensive administrative, civil, and criminal procedures for adjudicating IPR cases, and impose penalties for IPR infringement...The United States urges Turkmenistan to improve its IPR regime, including by adopting the necessary legal reforms to implement its commitments under the 1993 bilateral trade agreement.”

Legal Reform Deficiencies: Turkmenistan never adopted a comprehensive separate copyright and neighboring rights law. Instead, in October 1993, Turkmenistan formally incorporated the Soviet-era Civil Code (Chapter IV) into its legal structure. On March 1, 1999, the Civil Code was revised, with extensive amendments pertaining to copyright. As a result, the operational copyright law is the 1961 Civil Code, as amended in 1999. The rights and provisions necessary to comply with basic international norms are lacking. A draft Law on Copyright and Neighboring Rights has been under consideration for years, but has never been adopted by the Parliament to our knowledge.

IIPA knows of no cases to date where the Criminal Code (Article 153) was used against a copyright pirate. Turkmenistan, by failing to provide a proper legal regime, and lacking any police, prosecutorial, judicial, or border activity, is clearly not providing “adequate and effective” enforcement as required by the 1993 Bilateral Trade Agreement.

After adopting the necessary legal reforms, the Turkmen authorities must, at a minimum, commence police raids and seizures and act to stop the retail distribution of illegal material through the use of administrative and criminal sanctions.

According to the recording industry (International Federation of the Phonographic Industry, IFPI), there are no known optical media plants in Turkmenistan.

The U.S. Government and Turkmen Government signed a Trade and Investment Framework Agreement (TIFA) on June 1, 2004 to enhance trade and investment between the two countries and have subsequently held talks in the context of the TIFA, to further improve trade relations.

UZBEKISTAN

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

2012 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: IIPA recommends that Uzbekistan remain on the Watch List in 2012.

Priority actions requested to be taken in Uzbekistan in 2012 – Key Legal Reforms: IIPA recommends the adoption of the following legal reforms and treaty accessions in Uzbekistan in order to provide for effective copyright protection and enforcement:

- Revoking the reservation to Article 18 of the Berne Convention by a formal notification from the Government of Uzbekistan to the WIPO, in order to properly provide protection for pre-existing works compliant with Berne and the U.S. bilateral agreement.
- Adherence to the Geneva Phonograms Convention.
- Adherence to the WIPO digital treaties – the WIPO Copyright Treaty (“WCT”) and the WIPO Performances and Phonograms Treaty (“WPPT”).
- Correcting deficiencies (and some uncertainties) in the Copyright Law of 2006, including:
 - i. Providing protection for pre-existing works and sound recordings for a minimum of 50 years (and preferably, 70 years).
 - ii. Adopting an exclusive right of public communication for sound recording producers for the recording, broadcasting, or communication to the public by cable (which appears to be limited to a right of remuneration in Article 51).
 - iii. Clarifying the scope and application of the rental right for audiovisual works and computer programs (Article 21).
 - iv. Complying with the digital treaties (WCT and WPPT) – by improving the provisions pertaining to technical protection measures (Article 63, which currently provides for no civil or criminal remedies) and rights management information (Article 64).
 - v. Deleting the onerous provisions (found in Articles 38 through 42) that over-regulate the terms and conditions of authors’ contracts.
- Amending the Civil Code to provide the proper *ex parte* search provisions for effective enforcement against end-user pirates.
- Amending the Criminal Code to include “neighboring rights” violations (the current code only applies to infringements of “works”).
- Amending the Criminal Code to raise the penalties for IPR violations to deterrent levels (for example, to 500 times the minimum wage).

- Amending the Criminal Code to adopt a threshold for a criminal violation calculated on the basis of the price of legitimate product, instead of a threshold based on an undefined “large-scale damage” for IPR crimes; and, set that threshold at a low actual level.
- Amending the Criminal Code (or Criminal Procedure Code) to permit the confiscation and destruction of manufacturing equipment used to produce pirated material.
- Amending the Criminal Procedures Code to provide the proper *ex officio* authority for police officials to initiate copyright criminal cases and investigations.
- Amending the Administrative Code to provide *ex officio* authority to administrative officials to commence investigations and cases.
- Amending the Customs Code to grant the proper *ex officio* authority to border officials to seize illegal material and to commence their own investigations and criminal cases.

Summary of U.S. – Uzbekistan IPR Issues: In November 1993, Uzbekistan and the United States signed a bilateral Trade Agreement (in force, January 13, 1994). The agreement conferred Normal Trade Relations (then known as “Most Favored Nation”) status on Uzbekistan, in exchange for Uzbekistan agreeing to adopt critical IPR legal reforms, and to comply with international copyright treaty norms. Unfortunately, over eighteen years after the 1994 Trade Agreement, some of the most basic protections continue to be denied right holders in Uzbekistan. For example, since Uzbekistan is still not a member of the Geneva Phonograms Convention, it does not provide any protection or rights for U.S. or other foreign sound recordings. Further, it does not protect pre-existing foreign works prior to 2005 as a result of a reservation it made when it joined the Berne Convention (in contravention to that Convention and the 1994 Trade Agreement).

In April 2011, the U.S. Trade Representative, in announcing Uzbekistan’s retention on the Watch List, noted ongoing concerns because Uzbekistan “has yet to fully implement its IPR-related commitments under the 1994 United States-Uzbekistan Trade Agreement. Uzbekistan’s copyright law contains a number of gaps, and does not provide protection for preexisting works or for U.S. and other foreign sound recordings. Uzbekistan has also not joined the Geneva Phonograms Convention. While enforcement has improved slightly, criminal penalties for IPR infringement are not sufficient to deter further infringement. Additionally, amendments are needed to provide enforcement officials, including Customs officials, with *ex officio* authority to initiate investigations and enforcement actions.” As a result of its ongoing failures to improve its IPR regime, IIPA continues to recommend that the U.S. Government should deny Uzbekistan trade benefits and preferences including its eligibility to participate in the Generalized System of Preferences (GSP) program, because Uzbekistan is not providing the statutorily mandated “adequate and effective” copyright protection and enforcement under its present IPR regime.

Legal Reform Deficiencies: The Copyright Law of Uzbekistan was overhauled in 1996 (in force, September 17, 1996), and two additional copyright law amendments were adopted in 2000. Separately, Uzbekistan adopted a Law on Computer Programs and Databases, which was amended in 2002.

In July 2006, Uzbekistan adopted a new Law on Copyright and Related Rights (in force, July 20, 2006).² 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

²Note, IIPA bases this filing on an unofficial English translation of the 2006 Copyright Law. In 2006, Uzbekistan also adopted conforming amendments to its Civil Code on copyright and neighboring rights, as well as a decree on royalties for public performances and private copying (IIPA does not have official English translations of these laws/regulations).

future date. The 2006 law added: a making available right; a right of communication to the public; provisions pertaining to technical protection measures and copyright management information; regulations pertaining to private copying and public performance royalties; and, extensive provisions and regulations involving collective administration (Chapter Four of the law). The Copyright Law could have benefited from more input by copyright right holders, and as a result, is either missing key provisions (protection for pre-existing works and sound recordings), or has several unclear or incomplete protections, such as, those pertaining to technical protection measures).

In 2005, Uzbekistan adhered to the Berne Convention (effective April 19, 2005). Unfortunately, Uzbekistan made a reservation to its accession regarding Article 18 that denies protection for pre-existing works from the United States and all other Berne countries. This reservation, as noted by WIPO and other copyright experts to the Government of Uzbekistan, is in contravention to the Article 18 obligations of Berne (and the 1994 Agreement). Uzbekistan must withdraw its reservation immediately and provide clear protection for pre-existing works (and separately, for sound recordings as well).

On November 30, 2005, IIPA testified at the GSP country practice hearing regarding Uzbekistan's legal deficiencies. After that hearing, the U.S. Government asked IIPA for a list of "steps that the Government of Uzbekistan should take with respect to protecting IPR in order to retain GSP eligibility." IIPA provided the U.S. Government with eight recommendations for improving IPR in Uzbekistan, in a written response on December 14, 2005. We testified again on October 4, 2007, and on April 24, 2009 at GSP hearings. Now, more than six years later, and after three rounds of hearings, the Government of Uzbekistan has failed to adopt seven of the eight recommendations (which, for the most part, track the 1994 trade agreement obligations). The same set of recommendations is set out above – with some additional detail.

Although Uzbekistan has proposed and/or made changes in some of these areas previously, these proposed changes were not always adequate to fix the deficiencies. The 2000 Copyright Law amendments did two things: (1) added "copying of a record" to the enumerated rights of producers to fix a glaring deficiency; and (2) added a broad national treatment obligation into the law (Article 56.3), but not a clear point of attachment for all works and sound recordings — this latter problem appears (in the unofficial translation) to have been corrected by Article 4 of the 2006 law.

IIPA is unaware of any recent amendments to the Criminal Code following passage of the 2006 Copyright Act to adopt deterrent penalties for intellectual property violations. Drafts to amend the Criminal Code were circulated several years ago, but, to our knowledge, never adopted. In fact, one draft (2004) would have weakened, not strengthened, criminal penalties because: (1) no criminal penalties are applied "until one year after administrative penalties are assessed" – providing pirates with a chance to pirate without penalty the first time; and (2) the levels – set at 50 to 100 times the minimum wage – are much too low to be deterrent penalties. If a similar draft is proposed, IIPA would recommend that the first provision be deleted, and the second provision (regarding the minimum wage), be raised considerably to at least 500 times the minimum wage, as has been done in other countries.

A (2004) draft to amend the Customs Code would have established a complicated registration system for IPR enforcement at the border. IIPA strongly recommends that Uzbekistan not adopt a border registration plan because it will prove counterproductive to effective enforcement at the border.

A 2001 resolution (No. 285 of the Cabinet of Ministers) established a licensing system for the production, reproduction and sale of records, cassettes and CDs, according to which only licensed entities could carry out such activities. Industry experience shows that such licensing systems are not effective against the pirate production enterprises, which are common in this region. IIPA recommends that this plan be repealed.

Enforcement: The U.S. Government and Uzbek Government signed a Trade and Investment Framework Agreement (TIFA) on June 1, 2004 to enhance trade and investment between the two countries. The governments have since held talks, in the context of the TIFA, to further improve trade relations.

During the first eleven months of 2011, US\$721,000 in imports from Uzbekistan enjoyed duty-free treatment under the GSP program (in 2010, the figure was US\$2.1 million). Thus, even as the U.S. Government is promising to enhance trade and investment with Uzbekistan and providing GSP benefits and other aid, the Uzbek copyright regime is, at present, among the weakest of all of the countries in the C.I.S. The IIPA recommends that the U.S. Government should remove Uzbekistan from eligibility to receive GSP benefits because Uzbekistan is not complying with the IPR eligibility requirements for GSP benefits, namely the requirement to provide “adequate and effective” copyright protection and enforcement. Further, Uzbekistan is not in compliance with its bilateral and multilateral obligations, and is woefully inadequate in its IPR regime as a potential WTO member.

After the Uzbek Government adopts the necessary legal reform and treaty accessions, it also needs to commence enforcement actions. Such actions should begin with police raids and seizures at a minimum, and it must act to stop the retail distribution of illegal material through the use of administrative and criminal sanctions. There have been reports of some actions against retail shops that sell pirated product, which if true, are a positive step.

The IFPI reports there are no known optical media plants in Uzbekistan.

COLOMBIA

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2012 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: IIPA recommends that Colombia remain on the Watch List in 2012.

Executive Summary:¹ The Colombian market is an important one for IIPA members, but suffers from physical and digital piracy that requires greater attention to copyright protection and enforcement on the part of Colombian authorities. The recording industry in Colombia has seen no improvement in the level of music piracy in recent years. More than 70% of the physical music market is pirate. Physical piracy continues to be a visible problem in Colombia's major cities, where burned CD-Rs and DVD-Rs are sold on streets and flea markets. Internet piracy of music is almost 100% of the total digital market, mainly because of the lack of action to identify and prosecute administrators and owners of websites, blogs and "hubs" involved in the distribution of illegal music files. A number of developments in 2011 represent a downward shift in the level of priority the Government of Colombia has dedicated to copyright enforcement, and are of particular concern for a country that is party to a free trade agreement with the United States. IIPA urges USTR to maintain needed engagement with Colombia in 2012 to redirect the current trends that could result in declining enforcement, poor free trade agreement implementation and, ultimately, greater difficulties in this important market for the copyright industries.

In May 2011, the Colombian Government attempted unsuccessfully to implement its free trade agreement obligations to establish Internet Service Provider (ISP) liability provisions, by filing the "Ley Lleras." The effort failed to gain the necessary political support from the government's own party, and was defeated by well-organized opposition from civil society organizations and ISPs. Meanwhile, the national anti-piracy campaign lost its steam during 2011. In a troubling sign that reveals the lack of attention to the growing piracy problem in the country, the President broke with tradition and decided against ratifying the national anti-piracy agreement ("convenio nacional antipirateria") that had been in place for some time. Simply put, President Santos has failed to address the protection of copyright and Intellectual property as a matter of priority, in stark contrast to his predecessors. Furthermore, after the government became mired in allegations of deficient supervision over the collective management of copyright by the local authors and composers society (SAYCO), Minister Lleras ordered dramatic measures over the performance rights collective management system. These included the suspension of the operational license of SAYCO for one month, creating uncertainty in the market and causing great damage to performance rights collections around the country. Finally, Juan Carlos Monroy, Director of the Copyright Office within the Ministry of Interior and a strong advocate for copyright protection, was fired, thereby losing one of the most thoughtful and passionate defenders of copyright in Colombia.

IIPA and its members applaud the United States Government for signing the U.S.-Colombia Trade Promotion Agreement (TPA) in October 2011. This agreement contains a comprehensive chapter on intellectual property rights that will raise the level of copyright law and enforcement obligations in Colombia to the benefit of both Colombian and U.S. creators. Colombia should be encouraged to take effective steps in 2012 to implement its TPA obligations and to increase the focus of law enforcement officials on needed anti-piracy actions on the streets of Colombia and online.

Copyright Enforcement in Colombia: The weakest part of the music anti-piracy campaign in Colombia involves the prosecution of cases. Piracy is still considered a minor offense by Colombian criminal judges and appellate courts. Official figures provided by the General Prosecutor's Office report that during 2011 a total of 1,580 criminal prosecutions were initiated on cases related to copyright violations, including but not limited to music piracy. As a result of these prosecutions, only 15 convictions were issued and 6 were dismissed, and there has been no information as to any time served by the convicted. Despite the good efforts of the National Police (DIJIN) in conducting investigations and raids, most of the resources are wasted by the lack of effectiveness of the prosecution and the judicial system.

¹For more details on Colombia's Special 301 history, see Additional Appendix to this filing at <http://www.iipa.com/pdf/2012SPEC301HISTORICALCHART.pdf>, as well as the previous years' reports, at <http://www.iipa.com/countryreports.html>. For a summary of IIPA's 2012 global issues, see our cover letter at <http://www.iipa.com/pdf/2012SPEC301COVERLETTER.pdf>.



EGYPT

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

2012 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: IIPA recommends that Egypt remain on the Watch List.¹

Executive Summary: The Egyptian Government has undergone significant changes and unrest in the past year plus, culminating in the revolution of January/February 2011. The situation since then has somewhat stabilized, allowing us to better gauge progress in IPR protection. It remains the case that local Egyptian and U.S. right holders are equally hampered by piracy and other barriers, as the experiences of authors such as Alaa al-Aswany,² and the local Egyptian film market duopoly of the Arabic Company for Production and Distribution Group and El Mottahida (which suffer from piracy, cultural burdens, narrow theatrical windows, and a dearth of screens in the country) can attest. In addition to photocopy and print piracy, other piracy phenomena like piracy of music, software, games, and movies, and business software end-user piracy (which statistically worsened in 2010), caused losses to copyright owners and kept them from doing legitimate business in Egypt.

Law enforcement has mostly had its hands full adjusting to the new political realities after February 2011, but it appears that some positive transformative changes that had begun prior to the revolution have not been completely cast aside. IIPA is pleased that the Copyrights & Artistic Works Investigation Unit of the Ministry of Interior became more proactive, including some *ex officio* raids and actions regarding piracy of books and journals; further training can make this unit even more effective. IIPA applauded the establishment of new Economic Courts in 2008 (under Law No. 120 (2008)), under which civil and criminal copyright cases are to be handled by specially-trained judges; the Egyptian Government has expressed the hope that these courts would promote “speedy judgments rendered.”³ Industry reports that some of the more recent decisions of the Economic Courts have been stronger than those under the Commercial courts previously. IIPA had further hoped that the shift in jurisdiction for business and entertainment software to the Ministry of Communications and Information Technology’s “Information Technology Industry Development Agency” (ITIDA) would result in significant improvements, and the Egyptian Government has noted some significant cases arising out of ITIDA actions, but results have been mostly non-deterrent fines. Further, we urge ITIDA to form an enforcement unit and assist with awareness campaigns regarding software piracy. The Ministry of Culture, which still has enforcement purview over books, music, and motion pictures, remains largely inactive.

The United States and Egypt signed a Trade and Investment Framework Agreement on July 1, 1999, and there has been sporadic movement toward deepening the trade relationship; IP has continued to be one of the key issues for engagement. In late January 2012, United States Trade Representative Ron Kirk and Dr. Mahmoud Eisa, Egyptian Minister of Industry and Foreign Trade announced a Joint Statement declaring their intention to pursue steps to promote the U.S.-Egypt Trade and Investment Partnership and provide opportunities for job creation. The Joint Statement notes that U.S. and Egyptian officials would finalize an Action Plan to realize the individual elements

¹For more details on Indonesia’s Special 301 history, see Additional Appendix available at <http://www.iipa.com/pdf/2012SPEC301HISTORICALSUMMARY.pdf>. Please also see previous years’ reports at <http://www.iipa.com/countryreports.html>.

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

³See Arab Republic of Egypt (Mona El Garf, Advisor, Minister of Trade and Industry), *USTR Section 301 Report for the Year 2009 Submission by the Arab Republic of Egypt*, February 2009, submitted to regulattions.gov (on file with IIPA). The Submission indicated that the Shura Council and the People’s Assembly approved Law No. 120 for the Year 2008, establishing economic courts. According to the Ministry submission,

“These specialized courts will have jurisdiction over cases involving a number of economic laws, including the intellectual property rights law. These courts will ensure specialized judges trained in these legislations hear IPR cases and speedy judgments rendered. The courts will decide on both the criminal aspect of IPR cases as well as the civil remedies.”



of the Partnership including “protecting intellectual property rights and promoting innovation.”⁴ It is hoped that the enforcement, legislative, and market access issues raised in this filing can be properly addressed through the U.S.-Egypt relationship.

PRIORITY ACTIONS REQUESTED IN 2012

Enforcement

- Form a software copyright enforcement unit within ITIDA, and increase actions, particularly to legalize larger enterprises.
- Fully establish specialized “Economic Courts” with specialized judges to deal with copyright matters, emphasizing speed and deterrence in piracy cases (including end-user piracy of business software) and take active steps to develop core of specialized IP prosecutors and judges.
- Tackle book and journal piracy, both illegal reprints and photocopying, by taking sustained enforcement actions against pirate production and distribution, and ensuring universities adopt policies to use only legal copies of publications.
- Fully implement laws and decrees (such as Law No. 118/1975, Decree No. 770/2005, and other measures) to seize piratical imports and exports, without “guarantee” amounts that are prohibitively expensive.

Legislation, Market Access, and Public Awareness

- Ease onerous market access restrictions which close the Egyptian market to legitimate copyright companies.
- Amend the copyright law and implementing decree to cure other TRIPS deficiencies and resolve ambiguities, and fully implement and join the WIPO Copyright Treaty (WCT) and WIPO Performances and Phonograms Treaty (WPPT).
- Amend the law (or regulations) to provide that enforcement authorities shall destroy pirated and counterfeit products.
- Amend border measures regulations in order to lower the onerous official fees required to be paid by a right holder in order to seize suspected counterfeit products, and to provide Customs with needed *ex officio* authority to detain pirated and counterfeit goods.
- Launch and execute a public awareness campaign on the importance of copyright protection to Egypt, the dangers of piracy, and the consequences of engaging in piracy, including end-user software piracy.

PIRACY AND ENFORCEMENT CHALLENGES IN EGYPT

Previous reports have discussed the piracy and enforcement challenges faced in Egypt.⁵ The following sections provide brief updates to the piracy and enforcement situation in Egypt. Failure to mention a specific issue does not indicate that the problem has been fully resolved.

Business Software Piracy: The unauthorized use of software by businesses, so-called end-user piracy of business software, and retail piracy continue to cause serious harm to the business software and IT industries in Egypt.⁶ Reducing piracy in Egypt would bring positive benefits to the Egyptian economy. A study released in 2010 by

⁴United States Trade Representative, *U.S. Trade Representative Kirk, Egyptian Minister of Industry and Foreign Trade Eisa Adopt Joint Statement on a Trade and Investment Partnership*, January 25, 2012, at <http://www.ustr.gov/about-us/press-office/press-releases/2012/january/us-trade-representative-kirk-egyptian-minister-ind>.

⁵See International Intellectual Property Alliance, *Egypt*, at <http://www.iipa.com/rbc/2010/2010SPEC301EGYPT.pdf>.

⁶BSA's 2011 software piracy statistics will not be available until after the filing deadline for this submission, but will be released in May 2012, at which time piracy rates and U.S. software publishers' share of commercial value of pirated software will be available at www.iipa.com. In 2010, the software piracy rate in Egypt was 60%, representing a commercial value of unlicensed software attributable to U.S. vendors of US\$108 million. These statistics follow the methodology compiled in the Eighth Annual BSA and IDC Global Software Piracy Study (May 2011), <http://portal.bsa.org/globalpiracy2010/index.html>. These figures cover packaged PC software, including operating systems, business applications, and consumer applications such as PC gaming, personal finance, and reference software – including freeware and open source software. They do not cover software that runs on servers or mainframes, or routine device drivers and free downloadable utilities such as screen savers. The methodology used to calculate this and other piracy numbers are described in IIPA's 2012 Special 301 submission at <http://www.iipa.com/pdf/2012spec301methodology.pdf>.

IDC and BSA found that reducing the PC software piracy rate in Egypt by 10 percentage points over four years would generate US\$254 million in GDP, US\$33 million in additional tax revenues and 1,978 new IT jobs. The benefits would be even greater if this reduction was achieved in two years, which would yield US\$338 million in GDP and US\$44 million in additional tax revenues.⁷

The software industry notes good relationships with the Copyrights & Artistic Works Investigation Unit of the Ministry of Interior in carrying out raids, including *ex officio* raids, against retail establishments that offer pirated business software and corporations using unlicensed software. While relations with ITIDA are good, the lack of an enforcement unit within ITIDA has hindered their ability to take meaningful actions to address software piracy. Overall, there was an increase in raiding in 2010 and in early 2011. Several fundamental problems persist, however, in the enforcement system in Egypt: 1) the lack of an enforcement unit inside ITIDA to take copyright raids; 2) the lack in general of deterrent sentencing even by the more active Economic Courts; 3) low compensatory damages, which could be assisted by the adoption of pre-established, or statutory damages; 4) the lack of an effective destruction remedy in the Customs Regulations; 5) the unwillingness of authorities in general to seek legalization of software usage by publicly-owned companies, and difficulties obtaining evidence with regard to the illegal practices of such companies; 6) overall difficulties in obtaining sufficient evidence in Egypt to warrant an *ex parte* civil search (a TRIPS requirement); and 7) the lack of police interest in piracy cases unless they are visibly large amounts of piracy or counterfeiting (hence, Internet cases and end-user piracy cases often get short shrift).

A couple of additional problems are worth noting. First, the industry has identified some banks and hospitals which are using unlicensed software. However, due to the rigid criminal procedure rules which would require confiscation of hardware, and due to the essential nature of their operations, the problem of end-user piracy in these organizations is largely ignored. In addition, the software industry has experienced the problem of seized pirates and counterfeit products being put up for sale in auction by the Egyptian Government/District Attorney. This is a practice that as a general rule would violate Egypt's international obligations (for example, under Article 46 of the TRIPS Agreement). Finally, the industry notes enforcement hurdles, e.g., too many enforcement authorities must approve a copyright infringement action, thus discouraging right holders from coming forward to bring cases.

Book Piracy Continues to Hinder the Development of Legitimate Publishing Industry in Egypt:

Publishers report that print piracy continues to hinder the development of the local legitimate publishing market. Pirate enterprises in Egypt generally profit from prints of English language higher-education textbooks, English language teaching (ELT) materials, best-sellers, and books in translation. Local Egyptian publishers, Egyptian authors, and Egyptian distributors are as negatively affected as foreigner publishing entities. Unauthorized photocopying of ELT course books at universities and piracy of key ELT trade titles, particularly grammar titles and dictionaries, continues to be a significant problem. Regarding print piracy, which is the larger phenomenon in Egypt, assistance has been inconsistent. Nevertheless, industry has had some cooperation in pursuing isolated cases through the Copyrights & Artistic Works Investigation Unit in Cairo. Efforts were initiated in 2010 to raise law enforcement awareness of book/journal piracy and it is hoped that these efforts can be resumed soon. Most enforcement actions occur on the basis of complaints, not *ex officio*.

As previously reported, there have been a limited number of cases where Egyptian Government authorities were willing to take measures to address piracy occurring on university campuses (for instance, when accreditation to 'Western' universities is threatened). Unfortunately, legalizing most universities' practices tends to happen on an *ad hoc* basis and varies from faculty to faculty. For example, some faculty members only allow students to register who have a book receipt for a legitimate purchase. Others appear to encourage or condone illegal photocopying. In order to meaningfully tackle the unlawful print reproduction and photocopying that supply university campuses, the Ministries of Education and Higher Education should launch a campaign to legalize published materials used on college campuses. At present, public state-funded universities are taking no responsibility for ensuring that on-

⁷Business Software Alliance and IDC, *Piracy Impact Study: The Economic Benefits of Reducing Software Piracy: Egypt, 2010*, at http://portal.bsa.org/piracyimpact2010/cps/cp_egypt_english.pdf.

campus stores, presumably subject to a lease agreement with the university, does not engage in infringing activity. Unfortunately, it appears that some university employees provide the shops with the books, informing them of the number of students, and helping sell the pirate copies to students.

Establishment of Economic Courts to Deal With Copyright Cases a Welcome Development: IIPA welcomed the establishment of Economic Courts in 2008, and industry reports obtaining slightly better hearings in copyright cases since that time. The Egyptian government's 2009 Special 301 Submission reported five criminal case results from 2008-09, four "imprisonment of infringers," which the Submission notes "constitutes a new trend in Egypt's judicial efforts in deterring piracy."⁸ IIPA hopes that with the new courts, a specialized core of IP prosecutors and judges emerges and that court processes will also be improved. In particular, courts should not impose bureaucratic documentary hurdles to effective judicial enforcement, or other hurdles which could, if allowed to deny protection altogether, amount to inconsistencies with Egypt's current international obligations.⁹ It would also help right holders if the new courts shared court decisions in a more transparent manner by publishing them expeditiously, and in this regard, IIPA welcomes the government's reporting of the cases noted above in its Submission. There have been past instances in which clearly pirate material has been deemed "genuine" by the Ministry of Culture, leading to further delays in investigations leading to legal proceedings. ITIDA and MOC should regularly invite copyright owner assistance in ascertaining the legitimacy of suspect product. In some cases, the question may come down to the authenticity of documents purporting to identify particular companies as the authorized distributor of copyright products in the country. Right holders can quickly dispense of such questions.

Legal Framework Should be Established to Protect Authors and Artists in the Online Space: As of December 2010, Egypt had 20.1 million Internet users (according to the International Telecommunications Union), having more than doubled the number of users in just three years. Egypt also has more than one million broadband users as of 2010 by some industry statistics. Internet development (as well as mobile development) as a whole declined during the 2011 uprising, with decreased investment and deployment of new services in 2011. By early 2012, the situation had returned to relative normalcy. By that time, however, the music industry in Egypt had already suffered the ill effects of unlawful distribution models deployed on the Internet in Egypt.¹⁰ These models include

⁸The cases listed are:

- "Case No.14 for the year 2009, in which the court gave a sentence of imprison[ment] for 6 months."
- "Case No. 9172 for the year 2008 in which the court gave a sentence of imprison[ment] of a year plus a fine of 5000 Egyptian Pounds [US\$905]."
- "Case No.14532 for the year 2008, in which the court gave a fine of 15,000 Egyptian Pounds in addition to a sentence of pre-civil remedy of 5001 Egyptian Pounds[US\$905]."
- "Case No.9171 for the year 2008 in which the court gave a sentence of imprison[ment] for 3 months plus a fine of 5000 Egyptian Pounds [US\$905]."
- "Case No. 20039 for the year 2008 in which the court gave sentence of imprison[ment] for 6 months plus a fine of 5000 Egyptian Pounds [US\$905]."

⁹In several infringement cases in 2008 and 2009, ITIDA has noted that a victim company's failure to file formal deposit copies of the works involved and other documentation in line with Article 184 of the Copyright Law of Egypt is inconsistent with Egyptian law. As has been noted in previous IIPA submissions (and as discussed below), Article 184 outlines onerous deposit requirements, whereupon failure to deposit can lead to imposition of administrative penalties. In these cases, it is apparent that ITIDA would have preferred for the victim/rights holder to deposit copies of the works at issue, and notes that without so doing the rights holder risks the merits of the case. IIPA understands that the Egyptian Government has taken the position that deposit under Article 184 is not a prerequisite for copyright protection. However, if failure to adhere to these deposit formalities impacts criminal enforcement of the copyrights at issue, this could be inconsistent with Egypt's international obligations under the Berne Convention and the TRIPS Agreement. The Berne Convention imposes a "no formality" principle in Article 5, by requiring copyright protection to be afforded without regard to any formality. In the Egyptian Government's February 2009 Special 301 Submission, they indicated,

"With regard to depositing and registering software, ITIDA confirms that the copyright protection is automatic according to the Egyptian law. So the author is protected automatically without any formalities. Our system is completely compliant with Berne convention and TRIPS agreement without having any inconsistency. The process of depositing or registration will help in establishing evidence if there is any dispute. It is not by any mean a barrier nor a condition for protection, and this is very clear in article (184) of the Egyptian IPR law (Law 82 of 2002)."

The Ministry pointed to "Cases No. 9040 and No. 28896 Year 2007" as evidence that registration was not required since convictions were achieved in those cases without registration. IIPA appreciates this clarification of the issue and hopes that in all cases, documentary requirements and deposit requirements, the latter which are spelled out in the law, are never used to deny copyright protection.

¹⁰For example, the music industry reported in 2008 that 97% of all digital distributions of music in Egypt were pirate, but reported that the situation worsened in 2009, and that as a result of Internet-based piracy in Egypt and the resulting decrease in revenues from local music, the music industry's budgets for new production shrank by 50% in 2009. Foreign music revenues were also down. These losses meant less taxes paid to the government. Due to budget reductions, reductions in force have also resulted. Overall, the negative social effects of piracy hit the music industry extremely hard in Egypt.

illegally hosted content, deep linking sites, streaming sites, P2P services, BitTorrent, and auction sites which are being used for infringement of copyright.¹¹

The government is reportedly working with ISPs on a code of ethical conduct to encourage ISPs to take affirmative action against cybercrimes, child pornography, and IP online crimes. IIPA members have been encouraged by the Ministry of Interior Cyber Crime Unit's measured responses to local sites offering illegal copyright content based on complaints. Problems appear to exist in terms of enforcement with foreign sites, since authorities are unclear what the laws are in Egypt with respect to infringements originating outside the country. The laws should be amended to provide the proper legal framework for the Internet environment. The work with ISPs to establish guidelines in the form of a code of conduct is commendable, and it is hoped that a fair and effective legal framework for dealing with both hosted content (e.g., notice and takedown) and non-hosted infringements (e.g., providing incentives to cooperate) can be developed.

Pirate DVD Channels/Rogue Stations: The motion picture industry reports that at least three free-to-air channels in Egypt broadcasting on the NileSat and NorSat satellite have been telecasting films acquired from pirate DVD stores without authorization from or payment to the applicable right holders. The independent film and television industry (IFTA) indicates the channels involved are reported to be Panorama Action, Top Movies and Time Movies. This form of broadcast piracy is becoming increasingly prevalent in the region, and the government should take immediate steps to cease these broadcasts of pirated materials, whether under the Copyright Law or business licensing provisions, since the entities involved should be subject to license revocation for showing unauthorized materials from an unlawful source.

Cairo Declaration on Cybercrime: Computer-based infringements are on the rise in Egypt, whether Internet-based piracy or business software end-user piracy. Thus it is crucial that the government of Egypt deal with such copyright infringement as a species of cybercrime. In November 2007, Egypt hosted an Arab regional conference on cybercrime convened by the Council of Europe, at which 400 participants from around the region and other countries discussed using the COE Cybercrime Convention as a model to guide the development of national legislation on cybercrime.¹² One of the end-results was adoption of the Cairo Declaration on Cybercrime, dated November 27, 2007. IIPA hopes that the Declaration will result in Egypt leading the way to adopt legislation to meet the requirements of the COE Cybercrime Convention (2001).¹³ The Declaration notes that "[t]he Budapest

¹¹The independent segment of the film and television industry (IFTA) reports that online (as well as physical) piracy remain a significant export constraint in Egypt for independent producers and distributors, the majority of which are small to medium-sized businesses. Independent producers and distributors confirm that DVD sales have been particularly impacted since pirated digital copies are routinely offered for free online and with the same quality viewing experience that a DVD can provide. Piracy severely undermines and may permanently damage legitimate distribution networks essential to reaching consumers in Egypt and leaves little confidence for investment in intellectual property.

¹²The 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.

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

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

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

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

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,” and 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.”

Retail Piracy Remains Severe, Including Some Imports: All the industries continue to report that physical piracy in retail shops and street stalls remains a major problem in most major cities in Egypt, including Cairo, Alexandria, Giza, Mansoura, and Asyut. Retail establishments selling computers continue to offer illegal business and entertainment software unchecked. Imports of pirate software have become a serious concern, passing freely through the borders into Egypt. Resellers of pirate software advertise these illegal products openly in trade magazines. As noted just below, Egyptian Customs authorities are apparently poised to set up a mechanism for better handling of infringing import and export cases, to seize such goods at the point of entry or exit.

Customs Measures to Deal With Unauthorized Imports and Exports Would Be Welcome Improvement: Egypt’s February 2009 Submission to USTR regarding the Special 301 process indicated that Egyptian Customs is putting into place what it hopes will be “an effective mechanism” to deal with infringing imports and exports. Specifically, the Submission noted,

“In 2005, the Minister of Foreign Trade and Industry issued the Ministerial Decree No. 770/2005 Issuing the Executive Regulations To Implement Import and Export Law no.118/1975 as well as Inspection and Control Procedures of Imported And Exported Goods. Chapter 9 of These Regulations provided the rules governing the application of Border Measures. Competence of border measures is divided between Trade Agreements sector (TAS) under Ministry of Trade and industry and the Customs Authority. The former is competent for receiving complaints, inspection and decision making, while the latter is responsible for implementing these decisions.”

The Ministry had previously discussed establishing an “information bank” based on trainings conducted with a brand owner. IIPA welcomes the initiative of the government to try and effectively stop pirate imports and exports. IIPA would be wary of any formality put into place, such as any mandatory title verification, which would hinder the ability of Customs to act on an *ex officio* basis. For example, for U.S. publishers, it is a fact that almost any print editions destined for export from Egypt will be illegitimate, so the ability to act on an *ex officio* basis serves the purpose of providing greater efficiency to the system. To the extent the government goes forward with the “information bank,” it must be voluntary and not serve as a substitute for effective border enforcement against pirate exports of books. IIPA looks forward to seeing how this system discussed by the government can work to reduce infringing imports and exports.

MARKET ACCESS ISSUES

There remain several market access barriers in Egypt which make it more difficult for foreign right holders to operate in the market. For example, foreign movies are subject to a 46% import tax and are also subject to discriminatory sales and box office taxes. Pirates and counterfeiters do not have to contend with such restrictions, so legitimate right holders are further disadvantaged in the market. These market access barriers should be lifted.

COPYRIGHT LAW AND RELATED ISSUES

2002 Law and Implementing Regulations Leave Some Gaps in Protection: Copyright law in Egypt is governed under the Intellectual Property Law No. 82/2002 of Egypt (Copyright Law), and the 2005 Implementing

Decree, Prime Minister Decree No. 497 for the year 2005 (effective by Issue No. 12, Official Gazette, March 29, 2005). The Copyright Law and the Implementing Decree contain some inconsistencies with Egypt's international obligations, many of which have been discussed in previous filings. The laws also failed to fully implement the WCT and WPPT, which Egypt should implement and join. The following is a non-exhaustive list of some important changes that should be sought in amendments:

- **Amend Law to Ensure Registration and Deposit Are Voluntary:** Articles 184 and 185 contain registration and deposit provisions for copyright. ITIDA has indicated that these deposit requirements, though not necessary for copyright protection to attach, are nevertheless useful, presumably for enforcement purposes. While the February 2009 Egyptian government Submission indicates that there have been criminal convictions obtained without deposits, the law indicates deposit is mandatory, subject to administrative penalties for failure to deposit. As such, amendments should be sought to make the system (of registration and deposit) voluntary. While the government insists the requirement is not intended as a bar to copyright protection as such, to the extent failure to meet these requirements deny copyright protection and the ability to enforce rights, the IP Code should be amended to ensure registration and deposit are voluntary.
- **Criminal Remedies Too Low:** The Copyright Law contains very low criminal penalties which appear not to meet the TRIPS test of criminal penalties available that are sufficient to provide a deterrent to further infringements. Specifically, Article 181 provides a prison sentence of “not less than one month” and a fine of EL5,000 to 10,000 (US\$905 to \$1,810). The minimum sentence of “one month” imprisonment is important, but there is no set maximum jail term as there was in the old law, potentially rendering this provision much weaker than it was previously. Fines on their face also appear insufficient to provide a deterrent. IIPA understands that the fine is supposed to be imposed “per work” or “per title,” and that in a couple of cases, this calculation method has been employed. Fines should be increased, and, for example, should be doubled for recidivists. As of now a recidivist receives the mandatory minimum jail term and the maximum fine.
- **Civil Remedies.** Nowhere 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 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.¹⁴
- **Ex Parte Civil Searches.** Article 179 of the Code 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

¹⁴The 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.

a demonstrable risk of evidence being destroyed,” as required by TRIPS Article 50. The copyright industries are considering a test in the courts, but in the meantime, the law should be amended to expressly provide for the availability of this vital measure.

- **Remedy as to “Materials and Implements.”** Article 179(3) in the Code is TRIPS deficient, in that it provides for the seizure of “materials” that are “serviceable” “only” for infringement. TRIPS Article 46 requires that judicial authorities shall have the authority to “order that materials and implements *the predominant use* of which has been in the creation of the infringing goods” be (seized and) disposed of, and Article 61 provides, in appropriate cases, for the seizure, forfeiture and destruction of such materials and implements.
- **Government-Sanctioned Sell-Off of Pirated Products Violates TRIPS.** Article 180 provides that “the court may support a sequester with a view to republish the [allegedly infringing] work, sound recording, broadcasting program, as well as, exploiting or offer copies of it,” and “the accrued revenue shall be deposited with the court’s treasury until the original dispute is settled.” This provision diverges from accepted practice and is out of step with Article 46 of TRIPS, which requires Egypt to give the judicial authorities “the authority to order that goods they have found to be infringing be, without compensation of any sort, disposed of outside the channels of commerce in such a manner as to avoid any harm caused to the right holder, or ... destroyed.”
- **Modern, TRIPS-Compatible Presumptions.** The law does not provide expressly for presumptions of copyright ownership (as required by TRIPS) or subsistence of copyright. Such presumptions are crucial to the ability of copyright owners to effectively exercise their rights. The law must be amended to comply with TRIPS.¹⁵
- **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.¹⁶
- **Requirement of Translation into Arabic.** Section 148 of the Code requires translation of all literary works into Arabic within three years of publication; if not, they are deemed to fall into the public domain. This is an extremely disturbing development. This unprecedented provision violates Egypt’s TRIPS and international obligations, is highly prejudicial to all right holders, including U.S. publishers, and must be deleted.
- **Broad Compulsory License.** Article 170 of the IP Code contains a compulsory license for copying and translating works. It is not limited to literary works in printed form, and apparently extends to computer programs and audiovisual works. Such a compulsory license is contrary to international law and would be devastating to

¹⁵The 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.

¹⁶The 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.

the copyright industries if the Egyptian government allows for such practices. It must be fixed or deleted altogether. The 2005 Implementing Decree (Articles 4 and 5) failed to resolve this issue and leaves in place a Berne- and TRIPS-incompatible compulsory license.

- **Compulsory License Provision for Broadcasts.** Article 169 permits broadcasting organizations to use works without seeking authorization. This compulsory license should be deleted.
- **Article 171 Exceptions.** The law contains exceptions to protection which are broad and may be in questionable conformity with TRIPS Article 13. Preferably, Article 171 (on exceptions to protection) should include “chapeau” language limiting excepted acts to special cases, provided that such acts “do not conflict with a normal exploitation of the work [or object of neighboring rights]” and “do not unreasonably prejudice the legitimate interests of the author [or right holder],” in line with TRIPS Article 13. The Implementing Decree (Article 10) makes an attempt to limit the computer program exception in Article 171(3).
- **Restrictions on the Ability to Freely Contract.** Articles 150, 151 and 153 of the Code are restrictions on the ability to enter into freely-negotiated contracts, and should be abolished. Specifically, Articles 150 and 151 contain transfer provisions that impose undue burdens on the freedom to contract, while Article 153 is an unreasonable restriction on the ability for an author to enter into arrangements that might include future works under a private contractual agreement.
- **Broad Moral Rights Provision.** The moral rights provisions in the Code impinge on exclusive rights, in violation of TRIPS and Berne (TRIPS Article 9.1, Berne Articles 8 and 12). Article 142(3) provides that the author may reject “any amendment in the work, which the author considers as changing or distortion of his work,” regardless of whether the author has transferred economic rights. In this form, this provision violates Berne Article 12, as it would undermine the exclusive adaptation right. The standard for rejection of a change must be objective, as set forth in the Berne Convention, not subjective, as set forth in the Code. The Article also provides that “amendment in translation shall not be regarded as infringement, unless the translator fails to indicate points of deletion or change, or abuses the reputation and status of the author.” This would violate Berne Article 8, as it would impinge on an author’s exclusive translation right.
- **Performers’ Moral Rights Provision.** In Article 155(1), the performer’s right of attribution should permit the omission of the performer’s name, if such is dictated by the manner of the use of the performance, and Article 155(2) should qualify the kinds of changes made by a right holder that would be objectionable (i.e., changes that would be prejudicial to the performers’ reputation), and provide that it is not prejudicial to the performer for right holders to make modifications consistent with the normal exploitation of a performance in the course of a use authorized by the performer.
- **Exclusive Rights for Producers of Audiovisual Works.** Article 177(5) clearly should not apply to sound recordings and therefore the word “audio” should be stricken from this article. Also, the panoply of exclusive rights for producers of audiovisual works is unclear. The producer is defined as “the natural or legal entity who produces the ... audiovisual work, and undertakes the responsibility of such achievement” [Article 138(11)]. Article 177(5) provides that the producer “shall be considered as representative of the authors and successors in exploiting this work, without prejudice to the rights of the author of literary or musical works, unless otherwise agreed upon in writing,” and “the producer shall be considered as the publisher, and will have the rights of the publisher” Egypt should reverse this presumption, such that the producer of audiovisual works shall be presumed to have the exploitation rights unless otherwise agreed upon in writing.¹⁷ 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.

¹⁷The 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.”

The Implementing Decree created some additional issues. For example, Article 187, dealing with registration of businesses engaged in the distribution of copyright materials, is another potentially onerous and costly burden on legitimate businesses, which has the unintended but certain consequence of further insulating pirates, who will not pay for such registrations. Article 17 of the Implementing Decree and the Table set forth an elaborate schedule of charges to legitimate businesses dealing in copyright materials.

GENERALIZED SYSTEM OF PREFERENCES

The GSP program, designed to promote economic growth in the developing world by providing preferential duty-free entry for products from designated beneficiary countries and territories, expired on December 31, 2010, but on October 21, 2011, President Obama signed legislation to reauthorize the program through July 31, 2013. GSP trade benefits became effective 15 days after the President signed the bill (November 5, 2011) and apply retroactively from January 1, 2011. Egypt has been a major beneficiary of the GSP program. During the first eleven months of 2011, nearly US\$44 million in imports to the U.S. from Egypt enjoyed duty-free treatment under the GSP Program, or almost 2.5% of Egypt's entire imports into the U.S.¹⁸ Among the criteria the President must take into account in determining whether a country should continue to be designated as a GSP beneficiary country are "the extent to which such country is providing adequate and effective protection of intellectual property rights," and "the extent to which such country has assured the United States that it will provide equitable and reasonable access to the markets ... of such country." 19 USC 2462(c)(4) and (5). It is essential to the continued growth and future competitiveness of these industries that our trading partners, including Egypt, provide free and open markets and high levels of protection to the copyrights on which this trade depends. Egypt should provide adequate and effective protection for intellectual property rights of U.S. creators, and equitable and reasonable market access to U.S. creative products and services, to meet the requirements of this program.

¹⁸During 2010, nearly US\$51.5 million in imports to the U.S. from Egypt enjoyed duty-free treatment under the GSP Program, or more than 2.3% of Egypt's entire imports into the U.S.

GREECE

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2012 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: IIPA recommends that Greece remain on the Watch List in 2012.

Executive Summary:¹ Despite some very positive efforts from a small number of Greek enforcement units – especially the Greek tax police (SDOE) – the overall economic environment in Greece has served to prevent the country from making the needed structural changes in its handling of copyright piracy cases, and deficiencies in Greece’s copyright law obstruct the fight against Internet piracy. In general, copyright piracy levels have remained steady in 2011 and are virtually ignored by the country’s leadership. Public sector cuts in police forces, in key police cybercrime units and lack of human and technological resources within the Authority for the Prosecution of Financial Crimes (SDOE) – formerly the tax police (YPEE) – have undermined two of the most effective arms of Greece’s enforcement authorities. Drastic structural improvements within SDOE in 2011 show promise, in particular for anti-piracy in the business software sector, but need additional resources to bear better results. Physical piracy of many copyrighted products remains a problem in the cities and on the streets, although the level of street piracy is declining as Internet piracy takes hold of the Greek market. Discussions between the content industry and Internet Service Providers (ISPs) have been unsuccessful and need stronger political engagement by the government. Attempts to combat illegal peer-to-peer (P2P) file-sharing are frustrated by data protection laws that impede investigations and litigation against infringers. Furthermore, lengthy court delays and a lack of deterrent sentences continue to frustrate judicial efforts.

PRIORITY RECOMMENDED ACTIONS FOR GREECE IN 2012

- Coordinate at the highest levels a national enforcement campaign to involve rights holders, increase raids and prosecutions, allow cooperation from the Immigration and Municipal police in anti-piracy cases, encourage criminal non-suspended sentencing, and conduct public awareness and training.
- Provide the SDOE with technical infrastructure and trained personnel to expand anti-piracy actions affecting all copyright sectors and to support the proactive work they are doing in the software sector.
- Establish annual and monthly targets for the SDOE to perform audits with published results and conduct raids, issue follow-up warnings and conduct raids on non-responsive companies, where appropriate, with published reports of administrative fines imposed.
- Encourage Government ministries and agencies to legalize business software usage in public agencies.
- Direct prosecutors to bring cases more swiftly, and instruct courts to issue deterrent sentences without suspension, including imprisonment and fines as provided by the law.
- Establish specialized IPR courts in more Greek cities and expand their jurisdiction to criminal copyright cases.
- Amend the Copyright Law to provide the same level of protection for technological protection measures (TPMs) utilized in software that is currently afforded to other classes of works.
- Consistent with the 2008 European Court of Justice (ECJ) *Telefonica* decision, amend data protection laws to allow disclosure of the identification of infringers and other necessary information for rights holders to protect their rights in court.

¹For more details on Greece’s Special 301 history, see IIPA’s “History” appendix to this filing, at <http://www.iipa.com/pdf/2012SPEC301HISTORICALCHART.pdf>, as well as the previous years’ reports, at <http://www.iipa.com/countryreports.html>. To read IIPA’s cover letter to this Special 301 submission, go to <http://www.iipa.com/pdf/2012SPEC301COVERLETTER.pdf>.



COPYRIGHT PIRACY IN GREECE

Internet piracy remains high in Greece and, unlike in other European markets, it has done little to diminish the hard goods piracy that remains prevalent in cities throughout Greece. Problems continue in combating end-user piracy of business software in corporate settings.

The scope and depth of Internet piracy in Greece began to soar in 2008 as Internet accessibility outpaced government enforcement online – a trend that only began to subside very recently. There are now nearly 5 million Internet users in Greece, representing about 46% of the population.² Broadband connections numbered more than 2 million by early 2011, and one in four Greeks has Internet access via their mobile phones. However, digital piracy for certain copyright sectors has temporarily declined in the past year thanks largely to successful raids against the administrators of the most popular illegal torrent and forum websites, resulting in a large short-term decline in the data traffic over the Internet in Greece. Nevertheless, these activities have not continued, despite the constant offer of information from rights holders to the Hellenic Police, which is a result of close cooperation between MPA and IFPI. As a result, the number of popular active illegal Greek websites remains at an estimated 70 to 75 sites. P2P file-sharing of infringing content and cyber-lockers containing pirated material (with relevant links offered through forums) continue to be very popular. Mobile piracy is not a serious problem yet, as most of the mobile companies control the downloadable copyrighted works and the exchange of such works (ringtones) between the mobile users.

Software piracy: The Business Software Alliance (BSA) reports that the software piracy rate in Greece remains above fifty percent.³ The high commercial value of software piracy in Greece (in the hundreds of millions of Euros) translates to fewer job opportunities and decreased revenues for local IT businesses. Local IT businesses faced huge financial problems in 2011, in addition to the effects of the economic crisis that hit Greece.

End-user piracy continues to be the biggest piracy threat to its industry in Greece, but Internet software piracy is on the rise. In areas of Greece where Internet access is improving, such as Athens and Thessaloniki, hard goods piracy of software products is giving way to Internet downloads of illegal products. In other areas, unlicensed software continues to be distributed on low-quality pirated CDs.

Music piracy: The pirate music market is gradually migrating from physical product to the Internet. The cities with the largest problems regarding music street piracy are Patra, Kalamata, Corfu, Crete and Thessaloniki, while the situation in the center of Athens has substantially improved, primarily because immigrants find it more profitable to sell other infringing goods, such as bags, clothes, etc, rather than CDs and DVDs. Clearly, there is a network of illegal immigrants operating at all levels from manufacturing to retail distribution of pirate music products, and this accounts for over 95% of the pirate physical market. Piracy of sound recordings and music in Greece represents around 70% for both international and local repertoire. To be clear, the legitimate market for physical copies of recorded music remains in disarray. However, Internet-based piracy of music is rapidly growing, particularly in the form of cyber-lockers containing, and forums referring to, infringing content. This is a primary area in which industry action requires government support, not least in ensuring ISP cooperation.

Audiovisual piracy: The legitimate audiovisual market has shrunken considerably in Greece. Internet piracy hurts operations in all parts of the film and television distribution chain, from theatrical exhibition to video, and

² According to www.Internetworldstats.com, as of June, 2011.

³BSA's 2011 software piracy statistics will not be available until after the filing deadline for this submission, but will be released in May 2012, at which time piracy rates and U.S. software publishers' share of commercial value of pirated software will be available at www.iipa.com. In 2010, the software piracy rate in Greece was 59%, representing a commercial value of unlicensed software attributable to U.S. vendors of US\$166 million. These statistics follow the methodology compiled in the Eighth Annual BSA and IDC Global Software Piracy Study (May 2011), <http://portal.bsa.org/globalpiracy2010/index.html>. These figures cover packaged PC software, including operating systems, business applications, and consumer applications such as PC gaming, personal finance, and reference software – including freeware and open source software. They do not cover software that runs on servers or mainframes, or routine device drivers and free downloadable utilities such as screen savers. The methodology used to calculate this and other piracy numbers are described in IIPA's 2012 Special 301 submission at <http://www.iipa.com/pdf/2012spec301methodology.pdf>.

even video on demand. Online piracy takes many forms. Subtitling websites have become a major concern, comprising 20% of the known active illegal websites, as they allow local Internet users to connect with other foreign top sites (FTP servers at the top of the distribution chain for pirated content). Thousands of video stores have closed in recent years – now reduced to just about 300 nationwide – while 200 new stores have opened trading in DVDs from unverified sources. Overall, thousands of jobs in the audiovisual sector have been lost. Local representatives of the Motion Picture Association (MPA) report that the Internet is the major source of illegal content for optical disc manufacturers, street vendors, and video retailers. New technologies in piracy have enhanced the capacity of pirates to reproduce large numbers of DVDs in relatively short time, and in many cases shop owners load pirated digital files on hard disk drives, which are more difficult to locate during raids. While street piracy declined in 2011, small local groups of pirates continue to deal with major pirate DVD producers and distributors, bringing pirate product to commercial areas of Greece’s major cities and tourist locations. The major problem cities are Athens, Thessaloniki, Patras, and some of the Greek islands, such as Zante, especially during the summer months.

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

Independent producers and distributors are especially concerned with the impact of Internet piracy because of its harm to legitimate online distribution services – harming consumers and rights holders alike. Revenue from these services, which is licensed country-by-country, is critical for the independents to finance the development of new creative works worldwide. Since Internet piracy instantly exports troubled marketplaces and high piracy rates to other markets, this type of copyright infringement not only undercuts anticipated revenue from the distribution of a particular asset, it also harms the ability of independent producers to secure financing for future productions. The independent production sector is limited in its ability to shift to technology-enabled new business practices that might limit piracy. For example, worldwide same day releases (referred to as a “day-and-date” release) may prove an effective method to curb or delay piracy for the major studios, which control their own worldwide distribution, but for independents, whose national distributors release on their own schedule, this technique is impossible.

Videogame piracy: For 2011, Greece placed thirteenth in the world in the number of connections by peers participating in the unauthorized file sharing of select Entertainment Software Alliance (ESA) member titles on public P2P networks, up from its sixteenth place ranking position in 2010.⁴ Analysis by ISP shows that OTEnet S.A. and FORTHnet SA subscribers are responsible for more than 60% of this activity occurring in Greece. Circumvention devices, such as jailbreak devices, illegal firmware, and mod chips, to disable anti-piracy measures in videogame consoles are widely available in Greece.

COPYRIGHT ENFORCEMENT IN GREECE

Several years have passed since the Government of Greece organized its IPR enforcement efforts under a coherent plan with top-level leadership. The copyright industries report very positive working relationships with the Greek police, but economic constraints in 2011 led to disappointing cutbacks in key enforcement divisions. BSA also

⁴ESA’s reporting on P2P activity does not take into account downloads of these titles that occur directly from hosted content, such as games found on “cyberlockers” or “one-click” hosting sites, which appear to account each year for progressively greater volumes of infringing downloads.

reports that, in 2011, the software industries had excellent relationships with SDOE. More specifically, SDOE's Directorate of Planning and Coordination of Audits and the new SDOE's IPR Department were highly active in combating software piracy. The challenges, meanwhile, for copyright enforcement in Greece remain unchanged: court delays, postponements of hearings, and a lack of deterrent sentences are the main obstacles to effective enforcement. Defendants often receive suspended sentences, and courts do not impose the fines provided by law. Prosecutors must place greater priority on copyright crimes, courts need to facilitate speedier cases with deterrent sentences, and government leaders need to establish the tools for ISPs and rights holders to cooperate against Internet piracy.

We note that lack of results in the protection of intellectual property is not a side effect of the economic crisis, but lack of political decision-making. A special division for intellectual property protection was formed in SDOE, which so far deals only with big companies that use pirated software. Also, the division of electronic crimes of the Hellenic Police was upgraded and enriched with manpower, but does not address internet piracy. Finally, following immense pressure from commercial chambers regarding counterfeit and pirate products, the various officials admit that measures should be taken against illegal market as it causes overall damages of around 10 billion euros. However, very little has been done to address these problems.

Comprehensive Action Plan on the Protection of Intellectual Property Rights: In the past, the Ministry of Foreign Affairs led an Interministerial Steering Committee to ensure more efficient coordination of all intellectual property initiatives for the prevention of piracy and counterfeiting. Members of this "Coordination Committee for Monitoring and Coordinating IPR" included eight Greek Ministries, as well as the Hellenic Copyright Organization, the Hellenic Industrial Property Organization and the Municipality of Athens. In February 2009, the Coordination Committee issued a Greek national IPR plan. This document provided a summary of piracy and counterfeiting issues, the Greek legal framework, and the work of the legal offices and enforcement agencies, among other issues. It also outlined a 7-point action plan, with the following objectives: (1) ameliorating the legal framework; (2) collecting and processing statistical data and forming a database; (3) enhancing IPR enforcement measures; (4) coordinating law enforcement authorities; (5) training; (6) raising public awareness; and (7) promoting a dialogue on intellectual property rights. Unfortunately, the Interministerial Committee took no action on the plan and, to the knowledge of the copyright industries, ceased to meet. The copyright industries continue to urge the Government of Greece to coordinate enforcement efforts at an operational level; to adopt procedures for ISPs to deal effectively with repeat infringers; to develop and fund public awareness and education efforts; and to develop an open dialogue with industry to assist in these and any other enforcement efforts.

Actions by the tax police on business software cases: In April 2010, a new department specializing in IPR protection, was established within the Authority for the Prosecution of Financial Crimes (SDOE, or Tax Police) (by art. 88 Law 3842/2010), which has the authority to conduct raids and impose administrative fines on infringers. The new department was activated in the beginning of 2011 and has already conducted 14 raids against end-users and resellers within small and medium companies, seven taking place in Athens and seven in Thessaloniki. The majority of these were against end-users. Greek Intellectual Property law provides a fine of €1,000.00 for each copy of illegal software used and €20.00 for each illegal sound recording that is distributed by street vendors. The new department within SDOE imposed administrative fines of approximately €9,000,000 on infringers in 2011. Also, in accordance with the Greek Intellectual Property Law, SDOE submitted the above results to the Hellenic Copyright Organization (OPI) and OPI provided them to the affected software companies so they could seek compensation for these IPR violations. In addition, in September 2011 the SDOE Directorate of Planning and Coordination of Audits sent 3,216 audit letters to Greek companies requesting: a) a software inventory list, b) a copy of software invoices and c) software licenses, in order to check their software compliance. The subject companies included construction, architectural and engineering, public relations, design, pharmaceutical, and medical companies, and Internet cafes. As part of this proceeding, SDOE says it will proceed with raids against the non-responsive companies within 2012.

Moreover, in February 2011, (art. 4c of Presidential Decree 9/2011) a new Copyright Protection Department was established within the Cybercrime Unit of the Greek Financial Police (part of the Greek Police and independent

from the Ministry of Finance), authorized to conduct raids against Internet business software piracy. The Department was activated in August 2011 and has already conducted raids against operators of websites with illegal copyright products, although it faces a long, uphill battle against software piracy in Greece. Experts expect software piracy to remain at the same level in 2012, due to Greece's ongoing economic crisis and a need for greater publicity about SDOE's software piracy activities.

Some needed improvements within SDOE are still advised. In 2000, SDOE circulated instructions to its inspectors to include IPR, including software compliance, as part of their regular audits. In February 2011, SDOE issued a Circular, that was notified to its regional Directorates all over Greece, requesting that its inspectors not only check targets for infringing software and sound recordings, but also impose administrative fines on those found to be infringers. This action was pursuant to an innovative amendment adopted in January 2007 that introduced administrative fines for infringement of software and sound recording recordings. However, inspectors often do not have the technical knowledge to conduct software audits, and should receive adequate training to fulfill these duties. Technical infrastructure, including basic computer equipment in the Athens offices, and additional personnel are still needed. SDOE should be obliged to perform specific numbers of audits per year and to publicize all the results online (by reopening its currently inactive website) and in the media. BSA also urges that SDOE publish monthly statistics on the number of raids conducted and the resulting administrative fines imposed. BSA would like to see more raids against the companies that did not respond to SDOE's warning letters. The Greek Government should publicly commit to fight software piracy, an action that would increase public awareness regarding the risks of using illegal unlicensed software and codify the government's commitment to protect intellectual property.

Need to implement administrative fines in software and sound recording piracy cases: Enforcement authorities have not yet implemented the innovative law amendment adopted in January 2007 that introduced administrative fines for software infringements. For the last several years, the only enforcement activity implemented by the government has been audit letters and raids by the tax police. Proper implementation, as industry has proposed, would: (a) apply more deterrent administrative fines to be paid before legal proceedings in non-software related cases, (b) expand the scope of the regulation to include DVDs, (c) establish authority to inspect establishments (cafés, restaurants, etc.) where there may be illegal reproduction of phonograms for public performance, and (d) post the statistics of the results and the total amounts of the imposed administrative fines online.

Suspects caught with infringing music and software simply refuse to pay fines for pirated CDs, preferring to face a full trial where judges are known to issue light penalties that are often suspended (despite the available fines of €1,000–10,000 (US\$1,335–\$13,350), depending on the quantities seized). The Ministry of Culture ignored suggestions of the recording industry and the local collecting society for music rights (AEPI) in issuing a directive on procedural details, resulting in a new law that is so vague and full of gaps that the police are reluctant to proceed on the basis of the administrative fine procedures. The only new fine legislated is regarding the use of phonograms in cafés and restaurants that are copied/stored in hard drives without permission. IFPI is pressing SDOE to initiate inspections in such enterprises.

Civil infringement actions on business software: BSA has no major issues to report regarding civil litigation during 2011. Search orders are normally granted without major difficulties and parties typically settle the cases out of court. BSA reports that one court decision was issued in respect of an application for interim measures that determined that the software had been infringed and ordered the discontinuance of the illegal use of the software products.

Criminal actions (raids): Although the copyright industries report good cooperation with law enforcement authorities in Greece, judicial inability to follow through with speedy prosecutions and deterrent sentences is a major obstacle to progress against piracy in Greece.

The motion picture industry reports positive cooperation with Greek police, but the related court procedures face expected delays. The local film industry organization, the Company for the Protection of Audiovisual Works (EPOE), filed close to 50 criminal complaints by the end of 2011, of which 26 referred to video clubs, 13 to small-scale laboratories and distributors of pirate DVD-Rs, and seven to Internet cases. Authorities worked with industry to conduct 77 *ex officio* raids in the first 11 months of 2011, compared to 70 in 2010. In 2011, 57,000 pirate DVD-Rs and 7,000 counterfeit videogames were confiscated, an overall decrease compared to 2010. Police reports cite 103 IP criminal cases (including for pirate DVDs, music, and software) in the first part of 2011, a reduction by 63% from the same time period in 2010. EPOE reports that customs authorities took no action in 2011 against counterfeit optical discs (ODs), and that there is no indication of imported OD piracy. Customs also took no action for certain videogame peripherals for which industry investigations revealed pirate product being imported from China.

Many of the positive Internet actions taken in Northern Greece in 2010 were attributable to the valuable support of the Greek Cyber-Crime Unit of Thessaloniki, which to great disappointment was closed in 2011. However, 2011 also brought the closure of the most popular pirate forum site, “the Greekz,” along with four associated sites.

According to BSA, the IPR Department of the Greek Police conducted a small number of raids in 2011, but has not provided BSA with precise details. These included, however, raids against the operators of a website dealing in illegal copies of software, movies, PC games, and music products, and against the operators of a website providing unlicensed movie subtitles. While the IPR Department has the ability to conduct *ex officio* raids for software piracy, with an understanding of current economic constraints, trained personnel and increased raids are needed.

The recording industry reports that although its work and relationship with police authorities, especially in Athens, remained very good, it has transitioned out of anti-piracy actions aimed at physical piracy given the lack of court actions and the imposition of sentences that would establish at least some level of deterrence. As a result, there are no statistics available for comparison of 2011 with 2010.

Challenges in the courts—long delays, non-deterrent sentences: There is very little progress to report in the difficulties rights holders face in the Greek judicial system. Delays and non-deterrent sentences remain at the same level. Internet cases are very difficult to litigate, as the laws are not in place to permit plaintiffs to determine the identity of online copyright infringers, even in criminal cases – this despite opinions issued on behalf of the Attorney General that such data such be disclosed. The specialized IP courts in Athens and Piraeus only deal with civil and not criminal cases, and therefore are ineffectual against piracy. Greek prosecutors, especially at the local level, have largely ignored Supreme Court circulars directing them to prioritize IPR cases. Although this appears slowly to be changing in major Greek cities such as Athens, Thessaloniki, and Patras, more improvement is needed. Apart from the First Instance Court of Athens (which hears cases and renders judgments fairly quickly), when copyright cases do receive prosecutorial attention in Greece, they face inordinate delays and time-consuming procedures. Courts disregard measures requiring defendants to appear for hearings, and as a result most felony defendants are not present before the Court of First Instance or the Court of Appeals. Judges vary in practice from region to region, and often lack adequate knowledge for sophisticated IPR issues.

Industry continues to report that most copyright cases in Greek courts result in suspended sentences, although EPOE reports that it received four verdicts that resulted in non-suspended sentences in 2011. Judges still are prone to defy sentencing guidelines and insist on leniency for first offenders, suspending penalties and eliminating fines. A one-year imprisonment sentence by law may be reduced to three to four months and suspended for three years, and the €3000 fine (US\$3,860) is simply stricken entirely. Meanwhile, some First Instance Courts (especially in Athens, Piraeus, and Thessaloniki) now follow the law with non-suspendable sentences or fines, but defendants may launch an appeal at which point the Appeals Court often annuls the fines. Often, no bail is set to guarantee the appearance of the defendant in the higher court and the sentences handed out in first instance are suspended. In these and in felony courts, when the case reaches hearing after two to five years’ time, if the defendant cannot be located, the result is equivalent to an acquittal. The situation could be improved if the

Immigration Service and the Municipal Police could be directed to assist with court appearances in anti-piracy actions.

Special IP Courts: Specialized IP civil courts have been established in Athens, Piraeus and Thessaloniki. The copyright industries will continue efforts to expand such courts to additional cities, to encourage their judges to be relieved of other (non-copyright) duties, and to expand the scope of these courts to criminal copyright cases. While *ex parte* search orders are still granted without major difficulties, other delays in copyright cases, both in setting hearing dates and issuing orders, have reached untenable levels. Judges in typical cases are not adequately trained in IP matters. These concerns could be ameliorated with an expansion of the specialized IP courts throughout Greece.

Cooperation against Internet piracy: As filesharing of pirated works becomes increasingly common in Greece, the difficulties rights holders face in working with ISPs to identify infringing users in the filesharing environment have created a major obstacle to online enforcement, despite the efforts of copyright holders and the Hellenic Copyright Organization. Greek ISPs do cooperate with rights holders in cases involving websites hosting infringing material, but these cases are few. In the more prevalent file-sharing environment, ISPs refer to data protection legislation and the possibility of government sanctions to avoid cooperation. As a result, Internet investigations in Greece can go so far as identifying an infringing IP address but cannot uncover an infringer's name or physical address without a court or prosecutorial order. The relevant law for disclosure of personal data (Law 2225/1994) is very strict and limited to a specific range of crimes which, unfortunately, does not include even felony copyright infringement. In November 2011, rights holders brought an action against eleven Greek ISPs before the Athens Court of First Instance, with reference to the right of information provided under Article 8 of the EU Enforcement Directive. The ruling is still pending.

For its part, the Government of Greece has effectively shelved all efforts to improve the ability to bring Internet piracy actions for years now. Negotiations between copyright rights holders and ISPs went forward for more than two years under the auspices of the Hellenic Copyright Office (OPI), whose aim was for ISPs to adopt voluntary measures to decrease Internet piracy. The Ministry of Justice further promised to support the inclusion of felony copyright infringement as grounds in the data protection law for disclosure of personal data. Unfortunately, the negotiations came to no result and the data protection provisions remain unchanged.

COPYRIGHT LAW REFORM AND RELATED ISSUES

Greece was the first of the EU member states to complete implementation of the directives in its Copyright Law, and the copyright industries have been generally pleased with that implementation. Greece also has implemented the EU Enforcement Directive. Some reforms are still needed to allow rights holders to enforce copyright in the face of modern challenges, including Internet piracy and circumvention of TPMs.

The Copyright Act: There are currently no known plans for the Greek Government to take up amendments to the Copyright Act that the Ministry of Culture initiated in 2008 but abandoned soon thereafter. Future initiatives to draft amendments should consider the need to: strengthen court-imposed fines and sentences against suspension or non-payment, establish specialized police units, encourage ISP coordination on copyright infringement matters, and rectify shortcomings in provisions regarding TPMs to bring Greece into compliance with the WIPO Internet Treaties. When it initially adopted implementing legislation for the WIPO Internet Treaties, Greece opted for a bifurcated approach under which TPMs used by the creators of computer programs (Articles 66(5)(a) and (c)) are afforded less protection than those utilized in other types of works (Article 66A). Unfortunately, the software provisions fall far short of the requirements mandated by the WIPO Treaties, failing to explicitly cover both copy- and access-controls or provide civil remedies. The software provisions also utilize an impermissible "sole purpose test" for assessing whether a circumvention device runs afoul of the law. To achieve compliance, Greece must afford the same level of protection for TPMs applied to software as that which is applied to other types of works.

Government software legalization: BSA reports no new developments or progress on government legalization efforts during 2010. Governments should lead by example, stressing the importance of protecting intellectual property rights and legal software use within the Public Administration. By taking these positive steps and implementing policies that support legal software use, the Greek Government could raise significant awareness of the problem and help bring down the unacceptably high business software piracy rate.

Problems with obtaining access to personal data from ISPs: There has been no progress in the past year to amend Article 4 of the Data Protection Law (Law 2225/1994) to require ISPs to disclose the identity of users suspected of copyright infringement. In previous years, the Ministry of Culture opposed such an amendment and referred the question to the Ministry of Justice, but efforts within the Ministry of Justice appear to have been abandoned.

A legal structure by which ISPs may reveal the identities of copyright infringers, consistent with the 2008 European Court of Justice (ECJ) *Promusicae vs. Telefonica* decision, is a critical component of an effective campaign against Internet piracy. Such a provision should include appropriate steps to facilitate the ability of rights holders to obtain the necessary information to take civil actions to protect their rights.

Ineffective implementation against street vendors: Ministerial Decree No. K1-1178 was signed June 25, 2007 by the Minister of Public Order, and was intended to help remove street vendors from the streets by empowering the Municipal Police, the Tax Police and the regular Police to confiscate and destroy all items protected by the current intellectual property legislation when sold in the streets by street vendors. This 2007 decree, however, was never applied in practice due to the complexity of its content and the procedures necessary for its implementation. The decree itself did not mandate seizure and immediate destruction, but required boards comprised of municipal servants that would meet one or two times before they would come to a decision that would validate the destruction. As a result, the Municipal Police would rather pass the seized items to the Police. The Municipal Police, who are unarmed and have no authority to make arrests, insist on armed police escort because they are physically attacked by street vendors. Improved efforts are needed to get the three Ministries involved (that is, Internal Affairs, Public Order and Development), to considerably speed up the implementation process. Greek Law 3731/2008 provides the general provisions of jurisdiction of the Municipal Police, but the law does not explicitly provide for the arrest and prosecution of street vendors for IP infringements. Past amendments reportedly were proposed to this Decree that would simplify the procedure for the seizure and destruction of pirate products. New legislation to provide Municipal Police with authority to arrest and prosecute street vendors for IP infringements needs to be issued. The Municipality, the Ministry of Development and the Ministry of Citizen's Protection are still fighting with each other about which one will be the responsible authority. Despite the pressure from commercial chambers regarding counterfeit and pirate markets (including the CD-R market), nothing substantial has been yet done. Even a new law that provides the immediate destruction of pirate goods with the use of spray paint has not been put in effect yet.

IPR TRAINING AND PUBLIC AWARENESS

Greek judges would benefit greatly from IPR training organized by the Greek government, as a critical first step in effective enforcement against piracy.

The motion picture industry's local affiliate, EPOE, conducted training seminars with customs officials from the Athens International Airport and Port of Piraeus, but cites current economic conditions and some redundancies in attendance that negatively affected the usefulness of the trainings. BSA provided a training seminar to SDOE's new IPR Department officials in February 2011. BSA also has developed an awareness campaign in Greece, including outreach to companies and city mayors explaining the risks involved in using illegal software.

ISRAEL

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2012 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: Israel should be on the Watch List.¹

Executive Summary: Israel, which on September 7, 2010 became the 33rd member of the Organization of Economic Co-operation and Development (OECD),² and whose economic power matches that of the likes of South Korea and the European Union in terms of per capita GDP, has lagged behind in terms of protecting creative output of Israelis and foreign creators. Israel remains one of only two OECD members that has not implemented key provisions of, or joined, the WIPO Copyright Treaty (WCT) and WIPO Performances and Phonogram Treaty (WPPT), which provide the basic minimum framework for protection of copyright in the online environment.³ Piracy remains an issue in Israel, including Internet piracy, enterprise end-user piracy of business software, book piracy, and continued physical piracy in form of mostly burned recordable optical discs (CDs, DVDs, etc.). In 2011, Israel ranked 12th in the world in terms of number of detections of peers participating in unauthorized file sharing of select entertainment software titles. End-user software piracy is not subject to criminal liability as required by TRIPS.

Right holders' ability to take action to stop online infringement has been limited by a 2010 Supreme Court ruling, which held that courts are not empowered under Israel's existing legal framework to order Internet service providers (ISPs) to disclose the details of their users.⁴ The situation is not helped by new draft legislation which would essentially codify a duty of confidentiality for ISPs and provides safeguards for online infringers to remain anonymous and thereby evade detection. Israel has yet to introduce much-needed legislation to clarify the responsibilities of online service providers to address infringement, including a notice and takedown procedure for hosted content, and effective and fair mechanisms to deal with non-hosted infringements and repeat infringers. One major and longstanding issue for the audiovisual industry remains the refusal of Israeli cable operators to compensate copyright owners for the persistent unauthorized uses of their audiovisual works through their retransmissions (despite court judgments ordering them to do so), in violation of their international copyright obligations with respect to broadcast television signals.

PRIORITY ACTIONS REQUESTED IN 2012

Enforcement

- Enforce court decisions ordering Israeli cable operators to compensate copyright owners for unauthorized retransmissions of television broadcast signals, and establish a fair remuneration structure going forward.
- Ensure courts impose higher damages that create a deterrent to further infringements.
- Fortify the Special Police IPR Units, by adding staff and funding, and by providing them with *ex officio* raiding authority. A National Police Unit director should be assigned to coordinate districts for effective and sustained enforcement.
- Tackle burgeoning Internet piracy through proactive Israeli Police pursuance of Internet piracy cases.

¹For more details on Israel's Special 301 history, see Additional Appendix available at <http://www.iipa.com/pdf/2012SPEC301HISTORICALSUMMARY.pdf>. Please also see previous years' reports at <http://www.iipa.com/countryreports.html>.

²See Organization of Economic Co-operation and Development, *List of OECD Member countries - Ratification of the Convention on the OECD*, at http://www.oecd.org/document/58/0,3746,en_2649_201185_1889402_1_1_1_1,00.html.

³The following OECD members are members of the WCT and WPPT: Australia, Austria, Belgium, Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Japan, Korea, Luxembourg, Mexico, Netherlands, Poland, Portugal, Slovak Republic, Spain, Sweden, Switzerland, Turkey, United Kingdom, and United States. Only Canada, Iceland, New Zealand, and Norway have not, and of those, only Canada has not even partially implemented either of the treaties.

⁴Civil Leave to Appeal 4447/07 *Rami Mor v Barak* (Supreme Court, 25 March 2010). The case dealt with online defamation, but the ruling is not limited to defamation cases.



- Establish a national and independent prosecutors unit specifically to prosecute piracy cases, and give such cases priority attention for expeditious handling and processing in the courts.

Legislation

- Amend November 2011 data disclosure bill, which currently establishes a general duty of confidentiality for service providers, proposes a burdensome and lengthy court procedure which would deny right holders the possibility of obtaining infringing user details on an expeditious basis, and allows alleged infringers to remain anonymous when opposing a disclosure application.
- Enact legislation to address online infringement, including the establishment of criminal liability for the unauthorized making available of copyright works, an effective and fair takedown procedure to address non-hosted piracy, and injunctive relief and a duty on ISPs to provide information to law enforcement agencies and rights holders.
- Amend the Copyright Act to, *inter alia*, confirm criminal liability against enterprise end-user software piracy, provide minimum statutory damages, and prohibit circumvention of technological protection measures and the trafficking in (or the service of providing) circumvention technologies, devices, or components.

Market Access

- Scrap regulation prohibiting foreign television channels from carrying some advertising aimed at the Israeli market.

PIRACY AND ENFORCEMENT UPDATES IN ISRAEL

Previous reports and filings include discussions of piracy and enforcement challenges faced in Israel. The following section provides brief updates on piracy and enforcement issues in Israel.

Collections for Retransmissions of Broadcast Television Signals: Notwithstanding protections afforded to retransmitted works under Israel's copyright laws and an Israel Supreme Court decision confirming that Israeli law affords such copyright protection to copyright content retransmitted by cable, Israeli cable operators continue to refuse to make payments for their use of content contained in the broadcast television signal they retransmit. Specifically, AGICOA's now 12 year old claim, filed on behalf of its international members a significant claim seeking compensation for the unauthorized retransmission of copyright works by Israeli cable operators. This compensation is contemplated by international treaties including the Berne Convention and the TRIPS Agreement (as well as the WCT). AGICOA's claims, filed after many years of trying to come to terms with cable operators directly, have gone unresolved, though some of their claims have now been paid thanks to a favorable outcome in a bankruptcy case filed by certain cable operators that were part of the original suit. Most recently, in 2011, the District Court of Tel Aviv issued an order requiring cable operator defendants in AGICOA's lawsuit to pay damages for unauthorized retransmissions. AGICOA at the same time has actively sought an agreement to establish a structure going forward for compensation from cable operators. Cable operators have made clear their intention to abide by this court decision, but we remain concerned since they have avoided justice for more than a decade through skillful manipulation of the court system. It seems clear from the disregard of the Israeli courts and the failure by Israeli cable operators to advance serious settlement discussions that there is little will in Israel to ensure a fair result, namely an agreement or court order that equitable compensation must be paid to copyright owners of audiovisual works where those works are retransmitted by cable operators without authorization.

It is imperative that this matter be resolved promptly with fair settlement for past failure to compensate right holders, together with a reasonable agreement with AGICOA for payments going forward. In a previous Israeli Government Submission to USTR in the Special 301 process, the government indicated, "[r]etransmissions are subject to copyright exclusive rights," and "[w]ith respect to the referred to court case brought by AGICOA that case is still pending in the court system and its outcome will depend, *inter alia*, on the ability of AGICOA to prove their case." We appreciate the Israeli Government's statement confirming the exclusive rights of our copyright owners, but

respectfully suggest that local government officials have it within their power to support and motivate constructive settlement discussions both for past violations of copyright laws by cable operators and for fair payments going forward.

Business Software End-User Piracy Causes Harm to U.S. Software Companies: The level of business software end-user piracy in Israel has remained relatively low in recent years.⁵ In Israel, many small companies that purchase legal software engage in under-licensing by which they load computers beyond the scope of the license. Protecting copyright in Israel and reducing piracy would bring positive gains to the Israeli economy. For example, a study released in 2010 by International Data Corporation for the Business Software Alliance (BSA) demonstrated that reducing the PC software piracy rate in Israel by 10 percentage points in four years (from 33% to 23%) would deliver US\$799 million in new economic activity, 3,207 new IT jobs, and US\$430 million in additional tax revenues by 2013.⁶

Enforcement activities in Israel are chiefly aimed at pirate end-users. The software industry submitted two civil actions in 2011, in addition to many administrative actions and cease and desist letters. Unfortunately, end-user software piracy is not criminalized in Israel, a major deficiency in the law, and therefore, the Police and Customs do not get involved in such procedures. For deterrence, the industry must rely on the possibility of compensatory or statutory damages. However, no court has ever awarded the maximum statutory damage award (NIS100,000) (US\$27,000) and thus the increased maximum in the 2007 Copyright Law is dead letter. In addition, court decisions have created uncertainty about whether right holders can pursue copyright remedies against parties who, by virtue of their violation of the terms of an End User License Agreement (EULA), have forfeited their authorization to use the software.⁷ The industry reports that in some districts where the courts are busier than others (such as the Tel Aviv district court), end-user piracy cases move very slowly, sometimes taking up to six months to obtain a first hearing.

Industry representatives participate regularly in forums and lectures, and engages in public awareness over software issues and statistics (such as the BSA annual global software study). They also participate in IP forums, give lectures, participate in meetings with parliamentary committees, the Chamber of Commerce, and local police to further understanding of software-specific issues.

Book Piracy: Illegal photocopying at copy shops limits the legitimate market on university campuses. In some cases, unauthorized copying is facilitated by students, who produce the illegal copies of textbooks and sell them to other students. University administrators are apparently aware of the illicit activity but have not acted against the ongoing illegal activity. Certain universities also offer print-on-demand services where a student can request that a customized course pack be printed, for a fee, and likewise post excerpts taken from U.S. books on the institution's intranet for student use; in these cases, publishers' permission was not obtained and no royalties for such uses have been paid. In June 2011, in the case of *Hebrew University of Jerusalem vs. Yaakov Cohen*, the Supreme Court of Israel clarified the doctrine of contributory copyright infringement under Israeli law, holding that in order to find a defendant liable for contributory infringement, a plaintiff had to prove: 1) the existence of a direct infringement; 2) actual awareness of the infringement; and 3) actual and significant contribution. If those factors are present, then in the interest of efficiency, the Court ruled it would be proper to sue the conduits of the copying.⁸ This case sets an

⁵BSA's 2011 software piracy statistics will not be available until after the filing deadline for this submission, but will be released in May 2012, at which time piracy rates and U.S. software publishers' share of commercial value of pirated software will be available at www.iipa.com. In 2010, the software piracy rate in Israel was 31% (down from 33% in 2009), representing a commercial value of unlicensed software attributable to U.S. vendors of US\$80 million. These statistics follow the methodology compiled in the Eighth Annual BSA and IDC Global Software Piracy Study (May 2011), <http://portal.bsa.org/globalpiracy2010/index.html>. These figures cover packaged PC software, including operating systems, business applications, and consumer applications such as PC gaming, personal finance, and reference software – including freeware and open source software. They do not cover software that runs on servers or mainframes, or routine device drivers and free downloadable utilities such as screen savers. The methodology used to calculate this and other piracy numbers are described in IIPA's 2012 Special 301 submission at <http://www.iipa.com/pdf/2012spec301methodology.pdf>.

⁶ Business Software Alliance and IDC, *Piracy Impact Study: The Economic Benefits of Reducing Software Piracy: Israel*, 2010, at http://portal.bsa.org/piracyimpact2010/cps/cp_israel_english.pdf.

⁷The terms and conditions which are in the EULA should be seriously considered such as territorial restrictions for the use of the software products in other countries, Student and Educational versions which cannot be used by businesses, and OEM licenses which are valid only subject to the purchase of new hardware along with that specific software product.

⁸*Appeal to the Supreme Court 5977/07 by the Hebrew University of Jerusalem vs. Yaakov Cohen, the Labour Party and Schocken Publishing House against the ruling by Y Shapira in T.A. 6306/04 from 17 May 2007*, June 20, 2011 (heard on November 15, 2010 by Deputy President Rivlin, and Justices Jubran and

important legal principle under which those who, while not directly infringing, can nevertheless be held contributorily liable for copyright infringement of others.

Internet Piracy: A recent study showed Israelis use the Internet for an average of 2,300 minutes per month, second in the world only to Canada.⁹ More than 5.3 million Israelis used the Internet according with almost 1.7 million broadband subscribers as of 2008 (according to ITU). As such, it is not surprising that Internet infringements have increased in Israel, with illegal P2P filesharing, BitTorrent, deeplinking; illegal use of web bulletin boards and cyberlockers, and direct sharing of files becoming more prevalent.¹⁰ The recording industry estimates that over 90% of all music transmitted over the Internet in Israel is infringing. The Entertainment Software Association (ESA) reports that during 2011, Israel was 12th in the world in the number of connections by peers participating in the unauthorized file sharing of select ESA member titles on public P2P networks, up from 14th in 2010.¹¹

The Israeli Government has recognized the importance of Internet piracy issues, as detailed in previous filings in the Special 301 process.¹² Unfortunately, Israeli Government enforcement authorities (police, tax authorities, customs) have been relatively uninvolved in online enforcement, and the criminal liability of online infringers under existing law remains unclear. As a result, civil action remains the only course of action available to right holders to deal with infringement. The ability to bring effective civil actions has now been hampered by a March 2010 decision of the Supreme Court, where it was held that Israeli courts are not empowered to issue disclosure orders against ISPs. Although the court's ruling rests on procedure (that existing court rules do not provide a basis for disclosure orders), the ruling means that right holders cannot obtain the details of anonymous infringers for the purpose of bringing litigation against them. The Supreme Court, in its ruling, called upon to legislators to rectify the problem and pass legislation explicitly granting courts the powers to order disclosure. As detailed below, the Knesset is working on legislation, but the current draft is flawed. With no criminal enforcement and limited ability to bring civil action, local industry depends on voluntary cooperation from ISPs to deal with online piracy, and reports a generally satisfactory level of cooperation.

One recent case (*ALIS – Association for the Protection of Cinematic Works v. Rotter.net Ltd.*),¹³ following only two months after the *Hebrew University* case, resulted in a finding of no infringement for a deep linking forum site. However, the case may provide helpful guidance in terms of secondary liability for websites or services predicated on infringement of others. The Central District Court held that the owners of the website forum *rotter.net* which contained many user-posted links to infringing movie downloads, could not be held liable for these links, and were not required to monitor the site for infringement as long as they were operating a notice-and-takedown procedure. However, the court set out two circumstances under which the site could have been held liable for providing infringing links: 1) if the forum operator actively encouraged its users to post links to infringing websites or marketed its website as a platform for posting links to infringing websites; or 2) if the forum was predominantly

Danziger). The Israel Labour Party subsidized a student club called "Teh Ofek" (Horizon Cell) at the Mt. Scopus Campus of Hebrew University. As an incentive to get students involved, they provided cheap versions (NIS10) of a course textbook entitled "Traditional Japan," the copyright for which is owned by the publisher, Shocken and which sells for NIS89. Shocken sued the publisher-distributor, Yaakov Cohen, the Labour Party, and Hebrew University.

⁹Sharon Bauder, *Canada, Israel Rank Highest in Internet Usage*, VJ Virtual Jerusalem, January 11, 2011, at <http://www.ynetnews.com/articles/0,7340,L-4007770,00.html>.

¹⁰The independent segment of the film and television industry (IFTA) reports that online and physical piracy remain a significant export constraint in Israel for independent producers and distributors, the majority of which are small to medium-sized businesses. Independent producers and distributors confirm that DVD sales have been particularly impacted since pirated digital copies are routinely offered for free online and with the same quality viewing experience that a DVD can provide. Piracy severely undermines and may permanently damage legitimate distribution networks essential to reaching consumers in Israel and leaves little confidence for investment in intellectual property. Independent producers are especially concerned about Internet piracy because of its harm to legitimate online distribution services – harming consumers and rights holders alike. Revenue from these services, which is licensed country-by-country, is critical to financing the development of new creative works worldwide.

¹¹These figures do not account for downloads that occur directly from hosted content, such as infringing games found on "one-click" hosting sites, which appear to account each year for progressively greater volumes of infringing downloads.

¹²The Israeli Government has indicated in its 2009 Submission to USTR in the Special 301 process that "[p]iracy carried out through the internet is ... receiving attention," and noted, "like in many countries, where the servers are located outside of the jurisdiction enforcement is impeded," while when "activities are carried out from Israel enforcement is easier." The government's point regarding the potential complexities of enforcement when multiple jurisdictions are involved in an infringement is well taken, although the IFPI cases indicate that it is quite possible, and indeed, in the years ahead, will be necessary for enforcement authorities to deal with cases in which activities occur both domestically and extraterritorially.

¹³*ALIS, the Israeli Anti-Piracy Organization v. Rotter.net*, CA 567-08-09, August 8, 2011 (on file with IIPA).

infringing and is therefore was “improper”; this would be established on the basis of evidence showing that the majority of links posted on the forum are to infringing sites/content, and that the forum operator has knowledge of the infringement. The court stated as an example that a site would be “predominantly infringing” and “improper” if a paid site had more than 10 infringing links constituting more than 25% of the total links in the forum. If more than 50% of links on a free site are to infringing websites, the site would also be improper according to the court. Had the site been found to be improper, a presumption of knowledge of the extent of infringement on the site for purposes of a finding of contributory liability would result. While the owners/operators of *Rotter.net* site were not found secondarily liable in this instance, the case sets forth some important guidelines to other sites which may be providing links to infringing materials or otherwise are forums for such links, whether they are commercial or not.¹⁴

Physical Piracy: Commercial piracy of music product remains a major problem in Israel, and with an estimated three million pirated/counterfeit CDs sold annually in Israel, the industry reports that 95% are infringing CD-Rs burned in small burn-to-order labs. While the Police IP Unit has taken some steps to deal with this problem, more action is needed. The Unit is understaffed and does not have the required resources and manpower to address the problem effectively. As a result, even where the Unit investigates a case, the process is slow and it often takes months until charges are filed. There is an urgent need for specialized IP prosecutors at the police and attorney general's office to deal with infringement cases.

COPYRIGHT LAW UPDATES AND RELATED ISSUES

Need to Amend Pending Disclosure Bill So It Does Not Shield Infringers: A recent Disclosure Bill¹⁵ would essentially codify a duty of confidentiality for ISPs and provide safeguards for online infringers to evade detection while remaining anonymous. The existing text, which passed first reading, establishes a general duty of confidentiality for service providers and denies right holders the possibility of obtaining infringing user details on an expeditious basis (i.e., without getting a court order), and allows alleged infringers to remain anonymous when opposing a disclosure application (unless the court is convinced that the applicant's ability to challenge the opposition is undermined by the inability to cross-examine the subscriber). The proposal should be amended, so that right holders are in a position to obtain disclosure orders without delay, and avoid situations in which alleged infringers can oppose disclosure applications while maintaining their anonymity.

Draft E-Commerce Bill Should Move Forward: Reports indicate that the Ministry of Justice is considering the possibility of new legislation to address online infringement. The *Hebrew University* and *Rotter.net* cases demonstrate that secondary liability principles generally apply in Israel, but the contours of how these will be codified remains to be seen. It is critical that, whatever the approach, service providers do not receive blanket immunity for infringements of others occurring on or through their services, but rather, that ISPs should as a default comply with notices expeditiously to take down infringing materials (immediately in the case of pre-release material), have in place effective and fair policies to address non-hosted infringements and repeat infringers, and have provisions to discourage web advertising and payment processors in association with infringing sites. Legislative amendments should establish a clear obligation on ISPs to expeditiously cooperate with right holders when they know or have red flag knowledge (i.e., they are aware of facts and circumstances from which infringement is apparent).

Other Issues in the Copyright Law, Including the Lack of WCT/WPPT-Level Protection for TPMs: Copyright law in Israel is governed by the 2007 Copyright Law. The law creates a basic structure for protection of U.S. copyright in Israel, but still may not be fully compatible with Israel's international obligations, and should be modernized including bringing it into compliance with the WCT and WPPT.¹⁶ The following are some remaining areas of concern for the copyright industries in Israel that should be addressed.

¹⁴ See discussion of case at David Mirchin, Adv., *IT Update: Are Websites Liable for Links to Infringing Materials?* January 2012 (on file with IIPA).

¹⁵ Bill on the Disclosure of Details Relating to Electronic Network Subscribers, published 22 November 2011, Bills – Rashmote, No. 421, available at http://www.tazkirim.gov.il/Tazkirim_Attachments/40952_x_AttachFile.doc (in Hebrew).

¹⁶ The U.S. Trade Representatives National Trade Estimate 2011 indicated, “Israel has signaled a new willingness to make progress on other IPR issues of concern, such as implementing the core requirements of World Intellectual Property Organization (WIPO) “Internet Treaties,” (i.e., the WIPO Copyright Treaty

- **No Protection Against Circumvention of Technological Protection Measures:** Israel is one of the only OECD members that has not protected technological protection measures from unlawful circumvention, trafficking in circumvention technologies or devices, or providing circumvention services. The Israeli Government points out in written filings that Israel is not a member of either the WCT or WPPT so it is under no obligation to introduce protections of TPMs. This is true, but the Government is incorrect to suggest that authors oppose or do not rely on TPMs to make content available in the digital environment. Protection against circumvention of TPMs remains a vital part of development new distribution models for the digital and online environments. WIPO advocates such protection, noting, “it is not sufficient to provide for appropriate rights in respect of digital uses of works, particularly uses on the Internet ... no [digital] rights may be applied efficiently without the support of technological measures of protection There was agreement that ... appropriate legal provisions were needed to protect the use of such measures.” The Israeli Government is also incorrect to assert there is a “lack of uniform implementation worldwide,” as there are over 100 countries/territories as of February 2012 that had fully or partially implemented the anti-circumvention obligations, had already committed to, or had draft legislation which would provide such protection.
- **Need to Criminalize Enterprise End-User Software Piracy:** The Israeli Government’s position has long been that unauthorized use of software in a business setting does not constitute a crime in Israel. This situation makes deterrence very difficult as to end-user piracy, since it means BSA has to exclusively rely on bringing civil cases against enterprise end-user software piracy. In those cases there is invariably a lack of deterrence. The Israeli Government has in previous submissions excused its failure to criminalize this commercial form of piracy, indicating that “Business Software End user liability is addressed by Israeli copyright law” and asserting that Israel has some of the world’s lowest rates of business software piracy.” They have helpfully indicated that “[c]riminal liability may also inure provided that the software has been distributed on a commercial scale,” and IIPA contends that the dissemination of software within a business setting constitutes such commercial scale distribution. IIPA is interested in exploring this theory for criminal liability in Israel under the new Law (and the Israeli government’s interpretation in its filings). The unauthorized use of business software and other copyright materials in a commercial setting must be criminalized in order to meet the TRIPS Article 61 requirement to criminalize piracy on a commercial scale. To the extent the current law does not criminalize unlicensed use of software, the government should amend the law.
- **Minimum Statutory Damages Needed:** Currently, under Section 56 of the Copyright Law, 2007, the statutory damages range between no damages and NIS100,000 (US\$27,000), replacing the old minimum of NIS10,000 (US\$2,675) and maximum of NIS20,000 (US\$5,350). While the higher maximum is very helpful, the fact that there are no longer minimum statutory damages has harmed enforcement. To illustrate, while some courts have awarded zero damages against some infringers, no court has ever awarded any amount approaching the NIS100,000 maximum. This absence of a certain deterrent outcome for infringers has negatively affected copyright owners’ ability to seek redress effectively. For example, BSA, which operates its program through warnings and the elimination of illegal uses, has been stymied in its efforts due to the lack of an effective statutory damage remedy. The lack of such a remedy has also had a negative impact on enforcement against resellers (who are also subject to the same civil damages regime). It should further be noted that statutory damages are awarded at the discretion of the court (“the court is allowed, at the claimant’s request”) rather than at the election of the claimant, which is regrettable. Finally, the question arises whether pre-established damages should be available on a per-copy basis, or only on a per-work basis. Recent judgments regarding software copyright infringements have resulted in one statutory damage award per software title infringed, regardless of how many copies were infringed, though the number of infringing copies may be considered in the court’s determination of the amount of the award.

and the WIPO Performances and Phonograms Treaty). The United States welcomes this step, and encourages Israel to proceed with full accession to, and implementation of, the WIPO Internet Treaties.” United States Trade Representative, *2011 National Trade Estimate Report on Foreign Trade Barriers: Israel*, March 2011, at http://www.ustr.gov/webfm_send/2751.

- **Protection for Foreign Phonogram Producers on Basis of National Treatment Desired (Sections 8, 10):** Under the 2007 Law, foreign right holders in sound recordings (other than U.S. sound recordings which enjoy national treatment on the basis of bilateral arrangements) were denied equal treatment and could be denied rights, and therefore payments, for their sound recordings in Israel. The government should reinstate protection for foreign sound recordings enjoyed under the previous law, granting all foreign phonogram producers the full set of rights granted to Israeli nationals.¹⁷
- **Limited Right to Injunctions:** Section 53 could limit the ability of copyright owners to enjoin infringements of their rights, by providing that the right to an injunction in copyright infringement cases exists “unless the Court has grounds for not ordering so.” This limitation appears to undermine the well-rooted view under Israeli case law that the right for an injunction in infringement of IP matters (copyright included) is not subject to exceptions. This amendment raises questions about Israel’s compliance with TRIPS Article 44.
- **Destruction/Forfeiture Not Adequately Provided:** Section 60 of the 2007 Law provides for the possibility of destruction of infringing goods, but also gives courts the ability to order the “transfer of the ownership of the infringing copies to the claimant, if he has so requested, and the court may, if it finds that the claimant is likely to make use of those infringing copies, order the complainant to make payment to the defendant in the manner which it shall prescribe.” This provision appears to violate Article 46 of TRIPS which mandates the disposal of infringing goods “without compensation of any sort,” since the Section appears to create a default rule allowing the transfer with payment.
- **Term of Protection for Sound Recordings:** Under the 2007 Law, Israel protects sound recordings for only 50 years “from the date of its making.” There is no reason not to afford at least 70 years to the owners of sound recordings.¹⁸ The international trend is for more countries to amend their laws to provide at least 70 years for sound recordings, and the government of Israel should agree to follow this trend and provide longer term to producers of sound recordings in Israel.
- **Protection for Pre-Existing Works and Rule of the Shorter Term (Section 44):** Section 44 of the Law intends to impose a rule of the shorter term on works/phonograms, but apparently misapplies this rule in a way that violates Israel’s obligations under Article 7(8) and 18 of the Berne Convention. Namely, Section 44 provides, “The period of copyright in a work listed below shall not be longer than the period of copyright prescribed for such work in the law of its country of origin...” Article 18 of the Berne Convention requires that Israel protect “all works, which, at the moment of [the Berne Convention] coming into force, have not yet fallen into the public domain in the country of origin through the expiry of the term of protection.” It is well understood that this requires Israel to protect U.S. works, including those that may have fallen into the public domain due to failure to comply with a Berne-prohibited formality, or which never had a term of protection due to failure to comply with a formality. The rule of the shorter term allows that the “term shall not exceed the term fixed in the country of origin,” not the term “prescribed for such work” as in the Israeli provision. It is well understood that the “term fixed” means the term the work would have enjoyed had all formalities been complied with. Thus, Israel’s Section 44 may be deficient as compared with the Berne Convention and TRIPS, since there may be works or phonograms which fell into the public domain in the United States due to failure to comply with a formality, but which under Berne Article 18, must be protected in Israel. Israel must confirm that Section 44 meets the international obligation, or must amend it so that it does so.
- **Parallel Importation:** The definition of “infringing copy” in Paragraph 1 of the 2007 Law excludes from protection copies made with the consent of the owner of rights in the country of manufacture and imported into

¹⁷ The 2009 Israel Submission indicates, among other things, that “[t]he treatment of sound recordings under the new Copyright Law is fully conformant with Israel’s bilateral and multilateral obligations,” a statement with which we agree. However, the Submission fails to address the justification for the weakening of protection, i.e., the failure to maintain protection under the previous law, and the move from providing equal national treatment to discriminatory treatment for non-U.S. foreign recordings.

¹⁸ 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.

Israel . This means that goods which are considered genuine in their country of origin may not be prevented from importation to Israel even where the copyright owner in Israel is not the copyright owner of the work in its country of origin and has not authorized the import. Parallel imports of copyright material ultimately harm local distributorships, and increase the likelihood that piratical product will be “mixed” in with shipments of parallel imports, making piracy harder to detect and enforcement more difficult.

- **Limitations and Exceptions:** IIPA has in previous submissions discussed exceptions in the 2007 Law which could, if not properly interpreted, run afoul of the well-established Berne “three-step test” (incorporated into TRIPS), especially if applied in the digital environment. IIPA appreciates the Israeli government’s reaffirmation that “[t]he Berne ‘three step test’ ... sets forth a binding international standard that is embodied in the new Copyright Law, and in particular in its ‘fair use’ section ... and exceptions sections.” At least one decision has created concerns about how Israeli courts will interpret the new fair use provisions of their law, and we suggest that USTR, in conjunction with experts from the Copyright Office and PTO, begin a dialogue with the government, to ensure that it acts in a manner conducive with achieving interpretations consistent with Israel’s international obligations under the three step test. Exceptions raising cause for concern include:
 - The **public performance exception in educational institutions** (Section 29) (e.g., where sound recordings are concerned, the exception should be limited to teaching or examination purposes only).
 - The **computer program exceptions (backup and interoperability)** (Section 24) (e.g., the exception allowing for reproduction or adaptation for purposes of interoperability and for other purposes should be made consistent with the European Directive on the Legal Protection of Computer Programs, Articles 5 and 6 in order to appropriately narrow the exceptions).
 - The **temporary copy exception** (Sections 26) (while Sections 11(1) and 12(4) confirm that temporary copies are protected in Israel, the exception in Section 26 is vague enough, however, to cause concern, e.g., “to enable any other lawful use of the work,” is overly broad).
 - The **library/archive exception** (Section 30) which as written fails to meet the Berne Convention and TRIPS standard for exceptions; *cf.* 17 U.S.C. § 108(d) and (e) (U.S. Copyright Act) which allows for limited inter-library transfer of a single copy of one article from a compilation or periodical, in limited circumstances, or of an entire work, but only where the work cannot be obtained at a fair price.

MARKET ACCESS

Television Advertising Restriction Violates Israel’s WTO Agreement: IIPA generally opposes television advertising restrictions, as they lead to a reduction in advertising-based revenue, impeding the development of the television industry. On May 9, 2002, Israel’s Council for Cable and Satellite Broadcasting adopted a new provision to the existing Bezeq Law that regulates the pay television industry, creating many restrictions on the ability to provide advertising in the Israeli market.¹⁹ 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.

¹⁹ The U.S. Trade Representative’s NTE report in March 2011 indicated,

“Only selected private Israeli broadcast television channels are allowed to carry advertising. These channels received broadcast licenses and the advertising privilege in exchange for certain local investment commitments. Israeli law largely prohibits other broadcast channels, both public and private, from carrying advertisements. Foreign channels that air through the country’s cable and satellite networks are permitted to carry a limited amount of advertising aimed at a domestic Israeli audience. Currently, the regulations allow foreign channels no more than 25 percent of their total advertising time to target the Israeli market.”

USTR, *2011 National Trade Estimate Report on Foreign Trade Barriers: Israel*, *supra* note 16.

ITALY

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

2012 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: Italy should remain on the Watch List in 2012.

Executive Summary:¹ As the Italian Communications Regulatory Authority (AGCOM) moves forward with important regulations to address online infringement in 2012, IIPA urges the U.S. Government to remain engaged with Italy to ensure that this important momentum results in effective measures against Internet piracy, as well as needed legal and enforcement improvements. As a country where piracy levels top worldwide charts and a number of enforcement and legal weaknesses remain, Italy must brace for long-term focus if it is to counter such high levels of physical, digital, and end-user piracy. While a number of important hubs for online piracy in Italy have been shut down in the past two years, some Italian consumers have smartly adjusted their behavior to other activities, such as linking to foreign-hosted pirate content. As a result, legitimate content distribution continues to have difficulty accessing the Italian market. To fully address online piracy, further improvements in civil, administrative and criminal enforcement are needed. The Data Protection Authority and Italy's civil courts have interpreted privacy laws in such a way as to immunize heavy online infringers against civil enforcement measures. Enforcement authorities continue to be generally cooperative in conducting raids, but need better resources to meet demands in 2012. Courts suffer from a variety of hindrances, including: low prioritization for IP crimes; insufficient resources for the civil IP specialized courts, especially in the framework of the newly created specialized sections for company law that handle both IP and corporate matters; penalties that are not sufficiently deterrent in some cases; and laws that need to be updated to reflect the online environment. The Supreme Court recently held that self-employed professionals involved in software piracy would not be subject to criminal liability, making it virtually impossible to prosecute software pirates engaged in the professions.

PRIORITY RECOMMENDED ACTIONS FOR ITALY IN 2012

- Complete efforts to adopt AGCOM's proposed regulations, establishing an effective system for the active cooperation of Internet service providers with rights holders against online infringement.
- Take additional criminal actions against peer-to-peer (P2P) services that meet the criteria for injunctions and liability established in the PirateBay decision and order ISPs to block access to those services.
- Coordinate government bodies at a high level toward focused IP enforcement efforts, increased IP training, and more dedicated resources within the police and the judiciary.
- Eliminate legal obstacles for rights holders to gather non-personally identifying IP addresses and, consistent with the European Court of Justice (ECJ) decision in the *Promusicae v. Telefonica* case, identities of infringers to take appropriate civil actions for the protection of their rights in the online environment.
- Effectively enforce the anti-camcording law to curb the increasing problem of theatrical camcord theft and theft of dubbed soundtracks.
- Eliminate the stickering requirement with respect to business and entertainment software and recorded music.
- Clarify that professionals, like corporations, who infringe copyright on software in the framework of their activities are criminally liable under Art. 171bis of the Copyright Act.

¹For more details on Italy's Special 301 history, see IIPA's "History" appendix to this filing at <http://www.iipa.com/pdf/2012SPEC301HISTORICALCHART.pdf>, as well as the previous years' reports, at <http://www.iipa.com/countryreports.html>. For a summary of IIPA's 2012 global issues, see our cover letter at <http://www.iipa.com/pdf/2012SPEC301COVERLETTER.pdf>.



COPYRIGHT PIRACY IN ITALY

Internet piracy generally: Internet piracy continues to pervade the Italian market, in a variety of forms. Despite some enforcement successes against major online piracy operations, many forms of digital piracy continue to be unaffected and widespread. Many of the trends seen in 2010 continue in 2011: where illicit P2P file sharing once held the position as the single most damaging form of piracy online, sites linking to infringing content, including to foreign cyberlocker sites, now also are gaining in popularity. Mobile device piracy of music and videogames is also growing rapidly. As a result of this and enforcement deficiencies, the country's market of 30 million Internet users – the fourth largest in the EU – is less accessible to legitimate digital content providers than it should be.²

ISPs are not sufficiently cooperative with efforts to tackle illegal file sharing and other copyright infringements online. Some of the copyright sectors report that website operators were more responsive in the past year to takedown notices; still, the existing takedown process is too cumbersome to be effective against hosted piracy, and hosted piracy is only a fraction of Italy's online piracy problem. The initiative of Italy's Regulatory Communication Authority (AGCOM), launched in December 2010 and detailed below under "**Reform for Cooperation on Internet Piracy**," shows promise to address some of the escalating problems that rights holders face online, but does not appear poised to address problems related to P2P piracy directly.

Online piracy of entertainment software: The Entertainment Software Association (ESA) reports that Internet piracy remains a severe problem for its members in Italy, which again in 2011 placed first in the world in the number of connections by peers participating in the unauthorized file sharing of select ESA member titles on public P2P networks.³ ESA research also identified Italian ISPs as three of the top ten ISPs worldwide in terms of the number of subscribers participating in peer connections to swarms where ESA member titles were illegally shared, with Telecom Italia ranking first. 2011 was also witness to a growth in sites offering hyperlinks to videogame content.

Online piracy of music and sound recordings: In the last major third party report commissioned by the recording industry in 2010, according to the Tera Consultants study, online music piracy accounted for losses of \$200 million in 2010—far higher than what the industry generated in legitimate sales. The local recording industry associations, FIMI and FPM, report that more than 7 million people were using P2P networks for illegal uploading and downloading of music files in 2010. While piracy of physical product was still around 23% of the market, 95% of the global music downloads were unauthorized.

Online piracy of audiovisual works: P2P piracy and forums directing users to illegal copies of movies continue to damage the industry, while cyberlocker sites and links to them have caused a dramatic worsening in online piracy of motion pictures in Italy. The Motion Picture Association (MPA), through its local affiliate the Audiovisual Antipiracy Federation (FAPAV), reports that the overall incidence of audiovisual piracy in Italy has grown by 5% since 2009,⁴ much of this due to online piracy, for a total loss of €496 million (US\$670 million). According to 2011 FAPAV-IPSOS research, 37% of consumers have used an illegal copy at least once during the period under review and an estimated 384 million total infringements took place, an increase of almost 30 million over the previous year. With regard to MPAA members content, MPAA notes that Peer Media Technologies reported that during 2011, users initiated over 90 million downloads/uploads of unauthorized copies of major U.S. movie titles via certain P2P protocols in Italy.⁵ A phenomenon unique to the audiovisual industry is the illicit recording of Italian language audio

²There are an estimated 30 million Internet users in Italy as of June 2011, a 49.2% penetration rate. <http://www.internetworldstats.com>.

³ESA's reporting on P2P activity does not take into account downloads of these titles that occur directly from hosted content, such as games found on "cyberlockers" or "one-click" hosting sites, which appear to account each year for progressively greater volumes of infringing downloads.

⁴Italy's piracy rate for 2010 was 37%.

⁵A major U.S. movie is defined as a movie released in 1,000 or more theaters in the U.S., so these numbers reflect only a small subset of movie-related piracy activity (since it excludes non-major releases, including local titles, other peer-to-peer protocols, and non-peer-to-peer ones, such as websites, and streaming via other technologies). Also, since local language title versions for scanning are not always available from established sources, and access to foreign language BitTorrent sites may fluctuate, results in certain countries are likely underrepresented.

tracks in theaters immediately following a film's release, which are then added to good quality pirate video found on the Internet.

The independent segment of the film and television industry (IFTA) reports that Internet-based piracy has affected business in Italy and prevents the establishment of legitimate online distribution platforms and services for consumers, which independent producers may use to finance future productions. For independent producers who license content country-by-country, online piracy instantly exports troubled marketplaces and high piracy rates to other markets. The independent production sector is limited in its ability to shift to technology-enabled new business practices that might limit piracy.

Online piracy of business software: The Internet is a growing source of unauthorized productivity software and contributes to this sector's piracy losses. Cracked software, illegally downloaded using false codes or certificates of authenticity (COAs), is increasingly commonplace. Illegal software is available via infringing filesharing services, from illicit websites, and through infringing use of cyberlockers, and auction sites. The Internet is also a major source for manuals and packaging. Organizations dedicated to cybercrime exacerbate these problems as they continue to grow in technological sophistication.

End-user piracy of business software: At roughly one half of the PC software market, the level of piracy of business applications software by corporate end-users – the major cause of losses to the business software industry in Italy – is quite high by Western European standards.⁶ According to a 2010 report prepared for BSA by market research firm IDC, the information technology sector's contribution to the Italian economy could be even bigger if Italy's PC software piracy rate were to be lowered 10 percentage points over the next four years. This would create an additional 7,538 jobs, US\$5.2 billion in local industry revenues, and nearly US\$1.8 billion in additional tax revenues.⁷

Camcord Piracy: The level of camcord piracy in Italy continues to be unacceptably high, rising yet again in 2011. This is particularly disappointing given that Italy was the first EU country to adopt an anti-camcording law. The problem in Italy is a lack of enforcement and the fact that it takes literally years to move a criminal complaint. Audio captures is the biggest problem in Italy; camcord thieves capture the Italian audio track and marry it to a video capture available online. In this way, the infringer can select the highest quality visual image and pair it with an Italian soundtrack; the product is then uploaded to the Internet and burned to discs to be sold through street vendors. In 2011, there were 81 audio captures and 12 video camcords sourced to Italy. Designed to target the Italian market, these illicit audio and video captures have an immediate and direct detrimental impact on the legitimate Italian marketplace.

Piracy of physical product generally: Organized criminal syndicates remain heavily involved in the production and distribution of infringing product, particularly in Southern Italy.

Business software: As a fast-growing market for consumer PCs, Italy faces a new trend in the increasing reuse of old computers, which often contain pre-installed pirated software.

⁶BSA's 2011 software piracy statistics will not be available until after the filing deadline for this submission, but will be released in May 2012, at which time piracy rates and U.S. software publishers' share of commercial value of pirated software will be available at www.iipa.com. In 2010, the software piracy rate in Italy was 49%, representing a commercial value of unlicensed software attributable to U.S. vendors of US\$1.13 billion. These statistics follow the methodology compiled in the Eighth Annual BSA and IDC Global Software Piracy Study (May 2011), <http://portal.bsa.org/globalpiracy2010/index.html>. These figures cover packaged PC software, including operating systems, business applications, and consumer applications such as PC gaming, personal finance, and reference software – including freeware and open source software. They do not cover software that runs on servers or mainframes, or routine device drivers and free downloadable utilities such as screen savers. The methodology used to calculate this and other piracy numbers are described in IIPA's 2012 Special 301 submission at <http://www.iipa.com/pdf/2012spec301methodology.pdf>.

⁷The Economic Benefits of Reducing PC Software Piracy, commissioned by BSA and conducted independently by International Data Corporation (IDC), released September 15, 2010, looks at the bottom-line economic benefits of reducing piracy in 42 countries that together account for 93 percent of the total packaged software market. It is available online at <http://www.bsa.org/idcstudy>.

Entertainment software: Although sales of pirated hard copies of video games persist, online piracy is now the predominant problem facing the industry in Italy. Still, unauthorized copies of games downloaded from the Internet are of no use without circumvention devices, which enable users to make and play unauthorized copies on game systems. Despite improvements in courts' understanding and handling of cases involving circumvention devices, they remain widely available to users.

Audiovisual works: MPA reports that while physical piracy remains a problem (about 24% of total infringements), online piracy, as well as camcord piracy, are the predominant problems confronting its members in Italy.

IFTA reports that physical piracy of DVDs remains a significant export constraint for independent film producers and distributors, the majority of which are small- to medium-sized businesses. Independent producers partner with local authorized distributors to finance and distribute film and television programming. These authorized distributors find it nearly impossible to compete with pirates and report that the Italian marketplace has been decimated by piracy. Producers and distributors confirm that DVD sales have been significantly impacted since pirated DVDs are readily available on the street, at kiosks and in shops throughout Italy. Unable to compete with free, legitimate distributors often cannot commit to distribution agreements, or they offer license fees drastically below market rates, which are inadequate to assist in financing independent productions. Piracy undermines and may permanently damage the legitimate distribution networks essential to reaching consumers and leaves little confidence for investment in intellectual property in Italy.

Books and journals: Unauthorized commercial photocopying continues to plague academic publishers. Italy's Anti-Piracy Law allows a certain amount of photocopying, upon payment of remuneration to a collecting society. Industry reports some success with licensing educational institutions (namely libraries), but copy shops unfortunately continue unauthorized activities with little interference. Abuse of the law's provisions is common, adversely affecting Italian and foreign publishers alike. Copy shops are reportedly using increasingly sophisticated digital equipment in undertaking their activities—a growing trend that makes detection of unauthorized copying activities more difficult as scanned copies of reading materials are stored for printing on demand, rather than stockpiled.

REFORM FOR COOPERATION ON INTERNET PIRACY

Since Italy adopted the "*Decreto Roman*" in 2010, assigning Italy's Regulatory Communication Authority (AGCOM) with the responsibility to establish rules for the protection of copyright over the Internet, AGCOM has undertaken extensive work to draft regulations with the goal of tackling some of the most blatant and damaging forms of online piracy that plague the Italian market. The copyright industries are very supportive of AGCOM's efforts to seek broad-based support for this initiative, which is especially crucial in a time when opponents spread misinformation to disrupt such efforts. IIPA has provided comments to AGCOM⁸ and urges the Italian Government to push the regulations forward in 2012.

At the heart and purpose of AGCOM's work is the need for a solution to online piracy that is effective and efficient, while respecting due process. When new copyrighted works are released, rights holders frequently have just a matter of weeks to recoup their considerable investment before consumer interest begins to wane. If copyright owners must compete with free unauthorized copies that can remain online for up to two months, that opportunity is lost. Central to the AGCOM draft regulations is a multi-step "notice and take down" procedure that applies to hosts or uploaders of infringing content. IIPA encourages AGCOM to ensure that the notice and takedown process incorporates speedy procedures that incentivize parties to cooperate with authorities and rights holders. AGCOM should also eliminate loopholes for infringing sites that are anonymous or fail to provide contact points for receipt of

⁸A copy of the comments IIPA submitted to AGCOM in September 2011 are available at http://www.iipa.com/pdf/2011_Sep13_IIPA_ITALY_Submission_to_AGCOM.PDF.

infringement notices, and it should provide swift due process, avoiding the current judicial review system that can take years to conclude. Finally, IIPA recommends that AGCOM incorporate mechanisms to address repeat infringers, sites that facilitate infringement by aggregating links to infringing material, and operators that promote certain sites.

AGCOM currently has plans to establish a Technical Committee to promote dialogue among all relevant stakeholders, following the release of the new AGCOM framework. AGCOM is expected to take up a number of the recommendations that it included in its December 2010 resolution through the Technical Committee.

IIPA encourages all parties to work toward the following initiatives:

- Establishment of a roundtable discussion held by AGCOM of the technical issues surrounding the implementation of the proposed measures. The copyright industries look forward to continued engagement with AGCOM in this effort.
- A review of the Italian copyright law by the Government and Parliament. The IIPA recommends that the process initiated by the Parliament, aimed at improving rules on ISPs liability, is resumed and concluded successfully. In addition, consideration of the data protection law should be included as a crucial component to these initiatives, so that the momentum behind the AGCOM proposal may also drive the government and Parliament to establish either a firm basis in the law, or a specific process or authorization approved by the Italian Data Protection Authority, to address P2P piracy. Italian law currently does not incentivize ISPs to cooperate with rights holders with respect to material transiting their networks (the mere forwarding of infringement notices to potentially infringing subscribers is routinely refused), and has been interpreted by the Data Protection Authority and the courts so as to block rights holders even from identifying infringers for purposes of civil actions.
- Development of educational and informational activities on copyright protection addressed to end users, and especially to young people. IIPA members welcome efforts by AGCOM to promote campaigns for better awareness of the importance of copyright protection for the creative industries.

Adoption of these recommendations would be an important step in combating the common misperception in Italy that certain infringing activities, such as providing links to pirate content on foreign sites, are not serious violations of the law.

The Government of Italy should strive for a high-level, coordinated effort to ensure that matters such as Internet cooperation and other enforcement efforts move forward efficiently and expeditiously. Several such initiatives were launched in 2011. Unfortunately, these initiatives, while welcome, do not appear coordinated. With the mandate of AGCOM's President and Board scheduled to conclude in May 2012, it is imperative that clear leadership within the Government is established.

COPYRIGHT ENFORCEMENT IN ITALY

Internet-specific enforcement of copyright in Italy's courts has seen both successes and failures in recent years. The copyright industries report that local police and customs authorities take positive actions against IP crimes, but specialized forces – particularly prosecutors – are resistant to the idea that copyright crimes are serious offenses and fail to prioritize copyright cases. A number of weaknesses in the overall Italian enforcement system prevent the copyright industries from obtaining effective remedies and deterrent penalties against all forms of piracy, whether physical, online, or by software end-users. A coordinated government approach is needed for an effective anti-piracy campaign in Italy.

Internet Piracy Enforcement: Several actions against Internet piracy in the past three years demonstrate that, in cases where rights holders take initiative and have a strong footing in the law, anti-piracy efforts have the support of law enforcement. Major piratical hubs have been successfully brought to justice in Italy. Still, online enforcement in Italy's court system is hampered by (1) inconsistent holdings as to ISP responsibilities in cases of

online piracy, and (2) limitations on monitoring and collecting Internet piracy data, based on Italy's Privacy Code and the March 2008 ruling of the Data Protection Authority, resulting in a lack of civil enforcement against filesharing .

On December 23, 2009, the Italian Supreme Court, in a landmark decision, held that the PirateBay P2P filesharing service was engaged in criminal conduct through the unauthorized distribution of pirate content for profit through advertising on the site. Italy thus joined Sweden, Denmark and the Netherlands in declaring PirateBay a criminal enterprise. The site operators were held criminally liable for distribution in Italy to Italian users, even though the site is located outside of the country. The court confirmed that precautionary measures (including the seizure of even a foreign-hosted website) to prohibit the continuation of the crime can be issued by courts on the merits, and that courts may order, by way of injunction, ISPs to block access to the site under the EU's E-Commerce Directive.

Since the PirateBay case, authorities have successfully shut down other major sites involved in illegal file sharing, streaming, and downloading. In April 2011, the Italian Court of Cagliari (Sardinia) shut down the incredibly popular infringing bitTorrent site, BTjunkie.org, which was included in USTR's Notorious Markets List in February 2011. The site drew over 500,000 views per day in Italy and a total of 2 million per day overall, earning it an estimated 3.5 million Euros per year in advertising revenue. In September 2011, the Fiscal Police of Milan obtained the closure of two other important illegal websites, filmrealstream.net and crazyproject.org. These sites offered links allowing users to stream the latest audiovisual products and content unreleased in the Italian market. In November 2011, the Fiscal Police of Salerno, in collaboration with FAPAV, FPM, and AESVI, took down one of the largest networks for filesharing of unauthorized movies and games and charged all of its administrators. Five illicit portals were connected with this network, which allowed indexing and illegal downloading through links to cyberlockers and torrent files to more than 30,000 files of copyrighted material. Italian law enforcement also closed two websites offering pirated videogame content (CrazyProject and Gameternity), and stopped the activities of two other major online piracy forums (Animeonline and Angelmule). In 2011, over 96,000 cyberlocker links were removed.

Some civil enforcement efforts against ISPs have been facilitated by a few important decisions, according to which ISPs that received a specific notice from a right holder and failed to act were held to be in breach of the law (see the case RTI against Yahoo!, High Court of Milan, 9 September 2011, and the case RTI against Italia Online, High Court of Milan, 7 June 2011). Unfortunately, another online piracy case against an ISP that is still ongoing has brought mixed results for efforts to obtain injunctive relief in civil cases. In 2009, FAPAV sent a cease and desist letter to Telecom Italia requesting the blockage of major infringing websites and for measures to be put in place to prevent the widespread piracy of motion pictures over the Telecom Italia network. Telecom Italia's response was negative on all fronts. As a result, FAPAV filed a request for an injunction against Telecom Italia before the Rome Court's specialized section on intellectual property. In a momentary success for FAPAV, when the Data Protection Authority joined the case to challenge the methodology FAPAV used for the piracy data it submitted to the court, FAPAV was able to demonstrate that no privacy rights had been infringed in the process. In April 2010, however, the Court rejected FAPAV's request that Telecom Italia block access to infringing websites, accepting the ISP's argument that such legal actions were only appropriate against the host providers of the websites in question. This was despite specific ECJ jurisprudence ruling that Article 8.3 injunctions should also be available against access providers and the above-cited Supreme Court ruling directed at access providers as the key intermediaries for site blocking. The Rome Court did reject allegations that FAPAV violated the Privacy Code, and ordered the provider and other ISPs to report complaints and cooperate with judicial and administrative authorities against piracy infringements. After this partial success, the case is now continuing on the merits but is expected to drag on for a number of years.

Despite the advances that FAPAV made in data privacy issues in the case against Telecom Italia, Italian jurisprudence still appears to limit the ability of rights holders to use collected data in actions against individual infringers. At yet another level of online enforcement, civil enforcement against peer-to-peer (P2P) piracy has been severely hampered by the Rome High Court's interpretation of Italy's Privacy Code in the famous Peppermint cases, and by a March 2008 ruling of the Data Protection Authority to the effect that use of tools to gather IP addresses of

infringers would violate the Privacy Code.⁹ Unless rights holders can obtain IP addresses and thereafter the names of subscribers via a civil court order, civil enforcement against infringing users will, as a practical matter, be impossible.

End-user software piracy: In December 2009 the Italian Supreme Court issued a decision creating a major impediment to software piracy enforcement. The case held that unincorporated professionals (such as architects and engineers) using illegal software in the carrying out of their activities cannot be held liable under the criminal provision of Article 171*bis* of the Copyright Act, even for the same behavior that would render a company criminally liable under this provision. The decision limits criminal enforcement against non-corporate professionals, among whom the piracy rate is believed to be even higher than among companies.

Criminal enforcement: The recording, audiovisual, entertainment and business software industries all report continued good cooperation with the Italian police forces in 2011, including the Italian Fiscal Police (*Guardia di Finanza*, or GdF) and local police forces. Police and customs authorities continue to take *ex officio* actions with the assistance of copyright holders, in the form of preliminary information and technical assistance. However, the problem of slow court processes, lack of judges and prosecutors who have expertise in copyright issues, and lack of deterrent penalties overall have limited the deterrent effect of police action and cooperation. Prosecutors are slow to bring criminal copyright cases, sometimes delaying enforcement of a seizure or raid by months or even years from the time a complaint is brought. In the rapid distribution world of electronic communications, even a delay in terms of days and weeks is enough to create enormous harm let alone years. Once the case is filed, often two to three years or more pass before final judgment, significantly reducing the deterrent value of the increased raiding activity undertaken by the police. Criminal sanctions in practice vary from four months to one year, including in cases of repeat infringers, for whom the law provides a minimum term of one year.

Few judges and prosecutors have expertise in copyright issues, a particular difficulty for cases brought under local jurisdiction. Many Italian judges remain reluctant to impose deterrent sentencing on individuals charged with copyright infringement, especially where a large corporation owns the copyright. There are no specialized IP criminal courts.

The business software industry reports that its relationship with enforcement authorities remains generally good, particularly with GdF, which is the primary agency responsible for software piracy enforcement. However, public prosecutors do not inform injured parties of pending criminal proceedings, and prosecutors and judges continue to show a lack of interest with criminal enforcement of IPR violations.

AESVI, the Italian association representing the entertainment software industry also reports that its positive working relationship with law enforcement continued to strengthen in 2011, in particular with the Fiscal Police General Command. AESVI provides technical and legal support on *ex officio* activities carried out by GdF, and has continued its collaboration with the Italian Customs Agency Bureau. AESVI supported law enforcement efforts that led to the closure of three prominent sites engaged in the piracy of video game content.

The recording industry, as represented by its local anti-piracy organization, FPM, reports that the coordination with Italian enforcement agencies continued on a positive basis. The relationship with the GdF is very positive and led to successful operations. In particular, major cases in 2011 included the IP and DNS block of

⁹The Peppermint case was brought by the Germany music publisher Peppermint Jam Records GmbH, and has created a domino effect, on the controversial issue of monitoring P2P networks to acquire IP addresses of infringers. It started with an injunction issued by the Court of Rome (Procedure n. 81901/2006) that required Telecom Italy to disclose about 3,636 names of Italian Internet customers/infringers. The case was based on the use of anti-piracy software managed by the Swiss company, Logistep, on behalf of Peppermint, and the data collected consisted essentially of IP addresses of customers sharing copyrighted files through platforms like eMule or BitTorrent. Peppermint proceeded to send letters to some of the identified infringers with a settlement proposal of €330.00 (US\$452), in exchange for a pledge to refrain from turning the names over to the criminal authorities. There were a number of other similar proceedings brought by Peppermint and a Polish videogame publisher, Techland. While the Rome Court initially sided with the rights holders, in a later injunction proceeding, after intervention by the Data Protection Authority, the court reversed its ruling and denied the rights holders' requests. This eventually led to the March 2008 rule by the Authority that use of such software violated the Italian Privacy Code and the EU privacy directive and the resulting names could not be disclosed.

BTJunkie (the most used Bit Torrent tracker site in Italy), the seizure of ItalianShare.net (the biggest linking site in Italy for music, videogames and movies); the seizure of Crazyproject.org (a music and videogames torrent and cyberlocker linking site); and the closure (notice & takedown procedure) of 90 websites offering streaming of musical videos and other copyright protected materials (movies, live sport events). Other criminal cases have been carried out against uploaders of pre-releases. The cyberlocker site's notice and takedown system led to the removal of 800,000 infringing music files. Operations for violation of rights of broadcasting or other communication to the public (i.e. public performance) continued in 2011. Radio stations, web radio, discos, music providers, and gyms using unlicensed music have been identified, and more than 30 criminal cases were started in 2011. The co-operation with FAPAV (local MPAA branch), AESVI (Italian Entertainment Software Association) – both now members of FPM – and SKY Tv Italy proved to be very successful in the effort to fight digital piracy.]

The motion picture industry reports that the police continue to support FAPAV's efforts yet lack necessary resources. FAPAV reports that although the Italian enforcement authorities continue to conduct raids, little information is made available to rights holders. Hard goods piracy activity is fragmented in nature and conducted by numerous small operators, making effective enforcement raids difficult to organize. As is the case for other copyright industries, ultimately effective enforcement is bottlenecked by insufficient judicial resources and the dismissive attitude of the Italian judges towards piracy in general.

Civil Enforcement: Specialized IP civil courts suffer from a lack of resources that can mean major delays in proceedings. It is extremely important that new competent judges are allocated to the IP specialized courts, to avoid creating further delays in civil proceedings. This is all the more important now that IP specialized sections have been transformed into company law specialized sections. If there is no allocation of new judges, IP proceedings will suffer badly from this development.

The Business Software Alliance (BSA) continues to use the civil court system for enforcement against business users of unauthorized software. While many of BSA's civil searches result in early settlements out of court, in rare cases the actions are resolved in court. In these cases, BSA reports a positive degree of understanding among the courts of both the nature of the claim and of damages.

However, BSA reports a need to clarify in some courts that the search order procedure does not require a hearing for the confirmation of the order (as was the case in the past). Specialized IP courts set hearings after search orders are executed based on rules for other interim measures such as seizures and injunctions, which are not required by law and create unnecessary burdens, risks, and costs for the copyright holder. The process has never resulted in a revocation of the order in question, and as a result serve only to delay the judicial process.

COPYRIGHT LAW REFORM AND RELATED ISSUES

Implementation of the EU E-Commerce Directive: Italy's laws do not yet firmly establish fundamental liability when an ISP fails to take action in response to a notice of infringement provided by a relevant rights holder. In its implementation of the E-Commerce Directive (in Legislative Decree No. 70 of 2003), Italy appears to require takedown procedures to be available only upon application to, and order from, the "relevant authorities." This apparent requirement for the intervention of an undefined judicial or administrative authority is contrary to Article 14 of the E-Commerce Directive and is hampering cooperation from ISPs in taking down infringing files. Article 14 provides that an ISP may be liable merely when it is informed that an infringement over its facilities exists, triggering the obligation to takedown the infringing content. A recent initiative was taken by the Italian parliament that aimed to bring Italy into compliance with this provision of the E-Commerce Directive. On January 19th, 2012, the Italian Parliament Commission of EU Affairs approved an amendment to a bill for the European Community Law, referring to articles 16 and 17 of the Italian decree implementing the E-Commerce Directive. The draft amendment would have confirmed the existence of an ISP's duty of care when it becomes aware of an infringement based on information provided by rights holders, and of an ISP's responsibility to take actions to remove or to disable access "upon request [i.e. notice from] the competent authorities or any interested person." While the introduction of these provisions

was an important step forward, they were, unfortunately, withdrawn from consideration at the end of January, and future work remains uncertain.

Data protection and online enforcement: The overall legal environment in Italy makes private sector online enforcement efforts particularly difficult, if not impossible, in light of a 2008 decision rendered by the *Garante per la Protezione dei Dati Personali* (Data Protection Authority). In conjunction with the so-called Peppermint Case, the Data Protection Authority ruled that systematic monitoring of P2P users, and the collection of their IP addresses is an illegal activity under Italy's law on the protection of personal data despite the fact that IP addresses do not personally identify the individual. Because this results in the practical absence of civil remedies, Internet piracy enforcement necessarily falls to the criminal authorities. While criminal enforcement has been quite difficult, the recent PirateBay court decision should significantly improve the situation (see discussion above).

Problematic amendments to the copyright law: A recently adopted amendment to Article 70 of the copyright law allows the uploading to the Internet of images and sounds without permission or payment, so long as the resolution is low and the purpose is educational. This overbroad exception calls into question Italy's international treaty obligations. Another amendment was passed to Article 71^{septies} extending the private copy levy to "remote videorecording systems" wherein a cable, satellite or other provider of such a service could reproduce audiovisual works on a remote server (presumably at the request of its customer) and then transmit such copy to the customer upon its request for viewing. MPA views this amendment as incompatible with the EU Copyright Directive and international norms with respect both to the reproduction and making available rights, and sought EU Commission intervention. The EU Commission intervened, directing the Italian government to change its law. This has not yet happened; however, the Government has also not yet implemented the law.

Amend Article 171^{bis} of the Copyright Act: The Italian Supreme Court has held self-employed professionals are not within the scope of Article 171^{bis}, which requires that, for criminal liability to attach the infringing act had be carried out by corporate entities acting for commercial purposes. An amendment to Article 171^{bis} should therefore be enacted to specify that the provision also criminalizes infringements carried out with a professional purpose.

Eliminate the SIAE sticker requirement for business and entertainment software and music recordings: This problem remains a major concern for the business and entertainment software industries and, more recently, also for the recording industry. Specifically, Article 181^{bis} of Italy's Anti-Piracy law contains an extremely burdensome (and unnecessary, since software is not subject to collective administration of rights) requirement that requires software producers either to physically place a sticker on each work sold in Italy or to file complex "product identification declarations." Legitimate business software publishers who fail to sticker their products have found their products subject to seizure. For the recording industry, the SIAE sticker represents an additional and burdensome level of bureaucracy and extra costs for the commercialization of physical music carriers. The sticker system is not useful in the fight against online piracy, which represents around 90% of music consumption today. The sticker is also limiting the free circulation of musical recordings within the EU and puts the recording industry in Italy at a competitive disadvantage with respect to other countries.

Article 181^{bis} of the Copyright Law, providing for the stickering duty, conflicts with some basic principles of the EU Treaty (such as the "free flow of goods") as well as Directives 98/34 and 98/48, the TRIPS Agreement,¹⁰ and the Italian Constitution. As a consequence, IIPA urges that Article 181^{bis} be revised to exempt all software from the stickering requirement. Article 171^{bis} of the Copyright Law, which deals with criminal penalties for software, must also be amended if stickering is eliminated for software. The recording industry calls for the complete exclusion of

¹⁰Article 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.

physical carriers of recorded music from the stickering obligation. Entertainment software publishers have also raised concerns with the SIAE labeling requirement, and have similarly requested that the stickering requirement not be made applicable to video game software. IIPA supports these calls.

LEBANON

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2012 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: Lebanon should remain on the Watch List in 2012.¹

Executive Summary: IIPA hopes that in 2012, Lebanon's development goals, including its World Trade Organization (WTO) accession process, can be moved forward, and that enhancement of intellectual property protection standards plays an appropriate role within that context. IIPA has noted incremental progress in copyright protection in previous submissions and in recent testimony before USTR, although problems remain.² In this submission, IIPA highlights the importance for Lebanon to establish a proper legal framework for copyright protection, including online, and to fully implement those laws to reduce piracy and foster growth in the creative sectors in Lebanon.³

PRIORITY ACTIONS REQUESTED IN 2012

- Ensure that draft amendments to the Lebanese Copyright Law (1999) are compatible with major international copyright treaties, including the TRIPS Agreement and the WIPO Copyright Treaty (WCT) and WIPO Performances and Phonograms Treaty (WPPT).
- Take all steps necessary to join the Berne Convention (Paris 1971 text), and join the WCT and WPPT.
- Ensure that the special police bureau, the Cyber Crime and Intellectual Property Rights Bureau (CCIPRB) Unit, continues actively running raids against piracy targets, including end-user software piracy, and take steps to provide the Unit with *ex officio* raiding authority, authority to employ investigative techniques to detect piracy practices (such as "hard-disk loading"), and a regular operating budget.

COPYRIGHT LAW AND RELATED ISSUES

The Lebanese Government has been working on amendments to the Copyright Law (1999) and related laws in order to ready itself for accession to the WTO and to implement the relevant international treaties related to WTO accession.⁴ These include most notably the TRIPS Agreement, the Berne Convention, to which Lebanon has expressed interest in ratifying the latest text (1971 Paris text),⁵ and the WCT and WPPT, to which Lebanon's previous National Assembly had ratified, but which reportedly the current National Assembly may need to ratify again. The WCT and WPPT should then be deposited in Geneva with the WIPO.⁶ It is important that the government

¹For more details on Lebanon's Special 301 history, see Additional Appendix available at <http://www.iipa.com/pdf/2012SPEC301HISTORICALSUMMARY.pdf>. Please also see previous years' reports at <http://www.iipa.com/countryreports.html>.

²Since late 2006, the United States and Lebanon have been party to a Trade and Investment Framework Agreement. See *United States and Lebanon Sign Trade and Investment Framework Agreement*, November 30, 2006, at http://www.ustr.gov/Document_Library/Press_Releases/2006/November/United_States_Lebanon_Sign_Trade_Investment_Framework_Agreement.html. Copyright protection issues should be a permanent part of the TIFA agenda.

³In July 2007, the World Intellectual Property Organization released Roger Malki's report, *The Economic Contribution of Copyright-Based Industries in Lebanon* (published in World Intellectual Property Organization, *National Studies on Assessing the Economic Contribution of the Copyright-Based Industries*, July 2007, at 491-550). That report demonstrates that in 2005, the total copyright industries in Lebanon contributed around US\$1.04 billion to the annual gross domestic product (GDP), employed almost 50,000 workers, and contributed 4.75% to the GDP and 4.49% to overall employment, while the core copyright industries generated almost US\$556 million of value added, employed over 23,300 workers, and contributed 2.53% to the GDP and 2.11% to overall employment.

⁴See Tamara Qiblawi, *Beirut Boosts Efforts to Protect Copyright Owners*, The Daily Star, December 10, 2010, at http://dailystar.com.lb/article.asp?edition_id=1&categ_id=3&article_id=122371. This article cited a recent World Intellectual Property Organization meeting at which Economy Ministry Director General Fuad Fleifel asserted that the government has intensified its campaign against intellectual property rights violations in recent months by increasing surveillance and urged copyright owners to make use of special judicial courts.

⁵Lebanon currently adheres to the Rome (1928) text of the Berne Convention. In 2007, legislation was prepared and forwarded to the National Assembly to ratify the Berne Convention 1971 Paris text; passage of this legislation would be a welcome development.

⁶The previous National Assembly had ratified the WPPT through Law No. 77 (WPPT) and the WCT through Law NO. 78 (WCT) on March 6, 2010. However, in early January 2011, the national unity government collapsed after all ten opposition ministers and one presidential appointee resigned due to tensions stemming from the Special Tribunal for Lebanon, which was expected to indict those accused of assassinating former prime minister Rafic Hariri. The National Assembly eventually elected Najib Mikati in July 2011 as Prime Minister of Lebanon.



take steps to implement these accords into domestic legislation in greater detail as mentioned below, as well as deal with outstanding WTO/TRIPS accession issues.

The current Copyright Law provides a relatively sound basis of protection of works and objects of related rights (sound recordings, performances).⁷ At the same time, there are some deficiencies which must be addressed as part of Lebanon's WTO accession process and otherwise result in a more effective statute. These include (but are not limited to) the following issues:⁸

- The presumption provisions are incomplete and must be strengthened for WTO/TRIPS compatibility (and should be made equally applicable to related rights).
- There is no direct point of attachment for U.S. sound recordings (however, a point of attachment for U.S. sound recordings can be achieved by simultaneous publication in the U.S. and any Rome Convention Member). The amendments must ensure proper point of attachment for U.S. works, sound recordings and performers for WTO/TRIPS compatibility.
- Works and sound recordings are not explicitly given full retroactive protection in line with WTO/TRIPS standards.
- Article 25, providing a broad exception allowing copying of software, and even as limited by Decision No. 16/2002 (July 2002), does not meet the standards/requirements of the Berne Convention or the TRIPS Agreement. While many modern copyright laws include specific exceptions for the copying of computer programs under narrowly defined circumstances and/or exceptions allowing the copying of certain kinds of works for "personal use" (but almost never computer programs, except for "back-up" purposes), Article 25 sweeps more broadly than comparable provisions of either kind, to the prejudice of copyright owners. As such, Article 25 violates the requirements of Berne and TRIPS since it "conflicts with a normal exploitation of the work" (software aimed at the educational market) and it "unreasonably prejudices the legitimate interests of right holders" (eliminating or curtailing the educational market for software).
- The current "private" copy exception (Article 23) must be re-examined in light of new technologies and recalibrated to ensure it does not collide with international treaties standards.
- The current law does not accord a right of legal action to exclusive licensees, which is a significant obstacle to efficient enforcement, given that the exclusive licensee in a territory is invariably the party with the strongest interest in stopping piracy and has the best information about it.
- The law does not fully implement the WCT and WPPT.
 - Amendments should ensure explicit protection for temporary reproductions, a WCT- and WPPT-compatible "making available" right for authors, producers of sound recordings, and performers.
 - Amendments should also ensure protection against the circumvention of technological protection measures used by copyright owners to protect their works from unauthorized access or use, and against trafficking in (and providing services as to) circumvention technologies, devices, and components. Remedies should include both civil and criminal provisions. Amendments should also protect rights management information (RMI) in line with the WCT and WPPT.
- Amendments should deal with online piracy, including notice and takedown provisions, and provisions to ensure that Internet service providers take responsibility for, and have incentives to cooperate with right holders in dealing with, online infringements. Measures should include legal norms that create incentives for Internet Service Providers (ISPs) to cooperate with right holders in fighting infringement taking place over their networks

⁷The law includes civil remedies and criminal penalties against copyright infringement, the possibility of confiscation of illegal products and equipment, and closure of businesses engaged in pirate activities. The law also outlaws the trafficking in satellite or cable decoders (i.e., devices that receive, or arrange the receipt of, unauthorized transmissions of broadcasts "dedicated to a section of the public who pay a fee to receive such broadcasting").

⁸A more detailed discussion of deficiencies in Lebanon's copyright law can be found in the 2003 Special 301 report, at <http://www.iipa.com/rbc/2003/2003SPEC301LEBANON.pdf>.

or platforms, including *inter alia*: i) legal incentives for ISPs to cooperate with rights holders to effectively deal with Internet piracy; ii) rules that clarify the illegality of providing services that are intended to promote the infringement of copyright and related rights; and iii) injunctive relief and a duty on ISPs to provide information to law enforcement agencies and rights holders

- Amendments should be made to the current law (e.g., Article 17) to preserve the ability of parties to freely contract with respect to copyright licenses and transfers, including ownership issues, to avoid collisions with the exercise by copyright holders of exclusive rights guaranteed by international treaties. The law should not restrict parties' ability to freely contract, nor interpret private agreements by statute.
- The amendments should ensure that moral rights (Articles 21 and 44) abide by the Berne Convention (and the WPPT) and do not impinge on or otherwise interfere with the exercise of economic rights guaranteed by the law (and the Berne Convention and TRIPS).
- The amendments should provide that deposit should be voluntary, and that any presumption must not act as a formality to protection or enforcement under the law.
- In line with the international trend, consideration should be given to extending the term of protection, to life of the author plus 70 years, or 95 years in the case of sound recordings and audiovisual works.
- Enforcement measures should be strengthened to, among other things: strengthen civil remedy measures to ensure adequate compensatory damages are available (measured by the legitimate retail price of the good infringed) and provide for pre-established damages; increase the minimum and maximum criminal fines to ensure deterrence; ensure that criminal penalties apply to infringements which may cause significant damage to the market notwithstanding the motive of the infringer; ensure that a provisional and criminal seizure, forfeiture, and where applicable, destruction remedy is available; provide for information sharing by civil, criminal, and border officials regarding evidence of infringement and those participating in such activities; and provide adequate border measures against both imports and exports (as well as in-transit materials).

PIRACY UPDATES IN LEBANON

Notwithstanding the incremental progress noted at the outset of this report, piracy continues to harm right holders in Lebanon.⁹ Piracy phenomena include end-user piracy of business software, cable and pay TV piracy (which, as discussed, has improved somewhat due to consolidation of the illegal distributors), retail piracy (of movies, music, entertainment software/games, business software, published materials), book piracy in the form of illegal photocopying on and around university campuses as well as illegal translations and some counterfeiting of textbooks and trade books, rising Internet-based piracy, piracy involving mobile devices (either mobile downloads or resellers pre-loading content), hard-disk loading of software onto computers at the point of sale, and the sale of circumvention devices, particularly pay TV decoders. Meanwhile, the industries reporting data show continuing high piracy levels notwithstanding incremental progress.¹⁰ It has been demonstrated that the Lebanese Government is losing out as well due to piracy, in terms of lost taxes, social security contributions, and earnings.¹¹

The situation for right holders over the years has improved incrementally, for example, through the establishment of the Cyber Crime and Intellectual Property Rights Bureau (CCIPRB). The CCIPRB would be an even more effective body if the following were implemented: 1) the CCIPRB should be granted *ex officio* authority in order

⁹Failure to mention any specific issue previously noted by the IIPA should not necessarily be taken as an indication that the problem has been resolved.

¹⁰BSA's 2011 software piracy statistics will not be available until after the filing deadline for this submission, but will be released in May 2012, at which time piracy rates and U.S. software publishers' share of commercial value of pirated software will be available at www.iipa.com. In 2010, the software piracy rate in Lebanon was 72%, representing a commercial value of unlicensed software attributable to U.S. vendors of US\$27 million (up from US\$25 million in 2009). These statistics follow the methodology compiled in the Eighth Annual BSA and IDC Global Software Piracy Study (May 2011), <http://portal.bsa.org/globalpiracy2010/index.html>. These figures cover packaged PC software, including operating systems, business applications, and consumer applications such as PC gaming, personal finance, and reference software – including freeware and open source software. They do not cover software that runs on servers or mainframes, or routine device drivers and free downloadable utilities such as screen savers. The methodology used to calculate this and other piracy numbers are described in IIPA's 2012 Special 301 submission at <http://www.iipa.com/pdf/2012spec301methodology.pdf>.

¹¹In 2000, a study carried out by Statistics Lebanon, Ltd. between April and June 2000 estimated that, due to cable piracy alone, the Lebanese government lost approximately US\$38 million in 1999, including lost taxes, social security contributions, and the earnings of the Lebanese government if the cable industry was legitimate.

to address intellectual property rights infringement cases more efficiently; at present, in order for CCIPRB to act, a criminal complaint must be filed with the prosecutor's office; 2) the Lebanese Government should be asked as part of the Trade and Investment Framework Agreement (TIFA) process to provide transparency on cases they are pursuing to track statistics and successes in enforcement; 3) with an increasing number of piracy issues involving computers (e.g., end-user piracy of business software) or the Internet (Internet-based piracy, mobile device piracy), CCIPRB should continue to receive greater resources and assistance on computer crime issues; and 4) the CCIPRB Unit should be given a formal budget to help the Unit become even more stable and effective in its functioning.

One weak link noted over the years in the Lebanese copyright system is the courts. IIPA's previous reports document well the delays encountered in simple piracy cases, postponements in court, even of urgent matters, and judges who are unaware of and/or unsympathetic with the IP laws. When cases have reached judgment, damages (in civil cases) or fines and penalties (in criminal cases) are almost always so low as to be non-deterrent. IIPA urges the continuous training of Lebanese prosecutors and judges, and urges the government to consider seriously the establishment of a special IP tribunal, at least in Beirut, and to assign special IP prosecutors. The courts in Lebanon should also employ tools that would strengthen their hand, such as informants.¹²

GENERALIZED SYSTEM OF PREFERENCES

The Generalized System of Preferences (GSP) program, designed to promote economic growth in the developing world by providing preferential duty-free entry for products from designated beneficiary countries and territories, expired on December 31, 2010, but on October 21, 2011, President Obama signed legislation to reauthorize the program through July 31, 2013. GSP trade benefits became effective 15 days after the President signed the bill (November 5, 2011) and apply retroactively from January 1, 2011. The GSP program has been important to Lebanon's economy. During the first eleven months of 2011, more than US\$33.6 million in imports to the U.S. from Lebanon enjoyed duty-free treatment under the GSP Program, or more than 45.2% of Lebanon's entire imports into the U.S.¹³

Among the criteria the President must take into account in determining whether a country should continue to be designated as a GSP beneficiary country are "the extent to which such country is providing adequate and effective protection of intellectual property rights," and "the extent to which such country has assured the United States that it will provide equitable and reasonable access to the markets ... of such country." 19 USC 2462(c)(4) and (5). It is essential to the continued growth and future competitiveness of these industries that our trading partners, including Lebanon, provide free and open markets and high levels of protection to the copyrights on which this trade depends.

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 GSP trade program. IIPA's original Petition noted deficiencies in Lebanon's protection of copyright that caused economic harm to U.S. right holders that result in Lebanon failing to meet the GSP standard of providing "adequate and effective" copyright protection in practice.¹⁴ 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

¹²Industry has tried to convince the Chief Public Prosecutor, but to no avail, to allow the police to use special "informants" who would not encourage pirate traders but, e.g., would report when buying hardware if a seller voluntarily offered to load pirate software onto a computer. As a result, outlets selling computers continue to load pirate software onto computers, so-called "hard disk loading," with impunity as industry has no support from the police or prosecutors in providing evidence of such illegal activity. Computers are now either being delivered to the homes of buyers or are handed over to the buyer at a fixed time to avoid detection.

¹³During 2010, more than US\$38.3 million in imports to the U.S. from Lebanon enjoyed duty-free treatment under the GSP Program, or more than 45.7% of Lebanon's entire imports into the U.S.

¹⁴International Intellectual Property Alliance, *Request for Review of the Intellectual Property Rights Practices of Lebanon in the 2001 Annual GSP Country Eligibility Practices Review*, 66 Fed. Reg. 19278 (April 13, 2001), June 13, 2001, at http://www.iipa.com/gsp/2001_Jun13_GSP_Lebanon.pdf.

Lebanon that are inadequate and ineffective. The Petition questioned whether Lebanon should continue to receive GSP duty-free treatment for many of its goods imported into the United States. As noted, the GSP program lapsed on January 1, 2011, but was then renewed retroactively. In the 2011 GSP annual review, the IIPA Petition (007-CP-08) was "continued." IIPA believes the Petition should remain ongoing at least until the enactment of draft legislation to address deficiencies in the legal protection for copyright, namely, legislation which addresses Berne- and TRIPS-inconsistencies, and that otherwise implements the WCT and WPPT.

MALAYSIA

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

2012 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: IIPA recommends that Malaysia remain on the Watch List.¹

Executive Summary: The Government of Malaysia has been responsive to many of IIPA's concerns over the past year. The Malaysian Parliament passed legislation in late 2011 which prohibits the camcording of a motion picture inside a cinema, prohibits the circumvention of TPMs (both the act of circumvention and trafficking and servicing in circumvention technologies, devices, and components), and contains key components of a workable notice and takedown system in Malaysia, as well as the possibility of court ordered remedies against rogue websites and repeat infringers. IIPA congratulates the Malaysian Parliament and Government for making these important changes to strengthen its legal framework to deal with piracy. IIPA also congratulates the Malaysian Communications and Multimedia Commission (MCMC) and the Ministry of Domestic Trade, Co-Operative & Consumerism (MDTCC) for its actions in May 2011 to limit access in Malaysia to several notorious websites (one of which, MegaUpload, was criminally indicted in the United States in January 2012).² Industry also notes an increase in the number of enforcement officers and dedicated prosecutors, and improvements in the efficiency and deterrence of the judicial system.

In order to continue the forward momentum, the amended Copyright Act must now be implemented fully, e.g., clarifying coverage of access control TPMs, as well as other important clarifications. Enforcement steps must be taken to deal with: mall piracy,³ by reinvigorating enforcement by MDTCC's enforcement division; street piracy, by closing down those who sell pirated materials and unstickered product; enterprise end-user software piracy; infringing uses of copyright materials at universities; and other piracy phenomena. There remains a need to expand the specialized criminal IP courts, along with the training of key officers to handle important IP cases, to speed the pace of criminal prosecutions.

PRIORITY ACTIONS REQUESTED IN 2012

Enforcement

- Reestablish autonomous enforcement by the MDTCC enforcement division (where officers trained in enforcement make decisions on when and where to conduct enforcement actions), including on an *ex officio* basis and without Malaysian Administrative and Diplomatic Service (MADS) involvement.
- License all legitimate optical disc dealers at "night markets," and ban the sales of pirated discs in the night markets.
- Assign more dedicated judges to the Criminal IP courts, especially in Kuala Lumpur, and establish the promised 15 Sessions courts around the country, to reduce backlogs and see convictions meted out and publicized in the media as a form of deterrent.
- Enforce the Trade Descriptions (Optical Disc Label) Order 2010, following up with prosecutions leading to deterrent sentences.
- Make a renewed push for university legalization; specifically, the Ministry of Higher Education should adopt

¹For more details on Malaysia's Special 301 history, see Additional Appendix available at <http://www.iipa.com/pdf/2012SPEC301HISTORICALSUMMARY.pdf>. Please also see previous years' reports at <http://www.iipa.com/countryreports.html>.

²MegaUpload allegedly ran a file-sharing service whereby it sold premium memberships to users in order to induce them to upload and make available millions of infringing files. The indicted owners amassed huge profits from this activity, all predicated on users massively infringing copyright.

³Holiday Plaza (Johor Bahru), discussed below, was cited by IIPA and the Entertainment Software Association in their filings to the U.S. Trade Representative on "notorious markets." See, e.g., International Intellectual Property Alliance, *China's WTO Compliance - Notification of Intent to Testify and Testimony Re: "Request for Comments and Notice of Public Hearing Concerning China's Compliance With WTO Commitments"* (76 Fed. Reg. 50286, August 12, 2011), September 21, 2011, at http://www.iipa.com/pdf/2011_Sep21_IIPA_China_WTO_Compliance_Request_to_Testify_and_Testimony.pdf.



appropriate use and copyright policies for implementation by all universities and colleges to ensure that university personnel and students use only legitimate books.

- Implement a government-led software audit initiative to drive the use of legal software in the corporate sector.

Legislation, Market Access

- Evaluate progress toward implementing regulations in Malaysia for the amended Copyright Act to ensure coverage of all technological protection measures (TPMs), including access controls (if necessary, by confirming TPMs cover those technologies, devices, or components that “controls access to a protected work”).
- Impose liabilities on landlords and mall owners who are aware of (or have constructive knowledge of) piracy activities on their premises and continue to allow such illegal activities.
- Amend the optical disc laws to ensure that source identification (SID) code applies to recordable discs, to prohibit “gouging” of source identification codes from discs, to allow inspections at any location and at any time, day or night, and to make other needed changes.
- Join the WIPO Copyright Treaty (WCT) and WIPO Performances and Phonograms Treaty (WPPT).
- Resolve market access barriers, including lifting the quantitative and investment restrictions on foreign television broadcasts, and lifting the restriction on foreign advertising on terrestrial broadcast channels.

PIRACY AND ENFORCEMENT UPDATES IN MALAYSIA

IIPA’s previous reports describe in detail various piracy and enforcement issues and the harm caused to the U.S. content industries. The following provides updates on the piracy and enforcement situation in Malaysia in 2011 and early 2012.

Hard Goods Piracy Still Affects Domestic and Export Markets: Hard goods piracy, including distribution of local and imported factory-produced optical discs and “burned” recordable discs (CD-Rs and DVD-Rs), continues to harm copyright owners in Malaysia. Retail pirates remain active in several fixed premise locations in Klang Valley (particularly in Bangsar, Sri Hartamas, Petaling Jaya, and Shah Alam), Penang (Perangin Mall) and Johor Bahru (Holiday Plaza),⁴ despite numerous raids (including *ex officio*) resulting in impressive seizures and good cooperation among enforcement authorities.⁵ Unfortunately, retail shops generally reopen within 48 to 72 hours after a raid evidencing a lack of deterrence. Even where some fixed premise and mall piracy has decreased, it has quickly been replaced by night market piracy stalls, which flourish in different locations in Malaysia.⁶ The reality is that street vendors selling pirated CDs and DVDs at the day and night markets have grown beyond the control of the authorities, and there is evidence of organized criminal behavior protecting pirate traders from law enforcement. IIPA recommends that the markets be opened up by granting trading licenses to all legitimate optical disc dealers at “night markets,” so that the unlicensed illegal traders can be weeded out. Sales of optical discs outdoors (at night markets) were banned in 2001, but this strategy has now backfired, resulting in the legitimate music industry losing 30% of its income and creating a flourishing trade in pirated music which still exists today.

Malaysia remains a producer and supplier of pirate optical discs, including for export markets (e.g., Singapore, Brunei), although industry notes improvements through the Export Center where the number of attempted packages involving pirated discs has fallen over the years, continuing that trend in 2011. While the MDTCC continues to run hundreds of raids regarding physical piracy (the local recording industry reports over 100 raids related to its product in 2011), IIPA had raised concerns in the past about the lack of enforcement against licensed optical disc factories, and as such welcomed news that in January 2010 and again in January 2011, Royal Malaysia Police

⁴Holiday Plaza (Johor Bahru) shopping mall is a three-story structure located directly across the straits from Singapore that is well-known for sales of counterfeit merchandise, software, video games, DVDs and electronics products. Holiday Plaza sellers generate a huge volume of business from Singaporeans who drive across the strait in search of the counterfeit products that are harder to find domestically due to Singapore’s more effective IP enforcement regime. While there have been enforcement actions against pirate sellers, these have not had any lasting impact as the raided venues usually re-open 24-48 hours after the raid.

⁵Over 430,000 pirate DVDs, both burned and replicated, as well as close to 20,000 counterfeit Blu-ray Discs, were seized in 2011.

⁶The Ministry of Local Government and Housing, the Kuala Lumpur City Council (DBKL), and other like local councils and authorities, who are ultimately in charge of licensing night market vendors, have purview over the night markets.

raided licensed optical disc replicating factories engaged in the production of infringing DVDs containing movies and entertainment software files. These raids resulted in the seizure of thousands of infringing DVDs, and in the 2010 raid, the authorities estimated that the facility was capable of producing more than 17.5 million pirated optical discs per year. The 2011 case remains under investigation.

Internet Piracy Addressed Through Unprecedented Actions Against Rogue Sites: Malaysia had nearly 17.5 million Internet users by the middle of 2011, including 5 million broadband users, 2.5 million wireless broadband users, and 10 million 3G subscribers.⁷ Faster and more readily available broadband Internet means increasing online infringement of all copyright content has been detected, including direct infringing downloads from websites, illicit peer-to-peer (P2P) filesharing (a major issue for the music and motion picture industries), infringements using BitTorrent sites (game piracy is often accomplished using this technology), accessing infringing files of third parties through deeplinking, auction or advertising sites (for hard goods sale or delivery), illicit MP3 download sites, or infringing use of “blog spots,” social networking sites, or cyberlockers.⁸ In 2011, Malaysia placed 26th in the world in the number of connections by peers participating in the unauthorized file sharing of select Entertainment Software Association (ESA) member titles on public P2P networks.⁹ One new and troubling development reported is the emergence of “media boxes” sold in the physical markets. These boxes can be plugged directly to TVs, and facilitate easy access to remote online sources of unauthorized entertainment content including music, movies and TV dramas. Such media boxes are believed to be manufactured and sold in China, but have also found their way into Malaysia (as well as Taiwan and Singapore).

In 2011, there were a number of websites found to be hosted within local Malaysian networks supplying pirated product but many of these have been taken down as a result of complaints being lodged by right holders.¹⁰ In May 2011, the Malaysian Communications and Multimedia Commission (MCMC), under Section 263(2) of *The Communications and Multimedia Act CMA 1998*, took the unprecedented action of disabling access to many notorious piracy websites (including MegaUpload, the owners of which were criminally indicted in the United States in January 2012).¹¹ ISP cooperation in Malaysia improved largely as a result of increased Malaysian Government involvement. IIPA still believes a primary impediment to more effective enforcement in the online space may be the lack of adequate personnel devoted to investigating and addressing Internet piracy. MDTCC reportedly only had four officers responsible for Internet piracy and their main role was to compile information on self-help actions taken by right holders. An additional four officers at least who are trained in IT and enforcement are essential to take swift and effective action against Internet piracy. The MDTCC needs to play an active part in combating Internet piracy which is increasing in Malaysia.

Book and Journal Piracy Continues to Harm Educational Sector: Rampant unauthorized photocopying on and around university campuses continues to cause harm to publishers in Malaysia. Pirates print directly from soft copy scans of textbooks saved on computers or portable hard drives, making detection and identification of infringement more difficult. Very few copy shops keep stocks of copies or if they do, it is kept at various locations offsite to avoid detection. Other activities making piracy harder to detect include setting up shop facilities in gated residential areas, where a private security guard can warn pirates of incoming authorities. Piracy of books online is

⁷ Malaysian Wireless, *Malaysia: 17.5 Million Internet Users, 5 Million on Broadband, 10 Million on 3G*, June 15, 2011, at <http://www.malaysianwireless.com/2011/06/malaysia-broadband-3g-users/>.

⁸Internet-based piracy harms independent film producers since it prevents the establishment of legitimate online distribution platforms and services for consumers, which independent producers may use to finance future productions. For independent producers who license content country-by-country, online piracy can lead to high piracy rates in-country but also raises the threat of exporting the same to other markets instantly. The independent film production sector is limited in its ability to shift to technology-enabled new business practices that help to speed product to market. Thus it is critical that countries establish legal frameworks to address online piracy expeditiously.

⁹ESA's reporting on P2P activity does not take into account downloads of these titles that occur directly from hosted content, such as games found on “cyberlockers” or “one-click” hosting sites, which appear to account each year for progressively greater volumes of infringing downloads.

¹⁰The local recording industry reports, for example, anecdotal evidence indicating an 80% takedown rate (47 of 59 notices), with 12 remaining problem sites.

¹¹The sites for which access was disabled included [warez-bb.org](http://www.warez-bb.org), [thepiratebay.org](http://www.thepiratebay.org), [movie2k.to](http://www.movie2k.to), [megavideo.com](http://www.megavideo.com), [putlocker.com](http://www.putlocker.com), [depositfiles.com](http://www.depositfiles.com), [duckload.com](http://www.duckload.com), [fileserve.com](http://www.fileserve.com), [filetube.com](http://www.filetube.com), and [megaupload.com](http://www.megaupload.com). The ripple effect of the development in the U.S. was that several more of the sites chosen for enforcement action by the Malaysian Government, and listed here, were reportedly in the process of shuttering or significantly altering their illegal business practices.

also reportedly on the rise, with students claiming that certain titles are available either for download or for copying (even from their university library).

Problems in enforcement against book piracy have included lack of standard procedures, onerous requirements like statutory declarations *prior* to raids for books, not timing the raid during the first two weeks of each school session, lack of sufficient resources or teams to run multiple simultaneous raids, and requiring the photocopying machines to be in actual use for illegal photocopying at the time of raid as a prerequisite for seizure of pirate materials and the machines. The industry continued to raise these issues with MDTCC, which has responded by drawing up standard operating procedures to address book piracy raids. Regarding university legalization, MDTCC has been open to suggestions and is willing to work with the Ministry of Higher Education and local universities in structuring policies and strategies to eradicate piracy on campuses, but apart from periodic awareness raising campaigns of IP rights in general (including distribution of public awareness information) there has been little progress in this area. The universities should take an active role in legitimizing practices on their campuses, including adopting and implementing appropriate use and copyright policies to ensure that all university personnel and students use only original or legitimate copies of textbooks and other published reading materials. Furthermore, the Ministry of Education and Ministry of Higher Education should undertake system-wide efforts to promote the importance of copyright protection and encourage university administrators to address infringing activity occurring on their campus. In 2011, the Association of American Publishers (AAP), in cooperation with MDTCC, hosted an anti-book piracy dialogue with several university representatives in Kuala Lumpur. The event was a positive first step towards greater dialogue on how publishers, university administrators and law enforcement can work collaboratively towards more effectively curtailing unauthorized photocopying activities.

Authorities Continue to Tackle Enterprise End-User Software Piracy Problem: The willful use of unlicensed or under licensed software in the workplace in Malaysia and the installation in new computers of pirated software (hard-disk loading) continue to cause losses to the business software industry.¹² Reducing piracy would bring benefits to Malaysia in terms of added growth, tax revenues, and jobs.¹³ The Business Software Alliance (BSA) has excellent working relationships with the MDTCC. BSA and its members, working with MDTCC, carried out nearly 70 corporate end-user raids (up from 40 in 2010) which are now under criminal investigation, to be filed in court subsequent to the investigation.

New Law Will Help Combat Illegal Camcording: IIPA commends the Malaysian Government for passing legislation creating a strict liability offense against one who “operates [or attempts to operate] an audiovisual recording device in a screening room to record any film in whole or in part.” This legal framework will be extremely helpful in addressing the activity of illegal camcording – in which movies are stolen right off the screen by professional camcorder pirates, who use video cameras to illicitly copy movies during exhibition in a movie theatre, usually very early in its theatrical release or even prior to the film’s release (e.g., at a promotional screening).¹⁴ These illegally “cammed” copies are then distributed to pirate “dealers” throughout the world and over the Internet. More than 90% of newly released movies that illegally end up on the Internet and in street markets around the world originate from illegal recordings made in cinemas. The illegal upload to the Internet triggers an avalanche of illegal downloads that can significantly impact a film’s performance at the box office and throughout its distribution cycle.

¹²BSA’s 2011 software piracy statistics will not be available until after the filing deadline for this submission, but will be released in May 2012, at which time piracy rates and U.S. software publishers’ share of commercial value of pirated software will be available at www.iipa.com. In 2010, the software piracy rate in Malaysia was 56% (encouragingly, down from 58% in 2010), representing a commercial value of unlicensed software attributable to U.S. vendors of US\$303 million. These statistics follow the methodology compiled in the Eighth Annual BSA and IDC Global Software Piracy Study (May 2011), <http://portal.bsa.org/globalpiracy2010/index.html>. These figures cover packaged PC software, including operating systems, business applications, and consumer applications such as PC gaming, personal finance, and reference software – including freeware and open source software. They do not cover software that runs on servers or mainframes, or routine device drivers and free downloadable utilities such as screen savers. The methodology used to calculate this and other piracy numbers are described in IIPA’s 2012 Special 301 submission at <http://www.iipa.com/pdf/2012spec301methodology.pdf>.

¹³A 2008 study conducted by the International Data Corporation (IDC) with BSA entitled *The Economic Benefits of Reducing PC Software Piracy* concluded that decreasing Malaysia’s PC software piracy rate by ten percent (from 60% to 50%) would deliver an additional 2,600 new jobs, US\$140 million in tax revenues, and US\$660 million in economic growth in Malaysia.

¹⁴Camcording is particularly damaging in Malaysia because it can fuel rampant online piracy negatively impacting worldwide distribution and prevent the establishment of legitimate online distribution platforms. Camcording also threatens the continued growth of the Malaysian theatrical box-office marketplace.

The Government of Malaysia had done an admirable job addressing this problem. There were 63 interdictions from 2006 through 2011. On February 24, 2011, MDTCC arrested a 34 year-old man responsible for brokering the sale of large amounts of camcorded content from around the world. The arrest was the conclusion of a complex cross-border investigation and operation which required the joint efforts of a number of agencies and organizations in various countries, including Malaysia. The case remains with MDTCC prosecutors. The new law will only strengthen the hand of the authorities in controlling this damaging activity in Malaysia.

Mobile Device Piracy: Mobile penetration well exceeds 100% in Malaysia (estimated by MCMC at 30 million users as of the end of 2009),¹⁵ and broadband has reportedly reached 10 million people. As a result, mobile device piracy, in which infringing files are loaded onto mobile devices at the point of sale, has become and remains a serious piracy problem for the music and publishing industries in Malaysia. Many fixed locations engage in unlawful uploading/downloading of full tracks and ringtones both wireless and through over-the-counter sales and publishers report some downloading of reference books and dictionaries onto mobile devices. There are increasing numbers of services also offering illegal mobile downloads of content. It is estimated that about 1,000 fixed locations nationwide are still selling illegal music.

Criminal IP Courts Should Be Expanded: IIPA recommends assigning more dedicated judges to the Criminal IP courts, especially in Kuala Lumpur, and establishing the promised 15 Sessions courts around the country, to reduce backlogs and see convictions meted out and publicized in the media as a form of deterrent. IIPA applauded the establishment of the first IP courts launched in July 2007 in Kuala Lumpur, Penang and Johor to deal specifically with copyright and other intellectual property matters. Members report the judicial system has made vast improvements in the past three years and has become more efficient, partially clearing the backlog of cases. As one case example, in December 2010 a trader who had been charged with possession of 6,500 copies of pirated music recordings in 2008 was found guilty by the Sessions Court in Putrajaya and faces a fine of RM13 million (US\$4.3 million, equivalent of RM2000 or US\$660 per infringing copy) or a two-year jail term in default. The sentence was appealed. Continuous efforts are now needed to avoid backlogs and strengthen deterrence. Industry reports at least 175 criminal cases remain pending, many of which were lodged in previous years. In addition, most cases still reportedly result in low criminal fines. In one recent case involving unauthorized use of software in a business (end-user piracy), the fine was close to the minimum amount permitted by law, RM2,000 (US\$660) per copy, and given that the maximum criminal fine is RM20,000 (US\$6,600) this hardly constitutes a deterrent. The opening of new courts and assigning more judges to hear copyright cases will, it is hoped, solve the backlog problem and lead to more deterrent sentences in 2012.

Sticker Program Must be Fully Enforced Against Pirated Product and Not Create a Barrier to Legitimate Trade: The Trade Description (Original Label) Order 2002 has been in force since January 2003 (implementing Section 11 of the Trade Descriptions Act 1972 as amended). The Order imposed a hologram sticker requirement on all copies of works on optical discs (VCDs, DVDs, CD-ROMs, LDs, MDs), including imported discs distributed in Malaysia, whether manufactured locally or abroad. IIPA has noted in the past its general misgivings about mandatory labeling schemes, raising concerns such as added distribution costs and costs to consumers, and potential fraud. One benefit that could accrue to right holders is the seizure of non-stickered pirated product on the basis of the law. Right holders have done their best to comply with the Order, but notes that while pirates do not (a recent informal survey revealed that over 50% of games found in Malaysian markets did not have the requisite labels), the sticker requirement is not enforced against such violators. In 2010, the Trade Descriptions (Optical Disc Label) Order 2010 was issued (effective May 7, 2010) by MDTCC, enhancing their hand against those who are not using the stickers. Specifically, the Order makes it a crime to, among other things, supply an optical disc without a requisite label, and presumably enables MDTCC to authorize administrative actions against violators, whether manufacturers or distributors. IIPA calls upon the Malaysian Government to fully enforce the 2010 Order against pirates who continue to evade the sticker requirement.

¹⁵ Malaysian Communications and Multimedia Commission, *Penetration Rates at a Glance*, at http://skmm.gov.my/facts_figures/stats/ViewStatistic.asp?cc=45899166&srId=50919742.

Internet Café Server-Based Piracy Remains an Issue of Concern: A major problem for several years in Malaysia has involved the unauthorized use of copyright materials at Internet cafés or Internet game rooms. The prior practice of standalone computers loaded with unauthorized or pirated copies of games had migrated to a “client server” model, in which the unauthorized software is installed at the server level on-site (or more recently, offsite by third parties), and customers’ machines would be granted access to the same copy on the server.

COPYRIGHT LAW AND RELATED ISSUES

Copyright Amendments Enacted: On December 22, 2011, the Government of Malaysia passed the Copyright (Amendment) Act 2010 (amending the Copyright Act of 1987). IIPA commends the government for moving forward with copyright reforms to implement the WCT and WPPT (presumably with the aim to join those treaties), and to introduce important protections and enforcement remedies (like a new anti-camcording provision in Section 43A) that will contribute to the adequacy and effectiveness of Malaysia’s copyright system and confirm Malaysia’s role as a regional leader in the area of protection of the rights of creators. The following are some observations about the new law and considerations for implementing regulations to come, which can clarify some issues left unsettled in the amendments.

- **Technological Protection Measures (TPMs):** The amendments prohibit both the circumvention of TPMs and the trafficking in circumvention technologies, devices and services, in new Section 36A, and provides remedies against those who violate the law. One issue left unclear by the amendments is coverage of both access controls as well as copy controls, consistent with international best practices as reflected in the WCT and WPPT. It appears that the drafters intended to cover both. Section 36A(1)(a) covers any TPM “that is used by the owner of the copyright in connection with the exercise of his rights under this Act,” and Section 36A(1)(b) covers any TPM “that restricts acts in respect of his works which are not authorized by the owner concerned or permitted by law” is covered. However, the draft amendment to Section 3 would define a TPM as “any technology, device or component that, in the normal course of its operation, effectively prevents or limits the doing of any act that results in an infringement of the copyright in a work.” Since Section 36A stands alone from the definition of TPM in Section 3, arguably Section 36A(1)(b) can work to prohibit the act of circumvention of an access control, since “no person shall circumvent, or cause or authorize any other person to circumvent, the technological protection measure ... that restricts acts in respect of his works which are not authorized by the owner concerned or permitted by law,” language that is well understood to cover access controls. IIPA seeks clarification on this point. The same reasoning could apply to the trafficking provisions, but this should also be clarified. Since the prohibition on trafficking refers to the “circumvention” (Section 36A(3)) of a TPM, and to the extent this refers back to the act of circumvention as defined in Section 36A(1)(b), then arguably access controls are covered. To the extent this cannot be clarified in implementing regulations or explanatory memoranda, it may be necessary to make a technical amendment to the Section 3 definition of a TPM, to include “any technology, device or component that, in the normal course of its operation, effectively **controls access to a protected work or** prevents or limits the doing of any act that results in an infringement of the copyright in a work.” [emphasis added]
- **New Exception Confirms Temporary Copy Protection But Should be Narrowed:** It has long been understood that Malaysian law covers temporary reproductions, and Section 13 has been amended to create a new exception for “the making of a transient and incidental electronic copy of a work made available on a network if the making of such copy is required for the viewing, listening or utilization of the said work.” This amendment confirms coverage in Malaysia of temporary copies under the reproduction right, although in the future, it would be best if this was made explicit in the definition of “reproduction” in Section 3 of the Act. It must be clarified in implementing regulations that the Section 13 exception is only operable to the extent it does not conflict with a normal exploitation of the work or unreasonably prejudice the legitimate interests of the right holders, consistent with the Berne three-step test (and TRIPS Article 13). Implementing regulations should also therefore confirm that the exception only applies to the extent such viewing, listening or utilization is a lawful use

and from a lawful source (i.e., is caused by one who, by way of the authorization of the copyright owner or by operation of law is entitled to make that transmission), is part of an otherwise lawful transmission in a network between third parties by an intermediary, has no independent economic significance, and is automatically deleted without enabling the retrieval of the work for any purpose other than to perceive it.¹⁶ The term “utilization” should also be further explained in implementing regulations.

- **Statutory Damages:** IIPA commends the Malaysian Government for introducing statutory damages, in the amount of MYR25,000 (US\$8,195) with a maximum of MYR500,000 (US\$164,900). Implementing regulations should confirm that, by procedure, the plaintiff will be able to elect statutory damages, and that sound recordings are to be considered “one work” for the purpose of statutory damage awards.¹⁷
- **Civil Damages – Innocent Infringer:** Amended Section 37(6) provides an “innocent infringer” provision which denies actual damages (but not profits or statutory damages) to one who “at the time of the infringement or commission of the prohibited act the defendant was not aware, and had no reasonable grounds for suspecting, that the act was an infringement of the copyright or prohibited under section 36a or 36b.” While this change should be reconsidered in future amendments, in the least, implementing regulations should apply only when the “*infringer sustains the burden of proving, and the court finds*” that the infringer was not aware and had no reason to believe that his or her acts constituted an infringement of copyright. This is particularly important as it applied to remedies for circumventing TPMs, since statutory damages are excluded as a remedy.
- **Anti-Camcording:** IIPA applauds the Malaysian Government for introducing in Section 43A a new anti-camcording provision. This new strict liability offense against one who “operates an audiovisual recording device in a screening room to record any film in whole or in part,” and the separate offense for an “attempt” to do the same, will be extremely helpful in the fight against this harmful form of piracy in Malaysia. Implementing regulations could make clear that it is also cognizable if someone, after “record[ing],” attempts to make an onward distribution, communication to the public, or transmission of such recordings.
- **Service Provider Liability:** The new law encourages the active cooperation of Internet service providers (ISPs) with right holders to prevent the use of networks for the commission of infringing acts, and includes a court-ordered mechanism to deal with rogue websites and halt online infringements.¹⁸ The law addresses (in new Sections 43B through 43I) provisions related to service provider liability for various infringing activities occurring over its services.¹⁹ Questions remain as to the operation of the law, for example, whether red-flag knowledge is the equivalent of notice,²⁰ whether injunctive relief against a service provider is maintained,²¹ and whether the

¹⁶See, e.g., European Union, *Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society*, Official Journal L 167, June 26, 2001, Art. 5.1, at <http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32001L0029:EN:HTML>.

¹⁷A “collective work” is then defined in new Section 37(10)(b) as “a work in which relevant materials, constituting separate and independent works in themselves, are assembled into a collective whole.” It is assumed that individual sound recordings would each be regarded as “one work” notwithstanding that they also may be assembled into albums, but this could be usefully clarified.

¹⁸One provision the new law does propose is authorizing a court to order a service to disable access to an online location situated outside Malaysia or to terminate an account in cases where infringing material provided via “[t]ransmission, routing and provision of connections,” has been identified to come from such online location or location of account.

¹⁹It is noteworthy that the Malaysia-Japan Economic Partnership Agreement, which was signed by both Prim Ministers on 13 December 2005 in Kuala Lumpur and came into force on 13 July 2006, contains in Article 122 (2), the following obligation by which Malaysia is now bound:

Each Country shall provide for appropriate measures concerning limitations on liability for service providers:

(a) in case where a service provider provides a necessary deterrent to the transmission of information through telecommunication systems or networks controlled or operated by the service provider which it believes to be the infringement of copyright or related rights; and

(b) in case where the infringement of copyright or related rights occurs by the transmission of information through telecommunication systems or networks controlled or operated by a service provider and where the service provider is technically unable to deter the transmission or has difficulty in finding the infringement of copyright or related rights.

²⁰The implementing regulations should explain that “notice” is also defined to include red flag notice, i.e., that the service provider knows, or is aware of facts and circumstances from which the infringement is apparent.

²¹The implementing regulations should confirm that injunctive or other equitable relief is preserved.

law requires adoption by ISPs of a repeat infringer policy.²² These should be addressed in implementing regulations. The law imposes a 48-hour rule for takedown upon notice. Implementing regulations should clarify that in the case of pre-release material (movies, music, games, software, or published materials not yet available in Malaysia), takedown timeframes should be immediate or in any case no longer than two hours.

Other Copyright Law Issues: IIPA notes the following as some remaining issues which were not taken up in this round of amendments but should be marked for future consideration: 1) a provision imposing landlord liability (it is highly unfortunate that a draft provision providing that landlords would be liable for providing premises to tenants who infringe was removed from the earlier draft);²³ 2) recovery of costs and attorneys fees (a TRIPS requirement); 3) mandatory minimum jail sentences for piracy and/or sentencing guidelines to ensure imposition of deterrent sentencing; 4) presumptions in the law as to copyright ownership or subsistence of copyright without unduly burdensome requirements;²⁴ 5) a provision to deem infringing, in civil and criminal cases, the “possession and control” of infringing copies; 6) providing copyright term extension to “life plus 70,” and 95 years from publication for films and sound recordings; and 7) allow the filing of civil actions based on information gathered during criminal anti-piracy operations conducted by law enforcement agencies.²⁵ The government has also reportedly indicated an interest in dealing more generally with cybercrime, and thus should look to join and implement the Council of Europe Cybercrime Convention.²⁶

Make Necessary Changes to Optical Discs Act and Ancillary Regulations: The Optical Discs Act could be improved to address the changing situation in Malaysia, including, *inter alia*, the need to: 1) ensure that manufacturers or factory owners should not be allowed to import machinery without a valid license from MDTCC, and that MDTCC should have the power to seize and remove such machines if found in unlicensed premises; 2) prohibit the gouging or other removal of SID Codes from discs; 3) ensure that inspection authority is available and used at any time, day or night, and in any place where optical media production activity may be occurring; 4) prohibit the unauthorized burning of content onto recordable discs; 5) specifically empower the authorities to shut down factories based solely on positive forensic examination reports; 6) ensure that any plants, which indicate that they are producing “recordable” discs (CD-R, DVD-R, etc.), or existing plants requesting licenses to acquire or expand production to recordable discs, are fully subject to the licensing regime; and 7) exemplars from all such plants/lines must be provided, even from recordable-only plants.

²²The implementing regulations should require ISPs to have in place a fair and effective policy for repeat infringers, and to indicate that service providers who fail to inform their customers and implement such a policy would not be eligible for the safe harbors provided.

²³Five known civil actions have been filed against landlords for copyright infringement liability of tenants' use of their premises to sell pirated materials, and the government in 2007 lodged the first-ever criminal complaint against a landlord for the same. The civil cases filed by the music industry have either been settled or are progressing through the court system, with various interlocutory applications having been filed successfully by the landlords. In one case, the music industry failed in its appeal to the Court of Appeal against the High Court Judge's decision to strike out the industry's case against the landlord. The Court of Appeal did not agree that a duty of care could exist where landlords knowingly permitted and profited from their pirate tenants. They were unwilling to consider “duty of care” beyond the traditional boundaries. The music industry is considering an appeal to the Federal Court (highest court). The prosecution of the criminal case has not progressed. The head of MDTCC had made public statements that the Copyright Act would be amended so that action can be taken against owners of business premises who allow their tenants to carry out illegal activity.

²⁴Section 42 (which states that an affidavit or statutory declaration is *prima facie* evidence of facts contained therein) should be properly interpreted such that the burden of proof shifts to the defendant. As necessary, Section 42 should be amended to afford right holders with presumptions of subsistence of copyright and ownership in practice and expressly indicate the burden of proof (on the defendant) to ensure that statutory declarations of ownership and subsistence are not vulnerable to technical challenges by defendants. Specifically, it should be sufficient that the declaration says “copyright subsisted and continues to subsist at all material times” and the “true copy” requirement is overly burdensome. The maker of an affidavit of copyright ownership or subsistence should not be required to be physically present, in accordance with a High Court ruling that holds that such appearances are unnecessary and contrary to the spirit and intention of Section 42. “Presumptions” of ownership are required under Malaysia's current TRIPS obligations.

²⁵Section 52 of the Copyright Act should be amended such that facts adduced or gathered during a criminal investigation or prosecution may be admitted as evidence in any subsequent civil action. The MDTCC and Attorney General's Chambers continue to apply a narrow interpretation of Section 52, and as a result, in a number of recent cases, the music industry's requests to make “mirror copies” of digital works seized, to enable the industry to initiate civil cases, have been rejected by the Ministry.

²⁶*Government Looking Into Ways To Tackle Cyber Crime*, Bernama, January 17, 2011, at <http://kpdnkk.bernama.com/news.php?id=557241>. According to the article, the Malaysian Deputy Home Minister has indicated the government is “looking into amending relevant legislation to tackle cybercrime.” The Council of Europe Cybercrime Convention contains, in Article 10, “Offences related to infringements of copyright and related rights,” an obligation to “adopt such legislative and other measures as may be necessary to establish as criminal offences under its domestic law the infringement of copyright [and related rights] ... where such acts are committed wilfully, on a commercial scale and by means of a computer system,” and Article 11 contains the obligation to “establish as criminal offences under its domestic law, when committed intentionally, aiding or abetting the commission” of Article 10 offenses.

Employ Organized Crime Legislation: With the involvement of organized criminal syndicates in certain piracy operations in the country, the Government of Malaysia should employ more strategically the Anti-Money Laundering and Anti-Terrorism Act of 2001 in cases involving copyright infringement.²⁷ While no public information is available, it is believed that the Malaysian Government has taken some action against persistent or known pirates under the Anti-Money Laundering Act. The Government of Malaysia should also ensure that the prosecution of pirates under either one of these Acts receives sufficient media coverage as a means of deterrence.

TRANS-PACIFIC PARTNERSHIP (TPP)

On December 14, 2009, United States Trade Representative Ron Kirk formally notified Congress of President Obama's intention to negotiate with Trans-Pacific Partnership countries with the objective of shaping a high-standard, broad-based regional agreement.²⁸ IIPA has submitted public comments to the U.S. Government's Trade Policy Staff Committee which describe in greater detail the hoped-for results of a TPP negotiation, including a high-level IP chapter, high-level substantive copyright protection, high-level enforcement standards, provisions ensuring the free flow of electronic commerce products and services, and obligations to open markets to trade in copyright goods and services.²⁹ Enhancement of copyright standards and enforcement consistent and co-extensive with those agreed to by current FTA partners, Australia, Singapore, Chile and Peru, and an expansion of these protections to other countries in the region including Malaysia will contribute to U.S. job growth, an increase in exports, and economic recovery in line with the current Administration's goals.³⁰ On November 10, 2010, IIPA filed prepared and detailed testimony, which it delivered on November 19, 2010,³¹ strongly supporting Malaysia's participation in the TPP.

MARKET ACCESS AND RELATED ISSUES

Lift Broadcast Quotas and Investment Restrictions: Broadcast stations in Malaysia are being required, through licensing agreements, to devote 70% to 80% of terrestrial airtime to local Malaysian programming. Broadcast stations are also banned from broadcasting foreign programming during "prime time" hours of 8:30 to 9:30 p.m. These restrictions significantly limit the expansion of the television sector in Malaysia, and should be eased or lifted.

Lift Cinema Entertainment Tax: The entertainment tax for theater admissions, at 25% of the gross ticket price, is among the highest in the region and limits the growth of the theatrical industry by artificially increasing box office prices. The Malaysian Government has made no attempt to reduce this tax for the past several years.

Lift Foreign Ownership Restrictions: Foreign investment in terrestrial broadcast networks is strictly prohibited. The Malaysian government also imposes a 20% limit on foreign investment in cable and satellite operations through licensing agreements. This restriction should be lifted.

TRAINING AND PUBLIC AWARENESS

The copyright industries once again demonstrated their resolve and commitment to assist the Malaysian Government through participation, organization, and devotion of resources to trainings and public awareness

²⁷Other laws, such as those criminalizing fraud, tax evasion, false documentation or names and addresses, should also be brought to bear in piracy cases to address the organized crime/IP nexus in Malaysia.

²⁸ See United States Trade Representative, *Trans-Pacific Partnership Announcement*, December 14, 2009, at <http://www.ustr.gov/about-us/press-office/pressreleases/2009/december/trans-pacific-partnership-announcement>.

²⁹International Intellectual Property Alliance, *Public Comment Concerning the Proposed Trans-Pacific Partnership Free Trade Agreement with Singapore, Chile, New Zealand, Brunei Darussalam, Australia, Peru and Vietnam*, 74 Fed. Reg. 66,720 (December 16, 2009).

³⁰We note that President Obama signed the Korea-U.S. (KORUS) free trade agreement on October 21, 2011, and that agreement provides a strong starting point for an enhanced TPP agreement consistent and co-extensive with previous FTAs.

³¹International Intellectual Property Alliance, *"Participation of Malaysia in the Trans-Pacific Partnership Trade Negotiations" IIPA Request to Testify and Testimony Regarding "Negotiating Objectives With Respect to Malaysia's Participation in the Ongoing Negotiations of a Trans-Pacific Partnership (TPP) Trade Agreement,"* 75 Fed. Reg. 64778 (October 20, 2010).

activities in 2011. The Motion Picture Association of America's local group engaged in training activities, conducting trainings focused on Internet investigations (to MCMC, MDTCC, Prosecutors, and the Royal Malaysia Police), anti-camcording operations (provided to cinema staffs, the Royal Malaysia Police, and MDTCC). IIPA members would like to see greater focus and attention on 1) police, prosecutors, and judges handling criminal IPR cases; 2) public awareness educational activities to highlight the harms of piracy to local creative development, innovation and the IT industry; 3) public awareness and training programs targeted at directors and senior management of companies on legal copyright usage, including usage of software, e.g., by enlisting the support of the Kuala Lumpur Stock Exchange and the Companies Commission of Malaysia; and 4) encouraging and/or compelling companies to conduct yearly software audits to ensure legal compliance and work with audit firms to provide software audit services nationwide.

MEXICO

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

2012 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: IIPA recommends that Mexico be retained on the Watch List in 2012.¹ Even though cooperation with enforcement officials is good, absent substantial enforcement progress resulting in an improved marketplace in 2012, some IIPA members will recommend an elevation to the Priority Watch List next year.

Executive Summary: In 2011, hard copy piracy remained at about the same level as it has been for the past several years for most of the copyright industries. However, Internet piracy has grown considerably in Mexico, (with some industries, such as the motion picture industry, recording a 300% increase from 2010); the increase is due, in part, to increased broadband penetration across Mexico, but also as the result of ineffective enforcement. Piracy in Mexico is widespread, including: hard copy; various forms of Internet piracy; CD-R and DVD-R burning of music, audiovisual and videogame discs; unauthorized camcording in theaters; unlicensed use of software in corporate and government settings; unauthorized photocopying at universities; and widespread sale of all hard copy material in street markets.

IIPA members report an enforcement environment that mixes good government cooperation in some key sectors pertaining to hard copy piracy, with disappointing results, especially against Internet piracy. The weaknesses with regard to digital piracy (and hard copy piracy) enforcement are the result of ineffective criminal and customs procedures. Additionally, the Government of Mexico has been very slow to work on resolving a cornerstone of Internet enforcement, namely a cooperative agreement between rights holders and Internet Service Providers (ISPs). It has been four years since the commencement of an attempt to reach agreement between an initial coalition of rights holders and ISPs, under the auspices of the Mexican communications ministry; the process broke down due to opposition from the Communications Secretary and the Federal Commission of Telecommunications (COFETEL). Then, three years ago, 37 civil organizations representing copyright industries, other rights holders and collecting societies formally established the “Coalition for the Legal Access to Culture” (CALC), to re-start those efforts. In addition to the other challenges, effective enforcement is hampered by a lengthy list of legal deficiencies, including the need to fully implement the WIPO digital treaties. If Mexico is serious about membership in a future Trans-Pacific Partnership (TPP) agreement, which would almost certainly include baseline protections for digital works, Mexico needs to quickly and properly implement the digital treaty obligations, especially pertaining to technological protection measures (TPMs), as well as the other key components of digital protection and enforcement.

Mexican authorities, notably the Attorney General’s Office (the PGR – responsible for federal criminal enforcement), the Mexican Institute of Industrial Property (IMPI – responsible for administrative actions under the Copyright Law) and INDAUTOR (the author’s rights institute, which also has enforcement responsibilities), have worked well with rights holders over the years, including IIPA members. However, these authorities need to coordinate their efforts, and to increase their resources and training. Even though cooperation with the federal authorities is good, state and municipal government anti-piracy efforts continue to be weak, with few of these local entities working at all on combating illegal trade and piracy. One key recommendation is for the government to develop a high-level national anti-piracy plan that both enhances and coordinates federal, state and municipal enforcement activities, and address Internet piracy.

¹For more details on Mexico’s Special 301 history, see IIPA’s “History” appendix to this filing at <http://www.iipa.com/pdf/2012SPEC301HISTORICALCHART.pdf>, as well as the previous years’ reports, at <http://www.iipa.com/countryreports.html>. For a summary of IIPA’s 2012 global issues, see our cover letter at <http://www.iipa.com/pdf/2012SPEC301COVERLETTER.pdf>.



PRIORITY ACTIONS REQUESTED TO BE TAKEN IN 2012

The copyright industries recommend the following enforcement and legal reform priority steps to the Government of Mexico:

Criminal Actions, Raids and Prosecutions

- Develop a national “*ex officio*” anti-piracy campaign to address well-known street markets and distribution centers responsible for the sale of vast quantities of pirated goods, including cooperation with municipal authorities to revoke operational licenses, and to focus on enterprise end-users of unlicensed software and other materials.
- Coordinate the various police agencies (the federal police (PFP), the fiscal police (SAT), as well as state and local police) to identify and target individuals responsible for the large-scale distribution and importation of pirated goods.
- The government should set goals and augment the tax authorities’ (SAT’s) anti-piracy actions, including inspecting enterprises for software license compliance. In addition, SAT should act expeditiously on the numerous cases IMPI referred to SAT pertaining to unlicensed software use by enterprises.
- Create a fully empowered IP Intergovernmental Committee with authority to coordinate the various enforcement bodies including police and prosecutors, and to implement a national plan, including coordination with the PGR’s Organized Crime Division to act against major organized crime syndicates engaged in large-scale IP piracy operations.
- Address illegal photocopying by copyshops on or near major university campuses, and engage university administrations to encourage the use of legal materials by students and lecturers.
- Provide Customs with adequate resources and *ex officio* authority (to independently make seizures) to improve effectiveness in seizing infringing goods and components (including procedures to address changes in the size and frequency of shipments, and to deal with falsified documents). Re-launch the inspection program (by Customs) and adopt a maximum quota on blank media importations used for the pirate market.
- Ensure that seized goods in criminal and administrative actions are destroyed in a timely manner to prevent the reentry of infringing product into the market. Relevant rights holders should be notified of the destruction of infringing goods.

Administrative Enforcement

- Provide IMPI with additional resources (including personnel) to conduct inspections, and allow IMPI’s regional officers to become enforcement inspectors to conduct raids in their localities (in light of the 2011 reorganization of IMPI). Encourage IMPI to expeditiously issue its decisions; and, to waive right holder deposit fees in instances of “obvious” piracy.
- Provide INDAUTOR with more resources and facilities to increase its mediation capabilities, particularly by providing more mediators and mediation rooms, and requiring more expeditious notices to rights holders.
- Require the Secretary of Education to instruct INDAUTOR to expedite the publication of tariff rates for the public performance of sound recordings by TV and radio stations in Mexico (such rates are required in

accordance with the Copyright Act and Mexico's international obligations; this action has been "pending" for eight years).

Prosecutions, Judges and Courts

- Encourage prosecutors to take *ex officio* actions against all forms of piracy, to focus on prosecuting individuals arrested in such actions, and to seek deterrent sentences, including jail time. Also have the Supreme Court issue an advisory on this point to criminal judges nationwide. Encourage judges to act expeditiously on applications for search warrants in civil cases.
- Implement *ex parte* remedies (especially injunctive relief) for civil IPR infringement cases in order to fulfill Mexico's TRIPS obligations. On August 30, 2011, the Civil Code was amended to permit these remedies, but they have not yet been implemented.
- Create specialized IP courts for criminal matters. Continue to provide, and expand on, IPR enforcement training for law enforcement officials, prosecutors and judges. Provide sufficient resources for the IP magistrates within the Tax Court.
- Allow civil damages to be additionally awarded to plaintiffs in administrative and criminal cases.

Legal Reforms

- Fully implement the WIPO digital treaties – in the Copyright, Industrial Property, Criminal and Criminal Procedural Codes.
- Develop legislation calling for ISPs' cooperation to address online piracy following the direction of the CALC initiative, and including notice and takedown procedures.
- Ensure that all relevant right holders are entitled in law and practice to operate effectively through the collecting bodies of their choice in the licensing of broadcasting, public performance and other communications to the public.
- Pass legislation to impose criminal penalties for the unauthorized camcording of films in theaters.
- Amend the Criminal Code and the Copyright Law to facilitate the imposition of criminal sanctions for the distribution and importation of devices used for the unauthorized circumvention of technological protection measures (TPMs).
- Enact and enforce decrees to ensure the procurement and use of legal computer software in governmental agencies, especially at the state and municipal levels.
- Strengthen administrative enforcement by: (1) providing tax crime prosecution authority; and (2) increasing administrative sanctions.
- Enact pending (Senate) legislation to create a centralized customs registration database to assist with identification of infringing shipments.
- Adopt legal norms that create incentives for Internet Service Providers (ISPs) to cooperate with right holders in fighting infringement taking place over their networks or platforms, including *inter alia*: (i) legal incentives for ISPs to cooperate with rights holders to effectively deal with Internet piracy; (ii) rules that clarify the illegality of providing services that are intended to promote the infringement of copyright and related rights;

and (iii) injunctive relief and a duty on ISPs to provide information to law enforcement agencies and rights holders.

- Ensure that an unauthorized online distribution, communication or making available is considered an act of infringement, regardless of whether it is undertaken for profit-making purposes or other commercial benefit or advantage.

COPYRIGHT PIRACY IN MEXICO

Here is a snapshot of the nature of piracy and ongoing enforcement problems in the past year:

Internet piracy: Internet piracy is growing, as Internet use grows in Mexico: there are now an estimated 34.9 million Internet users in Mexico, representing 30.7% of the population; in 2000, only 2.7% of the population had Internet access (according to www.Internetworldstats.com). Mexico has no clear secondary (ISP) liability law in place, and no formal notice and takedown procedures; either would substantially improve enforcement, if properly implemented.

The most prevalent platforms for unauthorized downloads are peer-to-peer (P2P) file sharing, sites dedicated to providing links to infringing hosted content, illegal distribution hubs (also known as cyberlockers), forums and social networks, BitTorrent index sites and blogs. Many sites are hosted mainly in the U.S. and Europe but administered in Mexico, such as demonoid.me.

With the migration of customers from hard copy to downloading and mobile phone usage, peer-to-peer is the most prevalent source of music piracy, with ARES, Gnutella and BitTorrent dominating, as well as “linked” piracy on blogs and forum sites. “Blogspot,” a Google service, has been widely used; Google Mexico has been blocking links in response to takedown notices sent by rights holders (although their takedown procedure has proven to be very time consuming, and, thus not a very effective remedy). The most prevalent sites in Mexico for unauthorized music are peer-to-peer and BitTorrent sites (e.g., Megaupload, Fourshare and Rapidshare). The Motion Picture Association (MPA) undertook a study in 2010 (IPSOS survey) which found a three-fold increase in Internet piracy from the previous year, including 96 million illegal movie downloads, 28 million television program downloads, and 5.7 billion illegal music files downloaded in Mexico in 2010. Internet piracy is directly related to “source” piracy – the camcording of films that are then uploaded onto the Internet and available by all means (a bill to address this problem was introduced in December 2011). Independent film producers (IFTA members) are especially concerned about Internet piracy because of its harm to legitimate online distribution platforms and services – harming consumers and rights holders alike. Revenue from these platforms and services, which are licensed country-by-country, is critical to financing the development of new creative works worldwide, since piracy in one territory harms other markets instantly. Thus, Internet piracy is impacting the financing and distribution of independent content because “minimum guarantees” for license fees are being hurt by piracy, namely theatrical, DVD and television rights.

Hard goods piracy: Focused enforcement efforts are needed against the manufacturing and distribution networks, and on street and market sales. The main distribution centers for optical disc piracy (CDs and DVDs) – of music, film, entertainment and business software – remain as follows: Tepito, Lomas Verdes, Pericoapa, Salto del Agua, Plaza Meave, and Plaza de la Computación in Mexico City; La Cuchilla in Puebla; Las Pulgas in Monterrey; and San Juan de Dios and El Parián in Guadalajara. Tepito, San Juan de Dios and La Cuchilla are the dominant sources for manufacturing and sale, along with growing problems at Plaza de la Computación and Plaza Meave. IIPA continues to recommend focusing enforcement on these five locales, with a more systematic approach to identifying and prosecuting the criminal organizations operating in these (and the other) markets.

In 2006, the film and music industries combined their anti-piracy operations into the Association for the Protection of Film and Music (APCM). APCM reports that hard goods piracy for 2011 in the film industry remained at the same rate as in 2010, or at about 85%, and at about 71% for music. Flea market piracy remained at a constant

level, and is especially problematic in Mexico City, Guadalajara, Puebla, Cuernavaca (Morelos) and Monterrey. There remain at least 80 very large, very well-known, “black markets” in Mexico, many of which are well organized and continue to be politically protected. In some street locations, consumers can exchange previously purchased pirated product. Vendors also make available infringing copies of any catalog product or TV series, often with a 24-hour turnaround time.

Almost all of the pirated disc product in Mexican markets is locally manufactured, so controlling blank optical media imports is very important. Mexico imports much of its blank media from Taiwan and China; the main ports of entrance are Manzanillo, Matamoros, Reynosa, and Laredo. The street markets have discrete distribution chains and often involve organized criminal syndicates.

For years, hard goods piracy has been the most damaging form of piracy for the entertainment software industry, as evidenced by the enormous quantities of burned optical discs and counterfeit cartridges (and memory sticks) found in the major markets (cited above), particularly Tepito, Pericoapa, Plaza Meave and San Juan de Dios. Most of the pirated games available for purchase in Mexico are burned domestically, either burned on demand or sourced from local production points and wholesale distribution centers. Industry enforcement efforts have uncovered multiple burning labs in Tepito and Plaza Meave capable of producing hundreds of thousands of pirated games. Additionally, counterfeit cartridges continue to be imported from Asia, often in component pieces which are then assembled in Mexico. Circumvention activity continues to be a significant problem for the Entertainment Software Association (ESA), and occurs openly in many markets. The widespread availability of circumvention devices and technologies underpins and facilitates the growing problem of online piracy of entertainment software in Mexico. Circumvention is accomplished by the installation of “modification chips” in consoles, which bypass the technological protections embedded in the hardware and enable the play of pirated games, or by modifying the game platform’s operating system to facilitate the play of pirated games (so-called “soft modding”). Enforcement against distributors of circumvention devices is unavailable, because Mexican criminal law prohibits only the manufacture of such devices, but not the distribution or sale thereof. Increasingly, consumers in Mexico source their circumvention devices from online auction sites. Vendors sell circumvention devices for approximately 290 Pesos (US\$21.50), often with memory cards containing up to 400 unauthorized copies of games as part of the sale.

The independent film and television segment of the motion picture industry (IFTA) reports that online and physical piracy remain a significant export constraint for independent producers and distributors, the majority of which are small to medium-sized businesses. Independent producers partner with local authorized distributors to finance and distribute their films and programming. These authorized distributors find it almost impossible to compete with the pirates and report that piracy in Mexico has reached disastrous levels. Producers and distributors confirm that DVD sales have been particularly impacted since pirated digital copies are offered for free online and with the same quality viewing experience as a DVD. Unable to compete with free, legitimate distributors cannot commit to distribution agreements, or alternatively, they offer drastically lower license fees which are inadequate to assist in financing of independent productions. As a result, piracy is undermining and may permanently damage legitimate distribution networks essential to reaching the consumer and leaves little confidence for investment in intellectual property in Mexico. The independent film production sector cannot shift easily to new business practices that might otherwise limit piracy. For example, worldwide same day release (referred to as “day and date” release) may prove an effective method to curb or delay piracy for the major studio producers, who control their own worldwide distribution; but for independents, whose national distributors release on their own schedule, this technique is impossible.

Enterprise end-user software piracy: The primary concern for the business software industry remains the unlicensed use of software by enterprises (end-user piracy). The Business Software Alliance (BSA), in its annual study prepared by market research firm IDC, reported that the personal computer software piracy rate in Mexico dropped to 58% in 2010 (a 2% point improvement from 2009), with an estimated commercial value of unlicensed software of US\$1.2 billion (up from US\$1.056 billion in 2009). BSA will release its 2011 piracy data in May 2012. Illegal software is available at street markets (by “carpeteros”), on line auction sites, specialized download sites and

file sharing sites. In addition, “white box” vendors (small local assemblers or non-brand name vendors of computer hardware) continue to be a considerable source of software piracy, usually hard disk loading.

Camcorder piracy: The illegal recording of films in Mexican theaters continues to cause significant harm to the U.S. motion picture industry. In 2011, 29 films were stolen from Mexican theaters. In 2011, four professional individuals (camcorders) were apprehended in Mexico; three are currently in jail. It is estimated that these individuals were responsible for over half of the material identified from Mexico. One of these individuals (“Banana”), was also a broker and leader of a major online and hard goods release group, with ties to one of the largest distributors of DVD masters in Tepito. He was responsible for brokering or releasing 17 unique sources (seven audios and ten full camcords) from Mexico and Latin America during the first six months of 2011. On December 6, 2011, federal agents raided four locations, arresting Banana and seizing 70 disc burners, approximately 1.9 million inlay cards and DVD covers, 300 film DVD masters, and approximately 59,000 illegal discs containing approximately 700 films. This underscores the organized and profit-driven nature of this crime. As major blockbuster theatrical release dates in Mexico and the U.S. begin to coincide, Mexico has become a source of Spanish-dubbed camcords which are then made available online. The enforcement challenge in Mexico remains the same: the police cannot arrest an individual camcording unless there is also evidence of a distribution. To sustain a successful prosecution under the current law requiring proof of intent to distribute, investigators have to watch the thieves actually camcord the movie, walk out of the theater, hand it over to the people who hired them, and then wait for the film to be widely distributed; by that time, grievous harm has resulted. This is a terribly inefficient use of government resources, has little deterrent effect, and is causing grave economic damage, which is why legislative fixes are necessary.

Book and journal piracy: Unauthorized photocopying of academic materials at copy shops in and around university campuses remains of concern. The production of unauthorized compilations or course packs consisting of unlicensed content from a variety of publishers is also commonplace. In some cases, materials taken from U.S. books are posted on the institution’s intranet for faculty and student use, without permission and without payment to the publishers. Enforcement officials and education/university officials should take a more active role in addressing the problem of unauthorized reproduction, especially activity occurring on campus or using campus facilities. Universities should implement appropriate use and copyright policies that promote respect for copyright and raise awareness among personnel, faculty and students, and that discourages infringing behavior. The use of only legitimate materials should be required at institutions of higher learning, and appropriate sanctions meted out to those found engaging in infringing behavior. The local reprographic rights organization, CEMPRO (Centro Mexicano de Protección y Fomento a los Derechos de Autor), established in mid-1998, has “licensing” agreements with a number of university libraries and a few legitimate copy shops (such as Office Max and Office Depot). However, the royalties collected are largely symbolic, and are not a significant source of revenue for legitimate companies.

COPYRIGHT ENFORCEMENT IN MEXICO

Criminal Enforcement

Structural reforms and jurisdictional issues: There are several “structural” reforms or agency actions that could improve criminal enforcement. First, effective coordination and communication among the municipal, state, and federal governments could greatly improve criminal enforcement. Only four of Mexico’s 32 state governments cooperate on IPR enforcement – the State of Mexico, the Federal District, Jalisco and Puebla. Mexico has 2,400 municipal governments, and about 190 of them have populations of over 100,000 inhabitants. Each one of these municipalities has regulations related to commercial establishments, markets and street vendors; but even with such regulations, few local anti-piracy actions have been taken. Priority states for coordinated federal-“local” efforts include: the Federal District, Nuevo Leon, Jalisco, Mexico State, Puebla, Morelos, Baja California Norte, Veracruz and Michoacán.

A second goal is further improving the activities of the PGR (the Attorney General’s) criminal actions. In 2010, in a very positive development, legislation was enacted giving PGR the authority to take *ex officio* actions

against copyright infringement, and BSA and MPAA reported in 2011 that PGR is using this authority effectively. BSA reports an increase in the number of arrest warrants and convictions. The copyright industries are also applying the “Ley Federal de Extinción de Dominio” (Federal Law for Property Forfeiture) to piracy cases. The PGR anti-piracy coordinating committees are proving effective in several states, including Nuevo Leon, Morelos and Puebla. One particularly severe problem facing IIPA members is piracy undertaken by organized crime syndicates which are increasingly responsible for piracy in Mexico the past few years. The PGR has a special piracy unit, the “Subprocuraduría” Specialized in Investigation of Federal Crimes (SEIDF), which has worked effectively with industries and achieved significant results in some key markets (including in digital piracy cases). However, this unit is under-resourced to effectively dismantle the organized crime networks. There is also a PGR Organized Crime Investigative Division (PGR-SIEDO) with excellent investigators and attorneys and resources that the other divisions do not have – including paid informants, wire-tapping authority and witness-protection programs. IIPA members recommend better coordination between PGR-SIEDO and PGR-SEIDF. Criminal prosecutions remain a major concern for APCM Mexico because criminal sentences are rare, given the number of raids and cases commenced; additionally, more resources and training are needed.

The Mexican Tax Administration (SAT) is encouraged to use its inspection power to review companies for their use of legal software; this would serve as a powerful deterrent to unlicensed software use by business enterprises. BSA reports that in 2011, IMPI referred to SAT 99 cases of companies for investigation into whether they were infringing software copyrights and violating tax law; IIPA urges SAT to act on this information. SAT did work very effectively with other Mexican and U.S. enforcement officials in December 2011 (“Operation Holiday Hoax”), at which time over US\$80 million in counterfeit items were seized in the U.S. and Mexico; Mexican enforcement authorities executed 160 search warrants and seized 23.8 million counterfeit and pirated pieces, including pirated DVDs. The film and music industries reported a total of 3,046 search warrants executed in 2011. The Scientific Police of the Secretaria de Seguridad Publica have also assisted rights holders by providing information on illegal software websites.

One problem that undermines the effectiveness of raids by PGR is seized goods finding their way back into the black market because they are not expeditiously destroyed. IIPA continues to recommend that PGR adopt a policy to expeditiously destroy infringing goods as Customs, IMPI and PGR lack clear procedures on how to handle and destroy confiscated goods. In 2011, PGR did work with rights holders (MPAA and RIAA, in particular) on some actions to destroy a large number of seized goods; on February 8, 2012, PGR did undertake a massive destruction (20 million items) of infringing product. However, some rights holders continue to report problems. Article 70 of the Federal Law for the Administration and Alienation of Public Sector Goods (FLAAPSG) governs the regulation of seized or abandoned goods relating to IP crimes. However, Article 75 of FLAAPSG requires a final court order to destroy goods (if they are not “abandoned”) which means that while there is some cooperation (more recently), prosecutors need to wait 90 days to declare goods “abandoned” under current law in order to destroy them. IIPA recommends both clarity in the law, and more cooperation with rights holders to ensure that illegal materials do not get returned into the stream of commerce.

Another enforcement mechanism is to have the Federal Bureau of Consumer Interests (PROFECO) use its *ex officio* powers for consumer protection to stop street market piracy. Unfortunately, PROFECO lacks the human and financial resources to properly conduct raids, and needs police assistance to protect its personnel during raids. There have been training programs undertaken by industry (BSA, in particular) so it is recommended that the PROFECO be properly resourced to undertake action against street markets.

Summary of some criminal actions in 2011: In 2011, APCM reported good ongoing cooperation with PGR on film and music actions. There were 3,046 criminal actions conducted across Mexico against physical piracy, directed at 162 laboratories, 1,013 warehouses, and 1,011 street and 800 cyber-café actions. In 2011, APCM reported 3,524 actions executed, consisting of 1,169 street actions, 164 actions against laboratories, 1,049 against warehouses, 177 against discotheques, bars, video clubs and jukeboxes, and 960 against cybercafés. In total, this resulted in 3,718 street sale points being dismantled, and 3,108 (recorded music) burners being seized. Against

digital music piracy, APCM reported 882,402 actions, consisting of 1,388 cease and desist letters to webpages; 108,008 for blogspots; three for virtual auctions; 719,138 against cyberlocker links; 4,121 against streaming links; 25,687 against forum posts; 3,183 for peer-to-peer links; 19,048 for link protectors; four against social network profiles; and 1,836 for pre-release links. APCM reports that during the first six months of 2011, 135,479 online actions were taken against film piracy, which included the takedown of 135,020 cyberlocker links, 17 hosted web pages, and 377 permalinks. Additionally, APCM issued 65 cease and desist letters for films (alone), and 934 letters for movies (and music); it worked to takedown thirteen hosted web pages; 109,149 blog post permalinks; over 8 million peer-to-peer links; 1.6 million illegal distribution hub links; and 203,016 forum posts.

In total, there were 196 arrests and 24 sentences in 2011 (and 32 individuals currently in prison for IPR violations; over 24 defendants have received sentences of over four years). IMPI carried out 960 inspection visits, and 891 *ex officio* raids. The totals seized in police raids were: 6.1 million CD-Rs and 7.67 million DVD-Rs (motion pictures). BSA reported on twenty criminal cases commenced in 2011, with five arrest warrants and two convictions. MPAA and RIAA reported 171 arrests, 88 indictments, and 21 sentences. One very significant criminal action of note: the case against demonoid.me, which resulted in the imprisonment of the main operator of that service (though he was later released), and the seizure of materials used by the service.

Unfortunately, the ESA's anti-piracy enforcement program did not see a sufficiently high level of activity from PGR in 2011, which was very discouraging after a strong year in 2010. In February 2011, action was taken against three targets in Tepito, in which 4,450 pirated games were found; unfortunately, after that there was no other actions undertaken by PGR against ESA identified targets for six months, when in August an action was conducted against pirate game sellers in the Bazar de la Computacion y el Video Juego; that resulted in PGR confiscating over 14,000 discs containing pirated games. This was the last action that PGR took in 2011 targeting piracy games. While ESA understands that much of the inactivity during 2011 was attributable to the reforms and reorganization within PGR, this low level of enforcement efforts had a negative impact on the Mexican market for legitimate game products, contributing to a rise in the level of pirated game product circulating in the markets. ESA is very concerned that the momentum and progress that was achieved against organized game piracy (in 2010) have been lost. In early 2012, PGR did take action against pirated sellers in the San Juan de Dios market in Guadalajara; ESA is hopeful that PGR will now accelerate its activities. Further, it is hoped that there will be follow-up investigations directed at supply chains, followed by effective criminal prosecutions (especially given the high rates of recidivism).

Judicial issues: One continuing weak spot in Mexican IPR enforcement is the judiciary – the need for improved IPR expertise by judges (re-enforcing the need for special IP judges and courts), the non-deterrent sentencing in many or most cases, and persistent problems with civil litigation.

While cooperation between rights holders and the PGR is very solid, IPR prosecution is being hampered by a lack of proper resources, training (despite many programs), and a shortage of deterrent sentences. The number of cases is still far below what is needed to have any significant effect on the marketplace (as APCM reported in 2010, only 24 sentences were handed down). In 2011, only 21 sentences were issued. IIPA recommends that Mexico consider the adoption of mandatory sentencing regulations for criminal copyright cases, and/or that the Supreme Court issue its own recommended guidelines to assist judges with the imposition of deterrent sentences.

Mexico's three-tiered civil procedure system, involving actions in the first and second instance, plus the Amparo hearing makes civil litigation more complicated, time consuming, and costly for rights holders. Another concern is the delays in resolving cases. There have been some recent improvements: for example, Mexican law grants full validity to electronic documents and discovery, although, some judges are still not yet familiar with these rules. On August 30, 2011, Mexico amended the Civil Code to provide *ex parte* measures to avoid the destruction of evidence; however, those provisions have not yet been implemented. The other major impediment is that damages can only be collected after an infringement decision has become *res judicata*. This can mean an eight-to ten-year process of litigation in IMPI, the Tax Court and the circuit courts, with an additional two years to claim damages after

res judicata, in a civil court. This *res judicata* prerequisite for copyright infringement damages was set by the Supreme Court in 2008.

Administrative Enforcement

There are two administrative agencies that work on copyright matters in Mexico: IMPI and INDAUTOR; both are also very actively engaged in public awareness campaigns.

IMPI: In 2011, IMPI undertook 1,250 actions against enterprises infringing software licenses (891 *ex officio* actions and 339 *ex parte* raids, also known as “full raids”) – an increase from 2010 (and, with good results overall). BSA and other right holder groups continued to report significant cooperation and coordination with IMPI on enforcement actions, resulting in more and higher fines. BSA and other IIPA members welcomed the positive news of the enactment of the law in December 2011 (in force, January 1, 2012) to enhance IMPI’s authority providing for increased penalties and the establishment of a presumption of infringement in cases where enterprises refuse entry to IMPI inspectors (so-called “door closures”). IIPA members hope that IMPI will quickly use this new authority for even more effective enforcement. Additionally, IIPA recommends that investigations be conducted more rapidly, and evidence preserved immediately upon discovery of a presumptive infringement (including evidence discovered by the authorities during inspections, even if that evidence is not listed on the inspection order).

The music industry reports that IMPI continued its actions against cyber cafés offering access to peer-to-peer networks in Mexico City, Guadalajara and other important locations. In 2007, AMPROFON and IMPI signed an agreement to conduct 80 administrative procedures every month against the illegal downloading on cyber cafés, mainly in the capital city area; this agreement remains in force and continues to be successful.

In 2011, the Motion Picture Association (MPA) launched the final phase of an anti-piracy campaign with CANACINE, to release anti-piracy public service announcements in theaters (that air before screenings). In 2011, APCM held a training for criminal, administrative and civil judges on procedural matters. This training will continue in 2012, along with a variety of other industry training programs for enforcement officials to improve IPR enforcement.

INDAUTOR: IIPA members continue to recommend additional training for INDAUTOR staff on key copyright matters, and, that public awareness initiatives should continue to issue general information about the importance of copyright to the local culture and economy.

INDAUTOR also is responsible for supervising the collecting societies in Mexico. This includes the authority to issue tariff rates for the broadcasting of sound recordings in TV and radio stations; rates were due by the end of 2009, but have never been issued. A tariff proposal was under consideration two years ago by the Federal Market Commission (COFEMER) responsible to evaluate the impact of the future rates on the Mexican economy, with additional steps necessary before publication of the official tariff. The recording industry continues to work closely with INDAUTOR on this matter and is hopeful for a favorable resolution in 2012. INDAUTOR needs to take steps to complete the procedure, and publish the rate, within a reasonable timeframe.

Online Enforcement

Legal reforms: There are several legal deficiencies hampering effective online enforcement: first, there is no specific Mexican legislation establishing liability principles for ISP’s in piracy cases. It is assumed that ISPs are subject only to the general liability principles contained in the Civil and Criminal Codes. Second, specific provisions in the Telecommunications Law prohibit ISPs from disclosing customer’s personal information to rights holders seeking civil recourse against alleged infringers. The absence of clear law results in a lack of certainty for ISPs on how to react to Internet piracy and to notice and takedown notifications from the copyright industries. Some IIPA members report cooperation with hosted content take downs, but most said there was “no cooperation” or “very little” cooperation. Because ISPs are not allowed to provide information on alleged infringers, rights holders must bring a

criminal action to the PGR to obtain those details. Additionally, ISPs have been reluctant to include clauses in their subscriber agreements to permit terminations if subscribers infringe intellectual property rights.

The film and music industries report that they have received a decent level of cooperation from some Mexican ISPs involving hosted content, such as the removal of illegal music and movie files posted on webpages and forums. Some of the key sites taken down include: “Imperiolatino.net” with over 600 thousand music tracks; viciowarez.com which had attracted over 150,000 users (over 300,000 tracks); and, DARK-VILLE offering over 200,000 music and movie links.

Generally, file-sharing committed through peer-to-peer networks is not considered a serious legal violation by the civil courts. Article 424*bis* of the Criminal Code requires a profit motive as a prerequisite for criminal infringement, and as a result effective prosecutions in peer-to-peer cases are unavailable. APCM reports very few Internet piracy cases filed last year (and none pertaining to peer-to-peer piracy) mainly due to the lack of adequate criminal provisions as described above. For peer-to-peer file-sharing, ISPs (especially Telmex, which has about 70% of the domestic broadband connections in Mexico) have, to date, been reluctant to take any actions. In November 2009, the CALC was formed with 37 founding members to promote and defend copyrights and related rights threatened by physical and online piracy, working with different government entities and federal authorities. The CALC also focused on legislative reforms, including addressing private copy issues and promoting cooperation between right holders and ISPs to address piracy in the online environment, but no legislation was advanced in 2011. IMPI has also been working with ISPs and rights holders to develop “cooperative models” for fast and efficient disabling of infringing websites. There is currently a bill pending to enforce the rights holder’s authorization for “making available” (i.e., for the distribution or commercialization of) copyright material on websites.

Border Enforcement

There remain formal, onerous requirements to initiate border actions in Mexico. For example, Customs authorities will not seize infringing product entering the country without an official order from IMPI; this is true even in cases where the product is clearly infringing. Because IMPI does not issue immediate authorizations to seize products which have been identified by Customs as infringing, the suspect merchandise is usually allowed to enter the country; this is because Customs does not have authority to detain a shipment for more than a few hours. IIPA recommends greater cooperation between these two agencies to improve border enforcement, and to expedite the procedures by which Customs may make independent seizures of clearly infringing products. Additionally, the Customs Code needs to be amended to grant customs officers *ex officio* powers.

Five years ago, the PGR established a task force with Customs, the Ministry of the Economy and private sector representatives (music and film), to monitor and develop intelligence on blank media imports. Unfortunately, in 2011, PGR halted its seizure of in-transit containers, claiming a lack of authority. It is expected that this may be corrected in 2012 with a new “protocol” between PGR and Customs officials. The recording industry and others reported the continued production of pirate material locally, but that it was undertaken by using imported raw materials – blank CD-Rs, blank DVD-Rs, jewel boxes and burners. Although these importations are not considered a crime, there have been coordinated administrative actions by the PGR, SAT and APCM resulting in significant seizures of illegal imported raw material. IIPA continues to recommend cooperative efforts between U.S. and Mexican customs authorities to prevent Mexican exports of pirate movies to the U.S. Latin market, but also to control blank media exports from Southeast Asia that pass through the U.S. to Mexico (to avoid Mexican taxes).

Several years ago Customs began an anti-piracy initiative to: (1) conduct regular trainings of Mexican officials at various ports on intellectual property enforcement issues and the identification of various types of pirated product; and (2) hold monthly meetings with industry members to review the results of the trainings and to make improvements in border enforcement. ESA continues to report positive results from ongoing training efforts with Mexican Customs officials, including detention notifications and seizures of pirated game product from diverse ports, in particular, Guadalajara and Monterrey. ESA notes that importers are now reducing the size of their shipments to

avoid detection, making border enforcement even more critical, but more difficult. ESA did report an improvement in the level of support from Customs in dealing with shipments of circumvention devices. BSA reports Customs authorities have undertaken effective seizures in 2011 of imported illegal software and of computers containing illegal software. MPAA reported that trainings are on-going on a periodic basis.

COPYRIGHT AND RELATED LAWS IN MEXICO

Federal Law on Copyright (1996, as amended): Amendments to Mexico's 1996 Copyright Law entered into force on July 24, 2003; regulations to implement these amendments were issued in September 2005. Mexico acceded to both the WIPO Treaties (the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty) in 2002, but has yet to publish the WCT and WPPT Agreed Statements. Draft laws that were prepared in 2011, specifically for treaty implementation, would fall far short of proper implementation, on issues relating to technological protection measures, for example, and fail to address third party (ISP) liability at all. There are many remaining deficiencies in the Copyright Law (including long-standing NAFTA and WTO TRIPs obligations), as well as those relating to digital treaty implementation. IIPA has detailed a list of recommended amendments in prior filings; it is available at: <http://www.iipa.com/rbc/2010/2010SPEC301MEXICO.pdf>.

There have been two significant reforms adopted in recent years for which the Government of Mexico should be commended: first, in 2010 was the long-sought enactment of an amendment to the Criminal Code to provide *ex officio* authority in copyright infringement cases (in force, June 28, 2010). Second, was the adoption in December 2011 (in force as of January 30, 2012) of a law, to enhance the enforcement capabilities of IMPI by: (1) providing for increased penalties against enterprises that refuse entry to IMPI inspectors ("door closures"); and (2) establishing a presumption of infringement in such cases. Also, as noted, the Civil Code was amended (in August 2011) to provide *ex parte* search authority, but this has not yet been implemented.

Pending Legislation: A few key legislative reforms needed for effective enforcement (in addition to Copyright Law amendments) include:

- A bill to amend the Criminal Code to punish – with a prison term (3 to 10 years) and fines – the unauthorized camcording of films in theaters. The legislation needs to eliminate any required proof of commercial intent.
- A bill (in the Copyright Law or Criminal Code) to establish criminal sanctions for the distribution or trafficking in devices used for the circumvention of technological protection measures (TPMs). The bill should include "acts" as well as devices, components and services.
- A bill to adopt CALC proposals to promote cooperation between right holders and ISPs.

IPR Training and Public Awareness: IIPA member associations and individual companies continue to conduct training and information seminars for Mexican enforcement officials, and remain ready to continue to do so. In addition to the Customs training programs, and extensive public education programs, previously noted, there have been recent programs for criminal judges (November 2011), and events are planned in 2012 with PGR and the Ministry of Justice for at least four events, along with events with IMPI and the cyber police on Internet piracy matters, all of which include IIPA member participation.

THE PHILIPPINES

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

2012 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: IIPA recommends that the Philippines be on the Watch List.¹

Executive Summary: IIPA members continue to express concerns about piracy in the Philippines, but note positive developments in the past couple of years which seem to indicate the situation may be improving. Passage of the Copyright Bill should be a top priority in 2012, with implementing rules to follow to address remaining concerns including those raised in this filing. The issuance in October 2011 of new Supreme Court Rules of Procedure for Intellectual Property Cases holds promise for more and speedier civil and criminal trials and a possible resolution of the longstanding warrant “quashal” issue. It is hoped that the IP Office’s resolve and creative approaches to reducing street and mall piracy will continue to bear fruit in 2012, and their attention to Customs to address import piracy seems the right approach. The strategies being employed to reduce mall piracy have already led to closure of pirate traders in the Quiapo district, an extremely positive sign. The passage of the anti-camcording law in 2010 saw a reduction in detections of illegal camcording of major motion pictures from twenty in 2010 to only one in 2011, but to our knowledge there remain no judicial outcomes under the new law. It is important that the Philippine Government, with the new leadership at both the IP Office of the Philippines and the Optical Media Board (OMB), and the Philippine Anti-Piracy Team (PAPT) including Philippine National Police (PNP) and National Bureau of Investigation (NBI),² all mobilize to deal more effectively with end-user piracy of business software, book piracy (textbook copying and pirate or counterfeit bestsellers), Internet piracy (including notorious site *Kat.ph* and any others identified), and that it addresses emerging issues such as mobile device piracy.

PRIORITY ACTIONS REQUESTED IN 2012

Enforcement

- Implement new Rules of Procedure for Intellectual Property Cases to provide for speedier and more effective civil and criminal pre-trial procedures and trials, and resolution of the warrant “quashal” issue.
- Ensure effective action against online and mobile device infringements, and enhance anti-piracy enforcement work carried out by OMB by including mobile device piracy within its purview.
- Increase the budget of the OMB so it can conduct, in conjunction with the PNP, nationwide enforcement efforts.
- Bring deterrent criminal cases under the Anti-Camcording Act of 2010.
- Remedy enforcement bottlenecks, including inquests and preliminary investigations by prosecutors with the Department of Justice, including by streamlining signing procedures.
- Ensure that both the Department of Education and the Commission on Higher Education take an active role to ensure the use of legitimate copyright materials at colleges and universities.

Legislation

- Enact amendments to the IP Code (including a landlord liability provision) already passed by the House, addressing concerns raised in this filing, whether in the legislation or through implementing rules.
- Enhance the E-Commerce Act to facilitate removal of infringing material or services from the Internet through an effective notice and takedown system, which establishes Internet service provider (ISP) responsibility and fosters ISP cooperation.
- Include CD-R burning and border enforcement in OMB’s purview under the Optical Media Act.

¹For more details on the Philippines’ Special 301 history, see Additional Appendix available at <http://www.iipa.com/pdf/2012SPEC301HISTORICALSUMMARY.pdf>. Please also see previous years’ reports at <http://www.iipa.com/countryreports.html>.

²Specifically, IIPA members work with the Philippine National Police (PNP), the National Bureau of Investigations (NBI) (and its Intellectual Property Rights Department (IPRD)), and the Optical Media Board (OMB) (which continues to run raids on an *ex officio* basis but remains inadequately funded).



- Implement Republic Act 9184,³ such that the government will not permit the purchasing of illegal software, and will allow only suppliers of legitimate software to participate in government bidding.

Training

- The U.S. and the Philippines should effectuate a “judge swap” whereby a U.S. judge familiar with copyright cases would swap places with one of the Philippine judges for a period of time (e.g., one year) to have a direct consultancy approach to the workings of the new IP Commercial Courts.

PIRACY AND ENFORCEMENT UPDATES IN THE PHILIPPINES

Previous IIPA submissions have documented the physical piracy issues remaining in the Philippines (including mall piracy, street stall piracy, textbook and trade book piracy, and end-user piracy of business software), as well as emerging issues such as Internet piracy, illegal camcording of movies, and mobile device piracy. Enforcement by the OMB and PAPT in the past have led to significant seizures, and these continued in 2011 (with greater cooperation and participation with right holders, consistent with IIPA’s previous recommendations). With very little chance of deterrent outcomes in the courts, however, piracy remained pervasive. The following provides updates on the piracy and enforcement situation in the Philippines, and reports on initiatives taken by the Philippine Government and industry to address piracy concerns.

Issuance of New Supreme Court Rules of Procedure for Intellectual Property Cases: The issuance in October 2011 of the Supreme Court of the Philippines Rules of Procedure for Intellectual Property Cases, (A.M. No. 10-3-10-SC, En Banc) (effective November 8, 2011) holds the promise of more and speedier civil and criminal trials, since the time limits imposed by the Rules dictate case closure within about half a year, provide for civil and criminal search and seizure orders, confirm strong presumptions of subsistence and ownership, and address other evidentiary issues that have been and remain of concern. While they do not resolve entirely the warrant quashal issue that has plagued right holders over the years, the Rules may help since warrants will be granted by the new Commercial Courts (with specialized IP expertise), not by the “Executive Judge” of the local trial court, which in the past led to many of the quashals.⁴ The Rules for the most part appear to strengthen the hand of right holders and make court processes speedier and smoother with respect to copyright cases,⁵ but only time will tell if the Rules as implemented truly result in a more effective judicial remedy.

³Republic Act 9184 (An Act Providing For The Modernization And Regulation Of The Procurement Activities Of The Government And For Other Purposes).

⁴One of the most problematic aspects of the Philippine court system has been the challenges by defendants and quashals of warrants based on the argument (or a variation) that the police officer obtaining the warrant based on probable cause did not personally witness the infringement taking place. A line of decisions beginning with *Solid Laguna (Sony Music Entertainment (Phils), et al v. Hon. Judge Dolores Español et al* (G.R. No 156804, March 14, 2005), *Telmarc Cable (Telmarc Cable v. Hon. Antonio M. Eugenio, Jr., CA-G.R. SP. No. 96767 May 31, 2007)*, and *Powermac Centre Company* (2008), all undermined the Supreme Court’s decision in the *Columbia* case, which held that “testimonial or documentary evidence, depositions, admissions or other classes of evidence tending to prove the *factum probandum*” is sufficient for issuance of a warrant, “especially where the production in court of object evidence would result in delay, inconvenience or expenses out of proportion to its evidentiary value.” The downward turn continued in 2010 with the *New Fields*, *Tyger 828*, *The X-Habit*, and *Global Team Space* cases. In the *New Fields* case, on May 20, 2010, the PNP was able to secure search warrants, served on May 24, 2010, resulting in the confiscation of 83 computers loaded with unauthorized and unlicensed software, including 17 counterfeit CD installers of various software titles. The defendant petitioned to quash the warrant, and on July 8, 2010, local BSA counsel received a copy of the Order of the trial court dated June 29, 2010 in which the court directed the “immediate” return of the seized items to the defendant, and despite motions filed to stay the execution of that order, the local sheriff returned the 83 computers to the defendant the same day (mediation with the defendant has concluded without settlement and the case is currently on appeal). On April 5, 2010, NBI served search warrants on two sister companies, *Tyger828 Phils., Inc.* and *The X-Habit, Inc.* for alleged unlicensed use of software, resulting in the confiscation of 26 computers loaded with unauthorized and unlicensed software. The defendants filed a Motion to Quash the search warrants. Without hearing, on August 27, 2010, local counsel was informed by the NBI that the Motion to Quash was granted (by the same *New Fields* judge), although they were not notified by the court until September 1, 2010, citing “lack of board authorizations” authorizing the search warrants. The case is ongoing with a Motion for Reconsideration of the quashals that, to date, has not yet been resolved by the court. On November 5, 2009, the NBI served search warrants on *Global Team Space* in which a total of 50 computers loaded with unauthorized and unlicensed software programs. Following the tactic employed in the *New Fields*, *Tyger 828*, and *The X-Habit* cases, *Global Team Space* filed a Motion to Quash before the same court which quashed the search warrants in those cases, and on October 27, 2010, the same court granted the motion to quash and ordered the return of all seized items, which again was immediately carried out by the Sheriff, despite the timely filing of a Motion for Reconsideration. These are just the latest examples in a litany of cases in which search warrants for blatant piracy have been quashed and pirate goods (and materials and implements used in piracy) have been returned to defendants. This line of cases calls into question whether a search warrant is “available” as required under the TRIPS Agreement.

⁵The following are some highlights of the Supreme Court of the Philippines Rules of Procedure for Intellectual Property Cases, (A.M. No. 10-3-10-SC, En Banc) (effective November 8, 2011) with a few additional questions:

Up until the issuance of the new Rules, there had only been five criminal convictions under the Copyright Act (and three under the Optical Disc Act) (we have provided the case list in previous submissions). To our knowledge there were no criminal convictions in 2011 for copyright piracy. The largest criminal fine ever imposed in the Philippines for copyright piracy was a modest P200,000 (approximately US\$4,300), and in only two known cases did the penalty include imprisonment (in each case, one year, although the defendant in one case absconded and remains at large). Problems begin at the criminal inquest procedure at the Department of Justice and do not cease through to the criminal trial. Right holder inquests and preliminary investigations by the Department of Justice have often been delayed by purely bureaucratic signing procedures, as the Chief Prosecutor must sign off on every resolution issued by all prosecutors. There has also been little assistance by prosecutors in putting together evidence, obtaining witness testimony, and obtaining business records. Past trials have taken years, leading to many additional problems.⁶ It is hoped the new Rules will help resolve these longstanding deficiencies in the judicial system. The regular civil court system remains backlogged and extremely slow (an estimated 7,000 civil cases are presently backlogged at the Supreme Court). To assist with a strong implementation of the Rules, we suggest that a “judge swap” occur between the U.S. and the Philippines. In addition, training for prosecutors on techniques in copyright cases should occur.

Closure of Quiapo and Effect on Street and Mall Piracy: IIPA was heartened to hear that a new, apparently more effective, policy toward street and mall piracy took hold in the Philippines in 2011. The closure of the market (and distribution hub) in the Quiapo district of Metro Manila rippled throughout the community.⁷ It demonstrates that with a credible threat of enforcement, piracy can be reduced. OMB and the Mayor of Manila should be commended for these unprecedented enforcement actions. Other city/district leaders in Metro Manila have indicated they would like to follow the example,⁸ and, in conjunction with the OMB, are in the process of implementing plans to clean up the streets of physical piracy. The closure of Quiapo, attempts to turn pirate vendors away from illegal businesses and legalize their businesses (e.g., toward the sale of legitimate locally-produced cultural products), and the IP Philippines’ approach toward mall owners, represent a fresh approach to the piracy problem in the Philippines.

Notwithstanding these positive recent developments, physical piracy continues to be the main problem in the Philippines, evident in Metro Manila, Cebu (in the Visayas group of Islands), Davao (in Mindanao), and Baguio (in Luzon). Hard goods piracy still consists of pirated CDs, DVDs, CD-Rs, CD-ROMs, and DVD-Rs. Music and movies remain prevalent, with a noted decrease in pirated business software. An estimated 80% are imported into the Philippines, mainly from China, according to the IP Office of the Philippines, although industry reports a significant

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- The Rules place searches, seizures, warrantless arrest, pre-trial, trial, and provisional measures such as destruction of pirated materials, in the hands of these commercial courts.
 - The Rules set time limits for all aspects of an IP case from pre-trial (except “court-annexed mediation” for the civil portion of the criminal claim which appears to have no time limit) to trial, with 30 days for pre-trial, then possible judgment (if no issues for trial remain) within 30 days, or, if there are issues, trial, which apparently may last no longer than 150 days.
 - Rule 10, Section 2 provides that the Special IP Commercial Courts have purview over criminal searches and seizures, taking them out of the hands of the “Executive Judge” which we understand may have been the cause of previous quashals. The criminal complaint must then be filed 60 days from issuance of the Order.
 - Rule 11, Section 4 leaves consideration of motions “to quash a search warrant or to suppress evidence obtained thereby or to release seized goods” in the hands of the trial court.
 - Rule 16, Section 1 confirms that copyright infringement is subject to strict liability. Rule 16, Section 2 still requires consularization of copyright registration certificates, although Rule 19, Section 1 provides a strong presumption of subsistence and ownership, which can only be rebutted by “evidence” to the contrary (not merely placing subsistence or ownership into issue). Rule 19 confirms that registration is not a condition to “a claim of copyright infringement.”
 - While Rule 20 provides for destruction of infringing materials, labels, etc, it does not include machinery (materials and implements) used in the infringement which appears to be a drawback.

⁶Cases listed for trial proceed on non-consecutive days with multiple adjournments of several months at a time. For example, a ten-day trial with three-month adjournments would typically take at least two and a half years to conclude. During the extended trial period, many problems often arise, including the transfer of prosecutors and judges; the use of delay tactics by defendants’ counsel challenging search warrants or seeking further delays due to technicalities; and even the disappearance of key witnesses, the defendants themselves (the PNP have shown no sustained inclination or interest in searching for defendants), or key evidence needed to properly adjudicate the case. Challenges by defendants’ counsel (even those without merit) usually result in automatic consideration, leading to further months of delay before such technicalities are adjudicated.

⁷The Quiapo market was cited for a couple of years by IIPA in its filings on “notorious markets,” and recognized in turn by the U.S. Trade Representative.

⁸Cities in Metro Manila having the most piracy problems are Manila, Quezon City, Muntinlupa, and Pasay.

amount of CD-R and DVD-R burning (to order) continues to take place. The Optical Media Board reported that from January to October 2011, they seized roughly 8,500 “sacks” of pirated DVDs and other pirated CDs (CD-Rs, C-ROMs, etc.), with an estimated value of P1.16 billion (almost US\$37.5 million). Such sustained raiding by OMB (and police)⁹ has led many who had permanent kiosks and stalls to close their permanent stalls and instead sell on foot or set up makeshift tables that can be folded down easily in the event of raids. Dubbed by OMB as “Guerilla” piracy, this phenomenon is indication that the hard goods optical media piracy problem may be starting to move underground. Remaining street vendors avoid arrest by not having significant stocks on hand. Many vendors have backpacks (full of pirated optical media) and are itinerant, hawking to customers in a more secretive and ad hoc manner, hanging around 24-hour drugstores, convenient stores, clubs, restaurants and bars, and mostly selling at night. With OMB involvement, PNP officers have become more attentive to the problem of open physical street and mall piracy, but it remains the case that in most of the country, police are generally apathetic to these practices.

Getting to the Source – Customs “Choke Points” and Optical Media “Burning”: To do an even more effective job dealing with hard goods piracy in the Philippines, it is necessary to attack the supplies of such goods, which would involve stopping imported discs at the borders and cracking down on domestic burning of recordable optical media. IP Philippines has indicated a new approach is to seek choke points (e.g., through Customs at the airports and other ports throughout the Philippines) to reduce the numbers of imported discs over time. IIPA supports this approach which seems to have had positive results in late 2011 seizures.¹⁰ We also recommend that OMB continue its focus on confiscating “burning” machinery detected during raid actions.

Other Issues – Hard Disk Loading and Mobile/Mobile Device Piracy: While recent developments have constituted a blow to hard goods optical media piracy, other problems which law enforcement have spent less time addressing, but which cause increasing harm in the Philippines, remain largely unaddressed. Hard disk loading, the pre-installation of unlicensed software or other copyright materials on new PCs or other devices is still prevalent even among established computer stores and computer parts stalls. Mobile device piracy is a similar but more recent phenomenon, with mobile device vendors often masking as “repair” shops, stalls or kiosks, offering at the point of sale or as an after service the downloading onto a device (including cell phones, mp3 players, hard disks, thumb/flash/USB drives) music, ring tones, games, software, and published materials, especially medical and nursing titles and trade books. The recording industry estimates sales declines in the first half of 2011 of 19% compared with the same period in 2010, and attributes mobile device piracy and Internet piracy (discussed below) as chief causes. Such downloading stalls which appear even in reputable malls must be eliminated.

With mobile penetration exceeding 90 million in 2011 (in a country of 94 million),¹¹ and even with broadband mobile services in their relative infancy, there are increasing reports of infringing wireless application providers (WAP) which provide pirate content directly through wireless communications onto mobile phones/devices. While the copyright industries in the Philippines have legitimate business with all three major telecommunication companies, it has been difficult to convince telecommunication companies to block access to pirate sites on a voluntary basis. IIPA recommends empowering the National Telecommunications Commission (NTC) to work closely with the IP Office of the Philippines to act aggressively against piracy and other copyright issues conducted over mobile networks, and enhancing anti-piracy enforcement work carried out by OMB by including mobile device piracy within its purview.

⁹There continue to be some reports of irregularities within the police ranks. This problem has somewhat been ameliorated by the direct involvement of OMB, authorizing the PNP to conduct raids and seizures themselves, followed by immediate reporting to the OMB, documenting and surrendering seized items to the OMB. There remain reported instances of leaks of information related to search warrants (target areas, suspects involved) in the vicinity of the courts which are responsible for issuing search warrants. The lag time between the application for a warrant and the day of the operation adds to the opportunities for information to be leaked. Another problem for the OMB is logistics and geography of the Philippines, mainly due to OMB’s paltry budget; this confines OMB activities mainly to Metro Manila, since enforcement on a national scale would require resources to travel to cities in other island groups.

¹⁰In early December 2011, the Bureau of Customs reportedly turned over hundreds of boxes of Blu-ray Discs (in high-quality tin cans) and Christmas Videoke DVDs containing mixed English/Filipino songs. These pirated optical media were detected at the Manila (Sea) Port using Customs’ x-ray machines. The estimated market value of seized pirated products was P35 Million or over US\$800,000.

¹¹See *Research and Markets: Philippines - Mobile Communications - Market Overview and Forecasts – 2011*, November 1, 2011, at http://www.researchandmarkets.com/research/b9c036/philippines_mobi.

Business Software End-User Piracy/Government Legalization: The rampant use of unlicensed software in the workplace by businesses continued to cause the greatest revenue losses to the software industry in 2011, thereby stunting the growth of the information technology sector.¹² A September 2010 study by the International Data Corporation (IDC) and the Business Software Alliance (BSA) shows that reducing the piracy level by ten percentage points in the Philippines will lead to job creation in the thousands, the generation of millions in tax revenues and hundreds of millions to the country's GDP.¹³ The OMB has done *ex officio* corporate inspection visits on more than 200 establishments since 2009 which has helped drive software legalization. Unfortunately, as a result of the search warrant quashal issue discussed above, BSA only conducted two raids against end-user piracy targets in 2011, down from eight raids in 2010. Inquest procedures with DOJ prosecutors remain difficult, with them insisting on burdensome requirements before they will even file charges in court.

It remains important that the Philippine Government work to fully legalize government software usage and have procurement practices in place to pay for software. Republic Act 9184 (An Act Providing for the Modernization and Regulation of the Procurement Activities of the Government and for Other Purposes) must be implemented to ensure the government refrains from purchasing illegal software and allows only suppliers of legitimate software to participate in government bidding.

Book and Journal Piracy: Illegal commercial-scale photocopying of scientific, medical, technical books (STM), as well as textbooks (on or near college, medical, and nursing school campuses), and trade books/bestsellers remains the predominant problem in the Philippines. Unauthorized scanning of books and the sale of unauthorized compilations of educational and professional review materials burned on to CD-Rs (with 100-200 titles per disc) are additional problems. Online piracy of medical textbooks, professional books, and trade books, is also increasing in the Philippines.

The large number of college and graduate students in the Philippines results in high demand for university textbooks, technical books, and professional medical and nursing books. Unfortunately, much of this demand is being met through unauthorized photocopying and through downloads of unauthorized digital (scanned) copies of books onto mobile devices. The "university belt" in Metro Manila is notorious for illegal photocopying activities occurring at the many copy shops in the area. Copy shops also operate in and around hospitals, and near government regulatory agencies. Areas such as Morayta and Dapitan Street (in front of the Professional Regulations Commission main office) in Manila are commonly known for photocopying entire books, burning onto optical discs (CD-ROMs, DVDs) educational and review materials for professional examinations, as well as the sale of pirated books and CD-ROMs with educational materials. Many shops now operate on a "print-to-order" basis, thus avoiding stockpiles of infringing books in their establishments and thereby complicating investigations and enforcement actions. Vendors of pirated books also sell the infringing copies of books door-to-door at doctors' offices, medical establishments, and trade fairs. The Department of Education and, in particular the Commission on Higher Education, should take a more active role in developing appropriate use and copyright policies, encouraging the use of legitimate materials at colleges and universities, and ensuring that institutions of higher learning to adopt and implement such policies.

While the industry has been able to obtain some raids against notorious pirate operations, the court system has stymied efforts to carry these cases through to justice due to the inordinate delays and costs. The

¹²BSA's 2011 software piracy statistics will not be available until after the filing deadline for this submission, but will be released in May 2012, at which time piracy rates and U.S. software publishers' share of commercial value of pirated software will be available at www.iipa.com. In 2010, the software piracy rate in the Philippines was 69%, representing a commercial value of unlicensed software attributable to U.S. vendors of US\$167 million. These statistics follow the methodology compiled in the Eighth Annual BSA and IDC Global Software Piracy Study (May 2011), <http://portal.bsa.org/globalpiracy2010/index.html>. These figures cover packaged PC software, including operating systems, business applications, and consumer applications such as PC gaming, personal finance, and reference software – including freeware and open source software. They do not cover software that runs on servers or mainframes, or routine device drivers and free downloadable utilities such as screen savers. The methodology used to calculate this and other piracy numbers are described in IIPA's 2012 Special 301 submission at <http://www.iipa.com/pdf/2012spec301methodology.pdf>.

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

Multilinks/Marquez case¹⁴ remains pending, now some 5 years after the initial action. While currently raids are obtained through complaints filed with PNP or NBI, it is hoped the passage of the Copyright Bill will permit IPO Philippines to play a more active and coordinating role.

Internet Piracy: Internet piracy remains an emerging issue in 2011, with Internet penetration nearing thirty million people, and broadband penetration topping six million people by mid-2011 according to industry statistics (although higher speed connections remain mostly cost-prohibitive). Most of the Internet piracy experienced in the Philippines is over peer-to-peer (P2P) filesharing services, through the use of deep linking sites, and the use of one-click hosting sites (sometimes referred to as cyberlockers) whereby those engaged in piracy on those sites sell passwords to their stored infringing materials.¹⁵ The Motion Picture Association of America (MPAA) notes that Peer Media Technologies reported that during 2011, users initiated over 12 million downloads/uploads of unauthorized copies of major U.S. movie titles via certain P2P protocols in the Philippines.¹⁶

In addition, *Kat.ph* – a site with connections to the Philippines (including a mirror site there)¹⁷ – is an example of a site that employs or facilitates the use of the BitTorrent file sharing protocol to enable pirated content to be quickly located and downloaded, and in particular, allows for extremely fast downloads of the largest pirate files of all kinds of copyright content, including music, movies, software, games, and published materials. The site is notable for its commercial look and feel, indexes over 8.5 million torrents, and is ranked among the top 320 sites visited in the world. *Kat.ph* was cited by IIPA in its filing seeking to identify “notorious markets” for piracy, and on December 20, 2011, the U.S. Trade Representative listed *Kat.ph* as a notorious market.¹⁸ In 2011, sites engaged in the sale of physical hard goods also increased.

The legal framework and enforcement infrastructure to deal with Internet piracy in the Philippines has not caught up with the technology. The E-Commerce Law establishes important legal principles for liability (i.e., contributory and vicarious liability are codified in the law), but there is no statutory notice and takedown system (without relying on court-issued relief) in that law or in the current Copyright Law. Such a mechanism, as well as fostering cooperation with service providers to effectively deal with infringing websites and services and P2P piracy activities, including effective and fair termination policies for repeat infringers, should be added. The National Telecommunications Commission (NTC) in coordination with the IP Office of the Philippines should be much more aggressive in seeking workable approaches to this growing problem. In the meantime, there is no cooperation from local ISPs, as they do not currently feel compelled to do so.

Camcording Piracy: The passage of the anti-camcording law (Philippines. Republic Act No. 100,088) in 2010 saw an impressive reduction in forensic matches back to the Philippines of illegal camcords of major motion pictures, from twenty in 2010 to only one in 2011. This represents a remarkable turnaround, demonstrating the

¹⁴The *Multilinks* case was brought against the printing operation being run by Mr. and Mrs. Marquez, who were engaged in unauthorized reprinting of medical text books. A previous case against Catherine Marquez was moderately successful, resulting in the defendant’s conviction, but the conviction has not been served as the defendant absconded. Mr. Marquez is a co-defendant in the current *Multilinks* proceeding, which has remained plagued by delays.

¹⁵While there are no dedicated Philippine Internet sites selling illegal copies of books, books are found in general trade portals such as *sulit.com*, and illegal versions of e-books are available from *pinoyssp.com*. Internet piracy greatly limits the establishment of legitimate online distribution platforms and services for consumers, harming consumers and right holders alike. Revenue from these platforms and services are critical to financing the development of new creative works. For example, for independent motion picture producers who license content country-by-country, online piracy exports troubled marketplaces and high piracy rates to other markets instantly. The independent production sector is limited in its ability to shift to technology-enabled new business practices that might limit piracy, for example, independents cannot engage in worldwide same day “day-and-date” releases (which may prove an effective method to curb or delay piracy for the major studios) due to the fact that national distributors release on their own schedule.

¹⁶A major U.S. movie is defined as a movie released in 1,000 or more theaters in the U.S. These estimates reflect only a subset of movie-related piracy activity occurring during the monitoring period, as they account for only initiated downloads or uploads of major U.S. films through the listed P2P protocols. They do not include 1) downloads/uploads of unauthorized copies of movies that are not major U.S. releases, including local titles, through these P2P protocols; 2) downloads/uploads of unauthorized copies of any movies via other P2P protocols or through non-P2P technologies (e.g. websites); or 3) streaming of unauthorized copies of any movies via any technologies. Also, since local language title versions for scanning are not always available from established sources, and access to foreign language BitTorrent sites may fluctuate, results in certain countries are likely underrepresented.

¹⁷*Kat.ph* (formerly *Kickasstorrents.com*) currently receives its Internet connection from a provider in Romania. The local recording industry has notified the domain registration company which has not taken any positive action, and is in the process of discussing the issue with the IPO Philippines, but in the meantime, *kat.ph* remains operational in the Philippines.

¹⁸United States Trade Representative, *Out-of-Cycle Review of Notorious Markets*, December 20, 2011, at http://www.ustr.gov/webfm_send/3215.

importance of passage of the statute in 2010. Industry has also invested significant resources in training, and appreciates the support of the Philippine Government in attending to this important aspect of implementation of the Law. Cinema owners have done their part as well, such that in 2011, there were a total of 49 interdictions (compared with 22 in 2010) by cinema security staff, resulting in five court actions which remain pending.

Despite these successes, more needs to be done. For example, of the interdictions, unfortunately, the Philippine authorities admit that in well over a dozen cases, the police ended up erasing the contents of the illegal camcorders. In addition, we still do not have the first criminal conviction under the new law. It is critical that the government not stop now, since camcording is particularly damaging in the Philippines because it fuels rampant online piracy, negatively impacting worldwide distribution, and prevents the establishment of legitimate online distribution platforms. Philippine movie pirates engaging in this activity typically choose films that release earlier than, or day-and-date with, the U.S., and notably, a day-and-date release in the Philippines is still more than half a day earlier than a U.S. release.¹⁹ This piracy has had a devastating impact on the life cycle of many U.S. motion pictures, eroding their viability not just in the Philippines and other Asia Pacific markets, but also in the U.S.

Karaoke Music Licensing Issue: Karaoke is popular in the Philippines, and various machine brands are sold in Raon, Quiapo with accompanying discs containing as many as 5,000 karaoke tracks. These tracks consist of both local and international repertoire. Some brands come preloaded with karaoke recordings of legitimate record companies. Roughly ten brands have sought licenses from music publishers, but there are many that have not. Exacerbating the problem are a few manufacturing companies which incorporate USB ports onto their karaoke machines which allow the manufacturers or the owners of the machines to add unauthorized copies of tracks, including unauthorized tracks from the manufacturer's websites. IIPA thanks the OMB for coordinating discussions on proper licensing for these uses of music, and understands that negotiations are ongoing with chief outliers.

Pay TV (Cable and Satellite) Piracy: Signal theft in the Philippines continues to cost right holders in filmed and television content significant revenues with pirates stealing entire program streams and reselling them to subscribers without compensation to the rights holder. The NTC continues to renew the licenses of companies engaged in signal theft and no pirate cable company has been sanctioned by the courts or government. Under-declaration by legitimate providers also continues to cause losses to content owners, as does individual illegal connections to Pay TV signals.

Other IPO Enforcement Initiatives: In 2011, IPO issued revised "IP Violation Rules" giving IPO the ability to hear, on an administrative basis, applications for immediate injunctive relief (TROs), summary hearings to extend the TRO for an additional 17 days, and an expedited hearing for permanent injunctions as to infringing activity. The BSA has had one successful test case of this program. In addition, IPO launched a "brand" inspection program, by which 26 brands were listed for which "counterfeiting" is to be disallowed in the malls. There is nothing precluding copyright owners with "brands" from informing IPO about the authorized distributor in the Philippines, which would allow such goods to be subject to seizure.

COPYRIGHT LAW AND RELATED ISSUES

Copyright protection is governed under Republic Act 8293, the Intellectual Property Code (IPC) of the Philippines (in force January 1, 1998). Since that time, various copyright revision drafts have been introduced into each Congress over the years, with the intent to fully modernize the law, fix some deficiencies, and fully implement the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT) to which the Philippines acceded in 2002. IIPA understands that the Philippine Congress is currently considering IP Code amendments. IIPA further understands that House Bill 3841 (HB 3841) passed its third reading on May 23, 2011, while a Senate consolidated bill, which contains some differences with the HB, passed first reading in the Senate as

¹⁹Philippine-traced camcords of *Inception* and *The Losers* were available the same day as their U.S. release. Philippine-traced camcords of *Alice in Wonderland* and *Iron Man 2* were available prior to their U.S. release dates.

consolidated SB 2842 on May 25, 2011, although latest reports indicate that the Senate Bill, which was to be introduced before the Christmas break 2011, and then again in mid-January 2012, has been delayed by the impeachment proceedings against the Chief Justice of the Philippine Supreme Court.²⁰

HB 3841 contains many elements needed to establish a fully modern copyright system, but does not contain all of the strong elements contained in previous bills (e.g., in SB 2628). We support: i) granting the IP Office of the Philippines greater enforcement functions,²¹ ii) the broad definition of the “communication to the public” critical for protection of copyright in the online (and mobile) environment,²² iii) the express “making available” right for related (but this should be expanded as the general rule to all communications to the public),²³ iv) the confirmation that temporary reproductions are covered under the reproduction right (subject to the “fair use” defense as defined in Section 185 as amended), v) the addition of an exportation seizure remedy,²⁴ vi) the provision of “double” damages and mandatory maximum sentences for unlawful “circumvention,” and vii) the helpful enforcement disclosure requirements.²⁵

There remain some aspects of HB 3841 (like SB 2842) that need clarification or revision and are not as strong as previous bills (like SB 2628). It is hoped that many of these issues can be resolved with implementing regulations, should the Senate finally pass the current Bill, or even in explanatory memoranda. Among IIPA’s chief concerns are:

- **Technological Protection Measures:**

- HB 3841 lacks explicit coverage of access control TPMs. Previous bills were superior to the alternative House and Senate drafts in that the previous bills contained coverage of TPMs in line with the WCT and WPPT, defining them to include both measures used to restrict unauthorized access as well as the exercise of exclusive rights. By contrast, HB 3841 would need further interpretation, possibly through implementing regulations, to confirm coverage of “access control” TPMs.²⁶
- HB 3841 (in draft Section 216.1(b)(i)) contains no prohibition on trafficking in or providing services related to circumvention devices, technologies, or tools, prohibiting only the act of circumvention expressly.²⁷

²⁰IIPA previously expressed support for a different Senate Bill (SB 2628, introduced by Senator Loren Legarda on December 14, 2010).

²¹HB 3841 confirms that the Director General of IP Philippines may “undertake enforcement functions supported by concerned agencies such as the Philippine National Police, National Bureau of Investigation, Bureau of Customs, Optical Media Board, local government units, among others” and “conduct visits to establishments and businesses engaging in activities violating intellectual property rights and provisions of this act based on report, information or complaint received by the office.” This new set of powers could be very useful in transitioning the IP Office of the Philippines from what was mainly a political and bureaucratic office into a more operational role.

²²HB 3841 achieves a broad expansion in Philippine law of the concept of “communication to the public” including “any communication to the public, including broadcasting, rebroadcasting, retransmitting by cable, broadcasting and retransmitting by satellite” as well as the express (WCT/WPPT-compatible) making available right.

²³An express “making available” right is added for related rights, with the additional seemingly helpful language “as well as other transmissions of a sound recording with like effect.” Record companies increasingly seek new methods to make their recordings available for consumers to enjoy on different digital platforms. To encourage right holders to make their works available under a broad range of licensing schemes and prices and to invest in new and innovative services, an effective legal framework for right holders to control all types and forms of communication of the work to the public needs to be in place. Therefore, it should also be provided, as the general rule, that, aside from very limited (e.g., analog, non-interactive) circumstances, all communications to the public as to related should be afforded with an exclusive right.

²⁴Section 190 is amended to provide that Customs has the authority to seize not only prohibited imports but also exports, and to seize, condemn and destroy infringing items “before they are exported.” This could be very helpful.

²⁵HB 3841 introduces Section 220A which provides the requirement for the enforcement authorities to “notify the owner of the copyright in question or his authorized agent of the seizure or detention” of infringing articles, packaging or implements, where “reasonably practicable.” The particulars are set out in 220A.2 and 220A.3 of the House Bill and should be supported over the Senate Bill since they appear to be very helpful if this is carried out in practice.

²⁶It may be that the drafters intend the phrase “restrict acts ... which are not authorized ... or permitted by law” to include access controls, but the previous wording, “any technology, device or component that, in the normal course of its operation, controls access to a protected work,” was clearer and preferable. We suggest that the term be clarified in implementing regulations to provide the latter quoted explanation.

²⁷SB 2628 Article 229A.1(b) provided that any person who “manufactures, imports, exports, distributes, offers to the public, provides, or otherwise traffics in devices, products or components or offers to the public or provides services, which ... i) are promoted, advertised or marketed for the purpose of circumvention of any effective technological measure; or ii) have only a limited commercially significant purpose or use other than to circumvent any effective technological measure; or iii) are primarily designed, produced, adapted or performed for the purpose of enabling or facilitating the circumvention of any effective technological measure” is guilty of a crime and is assimilated to a copyright infringement subject to civil remedies. It is hoped that the definition of “circumvention” could be confirmed in the explanatory memorandum and in implementing regulations to cover these trafficking activities. If the outlawing of trafficking and circumvention services are not covered, and/or access controls are not covered, the bills cannot be said to fully implement the WCT and WPPT.

- HB 3841 deems the circumvention of TPMs merely as an aggravating circumstance, but a corresponding Senate version (S.B. 2487) criminalizes the circumvention of TPMs. The corresponding Senate version is preferable on this point.
- **Civil Damages/Statutory Damages:** Previous bills (e.g., SB 2628) were superior to the current bills, as their civil damages provisions set forth the goal of awarding damages which the court “finds to be sufficient to fully compensate the right holder for the injury he has suffered, and sufficient to constitute a deterrent to further infringements.” HB 3841 contains no such language: while it retains statutory damages, and while draft Section 261.1(b) provides a structure for additional damages (“in lieu of actual damages and profits, such damages which to the court shall appear to be just and shall not be regarded as penalty”), it sets the minimums very low at US\$1,140 and it is unclear whether the recovery amount is per work or per infringement. In addition, the meaning of statutory damages “in a sum equivalent to the filing fee of the infringement action” is unclear. This should be clarified. Damages should be “adequate to compensate for the injury the right holder has suffered” as provided for in TRIPS Article 45.
- **Duty to Account:** HB 3841 (in draft Section 180.5) introduces a new and confusing provision requiring an “accounting” from an assignee or licensee to a “copyright owner” (which is used interchangeably with “author”). In many countries, a joint author may use a joint work without authorization of the other joint author subject to an accounting, which may have been the intention of the drafters, but the insertion of a duty to account to all licenses or assignments is completely unwarranted and unduly interferes with the exercise of exclusive rights by right holders and impinges on their freely negotiated licenses and assignments. The Section should be removed from the substitute HB. The Senate Bill appears less harmful and restrictive as it simply indicates, “The copyright owner has the right of regular statements of accounts.” The House Bill creates unreasonable restrictions on contract and presumes a right of remuneration even after an assignment or license, namely,

“the copyright owner has the right to regular statements of accounts from the assignee or the licensee with regard to assigned or licensed work. The accounting shall be made in writing and shall be given to the author at least once a year accompanied by such information, including books of accounts, contracts reassigning his rights to his work, and such other documents that will help the author or copyright owner determine the proper remuneration due him.”

The passage interchangeably refers to the “copyright owner” having the right, and then the “author” being given the information to determine “the proper remuneration due him,” adding to the confusion.

- **Exceptions:** Several exceptions in HB 3841 must be examined and altered to ensure they meet the Berne Convention three-step test.
 - **Exception for the visually impaired:** HB 3841 (draft Section 185) introduces a new exception to “reproduce” and “distribute” works “in a specialized format exclusively for the use of the blind, visually- and reading-impaired persons.” This Bill should be amended to apply only to “print” or “written” materials, consistent with what is being proposed at the WIPO level. The Bill contains some limiting provisos, including that the reproduction and distribution be “on a non-profit basis” and that it comply with the three-step test (i.e., the 2nd and 3rd steps). It contains the worrisome phrase “this distribution is also permitted in case the copies have been made abroad and the conditions mentioned have been fulfilled.” It must be confirmed (for example, in implementing regulations or in the explanatory memorandum) that the phrase “the conditions mentioned have been fulfilled” means that only lawfully made or distributed copies would be subject to this exception. The Senate Bill (draft Section 184(l)) suffers from potential over-breadth (it is not being expressly bound by the three-step test), but does not expressly permit copies made abroad to be distributed.
 - **Library Exception Broadened:** Another example is the broadening (in draft Section 188 of HB 3841) of the exception for reprographic reproductions for libraries from a “single copy” to a “limited number of copies” of

the work “as may be necessary for such institutions to fulfill their mandate.” It is unclear whether this broader exception, with the vague use of the phrase “necessary ... to fulfill their mandate” can pass muster under international treaties to which the Philippines is party. Further, this exception should be subject to the three-step test and limited to copies necessary for archival and purposes and preservation of the work. It should be noted that previous draft bills (e.g., SB 2628) contained limiting language, e.g., in draft Section 188.2, the limitation is narrowed to a “single” reprographic copy and subject to the work being “not reasonably available to it through commercial channels.” The latter phrase is not included in the new draft bill.

- **Decompilation Exception:** A third example is the “decompilation” exception. In previous draft bills (e.g., SB 2628), the appropriately narrowing language allowing decompilation “to the extent that such decompilation is indispensable in order to obtain the information necessary to achieve such inter-operability” was changed in HB 3841 to the much broader “to the extent that such decompilation is done for the purpose of obtaining the information necessary to achieve such inter-operability.” The narrower formulation should be reinstated.
- **Exploitation Right in Audiovisual Works:** The current bills are missing a provision (in previous draft bills) ensuring that the producer of an audiovisual work had the “exploitation” right in the work, not just the right in “exhibition” of the work. While it is usually the case that contractually, the producer will exploit the copyright, clear recognition of this in the statute simplifies the process by which rights licensed can be recognized in the Philippines and recognizes the longstanding commercial practice of the film industry.
- **Notice Provision for Liability:** HB 3841 imposes liability if a person “benefits financially from the infringing activity of another person who commits an infringement if the person benefiting *has been given notice of the infringing activity* and has the right and ability to control the activities of the other person.” [emphasis added] This appears in the physical environment to create a structure for landlord liability, and in the online space (particularly in prong 3) provides a modified form of contributory liability as understood in the U.S. The language “has been given notice of the infringing activity” represents a narrowing of the provision when compared with previous drafts. In the least, “given notice” should also be understood in the explanatory memorandum to include constructive knowledge (e.g., red flag knowledge, such that liability will attach if one has awareness of facts or circumstances from which infringing activity is apparent).²⁸
- **Importation Right:** HB 3841 leaves out a provision included in previous draft bills which would have added an “importation” right to the current distribution right, since a key component of many laws to provide the author with the ability to authorize imports and prevent unauthorized imports.
- **Designation of Agent to Enforce Rights:** HB 3841 draft Section 183 falls short of defining who may enforce rights on behalf of copyright owners,²⁹ and would introduce a new collective management regime. This formal introduction of accreditation of a “collecting society” system must not be implemented in a way to restrict the activities of the “collecting society” such as its tariff structure and should not restrict the number of collecting societies operating in the Philippines.
- **Term Extension:** One of the important changes to be made in the Philippines is the extension of term of protection, to life of the author plus 70 years, or 95 years from publication for works whose term is calculated from such event. Previous bills contained term extension, which would avoid Philippine works and objects of related rights falling into the public domain in other countries on a discriminatory basis, and would bring its law into line with the international trend. It is unfortunate that HB 3841 removed this important and positive change.

²⁸SB 2628 (Section 216(b)) had set forth that liability attaches, e.g., if a person “benefits financially from the infringing activity of another person who commits an infringement if the person benefiting has the right and ability to control the activities of the other person.”

²⁹SB 2628 had added “or a similar agent” to Section 183, to ensure that right holder representatives can act on right holders’ behalves in effectuating protection of their rights in the Philippines.

- **Rights Management Information Protection:** Rights management information provides the basis for online licensing and benefits both right holders and users by certifying the integrity and authenticity of digital works. The draft bill should introduce provisions to prohibit dissemination of copies in which rights management information has been removed or altered and this prohibition should apply to all types of copyright works.
- **Express Coverage of Import, Export, and “Using” an Article “in a Trade or Business” as a Crime:** Previous draft bills included “import,” “export” and the “use of an article in a trade or business” without authorization as a crime. This language should be included in the draft bill.

Service Provider Issues: While the new copyright law, when enacted, will spell out with specificity some important criteria for copyright liability in general, the E-Commerce Law 2000 (Republic Act No. 8792) already deals with specific issues of copyright liability for Internet infringements as well as the role of service providers. First, the law contains a general copyright provision outlining infringements involving the Internet (or other devices using telecommunications).³⁰ Second, the Law states that service providers can be liable for direct infringement, for inducing or causing another person or party to commit any infringement or other unlawful act, or for indirect infringement, i.e., knowingly receiving a financial benefit directly attributable to the unlawful or infringing activity. It then provides a limitation on liability for service providers who “merely provide access” to an “electronic data message or electronic document” that infringes copyright, provided that the service provider does not have actual knowledge of infringement, or is not aware of the facts or circumstances from which infringement is apparent. These provisions are helpful in setting forth important liability principles, but the law should be modernized to provide for a statutory notice and takedown system (e.g., in the absence of court ordered relief) and policies to effectively and fairly address non-hosted infringements and repeat infringers. Under the current Law, service providers must only abide by “injunctive relief issued by a court ... requiring that the service provider take or refrain from actions necessary to remove, block or deny access to any material, or to preserve evidence of a violation of law.”

MARKET ACCESS ISSUES

Restrictions on Advertising: Over the years, a number of bills have attempted to limit advertising on Pay TV. The most recent iteration is HB 545 which would impose a 10-minute per hour advertising limitation and also prohibit foreign advertisements. Restricting advertisement placement tends to reduce the utility of advertising, leading to a reduction in advertising-based revenue and further impeding the development of the television industry in the Philippines.

Unreasonable Taxes and Duties on Motion Picture Business: Several taxes/duties imposed on film companies remain inordinately high. For example, U.S. companies are burdened with a 30% income tax on net profits, a 5% withholding tax on gross receipts chargeable to income tax liability, and a 10% tax on the distributor’s share of the box office. Import duties are assessed at 15% of the invoice costs, plus freight and insurance, on all prints and trailers imported into the Philippines, and related advertising materials are dutiable at a 10% amount. There is a 15% tax on royalty remittances (to producers) on profit remittances or dividends. A municipal license tax of 0.75% of a company’s prior year gross receipts is also imposed on motion picture companies. Philippines reduced the national entertainment tax rate ceiling from 30% to 10% in 2009. These oppressive tax burdens detrimentally impact the development of a legitimate audiovisual business.

Customs Duty for Films Should Remain Based on the Physical Carrier Medium: In 2010 and 2011, the Philippines Bureau of Customs considered reinterpreting its customs valuation of imported film prints to a transaction

³⁰Section 33(b) of the E-Commerce Act provides, “Piracy or the unauthorized copying, reproduction, dissemination, distribution, importation, use, removal, alteration, substitution, modification, storage, uploading, downloading, communication, making available to the public, or broadcasting of protected material, electronic signature or copyrighted works including legally protected sound recordings or phonograms or information material on protected works, through the use of telecommunications networks, such as, but not limited to, the internet, in a manner that infringes intellectual property rights shall be punished by a minimum fine of One hundred thousand pesos (P100,000.00) and a maximum commensurate to the damage incurred and a mandatory imprisonment of six (6) months to three (3) years.”

value assessment that included royalties generated from the exhibition of the film. Such a duty assessment is a violation of the World Trade Organization's Customs Valuation Agreement, since prints are not generally "sold" into the Philippines, thus rendering the application of the transaction value (not to mention the inclusion of royalties) a moot point. By the beginning of 2012, Customs appears to have moved away from royalty assessments but this issue requires continued monitoring.

Foreign Ownership Restrictions for Media Companies: Foreign investment in mass media, including the Pay TV sector, is strictly prohibited under the Philippines Constitution. Draft cable legislation dating back to 2005 remains under consideration, but if enacted, would allow for up to 40% foreign ownership/investment in cable systems that do not produce their own programs or content. As the broadcast industry moves towards a converging environment where operators are encouraged to provide both infrastructure and content, such restrictions will continue to impede development of the cable television market. Pending legislation in the form of a Convergence Bill could provide some relief, but consideration of this Bill remains stalled.

Television Restrictions and Local Agent Requirement: In October 2003, the NTC signed Implementing Rules and Regulations Governing Community Antenna/Cable television (CATV) and Direct Broadcast Satellite (DBS) Services to Promote Competition in the Sector. The rules limit the ability of content providers to enter into exclusive distribution agreements with local cable providers. Prior exclusivity arrangements are presumed valid, but may be subject to NTC review at its discretion, while future exclusivity arrangements are deemed presumptively anti-competitive and must be approved by NTC. In addition, the regulations require foreign content providers to maintain a local agent if they have such exclusive agreements in place. These regulations add costs, delays and uncertainty limit the ability of motion picture companies to distribute content in the Philippines and should be discarded.

GOVERNMENT COORDINATION, TRAINING, AND PUBLIC AWARENESS

First, we commend the Intellectual Property Office of the Philippines for its efforts to bring under its agency a coordinating role of enforcement organs for the protection of IP throughout the country, and others (like Customs and even the Bureau of Immigration). Its efforts also seem aimed at enhancing transparency of anti-piracy activities throughout the Philippines. Most recently, the IPO jointly organized with WIPO the 1st Philippine Anti-Counterfeiting and Piracy Summit with members of the National Committee on Intellectual Property Rights (NCIPR) on October 24-28, 2011. While results of these liaison activities remain to be seen, IIPA views the IPO's role as a positive one aimed at effecting real change in the enforcement landscape for right holders.

The industries have conducted capacity-building trainings for judges, prosecutors, enforcement agencies, and hearing officers of the Intellectual Property Office in 2011. Specifically targeted trainings also occurred throughout the year. For example, the motion picture industry conducted anti-camcording trainings for cinema staff, going through the latest *modus operandi* of the syndicates running the illegal camcording operations, and reviewing procedures for apprehension of those caught camcording. In all, the Motion Picture Association (MPA) organized or participated in 15 training sessions in 2011 with 257 participants. MPA also coordinated with local exhibitors to produce and finance warning posters in cinemas. Local exhibitors have upon their own initiative produced anti-camcording trailers for exhibition in the theaters and MPA regularly updates the "Make a Difference" training materials. They also sponsored a local Filipino student filmmaker to attend a MPA-sponsored film workshop in China.

The Optical Media Board's Chairman has devised a slogan *Bawal Kumopya* (copying is prohibited) and used it as an awareness-raising initiative. Members of the creative industries in the Philippines still use the slogan to this day in anti-piracy campaigns with businesses, representatives of local government, and in schools. The Chairman with the help of local Rap Artists D-coy, Dinky Doo, and Artstrong made an Official Optical Media Board Theme Song also called "Bawal Kumopya." The Chairman is also visiting different schools to create awareness and invites group of students and concerned citizens in his office to discuss the further need for anti-piracy efforts.

As for U.S. Government training initiatives, as noted above, IIPA recommends that continuous exchanges occur with opportunities for judges from the new IP Commercial Courts (established by the new Supreme Court IP Court Rules) and prosecutors to come to the U.S. One suggestion which has been made by the IPO is for a “judge swap” occur between the U.S. and the Philippines. In addition, training for prosecutors on techniques for streamlining copyright cases and on the new Rules should occur as well.

GENERALIZED SYSTEM OF PREFERENCES

The GSP program, designed to promote economic growth in the developing world by providing preferential duty-free entry for products from designated beneficiary countries and territories, expired on December 31, 2010, but on October 21, 2011, President Obama signed legislation to reauthorize the program through July 31, 2013. GSP trade benefits became effective 15 days after the President signed the bill (November 5, 2011) and apply retroactively from January 1, 2011. The Philippines has been a major beneficiary of the GSP program. During the first eleven months of 2011, more than US\$1.04 billion in imports to the U.S. from the Philippines enjoyed duty-free treatment under the GSP Program, or almost 12.4% of the Philippines’ entire imports into the U.S.³¹ Among the criteria which GSP beneficiary countries must meet are to provide “adequate and effective protection of intellectual property rights,” and “equitable and reasonable access to the markets ... of such country.” 19 USC 2462(c)(4) and (5).

³¹During 2010, almost US\$912.7 million in imports to the U.S. from the Philippines enjoyed duty-free treatment under the GSP Program, or almost 11.5% of the Philippines’ entire imports into the U.S.

ROMANIA

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2012 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation:¹ IIPA recommends that Romania remain on the Watch List in 2012.

Executive Summary: Piracy remains widespread in Romania for all forms of copyright works, and the problem has largely moved online, where even international pirates seek safe haven from more unwelcoming terrain elsewhere in Europe. In a country increasingly indifferent to copyright enforcement, reports of cooperative attitudes of police and piracy experts are appreciated, but ultimately negligible within the overall challenging enforcement environment in Romania. Leadership is needed from the highest level of the Romanian Government to adapt Romania's laws to the modern environment, to encourage a national policy of cooperation against online infringement, to ensure police officials are competent and well-equipped to conduct raids and investigations more efficiently, and to give prosecutors and courts the authority and training to bring piracy cases to speedy conclusion, with deterrent sentences and penalties.

PRIORITY RECOMMENDED ACTIONS FOR ROMANIA IN 2012

- Senior levels of the Romanian Government must express a coordinated commitment to fighting copyright piracy, providing the necessary resources and authority to all enforcement authorities to take sustained and concrete actions to support that commitment, and monitoring progress over an extended period of time.
- Provide adequate resources and high-priority support for police investigations and actions, including those involving piracy on the Internet, by reinforcing the IP investigation and prosecution task force within the Prosecutor General's Office.
- Impose deterrent, non-suspended sentences and fines for criminal copyright convictions, and avoid dismissing cases, especially those involving high-level damages or repeat offenders.
- Permit rights holders' organizations to serve as court experts in copyright infringement cases.
- Reauthorize IPR-trained Tribunal-level prosecutors with jurisdiction over copyright criminal cases, and instruct public prosecutors' offices and courts to prioritize IPR cases, including Internet piracy cases.
- Ensure that appointed specialized IPR prosecutors operate in a transparent manner, communicate with rights holders' representatives, and provide results by swiftly initiating and indicting criminal infringement cases.
- With respect to ORDA, (1) the statutory stickering (hologram) system should be abolished; (2) ORDA's track recordation system for sound recordings should be made voluntary and free of charge; (3) ORDA's tariffs should be substantially reduced; and (4) intricate and bureaucratic procedures should be simplified.
- Remove the warrant requirement for searching computers in public facilities by amending Law no. 161 of 2003 or Copyright Law no. 8 of 1996 or, alternatively, expressly provide for the principle that the premises search warrant also covers the PCs and digital media in the premises.
- Include rights holders in any legislative consultation process to amend the copyright law or other laws.

COPYRIGHT PIRACY IN ROMANIA

Internet piracy: Like many countries in the region, Romania was once plagued by hard goods piracy, but in recent years has experienced a significant shift to Internet piracy. Although Romanian users increasingly access

¹For more details on Romania's Special 301 history, see IIPA's "History" appendix to this filing at <http://www.iipa.com/pdf/2012SPEC301HISTORICALCHART.pdf>, as well as the previous years' reports, at <http://www.iipa.com/countryreports.html>. For a summary of IIPA's 2012 global issues, see our cover letter at <http://www.iipa.com/pdf/2012SPEC301COVERLETTER.pdf>.



illegal content at home, Internet cafés continue to allow customers to download and burn copyrighted materials—music, entertainment software, films and business software. Large amounts of video files are shared over the networks.

The Motion Picture Association of America (MPAA) reports that for the last year, the scope of Internet piracy of audiovisual content in Romania took on new dimensions, with a significant increase in number and visibility of illicit downloading and streaming websites. Some of these websites, for example vplay.ro, are accessible only from Internet Protocol addresses originating from Romania, while other, internationally available sites have sought safe haven for hosting services from within Romania. The lack of Internet enforcement in the face of these problems, report film industry representatives, has played a major role in deterring investors from developing a legal online market for audiovisual products.

The independent segment of the film and television industry (IFTA) reports that independent producers and distributors are especially concerned with the impact of Internet piracy because of its harm to legitimate online distribution services – harming consumers and rights holders alike. Revenue from these services, which is licensed country-by-country, is critical for the independents to finance the development of new creative works worldwide. Since Internet piracy instantly exports troubled marketplaces and high piracy rates to other markets, this type of copyright infringement not only undercuts anticipated revenue from the distribution of a particular asset, it also harms the ability of independent producers to secure financing for future productions.

The Entertainment Software Association (ESA) has seen an increase in the prevalence of peer-to-peer (P2P) piracy in Poland in 2011. For 2011, Romania placed tenth in the world in the number of connections by peers participating in the unauthorized file sharing of select ESA member titles on public P2P networks, up from its 13th place ranking position in 2010.

The Business Software Alliance (BSA) reports that Internet-based piracy of business software applications remained steady in Romania in 2011 compared to 2010, appearing most commonly via the illicit use of P2P file sharing and Torrents.

The level of Internet piracy in Romania in recent years has become so high that the music industry has struggled to develop new legitimate online services, while existing services face unfair competition from the massively available pirated free offer. The main segment of music Internet piracy has involved the illicit use of P2P file-sharing, yet the growing use of cyberlocker sites to distribute infringing music files is close behind. Encouragingly, the administrators of such sites typically cooperate in taking down infringing links.

End-user business software piracy: BSA representatives in Romania report that business end-user piracy is the most damaging to the industry. Under-licensing of software products is a significant problem. BSA reports that the commercial value of pirated U.S.-vendor software in Romania rose to \$195 million in 2010.² Hard goods piracy was on the decline in the past year, which can be attributed to the heavy increase in Internet piracy and determined enforcement actions.

Hard goods piracy: The levels of optical disc piracy in Romania have declined somewhat in recent years, as Internet piracy has become more popular. Remaining hard goods piracy consists of sales in street markets and unauthorized use of pirated copies of games in Internet cafes. ESA reports that piracy in Romania is quickly

²BSA's 2011 software piracy statistics will not be available until after the filing deadline for this submission, but will be released in May 2012, at which time piracy rates and U.S. software publishers' share of commercial value of pirated software will be available at www.iipa.com. In 2010, the software piracy rate in Romania was 64%, representing a commercial value of unlicensed software attributable to U.S. vendors of US\$117 million. These statistics follow the methodology compiled in the Eighth Annual BSA and IDC Global Software Piracy Study (May 2011), <http://portal.bsa.org/globalpiracy2010/index.html>. These figures cover packaged PC software, including operating systems, business applications, and consumer applications such as PC gaming, personal finance, and reference software – including freeware and open source software. They do not cover software that runs on servers or mainframes, or routine device drivers and free downloadable utilities such as screen savers. The methodology used to calculate this and other piracy numbers are described in IIPA's 2012 Special 301 submission at <http://www.iipa.com/pdf/2012spec301methodology.pdf>.

migrating online as Romanians have turned to downloading pirated PC games at home. With respect to audiovisual piracy, pirate content can now be purchased in high definition, and sold stored on hard discs through online auction website advertisements and e-mail offers. Pirate DVDs, even of new releases, continue to appear on the streets and in flea markets.

COPYRIGHT LAW AND RELATED ISSUES

There are a variety of Romanian laws that affect the abilities of rights holders to protect their content and of the authorities (both criminal and administrative) to enforce the law.

No legal framework for online anti-piracy investigations: Romania is currently considering a new draft law to implement the EU Data Protection Directive, under discussion for adoption in 2012. The Romanian Ministry of Information Society and Communication (MCSI) submitted the draft for public comments in June of 2011, and in October 2011 the European Commission issued a statement pressing Romania to move forward with implementation of the directive. Adoption of a legal framework for data retention could allow enforcement authorities to collect needed evidence in anti-piracy investigations, by clarifying that ISPs should retain online activity to be supplied to authorities in penal cases.

Local industries have been unable to enforce their rights in copyright works against online infringement in the aftermath of a now-defunct Data Retention Law (no. 298 of 2008), which in October 2009 the Constitutional Court found unconstitutional due to the fact that “it allowed Police Officers to commit abuses.” The law was enacted to implement the EU Data Retention Directive, and created a new “serious crime” warrant requirement that hindered the ability of Romanian police authorities to seek the identities of online infringers. Since the law was repealed, however, as a practical matter rights holders are now unable to gather the evidence needed to bring effective Internet piracy cases. Although the Copyright Law and Law on Electronic Commerce contain elements that should establish a role for ISPs in online anti-piracy actions, currently ISPs in Romania will not cooperate in such actions until new legislation is adopted to address data retention. Romania will need to adopt new legislation to transpose the Data Retention Directive, which should be clear that “serious crimes” must encompass copyright violations, regardless of whether or not they were performed by a criminal organized group, and that P2P infringements are included.

Internet cooperation: There are currently no plans in Romania to develop a clear framework for cooperation with Romanian ISPs to enforce copyright online, in the absence of which ISPs are reluctant to take any action. Rights holders in the film industry began working with Romanian hosting service providers in 2011, and report varied responses to notices of instances of piracy and efforts to collaborate. Some host providers responded rapidly, but most took no action in response to repeated notices. There is currently no effort on the part of the Romanian Government to facilitate an agreement for voluntary cooperation among rights holders and ISPs.

The Romanian Copyright Law addresses the unauthorized uploading and downloading of copyrighted works from the Internet, but is not clear as to the responsibility of ISPs specifically.³ Meanwhile, Romania’s Law on Electronic Commerce (Law No. 365 of 2002) provides that an ISP should suspend Internet access of a client upon notification by the authorities that the client has engaged in an act of infringement. The ISP can suspend a client’s services only through the disposition of the designated public authority (ANRCTI) or through a court order, based on a complaint of an interested party. Unfortunately, the authority (ANRCTI) cannot act in response to infringements of the copyright law, but only in cases of infringement of the E-Commerce Law, leaving copyright violations out of the purview of this ISP liability mechanism. Further, the E-Commerce Law provides for the liability of ISPs in cases where they do not take action if (a) they learn about the illegal/infringing nature of information stored, or (b) they facilitated access to such information (by search instruments and links). In the case of facilitation such illegal/infringing nature must be confirmed by a competent public authority. However, with respect to hosted information, it is not clear on

³See Article 1432 of the Copyright Law (a crime punishable with imprisonment from 6 months to 3 years includes the act of the person who, without the consent of the rights owner and knowing or having to know, permits, facilitates, provokes or hides an infringement of a right provided for in this Law.)

what criteria the ISPs must consider the information to be illegal or infringing, which may cause problems in practice. The law also provides for the general obligation of ISPs to alert authorities about the apparently illegal activities of their clients; should an ISP fail to do so, they are subject to administrative liability. Rights holders are concerned that this very broad and unspecific obligation is unenforceable.

Copyright law reform: The 1996 Romanian Copyright Law has been amended a number of times in the past decade, including in 2004, 2005, and 2006,⁴ often to bring the law into compliance with EU Directives. The overall legal structure is generally good but unfortunately Romanian law is not yet fully compliant with the WIPO Copyright Treaty (WCT), the WIPO Performances and Phonograms Treaty (WPPT), the EU Copyright and Enforcement Directives, or the WTO Trade Related Aspects of Intellectual Property Rights (TRIPS) Agreement. Some problematic provisions reported by local industry colleagues remain. Article 143, which provides protection for technological protection measures, does not appear to prohibit acts of circumvention, but only preparatory acts of circumvention and therefore fails to implement the WIPO Treaties and the EU Copyright Directive.

In August 2010, the Ministry of Culture requested comments on draft amendments to the Copyright law, but the draft has not progressed since comments were submitted in 2010. As published in 2010, the draft contained both good and bad provisions for the copyright industries. It would solve an issue long faced by the business software industry that computer search warrants must be requested in addition to location search warrants. A search warrant can be issued only by a court after the commencement of the criminal investigation (Law No. 161 of 2003). But the criminal investigation can only be commenced if sufficient evidence exists, and in practice it is difficult to gather the evidence on a suspect's premises in the first place, which can limit the number of *ex officio* police raids dramatically because police raids depend upon input from the rights holders. The solution is simple – the law should be amended to provide that the mere verification of the existence of software installed on computers should not require such a search warrant. Alternatively, it could be provided that the search of the computers is covered under the premises search warrant. BSA hopes that this issue can be included in the copyright law reform process. Unfortunately, the draft also includes decreases of penalties for some copyright crimes. A needed revision would implement Article 8.3 of the EU Copyright Directive to allow rights holders to seek injunctions before civil courts against intermediaries whose services are used by a third party to infringe copyright. Meanwhile, in 2012 new criminal and procedural codes are expected to come into force, although it has been reported that the new criminal code could be delayed until 2013. However, while the new criminal procedural code is to address computer searches in detail, it is not expected to resolve the issue that specific computers must be identified in warrants for subsequent search.

Also in 2009, the Romanian Copyright Office supported a legislative amendment to require resellers of software to inform customers about the legal risks of piracy at the point of sale. However, the legislative draft amending Government Ordinance no. 25 of 2006 was put forward without this provision. The concept should be retained in future efforts to increase public awareness about piracy.

ORDA, the hologram system and ineffective administrative enforcement: The music industry has for many years called for an abolition of the ORDA registration and hologram system, given its historical ineffectiveness regarding enforcement and its penchant for corruption. ORDA issues holograms for every optical disc (audio, video, software) that is released commercially. All copyright industries agree that this system produces more bureaucracy than help in anti-piracy activities and, for a variety of reasons, is a model that has proven over time and in many countries to be ineffectual. In addition, ORDA registers every sound recording and videogram that is released to a commercial circle for the purposes of issuing holograms (this requirement was introduced by the Government Ordinance No. 25/2006). As expected, the procedure is extremely complicated and time-consuming. The registration of each recording and videogram is taxed by ORDA, and the amount includes an additional 10% fee for a national cultural fund, while for example other additional fees (3% added to the sale price of DVDs or other tangible supports) are paid by the film distributors for the film fund administered by the Film Office. The copyright industries also have voiced concerns with a November 2008 decision regarding ORDA that added more provisions regarding tariffs, the

⁴For a detailed history of these amendments, see the IIPA's 2010 Report at <http://www.iipa.com/rbc/2010/2010SPEC301ROMANIA.pdf>.

use of expert reports, and the use of the “encouragement” fund for ORDA personnel. Romania should (1) abolish the statutory hologram system; (2) make the track registration system voluntary and free of charge; and (3) substantially reduce ORDA’s tariffs and allow rights holders’ organizations to act as court experts in copyright infringement and piracy cases.⁵

Government software legalization: In July 2010, the National Authority for Regulating and Supervising Public Procurement (ANRMAP) issued a draft amendment of the secondary legislation of public procurement (Government Ordinance no. 925 of 2006) for which the business software sector submitted a proposed revision that would allow contracting authorities to ask for statements of licenses for software used by bidders for public procurement contracts, and actual documentation of licenses upon winning a bid. Previous efforts were underway to amend the Ordinance to require software distributors to inform customers about software piracy risks. However, the current legislative draft was promoted without this provision. The process of amending the Ordinance continued to be stalled in 2011, but should be encouraged to move forward including the contemplated requirements for distributors.

Criminal Code reform delayed: A large part of the Criminal Code reform in 2006, including the intellectual property chapter, was postponed until September 1, 2008, then until September 1, 2009, and then, again, until October 1, 2011 and now is not expected until late 2012 or even early 2013. In a positive move, Law No. 278 of 2006 introduces criminal liability for legal entities and also provides for the general limits of criminal fines. However, there were some problems in this law. For example, the criminal code still does not sanction the possession of infringing materials, including the possession of the equipment used to make infringing material.

COPYRIGHT ENFORCEMENT IN ROMANIA

Copyright industries report some improvements in relationships with Romanian Police in 2011, but overall enforcement authorities have not prioritized combating piracy. Obstacles to gathering evidence in physical raids and Internet investigations continue to prevent cases from moving forward, and those that do reach prosecutors’ desks are often subject to dismissal. The generally poor economic situation, together with the lowering in late 2010 of jurisdiction over criminal copyright cases from tribunals to first-level prosecutors’ offices and courts, proved to have negative consequences for copyright enforcement efforts.

The Intellectual Property Working Group, formed in 2006 as a form of private-public partnership, in recent years has become less active and is in need of more engaged leadership. Led by the IP Department of the Public Ministry (General Public Prosecutor’s Office), this group includes all the public authorities having IPR enforcement jurisdiction along with representatives from the private sector. The main agencies responsible for criminal enforcement are the police and the prosecutors (the Public Ministry). The General Police Inspectorate–Anti-fraud Department includes a unit dedicated to intellectual property rights, and other agencies include the Border Police and the Gendarmerie. ORDA has the responsibility to provide forensic examinations/expertise reports, to store the pirate products during trial and destroy them after the trial is concluded, as directed by the court or prosecutor.

Police enforcement: In 2011, BSA reports that its relationship with the Romanian Police has substantially improved. A cooperation protocol was signed at the highest level, and the Inspector General of the Romanian Police personally participated in actions, bringing weight and visibility to a nationwide public awareness campaign. Authorities take *ex officio* actions, as well as new cases based on referrals from the private sector. However, in 2011 the number of raids conducted by the police dropped significantly, and the public prosecutors continued to drop cases. Police officers who have been specifically appointed to handle IPR cases again in 2011 reduced their attention to IPR cases or took on other types of cases, due to economic pressures. The superiors of the General Inspectorate of Police should retain specialized officers and ensure resources are adequate for their dedication to

⁵For further details on this long-standing problem, see the IIPA’s 2010 Report at <http://www.iipa.com/rbc/2010/2010SPEC301ROMANIA.pdf>.

IPR cases. Further, amendments to the copyright law to authorize police to verify software installed on computers, as described above, could provide the needed authority for police to move forward with raids in cases of software piracy.

In 2011, BSA had 248 new raids (more than 190 for end-users cases, more than 15 for resellers/distribution, six for hard-disk loading cases, and 34 for Internet piracy)—a significant decrease from the 319 raids conducted in 2010 and far below the 500 raids conducted in 2009. By the end of 2011, 30 cases resulted in convictions (11 of these were for end-user piracy, 16 in resellers/distribution cases, and three for hard-disk loading piracy, one of which resulted in a jail term for a second-time offender).

The entertainment software and motion picture industries report that relationships with law enforcement continue to be positive, although delays in case reporting continue due to lack of resources. As reported in 2011, both police and prosecutors would benefit greatly from better training and the necessary tools to gather evidence for the identification of online infringements. Local police initiate cases involving cross-industry pirated product, often actively seeking member company assistance in the course of investigations. One ESA member reports a considerable decrease in the number of criminal cases referred to prosecutors, from 104 in 2010 to just 35 in 2011. Unfortunately, enforcement efforts continue to focus on small cases, with the majority of video game cases involving between 4 and 80 infringing copies.

Gathering evidence in Internet piracy cases is significantly more challenging since the Constitutional Court brought down the legal framework on data retention in 2009, as explained above. Moreover, under legislation still in force, traffic data may be obtained by order as part of a criminal investigation, but such a case may not be opened without existing evidence sufficient to prove infringement – a limitation that in practice allows Internet copyright criminals to remain active without fear of detection.

Judicial enforcement: Romania's courts remain a bottleneck for copyright enforcement due to a longstanding problem of court officials dismissing cases referred by enforcement officials, unhelpful jurisdiction adjustments at the end of 2010, training needs for specialized prosecutors, and a need for search warrant reform and the issuance of deterrent sanctions. Public prosecutors continue with the long-problematic practice of closing cases for lack of "social harm."

Romania's local public prosecutor's offices each include one public prosecutor appointed for IPR cases, among other responsibilities. Due to a recent reorganization of court jurisdiction of copyright cases, however, their effectiveness has been diminished. A new law went into effect on November 26, 2010 in Romania, providing that all initial criminal copyright cases would be heard by First Instance Courts, courts of lower instance than the courts having jurisdiction in the past. The Tribunal courts had been the beneficiary of considerable prosecutorial training from the private sector, which will now go to waste. Since the competence for these cases moved to a lower level, the assigned prosecutors changed and required new training, a task made more difficult as training resources were stretched among several assigned prosecutors per country, rather than one per county at the higher level. Moreover, the last instance court will be one of the 15 Romanian Appeal courts, rather than the High Court of Cassation and Justice. All civil copyright cases will continue to be heard by the Tribunal courts. The maneuver might have been intended to simplify and accelerate the movement of IP cases through the judiciary, but without the needed emphasis in the lower courts of the seriousness of copyright crimes, 2011 showed none of the badly needed improvements in judicial enforcement for copyright crimes in Romania. Underscoring the fact that copyright crimes receive diminishing attention in Romania's courts, the National Institute for Magistrates (where future prosecutors and judges receive mandatory training) has removed intellectual property law from the mandatory curriculum beginning in 2011. The full impact of the change in jurisdiction remains to be seen; however, in 2011 the First Instance court issued three sentences in piracy cases, including one for effective jail imprisonment of three and a half years for a repeat infringer. Industry representatives recommend considering reinstating authority to the courts above, to be sure that the training invested in experts at the Tribunal level does not unnecessarily go to waste. Prioritization of IPR crimes in general needs to be instilled in the judiciary from the highest levels.

Unfortunately, cooperative efforts with law enforcement were often undermined once cases were referred to prosecutors. Because prosecutors view IP offenses as trivial, cases are all too often dismissed for “lack of social harm,” and such dismissals are almost always upheld on appeal. One recent case regarding a repeat offender associated with damages of over US\$130,000 was dismissed for lack of social harm. An ESA member reported that of nine cases dismissed in 2011, only one was overturned on appeal. When cases are not dismissed, prosecutors tend not to pursue deterrent penalties, even for repeat offenders. In the rare event that an investigation results in a case brought before a court, it generally takes an average of 3 years for completion of the trial. In one case a sentence was not issued until five and a half years after the initial raid took place. Typical penalties issued consist of suspended imprisonment of about 21 months, a court fine of up to US\$1,000, and occasionally damages amounting to a no more than a few hundred U.S. dollars. Such nominal fines result in very little deterrence.

On a positive note, BSA reports the support of the General Public Prosecutor’s Office and the General Inspectorate of Police in issuing a Software Copyright Enforcement Methodology Guide, to serve as a tool for enforcement agencies in tackling software piracy.

The music and recording industry has a good rapport with the police and prosecutors, in both hard goods and Internet cases; still, some hard good cases are dropped. Civil actions are also underway in the Internet realm, although too many are closed by the prosecutors based on a perceived “lack of social harm,” among other reasons.

Enforcement activities of ORDA: In addition to its administrative duties (explained above), ORDA has some competencies in criminal enforcement matters. Industry reports that, following a change in management of ORDA in the past year, there has been a positive trend in the average processing time to receive piracy expertise from ORDA officials, now down from about two to three months to just 16 days in 2011. After raids are conducted, the police send seized product to ORDA for forensic examination. ORDA examines the seized products and issues a technical report certifying which goods are pirated. Rights holders, however, are still not involved in the verification process. After ORDA finishes its examination of the products, the prosecutor decides whether to file charges and prosecute the case if he or she considers there to be sufficient evidence for conviction. In practice, only ORDA provides expert reports, and there are no independent experts in the copyright domain. The simple solution here is to follow the prevalent practice in Europe and other countries, and to transfer this forensic examination task to the copyright industries, who are true experts in their respective products.

IPR trainings and public awareness: In 2011 BSA conducted nationwide campaigns to raise awareness of software piracy risks. These included a program conceived and carried out together with the General Inspectorate of Police targeted to businesses entitled “Unlicensed software is a luxury you cannot afford!” with press event, direct mailing, and telemarketing to 13,000 targets along with a dedicated website, www.softwarculicenta.ro. BSA also launched a campaign for public sector local authorities. Both campaigns proved to be a success and thus will continue in 2012. Industry representatives recommend further training and capacity building is needed, and that exchanges with international counterparts on successful treatment of piracy cases could be beneficial.

SAUDI ARABIA

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2012 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: IIPA recommends that Saudi Arabia be placed back on the Watch List.¹

Executive Summary: In the 2010 Special 301 cycle, IIPA supported USTR's removal of Saudi Arabia from the Watch List, based on actions taken by the Saudi Government in 2009 and early 2010. However, IIPA noted that if continuing and comprehensive progress was not made to reduce high piracy rates through the systematic imposition of deterrent penalties, establishment of an effective regime against Internet piracy, and other actions, IIPA would recommend that the Kingdom be placed on the Watch List for the 2011 Special 301 cycle. Such progress was not made, and IIPA recommended in 2011, as we do this year, that Saudi Arabia be returned to the Watch List.

As we have noted for many years, piracy rates are higher in the Kingdom than in any other country in the Gulf region for the motion picture, music and recording industries (in the 90% range) and unacceptably high for the business software (an increase to 52% piracy in 2010, with the commercial value of unlicensed software attributable to U.S. vendors increasing to US\$236 million), entertainment software, and publishing industries. Despite this, IIPA recommended that Saudi Arabia be removed from the Watch List and noted the excellent efforts which were then being made by Ministry of Culture and Information (MOCI) Deputy Minister Abdul Rahman Al-Hazzaa to take actions against piracy and achieve Out-of-Cycle Review benchmarks identified by IIPA in its 2009 Special 301 submission. IIPA was optimistic that the adjudication of the *Video Mesfir* cases (from the Violations Review Committee (VRC) to the Board of Grievances (BOG)), with a recommendation that the infringer be given a prison term, would "very soon" result in a judgment of imprisonment – the first such judgment ever, and a key to bringing a deterrent precedent to the market. That optimism was misplaced as the BOG has still refused to adjudicate this case. The latest setback was on January 28, 2012, following several similar delays over the last two years, when the BOG hearing in the *Video Mesfir* case failed to result in a successful outcome.

More importantly than this one case, systematic and routine judgments with deterrent penalties are needed in order to dramatically reduce piracy rates in Saudi Arabia. Other benchmarks were also very close to being achieved, but almost no progress has been made. Piracy rates remain unacceptably high as the government has made little progress in legalizing its software use, street vendor piracy continues to be a major and visible problem, MOCI enforcement efforts have not been publicized, enforcement against Internet piracy remains ineffective, and there remains a dearth of other deterrent enforcement actions. In October 2011, IIPA was asked to file its comments to the U.S. Government concerning the development of the MENA Trade and Investment Partnership, and to develop mutually beneficial short- and long-term IP goals.² This list of goals for Saudi Arabia is unfortunately quite long, but it is hoped that with some concerted and effective actions, the situation can improve for the better in 2012.

PRIORITY ACTIONS REQUESTED IN 2012

Enforcement

- Re-commence a zero-tolerance policy toward street vendor piracy in the major cities until it becomes a *de minimis* problem. Prevent law enforcement from releasing violators arrested without any penalty.
- Complete the adjudication of the *Video Mesfir* case at the Board of Grievances (BOG) with a sentence of imprisonment; going forward, ensure that cases involving major seizures or repeat offenders are systematically

¹For more details on Saudi Arabia's Special 301 history, see Additional Appendix available at <http://www.iipa.com/pdf/2012SPEC301HISTORICALSUMMARY.pdf>. Please also see previous years' reports at <http://www.iipa.com/countryreports.html>.

²International Intellectual Property Alliance, *IIPA Written Comments in Response to: Request for Comments on The Trade and Investment Partnership for the Middle East and North Africa*, 76 Fed. Reg. 55456 (September 7, 2011) Docket: USTR_FRDOC_0001-0160, October 15, 2011, at http://www.iipa.com/pdf/2011_Oct15_IIPA_Comments_on_MENA.PDF.



adjudicated through the Violations Review Committee and the Board of Grievance, resulting in deterrent sentencing, signaling to citizens that piracy crimes will receive deterrent penalties and especially imprisonment in appropriate cases.

- Increase MOCI enforcement inspectors, to 15-20 in the short-term, increased to 25 or more by the first quarter of 2012, and develop a recognition and reward system within MOCI similar to Customs by mid-2012.
- Publicize widely, and on a regular basis, all these actions, including press statements by high government officials that piracy will no longer be tolerated, and that deterrent sentencing will be applied against pirates.
- Fully populate the MOCI website with data on raids, hearing dates, judgments and penalties commencing at the beginning of 2008 through the present, in both Arabic and English.
- Create a framework for increasing deterrent penalties, including by adding a prosecutorial position within the VRC.
- Administrative penalties imposed by the VRC should be increased to provide more deterrence, through the Board of Grievance with the support and guidance of the Minister of Information, Deputy Minister Eid Al-Hoot, and the Board of Grievances.
- The Police Committee in Riyadh should be reactivated and duplicated in other major cities to assist with street vendor raids and to investigate, and bring charges as appropriate against, large producers and distributors of pirate product. Greater police involvement is critical and has yet to be ensured.
- A special cyber crime unit within the Police Committees and an Internet piracy unit at MOCI should be established, and the MOCI should work closely with the Communication and Information Technology Commission (CITC) to take actions against Internet piracy. At present, nothing is being done by the government to address rampant online piracy over P2P networks and enforcement authorities do not take actions to curb copyright infringements committed in this way.
- Enforcement of marketing conditions should be enforced, meaning raids and takedown actions against pirate products which are both freely available on the streets and advertised online.
- CITC is currently blocking websites for pornographic content but not for copyright violations. CITC should act on its own to identify such websites and coordinate with MOCI to block such websites.
- The MOCI, the police and rights holders should cooperate to develop a plan to convert the compounds to legitimacy, bringing Pay-TV piracy in the compounds to an end.
- The customs system must be reformed to establish an IPR Task Force and Saudi Customs must impose deterrent fines on importers of seized product.

Legislation

- Make significant progress toward legalizing software use within the KSA Government. Despite a decree from the King directing all Saudi Government entities to ensure they use legal software, the software piracy rate within the Saudi Government is significant. Budget unavailability and the refusal of the Ministry of Finance to grant budget have been raised as reasons for the lack of progress.
- The Copyright Act must be amended to fully implement and ratify, the WIPO Internet Treaties, including ensuring the law provides incentives for ISPs to cooperate with rights holders against online piracy.

PIRACY AND ENFORCEMENT CHALLENGES IN SAUDI ARABIA

Deterrent Enforcement and Penalties: In 2010, under H.E. Al-Hazaa's leadership, raids against street vendors and retail operations continued at a steady rate but apparently with some fall off. The MOCI IPR Standing Committee 2011 Special 301 submission³ indicated there were "225 eligible cases" of copyright infringement, with cumulative fines of more than SR3.2 million (US\$853,000), SR836,500 (US\$223,000) in compensation to right

³Kingdom of Saudi Arabia, Ministry of Commerce and Industry, Intellectual Property Rights Standing Committee, *KSA Report for the USTR 2011 Special 301*, March 2011 (on file with IIPA).

holders, more than 400,000 items seized, and 1,320 “closure days” for infringing shops.⁴ IIPA reported in its 2010 Special 301 submission that the VRC had been clearing more cases than in the past and that administrative penalties had increased, including a few cases involving the maximum penalty of SR100,000 (US\$26,665).⁵ H.E. Al-Hazzaa, Deputy Ahmed Al-Hoot, and Rafeeq Al Okaily had been a critical part of these improvements. The MOCI IPR Standing Committee reported in March 2011 that the VRC “strengthened the penalties by increasing fines by 20 percent from what was previously applied before,” and is preparing “large signs” to place on closed shops. We appreciate these efforts as well as the continued efforts by the head of the General Directorate of Copyright Department, Rafiek Al-Okaily. Obtaining deterrent penalties for all copyright sectors, both at the administrative level and more importantly deterrent sentencing, including imprisonment from the BOG, is the IIPA’s highest priority. Unfortunately, the lack of an adequate number of MOCI inspectors in the copyright departments (reportedly there are only four in Riyadh at this time and two in Jeddah) is a principle cause for a lack of significant raiding activity in Saudi Arabia. IIPA recommends that the Saudi Government increase MOCI enforcement inspectors, to 15-20 in the short-term, increased to 25 or more full-time employees by the end of the first quarter 2012, and that it develop a recognition and reward system within MOCI similar to Customs by mid-2012. IIPA also recommends the systematic involvement of the Ministry of Interior to spearhead investigations, raids and prosecutions against source piracy. Moreover, the Ministry must appoint a prosecutor to take charge of cases before the VRC as recommended. Finally, raids need to be increased and extended to piracy of music and sound recordings.

IIPA’s recommendation to remove Saudi Arabia from the Watch List in 2009 to 2010 was based primarily on the understanding, confirmed by an IIPA visit with the BOG in June 2010, that a judgment of imprisonment by the BOG in the *Video Mesfir* case was imminent. Video Mesfir is a seven-time raided pirate operation consisting of a retail outlet and a warehouse, which involved the total seizure of well over 100,000 pirate copies along with significant amounts of reproduction equipment. Two of these cases received their first hearing before the BOG on February 16, 2010 and one case received the necessary recommendation of Minister of Culture and Information that the BOG impose a sentence of imprisonment. Two years later, the BOG is still sitting on all the Video Mesfir cases. Without concluding the adjudication of these cases and imposing a sentence of imprisonment, and more importantly, starting a chain of systematic judgments involving deterrent sentencing against repeat offenders or large seizures, there is little hope that piracy rates in the Kingdom can be reduced.

As IIPA has highlighted in past submissions, studies have shown that there is little or no fear that any pirate would ever go to jail or that even a significant deterrent fine would be imposed.⁶ In 2009, the VRC has succeeded in imposing the maximum fine that it has the authority to impose – SR100,000 (US\$26,665) – in a few larger cases. This trend has not been sustained. With at least three piracy cases before the BOG including a Ministry-appealed case, there is no excuse for inaction. In June 2010, judges on the BOG reiterated to IIPA and the U.S. Government that when a case is brought before them, they will not hesitate to impose deterrent jail terms. That this has not occurred is without explanation or justification.

Government Legalization of Software and Enterprise End-User Software Piracy: Another of the critical benchmarks in IIPA’s 2010 and 2011 Special 301 submissions was for the Saudi Government to begin the task of legalizing its use of software in government ministries. Lack of government legalization and enterprise end-user piracy of software are the largest contributors to losses suffered by the U.S. software industry in Saudi Arabia.⁷

⁴Arabian Anti-Piracy Alliance (AAA), which conducts raiding and enforcement activity on behalf of entertainment companies, the entertainment software and publishing industry associations in Saudi Arabia, reported that in 2010 they were involved in 175 raids and seizures of 137,179 units of pirate product. AAA reports that this is but a small fraction of the pirate product that pervades the marketplace.

⁵The VRC had also started awarding civil damages in its administrative cases and in 2008 had done so in 19 cases involving software piracy. The average of the fines and damages was around US\$3,000, which remains too low. The total of all fines and damages in 19 cases were SR148,000 or US\$39,466. This trend needs to continue.

⁶A few of the later Video Mesfir raids were run after the VRC began imposing its maximum sentence. This illustrates vividly that pirates have little concern that the authorities will take significant action against them, other than seizing their pirate product and imposing small fines.

⁷BSA’s 2011 software piracy statistics will not be available until after the filing deadline for this submission, but will be released in May 2012, at which time piracy rates and U.S. software publishers’ share of commercial value of pirated software will be available at www.iipa.com. In 2010, the software piracy rate in Saudi Arabia was 52%, representing a commercial value of unlicensed software attributable to U.S. vendors of US\$236 million. These statistics follow the methodology compiled in the Eighth Annual BSA and IDC Global Software Piracy Study (May 2011), <http://portal.bsa.org/globalpiracy2010/index.html>. These figures cover

Reductions in business software piracy would result in positive gains for Saudi Arabia's economy. A study released in 2010 by IDC and BSA found that reducing the PC software piracy rate in Saudi Arabia by 10 percentage points over four years would generate \$786 million in GDP, \$19 million in additional tax revenues and 1,420 new IT jobs. The benefits would be even greater if this reduction was achieved in two years, which would yield \$1 billion in GDP and \$25 million in additional tax revenues.⁸

In 2010 and again in 2011, IIPA reported on apparent efforts of the MOCI, following the commitments made at the 2009 IPR Working Group meeting, to upgrade and legalize its software use. We were told then that that process had begun but the industry was never made aware that the effort was completed. MOCI was to have also undertaken an inventory, but again no results were ever made available to industry. Furthermore, many discussions over the past couple of years between industry and government designed to make progress on legalization (the piracy rate for software in government is estimated to be 70%) have yielded no gains. The making of imminent progress on this front was a key element of IIPA's recommendation to remove Saudi Arabia from the Watch List. In addition, industry now reports a sharp increase in high-quality (and thus deceptive) counterfeit software being sold to Saudi Government ministries as part of hardware purchases. This ominous development should have led to immediate enforcement action against such vendors. It was requested by industry but MOCI has not taken action, well over a year after the initial discovery of these high-quality counterfeits, incidentally purchased by a public sector customer. The computers purchased with such software were merely returned to the vendor. MOCI should communicate with all government entities on such issues and lead an initiative to address piracy in the Saudi Government, including tackling suppliers of pirated software such as in the instance noted.

Transparency and Public Awareness: From 2009 to 2011, there was some progress in posting new cases on the MOCI website, but now the website shows the sign "under development" and there seems to be little transparency. Unfortunately, H.E. Al-Hazzaa's commitment to complete population of cases on the website (and to have them translated into English) by Ramadan in 2010 has not been fulfilled. Right holders have been able to participate in VRC proceedings upon request and the right to appeal results and penalties to the BOG has been confirmed. Right holder lawyers continue to be able to obtain information on the progress of cases at the VRC and to participate in VRC proceedings upon request. The Ministry has yet to put into place mechanisms enabling effective exchange of information and cooperation between KSA enforcement authorities and foreign right holders whose anti-piracy operations, especially in the Internet sphere, are frequently run from outside the Kingdom. There should be clear information, available in English, on the organizational structure and responsibilities within MOCI as well as named contact persons for handling cooperation with foreign-based representatives of affected right holders. In addition to the above, any deterrent result will not have its intended effect in Saudi Arabia unless it is properly publicized. MOCI should help develop a PR plan to capitalize on enforcement actions now occurring and create the right level of coverage and therefore the expected effect for deterrent enforcement actions.

Enforcement Against Internet Piracy: The CITC, which regulates the ISPs and telecom industry in general, continues to block foreign websites when requested by rights holders, but only on the grounds that they violate Saudi censorship laws. Many of these cases involve both censorship violations as well as infringement. Efforts have been ongoing to convince MOCI to set up an Internet piracy unit within the Copyright Department rather than have this enforcement undertaken through the CITC. It is imperative for both CITC and MOCI to develop comprehensive regulations on addressing copyright violations committed over the Internet. Any solution must include both hosted as well as remotely accessible content and address infringements over P2P networks. The Ministry was reportedly considering establishing such a unit and reviewing MOCI authority in this area, and, as well, working more closely with CITC. This was also a topic of discussion during IIPA's visit to the Kingdom in June 2010. Unfortunately,

packaged PC software, including operating systems, business applications, and consumer applications such as PC gaming, personal finance, and reference software – including freeware and open source software. They do not cover software that runs on servers or mainframes, or routine device drivers and free downloadable utilities such as screen savers. The methodology used to calculate this and other piracy numbers are described in IIPA's 2012 Special 301 submission at <http://www.iipa.com/pdf/2012spec301methodology.pdf>.

⁸Business Software Alliance and IDC, *Piracy Impact Study: The Economic Benefits of Reducing Software Piracy: Saudi Arabia*, 2010, at http://portal.bsa.org/piracyimpact2010/cps/cp_saudiarabia_english.pdf.

no progress on this front has been made. Nor has a cybercrime unit been set up within the police, as requested in recent years' submissions. MOCI must also engage with foreign-based right holder representatives in this regard.

Enforcement Against Pay-TV Signal Theft in the Compounds: Signal piracy of premium services like Orbit Showtime Network, Abu Dhabi Media Company in compounds continues to be a very serious problem in Saudi Arabia. The compounds have upwards of hundreds/thousands of homes under a single management that centrally controls and operates the cable service within each compound. The compounds utilize a smart card, installing it in their centralized head end and then redistributing Pay TV channels to hundreds/thousands of homes. The management of these compounds are very influential and can clearly afford to pay for premium channels. Enforcement is complicated because it is very difficult for even the police to enter these compounds quickly and easily; they are heavily guarded by private security firms and by the time the raid team finally gets to the head end the evidence of piracy has conveniently disappeared. The Ministry and the police had indicated that they would begin taking action in this area. Some actions have indeed been taken, including letters written to the compounds by then Deputy Minister Al-Hazaa. Complaints made to the VRC have simply not been acted upon. Another major issue affecting Pay TV stakeholders is the illegal importation, distribution and sale of decoder boxes that circumvent encryption technologies. The government is very cooperative in seizing these illegal products, but, as with other kinds of piracy in the Kingdom, penalties are small or non-existent. Far heavier penalties, including referring these cases to the BOG, is critically needed.

Enforcement Against Book Piracy and Music and Sound Recording Piracy: Publishers have within the last two years commenced an aggressive enforcement program. They are receiving good cooperation from the Ministry and regular raids are being run upon request. In 2010, the industry conducted 55 raids against book shops, seizing over 900 pirated books. As noted above, raiding needs to be extended to all sectors, including the music and recording industry which suffers rates of piracy over 90% in the Saudi market, and nearly a 100% online piracy rate. Again, however, without deterrence in the form of significant penalties imposed by the VRC and BOG, merely conducting more raids will not result in significant change in the market.

COPYRIGHT LAW AND RELATED ISSUES

Progress Toward Implementation and Ratification of the WIPO Treaties: Some very slow progress had been made for law reform in the area of implementing the requirements of the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT) through 2009, but there have been no developments since. The Saudi Government has engaged with WIPO and in early 2010 was reportedly preparing questions for WIPO responses. We have heard no word whether further progress has been made. This process needs to be accelerated and completed.

SPAIN

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

2012 SPECIAL 301 REPORT ON COPYRIGHT ENFORCEMENT AND PROTECTION

Special 301 Recommendation: IIPA recommends that Spain remain on the Special 301 Watch List in 2012.¹

Executive Summary:² IIPA applauds the Government of Spain for taking swift action in December 2011 to implement the Law on the Sustainable Economy (LES), establishing a mechanism for the removal of pirated content on hosted websites, and, we understand, for addressing linking sites and indexers. The action sets in motion a much needed procedure for rights holders to engage with Internet Service Providers (ISPs), in a manner that respects principles of due process. It also makes an important statement on behalf of creators: there can and must be a reasonable means to respond to blatant violations of law, even if those violations occur in the digital environment. IIPA will continue to support the Spanish Government as it moves forward in 2012 to put the Commission established by the LES to work, in the hopes that it will continue to remove obstacles to fighting the widespread piracy that plagues its market, not only in the hosted web environment but in all forms – many of which have overtaken online hosted piracy in both scope and sophistication. In 2012, the highly connected Spanish market remains largely out of reach for legitimate digital content due to Spain's persistently high levels of Internet piracy, which emerge in particular through peer-to-peer (P2P) platforms that will largely remain unaffected by the recently implemented LES amendments.

Coordinated leadership is needed both in legislative reform and on all fronts of Spain's enforcement efforts to turn Spanish consumers from infringing materials to legitimate products, in the face of an Internet piracy problem that, for many of the copyright sectors, has decimated the Spanish market. The cooperative relationships that rights holders report with police officials and the Ministry of Industry are highlights to be replicated across the Spanish judicial system. Illegal downloading of content via P2P file sharing has been effectively immune from prosecution due to a long-standing statement by the Attorney General decriminalizing the activity. This will need to be revisited by the Spanish Government in light of the implementation of LES. Meanwhile, Spain's laws fail to establish the necessary tools to obtain the identity of a direct infringer, making civil piracy actions impossible. As a result of these and myriad legal defects, police frequently refuse to take Internet enforcement actions. Certain amendments to the Penal Code have made enforcement more complicated and undermine what positive efforts enforcement authorities have demonstrated in 2011. As a result, pirate product and circumvention devices enabling the use of illegally copied games are widely available. The business software sector in Spain reports good cooperation with the Ministry of Industry on public awareness efforts and important reductions in the level of certain types of software piracy. However, the industry faces persistent organizational end-user software piracy and remains concerned about the availability, cost, and speed of civil enforcement measures, citing problems such as expensive bonds and low damages.

PRIORITY RECOMMENDED ACTIONS FOR SPAIN IN 2012

- Correct the Attorney General's May 2006 Circular that decriminalizes infringing downloads over P2P networks, and that continues to prevent authorities from pursuing cases against Internet piracy.

¹IIPA applauds the Government of Spain for its swift implementation of the Law on the Sustainable Economy (LES). Given the significance of this step, some IIPA members were of the view that Spain should be removed from the Watch List at this time. However, other IIPA members believe that removal would be premature given the work that lies ahead and the perilous state of the Spanish market at the time of this filing.

²For more details on Spain's Special 301 history, see IIPA's "History" appendix to this filing at <http://www.iipa.com/pdf/2012SPEC301HISTORICALCHART.pdf>, as well as the previous years' reports, at <http://www.iipa.com/countryreports.html>. For a summary of IIPA's 2012 global issues, see our cover letter at <http://www.iipa.com/pdf/2012SPEC301COVERLETTER.pdf>.



- Provide rights holders the ability to bring civil and criminal actions against infringers by allowing them to obtain identifying information, in a manner that respects rights to data privacy, consistent with the 2008 European Court of Justice (ECJ) decision in *Promusicae vs. Telefonica*.
- Expediently move forward with establishment of the Spanish Copyright Commission to complete implementation of the provisions of the Law on the Sustainable Economy that address web-hosting of pirated content, and, consistent with representations of the Spanish Government, ensure their application to linking, indexing and torrent sites.
- Amend Spain's e-commerce laws to clarify that rights holder-submitted notices of infringement are capable of imparting ISPs with effective knowledge that infringement is occurring through its service without a court order.
- Incentivize ISPs to cooperate in efforts to stem infringing file sharing activities.
- Take appropriate legislative steps to ensure that circumvention devices are illegal.
- Introduce changes in legislation to facilitate civil cases against software piracy, by avoiding bonds for *ex parte* raids, permitting anonymous evidence to initiate *ex parte* raids, and clarifying that compensation of damages must be valued at least at the full retail value of the infringed goods or copies.
- Establish a national authority to coordinate Internet piracy enforcement, and ensure allocation of adequate resources for investigation of Internet and computer crimes within the Ministry of Interior, the Guardia Civil, and the Cuerpo Nacional de Policía (National Police).
- Ensure allocation of appropriate resources for Criminal Courts and Commercial Courts ("Juzgados de lo Mercantil") that have jurisdiction over IP cases, to avoid unnecessary delays.

COPYRIGHT PIRACY IN SPAIN

Spanish consumers are remarkably Internet-savvy. But unfortunately, as such a well-connected population³ exists within a market that to date has been completely void of rule of law on the Internet, there is little to deter the average consumer from participating in an online free-for-all for copyrighted content. Street piracy in Spain has diminished in recent years, but only to an extent attributable to the uptake in digital infringement. Piracy of audiovisual products, music and sound recordings, and entertainment software in Spain has supplanted the legitimate marketplace, making it extremely difficult for these industries to distribute authorized content. Piracy of copyright works in Spain takes many forms, including street sales of pirated optical discs, end-user piracy of business software, sale of circumvention devices for the use of illegal copies of videogame software, illegal camcording in theaters, unauthorized public performances of music and sound recordings, and, overwhelmingly, Internet piracy.

Online piracy: Internet piracy in Spain began to skyrocket in 2007, and it has continued to grow at a tremendous rate. Today, Internet piracy in Spain takes place via hosted websites, linking sites that direct users to infringing content stored in "cyberlockers" and BitTorrent networks, more "traditional" P2P networks, and streaming sites. Comparative studies by the music and videogame industries, and information from the independent motion picture industry, continue to show that Spain has one of the worst Internet piracy problems in the world, and has already suffered damaged to the distribution infrastructure for legitimate content. According to the Anti Piracy Federation (FAP), whose members include film and videogame groups in Spain, 55% of digital piracy in Spain occurs via P2P networks, 34% via hosted websites, and 11% by streaming sites. By the end of 2010, Spain had the worst online music piracy problem among the major European markets, with close to half (45%) of all active Internet users in Spain using services that distribute music illegally – a ratio well above the average among the top 5 EU markets (23%).⁴ For the independent motion pictures, Spain ranks consistently among the worst countries in which unfettered

³As of June 2011, 29.1 million Internet users comprise 62.2% of Spain's population (According to www.internetworldstats.com).

⁴According to The Nielsen Company, October 2010.

and unlicensed downloading and streaming have damaged the ability of independents to finance and distribute content and also to identify and license their content to legitimate online distributors.

Online Music Piracy: Spain has been one of the worst performing music markets in Western Europe over the last five years. Today, Spain's music market is approximately one-fifth of its 2001 size,⁵ despite the availability of many legal online services (from Apple's iTunes to Spotify, Deezer, and 7digital). Research by IDC in 2010 found that the Internet music piracy rate in Spain was 97.8%. The value of pirated music in the first half of 2010 was US\$3.6 billion. According to IDC estimates, Spain's legitimate online music market could have been valued at US\$2.3 billion. IDC also found that almost 70% of Spanish Internet users admit to downloading illegal copyright content (music, film, videogames, and books) via P2P sites (85% in the case of Internet users under 24), and that almost 50% of Internet users downloaded content from direct download sites (75% in the case of those under 24).

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

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

Online videogame piracy: The Entertainment Software Association (ESA), representing the videogame industry, also reports that piracy levels in Spain significantly worsened in 2011. For the videogame industry, online piracy via illegal downloads has completely overtaken hard goods piracy in Spain. More and more of these sites are beginning to include cyberlocker links for direct downloads of infringing material. There are about 30 major websites offering links to unauthorized downloads of videogames in Spain. These links mostly direct users to cyberlockers and BitTorrent files, while some link to files for downloading via the eDonkey P2P network, which is still very popular in the country. ESA reports that in 2011, Spain placed fifth in the world in the number of connections by peers participating in the unauthorized file sharing of select ESA member titles on public P2P networks.⁶ Spain's Telefonica de Espana ranked second among the world's ISPs in the number of connections by subscribers participating in the unauthorized file sharing of select ESA member titles. To date, Spanish ISPs have shown no willingness to cooperate with rights holders and stem infringing activity on P2P networks, allowing these staggering levels of online videogame piracy to continue. Widespread availability of circumvention devices and services significantly contributes to growing Internet piracy, as downloaded infringing video game software can only be played on consoles modified by such technologies.

Digital and hard goods piracy of independent films and television programming. The independent film and television industry represented by the Independent Film & Television Alliance (IFTA) produces about 75% of all U.S. films, with most of these films financed, produced and internationally distributed outside of the six major Hollywood studios. Independent producers partner with national distributors worldwide to finance production and

⁵The value of physical recorded music sales in Spain has decreased from €102 million (US\$134 million) in 2001 to just €128 million (US\$171 million) in 2011, which means an 83% decrease in value. Total recorded music sales (including physical and digital sales) are now €149 million euros (US\$196 million). In unit terms, sales were 73 million in 2001 and only 13 million in 2010, a drop of 82%. Because of these falling sales, more than 50% of the employees of the music sector have lost their jobs in the last few years.

⁶ESA's reporting on P2P activity does not take into account downloads of these titles that occur directly from hosted content, such as games found on "cyberlockers" or "one-click" hosting sites, which appear to account each year for progressively greater volumes of infringing downloads.

secure distribution on a country-by-country basis. Piracy has damaged the ability of independent producers to raise production funding in order to produce films.

The health of Spanish distributors is of vital importance to the independent film industry, and piracy remains a significant constraint for independent producers and distributors, the majority of which are small- to medium-sized businesses that rely on local distributors in Spain to form partnerships for the finance and distribution of independent films. When legitimate Spanish distributors and businesses must compete with “free” illegal copies (digital or hard good), they can no longer afford to partner with independent producers to provide minimum guarantees toward licensing fees which assist the producer in financing the production. Once part of a flourishing marketplace where an independent producer could receive as much as 10% of a production budget from a minimum guarantee of a license fee, surviving Spanish distributors may now be able to guarantee only 2 to 3% of the film’s budget, if any.

Internet piracy not only continues to prevent the establishment of legitimate online distribution platforms and services for consumers, but has damaged the ability of independent producers to finance and then license their content online, via DVD, Video on Demand or other platforms in Spain. It is not enough to direct consumers to legitimate sources if in fact they can access the content for free. These rogue sites must not be allowed to deal in unlicensed content for their own gain and benefit. Piracy is devastating the legitimate distribution channels in Spain in favor of rogue web site operations.

Street piracy: Street piracy continues in Spain and, while it has diminished for some copyright sectors, overall remains steady as an unacceptable problem for copyright industries in Spain. Pirate networks running illegal sale activities in the streets and flea markets seem to be mostly selling film DVDs.

Street piracy of music and sound recordings: Physical piracy of music in Spain did not increase in 2011, although some peaks registered in tourist places around the Christmas and summer seasons. The overall average is near 20%, while cities such as Sevilla, Granada, Murcia and Alicante suffer rates reaching over 30%. In 2010, for the first time, the music industry detected pirate CDs of pre-release music in street sales, although this cannot be considered a general trend in Spain. This kind of piracy likely will grow as physical pirate networks compete against growing Internet piracy. While digital piracy today has a bigger impact on music sales, street piracy continues to harm the local industry – 69% of music sales in the country still come from physical formats.

Promusicae, Spain’s national association of record producers, conducted a national survey and in November 2009 issued “The Map of Physical Music Piracy in Spain 2009.” This report investigated 25 cities from 22 provinces and 12 autonomous regions during October 2009, and covered an area that represents 81% of legal music sales. The number of regular pirate CDR/DVD-R sellers exceeds 1,200 and can reach up to 2,000 during the spring and summer. The survey found that 53.4% of the sales were carried out by rucksack sellers (top mochila), 26.7% in the open air flea markets and 18.6% on blankets (top manta). The structural situation shown by the Map of Physical Piracy remained the same in 2011, although a general decrease has been seen in the volume of physical piracy of music in favor of film piracy. It should also be highlighted that the number of street sellers has increased since the entry into force of the amendment of the Criminal Code at the end of 2010, which defines the street sale of illegal goods valued under 400 Euros as a minor offense instead of a criminal offense.

Unauthorized public performances of music and sound recordings: The music industry in Spain is experiencing a gradual increase of new illegal business niches linked to public performance in entertainment premises. Companies reproduce unauthorized music in both audio and video formats for loading coin-activated jukeboxes, or, more and more frequently, place computer devices loaded with illegal music in premises such as pubs, discos, etc. for background ambiance.

The Spanish music market declined an additional 11% in 2011 after its the spectacular 21% collapse in 2010. According to details from the producers’ collecting agency AGEDI, more than 40% of jobs have been lost during the last 4-5 years in Spanish recording companies. To draw attention to this economic plight, a rally was

staged by the workers of all the music industries in front of the Ministry of Industry on December 1, 2009, to highlight that “Music is culture” and “music is employment,” and asked for tougher action by the government to protect the industry. The Ministry of Industry received a delegation of the demonstrators and promised action. However, the implementation of the Law on the Sustainable Economy represents the only meaningful steps taken to date. In response, the Instituto Ibercrea launched an Internet campaign on behalf of those who lost jobs as a result of Internet piracy, including a petition that had collected 3,332 signatures as of January 2012.

Hard goods piracy of entertainment software: Hard goods piracy of videogames has declined as Spanish consumers increasingly turn to the Internet to download pirated games. However, street vendors are still easily seen in Madrid, Seville, Alicante, Valencia, Oviedo, Gijón, and Vigo. The widespread availability of mod chips and game copiers that bypass technological protection measures (TPMs) are central to the overall piracy problem for the industry, as these devices are needed to produce and play unauthorized copies of entertainment software. Due to deficiencies in Spain’s laws and enforcement discussed in further detail below, circumvention of videogame console TPMs remains an enormous challenge for the entertainment software industry.

Hard goods piracy of film and home video entertainment: Hard goods piracy, when combined with online piracy, deals a devastating one-two punch to independent producers that further lowers the licensing fees that can be paid by authorized Spanish distributors. Street vendor activity is easily visible in Alicante, Madrid, Sevilla, and Valencia, and particularly in Spain’s northern regions, included Gijón, Vigo, and Oviedo.

Camcord piracy: Camcording is particularly damaging in Spain because it fuels rampant online piracy, negatively impacting worldwide distribution and preventing the establishment of legitimate online distribution. Spanish-sourced copies appear in other markets, particularly in Latin America. Even illegally exchanged P2P movies are sourced locally via camcording in Spanish theaters. Despite the clear commercial damage of such camcording and the clear evidence of the organized criminal nature such piracy, prosecution of camcorders remains quite difficult. While not an anti-piracy tool, the independent film industry reports that independent producers are less likely to have the ability to coordinate “day and date” releases amongst their national distributors, leaving them and their authorized distributors especially vulnerable to piracy stemming from camcording piracy. The public prosecutors are generally not inclined to prosecute criminal cases.

Business software piracy: The Business Software Alliance (BSA) reports that business end-user piracy remains the most damaging of several sources of piracy of business software in Spain. Small- to medium-sized enterprises (SMEs) in particular contribute to widespread corporate use of unlicensed software. Internet piracy also continues to present significant challenges in the business software market.

Spain is a country largely characterized by SMEs, among which levels of piracy are still considerably more rampant than among the larger corporations that might characterize other markets. According to IDC market data, it is projected that the IT industry in Spain will generate a market volume of €21 billion (approximately US\$27.5 billion) by 2013, and will employ directly 102,000 people. According to IDC, if piracy levels were reduced by 10 percentage points within the next four years, at least 2,244 high qualification jobs would be created; US\$538 million would be generated in additional tax income for the Spanish treasury; and the increase for Spain’s GDP would be \$US2.923 billion.⁷

⁷See The Economic Benefits of Reducing PC Software Piracy, available online at <http://portal.bsa.org/piracyimpact2010/index.html>. BSA’s 2011 software piracy statistics will not be available until after the filing deadline for this submission, but will be released in May 2012, at which time piracy rates and U.S. software publishers’ share of commercial value of pirated software will be available at www.iipa.com. In 2010, the software piracy rate in Spain was 43%, representing a commercial value of unlicensed software attributable to U.S. vendors of US\$663 million. These statistics follow the methodology compiled in the Eighth Annual BSA and IDC Global Software Piracy Study (May 2011), <http://portal.bsa.org/globalpiracy2010/index.html>. These figures cover packaged PC software, including operating systems, business applications, and consumer applications such as PC gaming, personal finance, and reference software – including freeware and open source software. They do not cover software that runs on servers or mainframes, or routine device drivers and free downloadable utilities such as screen savers. The methodology used to calculate this and other piracy numbers are described in IIPA’s 2012 Special 301 submission at <http://www.iipa.com/pdf/2012spec301methodology.pdf>.

COPYRIGHT AND RELATED LAWS IN SPAIN

The end of 2011 brought a major change in direction for the legislative prospects of copyright protection in Spain. After months of inaction on the part of the Zapatero Administration to implement the Sustainable Economy Law that was adopted in early 2011, Spain's new government wasted no time in adopting the awaited regulations at the end of December. IIPA members greatly appreciate this action of the Spanish Government, both for the anticipated improvements in enforcement against Internet piracy, and for the demonstration of political will that it represents. As a result, rights holders anticipate the ability in 2012 to initiate much needed procedures that will facilitate the removal of infringing content from hosted websites, and hopefully effective actions against linking sites and similar sites.

Still, many legislative challenges in Spain remain to be addressed. Ambiguities in Spain's laws have made criminal online infringement actions impossible, and rights holders still lack many of the legal tools needed to bring civil actions against online piracy committed by users or websites that choose more evasive methods than simple hosted piracy. While the Sustainable Economy Law as implemented will now enable action against certain forms of piracy – the laws in Spain need immediate attention in the coming year to address the many types of infringement that may still elude enforcement, including P2P filesharing. There are also significant gaps in the Spanish legal infrastructure for the protection of copyright works under technological protection measures (TPMs) from illegal circumvention devices.

IIPA members welcome corporate liability amendments to the Criminal Code that were introduced in 2010, but other penal code amendments have severely limited the available remedies against unauthorized distribution by street vendors. As discussions move forward on these topics, it is imperative that the Spanish Government work with copyright industry groups in a transparent and cooperative way to achieve effective solutions to pervasive Internet piracy.

Removal of hosted infringing content—The Sustainable Economy Law: On December 30, 2011, the Spanish Government adopted much-anticipated regulations implementing the comprehensive bill called the Law on the Sustainable Economy (LES). The implementing regulations establish a Commission for the administration of notices and removal orders regarding infringing hosted online content. The enactment of the LES and establishment of Section 2, the Spanish Copyright Commission in charge of these of infringements, serves as a major step to address hosted illegal content – one of the pervasive forms of Internet piracy in Spain. Rights holders will be closely monitoring how the Spanish Government employs its new powers and ensures access to remedies and enforcement mechanisms for rights holders. We look forward to robust implementation of the LES, and in particular await action by the Commission to ensure that the law effectively applies to torrent and linking sites, as Spanish authorities indicated would be the case.

Under the law's procedure, if the owner of a website subject to a complaint were to refuse to submit a convincing rebuttal or take down infringing content, the Commission could ask a tribunal for authorization to block access to the site through an ISP. The tribunal would hear from the interested parties and then authorize or reject the measure proposed within four days. The tribunal judge would not be expected to examine the merits of the case beyond a review of whether the remedy is justified and, in particular, whether fundamental rights have been respected; the idea is to accelerate the procedure for the taking down of infringing content hosted on websites. It is hoped that with time and experience, the process will become routine and efficient. The procedure has, as predicted, generated significant pushback from the Internet user community, and much of the popular coverage of the law has mischaracterized the scope of the Commission's authority. The proposed law is narrowly tailored to handle hosted piracy specifically; it does not, for example, address copyright infringement committed by end users. It is also comprehensive in its effort to ensure judicial review and due process. These actions will allow Spain to move toward meeting its key obligations under the WIPO Internet treaties to "ensure that enforcement procedures are available ... so as to permit effective action against any act of infringement of rights ..., including expeditious remedies to prevent

infringements and remedies which constitute a deterrent to further infringements” (Article 23 of the WPPT, and Article 14 of the WCT).

P2P Enforcement—The 2006 Attorney General’s Circular: Statements issued by the Attorney General in 2006 de-criminalizing infringing distributions of content by P2P networks continued to have ramifications in 2011, having led to a halt in criminal enforcement actions against illegal filesharing, and causing Spain to fall out of compliance with EU Enforcement Directive obligations. Circular 1/2006 from Spain’s Office of the Prosecutor-General (Attorney General) explains that unauthorized uploading or downloading of copyright protected materials over the Internet, including via P2P systems, does not meet the requirements for consideration as criminal offenses under Article 274 of the Criminal Code unless such acts are “for commercial profit.”

The Spanish Government has stated that the Circular is “not binding” on any judge, but in practice it has undermined criminal Internet piracy enforcement. Both the police and some criminal courts have pointed to the Circular as justification for not taking action against P2P infringers. The few police actions taken against organized networks and companies that clearly made direct or indirect gains from Internet piracy, including through advertising income, are now being dropped as a consequence of the supposed requirement to establish commercial intent. Most of the cases never even reach the trial stage. In previous years Criminal Investigation Courts have cited the Circular in finding no criminal grounds in cases against Elite Divx, PS2Rip.net and pctorrent.com. Fortunately, these decisions were reversed by Appellate Courts following appeals by private prosecutors, but the Criminal Investigation Courts have continued to disfavor criminal liability in P2P cases. The Attorney General has refused industry requests to discuss the Circular, which remains in effect six years later. Moreover, the National Police, Technology and Internet Division (the BIT) will no longer engage in raids against Internet sites that facilitate copyright infringement, and is reducing its focus on Internet piracy. The BIT and the Guardia Civil did not carry out any new actions in 2011 against the illegal downloading of copyrighted music content. On the whole, effective police action is not feasible today. At the end of 2011, the Attorney General’s Office created a new position, a Prosecutor specialized in Cybercrime, who will coordinate the activities performed by the Prosecutors that deal with cybercrime cases.

In the aftermath of the Circular, Spanish courts have declared that merely linking to infringing files is not a criminal offense under the Spanish Criminal Code.⁸ ADESE reports that of the four criminal cases brought against operators of infringing online services, two were dismissed on the grounds that the provision of links to infringing material is not an infringement of the communication to the public right. In one case, however, based on a criminal complaint filed by aDeSe, the Spanish game industry association, the Provincial Court of Vizcaya found the operators of two prominent Spanish linking sites, FenixP2P.com and MP3-es.com, guilty of criminal copyright infringement. The court reasoned that the provision of links to infringing content hosted on third-party servers was a communication to the public due to the defendants’ “technical intervention,” which involved indexing, ranking and commenting on the infringing works to which they linked.

Incentives for ISP involvement in the removal of pirated content: Up until the end of 2011, there existed no incentive for Spanish ISPs to cooperate in the removal of infringing content from the web. With the establishment of Section 2 of the Spanish Copyright Commission in December 2011, a mechanism now may be put into operation whereby illicit content is declared infringing, establishing effective knowledge on the part of the relevant ISP for purposes of potential liability. The procedures put in place by the LES will permit rights holders to initiate the Spanish Copyright Commission review of allegedly infringing content, for eventual notification to the responsible party and removal of the infringing content or presentation of a defense.

Outside of the scope of the Commission’s authority, a problematic loophole in Spain’s Information Society Services and Electronic Commerce Act (LSSI), combined with other shortcomings of ISP liability provisions in the copyright law, leaves no incentive for ISPs to cooperate in the removal of infringing online works. In December 2007, the Spanish Parliament approved amendments to the LSSI as part of the government’s “2006-2010 Information

⁸In 2011 there were several final (unappealable) decisions: Indicedonkey (Madrid), Edonkeymania (Madrid) and Zackyfiles (Zaragoza).

Society Development Plan.” Article 16 of the LSSI as amended establishes liability for the ISP if it has effective knowledge of the infringement and does not act diligently to remove or block access to the infringing content. Unfortunately, rights holders cannot establish “effective knowledge” on the part of an ISP by directly notifying a site operator of the presence of infringing material on its site or service (a standard not in line with Article 14 of the E-Commerce Directive, which refers to “actual knowledge”). Further, under Article 11.2 of the LSSI, as amended, access may be restricted from Spain to a specific service or content provided from a non-EU State when the “competent authorities” have requested the removal or interruption of such content or service; however, the definition of “competent authorities” is unclear. Despite the implementation of the Law on Sustainable Economy, due to these loopholes the LSSI ultimately fails to effectively implement the EU E-Commerce Directive. The Law on Sustainable Economy enables an existing administrative authority to take this kind of action; however, the LSSI still fails to meet the important obligation under the E-Commerce Directive that hosting providers must remove content when they are aware that the content is illegal.

Identifying online infringers—*Promusicae vs. Telefonica* and the EU Directives: Serious challenges remain in Spain to identify online infringers in both civil and criminal copyright proceedings. The Government of Spain should provide for an effective mechanism through which rights holders can obtain the information necessary to protect and enforce their rights. Because a Spanish court has determined that present law permits no such disclosure, the government should move quickly to adopt legislation, in accordance with EU requirements, to permit disclosure of the appropriate information so as to facilitate rights holder action. The *Promusicae vs. Telefonica* decision, issued on January 29, 2008 by the European Court of Justice (ECJ), considered the decision of a Spanish court in the course of national proceedings between the rights holders association Promusicae and the Spanish ISP Telefonica, concerning the latter’s refusal to disclose data about its subscribers who had shared or uploaded large numbers of music files via the Kazaa network. The ECJ stated that Member States must allow a “fair balance” to be struck between fundamental rights, including the “right to respect for private life,” and the “rights to protection of property and an effective remedy.”

The ECJ also established that the Spanish E-commerce Law (the LSSI), which provides that personal data can only be disclosed in criminal proceedings, is in line with EU obligations. However, combined with the Attorney General’s 2006 Circular that decriminalized infringements via P2P networks (see above), the inability to obtain user information in civil proceedings renders rights holders unable to enforce their copyrights online, civilly or criminally. As a result, Spain fails to provide the “fair balance” required by the ECJ in *Promusicae* – it offers no meaningful manner in which copyright owners can effectively protect rights guaranteed under EU Directives.

Spain also has not properly implemented a related element of the EU Enforcement Directive (2004), which aims in particular to strengthen enforcement in the digital environment. The “right of information” afforded in Article 8 of the Directive allows rights holders to identify infringers and obtain information about infringements. Article 8 permits rights holders to obtain an order requiring an ISP to disclose an infringer’s identity where it appears a website or a user has committed copyright piracy. Unfortunately, the “right of information” in Spain suffers from a burdensome dual commercial scale requirement, applying to both the services provided by the ISPs as well as to the infringements committed by the direct infringer. Under the Directive, however, the commercial scale requirement should apply only to the services provided by the ISPs, not to the acts committed by the infringer. Spain’s erroneous implementation of this element in effect relieves ISPs from any liability to provide the identity of infringing websites or users, making it impossible for rights holders to bring copyright infringement actions. The Spanish Government in 2011 rejected proposals to amend Article 256 of the Civil Procedure Law (the LEC) to remedy this shortcoming.

Yet a further legal obstacle prevents rights holders from accessing the identity of infringers. Spain’s Data Retention Law allows retention and disclosure of personal data only for serious crimes. Under the Spanish Criminal Code, serious crimes are those punished with a prison term of more than five years. However, the punishment provided for intellectual property crimes in their most serious form is four years. As a result, they can never be considered serious crimes and disclosure of personal data in intellectual property crimes is not possible. Because the

Data Retention Law also has been interpreted to prevent personal data disclosure in civil proceedings, this law eliminates the possibility to bring P2P infringers to justice, both in the civil and in the criminal courts.

Anti-Circumvention Measures – WIPO Internet treaties obligations: Spain has ratified the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT) (together, the WIPO Internet treaties), and these obligations entered into force on March 14, 2010. To come fully into compliance with these treaties, Spain needs to address significant gaps in its legal structure for the protection of copyright works that are protected by technological protection measures (TPMs) against circumvention devices. Spanish courts have erroneously concluded that devices primarily designed for purposes of circumvention are lawful when capable of some ancillary non-infringing use. While these courts arguably are improperly interpreting the law, legislative amendments would ensure that the provisions function as intended to effectively prosecute the manufacture and distribution of circumvention devices.

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

Additional WIPO Internet Treaties obligations: Any reform to the copyright legislation in Spain should be adopted in a manner consistent with the two WIPO Internet treaties, to include securing the exclusive right of record producers with respect to the right of “communication to the public” and the “making available” right. Also, the right of remuneration for making available to the public, granted both to audiovisual and musical performers in the 2006 copyright law amendments, represented an erosion of the value of the exclusive rights of rights holders that were already granted in accordance with the requirements of the WIPO Internet treaties, and should be eliminated in future copyright law reform.

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

Unfortunately, the penal code amendments reduced penalties and changed the legal nature of the unauthorized distribution of CD-Rs and DVD-Rs containing copyright works when sold by street vendors. Vendors selling pirate products valued under €400 are no longer subject to criminal liability, and the evidence of an adequate level of economic gain is a particularly evasive element for rights holders to prove. Courts as a result would impose only fines or community service (from 31 to 60 days). Following these amendments, judges in the Basque region adopted decisions not to prosecute illegal street vendors. This change has led to a significant decrease in street

piracy actions on the part of Spanish law enforcement. The Ministry of Justice also rejected industry proposals to amend the penal code to ensure that circumvention devices are illegal. Such an amendment would have brought clarity to the problem rights holders face that the judicial criteria in this field vary depending on the region of the country. These amendments have, unfortunately, undermined one of the few bright spots in Spain's enforcement of copyright.

COPYRIGHT ENFORCEMENT ACTIONS IN SPAIN

With the recent implementation of the Law on the Sustainable Economy, copyright industries are hopeful that the Government of Spain will take further action to provide needed tools to address devastating piracy in Spain. It is important that the Spanish Government provide a strong message of its intent to combat piracy by following through with implementation and effectively encouraging the Spanish consumer to embrace the benefits of accessing licensed content through authorized online distributors. As in 2010, industry groups report good cooperation with certain enforcement authorities in Spain, but government-wide attention to copyright enforcement is needed. Local and regional authorities must be incorporated in a national action plan to heighten sensitivity to the piracy problem in Spain.

Some rights holders report good cooperation with Spanish police forces, including the National Police, Regional Police, and Guardia Civil, on criminal cases. In contrast, industry groups report a lack of intellectual property awareness among many in the judiciary, particularly in the digital realm. Attendance of industry organized seminars among judges and public prosecutors is limited, as they tend to favor only official seminars provided by the General Council of Judges (the CGPJ). Attendance among police officials, however, has been very high. Judges and public prosecutors show little interest in prosecuting IP crimes in general. Court procedures suffer from lengthy delays, lasting on average 18 months, and appeals are brought before regional courts with different and unpredictable criteria.

In addition to the priority actions mentioned in the Executive Summary, IIPA encourages the Government of Spain to take the following enforcement steps in 2012:

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

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

According to local industry, Spanish police raided 9 pirate website raids and dismantled two release groups in the first 11 months of 2011. The "Coalition of Creators and Content Industries," representing record producers, authors, publishers, and representatives from cinema, videogames, and software industries, provided the Ministry of Industry and SETSI with the details for 200 websites offering links to illegal downloads of copyright works, of which only 35 have yet been subject to administrative procedures. Of these, just over half were dropped, as the Ministry

found no grounds for administrative infringement. Only 16 cases have been initiated to date, but so far none have been subject to sanction.

Spanish authorities initiated over thirty legal procedures in 2006 and 2007 after Police operations called “Descargas en la red I” and “Descargas en la red II,” but only three so far have resulted in convictions, one of which was issued in 2011.⁹ In the aftermath of the Attorney General’s 2006 Circular, six of the cases resulted in acquittals at the appellate level. Private prosecutors have stepped in where public prosecutors backed away from these cases, leading to only three appellate decisions in 2010 to uphold criminal liability in Internet piracy cases.¹⁰

Police actions and prosecutions involving physical piracy: Some of the biggest bottlenecks in IP enforcement in Spain include: (a) slowness in the judicial proceedings (an average of two to three years to obtain a judgment), which is (b) exacerbated by the lack of interest of the prosecutors following the Attorney General’s Circular, and (c) the lack of deterrent sentences, which undermines the work of the police actions. An example is the *Blubster* case: in April 2008, Promusicae filed a case against the Blubster P2P file sharing service, which was followed by a hearing in May 2009. The main petition came along with an injunction that was served after the first petition, but the court of first instance did not issue a final decision until December 2011, when it dismissed the case.

Additional enforcement problems include:

- Detailed forensic reports must be delivered within the stringent 72-hour deadline set for special procedures called “fast-track trials,” the failure of which leads the competent judge to refer the case to an “abbreviated procedure,” which is in fact a much longer and less effective process.
- Some judges require extremely detailed lists identifying every single seized item (such as album name, every artist, producer and song), on a one-by-one basis; this is hugely inefficient, due to the high cost in human resources and time involved for enforcement agencies.
- Police storage facilities are full of millions of units of seized music carriers. In many cases, judges do not order the destruction of goods, and as a result, this involves high expenditures for storage fees and monitoring security while pressing for destruction.

Promusicae reports that police enforcement agencies and customs administration act *ex officio* in the vast majority of actions involving physical piracy of music and sound recordings. Unfortunately, regarding digital piracy the number of actions is virtually nil due to the numerous legal deficiencies and loopholes in the digital arena. The recording industry reports that the criminal activity involved with optical disc piracy in Spain is severe. The industry appreciates the work done by its investigators and the enforcement agencies, which have carried out important operations. Among the most significant actions carried out in 2011 by the Madrid local police, Guardia Civil and the National Police, were 24 raids against organized pirate groups in the provinces of Alicante, Almería, the Balearic Islands, Barcelona, Granada, Madrid and Valencia. As a result of these police actions, 116 people were arrested and over 400,000 pirate carriers and 910 burners were seized. In a coordinated action on December 13, the Guardia Civil raided entertainment premises in several Catalonian provinces and seized jukeboxes machines. The company preparing and distributing pirated music for the jukeboxes was also raided, and 3 people were arrested for unauthorized reproduction for the public performance.

⁹Vizcaya Appeal Court handed down an unappealable ruling dated 27th September 2011, sentencing the administrators of two websites to one year imprisonment and fines for linking to copyrighted works.

¹⁰In 2010, an Alicante Court ordered the blocking of sixteen sites. One of these was the infamous Spatorrent website, one of the largest release sites in Spain and the subject of a lengthy 2009 investigation into a camcording thief.

	Actions	Arrested People	Total Carriers	Recorded Carriers		Blank Carriers		Burners	Inlays	Juke-boxes	Hard Drives
				CD-R	DVD-R	CD-R	DVD-R				
2009	3571	1820	1342451	631,163	680,210	14,256	16,822	928	151,947	11	21
2010	4,788	1,199	792,828	347,828	424,217	40,900	9,654	506	103,664	8	35
2011	1,636	582	809,072	355,851	422,217	12,579	18,425	918	110,419	13	94

Spain: Anti-piracy operations, years 2009, 2010 and 2011. The 2011 data above is not yet final as more information may be provided by the enforcement agencies.

ADESE, the Spanish entertainment software industry association, reports continuing difficulties in prosecuting individuals engaged in the distribution of illegal circumvention devices in 2011. Police forces do not accept complaints due to the expectation that judges are likely to find no grounds for conviction. Of the four criminal decisions issued on circumvention devices in 2011, half were dismissed by judges on grounds that the device had ancillary uses apart from circumventing antipiracy measures.

BSA reports that its work in 2011 with the police forces continued smoothly. There were 13 raids against infringing end-user companies in 2011, resulting in the recovery of substantial damages. In addition, 246 cease and desist letters were sent to infringing end-user companies, four cease and desist letters to illegal distributors, and one takedown notice in a case of Internet software piracy. The police typically seek BSA support to file criminal complaints, as well as industry support in technical experts and other logistics regarding raids, but occasionally police forces initiate *ex officio* actions. However, nearly all of BSA's judicial cases involve the civil courts. BSA is fully satisfied with its cooperation with the Ministry of Industry. Furthermore, in 2011 BSA will increase its cooperation with the Tax Agency, which will increase its involvement in the investigation of end-user companies using unlicensed software, as well of illegal resellers of software.

In a recent positive development, in 2011 the General Prosecutor of the State established a Prosecutor's Office for Computer Crimes. The civil courts act reasonably quickly in the granting of *inaudita altera parte* search orders. However, BSA reports that several other problems remain when they work with the civil courts:

1. High bonds: Nearly all *ex parte* searches are submitted to the previous postings of bond, in order to cover potential damages in the event the target company was not infringing. After successful raids, these bonds cannot be returned to copyright holders until the closing of the case. Although amounts requested are often reasonable (between US\$2,300 to \$4,500), in some cases the bonds requested have been so costly (in one instance €120,000, approximately US\$163,090) as to make it impossible to bring the case.
2. Raids granted based on anonymous information: Before the civil courts were empowered to handle intellectual property issues in 2005, civil courts had no problems in granting raids based on anonymous information. However, some civil courts (mainly in Madrid and Barcelona) now refuse to accept anonymous information as evidence to grant a raid, even if a bond is offered. This problem makes it difficult for the software industries to pursue actions in these two major markets.
3. Calculation/valuation of damages: The usual rule in calculating damages involves the full retail price of the product. However, a decision from a court of appeal (against the company "In Hoc Signo Vinces"), might have a negative effect because it reduces the valuation of damages for right holder companies that are based outside Spain. On the theory that the benefit obtained by such companies directly from the Spanish market was arguably not the same as the full retail value, the valuation of damages was reduced. The correct definition of valuation of damages appears within article 140 of the Spanish Intellectual Property legislation, and it is clear that the valuation must correspond to at least full retail value. This was confirmed by other recent lower court decisions, including the judgment issued by the Juzgado de Primera Instancia núm. 6 de Logroño y Mercantil de la Rioja, on April 15, 2011.

BSA also voices generalized concern that the knowledge level of prosecutors and civil and criminal judges on copyright issues needs improvement.

TRAININGS and PUBLIC AWARENESS

The content industries regularly offer training sessions and enforcement assistance in Spain. What is clearly needed is more government involvement in such seminars, particularly to increase the participation of judges and public prosecutors.

During 2011, in addition to two training sessions for public prosecutors hosted by the Ministry of Culture and the Prosecutor's office respectively, Promusicae organized or took part in a total of 19 training seminars and courses on intellectual property enforcement. A total of 1,575 people attended from the Guardia Civil, local police and National Police. Eight of the seminars were hosted by the Madrid University URJC through its *Catedra Legalitas*. A total of 723 certificates were issued.

BSA is cooperating with the Ministry of Industry to continue its ongoing awareness efforts, and specifically with the Secretary of State for Telecommunications and the Information Society (SETSI), which regulates telecommunications, including ISPs. SETSI has allocated an investment of at least 200,000 Euros for a new awareness campaign. The Campaign aims to reduce levels of piracy among illegal channels, and in a new initiative, to target SMEs for similar results in piracy reduction. Since BSA's awareness work with the Ministry of Industry began, the level of piracy in the specific field of illegal resellers reduced dramatically to 21% (although software piracy levels by business end-users have not improved). The Ministry of Industry has confirmed that it will dedicate €300,000 during 2011, to consolidate piracy reductions in the distribution channel and to generate a similar reduction of corporate end user piracy among SMEs. At the present moment the Ministry is starting to design the contents of the campaign for this purpose.

MARKET ACCESS BARRIERS

Film Dubbing (Catalunya): Independent film producers still suffer from restrictions adopted in July 2010 on films released in Catalunya. Article 18 of the Law on Cinema, adopted by the regional parliament, imposes on the distributors the obligation to dub and subtitle in Catalan – the regional language – half of the analog prints, and all of the digital prints, of any film dubbed or subtitled that is to be released in Catalonia, with the single exception of European dubbed (not subtitled) films whose distribution amounts to 15 or fewer prints. Similar obligations apply to DVD distribution. This is costly and not warranted by public demand. For independent motion picture producers, for instance, which generally release fewer prints, the per-print costs will be higher, thus constituting higher market access barriers. While promoting “linguistic access” is a legitimate goal, the means are neither suitable nor fair.

Screen Quota: The independent film sector also faces discriminatory screen quotas that disadvantage U.S. and non-EU country films, and stifle development of Spain's theatrical market. For every three days that a non-EU country film is screened, in its original language or dubbed into one of Spain's languages, one European Union film must be shown. This is reduced to four to one if the cinema screens a film in an official language of Spain and keeps showing the film at all sessions of the day in that language. Non-observance of the screen quotas is punishable by fines.

SWITZERLAND

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

2012 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: IIPA recommends that USTR place Switzerland on the Watch List in 2012 and urges that USTR increase its bilateral engagement with Switzerland in the coming year.

Executive Summary:¹ Since the September 8, 2010 issuance of a troublesome opinion of the Swiss Federal Supreme Court in the Logistep case, which authorities have interpreted to preclude private parties from collecting the IP addresses of Internet users sharing pirate material over publicly available networks, the Federal Council has closed the lid on civil Internet enforcement in Switzerland. In November 2011, the Federal Council published a report that forecloses any effort in the near future to resurrect the discovery of a crucial piece of information needed to bring a copyright infringement action. The Logistep decision, issued by Switzerland's highest court, required Logistep AG to stop collecting the IP addresses of suspected infringers that it turned over to right holders for purposes of pursuing civil actions. In doing so, the Federal Supreme Court held in favor of a 2008 recommendation issued by the Swiss Data Protection Authority (FDPIC), which argued that Switzerland's Data Protection Act (DPA) only allows such data harvesting to be used in criminal actions. FDPIC has interpreted the decision to be fact-specific to the type of data collection done by Logistep, stating, "Clearly it should be possible to punish copyright infringements on the internet. The DPA provides no protection against illegal acts."² However, in the aftermath of the Logistep decision, anti-piracy activities in 2011 were completely undermined by an overly broad reading of the Logistep decision: public prosecutors abandoned actions declaring as inadmissible evidence any IP addresses used to identify defendants. Appellate judges agreed, dismissing the subsequent appeals against these determinations. Rights holders are thus proscribed from analyzing the IP addresses of suspected infringers, notwithstanding the fact that such information is made publicly available by users who participate in P2P file sharing on public networks. Rights holders are unable to bring civil actions for online copyright infringement in Switzerland, a violation of Switzerland's obligation to "ensure that enforcement procedures ... are available under [its] law so as to permit effective action against any act of infringement of intellectual property rights" covered by the World Trade Organization Agreement on Trade-Related Aspects of Intellectual Property Rights. In addition, though somewhat marginalized by these recent developments, IIPA also has other long-standing concerns with certain aspects of the copyright and related laws in Switzerland, which are detailed further below.

PRIORITY RECOMMENDED ACTIONS FOR SWITZERLAND IN 2012

- Resume enforcement of the current Copyright Act in the Internet environment by Swiss public prosecutors and courts.
- If necessary, amend the Data Protection Act and/or the Copyright Act in Switzerland to permit the collection of data available over digital networks for the purposes of enforcement of copyright against infringing activity.
- Ensure that further copyright reform and the importance of effective copyright enforcement in both the offline and online environment continue to be addressed both through U.S.-Swiss trade dialogues and within the Government of Switzerland itself.

¹For more details on Switzerland's Special 301 history, see IIPA's "History" appendix to this filing at <http://www.iipa.com/pdf/2012SPEC301HISTORICALCHART.pdf>, as well as the previous years' reports, at <http://www.iipa.com/countryreports.html>. For a summary of IIPA's 2012 global issues, see our cover letter at <http://www.iipa.com/pdf/2012SPEC301COVERLETTER.pdf>.

²See <http://www.edoeb.admin.ch/aktuell/01688/index.html?lang=en>.



ONLINE COPYRIGHT ENFORCEMENT IN SWITZERLAND

IIPA raised the Logistep decision and its implications for copyright actions in our 2011 Special 301 filing on Switzerland, noting concern that legislative amendments would be necessary to undo the damage to civil actions that the Logistep decision would do. On November 30, 2011, the Federal Council published a report on illegal uses of works on the Internet in response to the March 2010 motion of Senator Géraldine Savary to determine whether better legislation is needed to protect music online.³ The report concludes that there is no need for new legislation. It questions whether Internet piracy is an immediate concern for Switzerland because the illegal distribution of copyright protected works online is generally a cross-border phenomenon that should be coordinated internationally and points out, in any case, that there are no figures available regarding the impact of Internet piracy problems in the country. Nevertheless, the report extrapolates from a 2009 Dutch study⁴ that in 2010, one out of three users in Switzerland have been downloading films, music or software illegally. Despite that determination, the Federal Council sees no need for action to change the existing legislation as the current legislative framework is “sufficient.” The Swiss Federal Institute of Intellectual Property (IPI), Switzerland’s Federal agency in charge of patents, trademarks, industrial designs and copyright, commented on the report, concluding that internet piracy is not actually a problem for Switzerland because it mainly affects foreign rights holders. (It should be noted that foreign films, for example, account for about 95% of the market share in Switzerland). Together with the opinion of the Data Protection Commissioner in support of the Logistep decision, three Federal agencies of crucial influence over copyright enforcement policy have interpreted Swiss law to foreclose the analysis of publicly available IP addresses in civil copyright cases.

There appears to be one avenue of recourse that could allow civil and criminal anti-piracy activities to resume in Switzerland. Despite his support for the Logistep holding, the Data Protection Commissioner has opined that the anti-piracy activities of the type carried out by IIPA members, including the music and film industry are compliant with the Data Protection Act. Following from this opinion, the State Secretariat for Economic Affairs (SECO) is forming a Roundtable to develop a code of best practices in anti-piracy activities. It is likely to take place in March 2012 and will be chaired by SECO. Invitees will be the Federal Data Protection Commissioner, representatives of the Federal Supreme Court, Public Prosecutors, representatives of the IPI, and the Federal Office of Justice, as well as representatives from some copyright sectors. If successful, the best practices could permit anti-piracy activities such as those undertaken by the local music and film industry bodies to resume. If the Roundtable does not find a resolution, the only remaining recourse would be legislative amendments, a process that guarantees to be lengthy and to leave Internet piracy virtually unhindered for some time to come.

COPYRIGHT PIRACY IN SWITZERLAND

Switzerland is known to host a powerful Internet piracy infrastructure that influences worldwide networks, including such piracy heavy-hitters as Razorback2, Sharereactor, Rapidshare, and Private Layer. A safe haven for top-level source piracy directed to the German and worldwide markets, Switzerland is now even closer to gaining status as a market largely lost to illegitimate copyrighted content. And with 6.15 million Internet users,⁵ one-third of which already are reported by the Federal Council to be engaged in piracy, the market to be lost to piracy is considerable indeed. German release groups continue to use Switzerland as a base for recording soundtracks and for maintaining their file-servers. Cyberlockers (such as Rapidshare, based in Switzerland) that are used to store and distribute infringing content also present a problem with an ever growing number of portal sites and forums offering links to such content—these trends have, predictably, gone unchanged in the past year. Since Switzerland’s copyright law contains a private copy exception with no expressly stated legal source requirement, downloading and

³The report is available in German, French, and Italian at: <http://www.ejpd.admin.ch/content/ejpd/fr/home/dokumentation/mi/2011/2011-11-30.html>.

⁴Huygen, Annelies et al (2009): Economic and cultural effects of file sharing on music, film and games. TNOP Rapport on behalf of the Dutch ministries of Economic Affairs, Justice and Education, Culture and Science.

⁵According to <http://www.internetworldstats.com> (as of June 2011).

streaming from servers operated by pirates outside Switzerland are being portrayed as legal in Switzerland by the press and anti-copyright activists, as long as there is no uploading. Switzerland also has a problem with parallel imports of DVDs coming from Canada while the films are still running in Swiss cinemas.

THE SWISS COPYRIGHT ACT AND RELATED LAWS

On July 1, 2008, the Swiss law implementing the 1996 WIPO Internet Treaties entered into force. Right holders' proposals in a number of areas were not approved. Since 2008, IIPA continues to have concerns with several other areas related to Switzerland's law which lead to severe problems.

First, the private copy exception in Article 19 of the copyright law is too broad, and has been interpreted to allow the making of copies of works or phonograms that come from unlawful sources. This is completely inappropriate for a "private copy" exception and is inconsistent with the three-step test in the Berne Convention, the WIPO Internet treaties, and the WTO TRIPS Agreement.

Second, Swiss law allows acts of circumvention of technological measures "for the purposes of a use permitted by law" (Article 39(a)(4)), an exception that is also far too broad, particularly given the inappropriately wide scope of the private copying exception. Taken together, these exceptions would allow individuals to circumvent access or copy control measures in order to copy from illegal sources and share with friends.

Third, IIPA has a number of concerns with a review mechanism ("observatory") created to monitor "misuse" and "the effects of technological measures," as set out in a draft decree implementing Article 39b of the Copyright Act that entered into force on July 1, 2008. It still remains unclear how the mechanism will fulfill its role, but the decree focuses its attention very narrowly on abuse of technical measures and could undermine the observatory's authority to act as a fair mediator.

Fourth, the new Articles 22a to 22c regarding mandatory collective administration provide overbroad benefits to state-licensed broadcasting organizations, at the expense of record producers and artists.

Fifth, Article 60(2) of the Swiss Copyright Act caps the remuneration payable to right owners (usually collected via collecting societies) at 10% of the licensees' income for authors and 3% for neighboring right owners. The Swiss artists and record producers requested collecting society "Swissperform" to start arbitration proceedings against this cap as the codified cap (1) has the effect of an expropriation and devaluation of the intellectual property rights of Swiss right owners, (2) is not in line with the notion of "equitable remuneration" contained in international copyright conventions such as Article 15 of the WIPO Performances and Phonograms Treaty, and (3) curtails the freedom of right owners to negotiate their "equitable remuneration." Furthermore, it does not reflect the higher income shares negotiated by other European collecting societies. On November 4th 2010, the Swiss Arbitration Commission dismissed Swissperform's complaint on the ground that the above cap was in line with Swiss law. Swissperform has appealed this decision to the Swiss Federal Administrative Court which is expected to render its judgment by the end of 2012. The next and final instance will be the Swiss Federal Court.

Sixth, there is a need for camcording legislation to combat the illicit recording of movies at movie theaters, a major source of pirated motion pictures on the Internet, as well as on street corners and flea markets around the world. These issues were not adequately addressed in 2011.

Finally, the Swiss Federal Institute for Intellectual Property is focused on issues in the areas of patents and trademarks, where Switzerland has a strong export industry, and provides little support to strengthening copyright law and its enforcement.

TURKEY

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2012 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: IIPA recommends that Turkey remain on the Watch List.¹

Executive Summary: The copyright system in Turkey continues to show incremental progress, but has not entirely kept pace with technological developments or been effective enough to significantly reduce most forms of piracy. The value of unlicensed software use in Turkey remains high, and rapidly expanding Internet piracy has stunted the growth of the music and other industries in Turkey. In addition, book piracy continues to hinder the development of the publishing industry, while physical optical disc piracy has seen slight declines year-on-year. One bright spot in the system remains good cooperation with Special IP Police units, especially in larger cities, in dealing with physical piracy. The whole system is weakened, however, by burdensome court processes, long delays in adjudication of cases, and overall lack of IP expertise within the judiciary. In addition, government agencies, enforcement authorities, and judicial officers are ill-prepared to deal with rapidly expanding Internet-based piracy, leaving enforcement against Internet piracy phenomena largely to industry self-help. Without a legal infrastructure in place, ISP cooperation is rare. New reported amendments to the Regulation of Publications on the Internet and Suppression of Crimes Committed² weaken certain aspects of dealing with online copyright infringements. Discriminatory hurdles have been placed in the way of right holders with respect to their participation in collecting societies, and the Turkish Government also fails to administer private copy levies in a way that fairly compensates right holders or otherwise benefits the enforcement of their rights in Turkey. Notwithstanding negotiations with the EU, and the Framework for Strategic Economic and Commercial Cooperation with the United States,³ copyright issues have not to date been successfully addressed, leading to significant harm to the copyright industries.

PRIORITY ACTIONS REQUESTED IN 2012

Enforcement

- Increase the number of specialized IP courts throughout Turkey, e.g., especially outside Ankara, Istanbul, and Izmir,⁴ and address and eliminate hurdles experienced in the different IPR courts, including delays in the issuance of preliminary court injunctions, misapplication of the presumption of copyright ownership (e.g.,

¹For more details on Turkey's Special 301 history, see Additional Appendix available at <http://www.iipa.com/pdf/2012SPEC301HISTORICALSUMMARY.pdf>. Please also see previous years' reports at <http://www.iipa.com/countryreports.html>.

²Regulation of Publications on the Internet and Suppression of Crimes Committed, Law No. 5651.

³The EU accession process and the "Twinning Project" with EU Member State Governments have led to engagement on enforcement issues and an invigorated legislative process, and it had been hoped that this process would lead to legislation in 2011 to complete EU Directive implementation, including implementation of the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT). Meanwhile, it was hoped that the 2009 launch of the "Framework for Strategic Economic and Commercial Cooperation" would lead to greater engagement between the United States and Turkey on important copyright and enforcement issues. The EU Accession IP Chapter obligates Turkey to make sure that "enforcing bodies dispose of sufficient administrative capacity to enforce the rights concerning the fight against piracy and counterfeit," and that it "provides a satisfactory track record of investigations, prosecutions and judicial treatment of violations and an improved performance concerning the effective enforcement of Intellectual Property Law, including a substantial reduction in the volume of counterfeited and pirated goods exported to the EU."

⁴In the Government of Turkey's submission in the 2011 Special 301 process, the government notes:

There are (11) eleven criminal courts and (12) twelve civil courts, in total (23) twenty three (*In Istanbul: 7 IPR civil courts, 7 IPR criminal courts; in Ankara: 4 IPR civil courts, 2 IPR criminal courts and in Izmir: 1 IPR civil court, 2 IPR criminal courts*) specialized IPR courts in Turkey. These courts are established in Ankara, Istanbul and Izmir, the cities chosen according to the level of infringements of IPR. ... General civil courts and general criminal courts are competent to deal with IPR cases where specialized IPR courts have not been established yet.

Republic of Turkey, Prime Ministry, Undersecretariat for Foreign Trade, General Directorate of Agreements, *Protection of Intellectual Property Rights in Turkey*, February 2011, A.2.1.1 (on file with IIPA).



requiring proof of title), and rejection of search warrant requests due to unreasonably high evidentiary requirements for probable cause.

- Speed criminal trial processes in appeals of copyright cases, and work to defeat recidivism by significantly reducing the number of suspended sentences and/or amnesties.
- Take a more active role in significantly reducing Internet piracy, by, *inter alia*, establishing a special division within the IP Police and educating judges and prosecutors on its technological aspects.
- Reconfirm through a formal circular that Police and Inspection Committee members have *ex officio* raiding authority against sales of copyrighted materials on the streets and banderole infringements.
- Take significant steps to legalize large- and medium-sized businesses engaged in end-user software piracy.
- Take significant raiding actions against illegal commercial photocopying and organized pirate printing of books.
- Improve coordination and cooperation between authorities, police, judiciary and anti-piracy commissions in cities other than Istanbul, Ankara and Izmir.

Legislation

- Amend copyright law consistent with the comments made in this submission, including, among other changes:
 - Fully implementing the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT);
 - Making necessary amendments to ensure that copyright piracy is included among cybercrimes;
 - confirming/restoring *ex officio* authority to specialized IP units under the Ministry of Internal Affairs and Security General Directorate of the Police for street piracy and banderole infringements; and
 - Ensuring that ISPs comply with notices to take down infringing materials, have in place effective and fair policies to address non-hosted infringements and repeat infringers, and provisions to discourage web advertising and payment processors in association with infringing sites. Legislative amendments should establish a clear obligation on ISPs to expeditiously cooperate with right holders when they know or have red flag knowledge (i.e., they are aware of facts and circumstances from which infringement is apparent).
- Ensure liability for corporate entities so that companies and managers face consequences for infringements carried out by a corporation (e.g., in the case of end-user piracy of business software).
- Make copyright piracy a predicate offense in organized crime law that triggers remedies to deal with organized crime, including freezing assets implicated in criminal pirate enterprise.
- Amend the laws and regulations to ensure that private copy levies are collected and fairly distributed to right holders; at present, all amounts accrue to the Ministry of Culture and Tourism, which does not collect efficiently, disburse the monies to the proper right holders, or use the money that is collected for useful anti-piracy purposes or in ways helpful to those right holders.
- Amend the Collective Management Organization (CMO) Regulations to ensure that foreign right holders are permitted to participate in collecting societies (i.e., there should be no local establishment criterion), that they receive transparency, fair treatment, and efficiency, and that the laws do not create, e.g., through a registration requirement, a formality inconsistent with Turkey's international obligations under the Berne Convention and the TRIPS Agreement.
- Take urgent action to legalize all use of software in the public sector by government agencies, employees, contractors and grantees, including implementation of Circular No. 2008/17 (Prime Ministry Circular on Legalization of Software Use in Public Entities).

PIRACY AND ENFORCEMENT UPDATES IN TURKEY

Previous IIPA reports have discussed piracy and enforcement challenges faced in Turkey in detail. The following provides brief updates on piracy and enforcement issues over the past couple of years (failure to mention a specific issue does not signify that it has been resolved).

Enterprise End-User Software Piracy, Hard Disk Loading, and Government Legalization: Unauthorized use of business software by enterprise end-users causes significant losses for copyright holders in

Turkey.⁵ Piracy is particularly bad in the industrial regions and cities where economic activities are more intensive, such as Istanbul, Ankara, and Izmir. Another problem faced by the business software industry is hard disk loading, by which computers sold at retail are either pre-loaded with illegal software, or are sold “stripped” and later loaded with pirate software. A third problem noted in Turkey involves circumvention software such as serial crackers and key generators used to gain unlawful access to software. This is reportedly a common problem in Turkey, and a legislative fix to outlaw the circumvention of technological protection measures or trafficking (or servicing) in circumvention devices is needed. Reductions in business software piracy would result in positive gains for Turkey’s economy. A study released in 2010 by IDC and BSA found that reducing the PC software piracy rate in Turkey by 10 percentage points over four years would generate \$783 million in GDP, \$154 million in additional tax revenues and 2,180 new IT jobs. The benefits would be even greater if this reduction was achieved in two years, which would yield over \$1 billion in GDP and \$205 million in additional tax revenues.⁶

The business software industry continues to report generally good cooperation from the dedicated Special IP Police units established in the larger cities to combat enterprise end-user software piracy. Business software right holders collaborate during raids, which are conducted on the basis of search warrants (obtained rapidly and with minimal cost), against resellers of pirated software and enterprise end-users of unlicensed software. In 2011 (as in 2010), BSA conducted approximately 50 raids against corporations suspected of using software without licenses (or under-licensing), with BSA members conducting many additional raids on their own. Improving cooperation and awareness in the smaller cities and suburbs could increase efficiency and reduce end-user software piracy levels throughout Turkey. There remain several problems with enforcement in Turkey, which are not singular to the software industries. For one, police take *ex officio* actions only if copyrighted material is sold in public places, so enterprise end-user piracy actions still require complaints of right holders. Another weakness remains the court system, since some judges and prosecutors remain unaware of the technical specifics of software copyright protection. Thus, right holders report difficulties in obtaining injunctions and search warrants from some courts.

Unfortunately, it also remains the case in Turkey that many public authorities, both central and local, use illegal software products. In 2008, the Prime Minister issued a *Circular on Legalization of Software Use in Public Entities*, Circular No. 2008/17 to address this issue. However, this Circular has not been widely implemented. The Turkish Government should take urgent action to legalize all use of software in the public sector by government agencies, employees, contractors and grantees.

Internet Piracy Explodes in Turkey, and Mobile Increasing Dramatically: Turkey has approximately 35 million Internet users as of mid-2010.⁷ The number of broadband subscribers skyrocketed to almost 13 million users in 2011. According to the largest ISP, TTNET, which did a survey on June 21, 2011 (the longest day of the year) of Internet usage patterns, video streaming was the most popular usage of subscribers, at 28.97% of the traffic, followed by P2P downloads at 13.80% of the traffic, and “web download” at 6.54% of the traffic. In all, just these three together accounted for about half (50%) of all web traffic in Turkey (see graphic reproduced just below).⁸ Mobile penetration in the country has also grown despite over-regulation, and the top mobile provider, Turkcell, reported it

⁵BSA’s 2011 software piracy statistics will not be available until after the filing deadline for this submission, but will be released in May 2012, at which time piracy rates and U.S. software publishers’ share of commercial value of pirated software will be available at www.iipa.com. In 2010, the software piracy rate in Turkey was 62% (down from 63% in 2009), representing a commercial value of unlicensed software attributable to U.S. vendors of US\$284 million (up from US\$228 million in 2009). These statistics follow the methodology compiled in the Eighth Annual BSA and IDC Global Software Piracy Study (May 2011), <http://portal.bsa.org/globalpiracy2010/index.html>. These figures cover packaged PC software, including operating systems, business applications, and consumer applications such as PC gaming, personal finance, and reference software – including freeware and open source software. They do not cover software that runs on servers or mainframes, or routine device drivers and free downloadable utilities such as screen savers. The methodology used to calculate this and other piracy numbers are described in IIPA’s 2012 Special 301 submission at <http://www.iipa.com/pdf/2012spec301methodology.pdf>.

⁶Business Software Alliance and IDC, *Piracy Impact Study: The Economic Benefits of Reducing Software Piracy: Turkey*, 2010, at http://portal.bsa.org/piracyimpact2010/cps/cp_turkey_english.pdf.

⁷Over 41% of households in Turkey had Internet as of August 2010, and 43% of the population (roughly 33.5 million) used the Internet, according to the Turkish Statistical Institute. Turkish Statistical Institute, Prime Ministry, Republic of Turkey, *Information and Communication Technology (ICT) Usage Survey in Households and Individuals*, 2010, Press Release No. 148, August 18, 2010, at <http://www.turkstat.gov.tr/PreHaberBultenleri.do?id=6308>.

⁸YouTube use was another 8.47%. Sahin Sen, *Stunning Data on Use of Internet in Turkey*, June 21, 2011, at <http://blog.ttnet.com.tr/turkiye%E2%80%99de-internet-kullanimiyla-ilgili-carpici-veriler/>.

had six million 3G users accessing the Internet using their mobile phone services as of July 2010, so the overall number of mobile web users is undoubtedly higher by now.⁹ As a result of these developments, Internet usage of copyright materials has begun to displace physical product in Turkey, and Internet piracy has significantly worsened. Internet piracy in Turkey takes on many forms, including illegal P2P filesharing services, cyberlockers hosting pirate content (and encouraging users or even paying them to share), BitTorrent sites (employing swarm technology for faster downloads of pirate material), pirate video hosting sites, deeplinking sites (to pirate materials), and forums providing direct download links to pirate materials. All creative content owners – of music, movies, business and entertainment software, and books and journals – are victims of Internet piracy.

For example, sites hosted in Turkey are making available for download pirated copies of dictionaries, online journals, textbooks, grammar, and reference books, and are thus a threat to the English language teaching (ELT) market. During 2011, the Entertainment Software Association (ESA) reports that Turkey placed 15th in the world in the number of connections by peers participating in the unauthorized file sharing of select ESA member titles on public P2P networks.¹⁰ In 2010, Turkey ranked twenty-first in the world in the number of connections by peers participating in the unauthorized file sharing of select ESA member titles on public P2P networks, indicating that the situation has gotten worse. Internet piracy is a main factor for the economic crisis in the Turkish music market: the availability of unlicensed content depresses prices at which music rights are valued and creates unfair competition for licensed services. As of 2004, there were only 400,000 broadband subscribers in Turkey and physical sales were at the level of 42 million units. Today there are roughly 13 million broadband users and physical sales are down to 10 million units. File sharing activities on the networks of universities are a severe problem. In addition to online piracy, the trading of hard goods and circumvention devices through websites, mostly auction sites, or through newsgroups, also remains of concern in Turkey.

In previous years, IIPA members reported cooperation among service providers in fighting Internet piracy, as “Additional Article 4” of the Copyright Law (added in 2004) provides a basic structure for service provider cooperation.¹¹ It is telling that in the Turkish Government’s 2011 Special 301 Report, unlike its 2010 report, there is no mention of any Internet enforcement activities.¹² Many key issues remain unresolved in the Turkish enforcement system to address Internet-based piracy. These include most notably: 1) the lack of a legal framework to ensure that ISPs comply with notices to take down infringing materials, and have in place effective and fair policies to address non-hosted infringements and repeat infringers, and to discourage web advertising and payment processors from supporting infringing sites; 2) the lack of a clear obligation on ISPs to expeditiously cooperate with right holders when they know or have red flag knowledge (i.e., they are aware of facts and circumstances from which infringement is apparent and offer assistance without demanding an official order or request of a prosecutor’s office or a court); 3) the lack of a legal framework establishing copyright piracy as a cybercrime; and 4) the lack of any mechanism for identifying perpetrators who often use privacy services provided by ISPs making it impossible to locate them.¹³

⁹Ercan Ersoy, *Turkey’s Mobile Leader Blames Regulator*, *Hurriyet*, July 29, 2010, at <http://www.hurriyetaidailynews.com/n.php?n=turkey8217s-mobile-leader-blames-regulator-2010-07-29>.

¹⁰ESA’s reporting on P2P activity does not take into account downloads of these titles that occur directly from hosted content, such as games found on “cyberlockers” or “one-click” hosting sites, which appear to account each year for progressively greater volumes of infringing downloads.

¹¹Additional Article 4 of the Copyright Law No. 5846 specifically addresses the responsibilities of content and Internet service providers. In practice, once an infringement is detected on a site, a cease and desist letter is sent to the site requesting the site to cease infringement within three days. If, after this period, infringement continues, a folder is assembled containing (a) the printouts of the site showing the infringements; (b) an investigative report about the site; (c) the “ownership license of work of art” related to the titles; and (d) the WHOIS details of the site administrator. That folder is provided to a prosecutor together with a formal application to block the site in question. The prosecutor sends the “decision of closure” in no more than one week (to Turkish Telecom), and access to the sites in question is blocked.

¹²In its 2010 report, the Government of Turkey noted, “[a]ccess is blocked by court to 213 web sites regarding music which have breached the law. 766 denunciations in music have been made regarding copyright infringements. With the warning of the right owner collective societies, the works subject to infringement have been removed from the content.” Republic of Turkey, Prime Ministry, Undersecretariat for Foreign Trade, General Directorate of Agreements, *Protection of Intellectual Property Rights in Turkey*, February 2010 (on file with IIPA).

¹³Turkish judicial authorities assume that IP addresses of Internet users are personal data and under the protection of Section 9 of the Criminal Law. Therefore, such data cannot be shared with right holders without judicial findings even if there are clear-cut infringements of copyright. Thus, even if right holders and/or collecting societies monitor infringements occurring on the Internet, there is no way to find out the identity of infringers without applying to judicial authorities. According to the Turkish Copyright Law, in order to collect information on infringement and an infringer, it is necessary to make a complaint to the prosecutor who will then collect necessary information concerning the identity of the infringer, information regarding his/her address, etc. A prosecutor would

Legislation reconfirming ISP responsibility and fostering cooperation is critical to shift ISPs from their current tendency not to cooperate.

In the absence of an adequate legal framework and the necessary enforcement tools to make the system more effective for right holders, they must largely resort to self-help measures. For example, the music industry has an Internet enforcement team which detects illegal websites and sends notices to remove illegal content, with the commencement of a criminal complaint if the notice does not lead to relief. In 2011, over 1,600 websites were checked and notices sent to over 1,000 websites, and out of these, more than 300 websites have had illegal content removed or blocked pursuant to Turkish prosecutor involvement. Unfortunately, many ISPs still do not cooperate with right holders, creating a bottleneck to effective enforcement at the outset. In addition, when clear-cut piracy cases are mounted and brought to the courts, relief is difficult to obtain. In some cases, this is due to the fact that the website servers are located overseas, meaning that even if a court decision is issued to remove infringing material, it cannot easily be enforced.

Book Piracy Remains Severe: While Turkey should be a good market for English language teaching (ELT) materials and a growing market for higher education textbooks, continuing unauthorized commercial photocopying and print piracy hampers the growth and further development of the legitimate market. Various types of books are affected, including fiction, non fiction, school books, college textbooks, supplements, dictionaries, ELT texts, and scientific, technical and medical (STM) materials. Illegal photocopying is especially prevalent on and around university campuses but law enforcement agencies remain reluctant to take action on campuses. It is thus left to university administrators to address book piracy, but to date, there have been no actions directed against infringing activities occurring on campuses. Though the Turkish Publishers' Association (PA) has raised book piracy issues with the Ministry of Culture, the Ministry has not responded to these concerns. However, there has been greater cooperation in recent years with the Turkish Police Force resulting in raids against entities engaged in unauthorized photocopying activities. In 2011, the Turkish PA conducted a number of raids and awareness raising exercises with university administrators and lecturers, urging against the use of unauthorized copies of text books at centers of higher education.¹⁴

More Specialized Courts Needed in Underserved Areas: IIPA commends the Government of Turkey for its establishment of 23 specialized IP courts, and the establishment of a special prosecutor's bureau responsible for IPR investigations.¹⁵ Right holders would be greatly served by the establishment of specialized courts in other areas, i.e., in cities other than Istanbul, Ankara and Izmir. IIPA has noted several successful verdicts in recent years in copyright cases in previous submission; nonetheless, we note some continuing problems. The Government of Turkey, in its 2011 Special 301 Submission, still fails to contain updated court case information.¹⁶ The Government's statistics identify some other glaring problems, most notably, delays in adjudication (of three to five years) and the lack of overall deterrence in results.¹⁷ Other problems include 1) most criminal cases end in suspended sentences

provide an order to the police who would in turn investigate the IP address and forward that to the service provider. Only then would the service provider give the identification information, address, etc. to the prosecutor. This procedure takes a very long time and has not proven to be an efficient way to struggle with the Internet infringements.

¹⁴In 2011, the Turkish Publishers' Association aided law enforcement in a number of raids around university centers that resulted in seizures of 4889 books, several photocopying machines, external hard disk storage devices and computer hardware.

¹⁵In its 2011 Special 301 Submission, the Government noted, "There are specialized prosecutor bureaus especially on important subjects in the felony courts, juvenile courts, commercial and IPR courts, in the big cities like Istanbul, Izmir and Ankara." See *supra* note 4.

¹⁶Court statistics are provided for 2007 and 2008, and even then, the 2008 case disposition statistics show clearly that, other than Istanbul and one court in Izmir, the backlog of both civil and criminal cases is actually growing. For example, the Istanbul courts are dealing with the backlog through disposing of criminal cases at almost a 2:1 ratio, but they are still transferring many thousands of cases to the next year's docket. Other courts in Ankara, Izmir, and elsewhere did not fare as well. Of course, disposition of large numbers of cases does not result in deterrence but hopefully over time may lead there. See *supra* note 4.

¹⁷For example, in 2007, of the 6,484 criminal cases under Law No. 5846, from which 6,793 (changed from "6,693" in the 2010 report) were accused, almost one-third of the cases resulted in acquittal or dismissal. Of the convictions, over 2,700 resulted in imprisonment and almost 2,000 resulted in a fine, but of those, we know that most sentences were suspended or were appealed. It is telling that of the over 200 civil cases under Law No. 5846, there were only four settlements, but over 100 dismissals or other negative dispositions.

which encourages recidivism;¹⁸ 2) many sentences are reversed on appeal which encourages recidivism; 3) preliminary court injunctions are difficult to obtain (this is a general problem experienced in Turkish courts); 4) obtaining a criminal search warrant in some districts is difficult;¹⁹ 5) in some cases the presumption of ownership is not properly applied;²⁰ 6) private sector experts can submit reports to the Courts, however, the Courts are not bound by such reports and if they deem necessary they can instruct external experts for determination of pirate materials;²¹ and 7) there remain difficulties in storing of large amounts of pirate materials.²²

Retail Piracy (Optical Discs), Mobile Device Piracy, “Mod Chips”: Physical piracy has decreased somewhat in Turkey over the years but still remains prominent in big cities, representing along with other forms of piracy a major hurdle to the growth of legitimate creative industries in Turkey.²³ This situation persists notwithstanding significant numbers of raids run and seizures in the tens of millions of pirated products by the authorities.²⁴ Past IIPA reports have detailed the migration to “burned” recordable discs²⁵ from imported factory discs (although these still can be found), and mobile device piracy, through which music, audiovisual works, software, and published materials are loaded onto any portable device, including phones, MP3 players, PDAs, iPods, portable hard drives, and the like, with stores uploading illegal content, including content illegally downloaded from the Internet, directly onto customers’ mobile devices. IIPA has highlighted the decrease in street sales over the years due to the ban on illegal street stalls, and for the most part, this is where *ex officio* enforcement action becomes possible (to enforce the Banderole requirement). One recent phenomenon noted is the increase in sale and servicing of “mod chips” installed into videogame consoles to play illegal games. Of course, the “mod chips” being installed would have little value without the pirated games, and there is continued evidence of imports of these into Turkey. The increase in “mod chip” circumvention highlights the need for a legislative fix prohibiting the act of circumvention of TPMs (like the handshake in consoles which is broken by mod chips, and the trafficking in circumvention devices (including the service of installing mod chips).

Banderole Enforcement Results in Huge Seizures, But Authorities Otherwise Lack *Ex Officio* Authority: Enforcement against physical piracy has generally been strong in Turkey, since *ex officio* raids and seizures by the Police and Inspection Committee members in Turkey can be effectuated through the banderole

¹⁸The current Copyright Law stipulates penalties ranging from 1 to 5 years imprisonment, or a judicial fine. The criminal IP courts tend to use their discretion not to imprison defendants, relying on Article 231 of the Criminal Procedural Law, which stipulates that the court can suspend the conviction if the penalty is for imprisonment of less than 2 years or a judicial fine. Although there are requirements for a suspension, e.g., the accused must not be a repeat offender for an intentional crime, courts frequently apply Article 231 to suspend sentences. Further, Article 51 of the Turkish Criminal Code stipulates that any penalty of imprisonment of less than 2 years can be suspended. IIPA urges the courts to rely on these provisions less in order to provide deterrence in Turkey against ongoing infringements and reduce piracy levels, but also recommends an amendment to the Copyright Law to provide for both imprisonment and a fine.

¹⁹In some districts, public prosecutors require search warrants from judges to approve any raid action in anticipation of a criminal case. In those districts, search warrant applications must be made to standard criminal courts (via prosecutor’s offices). The criminal courts in some instances have been reluctant to grant search warrants without substantial evidence, which can only be obtained via the raid, hence, a Catch 22 situation is encountered.

²⁰IIPA members have reported burdensome documentary requirements, such as the demand on U.S. publishers that notarized translations of original contracts between the author and publisher be produced in order to prove copyright ownership for each title, at quite substantial fees. These requirements may hinder the right holder from being able to exercise its rights and thus may collide with Article 15 of the Berne Convention.

²¹In line with the EU Twinning Project’s goals, such changes would bring Turkey’s practice into line with similar practices adopted in the European Union.

²²Over the years, Police and Istanbul Inspection Committee warehouses have become filled with pirate materials. This situation impedes the Police’s willingness to take more actions. This problem has been discussed with representatives of the Ministry of Culture and they leased a bigger warehouse to store pirate materials. In addition, as we reported in the 2010 report, the Director of the Istanbul Inspection Committee has also promised to secure a larger warehouse for storage, so it appears the situation is headed in the right direction. IIPA understands that an amendment concerning the destruction of pirate materials is in the preparatory stages, which would be a helpful development. In a related matter, in some cases, prosecutors, especially outside the major cities, have not accepted large quantities of evidence, resulting in pirate copies and evidence being left behind at raid sites with the accused.

²³The legitimate physical music market has decreased approximately TL75 million (US\$40.7 million) from 2004 to the end of 2010. In part this may be due to an increase in digital sales (estimated to compensate for roughly 10% of the lost revenue); the remainder is due to piracy. One indicator of the shrinking physical market is the decrease in the number of banderoles being requested year-on-year. In 2011, while broadband subscriptions rose to roughly 12.8 million in Turkey, the number of banderoles decreased for the eighth straight year (since industry has been calculating), down from almost 44 million banderoles in 2004, to just about 11.8 million in 2011 (this number is down approximately one million from the 2010 number).

²⁴The Turkish Government’s 2011 Special 301 Report indicates over 24 million “pirated materials” confiscated. See *supra* note 4.

²⁵Shops have in recent years capitalized on Internet connectivity to engage in CD-R burning of content downloaded from the Internet, as well as burning compilations on-demand to CD-Rs. Illegal CD-R copies of music played at tourist hot spots, hotels, bars and clubs are sold “on the spot.” Moreover, most of the source music played in bars and discos derive from illegal copies or Internet downloads.

system (pursuant to Article 81 of the Copyright Law).²⁶ IIPA has noted in past reports some concerns about the integrity of the system,²⁷ but also, the need for an automated system and for industry representatives to be able to participate in the administration of the banderole system. It seems that both these developments are occurring. In the Turkish Government's Special 301 submission in 2011, they reported, "Online inquiry of banderole of books through the 'Banderole Automation System' is being initiated. In this context, mobile modems are allocated to Provincial Inspection Commissions in order to identify the pirated materials online without any loss of time."²⁸ The Government of Turkey indicated in its 2011 Special 301 filing that in 2010, out of more than 3,700 raids, 1.27 million non-banderole CDs and VCDs were seized (a downward trend from previous years), and that more than 1.7 million non-banderole DVDs were seized (an increase from 2009). Seizures of suspected pirated books remained large, at 1.4 million in 2010 (down from 1.9 million pirated books in 2009). These numbers are impressive and they also indicate the continued size and scope of the physical piracy problem in Turkey. Restoring *ex officio* authority to specialized IP units under the Ministry of Internal Affairs, Security General Directorate of the Police (Special IP Police) would complement the Police and Inspection Committee members' current activities under the banderole system.

COPYRIGHT LAW AND RELATED ISSUES

Law No. 5846, Law on Intellectual and Artistic Works 1951 (amended in 1983, 1995, 2001, 2004, 2008)²⁹ provides basic copyright protection in Turkey. The Government of Turkey's 2011 Special 301 Submission does not indicate (as the 2010 report did) that the government is ready to move on draft amendments to Law No. 5846.³⁰ The Ministry of Culture, which is in charge of amending the copyright law, has apparently completed a draft, but this law is not a priority of the Government/Parliament at present. IIPA hopes the process of amending the law will be accelerated in 2012. There are several points which the new law (or related regulations, circulars, etc.) should address in particular, among the following:

- **Fully Implement the WCT and WPPT:** Turkey joined the WCT and WPPT effective November 28, 2008. The law should be amended to fully implement those treaties, including strong and effective protection against circumvention of technological protection measures (both access and copy controls), and prohibitions (with availability of both civil and criminal remedies) on the trafficking (or servicing) in circumvention technologies, devices, or components.

²⁶According to Article 81 of the Copyrights Law, those reproducing, putting into the market, selling, distributing or commercially purchasing or accepting works in violation of the banderole obligations or without any banderoles are criminally liable for up to one to five years imprisonment and a fine of up to five thousand days (with the maximum range being from TL100,000 to TL500,000, according to the Turkish Government).

²⁷Over the years, IIPA has raised concerns about leaks of banderoles, and has questioned whether the system functions well as a deterrent. There have been very few cases against the unauthorized use of banderoles, and all industries have reported at one time or another that some plants have had on hand unnecessarily large quantities of unused banderoles which were not secured adequately.

²⁸In 2009, the Ministry of Culture and Tourism completed the virtual automation system enabling online applications for the registration of banderoles, obtaining banderoles, and certifying them. In the Government of Turkey's 2010 Special 301 Submission, they noted, "software regarding automation system has been received and the background of a common database has been established ... in order to establish an efficient rights chasing system; a system will be launched which would be open to the access of all stakeholders of the intellectual property system and will be using an electronic signature background, and all registration and banderole operations will have to be approved by the relevant collective society."

²⁹Last amended by Law No. 5728 (2008).

³⁰The Turkish Government's 2010 Special 301 Submission indicated, "[t]echnical study regarding the Draft Law Amending Certain Articles of Law No: 5846 have been completed in order to accomplish full harmonization with the EU Acquis. Draft Law will be presented to the opinions of relevant institutions and collective societies in the following period."³⁰ Some IIPA members' industry comments have already been provided to the Government, Industry comments focused on the following issues, among others:

- Private copy levies: Industry has noted that a private copy exception is described in Article 38 but the wording appears to be inconsistent with international treaties due to the fact that it doesn't include the condition of "fair compensation of the right holders" in exchange for availing oneself of the exception. Meanwhile, Article 44 authorises the MOCT to collect fees from reproduction equipment but this amount is not distributed to right holders and is controlled by MOCT.
- Realignment of retransmission rights: Industry has noted that Article 80 is unclear and should be rewritten. Particularly, definitions of retransmission, cable retransmission, and retransmission by satellite should be added to the current law, and legal arrangements should be made which will ensure that all categories of organization dealing with retransmissions, such as cable operators and digital platforms, must be subject to licensing activities.
- The responsibilities of ISPs: Industry notes that the existing law gives ISPs minimum responsibility with respect to copyright infringement, but the Internet Law authorizes prosecutors to act to prevent certain designated illegal activities. Copyright infringement should be designated under that statute.

- **Confirm/Restore *Ex Officio* Authority:** The Government should confirm/restore *ex officio* authority to specialized IP units under the Ministry of Internal Affairs, Security General Directorate of the Police (Special IP Police), e.g., by issuing a formal circular, so they can combat copyright piracy without need of a complaint.
- **Mandate Imprisonment “and” a Judicial Fine as in the Law Prior to the 2008 Amendment:** The Copyright Law should also be amended to provide criminal penalties including imprisonment “and” a judicial fine as is the case in the Trademark Decree and as was the case in the Copyright Law prior to the 2008 amendment.
- **Foster Effective Enforcement Against Online Infringement:** The enactment of Additional Article 4 in 2004, along with Law No. 5651 Regarding Regulation of Publications on Internet and Combating Crimes Committed Through Such Publications (2007), provided what was thought to be a basis for notice and takedown in Turkey. Article 9 of Law No. 5651³¹ provides that persons who claim their rights were infringed may apply to a content or hosting provider for removal of the content, with takedown within 48 hours, but allowing for a judicial review upon a refusal to takedown (this is a weakness since most notice and takedown systems call for automatic takedown upon the filing of a proper notice). However, infringement of intellectual property rights was not explicitly included. IIPA urges the government to amend the laws to provide for liability of ISPs as mentioned in Additional Article 4, and, if necessary, other laws, to foster more active cooperation of ISPs with right holders to prevent the use of networks for the commission of acts of copyright infringement, including but not limited to effective and fair policies regarding possible termination of accounts of repeat infringers. The laws should provide for a mechanism to obtain information on infringing users to effectively address Internet piracy and prevent infringements. IIPA understands there is a study on possible amendments to the Law No. 5651, which do not help significantly in dealing specifically with online copyright infringements; industry has reportedly raised its concerns regarding the amendments.
- **Criminalize Infringement Without Regard to Commercial Intent:** An amendment to the Copyright Law should confirm that copying, distributing, or unlicensed use of all kinds of copyright materials can be considered a crime regardless of commercial purpose.
- **Reinstate Manager/Shareholder Liability:** The provision in the old Copyright Law prior to its amendment in 2008 should be reinstated, such that liability can attach to company managers and shareholders who do not take necessary precautions to prevent infringement.
- **Ensure Exclusive Rights in Sound Recordings Are Not Abused:** Currently in Turkey, those employing sound recordings, e.g., for broadcasts, abuse the system by refusing to pay for sound recordings at all or paying only nominal sums and refusing to negotiate in good faith. This problem is made worse by court precedents treating a sound recording producer’s exclusive broadcast right as if it was a remuneration right, i.e., not enabling the right holder to exercise its exclusive right by prohibiting use. Especially when dealing with a CMO, it is extremely important that right holders enjoy safeguards to proceeds, for example, users should have an obligation to pay to the CMO either the undisputed amount or a reasonable interim rate set by the court, with the difference paid into escrow pending the dispute resolution/court decision.³²

Private Copy Levy System: Since Turkey has chosen to implement a private copy levy, it is imperative that the levies are in fact collected and fairly distributed to right holders. Unfortunately, despite current regulations concerning the usage of levies in Article 44 of the Law, right holders do not receive any of the levies collected. Instead, the Ministry of Culture and Tourism collects and keeps the fees paid for recording equipment and blank

³¹Regulation of Publications on the Internet and Suppression of Crimes Committed, Law No. 5651 (which provides a takedown mechanism that can act as guidance for the copyright context).

³²This solution is used e.g., in the German Copyright Management Law, s.11, paragraph 2.

media.³³ Moreover, MOCT has been inefficient at best at levy collection. The recording industry estimates on the basis of import statistics from the Turkish Statistics Institute that well over US\$20 million could have been collected on this basis. The amounts that are collected are not used for anti-piracy purposes or in ways helpful to right holders. The system in Turkey should be changed as a matter of priority and in a way to make it compatible with international conventions and EU Directives. IIPA understands that the EU experts in the EU accession consultation process have determined that MOCT must provide the private levies to right holders, but this still has not occurred. IIPA also understands that the Turkish Government has just passed a new regulation on this topic, but it unfortunately failed to address the distribution of levies to right holders. This is highly unfortunate.

Collective Management Organizations (CMOs) Should Permit Foreign Right Holder Participation, Provide for Transparency, Fair Treatment, No Formalities: There are several critical problems in the current Collective Management Organization (CMO) Regulations. First, Article 10 contains membership criteria, including the requirement that the individual or entity have an “establishment” in Turkey and local “production” (evidenced by registration with MOCT) in order to become a Full Member of a CMO. This provision discriminates against U.S. and other foreign right holders on the basis of establishment. Second, current practice suggests a lack of transparency in the administration of rights and a lack of fairness in the process, particularly as to foreign right holders. Finally, the requirement to register repertoire potentially creates a formality inconsistent with Turkey’s international obligations under the Berne Convention and the TRIPS Agreement. The laws should also be amended to provide the representatives of the appropriate collecting society with authority to collect evidence regarding infringement.

Business Software Legalization Circular Not Being Enforced: IIPA welcomed the Government of Turkey’s issuance of the Prime Ministry’s Circular No.2008/17 which was published in July 2008, ordering that government agencies should legalize their software use. Unfortunately, the government has not widely implemented the Circular. Public sector administrators should train users to avoid the use of unlicensed software. Some IT managers of public sector agencies complain that although they are required under the Circular to legalize software usage, they have not been allocated sufficient budgets to ensure that all software is licensed. The State Planning Organization (DPT) and Ministry of Finance must allocate sufficient budgets for such. By implementing the Circular, the Turkish Government can set a powerful example for businesses and consumers in Turkey.

Regulation on “Certification of Businesses” Includes Some Key Components of Good Optical Disc Regulation: The Ministry of Culture and Tourism (MOCT) issued the “Regulation on the Certification of Businesses Undertaking the Distribution or the Recording, Reproduction and Sale of Materials on which Intellectual Property and Works of Art Are Fixed” (April 18, 2005), requiring facilities involved in recording (including optical discs), exhibiting, and distributing copyright works to receive certificates from the MOCT. These regulations provide some essential elements of effective optical disc regulation.³⁴ Unfortunately, the Regulation suffers from two major weaknesses: 1) the certification authority is overly broad, veering into legitimate businesses with legitimate business models (in sectors where the risk of piracy is low), and which in the Internet environment will be burdened by the certification requirement while those engaged in online piracy will ignore it;³⁵ and 2) while the Regulation calls for “administrative

³³The current system is organized pursuant to the Ministry of Culture and Tourism “Regulation on Principles and Procedures of the Use of Deductions Made From the Prices of Carrying Materials Containing Intellectual and Artistic Works and of Technical Devices Used for Reproduction of Such Works” (April 13, 2006).

³⁴The positive elements of this Regulation have been noted in previous IIPA reports, e.g., International Intellectual Property Alliance, *Turkey*, at <http://www.iipa.com/rbc/2009/2009SPEC301TURKEY.pdf>.

³⁵The Regulation covers “[m]ovie theatres and similar places undertaking public display and transmission of cinematographic films,” “[p]remises ... importing, distributing or selling empty fixing materials,” “[p]remises undertaking sale, distribution, importation and marketing of intellectual property and works of art and fixing materials concerning productions entailing intellectual property and works of art through any means and techniques including digital transmission and those that rent these out,” and companies engaging in Internet distribution. This broad certification authority undercuts the purpose of the legislation, since legitimate businesses will be burdened while illegal businesses will never come forward to be certified. This has already proved to be the case, since back in 2005, MOCT could not get all the optical disc plants to register.

finer” for operating without certification, in the case of optical disc factories, it is feared this remedy is not enough to deter them from going underground.³⁶

(Radio and Television Supreme Council of Turkey)³⁷ Failure to Enforce Licensing As Pre-Condition to Broadcast: The Radio and Television Supreme Council of Turkey has not taken necessary steps to fulfill its obligations under Law No. 3984, which stipulates that conclusion of licenses with right holders is a pre-condition to engaging in broadcasting activities. RTÜK has not enforced against broadcasters who broadcast without a license.³⁸ Under the Law, the failure to sign licensing agreements with collecting societies should be subject to administrative fines from TL125,000 (US\$82,000) up to TL250,000 (US\$164,000) and closure of the radio or TV station. Further, in respect of other royalty payments due, the independent film and television industry sector (IFTA) reports that they are not receiving any royalties due to them pursuant to Article 43 of the Copyright Law.

TRAINING AND PUBLIC AWARENESS

Prior years’ IIPA reports have detailed descriptions of IIPA members’ involvement in training and public awareness activities in Turkey. In the Government of Turkey’s 2011 Special 301 Submission, they reported many training and capacity building activities, both domestic programs and those involving international organizations or foreign governments.³⁹ In 2011, IIPA members also continued offering training programs for judges, public prosecutors and police, and frequently work together with competent authorities through organizing law enforcement operations, attending seminars, sponsoring awareness activities, etc. The Business Software Alliance (BSA) together with BIYESAM (local software owners association) and several other associations and NGOs joined an initiative called the “National Software Movement.” Further, BSA Turkey also cooperated with Turkish Police to place public awareness ads in metro stations. The local recording industry group organized seminars for its affiliates about Internet protection and enforcement.

GENERALIZED SYSTEM OF PREFERENCES (GSP)

The GSP program, designed to promote economic growth in the developing world by providing preferential duty-free entry for products from designated beneficiary countries and territories, expired on December 31, 2010, but on October 21, 2011, President Obama signed legislation to reauthorize the program through July 31, 2013. GSP trade benefits became effective 15 days after the President signed the bill (November 5, 2011) and apply retroactively from January 1, 2011. Turkey has been a beneficiary of the GSP program. During the first eleven

³⁶The remedies for operating an optical disc plant without certification should include seizure and forfeiture of all equipment and goods found in such a plant, closure of the plant, and criminal liability including deterrent fines and imprisonment, including individual liability to pierce the veil of the company engaging in production without a certificate.

³⁷The 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.

³⁸The amendment in Article 37 of the Law on Radio and Televisions No 3984 provides that broadcasting organizations shall sign agreements so as to get an authorization from right holders or their Collecting Societies of which they are members, within the framework of the Law on Intellectual and Artistic Works No. 5846, and to pay royalties.

³⁹The Twinning Project’s 2009 program, “*Support to Turkish Police in Enforcement of Intellectual and Industrial Property Rights*” (TR.06.03.08-TR06IBJH05)” was reportedly conducted in order to “strengthen the administrative and technical capacity of the Turkish National Police in the enforcement of intellectual and industrial property rights and improve cooperation with other enforcement bodies and right holder associations, in line with European Union legislation and practices.” The institutions involved in the Project included the Turkish National Police (State Security Department, Anti-Smuggling and Organized Crime Department and Criminal Police Laboratory Department), the Ministry of Justice (General Directorate of the European Union), the Ministry of Culture and Tourism (General Directorate of Copyright and Cinematographic Works), Undersecretariat of Customs (General Directorate of Customs) and the Turkish Patent Institute. The Project included twenty activities and involved 702 participants. Included among the components of the program were “Strengthening the capability of the police in the fight against piracy and counterfeiting (including Assessment of current awareness and capacity improvement needs on IPR of different provincial police units, judiciary and selection of adequate trainees.” Also included were “train the trainer” programs and “specialist training seminars” involving police chiefs, judges, prosecutors, Customs officials, police from the “Provincial Directorates State Security Divisions,” and police from “IPR Offices of Adana, Ankara, Bursa, Diyarbakir, Izmir and Istanbul Provincial Directorates,” and six training seminars for Police through an “Intellectual Property Crimes Specialist Training” program for 193 police officers from 81 Provinces.

months of 2011, more than US\$815.8 million in imports to the U.S. from Turkey enjoyed duty-free treatment under the GSP Program, or more than 17.0% of Turkey's entire imports into the U.S.⁴⁰ Among the criteria the President must take into account in determining whether a country should continue to be designated as a GSP beneficiary country are "the extent to which such country is providing adequate and effective protection of intellectual property rights," and "the extent to which such country has assured the United States that it will provide equitable and reasonable access to the markets ... of such country." 19 USC 2462(c)(4) and (5). It is essential to the continued growth and future competitiveness of these industries that our trading partners, including Turkey, provide free and open markets and high levels of protection to the copyrights on which this trade depends. Turkey must live up to its end of the bargain by providing adequate and effective protection for intellectual property rights of U.S. creators, and equitable and reasonable market access to U.S. creative products and services.

⁴⁰During 2010, more than US\$792.9 million in imports to the U.S. from Turkey enjoyed duty-free treatment under the GSP Program, or almost 19% of Turkey's entire imports into the U.S.

VIETNAM

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2012 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: Vietnam should remain on the Watch List.¹

Executive Summary: IIPA had hoped that the 2005 passage of the IP Code in Vietnam, revisions to the Criminal Code in 2009, an administrative enforcement Decree (No. 47) also in 2009, and a nationwide judicial reform process would lead to steady improvements in copyright protection, allowing a legitimate creative marketplace to emerge in Vietnam. Unfortunately, online and mobile piracy has gotten significantly worse in Vietnam, and end-user piracy of business software remains largely unchecked, among other piracy problems. Increased Internet and mobile penetration and more widely available broadband capacity have led to a severe increase in the trade of illegal copyright files online. Technological advances in Vietnam have outpaced the government's response to copyright issues, notwithstanding that the Vietnamese have long recognized that piracy in the country is increasingly "sophisticated" and involves violations of "[m]ost of the objects of the rights."² The Vietnamese Government has taken very few enforcement actions over the years, and no criminal case has ever been brought to address copyright piracy. The current Criminal Code remains in violation of Vietnam's commitments under the Bilateral Trade Agreement (2001) (BTA), and a new Decree (issued without any public consultation period or other form of transparency with the U.S. Government or industry, to our knowledge) casts further doubts on whether the IP Code is in full compliance with Vietnam's obligations under the BTA with the United States and the TRIPS Agreement. The Vietnamese Government refuses to engage with right holders, and apparently with the U.S. Government, regarding onerous market access restrictions. Vietnam, which has benefitted enormously from bilateral trade with the United States and continues to grow economically, must now hold up its part of the bargain to address copyright piracy and related concerns.

PRIORITY ACTIONS REQUESTED IN 2012

Enforcement

- Devote greater resources and Ministry of Culture, Sports and Tourism (MCST) Inspectorate and Economic Police manpower to running raids and bringing cases under the Criminal Code through targeted criminal actions, e.g., against online piracy, end-user piracy of business software, retail and source piracy, CD-R burning labs, reprinting/photocopying facilities, etc.
- Take effective enforcement measures against notorious infringing sites whose business models are based on providing access to infringing content, including in particular those sites identified in this report (e.g., *Bamboo.com*; *Socbay.com*; *Tamtay.cn*; *Zing.vn*, etc.).
- Enforce Ordinance No. 4 and Decree No. 47 on administrative remedies for copyright infringement, imposing maximum penalties.
- Reduce pirated imports from China.
- Reduce signal theft by removing illegal content from local cable operators and stopping retransmission of signals from neighboring countries without license.

Legislation and Market Access

- Issue implementing guidance for the revised Criminal Code so that prosecutions can commence, in line with Vietnam's BTA obligation, including by i) confirming that the Code applies to online distributions, and ii) providing detailed interpretations of "commercial scale" infringements that include those undertaken without a profit motive.

¹For more details on Vietnam's Special 301 history, see Additional Appendix available at <http://www.iipa.com/pdf/2012SPEC301HISTORICALSUMMARY.pdf>. Please also see previous years' reports at <http://www.iipa.com/countryreports.html>.

²Copyright Office of Vietnam, *Overview of Copyright in 2008*, January 19, 2009, at <http://www.cov.gov.vn/English/viewNew.asp?newId=217&rd=20090202or146>.



- Make necessary changes to IP Code and implementing decrees to ensure Vietnam is in full compliance with its BTA and other international obligations, and otherwise facilitate the free exercise of rights by copyright owners.
- Expedite the drafting process for, and provide public consultation as to, amendments to the Internet Decree (or circular) on ISP liability that clarifies the secondary liability of ISPs for copyright infringement, avoids blanket immunities for intermediaries, and requires ISPs to take responsibility and cooperate with right holders to combat online infringements both in the hosted and the non-hosted environment.
- Afford U.S. right holders greater access to the Vietnamese market, by eliminating foreign investment restrictions and other entry barriers with respect to production, importation and distribution of copyright materials whether in the physical or online/mobile marketplaces.
- Join the WIPO Copyright Treaty (WCT) and WIPO Performances and Phonograms Treaty (WPPT).
- Extend the term of protection for sound recordings to the BTA-compatible term (75 years or more) and otherwise extend copyright term in line with the international trend (life of the author plus 70 years).
- Pass optical disc licensing regulation.

PIRACY AND ENFORCEMENT CHALLENGES AND UPDATES IN VIETNAM

Internet and Mobile Piracy Causing Severe Damage to Copyright Owners: Internet penetration continued on an upward path, with 30.5 million Internet users (35% of the population) as of November 2011.³ The vast majority of websites dealing in copyright content remain unlicensed, although there are now a few operators of online services providing licensed music. The rest are streaming, deeplinking, cyberlocker, forum, video, and social network sites all being employed to deliver unlicensed copyright content, including music, movies, entertainment and business software, and published materials. Some are Vietnam-based/hosted sites, and since both international and other Asian repertoire such as Chinese, Japanese and Korean music can be found on these sites, it appears the online music piracy problem in Vietnam is now impacting overseas markets. There is clearly a strong demand in Vietnam for copyright content with little regard to its legality, as recent survey results show.⁴ Vietnam ranks seventh in Asia in the total number of Internet users, well ahead of Thailand and Malaysia, just behind the Philippines, and catching up quickly with the relatively well-developed Internet market in Korea.⁵ Broadband usage expanded rapidly in 2010, up to 4 million broadband subscribers or roughly 5% of the total population.

Meanwhile, mobile penetration continued to skyrocket in Vietnam in 2011, with an estimated 157.8 million mobile subscriptions as of April 2011,⁶ almost doubling the 100% mobile penetration rate which was surpassed in 2009. The most significant statistic related to mobile, however, is the number of 3G network users, which was up to 12.8 million users by the third quarter of 2011, according to the Ministry of Information and Communications.⁷ With rapid increase in mobile phone subscribers in Vietnam, operators of unauthorized online music services have extended their services to mobile applications, and like the illegal online services, the majority of IT and telecommunications companies prefer to maximize their profits and turn a blind eye to the need to license copyright content.

³*Notice of Internet Data Development Vietnam Report on Internet Statistics of Vietnam*, November 2011, at <http://www.thongkeinternet.vn/isp/trangchu/index.jsp> (in Vietnamese).

⁴According to the author of a 2011 Internet usage survey conducted by Cimigo, "Vietnamese people especially like to listen to music and watch movies online. We measured a constant increase in such entertainment activities over the past few years. At the same time, there is an increasing number of websites offering such services." According to the study, about 80% of internet users listen to music online, and two-thirds download music from the internet. Half of internet users watch movies online. *2011 Vietnam NetCitizens Report: Internet Usage and Development in Vietnam, April 2011*, available at <http://www.cimigo.vn/en-US/WhatsNew/2010-01/cimigo-releases-report-about-internet-usage-in-vietnam-netcitizens-report-2011.aspx>.

⁵See *Asia Internet Usage and Population*, Internet World Stats, at <http://www.internetworldstats.com/stats3.htm>.

⁶ *Vietnam Subscriber Base Touches 174.3m as at the End of April*, VnEconomy, Vietnam Business News, accessed January 28, 2012, at <http://vietnambusiness.asia/vietnam-subscriber-base-touches-174-3m-as-at-the-end-of-april/>.

⁷ *VNPT Claims 50 Million Mobile Subscribers*, Viet Nam News, January 21, 2012, at <http://vietnamnews.vnagency.com.vn/Economy/219976/vnpt-claims-50-million-mobile-subscribers.html>.

The list of notorious Internet piracy services is vast and growing;⁸ this problem must be dealt with by the Vietnamese Government with urgency. Notorious websites include *Baamboo.com*, *Tamtay.cn*, *Socbay.com*, and *xalo.vn* (piracy-oriented search indexes);⁹ forum sites like *kenh14.vn*, *yeuamnhac.com*, *hihihehe.com*, *1280.com*, *loitraitim.com*;¹⁰ streaming sites (offering unauthorized video and audio content) like *musik.soha.vn*, *nghenhac.info*, *VietGiaiTri.Com.Vn*, *Nhac.vui.vn*, *Yeucahat.com*, and *Music.dinhcao.vn*; peer-to-peer (P2P) services specializing in pirate copyright content like *up.4share.vn*; cyberlockers used for piracy like *azsharing.com*. University networks are increasingly being used for dissemination of infringing content

Zing.vn is one notorious website which was identified by IIPA in its annual notorious markets filing with the U.S. Trade Representative, and USTR placed *Zing.vn* on its “Notorious Markets” list.¹¹ *Zing.vn* is an online portal service operated by VNG Corporation (previously called VinaGame) in Vietnam. *Zing.vn* provides various services including an online music portal, social networking, a search engine, instant messaging, movies, karaoke, video and photos. The user traffic of *Zing.vn* has increased significantly. According to Alexa, *Zing.vn* is ranked fourth in Vietnam in popularity. Globally, *Zing.vn* is ranked number 444 in terms of internet traffic. The *Zing MP3* music service was launched on August 1, 2007. It provides an unlicensed music service similar to Sohu/Sogou’s (China) MP3 music deeplinking service. *Zing MP3* actively encourages and induces users to listen to infringing music online (streaming) and download infringing music files hosted on a fixed server (although it is unclear whether the file server belongs to *Zing MP3*). The service also embeds the music player into forums or blog sites for Vietnamese, Chinese and international repertoire for streaming and/or download of infringing music files. Users are encouraged to stream and download infringing music files via the music search function or the music charts (e.g., “Hot Vietnamese Music,” “Hot European and American Music,” “Hot Korean Music,” “Hot Japanese Music,” “Love Songs,” “Movie Clips,” “Zing Collection,” etc.), which are designed by *Zing MP3 (mp3.zing.vn)* to facilitate mass-scale copyright infringement. In addition, the *Zing MP3* service is currently available on multiple platforms, including music portal sites, WAP (mobile phones), and other mobile phone applications. *ZingMP3* iPad application was listed in the top two mobile music applications in Vietnam as of February 2012.¹² Since January 2008, cease and desist notices have been sent to *Zing.vn* but the right holders’ notices have been largely ignored and the take down rate has been less than 1%. Administrative complaints against *Zing.vn* were filed with MCST and the Copyright Office of Vietnam in March 2010 and again in October 2011. No enforcement actions have been taken against the unauthorized operator and a large quantity of music files infringing U.S. (and foreign) record producers’ rights are still available on the multiple platforms operated by *Zing.vn*. The Vietnamese Government has not come forward with any explanation as to why no enforcement action has been taken.

Like *Zing.vn*’s parent company, VNG Corporation, virtually all of the companies operating websites or services predicated on infringement do it for one reason only – to maximize profits. The chief forms of revenue for search-based websites or deeplinking sites may be advertising (and many well-known brand names still advertise on many of the sites listed), but more often in recent years, the business models of many Vietnamese sites mirror those from other countries in which massive revenues can be generated from membership schemes or reward schemes. The cyberlocker services noted above are examples of this kind of business model, and one of the most notorious, *MegaUpload* (with headquarters located in New Zealand) was just subject to a criminal indictment in the United States for facilitating massive amounts of infringement.¹³

⁸The independent film and television segment of the motion picture industry (IFTA) reports that online and physical piracy remains a significant export constraint for independent producers and distributors, the majority of which are small to medium sized businesses. Independent producers partner with local authorized distributors to finance and distribute their films and programming. Unable to compete with free, legitimate distributors are unable to commit to distribution agreements or offer drastically lower license fees which are inadequate to assist in financing of independent productions. Piracy is undermining and may permanently damage legitimate distribution networks essential to reaching the consumer and leaves little confidence for investment in intellectual property.

⁹Industry indicates that both *bamboo.com* and *xalo.vn* have diversified their services to include video and an mp3 search engine.

¹⁰Informal networks and forums used particularly by students but also by other Internet providers are increasingly used for dissemination of infringing content.

¹¹See International Intellectual Property Alliance, *IIPA Written Submission Re: 2011 Special 301 Out-of-Cycle Review of Notorious Markets: Request for Public Comments*, 76 Fed. Reg. 58854 (September 22, 2011), Docket No. USTR-2011-0012, October 26, 2011, at http://www.iipa.com/pdf/2011_Oct26_IIPA_Notorious_Markets_Submission.PDF; United States Trade Representative, *Out-of-Cycle Review of Notorious Markets*, December 20, 2011, at http://www.ustr.gov/webfm_send/3215.

¹²*App Annie*, *Top Charts-iPad-Music-Vietnam*, February 4, 2012, at <http://www.appannie.com/top/ipad/vietnam/music/>.

¹³*MegaUpload* allegedly ran a file-sharing service whereby it sold premium memberships to users in order to induce them to upload and make available millions of infringing files. The indicted owners amassed huge profits from this activity, all predicated on users massively infringing copyright.

There has also been an increase in “mobile” piracy over the year. Right holders now face two major challenges in the mobile space: 1) the loading by mobile device vendors of illegal copyright content onto devices at the point of sale; and 2) illegal music channels or “apps” set up to be accessed on mobile platforms, without any intervention from the authorities to cease such activities. As an example of this phenomenon, sites like *Socbay.com* offer illegal downloads of ringtones to mobile phones, but *Socbay* has now developed a mobile “app” called *Socbay iMedia* which provides a variety of unauthorized entertainment content, including, *inter alia*, music files. This second phenomenon will, if allowed unchecked, threaten the entire online/mobile market for music and other copyright materials into the future and must be addressed.

Despite notifying the Vietnamese Government of sites involved in piracy of music, movies, software, games, and published works (with reports of growing electronic piracy of textbooks and dictionaries, among other published products),¹⁴ the government has been mainly inactive and disinterested. On top of the lack of Vietnamese Government intervention (or perhaps because of it), cooperation from ISPs and content providers found to be involved in copyright infringement is extremely poor, with takedown rates reportedly being less than 9%. Both *zing.vn* and the second most popular site for infringing music, *nhaccuatui.com*, have been brought to the attention of administrative authorities in Vietnam, but there has been no response. The problem is further compounded by existing administrative enforcement remedies being rendered ineffective by: 1) the lack of an effective procedure to deal with online piracy administrative complaints; 2) a heavy burden on right holders for production of evidence and proof of actual damages (as opposed to regarding advertising revenues and other commercial advantage as sufficient proof of damage); 3) continued rudimentary issues related to MCST knowledge of and ability to identify and effectively deal with online infringement cases; and 4) lack of compliance with administrative orders, since some infringing websites do not comply with Orders issued by MCST, and some websites merely remove infringing “URLs” without ceasing the infringing operation.

End-User Piracy of Business Software Harms the Software Industry and Stunts the Growth of the IT Sector: The rampant use of unlicensed software in the workplace by businesses continues to cause the greatest revenue losses to the software industry, thereby stunting the growth of the IT sector. Retail piracy and hard disc loading continue to cause losses as well. Apart from a handful of *ex officio* actions undertaken by provincial enforcement authorities (e.g., Son La Provincial Market Management Bureau) against distributors of pirated software, most leading cities, such as Hanoi, Ho Chi Minh City, Đà Nẵng, and Hải Phòng are key software piracy hotspots. While efforts by the Copyright Office of Vietnam to partner with the private sector on IP education and training are laudable, the enterprise end-user software piracy rate in Vietnam remains high.¹⁵ A 2010 study done by the International Data Corporation (IDC) with the Business Software Alliance (BSA) concluded that decreasing Vietnam’s software piracy rate by ten percent over a four year period would add US\$1.17 billion to Vietnam’s economy, create 2,100 new high-wage high tech jobs and generate an additional \$60 million in tax revenue.

In 2011, the business software industry continued to experience good cooperative efforts with the Vietnamese Government to legalize enterprise software use. In all, at least 15 raids against end-users were conducted on behalf of BSA member companies, and two more are in the process of investigation for possible raiding. The Economic Police and Customs both carried out *ex officio* raids. While the Economic Police worked well in teams with the MCST Inspectorate during the enforcement actions, no criminal cases were brought based on these (or any prior) raids, although a civil case is still being considered. This leaves only the administrative system to

¹⁴In addition to the sites listed in this filing, MCST and COV have been informed of the following websites: *1280.com*, *7Sac.com*, *bbs.orzko.com*, *clip.vn*, *galaxy.net*, *Gate.vn*, *giaitri24.vn*, *giaitriamnhac.info*, *hihihehe.com*, *karaoke.com.vn*, *kenh14.vn*, *livevn.com*, *loitraitim.com*, *nhac.vui.vn*, *nhaccuatui.com*, *noi.vn*, *onlinemtv.net*, *rap.vn*, *timnhanh.com*, *Top1.vn*, *truongton.net*, *vast.net.vn*, *VietGiaiTri.Com.Vn*, *Yeah1.com*, *Yeumnhac.com*, and *yeucahat.com*.

¹⁵BSA’s 2011 software piracy statistics will not be available until after the filing deadline for this submission, but will be released in May 2012, at which time piracy rates and U.S. software publishers’ share of commercial value of pirated software will be available at www.iipa.com. In 2010, the software piracy rate in Vietnam was 83% (one of the highest in the world), representing a commercial value of unlicensed software attributable to U.S. vendors of US\$247 million. These statistics follow the methodology compiled in the Eighth Annual BSA and IDC Global Software Piracy Study (May 2011), <http://portal.bsa.org/globalpiracy2010/index.html>. These figures cover packaged PC software, including operating systems, business applications, and consumer applications such as PC gaming, personal finance, and reference software – including freeware and open source software. They do not cover software that runs on servers or mainframes, or routine device drivers and free downloadable utilities such as screen savers. The methodology used to calculate this and other piracy numbers are described in IIPA’s 2012 Special 301 submission at <http://www.iipa.com/pdf/2012spec301methodology.pdf>.

deter piracy, and unfortunately, while quicker, cheaper and more effective to carry out, the result is non-deterrent fines, in amounts below the cost of having purchased legal software. It is reported that low fines result from reluctance to consider the legitimate value of the products infringed rather than the “pirate value.” The authorities seem to consider legalization the key issue, not compensation for the damage suffered by right holders or the TRIPS principle of deterring further infringements. A 2008 Memorandum of Agreement has been effective in fostering good working relations between industry and government enforcement authorities through the Partnership in Protection of Software Copyright program.¹⁶ Still, while enforcement officers show a strong interest in learning about copyright, improving their inspection skills, and applying what they have learned in practice, this interest has not translated into increased deterrence through greater numbers of actions, criminal prosecutions, or deterrent administrative enforcement.

Physical Piracy Remains Rampant, Including Pirate Imports, Pirate Burned Content, and Factory Production: Evidence of physical piracy can still be found everywhere in Vietnam, especially in urban areas, including major piracy hubs like Hanoi, Ho Chi Minh City, Đà Nẵng, Hải Phòng, and Vietnamese-Chinese border cities Lang Son and Mong Cai. It remains very easy to buy almost any kind of software at shops on the so-called “PC streets” or other “CD-DVD” shops.¹⁷ Piracy storefronts are more than happy to supply any content on recordable discs, complete with hacking or cracking instructions for those products embedded with technological protection measures (access controls or copy controls). Vietnamese law outlaws the circumvention of such TPMs as well as the trafficking in circumvention tools, and thus it is critical that the laws be implemented to halt these practices. Vietnamese-sourced pirate products flood the domestic markets and have been found in other markets in recent years in Asia, North America, and even Eastern Europe. For the music industry, with piracy levels still extremely high, financial returns for recorded music sales have dropped so deeply that the companies involved are unable to invest in new albums and artists, choosing to recoup investment through ring tones, ring-back tones, ancillary revenues for personality rights, and music channel licensing.

Though MCST has been supportive in recognizing the problem, they have devoted very few resources to deal with physical piracy across Vietnam. With the development of the Internet, some physical piracy has begun to migrate to smaller provinces like Khánh Hòa, Đồng Nai, Bình Dương and Hưng Yên where Internet connectivity is less developed.¹⁸ Only a ‘zero tolerance’ campaign, including *ex officio* actions against open and blatant piracy activities of all kinds, with deterrent administrative fines meted out to their maximums, license revocations, shop closures, seizures of pirate imports and pirated product destined for export by Customs, and criminal penalties can result in a significant reduction in piracy in Vietnam.

Book and Journal Piracy Severely Harms Publishers: Book and journal publishers continue to suffer from rampant piracy in Vietnam, in the form of illegal reprints and unauthorized photocopies. Bookshops, roadside vendors and copy shops all sell unauthorized copies of bestselling trade books, travel books and academic textbooks, and unlicensed print overruns continue to plague foreign publishers. Unauthorized translations are another problem, often being produced by university lecturers or professors, who append their name to the translated textbook with no acknowledgment that the work is not of their own authorship.¹⁹ The English language teaching market continues to be hard hit, with much of the market (private-sector education and universities) being supplied by unauthorized reprints and adaptations. State-sector publishers also have an interest in making sure their licenses (such as those of the Ministry of Youth and the General Publishing House of Ho Chi Minh City) are not misused. In 2009, law

¹⁶In August 2008, a Memorandum of Agreement was signed establishing the “Partnership in Protection of Software Copyright” between BSA, the Vietnam Software Association, the Inspectorate of the Ministry of Culture, Sports & Tourism (MCST), and the Copyright Office of Vietnam.

¹⁷Pirate optical discs in the market come in three varieties: imports, mainly from China; locally produced “burning” onto recordable discs; and factory-produced discs. The majority of pirate VCDs and DVDs of movies are now imported from China. Authorities in Vietnam have previously reported eight optical disc plants operating in Vietnam today, with the capacity to produce well above any rational legitimate domestic demand.

¹⁸A reported seizure in Ho Chi Minh City on January 6, 2010 of “300,000 discs of all kinds that could be considered pirated” from a plant supposed to be producing blank discs highlights the continued struggle in Vietnam against piracy. *Vietnam Police Say Pirated Discs Seized*, Agence France Presse, January 7, 2010, at <http://www.france24.com/en/20100107-vietnam-police-say-pirateddiscs-seized>.

¹⁹*Uni Faculty Members Accused of Plagiarism*, <http://english.vietnamnet.vn/education/201005/Uni-faculty-members-accused-of-plagiarism-910815/>

enforcement authorities raided the premises of a printer/bookstore owner engaged in unauthorized reprinting of ELT materials. Though a fine was imposed, it apparently remains uncollected.²⁰

Signal Piracy/Pay TV Piracy: Vietnam's Pay-TV sector is one of the fastest developing markets in the Asia Pacific, and is set to rank fourth in the region in growth over the next four years.²¹ With 4.2 million overall connections as of May 2010, and digital systems taking hold (including through Vietnamese Government infusion of capital), signal piracy in Vietnam still holds back the legitimate Pay-TV market,²² and causes major damages to right holders.²³ Urban cable systems are prone to “line tapping” and signal theft by individual consumers, including the unauthorized reception and redistribution of foreign satellite channels using illegal decoders. Cable companies continue engaging in “under-declaration” by which they fail to pay for the full number of customers to whom they provide programming, and also use unlicensed content (including unauthorized broadcasts of DVDs directly over their channels). “Overspill” is also a problem in Vietnam as cable operators capture signals from neighboring countries’ satellite systems. These are endemic problems which the government should address. A relatively new and dangerous problem in Vietnam involves the operation of websites which steal Pay-TV signals and stream them onto the Internet. Several sites have been identified as streaming premium content channels without authorization, mainly focusing on motion pictures or sports content. On top of this increase in lost revenues, there are lost opportunities due to restrictions placed by the Vietnamese Government on the number of international channels. Even with the current hundreds of TV channels of all kinds in Vietnam, foreign right holders are being denied access to the Vietnamese market.

Court Reform Efforts Lacking: The inactivity of the courts in dealing with copyright infringement issues is a major disappointment. To IIPA’s knowledge, no criminal copyright infringement case has ever been brought to the courts in Vietnam. While inter-governmental discussions have been held on judicial reform, there seems to be great reluctance in Vietnam to apply criminal remedies to even the most egregious cases involving copyright infringement. There have to date been relatively few civil court actions involving copyright infringement in Vietnam. The main reasons for this are complicated procedures, delays, and a lack of certainty as to the expected outcome. Building IP expertise must be a part of the overall judicial reform effort. Training should be provided to police and prosecutors as they play a very important role in bringing a criminal offense case to the courts.

COPYRIGHT LAW AND RELATED ISSUES

Criminal Code Violates Vietnam’s BTA Obligations; Implementing Circular Should Ensure Full Compatibility with BTA: Vietnam’s revisions to the Criminal Code in 2009 included a new Article 170a criminalizing “commercial scale” acts of “[c]opying of works, audio recordings and visual recordings” or “[d]istributing the copies of work, audio or video recording.” Article 170a improved Vietnam’s statutory framework in two respects: 1) the phrase “and for commercial purposes” was removed from the Criminal Code, so the standard for criminal liability is now “on a commercial scale”; and 2) fines are increased to a range from US\$3,000 minimum to US\$30,000 maximum, and for crimes committed in “an organized manner” or for recidivism, fines are increased to a range from US\$22,000 minimum to US\$57,000 maximum.

²⁰There were two raids run against these premises, in December 2009 and March 2010, resulting in seizures of 38,764 pirated books. A fine of VND 500 million (US\$25,700) was imposed but has yet to be collected.

²¹Louise Duffy, *Vietnam Pay-TV Market Set to Take Off*, Rapid TV News, December 23, 2011 (indicating Vietnam will be the fourth fastest-growing market for Pay TV services through 2016, according to industry market research).

²²Cable and Satellite Broadcasters Association of Asia (CASBAA), *CASBAA Release - Vietnam Pay-TV in Bloom*, May 7, 2011, at <http://www.casbaa.com/media-and-resources/news-center/casbaa-news/casbaa-news-archive/55-casbaa-release-vietnam-pay-tv-in-bloom>. It has been reported in recent years that signal piracy extends as far as Vietnam Television Corporation (VTC), operated by the Ministry of Posts and Telecommunications, which has broadcasted foreign content without a license to do so.

²³According to the Cable and Satellite Broadcasters Association of Asia (CASBAA), the cost of pay-TV piracy in Vietnam increased 20% to almost US\$18 million in 2010, attributable to more than 1.1 million illegal connections at the time (307,000 illegal individual connections or overspill, and 825,000 under-declarations or illegal distributions).

Unfortunately, overall, Article 170a is weaker than the provision in force up until its adoption, the February 2008 Criminal Circular. That 2008 Circular criminalized all acts of “infringement” by referring to Articles 28 and 35 of the IP Code, including all acts of infringement defined therein, as well as violations involving circumvention of technological protection measures (TPMs), decryption of encrypted satellite signals, and other acts. Implementing legislation should once again confirm coverage of acts of infringement or other violations enumerated in the IP Code, which would confirm that Vietnam does not violate its commitments under the BTA with the United States.²⁴ In the BTA, Vietnam agreed, in Chapter II, Article 14, to criminalize all “infringement of copyright or neighboring rights on a commercial scale.” The BTA also expressly calls for criminalization of the trafficking in a device or system used for “the unauthorized decoding of an encrypted program-carrying satellite signal” or “the willful receipt or further distribution of an encrypted program-carrying satellite signal that has been decoded without the authorization of the lawful distributor of the signal,” so it must also be confirmed in implementing regulations that the revised Criminal Code covers this act as well, or the Government of Vietnam must separately demonstrate that such acts are criminalized elsewhere in the Code (otherwise this lack of coverage would place Vietnam in violation of Chapter II, Article 5 of the BTA). The U.S. should commence immediate consultations in conjunction with Chapter VII, Article 5 of the BTA, to resolve these express violations of the terms of the BTA, recognizing that resolution is also connected to Vietnam’s successful participation in the TPP.²⁵

An Inter-Ministerial Circular to implement the revised Criminal Code is to be issued. IIPA understands the drafting team is headed by the Inspectorate of the Ministry of Science & Technology. In such a Circular, the Vietnamese Government should clarify the types of acts subject to criminal liability under the amended Criminal Code to include online distributions and offers to distribute online (making available).²⁶ It would also be important for the Vietnamese Government to provide detailed interpretations of “commercial scale” infringements that include acts which harm the market regardless of the motive of the infringer to make profits. Guidance should be provided to set out that “commercial scale” includes infringements that are undertaken without a commercial purpose but which nevertheless have a clear commercial impact (such as the unauthorized making available on the Internet of copies of protected works, knowingly providing access to such infringing materials, or other acts such as the unauthorized use of software in a business). Such guidance will give administrative authorities in Vietnam the confidence to recommend cases for criminal action when harmful Internet piracy activities are taking place.

Administrative Remedies Decree Must Be Implemented in Practice: Several ordinances and decrees built on one another govern administrative enforcement of copyright in Vietnam over the past several years. The administrative enforcement system is intended to deal with “intentional or unintentional actions of individuals or organizations violating the law on copyright and related rights but not serious enough to hold criminal liability,” which appears to cover any violation of the IP Code including violations as to works in Article 28 of the Code and as to related rights in Article 35 of the Code.²⁷ The current Ordinance No. 04/2008/UBTVQH12, issued on April 2, 2008,

²⁴See *Agreement Between The United States of America and The Socialist Republic of Vietnam on Trade Relations*, July 13, 2000 (BTA).

²⁵Chapter VII, Article 5(3) of the BTA provides in relevant part,

The Parties agree to establish a Joint Committee (“Committee”) on Development of Economic and Trade Relations between Vietnam and the United States of America. The Committee’s responsibilities shall include the following:

A. monitoring and securing the implementation of this Agreement and making recommendations to achieve the objectives of this Agreement;

...

C. serving as the appropriate channel through which the Parties shall consult at the request of either Party to discuss and resolve matters arising from interpretation or implementation of this Agreement...

²⁶Specifically, to ensure proper coverage of commercial scale Internet-based copyright infringements, which cause enormous commercial damage to copyright owners, those drafting interpretations should ensure that Internet transmissions are included within the term “distributing,” so that communicating works to the public by wire or wireless means, through electronic information network or by any other technical means, and such acts as making available works through interactive networks, are covered.

²⁷For such violations, Section 2 of the Administrative Decree provides, “for each administrative violation, the individual or organization shall be subjected to one of two forms of primary penalty: warning and fine,” with the maximum fine being VND500 million (US\$25,700). Remedies also include seizure of all infringing goods and materials (transport, equipment, raw materials, and imported materials) used in the infringement, suspension of the business or service for three to six months, and possible destruction of all infringing goods and materials used to effect the infringement. Importantly, the law expressly refers to removal from the Internet of copies “that were transferred illegally by digital networks,” and removal of all illegal copies “under form of electronic storage.” While there is overlap, the Administrative Decree also sets forth separate penalties, with a different fine structure, for illegally making derivative works, displaying (or performing) works

raised the maximum fine up to VND 500 millions (about US\$25,000).²⁸ Decree No. 47/2009/NĐ-CP, on “Handling Administrative Infringement in Copyright and Related Rights” implemented Ordinance No. 04. Unfortunately, administrative remedies in Vietnam as implemented have been mostly non-deterrent. On December 2, 2011, the Prime Minister approved Decree No 109/2011/ND-CP on amending and supplementing some articles of Decree 47.²⁹ Decree No. 109 deals in large part with valuation of infringed commodities in order to determine the fine structure. For the most part, the Decree will not help lead to more deterrent enforcement. For example, the Decree adds to the administrative liability structure to provide penalties of a fine between 10 million VND (US\$475) and 90 million VND (US\$4,200) if the value of infringed commodities cannot be determined. While this newly added provision is welcome to address the difficulties faced by the right holders and/or law enforcement agencies in estimating the value of infringed commodities, it appears that the level of administrative fine remains wholly inadequate to create real deterrence.

The Decree also does not address Internet infringements head on, although Articles 7 (amending Article 35 of Decree 47) and 8 (amending Article 37 of Decree 47) of the new Decree impose fines against acts of “distributing” phonograms without a right holder or CMO’s permission, which could be interpreted to include Internet infringements. It is critically important that online transmissions of works and sound recordings be covered under civil, administrative and criminal remedies.³⁰ While the Ordinance and new Decree in general should not be viewed as a substitute for a workable and deterrent criminal remedy in Vietnam, IIPA members believe that swift implementation in practice of the remedies in the Ordinance and Decree can, if implemented with maximum fines in most circumstances, and if applied to the online environment, begin to deter piracy and send a strong signal that violations of the IP Code will not be tolerated. The one software case noted above is an example of the problems that can occur when implementing Decree 47 in practice, since in that case, the maximum administrative fine was administered, but never paid, and the perpetrator remains in operation to this day under a different business name.

New Decree No. 85, Amending Decree No. 100 (Implementing Regulations for the IP Code and the Vestigial Civil Code) Potentially Creates New Problems in the Law: IIPA has commented in detail in previous submissions³¹ regarding the Intellectual Property Code (2005)³² and the 2009 amendments to that Code.³³ The law, and the Civil Code which remains as a vestigial parallel law, are subject to implementing Decree No. 100.³⁴ Decree No. 100 was amended in late 2011 by Decree No. 85, effective November 10, 2011.³⁵ This Decree was issued without any public consultation period or other form of transparency with the U.S. Government or industry, to our knowledge, which is unfortunate, since both likely would have had comments. Decree No. 85 contains some helpful

to the public, reproducing works, distributing or importing works, communicating works to the public by wireless or wired means, electronic information networks or other technical means, and rental of cinematographic works or computer programs.

²⁸The first Ordinance on handling administrative violations was issued on July 6, 1995. This ordinance was replaced by the revised Ordinance No 44/2002/PL-UBTVQH10 issued on July 2, 2002, which in turn was replaced by the current Ordinance (2008).

²⁹An English copy from the Copyright Office of Vietnam’s website is available at http://www.cov.gov.vn/cbgen/index.php?option=com_content&view=article&id=797:decree-1092011-nd-cp&catid=42:vn-law-document&Itemid=67.

³⁰According to Article 30 of Vietnam IP Law (2005), it is the right of producers of phonograms to “distribute to the public the original or copies of the phonogram by sale, rental or distribution or any other technical means accessible to the public.”

³¹See, e.g., International Intellectual Property Alliance, *Vietnam*, in 2009 Special 301 Submission, at <http://www.iipa.com/rbc/2009/2009SPEC301VIETNAM.pdf>.

³²Law 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 December 25, 2005. The law, while not entirely in compliance with Vietnam’s international or bilateral obligations, represented at the time a major modernization, including partial implementation of the WCT and WPPT; Vietnam should now be encouraged as an immediate next step to join those treaties. In addition to the remaining issues discussed in the text below, members have indicated it would be helpful if the government considered introduction of a provision making pre-established (statutory) damages available, upon the election of the right holder. Statutory damages can be very important in civil cases in circumstances in which the amount of reproduction or distribution having occurred is difficult to calculate. Such damages systems have been adopted in many countries, including China and Malaysia.

³³National Assembly of Law No. 36/2009/QH12, “Law on Amendment of and Supplement to Some Articles of the Intellectual Property Law,” which went into effect January 1, 2010.

³⁴Decree No. 100 on Detailed Regulations and Guidelines to the Implementation of Number of Provisions of the Civil Code and the Intellectual Property Law on Copyright and Related Rights, Decree No. 100/2006/ND-CP, September 21, 2006, at <http://www.cov.gov.vn/english/viewNew.asp?newId=79>.

³⁵Decree No. 85/2011/ND-CP Dated September 20, 2011 of the Government Amending and Supplementing a Number of Articles of the Government’s Decree No. 100/ 2006/ND-CP of September 21, 2006, Detailing and Guiding a Number of Articles of the Civil Code and the Intellectual Property Law Regarding Copyright and Related Rights (effective November 10, 2011) (English translation on file with author, courtesy of Baker McKenzie Vietnam).

clarifications,³⁶ but potentially raises new questions with respect to Vietnam's compliance with its international obligations. The following are some initial observations regarding the Decree:

- **Coverage of Temporary Reproductions:** Article 5 of Decree No. 85 alters Article 23(2) of Decree No. 100 to provide that the right of reproduction “provided at Point c, Clause 1, Article 20 of the Intellectual Property Law means one of exclusive economic rights under copyright which are performed by copyright holders or their authorized persons to make copies of works by any means or in any form, including electronic ones.” Article 20(1)(c) of the IP Code provides a more detailed definition of reproduction, including “permanent or provisional backup of the work in electronic form.” Since that provision is not altered, we read Decree No. 85 as consistent with, if less detailed than, the IP Code provision. To the extent the intent of the drafters is to alter the IP Code to remove “provisional backup” (i.e., temporary storage) from the law, it would appear to us necessary to make an amendment to the IP Code itself. Such an amendment would be inadvisable, however, since 1) over 100 countries recognize temporary reproductions as part of the reproduction right in their national legislation, or through interpretation, and 2) it would be hoped that through the TPP process protection of temporary copies will be included, as confirming the understanding of Article 9 of the Berne Convention, and carried forward into the WIPO Copyright Treaty and WIPO Performances and Phonograms Treaty.
- **Collective Management:** Article 11 of Decree No. 85 makes certain changes to Article 41 of Implementing Decree No. 100 which governs collective management. Some of these changes are useful clarifications, e.g., it requires that collective management organizations have “signed authorizations” (Article 41(1)(b) as amended), and takes away discretionary power for MCST to “guide the division of royalties, remunerations and other material benefit” when right holders have “not yet authorized any organizations to act as collective representatives of copyright or related rights.” Unfortunately, some other changes to Article 41(3) and especially the changes to Article 41(4) are onerous and conflict with the ability for collective management organizations to operate freely, and are especially onerous with regard to right holders’ ability to freely determine on what terms their rights will be administered. As the most egregious example, Article 41(4) of Decree No. 100 as amended now requires the following particulars to be reported by the collective management organization to MCST, as well as the Ministry of Home Affairs and the Ministry of Finance:

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

Such onerous provisions should be stricken from the law in order to allow right holders to freely exercise their rights in Vietnam.³⁷ In the absence of immediate changes, it should be clarified that these new provisions do not apply to administration of foreign rights.

³⁶For example:

- Article 6 of Decree No. 85 confirms a BTA-compatible term for cinematographic works.
- Article 8 of Decree No. 85 helpfully clarifies that broadcasters’ rights as defined in Article 31 of the IP Code shall include the ability to control the “relay, re-broadcast or transmission] via telecommunications or electronic communication networks or in any technical media broadcasts of other broadcasting organizations,” as well as “[a]ny modification, mutilation or supplementation of broadcasts of other broadcasting organizations for rebroadcasting or transmission via telecommunications or electric communication networks or in any technical media.” It would be helpful if the law also specified these rights in the authors of cinematographic and other audiovisual works, but since they are already granted broad “communication to the public” right as well as remedy against any form of “dissemination” we see these enumerated rights as covering most, if not all, the acts enumerated in Section 8 of Decree No. 85.

³⁷To ensure that CMOs can operate in the most efficient way, it is important for the Vietnamese Government to establish a flexible legal framework that allows them to operate without unnecessary or burdensome requirements. An efficient licensing market based on minimum state interference allows different players to adjust to the best solutions of the domestic marketplace, for the benefit of all stakeholders involved.

- **Remuneration “Principles and Methods”:** Article 12 of Decree No. 85 adds Article 45a to Decree No. 100, setting out some “Principles and methods of payment of royalty, remuneration and material benefits.” The first principle of the provisions noted in the IP Code are that the rights enumerated therein are exclusive rights, and thus, the method and manner in which exploitation of those rights will occur is the primary domain of the author, co-authors, or right holders, as the case may be. IIPA is worried that the obligatory nature of the “principals and methods” set forth in Article 45a as amended (“Royalty and remuneration ... *shall be determined* as follows”) suggests they are compulsory. However, in reading the “principals and methods” they do not seem to be inconsistent with the ability for right holders to freely contract and freely determine the terms under which their exclusive rights may be exercised. This should be confirmed, however, by the Vietnamese Government. To the extent the Vietnamese Government is considering compulsory remuneration, it should be reminded, for example, that the BTA prohibits Vietnam from availing itself of the very narrow and restrictive provisions of the Berne Convention Appendix.³⁸

Copyright Law and Implementing Regulations to IP Code Remain Incompatible with the BTA and Potentially Vietnam’s Other International Obligations: The following summarizes issues raised by IIPA in previous submissions regarding the IP Code’s compliance with Vietnam’s BTA obligations and other international obligations/standards.

- **Term of Protection (BTA):** The 2009 amendments did not meet the BTA obligation to increase the term of protection for sound recordings to 75 years from publication (or 100 years from fixation, if not published within 25 years of fixation). Article 34(2) of the IP Code therefore still violates BTA Article 4.4. When the government does go forward and amend the law to fix this BTA deficiency, it should follow the international trend to extend the term of protection for works as well to life of the author plus 70 years.
- **Internet Rules to Clarify Service Provider Responsibility and Promote Service Provider Cooperation:** Laws in Vietnam dealing with Internet issues and service provider responsibility include the Information Technology Law (2007),³⁹ and Decree No. 55 on the Management, Provision and Use of Internet Services (2001) (Internet Decree).⁴⁰ The Information Technology Law apparently provides a broad exemption for information transmitted over or stored on their network.⁴¹ The Internet Decree, by contrast, contains helpful language on service provider issues. Article 6(1) provides, “[i]nformation stored, transmitted and received on Internet must comply with the corresponding provisions of the Press Law, Publication Law, Ordinance on the Protection of the State’s Secrets and other law provisions on intellectual property and Internet information management.” Article 6(2) provides, “[o]rganizations and individuals providing and/or using Internet services must be responsible for the contents of their information stored and/or transmitted on Internet.” To create meaningful copyright protection online in Vietnam, the laws must be tailored to foster service provider responsibility. This can be done initially by creating mechanisms including statutory notice and takedown to deal with infringement in the hosted environment. With increasing broadband penetration and mobile piracy, fostering responsibility (especially when the service provider knows or has red-flag knowledge of infringing activity) in the non-hosted environment is critical. The government must engage ISPs, most of which have ties to Vietnamese Government agencies, and adopt policies so that they can easily stop online infringements and repeat infringers from engaging in such illegal activities. IIPA understands Vietnam is working on changes to the Internet Decree

³⁸See *Agreement Between The United States of America and The Socialist Republic of Vietnam on Trade Relations*, July 13, 2000 (BTA), Article 5, which provides,

Neither Party may grant translation or reproduction licenses permitted under the Appendix to the Berne Convention where legitimate needs in that Party’s territory for copies or translations of the work could be met by the right holder’s voluntary actions but for obstacles created by the Party’s measures.

³⁹Law No. 67/2006, enacted by the National Assembly on July 29, 2006 (into force January 1, 2007).

⁴⁰Decree No. 55/2001/ND-CP of August 23, 2001 on the Management, Provision and Use of Internet Services.

⁴¹The IT Law does not expressly cover copyright, so it is believed that the Internet Decree should govern copyright cases. Under the IT Law, ISPs are not responsible for any violations over their networks, unless (i) they themselves initiated the transmission of the information; (ii) they themselves proactively selected recipients of transmitted information; (iii) they proactively selected and modified the content of the transmitted information. Industry indicates that in practice, this means ISPs have to take down infringing content only where they are so requested by competent State authorities.

and providing for a public consultation process is extremely important in regard to this critical legislation. IIPA welcomes the opportunity to comment in that process.

- **Making Available Right:** The Implementing Decree does not expressly confirm that Article 30(1)(b) provides producers of sound recordings with a WPPT-compatible right of “making available” as required by Article 14. Either a clarification should be made to Article 30 of the IP Code to ensure that this right should cover any form of transmissions of sound recordings under the distribution right, including interactive and non-interactive digital transmissions, or Article 23(4) of the Decree should be made applicable, *mutatis mutandis*, to Articles 29 and 30 of the IP Code (covering related rights) to ensure full implementation of the WPPT.
- **Technological Protection Measures (WPPT):** It appears an inadvertent gap was created in enactment of the IP Code, namely, the prohibition on trafficking in circumvention devices (codified in Article 28(14) as to works) was not made applicable to related rights. This can be resolved in one of two ways: Article 28(14) can be made applicable, *mutatis mutandis*, to related rights, or a separate provision of Article 35 can be added to provide that trafficking (as in Article 28(14)) is a “related rights infringement.”
- **Restrictions on IP Rights:** IIPA remains concerned about Article 7(2) (which potentially gives the State unchecked power to decide when a right holder may exercise rights and under what circumstances), Article 7(3) (which permits the State to take away copyright altogether or restrict the ability of a right holder to exercise lawful rights), and Article 8 (which establishes impermissible content-based restrictions of protection under copyright, similar to a provision in the Copyright Law of the People’s Republic of China which was found by a WTO panel to violate China’s WTO obligations). The scope of Article 23 also remains ambiguous. These articles must be made compatible with Vietnam’s commitments under bilateral and international copyright agreements and treaties.
- **Unacceptable Hierarchy Between Works and Other Subject Matter:** Article 17(4) creates an unacceptable hierarchy of the rights of authors over related rights. The need for the authorization of the performer or producer must not cease to exist because the author has granted authorization of a particular use, and vice versa. Article 35 of the Implementing Regulations establishes the supremacy of copyright over related rights. This should be remedied.
- **Exceptions Overly Broad, and Impermissible Compulsory Licenses:** Certain exceptions in the IP Code may be overly broad. Article 25(1)(g) on “[d]irectly recording and reporting performances for public information and educational purposes” and Article 25(1)(e) on “dramatic works and other forms of performing arts in cultural gatherings or in promotional campaigns” remain potentially problematic. IIPA also remains concerned that Article 25(2) of the Implementing Decree appears to allow the copying of a computer program “for archives in libraries for the purposes of research,” which would create a TRIPS-incompatible exception which must be remedied. Article 25 further codifies a broad broadcasters’ compulsory license as to all works except cinematographic works. Notwithstanding the attempt to limit the scope of the compulsory license to the three-step test, the simple addition of the language of the test will not avoid any compulsory arrangement from colliding with it. As drafted, it creates a Berne- and TRIPS-incompatible compulsory remuneration scheme. Similarly, the Article 33 compulsory license (which was a last minute addition to this legislation) for use of sound and video recordings for commercial “broadcasting” violates international standards. Article 33(1)(b) allows “[u]sing a published sound/video recording in ... business and commercial activities.” Again, the Vietnamese attempt to limit the scope of these compulsory license provisions with the Berne Convention three-step test language (Article 33(2)) fails, because this compulsory license, by its very nature, conflicts with a normal exploitation of the sound and video recordings, and unreasonably prejudices the legitimate interests of the right holders involved.
- **TRIPS/Berne-Compatible Presumption of Ownership Must Be Afforded and No Formality Principle Honored (BTA, Berne, TRIPS):** Article 203 of the IP Code requires right holders to provide “necessary evidence proving basis [for] the establishment of copyrights, related rights, of which [a] Copyright Registration Certificate

and Related Right Registration Certificate are consider[ed] as acceptable evidence.”⁴² The Vietnamese Government has taken the position that nothing in Article 203 requires a registration certificate as a formality and that it affords a presumption of ownership without production of a certificate. Vietnam must adhere to the “no formalities” principle of Berne and TRIPS, and Article 3.2 of the BTA.⁴³

- **“Compelling Distribution or Use for Non-Commercial Purpose of Goods, Materials and Implements”:** Articles 202(5) and 214(3) of the IP Code provide that remedies for copyright infringement may include compelling the distribution or use for non-commercial purpose of the infringing goods, as well as the materials and equipment used in furtherance of the infringement, provided that such distribution does not affect the exploitation of rights by an aggrieved rights holder. These provisions fall short of Vietnam’s BTA (Article 12.4) and TRIPS obligations.⁴⁴
- **Optical Disc Regulations:** IIPA understands that draft optical disc regulations have been under consideration by Vietnam for some time to deal with optical disc production over-capacity in Vietnam. This regulation should be enacted and implemented forthwith. IIPA members have provided the government with model legislation on numerous occasions. Such a regulation on the licensing of optical disc manufacture should include the mandatory use of source identification (SID) Codes (including on blank discs), government inspections of optical disc production facilities, revocations and suspensions for violating plants, a prohibition on the unauthorized commercial burning of content onto CD-Rs or DVD-Rs, and a way to monitor imports of machinery and raw materials used to make pirate discs. APEC Member Economies’ Ministers endorsed a paper, “Effective Practices for Regulation of Optical Disc Production” in 2003, which contained key aspects of an effective optical disc regulatory scheme.

MARKET ACCESS BARRIERS IN VIETNAM

Various market access barriers exist in Vietnam today, the most serious of which are limitations and prohibitions on foreign companies’ setting up subsidiaries to produce or distribute “cultural products,” including IIPA members’ products. These restrictions contribute to the lack of a robust and competitive marketplace for content, and limit investment in the creation of new Vietnamese cultural materials. Thus, the vicious cycle of high piracy rates and little to no market access continues. To facilitate commercial development of Vietnam’s cultural sector, Vietnam should look to internationally accepted standards and practices which are premised on the understanding that constraining market access for legitimate products complicates efforts to effectively combat piracy. The Vietnamese have indicated they prioritize preserving cultural diversity and strengthening Vietnam as a producer and provider, not just as a consumer, of creative products.⁴⁵ Unfortunately, Vietnam’s restrictive policies on foreign investment operate as a limitation on investment in cultural production, thus, undermining this objective.

IIPA has included extensive discussions of various market access barriers in previous submissions. The following provides a summary and, where applicable, updates.

New Concerning Regulatory Intervention in the Pay TV Sector: Decision No. 20/ 2011/ QD-TTg issued in 2011⁴⁶ requires foreign Pay TV channel operators to appoint and work through a locally registered landing agent to ensure the continued provision of their services in Vietnam. All foreign programming is required to be edited and

⁴²Articles 208(1) (regarding provisional measures) and 217(1)(a) (with respect to border measures) of the Code apply the same standard of proof as Article 203.

⁴³Article 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.”

⁴⁴The government of Vietnam points to “Circular 01/TTLT-TANDTC-VKSNDTC-BCA-BTP of February 29, 2008,” which indicates that in case any law of Vietnam or international treaty to which Vietnam is party “provides that infringing goods, materials, equipments must be destroyed, the proceeding agencies must destroy them even if they still have use value.” This response seems helpful, although it may not fully satisfy the default rule in the IP Code, since that Code does not compel the destruction of infringing goods.

⁴⁵See Asia-Europe Meeting (ASEM) Seminar on Cultural Diversity in Hanoi on Dec. 15, 2008, discussed in *Vietnam Prioritises Preservation of Cultural Diversity*, Nhan Dan, March 26, 2009, at http://www.nhandan.com.vn/english/culture/171208/culture_v.htm.

⁴⁶Decision No. 20/ 2011/ QD-TTg Dated 24 March 2011 Promulgating the Regulations on Management of Paid Television (effective May 15, 2011).

translated by an approved licensed press agent, there are new local language subtitling requirements for most programming, imprecise content guidelines, and new registration requirements. The regulations also provide that all commercial advertisements airing on such channels in Vietnam must be produced in Vietnam. These measures, if fully implemented, are unduly restrictive and could severely impede the continued growth and development of the Pay TV industry in Vietnam. Further, these regulations essentially expand censorship requirements to all channels, while such regulations had previously applied solely to “sensitive” channels. This mandate also appears to impose new “editing” fees on international channels.

Restrictions on Trading Rights for Films and Distribution Services: Importation (trading rights) and distribution of foreign films are limited to cinemas and business entities that own or have the right to operate a qualified cinema for at least five years and have a license from the Ministry of Culture and Information (MOCI). The import plan and the contents of foreign films must also be pre-approved by MOCI.

Quantitative Restrictions on Foreign Films Imported for Theatrical Distribution: Under the market liberalization measures offered by Vietnam in conjunction with its bid to gain WTO accession, the number of cinematographic films imported each year may not exceed two-thirds of those domestically produced. Also, the number of foreign films projected by each cinema is only allowed to reach two-thirds of the total projected films in a given year. Since the domestic film industry is underdeveloped and the number of domestic films produced has generally ranged between 10-15 films or less per year, these restrictions, if enforced, would be a significant barrier to the import and distribution of foreign films in Vietnam. The Cinematography Law amendments appear to leave the possibility for quantitative restrictions on importation of films for distribution.

Laws Leave Potential Quotas In Place: IIPA has in previous submissions noted the concern over potential quotas for foreign film projection in Vietnam in the Cinematography Law as amended. Such quotas should be disfavored. Certain articles also endanger the television broadcast market, for example, Article 35(2) provides that broadcast of films shall ensure “the proportion of Vietnamese films broadcast as compared with foreign films, the hours for broadcasting Vietnamese films, and the duration of and hours for broadcasting films for children in accordance with regulations of the government.” Unfortunately, Article 2.4 of Decree No. 96 implementing certain provisions of the Cinematography Law requires that the proportion of Vietnamese films broadcast on TV must be at least 40%.⁴⁷ Such quotas are disfavored and should be lifted.

Foreign Investment Restrictions: Foreign investment in cinema construction and operation in Vietnam is limited to 51% and must be through joint ventures which are state-approved. A foreign investor cannot establish a distribution network for home video if they do not engage in manufacturing, and foreign investors may only engage in videotape, VCD, and DVD production in Vietnam in the form of a joint venture with local interests.

Government Monopoly Over TV Broadcasting/Foreign Broadcast Quotas: The Vietnamese government controls and owns all television stations in the country. It does not allow private- or foreign-owned TV stations, or foreign investment in broadcast stations. Foreign content is reportedly limited to 50% of broadcast time, and foreign programming is not allowed during prime time.

Censorship Process for Filmed Entertainment: MOCI maintains strict censorship of the content of films, television and home video, including foreign content. Because of the broad discretion delegated to the reviewing authority resulting in unpredictable and arbitrary results, the process inevitably becomes highly dependent on personal relationships. Films that require editing are subject to an additional review, though importers are not assured a right of appeal. The implementation of a classification and rating system would be preferred for the development of the theatrical market in Vietnam as opposed to its existing censorship process.

⁴⁷Decree No. 96/2007/ND-CP dated June 6, 2007 Detailing and Guiding the Implementation of a Number of Articles of the Cinematography Law, Article 2.4.

Onerous Market Access Restrictions on the Music Sector: Onerous Vietnamese restrictions prevent U.S. record companies from engaging in production, publishing, distribution and marketing of sound recordings in Vietnam. Vietnam maintains investment barriers against foreign sound recording companies, many of which are of a discriminatory nature. Vietnam made no commitments with respect to production, publication and distribution of sound recordings under GATS as part of its WTO accession. Vietnamese restrictions on the business of making and selling music stifle the development of the Vietnamese music industry, and deny participation of U.S. companies in the market.⁴⁸ The lack of a meaningful commercial presence of U.S. record companies in Vietnam also inhibits IIPA members' anti-piracy efforts – the effectiveness of which is further hampered by restrictions on the ability of our industry to investigate the activities of pirates in Vietnam. This leaves it incumbent upon the Vietnamese Government to enforce intellectual property rights of U.S. content largely on its own. In order to enable lawful trading and curb copyright piracy in Vietnam, foreign record companies should be given an unrestricted right to import legitimate music products into Vietnam and to establish music publishing houses and websites to publish and distribute legitimate music products in Vietnam.

Discriminatory Consumption Tax on Imported Game Products: IIPA had previously received information about a draft decree of the Ministry of Information and Communication targeting games for a discriminatory 30% special consumption tax imposed only on imported online and offline games. The Draft Decree remains up on the MIC website, but we are unaware of developments toward issuance of this Decree.⁴⁹ The Vietnamese Government should refrain from imposing such discriminatory taxes which prejudice legitimate right holders and ease the way for pirates who do not have to contend with such costs.

Onerous Market Access Restrictions on the Online Game Industry: The Vietnamese Government controls the country's online games market through an onerous licensing process. Game operators without a license are foreclosed from the market. In 2010, the Vietnamese Government banned issuance of new licenses for online games and banned advertising of online games, with a disproportionate impact on foreign game publishers.⁵⁰ Reports indicated that the ban remained in effect in 2011.⁵¹ Prior to the ban, obtaining a license required the approval of three separate government ministries, and was limited to companies that were at least partially domestically owned.

TRANS-PACIFIC PARTNERSHIP (TPP)

On December 14, 2009, United States Trade Representative Ron Kirk formally notified Congress of President Obama's intention to negotiate with the TPP countries – including Vietnam – with the objective of shaping a

⁴⁸Under present rules in Vietnam and in the absence of bilateral or multilateral commitments, the ability of foreign sound recording companies to set up subsidiaries to produce or distribute "cultural products" is unclear. It appears that foreign sound recording companies must license a Vietnamese company. Vietnamese companies have not been interested in licensing legitimate product from American companies given that pirated versions of these products are already readily available in the Vietnamese market. Thus, rights holders in sound recordings (and musical compositions), especially with respect to physical product, are largely excluded from the market. U.S. right holders should be permitted to establish wholly-owned subsidiaries in Vietnam that are permitted to engage in all industry activities, including but not limited to creation, manufacture, sale, promotion, publication, distribution, and advertising. It is especially important that foreign-owned enterprises be permitted to invest in Vietnam for the purpose of importing and distributing recorded music for online and mobile distribution to the public. Vietnam's failure to make any significant commitments to market access for U.S. and other foreign record companies within the framework of the WTO accession agreement is, IIPA believes, a major mistake that prejudices both U.S. and Vietnamese interests. Consumers in markets around the world demand and get access to popular cultural materials, with the only question being whether such access will be provided by legitimate or illegitimate means. If major record companies cannot do business in Vietnam, pirates will fill the void, forming a unique pirate supply chain for consumers. This is what has happened in other markets – like that in China – which results in harming U.S. rights holders, but also local artists. One way to make headway into the damaging piracy that has resulted from lack of market access for foreign sound recording companies in Vietnam is to permit legitimate companies to participate in the growing mobile and Internet markets for music. Namely, Vietnam should permit foreign copyright holders to license their content to Vietnamese Internet or mobile content providers. Further, foreign-owned enterprises should be permitted to invest in Vietnam to engage in the importation and distribution of copyrighted materials including for Internet and mobile users.

⁴⁹See *Draft Decree Guiding Some Articles of the Law on Information Technology for Information Technology Services (28/04/2010 9:19 CH)*, Article 14, at <http://mic.gov.vn/lavyknd/Trang/duthaonghidinhhuongdanmotsodieucualuatcongnghethongtinvedichvucongnghethongtin.aspx>.

⁵⁰The ban is imposed pursuant to MIC Inter-Ministerial Circular No. 60 (2010) and, to IIPA's knowledge, remains in effect.

⁵¹*Unlicensed Games Still Rife in Vietnam*, Gameland International, August 7, 2011, at <http://en.gamelandvn.com/news/596/unlicensed-games-still-rife-in-vietnam.html>.

high-standard, broad-based regional agreement.⁵² Negotiations are proceeding apace with an aggressive schedule and a goal of completion in 2012. IIPA has submitted public comments to the U.S. Government's Trade Policy Staff Committee which describe in greater detail the hoped-for results of a TPP negotiation, including a high-level IP chapter, including high-level substantive copyright protection, high-level enforcement standards, provisions ensuring the free flow of electronic commerce products and services, and obligations to open markets to trade in copyright goods and services.⁵³ Enhancement of copyright standards and enforcement consistent and co-extensive with those agreed to by current FTA partners, Australia, Singapore, Chile and Peru, and an expansion of these protections to other countries in the region will contribute to U.S. job growth, an increase in exports, and economic recovery in line with the current Administration's goals.⁵⁴ Vietnam has taken strides in its substantive laws which make meeting the legal and enforcement obligations of previous U.S. free trade agreement IPR chapters less challenging. At the same time, as noted, recent changes threaten to move Vietnam further from those standards, and in addition, Vietnam has some of the most restrictive market access barriers in the world. IIPA urges USTR to seek through the TPP negotiations opportunities to address the range of market access impediments identified herein. The TPP e-commerce chapter, and the TPP's market access provisions for services and investment, should require TPP partners to eliminate discriminatory taxes and policies and open Vietnam's market to foreign competition. We remain hopeful that Vietnam's participation in TPP negotiations will aid in the elimination of such discriminatory barriers.

GENERALIZED SYSTEM OF PREFERENCES

The GSP program, designed to promote economic growth in the developing world by providing preferential duty-free entry for products from designated beneficiary countries and territories, expired on December 31, 2010, but on October 21, 2011, President Obama signed legislation to reauthorize the program through July 31, 2013. GSP trade benefits became effective 15 days after the President signed the bill (November 5, 2011) and apply retroactively from January 1, 2011. Among the criteria the President must take into account in determining whether a country should continue to be designated as a GSP beneficiary country are "the extent to which such country is providing adequate and effective protection of intellectual property rights," and "the extent to which such country has assured the United States that it will provide equitable and reasonable access to the markets ... of such country." 19 USC §§ 2462(c)(4) and (5).

On August 4, 2008, IIPA submitted a filing to the GSP Subcommittee of the Trade Policy Staff Committee of the United States in response to a Federal Register notice on whether to designate "the Socialist Republic of Vietnam as a GSP Beneficiary Country." While the IIPA filing did not oppose granting Beneficiary Developing Country status to Vietnam under the Generalized System of Preference trade program, the filing did note several areas – both market access and IPR deficiencies – in which Vietnam does not fully meet the eligibility criteria. Now that the GSP program has been reauthorized, the piracy and market access barriers highlighted in this report are key reasons Vietnam should be scrutinized closely before being granted beneficiary status under the GSP program.

⁵² See United States Trade Representative, *Trans-Pacific Partnership Announcement*, December 14, 2009, at <http://www.ustr.gov/about-us/press-office/pressreleases/2009/december/trans-pacific-partnership-announcement>.

⁵³ International Intellectual Property Alliance, *Public Comment Concerning the Proposed Trans-Pacific Partnership Free Trade Agreement with Singapore, Chile, New Zealand, Brunei Darussalam, Australia, Peru and Vietnam*, 74 Fed. Reg. 66,720 (December 16, 2009). See also International Intellectual Property Alliance, "Participation of Malaysia in the Trans-Pacific Partnership Trade Negotiations" IIPA Request to Testify and Testimony Regarding "Negotiating Objectives With Respect to Malaysia's Participation in the Ongoing Negotiations of a Trans-Pacific Partnership (TPP) Trade Agreement," 75 Fed. Reg. 64778 (October 20, 2010).

⁵⁴ We note that President Obama signed the Korea-U.S. (KORUS) free trade agreement on October 21, 2011, and that agreement provides a strong starting point for an enhanced TPP agreement consistent and co-extensive with previous FTAs.

PARAGUAY

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

2012 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: IIPA recommends that Paraguay remain under Section 306 Monitoring in 2012.

Executive Summary:¹ Paraguay has languished under Section 306 monitoring for more than ten years now, and after so many years, few of the country's most pervasive piracy problems have changed. There continues to be large-scale production of pirate optical discs and illegally modified videogame consoles within Paraguay and a consistent traffic flow of illegal goods into Brazil. The business software sector continues to suffer from end-user piracy, and the government has taken no steps on its commitment to implement a legalization program among its agencies. In 2012, the Government of Paraguay can point to a variety of actions to adjust its resources among its enforcement bodies, including welcome attention to the formerly very effective Specialized Enforcement Unit (the UTE), but to date none of these efforts has resulted in concrete enforcement improvements. Police and customs forces need a coordinated plan to focus more proactively on the steady piracy-based crimes occurring at the manufacturing sites, marketplaces, and borders of the country. IPR Prosecutors Units must be staffed with experienced and effective personnel. Courts need to receive training and would most benefit from judges dedicated to IPR cases. Enforcement efforts overall, while appreciated, are sporadic and simply incapable of producing any level of meaningful deterrence. As IIPA pointed out in its Public Comments on the U.S.-Paraguay IPR Memorandum of Understanding (MOU), submitted to USTR on October 18, 2011,² Paraguay avoided years ago the consequences that designation as a Priority Foreign Country would entail in exchange for agreeing to the terms of the Enforcement Action Plan embodied in the MOU. Yet, the serious enforcement deficiencies identified in the MOU continue to persist. As the current IPR MOU, now extended through April 2012, nears its expiration, IIPA urges USTR to bring Paraguay's attention to the need for national commitment and follow-through in the government's renewed focus to copyright enforcement.

PRIORITY RECOMMENDED ACTIONS FOR PARAGUAY IN 2012

- Establish a specialized IPR Court with national competence, authorization to take independent actions across the country, and a staff of trained IPR judges and prosecutors.
- Facilitate swift and deterrent convictions by removing corrupt expert witnesses and judges, providing for the proper handling of pirate product evidence, and imposing deterrent level sanctions provided by the 2008 Criminal Code amendments.
- Support the restored authority of the special anti-piracy unit (UTE), by stepping up enforcement actions and encouraging better communication with rights holders in 2012, including detailed reports of products seized and destroyed.
- Investigate and conduct raids against the large-scale distribution points operating in Ciudad del Este as well as the sources of local production.
- Continue to increase actions at the border to control the spread of pirate product across the region.
- Issue and implement a software legalization decree (a long overdue obligation from the IPR MOU).

¹For more details on Paraguay's Special 301 history, see IIPA's "History" appendix to this filing at <http://www.iipa.com/pdf/2012SPEC301HISTORICALCHART.pdf>, as well as the previous years' reports, at <http://www.iipa.com/countryreports.html>. For a summary of IIPA's 2012 global issues, see our cover letter at <http://www.iipa.com/pdf/2012SPEC301COVERLETTER.pdf>.
²http://www.iipa.com/pdf/2011_Oct18_IIPA_Comments_US_Paraguay_IPR_MOU.PDF.



The IPR Memorandum of Understanding and Action Plan: Both the Paraguayan and the U.S. governments have invested years of effort to improve the laws and enforcement mechanisms in the Paraguayan intellectual property rights system. The current U.S.-Paraguay Intellectual Property Rights Memorandum of Understanding (IPR MOU) has been extended from its original expiry date of December 31, 2011 to April, 2012. Despite years of work under this MOU framework, Paraguay unfortunately has not met many of the major objectives. It has failed to: (1) significantly reduce the levels of copyright piracy; (2) increase *ex officio* actions at the border; (3) strengthen deterrence by actually imposing mandatory minimum prison sentences on offenders convicted of manufacturing, importing or distributing commercial quantities of pirated or counterfeit goods; (4) provide for the seizure of an infringer's assets upon conviction for commercializing pirate product; (5) find ways to work with the judiciary to promptly resolve pending cases; and (6) increase the terms of copyright protection for all copyrighted materials.

The extension of the MOU in 2012 should not be viewed as an end in itself. IIPA reiterates to USTR its view that, should the two governments agree to a revitalized MOU, the U.S. Government must encourage renewed attention to these priorities by proactively monitoring progress against its provisions through periodic consultations with the Government of Paraguay in the coming year. Such interactions would allow for the review of accomplishments toward an informed decision as to whether the Government of Paraguay has met its obligations under the agreement.

Generalized System of Preferences: Paraguay is a beneficiary country under the U.S. Generalized System of Preferences program (GSP), which requires that a beneficiary country provide "adequate and effective" protection to U.S. copyrighted materials. During the first eleven months of 2011, \$67.4 million worth of Paraguayan goods entered the U.S. under the duty-free GSP code, or more than 70% of Paraguay's entire imports into the U.S.³

COPYRIGHT PIRACY IN PARAGUAY

The Paraguayan market is characterized by an abundance of physical piracy. The country is a major source of manufactured and trans-shipped pirate products throughout the region. Pirated physical goods appear in the principal markets of Paraguay, in the form of pirated optical media of videogames, movies, music and recordings, and business software on CD-Rs and DVD-Rs, as well as videogames in cartridge format. Of particular concern are the large quantities of game consoles and PC computers modified in Paraguay to store or accommodate pirated software of all kinds, which are then transshipped to Brazil and other markets. Unauthorized copies of application software are common in businesses. Widespread photocopying of copyrighted books takes place especially in and near universities. Internet piracy is also beginning to take root in Paraguay, affecting certain sectors in particular.

The primary targets for enforcement in Paraguay have long been the markets of Asuncion and Ciudad del Este, the latter having been a major concern for foreign governments because of the central role the city plays in transshipment activities in the tri-border region with Brazil and Argentina. The Uruguayan market is also directly implicated by Paraguayan piracy, given its geographical proximity and Montevideo's longstanding role as a transit point for containers destined for Paraguay. The markets of both of these neighboring countries face long-term effects from Paraguay's massive-scale production of physical pirate product. That said, commercial traffic in general in Ciudad del Este decreased significantly in 2011 due to Brazilian controls on the Friendship Bridge and at other land transit points on Brazilian routes between Ciudad del Este and Sao Paulo, resulting in some positive trends against the flow of pirated products to Brazil. While Brazilian efforts are aimed primarily at stopping the flow of arms and narcotics from Paraguay to Brazil in preparation for global sporting events to be hosted in Brazil in the coming years, counterfeit and contraband products are also seized in these controls. As a result, wholesale Brazilian buyers have sought other sources of these products.

³During 2010, more than US\$43 million in imports to the U.S. from Paraguay enjoyed duty-free treatment under the GSP Program, or more than 71% of Paraguay's entire imports into the U.S.

Optical disc piracy remains a large-scale problem, though it appears less in retail outlets than in years past. The few individuals who continue to deal exclusively in industrial OD piracy generally do not maintain retail outlets, but distribute from warehouses to wholesale buyers. Burned copies of CD-Rs/DVD-Rs full of pirated content and illegal cartridge-based video games are readily available in Paraguay. This is a very visible form of physical piracy found in Ciudad del Este. Street piracy remains steady, particularly in cities bordering Brazil, such as Ciudad del Este, Pedro Juan Caballero and Salto del Guaira. Significant piracy, mostly of music, movies, and videogames (CD-Rs and DVD-Rs), can be found on the streets of Asuncion.

The prevalence of circumvention devices in Paraguay remains a crucial concern for the entertainment software industry; however, as a result of recent enforcement actions against entities selling modchips, the modchips and game copiers are normally only sold to laboratories using modchips to modify game consoles (“modlabs”) and known Brazilian buyers. Retail outlets send consoles to modlabs to be modified, and the modlab then supplies and installs the modchips. The circumvention device industry in Paraguay is sophisticated, and Paraguay continues to serve as a transshipment point for syndicates who bring in such goods from overseas with the intent of distributing them throughout South America. Circumvention devices, including modchips, game copiers and USB-based modification software, are freely imported into Paraguay via passenger suitcases, air cargo, and courier services, often declared as “parts,” from unknown sources. Courier services sometimes deliver modchips to Brazil where they are legal and can be smuggled into Paraguay by land. R4 circumvention devices are sold; however, they are not as readily available as in the past, likely due to enforcement actions taken to seize these products. Following the initial seizures of R4s in 2009, importers began importing the parts and packaging of R4s separately to hinder identification efforts and lower damage in the event that a shipment is seized. In addition, modification software is downloaded and used in modification labs to modify significant quantities of consoles so that they can play pirated games. The business software industry reports that end-user piracy in businesses and government agencies continues to cause the most economic harm for this sector. Corporations place orders via email to receive pirate software from hired distributors, and PCs customized with illegal pre-installed software is produced in Paraguay to be sold in Brazil. Pirate organizations offer illegal compilations of programs, including technical software for particular business sectors, for example, to engineers, architects, and accountants. Government implementation of a software legalization decree (required by the original IPR MOU) is long overdue. This sector is also affected by street piracy, and the growing availability of the Internet is starting to adversely affect the business software sector.

Internet-based piracy in Paraguay has grown in recent years as local Internet access is becoming more and more affordable, although the growth in digital piracy is limited as broadband connections are few and slow in Paraguay. Many of the popular cyber cafés have installed illegal games and software on their computers. Consumers use Internet forums to offer pirate products and upload links to free hosting sites such as Megaupload or Rapidshare, but also use websites to order hard copies of pirated goods (often in optical disc format). In general, Paraguay’s Internet piracy problem is a cause of concern, but has changed little in the past year, and is not yet at the level of severity reported in Brazil and Argentina.

COPYRIGHT ENFORCEMENT IN PARAGUAY

IIPA members report that relationships with Paraguayan enforcement authorities remained the same in 2011, and in some cases deteriorated. The government has directed much positive focus on revitalizing the Specialized Technical Unit (Unidad Tecnica Especializado, or UTE), but there is little evidence that the unit’s additional resources have yet paid off. Border efforts are lacking; and police forces show little initiative. Within the judicial system, rights holders face poor engagement on the part of prosecutors, procedural obstacles regarding the retention of seized evidence and expert witnesses, long delays, and non-deterrent sentences. The result is visible: street piracy continues to be high in Paraguay’s major economic areas. The Government of Paraguay has meanwhile made no effort to demonstrate a respect for legitimate software within public offices. A specialized IPR court is needed to overcome enforcement hurdles resulting from an untrained, and often corrupt, judiciary.

Government software regulation: The Government of Paraguay has taken no steps to issue or implement a software legalization program among its agencies, an important obligation under the country's MOU with the United States.

The Specialized Technical Unit (UTE): Although the UTE has undergone positive changes in 2011, industry still awaits evidence that the unit's training and re-staffing can result in renewed effectiveness in its enforcement efforts. After suffering devastating setbacks between 2009 and 2010, the Specialized Technical Unit in the Ministry of Industry and Commerce saw the hiring of new unit members at the end of 2010 and began training in January 2011 through the USAID coordinated Plan Umbral II and the U.S. State Department's INL. Historically the one agency of the government to independently investigate, collect evidence and seize products, the private sector looked to 2011 for the UTE to retain qualified personnel and regain its effectiveness in unilaterally pursuing investigations. Early in 2011, members received training on Procedural Criminal Law under Umbral II; however, in March of 2011, Umbral II canceled its support to the UTE due to the short time frame between the establishment of the re-staffed UTE and the close of Umbral II in October, 2011. USAID continued to provide eight training sessions to the unit on issues including Intellectual Property, Registering Trademarks, Detection of Counterfeit and Pirated Products, and Trademark Violations, among other topics. USAID also assisted the UTE in establishing profiles for vacancies and strengthening their working relationship with other government entities. In February 2011, a presidential decree was signed appointing a legal advisor to the UTE, another positive move forward. The Ministry of Industry and Commerce also called for applicants for additional five investigator slots; which according to the UTE now have all been filled. In 2010, the government added a budgetary line item to provide Paraguayan funding for the UTE for the first time, and as of January 2012, the government proposed the same budget, approximately US\$450,000, pending the signature of the President of Paraguay.

Unfortunately, the UTE has not yet regained the trust of the private sector. Despite these positive developments, questions remain regarding the qualifications and dedication of the unit's new leader, and UTE has reported very few details to the private sector regarding its *ex officio* enforcement actions for 2011. News reports indicate with little detail that the UTE has conducted *ex officio* enforcement actions against targets involving gaming piracy and modified consoles in Ciudad del Este. USAID also received reports from UTE stating that from April through November 2011, it conducted seizures valued at US\$31 million, but no information as to products seized, destructions, or product returns are available. Without confirmation of destruction or at least that these seizures did not suffer from large returns to their sources, it is impossible to know whether the past year's activity has been truly productive or simply for show. While IIPA encourages U.S. Government involvement in providing training and funding for UTE, such aid must be conditioned on UTE allowing USG to monitor investigations and seizure actions to ensure transparency and the absence of corruption. To the knowledge of industry, since the original UTE staff has been replaced, no entity has attempted the same level of mass enforcement of street piracy in Paraguay that it had conducted in the past.

Border enforcement: IIPA members report that border enforcement actions in 2011 had limited results, and even then were based on private sector initiative. A major setback was the removal of Customs Director Javier Contreras, an ex-anti-corruption prosecutor who made significant advances in combating corruption in customs, and his subsequent replacement with two customs directors who have demonstrated no interest in combating either piracy or internal corruption. While the Government of Paraguay maintains cooperation efforts with Brazilian, Argentine, and Uruguayan authorities, most neighboring governments are untrusting of Paraguayan authorities. Customs authorities, primarily investigative and border control units such as the Administrative Coordination of Customs Investigations (CAIA) and the operational unit (COIA), as well as Departamento Tecnico Aduanero de Vigilancia Especializada (DETAVE), conducted only sporadic seizures to combat piracy 2011. One of the most significant seizures consisted of game consoles (presumably modified) and accessories being loaded into a small airplane in the airport of Salto del Guairá to be smuggled across the border in to Brazil. Like prosecutors and police units in Paraguay, customs officials lack the motivation to conduct *ex officio* enforcement actions.

Police enforcement: The Entertainment Software Association (ESA) reports that police enforcement efforts have decreased in the past year, partly due to the decrease in commerce in Ciudad del Este described above. Still, *ex officio* enforcement actions are not a priority for police authorities. No *ex officio* enforcement actions involving pirated game products were known to have been conducted by the National Police Economic Crimes unit.

Problems within the judiciary: On the whole, the primary enforcement problems in Paraguay are the judicial and administrative personnel involved in the IPR prosecutors office and the courts. Judges are inexperienced in IPR and have little appreciation for copyright enforcement; *ex officio* prosecutorial actions, already rarely if ever taken, have been called into question; evidence is poorly supervised and rarely destroyed after convictions (and in some cases has disappeared, with broken security seals left uninvestigated); corrupt expert witnesses are common; cases face years of delays; and sentences are not deterrent. In 2011, Paraguay named the first specialized Economic Crimes judge designated to handle all IPR cases in Asuncion; however, because the judge does not have nationwide competence his jurisdiction does not include the principal problem area of Ciudad del Este.

In Ciudad del Este, the situation was temporarily improved following the revocation of a 2010 resolution that designated two specific judges for all IPR cases. The selection system for judges for each legal proceeding returned to a lottery system in 2011. Another 2010 resolution of the Supreme Court continues to represent a judicial hurdle, requiring a judge to accompany all IPR and tax raids and container inspections in Ciudad del Este. Problems such as information leaking prior to enforcement actions and dismissals regarding seized infringing product continue. The judicial system in the capital city of Asuncion differs greatly from Ciudad del Este and other areas. Prosecutors and judges in Asuncion can be expected to conduct themselves in a much more professional and transparent manner in IPR cases as compared to their colleagues in other parts of the country with IPR issues.

Enforcement efforts carried out on behalf of ESA in Paraguay resulted in limited, but positive seizures. The quantity of efforts was limited by the substantial decrease in commercial activity in Ciudad del Este. In 2011, enforcement actions were conducted as criminal actions initiated through the IPR Prosecutor's Office as a result of independent investigation, taken on behalf of ESA. They resulted in the seizure of the following merchandise:

January 2011: modification labs, warehouses and retail outlet in Ciudad del Este

Modchips	1,113 units
Modified Consoles	2 units
Optical media video games	965 units
Game Copiers	2 units

September 2011: warehouse in Ciudad del Este

Optical media disks	26,100 units
Optical media game inserts	217,000 units

ESA reports that all of the product seized in the January raid was destroyed; however, no significant legal sanction was applied to the defendants.

Meanwhile, the Business Software Alliance (BSA) reports that no major actions involving the massive imports of optical discs were publicized for 2010 by the Direction of Intellectual Property within the Ministry of Industry, nor were actions taken by the Ministry of Industry, the Ministry of Finance, or any District Attorneys regarding tax evasion on the imports of optical discs.

BSA also continues to report unnecessary enforcement delays in Ciudad del Este, as well as information leaks that lead to unsuccessful investigations. Requests for a warrant and a search and seize order involve lengthy waiting periods, during which informants within the court give notice to the targets in time to vacate the premises

before a raid is conducted. In those cases in which the prosecutors of Ciudad del Este have conducted successful raids, they fail to seek deterrent sanctions.

The copyright sectors report no progress in 2011 on the need for Paraguayan officials to address the role of landlords at large-scale distribution points operating in Ciudad del Este, including with respect to the open and notorious illegal activities taking place on their premises. Sanctions against landlords of pirate points of sale are not applied in Paraguay. According to sources, authorities feel they are not authorized to take action against landlords; in the past, sources inside the UTE explained that attempts to apply landlord liability laws were denied by the Fiscalía (the district attorney's office).

In July, 2009, the revised criminal code took effect and implemented changes to the copyright law prohibiting circumvention devices, to include modchips and R4 devices. While IPR Prosecutors now have an adequate understanding of the law and the definition of circumvention devices, judges remain in dire need of additional education and training on this topic.

Specialized IPR Prosecutors Units: Paraguay's specialized IPR prosecutor units, formerly known as the "Trademark Units," have undergone restructuring and were replaced by the UEPI-Unidad Especializada de Propiedad Intelectual. Under the new structure, however, the IPR Prosecutor's office does not have the in-house investigative resources necessary to identify potential targets, leaving the responsibility to the private sector to signal criminal activities for action. At the end of 2011, we saw the transfer of one of the three IPR prosecutors in Ciudad del Este to Asuncion, to be replaced by an IPR prosecutor who previously held the position and was known to be highly ineffective. As a result, only one prosecutor in Ciudad del Este can be trusted to conduct enforcement actions. The existing IPR prosecutors and an IPR Prosecutor's unit now in place in Encarnacion, a major land port for containers entering Paraguay from Argentina, should have "nationwide competence," an element that copyright industries have long sought. Specialized IPR Public Prosecutors are also now empowered to investigate tax evasion cases. However, under the new structure the prosecutors will still depend on judges in local jurisdictions to issue raid warrants, which could diminish the positive effects of nationwide prosecutorial jurisdiction. Rights holders are optimistic for improvements in 2012 with the expected change of the Attorney General.

Specialized IPR Court: A trained and dedicated specialized IPR court that works effectively with specialized IPR prosecutors is badly needed in Paraguay. Local representatives have questioned the composition of the IPR court in Ciudad del Este, reporting that a number of cases have been plagued by "irregularities." BSA has met with the President of the Supreme Court to suggest that new courts with exclusive jurisdiction for intellectual property infringements be created (like those courts that exist for Drug Corruption and Terrorism). The creation of such a court would be beneficial for the entire industry and specialized IPR training for these judges could be offered. The creation of a specialized IPR judge with national jurisdiction would also be helpful.

Ex officio prosecutorial actions: The Supreme Court is now reviewing the decision of an appeals chamber declaring that, in IP infringement cases, each action must be individually initiated. If affirmed, the decision would undo the ability of prosecutors to take *ex officio* actions, a crucial element in anti-piracy activities.

Supervision and Destruction of seized evidence: In 2010, Paraguay passed penal code reforms that proscribe the distribution of circumvention devices. Some Prosecutors have begun to embrace the penal code reforms, and now conduct raids without hesitation. Others, however, are reluctant to seize the entirety of illegal merchandise in a given raid, limiting seized goods to only those products of companies represented by the attorneys in the instant case. Furthermore, due to poor security in the prosecutors' warehouse, modified consoles are normally left in the custody of the defendant. On several occasions, consoles retained under judicial orders and in the control of defendants have been removed and altered. Judges, however, take no notice of the blatant violation of the judicial orders, making prosecution futile. Many judges simply do not believe that modified consoles should be destroyed due to their high value, and believe that circumvention devices may have legitimate uses. Others have taken more inexplicable steps: in one case of pirate merchandise discovered within the defendant's store and home, the

evidence was proven to be illegal but the defendant was found to be innocent, and the court ordered the seized merchandise to be returned to the defendant. On appeal, the sentence was revoked. A new trial is pending, but the defendant has fled and is now a fugitive.

Meanwhile, despite numerous ESA seizures, to date, no modified consoles have been destroyed in Paraguay. Current destruction procedures require high court fees from the complainants for each individual case, instead of pooling them together. Current provisions in the criminal procedure code do not allow judges to destroy seized merchandise before final ruling. Destructions are expensive because the petitioner must cover all costs related to storage, transport, destruction, attorneys and court fees. In 2008, the Supreme Court issued a decree regulating the amount to be paid to judges for destructions. Initially, judges refused to act on cases where attorneys refused to pay higher sums in accordance with the new decree; however, the reduced fees appear now to have been accepted. Despite this, one ESA member reports that it continues to be charged destruction fees from seizures that were conducted 4-5 years ago.

Expert witnesses: There has been little improvement in the area of corrupt experts and judges in Paraguayan courts. Rights holders have recently experienced problems coming up against expert witnesses that are paid by defendants but have little or no qualifications. The problem is massive and widespread. In 2008, the Supreme Court suspended authorizations of new expert witnesses, but the problem persists. In a recent trial, the court appointed expert witness refused to appear in court, and although the court issued an arrest order for the expert, the lack of an expert resulted in a mandatory sentence favorable to the defendant. Judges continue to use a long-standing “2 to 1” practice, citing to two expert witnesses hired by defendants to report that product is authentic against one expert declaring the product not authentic. In this manner, judges are able to wash their hands in cases in which pirated product is returned. The inclusion of an IP Expert witness in the UEPI unit may be a step in the right direction if honest, competent individuals are appointed. Local business software representatives highlight that promising expert witness regulations have been endorsed by the Supreme Court, and are now under review.

Internet enforcement: To date there have been very few developments in Internet piracy enforcement. The local ISPs are cooperating responsively to protect copyright, but only in the limited circumstances when they are required to provide information by judicial order. Currently there is no specific legislation regarding ISP liability. Many providers assume that they are subject to general liability principles in the Civil Code, though this has not yet been tested.

Anti-corruption measures: The Supreme Court has displayed unwillingness to investigate allegedly corrupt judges, even though Plan Umbral I created mechanisms to file a complaint and request an investigation against judges involved in cases of corruption. In practice, the Supreme Court has disregarded the findings of investigations and failed to sanction or remove corrupt judges. As there is no mechanism for anonymous filings, rights holders fear that filing a complaint will prejudice judges in pending cases.

Criminal sanctions are not deterrent: Despite reforms to the Criminal Code, prosecutors do not press for deterrent level sanctions, and judges similarly do not impose deterrent sanctions in criminal copyright cases. As a result, the relatively low fines that can be expected, should a defendant be convicted, have become a simple business expense for IP criminals.

Delays and low damages in civil cases: BSA faces ongoing difficulties in its civil *ex parte* actions, including excessive delays and low damages awarded by the courts. In many cases, it can take a minimum of 45 days to obtain a civil warrant search. It takes an average of three years to reach a decision from a district court and an additional year if the case is appealed, a problem that creates a danger of leaks.

IPR Training Programs: Judges in Paraguay, in particular, are in dire need of training in the importance and operation of intellectual property enforcement. In August 2010, ESA co-sponsored training for officials from the Asuncion Prosecutor’s office, Customs, the UTE, and Treasury; however, not a single Prosecutor or assistant

attended. Training should be required for Judges and Prosecutors, who should not be permitted to send their assistants to attend as their replacement. BSA reports that it has conducted several seminars in the past two years for the benefit of public prosecutors forensics officials, public prosecutors, and judges.

COPYRIGHT LAW AND CRIMINAL CODE ISSUES IN PARAGUAY

Cybercrime law: A draft Cybercrime Law was recently presented to the government, but has not moved forward. As Internet piracy rates gradually increase in the country, so do cases of identity theft. Paraguay should consider updating its laws to deal with illicit activities online.

Copyright Law of 1998: Paraguay adopted a new copyright law in 1998 (Law No. 1.328/98), and later deposited its instruments of ratification to both the WIPO Treaties – the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty. Although the copyright law in general is quite good, further refinement would be needed in order to fine-tune the legislation up to modern standards. In recent years, the copyright industries have focused on enforcement objectives, including reform of the criminal code. One major concern for the recording industry is the term of protection for sound recordings which is only 50 years from publication. Paraguay must increase the term of protection up to 70 years to adapt its legislation to current trends in the region.

Criminal code reform in 2008: Paraguay achieved important reforms to its criminal code that have not been fully implemented in practice. IIPA and its members worked with the government for years to try to fill the troubling gaps in the criminal code and strengthen enforcement remedies for copyright infringement. After a comprehensive effort, amendments to the Criminal Code (formerly Law No. 1160/97) were approved in Law No. 3440 of July 16, 2008, and entered into force in July 2009. This legislation makes copyright infringement a major crime, upgrading infringement to a felony. The amendment significantly increases the maximum penalties of copyright infringement up to five years, and in special and serious cases the penalty could be extended to eight years of imprisonment. Furthermore, the reform of Article 184 (which addresses copyright and related rights) has been expanded to include more infringing acts, including prohibitions against circumvention devices. The legislation unfortunately keeps a minimum penalty of one month for some infringing acts, and as the industries have long complained, this discretionary low minimum penalty may lead judges to refuse to issue jail sanctions, instead issuing only fines. Now that the criminal code has been amended, prosecutors and judges must impose these deterrent penalties in-practice. In addition, the 2008 reforms also expand the existing money laundering provision (Article 196) to include copyright violation (as defined in Article 184a) as a crime used to facilitate money laundering.

ALBANIA

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

2012 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: IIPA recommends that the U.S. Government should actively monitor developments in Albania during 2012 with respect to the issues discussed in this Special Mention report.

Executive Summary: Several copyright industries, including the motion picture industry and the business software industry in particular, note significant enforcement problems in Albania. According to the Business Software Alliance (BSA), the software piracy rate in Albania has held steady at around 75% for the past few years.¹ This ranks Albania behind only the Republic of Montenegro (79%) in piracy in the Western-Balkans peninsula.

In general, Albania's legal framework for IPR protection is sufficient; a new (and improved) Copyright Law is expected to be considered by the Parliament in 2012 to implement key European Union directives (such as the 2004 Enforcement Directive). Drafts of the law are currently being considered by the government (Ministry of Culture and the Copyright Office), including meetings with rights holders. Passage of the law is also necessary to implement the Government of Albania's "Intellectual Property Rights Enforcement Strategy 2010-2015" which established a dedicated interagency detail (an *ad hoc* IPR "Inspection Agency") for combating IPR enforcement. There were two other additions to the legal framework. The first, was adopted in 2009 (implementing the 2003 European Council Regulation No. 1383/2003), to provide customs officials with *ex-officio* authority to suspend the release of goods or to seize goods on sufficient grounds. In addition to this authority, customs actions can also be undertaken on a rights holder's request. The second was adopted, effective July 2011, to the Law on Inspections, which allows internal market inspections (including IP inspectors) to use *ex officio* authority.

Despite these encouraging legal reforms, enforcement activity by government authorities is described as "virtually non-existent" – for most copyright industries, and especially in the case of the business software industry. The BSA reported that there were no raids conducted by enforcement authorities in 2011, even after notifications by rights holders, against suspected businesses engaged in software piracy.

Inspectors of the Albanian Copyright Office (until, July 2011, the agency with responsibility for monitoring and surveillance of the marketplace for copyright materials) have lacked both the personnel and expertise to act properly and efficiently. Under the July 2011 amendments, this authority for inspections transferred from ACO to the new system of "ad-hoc" inspectors in the Ministry of Tourism and Culture, where it is hoped that more effective enforcement will result. To date, there has been a general lack of knowledge, experience and training in the inspection and prosecution of copyright cases (especially software piracy cases), despite numerous rights holder training programs over the last several years. In addition, the legal structure bifurcated the issuance of fines by ACO, and the collection of fines, by the tax authorities, who, alas, have not collected any fines imposed. The problems of inadequate enforcement persist for customs officials as well – where training, personnel, and experience is lacking

¹BSA's 2011 software piracy statistics will not be available until after the filing deadline for this submission, but will be released in mid-May 2012, at which time piracy rates and U.S. software publishers' share of commercial value of pirated software will be available at www.iipa.com. In 2010, the software piracy rate in Albania was 75%, representing a commercial value of unlicensed software attributable to U.S. vendors of US\$3.30 million. These statistics follow the methodology compiled in the Eighth Annual BSA and IDC Global Software Piracy Study (May 2011), <http://portal.bsa.org/globalpiracy2010/index.html>. These figures cover packaged PC software, including operating systems, business applications, and consumer applications such as PC gaming, personal finance, and reference software – including freeware and open source software. They do not cover software that runs on servers or mainframes, or routine device drivers and free downloadable utilities such as screen savers. The methodology used to calculate this and other piracy numbers are described in IIPA's 2012 Special 301 submission at <http://www.iipa.com/pdf/2012spec301methodology.pdf>



(in the new department handling IPR matters). The General Customs office remains understaffed, and as a result, software piracy seizures or actions using *ex officio* authority, or upon a request filed by a rights holder, have been very weak.

One particular problem in Albania has been television piracy. There are over 60 public and private channels in Albania and many stations continue to broadcast U.S.-owned motion pictures without a license. In some cases, the materials have been licensed to certain stations in Albania, and other stations simply take and rebroadcast them without a license. The National Council of Radio and Television (NCRT) has issued fines against some of the broadcasters, but the fines have not been a deterrent penalty. This is because only the local tax authorities have the ability to execute (collect) the fines, and they are not doing so, despite a Memorandum of Understanding between the NCRT and the tax authorities. Both the individual rights holders (the studios), and the Motion Picture Association of America (MPAA) have sent cease and desist letters to individual stations, but to no avail. The stations continue to broadcast unlicensed material, and the current enforcement regime in Albania has either been unable or unwilling to stop this activity.

In sum, passage of the new Copyright Law is the top priority on the legislative side, and the implementation of Law on Inspections with the creation and effective enforcement by *ad hoc* IPR inspectors, is the top priority for enforcement. Other priority actions include: (a) amending the current Criminal Code to give state prosecutors *ex officio* authority to prosecute copyright infringements; (b) improving the resources, training and expertise of both the Albanian Copyright Office and the Albanian Customs IPR Department in order to enable these authorities to start effectively pursuing IPR enforcement; (c) addressing the television piracy problem; and (d) creating specialized IP courts (including an Administrative Court), and conducting more IPR enforcement training, to improve IPR enforcement by judges, prosecutors and enforcement agencies.

BULGARIA

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2012 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: IIPA files this Special Mention report to highlight: 1) the passage of legislation that significantly hinders the ability of right holders in music and sound recordings to operate in the market in Bulgaria, and fails to enact measures to address mounting online piracy of music; 2) the severe harm caused by online music piracy in Bulgaria, notwithstanding some remarkable enforcement efforts of the Cyber Crime Unit to shut down infringing websites; and 3) the lack of follow-on criminal prosecutions in Bulgaria following the good work of the Cyber Crime Unit.¹

Copyright Law Amendments Hinder Legitimate Music Industry in Bulgaria: On March 27, 2011 the National Assembly of Bulgaria adopted amendments to the Bulgarian Copyright and Related Rights Act. In particular, the amendments codified the following flaws: 1) an accreditation procedure for collecting societies which undermines the existing collective rights management system in Bulgaria; 2) a government-monitored tariff setting procedure under which the market value of copyright works is no longer the relevant criterion for rate setting; 3) the elimination of simulcasting and webcasting as separate uses for which rights holders were previously entitled to equitable remuneration; 4) a set of provisions that in the aggregate eliminate royalties from private copying levies, which were one of the only sources of revenue in an otherwise difficult Bulgarian music marketplace; and 5) a failure to repeal existing law which limits the freedom to enter into contracts for more than five years, inconsistent with best copyright industry practice. Provisions on administrative measures for combating online piracy were removed from the draft prior to passage.

These amendments have already had a negative impact on the creative community and right holders, and *post facto*, there appears to be some recognition by some Parliamentarians that at least the administrative measures for combating online piracy should not have been removed from the Bill. IIPA hopes that the ruling majority in the Parliament will move quickly to present such amendments, to improve the prospects for effective IPR enforcement in Bulgaria, curb the piracy rate, and create space for legitimate music services online. Fallout from the new law is that it has already had a detrimental effect on payments for broadcasting rights, notwithstanding that the longstanding dispute between the national collecting society and the broadcasters' association in Bulgaria was settled in April 2011.² However, due to delays with the new procedures related to registration of collecting societies, no agreements have yet to be reached for 2011, thus Bulgaria's broadcasters have been using music without payment. This must be quickly resolved.

Online Music Piracy Remains Rampant, Notwithstanding Cyber Crime Unit Actions: Numerous download sites, BitTorrent sites, Rapidshare sites and widespread peer-to-peer piracy provide illegal music to the masses in Bulgaria, making it very difficult for a legitimate online music market to develop. We note that two legitimate online music services came to Bulgaria in 2011, bringing the total number of legitimate services to nine. All of the legitimate online music services struggle to survive in a marketplace with an extremely high online piracy rate, and cannot content with notorious pirate sites like *zamunda.net* and *arenabg.com*, which still function together with the user-generated video exchange platform, *VBox7*.³

¹For more details on Bulgaria's Special 301 history, see Additional Appendix available at <http://www.iipa.com/pdf/2012SPEC301HISTORICALSUMMARY.pdf>. Please also see previous years' reports at <http://www.iipa.com/countryreports.html>.

²The longstanding dispute between the national collecting society (PROPHON) and the Broadcasting Association (ABBRO) related to the lack of licensing agreements and payments for broadcasting rights by Bulgaria's commercial radio stations for the years 2009 and 2010 was successfully settled with a framework agreement in April 2011.

³*Zamunda.net* has been identified by the U.S. Trade Representative on its "Notorious Markets" list. See United States Trade Representative, *Out-of-Cycle Review of Notorious Markets*, December 20, 2011, at http://www.ustr.gov/webfm_send/3215. USTR cited *zamunda.net* as a BitTorrent tracker, explaining, (...continued)



The music piracy situation persists notwithstanding some laudable efforts of the Cyber Crime Unit. Thanks to the Unit, four “one-click” hosting sites (sometimes referred to as cyberlockers), *rapidadd.com*, *4storing.com*, *afasta.com* and *bgshare.com* have ceased their activities in which they were encouraging infringement of others. IIPA appreciates the work of the Cyber Crime Unit in this regard, and notes further that thanks to enforcement actions undertaken by Bulgarian law enforcement, *HD-torrents.org*, *Energy-torrent.com*, *Mamba-jamba.com*, *Danix-bg.com*, and *Torrent.danix-bg.com* have all ceased operations. Court cases continue against some of the largest pirate sites, including *zamunda.net* and *arenagb.com*. Unfortunately, while the cases continue, *zamunda.net* has seen a spike in its popularity, reportedly generating enormous revenues from advertising.

Enforcement – Raids Being Run By Cyber Crime Unit, But Prosecutors Largely Fail to Follow Up:

The Minister (and Ministry) of Interior and the Cyber Crime Unit have demonstrated the will to address the piracy situation, and have cooperated with industry in promoting more efficient IPR protection. Unfortunately, the same level of support cannot be said to exist in other organs of the Bulgarian Government. For example, while the Cyber Crime Unit conducted 28 raids in 2011, only 5 of those resulted in investigations and cases being brought to court; none of the 5 cases has reached a successful conclusion. Of the remaining raids, 6 did not even result in an investigation, and 17 preliminary investigations were terminated by prosecutors. Representatives of the courts and the Supreme Cassation Prosecution Office have indicated support for stronger criminal enforcement, but prosecutors at the district court level are resistant to change. The U.S. Government held a recent roundtable event at which inadequate criminal enforcement in Bulgaria was the main topic, and we call upon the Bulgarian Government to fully engage in this process of reform in the criminal process to drive results by using all of the tools at its disposal.

(...continued)

“Although BitTorrent trackers can be used for lawful purposes, such sites can also be used to transfer allegedly infringing material, by directing users to peers who share the infringing content. USTR went on to note, “Bulgarian-based *zamunda*, currently ranked among the top six most visited sites in Bulgaria, according to *Alexa.com*, is currently the target of a noteworthy criminal prosecution.”

HONG KONG

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

2012 SPECIAL 301 REPORT ON COPYRIGHT ENFORCEMENT AND PROTECTION

Special 301 Recommendation: IIPA recommends that USTR actively monitor developments in Hong Kong during 2012 with respect to the issues discussed in this Special Mention report.¹

LEGISLATIVE ISSUES

Hong Kong enforcement authorities are actively engaged in efforts to combat piracy in the Hong Kong Special Administrative Region (HKSAR), and in general have close and productive working relationships with right holder organizations. However, the HKSAR Government has long recognized that its Copyright Ordinance needs updating for the digital networked environment, and in 2011 took some important steps forward in the protracted process of making those updates.²

The Copyright (Amendment) Bill 2011 was presented to the Legislative Council in June. The Bill included several progressive features, such as recognizing an exclusive “making available” right for on-demand dissemination of copyright works, and providing criminal remedies for violations of this right in appropriate cases. At the same time, the Bill fell short in several areas of constituting an effective response to the challenges facing copyright owners in the Hong Kong market today and tomorrow. For instance, the Bill omitted any provision for pre-set statutory damages, which would provide greater certainty and deterrence in situations in which actual damages are difficult to prove, including but not limited to online infringements.

Of course, a major focus of the entire digital environment law reform effort in Hong Kong has been a more effective response to online piracy. The problem is serious there, with high levels of music piracy taking place via “forum sites,” such as uwants.com and discuss.com.hk; infringing distribution hubs like Filesonic; and peer-to-peer (P2P) file sharing services using protocols such as BitTorrent, eMule, and Xunlei. A critical goal for legislative reform must be to provide strong legal incentives for service providers to cooperate with right holders in order to deal with the problem. The government’s legislative approach focuses on establishing a “safe harbor,” within which service providers who take “reasonable steps to limit or stop infringement” may be immune from damages. While this is similar to how other jurisdictions have approached the problem, Hong Kong’s safe harbor proposal falls short of global best practices in some important ways.³

One of the most critical gaps is the lack of any effective policy to identify and deal with repeat infringers of copyright, who inflict a disproportionate share of the harm to copyright owners and to legitimate e-commerce that results from online infringement. While the government has pre-emptively dismissed one approach to such a policy – a statutory graduated response system – it has presented no alternative. Hong Kong’s Bill would allow a service provider to claim immunity from damages without having taken any steps to deal appropriately with those who persistently use their services to infringe. Hong Kong should be strongly encouraged to follow the lead of the many other jurisdictions that have made implementation of repeat infringer policies a vital pre-requisite to qualification for any online infringement safe harbor.

¹For more details on Hong Kong’s Special 301 history, see IIPA’s “History” appendix to this filing at <http://www.iipa.com/pdf/2012SPEC301HISTORICALCHART.pdf>, as well as the previous years’ reports, at <http://www.iipa.com/countryreports.html>. For a summary of IIPA’s 2012 global issues, see our cover letter at <http://www.iipa.com/pdf/2012SPEC301COVERLETTER.pdf>

²The process began with issuance of a consultation document in December 2006.

³The Bill should also be revised so that the statutory exceptions to the reproduction right with regard to temporary copies made by service providers are folded into the safe harbor structure rather than free-standing exceptions. In other words, service providers who make temporary copies under the conditions specified should be immune from monetary damages, but not necessarily from injunctive relief in an appropriate case.



The same fundamental flaw undermines the Hong Kong Government's proposal for a Code of Practice for Online Service Providers, compliance with which would support a service provider's claim to safe harbor status. Neither the original version of the Code that was published for public comment in August 2011, nor the revised second draft that was issued on January 31, 2012, addresses the repeat infringer issue. In its most recent draft, the Code of Practice sets forth procedures for both a "notice and takedown" system (for removing infringing hosted material or links to such materials), and a "notice and notice" system (for providing warnings to subscribers who employ network services to engage in infringement via peer-to-peer (p2p) services and similar means). But in neither case is the service provider required to take any steps to deal with repeat infringers, or even to identify who they are. Nothing in the Code requires service providers even to correlate a given notice of infringement with previous notices in order to determine whether this particular notice involves a repeat infringer. In effect, a service provider can remain in the safe harbor even if it receives (and forwards) 10, 100 or 1000 infringement notices about the same subscriber, and yet chooses not to do anything else about it. Under such circumstances, it is extremely unlikely that the notice-and-notice system set forth in the Code of Practice will accomplish anything of value; instead, it will squander resources that would be better expended in identifying repeat infringers and dealing with their persistent misconduct.

The Hong Kong Bill also lacks any provision to expedite the identification of online infringers, such as by requiring service providers to respond to right holder requests for such information. The most recent draft of the Code of Practice compounds the problem. It would allow a subscriber who posts infringing material that is taken down in response to a right holder notice to file a "counter-notice," thus triggering a reinstatement of the material in question, but also to prohibit the service provider from disclosing the subscriber's contact information to the right holder when it notifies the latter of the reinstatement. This "opt out" provision undercuts the entire purpose of the counter-notice concept, which is to allow the service provider to step out of the dispute, restore the *status quo ante*, and enable the right holder to proceed directly against the subscriber in an infringement action. It should be deleted.

The revised draft of the Code of Practice omits any reference to the situation in which a service provider learns about infringing activities through some mechanism other than a notice from a right holder. While this deletion makes sense (such situations do not fit well into the "notice and takedown" framework), it must be clarified that the service provider nonetheless must act when it gains actual knowledge of infringing activity, or of facts or circumstances leading inevitably to that conclusion, if it wishes to claim the safe harbor. In other words, while the Code of Practice applies to how a service provider may achieve safe harbor status in responding to notices of infringement from right holders, it does not apply when it learns of infringement through other means. Removing any impediments to enforcement of terms of service that ban use of facilities for infringement, or to other voluntary measures to ensure that finite bandwidth and other resources are not squandered on clearly illegal activities, is an essential element of the overall strategy to rid the Hong Kong e-commerce marketplace of online piracy.

IIPA appreciates that the revised Code of Practice replaces the arbitrary time limits for service provider action in response to a compliant notice with the requirement that the service provider act "as soon as practicable." We also commend the provision requiring records of notices received and processed to be preserved for 18 months, but note that the Code should include reasonable requirements that the service provider consult these records in order to identify repeat infringers, especially in situations in which the identity of the infringing subscriber ordinarily cannot be known to the right holder (e.g., in the P2P scenario). We also urge the drafters to re-examine the decision to require the right holder to include in each infringement notice information such as the date of creation or first publication of the work. This data is of no relevance, and requiring its inclusion significantly increases the risk that a notice will be rejected as defective, or even that the right holder might be liable for an inadvertent error in this data element, especially since the infringement notice must take the form of a statutory declaration. Such a result would discourage use of the notice process, and thus limit the right holder's ability to protect its copyrighted works online, which is the opposite of the stated legislative intent.

Finally, although the question of new criminal penalties for online piracy activities was discussed in the consultation process leading up to the drafting of the Bill, Hong Kong authorities ultimately decided to omit them, on the ground that existing criminal provisions were sufficient. However, recent experience in the Hong Kong courts

casts doubt on this conclusion. Because it is difficult to prove an element of commercial gain in some online infringement cases, even when the activity inflicts substantial damage on the right holder, some Hong Kong magistrates have imposed extremely lenient sentences (small fines, a short period of community service, or even an unconditional discharge) in several recent cases, including on defendants who posted cyberlocker links to infringing pre-release material. This has occurred despite clear guidelines from the Court of Appeal, in the case of *Secretary for Justice v Choi Sai Lok*⁴ and from the Court of Final Appeal in *HKSAR v Chan Nai Ming*.⁵ Those guidelines provide that custodial sentences should be imposed in copyright piracy cases, even those in which a commercial motivation cannot be proven, unless “truly exceptional circumstances” are present. Hong Kong courts should consider issuing additional guidelines to assist trial courts in imposing consistent, proportional and deterrent penalties for online copyright offenses in Hong Kong.

⁴ [1999] 4 HKC 334

⁵ [2005] 4 HKLRD 142; [2007] 1 HKLRD 95; [2007] 2 HKLRD 489

HUNGARY

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

2012 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: IIPA recommends that the U.S. Government should actively monitor developments in Hungary during 2012 with respect to the issues discussed in this Special Mention report.¹

Executive Summary: The copyright industries report good cooperation in general with Hungarian law enforcement officials on investigations and prosecutions, especially against hard copy piracy. However, as the nature of piracy has changed, from mostly hard copy to mostly digital (Internet) piracy, under-resourced and under-equipped enforcement officials have not been able to keep pace effectively. Additionally, there has been a recent government reorganization pertaining to the tasks of copyright administration and other related matters; while this is a positive step, it has temporarily slowed some of the legal reform and enforcement activities (as a result of budget cuts for IPR enforcement, and the loss of some IPR enforcement police and investigators). There are institutional obstacles that impede effective enforcement in Hungary, including: criminal evidentiary procedures that make proof of ownership especially burdensome and slow (requiring expert opinions for seized goods); the reluctance of prosecutors and judges to commence cases; and, the lack of deterrent sentencing for those criminal cases that do move forward. There are two legislative hurdles, one on the verge of being corrected, the other that needs to be addressed. The positive development is the Copyright Law amendments that are pending for final enactment (in 2012), that would change the current requirement of a single collective management organization for rights owners, and would permit competitive organizations (and which would eliminate the required contributions to, and levels of “cultural” deductions from rights holder monies). The other legislative concern is the absence in the law of a statutory prohibition on private copying from illegal sources. While such activity is barred by European law, the Hungarian Copyright Law would benefit from clarity on this matter.

PRIORITY ACTIONS REQUESTED TO BE TAKEN IN 2012

The copyright industries make the following recommendations of priority actions to the Government of Hungary:

Enforcement

- Implement the national action plan against piracy that was prepared (in 2008) and presented by the inter-ministerial task force known as HENT (the National Board against Counterfeiting) to the Government of Hungary.
- Encourage the (new in 2011) IT Division within the National Tax and Customs Office (NTCO) to undertake digital piracy investigations and, to commence cases against Internet piracy in all its various forms.
- Allocate more resources (including training) to police and customs officials to fight Internet piracy, and make it clear to police, prosecutors, customs officials, and the courts that copyright cases, including those against digital piracy, are a priority.
- Encourage Internet Service Providers (ISPs) to cooperate with the content industries in the fight against piracy (including encouraging the work of the HENT dedicated working group on ISP – right holder cooperation issues).

¹For more details on Hungary's Special 301 history, see IIPA's "History" appendix to this filing at <http://www.iipa.com/pdf/2012SPEC301HISTORICALCHART.pdf>, as well as the previous years' reports, at <http://www.iipa.com/countryreports.html>. For a summary of IIPA's 2012 global issues, see our cover letter at <http://www.iipa.com/pdf/2012SPEC301COVERLETTER.pdf>.



- Undertake enforcement actions against business (end-user) infringement of software.
- Develop procedural systems to aid the police and prosecutors in undertaking copyright infringement investigations, and, for cases that go forward, to encourage judges to impose deterrent sentences.
- Develop, with the copyright industries, a joint IPR enforcement public awareness campaign, including instructions on the detrimental effects of Internet piracy, CD-R/DVD-R burning, and commercial scale photocopying of books in and around educational institutions (schools, colleges, universities).

Legislation

- Revise the expert opinion system in copyright infringement cases to allow for sampling methodologies, and increase resources allocated to fund the requisite expert opinions.
- Clarify that the private copy exception does not extend to those cases where the persons making the copies have actual or constructive knowledge about the illegal nature of the source.
- Withdraw legislation that would deny compensation to foreign performers and producers of sound recordings, and also create an exception to performance rights for commercial broadcasters.
- Adopt (final steps) and implement the pending legislation (November 2011) to eliminate the legal monopoly of collective management organizations, and to eliminate the mandatory payments for “cultural” contributions taken from rights holders monies from such organizations.

COPYRIGHT PIRACY AND ENFORCEMENT IN HUNGARY

Internet piracy: As of March 2011, Hungary had almost 6.2 million Internet users, or about 62% of its population online (reflecting a more than seven-fold increase in the last decade, all according to www.internetworldstats.com). In fact, Hungary has the highest broadband penetration in Central and Eastern Europe. As a result, digital copyright piracy has grown significantly, because enforcement has not kept up with the migration from hard copy, to digital copy piracy. Digital piracy in Hungary, as in other countries, takes many forms including: peer-to-peer piracy – with BitTorrent sites being the most popular, as well as computer storage services, hyperlinked (mainly non-Hungarian) sources, and premium file transfer protocols that include pay-per-download services that occur via “sms” (a short message service, i.e., text messaging). The most commonly used peer-to-peer service is DC++, although it has steadily been losing popularity. The music and recording industry, represented by its local anti-piracy organization ProArt, initiated several criminal actions against operators and major uploaders, including criminal cases launched against the DC++ hub operators over four years ago. The recording and film industries have also successfully filed complaints with police who in turn have run several major raids over the years against BitTorrent and FTP sites.

In 2011, the largest case launched by ProArt, was the “Apollo FTP” filed against an illegal service. The IT Division within the National Tax and Customs Office, which now has IPR enforcement authority, investigated the operations of this illegal service – a premium file transfer (“sms”) service. Their investigation revealed that profits from illegal activity over a four year period was 100 million HUF (Hungarian Forint) or approximately US\$450,690; two persons were taken into custody and several computer servers were seized, and the criminal case is now proceeding. One of the largest internet movie piracy enterprises (a “release” group) was also uncovered – Cinedub – as part of that investigation. Other services have been gaining popularity which feature illegal film and television programs, including video streaming sites via YouTube and videa.hu.

There are two major Internet-based piracy cases about to go to trial (in 2012), as a result of good cooperation with rights holders and enforcement authorities. Additionally, the IT Division in NTCO was able to disable

and take down Cinedub, as a result of the investigation noted above; Cinedub was one of the largest pirate networks in Hungary.

The Entertainment Software Association (ESA) reports that online entertainment software piracy consists primarily of file sharing and commercial FTP servers offering pirated content. According to a 2011 ESA study, Hungary is in the top 20 countries worldwide in terms of the number of detected connections from peers participating in unauthorized file sharing (taken from a sampling of ESA titles on public peer-to-peer networks). The ESA reported that in 2011, the police did seek additional support from ESA in investigations (pertaining to uploading and downloading cases), and that this cooperation resulted in almost all of the new cases commenced in 2011. There is also one major case, held over from 2010, involving an FTP server (including film and music predominantly) which ESA is also assisting on, but which has not yet gone to trial.

Entertainment software piracy: The majority of entertainment software piracy in Hungary is now digital piracy, in the various forms already described. ESA reports the entertainment software hard copy piracy consists primarily of material made for personal computers, with a smaller portion of material being made for use platforms, such as on Xbox360 and PS2/PS3 players. Thus, in addition to the extensive downloading of games in Hungary, ESA reports that locally burned pirated game discs, produced in small quantities or on-demand by small dwelling operations, or in burning labs, continue to be available at flea markets and through small retail shops (some of which accept orders for specific titles), although hard copy piracy is generally on the decline (as it is replaced by digital piracy).

The ESA reported about 40 cases that were commenced by local enforcement officials aimed at entertainment software piracy; that is down considerably from the nearly 170 cases undertaken in 2010. Since hard copy piracy has been the main target of enforcement officials, even as Internet piracy increases, the diminishing amount of hard copy piracy is likely the “reason” for the decline in enforcement cases. There were also 10 cases in 2011 that ended due to insufficient evidence or the inability to properly identify the infringer; often times cases are hampered by the lack of communication between investigative authorities and rights holders (who could provide substantive evidence to help with prosecutions). There were 10 cases that did result in sentences in 2011, although, as with the other copyright industries, most included very low fines or sentences. With cases taking at least two years in some instances, criminal defendants often have the ability to plea to small fines or suspended sentences, for the few cases that do proceed.

Business software piracy: Business Software Alliance (BSA) reports that during 2011, while the NTCO did conduct raids, most were directed against individuals, and not large (or even small) business enterprises engaged in end-user piracy. Almost half of the raids were conducted because of other, non-IPR related, criminal activities, highlighting the low priority of IPR enforcement. As is true for all of the other copyright industries, the consolidation of IPR enforcement authority – effective January 1, 2011 – means NTCO has the authority for software piracy cases. The BSA reported that NTCO is undertaking *ex officio* actions and does have dedicated IPR enforcement personnel for all the regions of Hungary (but, unfortunately, there are no dedicated prosecutors for such cases).

The BSA reported in 2011, there were about 90 total raids undertaken; they further reported that in civil and/or criminal investigations that followed, about 70% to 75% of the cases resulted in some fine being imposed, but that the targets, and the fines, were very small. The courts rely on expert opinions to assess damages (in some cases using the street price as the damages price), which means that the cases are expensive (and take a long time to proceed), and the fines imposed are very low. Of the total number of raids involving software piracy, almost all concerned end-user piracy.

Piracy of books and journals: The book and journal publishing industry reports that unauthorized photocopying of academic textbooks in and around university campuses continues to be problematic. While there has been some improvement in the market, progress remains slow. Law enforcement authorities have been

responsive to rights holder requests for actions against copy shops while also undertaking a few actions *ex officio*. Prosecutions, when they occur, unfortunately continue to be very slow.

Audiovisual piracy: As with the other copyright industries, the motion picture industry (MPA) and ASVA (the local film industry anti-piracy group) report that 2011 continued the migration from hard copy piracy to Internet piracy. Hard copy piracy exists, but is decreasing in size and scope; it consists of locally burned pirate DVD-Rs sold at flea markets, by street vendors, and in video retail shops. MPA and its members have worked with local theaters and police to address camcording of films, and report some success. With the consolidation of IPR enforcement in NTCO, the MPA reports good cooperation, especially with the new IT Division (established in March 2011). MPA has also had good relations with customs and tax enforcement authorities. MPA reports, however, that most NTCO *ex officio* actions, to date, have been directed at hard copy (burned disc) operations, and not at Internet sites. They report good cooperation with NTCO on the hard copy cases, but the same obstacles as other copyright industries: namely, prosecutorial and investigative delays, and the lack of deterrent sentences in the cases that do go to trial.

One concern for all of the copyright industries, is the definition and calculation of damages caused by illegal online content services. While anti-piracy groups insist that such calculations should be done based on the value of the (many) works being made available, the current procedures usually apply the “retail” (pirate) price of a single work – the difference of damages being a few dollars per work versus the thousands of dollars in damages caused.

Hard copy piracy: Hard copy piracy, in general, is on the decline in Hungary, and the police are bringing fewer (and smaller) cases. These cases include some street piracy including flea markets and independent retail stores, but mostly involve burned optical discs replicated in small facilities (or dwellings), that mass-produce CD-Rs and DVD-Rs (especially 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 some cases. The pirate product is predominantly distributed through Internet sites, or via advertisements in newspapers, and in small retail shops.

There is one optical disc factory in Hungary; the plant has been issued and does use SID codes. There are regular plant visits (by ProArt), including the collection of exemplars and lab testing, and there is no evidence or reason to believe that this factory is used for an illegal activity.

Inter-Ministerial Task Force (HENT): It has been five years since the Hungarian government agreed to establish an Inter-Ministerial IP task force (in January 2007). This task force, known as the National Anti-Counterfeiting Body (HENT), is under the Ministry of Justice and Law Enforcement and coordinated by the Hungarian Patent Office and is composed of government and industry representatives. HENT’s objectives include cooperating in developing the national strategy against piracy and counterfeiting, preparing awareness campaigns, coordinating the activities of the state bodies and non-governmental organizations, and preparing legislative proposals, among others. The government accepted the HENT plan, as a new national strategy, on October 1, 2008. The three pillars of the strategy involve: statistics, raising public awareness, and enforcement.

In 2011, a new working group within HENT was created to try to develop a cooperative enforcement plan with ISPs and rights holders. Additionally, HENT has been working with the BSA on developing a new government procurement policy that would require companies contracting with government agencies to ensure their use of legal software. IIPA encourages both of these undertakings.

In 2005, ASVA, BSA and ProArt (together the three groups are known as the Alliance for Copyright Protection) signed a co-operation agreement with the Anti-Crime Division of the National Police Headquarters, confirming their intention to collaborate in a united effort to address copyright crime. These three groups also signed a similar agreement with APEH (the Tax and Financial Control Administration) aimed at assisting government efforts to crack down on the “black economy” and the losses sustained by Hungary’s economy as a result of piracy. Parties to the cooperation agreements provide expert assistance, training and technical information. In 2007, a new sub-

department of the Budapest Police was established to deal specifically with online infringements. Thus, in sum, the apparatus is there for effective enforcement, including good cooperation with rights holders. However, budget cuts, and the lack of sufficiently available trained enforcement officials, along with the procedural and other institutional obstacles, are not resulting in effective enforcement, especially for Internet piracy.

Border enforcement is a longstanding concern, especially because of Hungary's proximity to Ukraine, Slovak Republic, and Russia, and the possibility for cross-border traffic in hard copy materials. The border patrol was integrated into the police (formerly, the IPED – Intellectual Property Enforcement Department within Customs), into the new NTCO. In theory, this should facilitate border officials, working on Internet piracy investigations, and working with the tax administration, to initiate tax cases.

One procedural hurdle has been long-identified: expert opinions given to the police by registered “experts” of intellectual property are often plagued with errors. There are a number of experts in the Hungarian Copyright Experts Council (appointed by the Minister of Justice and Law Enforcement and linked to the Hungarian Patent Office) who work with industry and are well versed in the nature of piracy, but it is always up to the authorities to choose the expert they wish to get the official opinion from. The practical problem is that the authorities have developed their “favorites,” who are not necessarily fully qualified. The expert opinion system should be revised to allow for sampling methodologies. Resources allocated to fund the requisite expert opinions should also be increased (the police budget for judicial expert fees has been significantly decreased).

The copyright industries reported, as they have in prior years, on numerous training programs that they have conducted with IPR enforcement officials, and stand ready to continue to conduct such programs in 2012. With the reorganization, many of the copyright industries report on the need to have more and better trained police, prosecutors and judges.

LEGAL REFORMS

Copyright law: Hungary has amended its copyright law (the Copyright Act No. LXXVI of 1999, as amended) to comply with international norms and accede to the European Union. It also has implemented the relevant EU Directives, including the EU Information Society Directive, the EU Enforcement Directive, and the EU Resale Right Directive. In Hungary the Electronic Commerce Act (Act CVIII of 2001) contains detailed regulation with respect to ISP liability and also includes a notice and takedown procedure. The Act is in full compliance with the EC requirements laid down in the relevant EC Directives (basically 2000/31/EC and 98/27/EC). At the end of 2008, the Parliament adopted a law to amend the Copyright Act (in particular, extending the application of the public lending right and regulating the use of “orphan works”). The amendments entered into force on February 1, 2009; the entry into force of the orphan works provisions was postponed until the publication of the implementing government decree (May 16, 2009). A new law on data protection and privacy was also adopted, and came into force on January 1, 2012.

In September 2011, Hungary also fully implemented the extension of term for sound recordings from 50 to 70 years from fixation.

IIPA members have two long-standing legal reform recommendations (concerns). First, IIPA and its members remain concerned that the private copy exception might be interpreted to extend to copies from illegal sources; IIPA recommends that the law be clarified. Second, there is the long-standing concern regarding the monopoly positions of certain collecting societies, and the existing required deductions (taken from rights holder monies) for “cultural” purposes. Legislation to allow for other entities, including foreign entities, to operate collecting societies and to eliminate the mandatory contributions is nearing final enactment. IIPA and its members are encouraged by this development and hope it can and will be finalized in 2012.

LATVIA

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

2012 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: IIPA recommends that the U.S. Government should actively monitor developments in Latvia during 2012 with respect to the issues discussed in this Special Mention report.¹

Executive Summary: Several copyright industries report that poor enforcement persists in Latvia, and in particular, the business software industry reports both high piracy rates and a weak enforcement apparatus. IIPA and its members met with the Government of Latvia in 2011, and appreciate the Government's pledge of better cooperation with IIPA and its members on key enforcement issues (including software legalization programs). IIPA is also cognizant of the significantly reduced police and prosecutorial resources in the country as a result of the severe economic crisis in Latvia over the last several years; IIPA and its members, hope that, nonetheless, working in cooperation with the Government of Latvia in 2012, there can be a significant improvement in the current IPR enforcement regime.

According to the Business Software Alliance (BSA), the software piracy rate in Latvia has essentially remained unchanged for the last five years, and remains high in both the business and public sectors – that is, end-user businesses and government institutions using unlicensed software.²

In prior years, the Business Software Alliance (BSA) reported on the challenges it faced with obtaining successful criminal convictions, in large measure because of deficiencies in the intellectual property rights (IPR) sections in the Criminal Code. In January 2011, the Criminal Code was revised to, in theory, make it easier to commence cases and succeed (as a result of new evidentiary burdens), especially, in software piracy cases. However, even though the code improved, there were only a few court convictions in 2011 and most cases settled before they reached the courts. This is because of ongoing and additional shortcomings in the Latvian judicial process: namely, very lengthy proceedings (that permit defendants to unreasonably delay proceedings); a still too high evidentiary burden in criminal and civil proceedings; and, a judiciary (courts and prosecutors) unwilling to bring copyright cases. In addition, penalties for copyright infringements for the few cases that do make it through the courts, remain minimal (usually comparable to the fines assessed for minor administrative offenses), and, in a number of cases, infringing goods have even been returned to the pirates. In short, the majority of judges and prosecutors do not comprehend the serious harm – both social and economic – that results from IPR infringements, and are not treating these cases properly.

IPR protection must be again added to the list of state priorities to help develop and grow the (technology and knowledge-based) economy, and as a weapon against the ongoing underground economy (the black and grey markets) which fosters tax and fair competition problems for legitimate businesses and the government. IIPA recommends that police, prosecutors and judges should increase their focus on IPR cases, and undertake these efforts in cooperation with their colleagues from other EU and developed countries. The Latvian Judicial Training

¹For more details on Latvia's Special 301 history, see IIPA's "History" appendix to this filing at <http://www.iipa.com/pdf/2012SPEC301HISTORICALCHART.pdf>, as well as the previous years' reports, at <http://www.iipa.com/countryreports.html>. For a summary of IIPA's 2011 global issues, see our cover letter at <http://www.iipa.com/pdf/2012SPEC301COVERLETTER.pdf>.

²BSA's 2011 software piracy statistics will not be available until after the filing deadline for this submission, but will be released in May 2012, at which time piracy rates and U.S. software publishers' share of commercial value of pirated software will be available at www.iipa.com. The 2010 statistics follow the methodology compiled in the Eighth Annual BSA and IDC Global Software Piracy Study (May 2011), <http://portal.bsa.org/globalpiracy2010/index.html>. These figures cover packaged PC software, including operating systems, business applications, and consumer applications such as PC gaming, personal finance, and reference software – including freeware and open source software. They do not cover software that runs on servers or mainframes, or routine device drivers and free downloadable utilities such as screen savers. The methodology used to calculate this and other piracy numbers are described in IIPA's 2012 Special 301 submission at <http://www.iipa.com/pdf/2012spec301methodology.pdf>.



Center regularly organizes training programs and seminars for judges and other law enforcement officials; unfortunately, during 2011 there were no such seminars or trainings held to address IPR issues. Additionally, although a few colleges offer IPR courses, there are too few courses, and very little competency in teaching about IPR laws, its protections and benefits, in college and pre-college educational systems. These classes should be part of the basic school curriculum, on the benefits – to science, culture and the arts – of copyright and IPR protections generally, as well as part of a broader public education campaign on the economic and non-economic benefits of IPR protection and enforcement.

As enforcement priority actions in 2012, IIPA recommends that the Latvian judiciary accelerate IPR proceedings, that is, that they move to avoid the unnecessary delays in investigations and prosecutorial activities. A relaxation of the onerous evidentiary burdens regarding the preparation of expert reports in criminal cases is also required to enable effective enforcement. Further, rights holders ask that when a copyright case does go to trial and results in a conviction, courts impose deterrent penalties.

One way to improve enforcement would be to improve the communication and cooperation among all enforcement authorities, including: the Economic Police, the Municipal Police, the Financial Police, Customs, and the prosecutors and judges, as well as to increase effective cooperation between authorities and right holder organizations. It is also important to sustain and advance capabilities of the state police division that is in charge of such matters as cyber-crimes and IPR protection. The Government of Latvia should also become a role model for the general public by legalizing its own software use, which it has, to date, failed to do. It would also be helpful for all of the enforcement agencies to be publically tasked to make IPR protection a priority.

Enforcement: The IPR Enforcement Division of the State Police established in 2006 was, unfortunately, closed in 2010. Although some of its former staff joined the Cybercrime Division under the Economic Police, IPR issues are no longer a priority. As a result, IPR enforcement efforts continue to be ineffective. In total, BSA reported 57 end-user *ex officio* raids conducted by the Economic Police in 2011 against businesses; additionally a few cases were initiated by the Cybercrime unit of the Economic Police for illegal software usage. In addition to end-user piracy, BSA has also been trying to address channel piracy (that is, distribution piracy, including the sale of pre-loaded software); however, as the result of poor government-led IPR enforcement, there was little progress to report in 2011. We highlight the following issues and recommendations as priorities for 2012:

- The pirated products sold in flea markets across the country. For example, at the largest illegal marketplace in Riga (Latgalite), the police have completely discontinued their efforts to stop sales of pirated goods because of the complex evidentiary burdens and the high bar for proving infringement in IPR cases.
- The widely available copies of illegal prerecorded optical media (DVDs, CDs etc.) containing musical recordings and software – including both pirated and parallel import copies – coming from Russia.
- Internet piracy cases, which in 2011, were not being prosecuted at all even as illegal file-sharing became commonplace. In 2005, an Internet case was initiated by Microsoft (for the sale of counterfeit CDs containing Microsoft software being sold on an eBay site). The damages were estimated to be more than \$3 million and still, to date, the court has not rendered even a preliminary judgment in the case.

Legislation: In late 2010, the Latvian Parliament adopted several important amendments in the Criminal Code. Prior to those amendments, under Article 149, an unreasonable burden of proof (especially in software cases), made it virtually impossible to succeed in IPR cases, so there was little impetus for police or prosecutors to commence investigations. Effective January 1, 2011, Article 149 was deleted and replaced with an improved burden of proof (in a new Article 148). In sum, IIPA believes that most of the basic (critical) legal reforms are in place, but the enforcement environment remains weak. Still, there are some additional legislative reforms that IIPA and its members recommend to further IPR enforcement improvement.

The criminal procedural provisions are archaic and result in substantial difficulties during prosecutions, especially because they call for the securing of detailed (and unnecessary) expert reports in all copyright infringement cases before criminal actions can be undertaken. Additionally, the police are very reluctant to verify accounting documents of pirate software resellers, or to question employees during raids – either of which would be very useful for completing investigations. In many cases, courts drop charges against the owners or managers of companies using unlicensed software because of a lack of evidence (since the evidentiary burden is so high); these burdens require either proof of “individual guilt” or “direct intent” of the individual – these requirements are very difficult hurdles to overcome.

Amendments in 2006 to the Copyright Law and Civil Procedure Act incorporated WTO TRIPS-mandated civil *ex parte* search procedures. However, courts remain reluctant to effectively apply these provisional measures, and require an onerous burden to obtain an indictment (even though the goods seized can be used in a later infringement action). Additionally, plaintiffs are required to post bonds (deposits) at very high rates, generally the equivalent of the likely amount of the claim; this discourages rights holders from otherwise commencing legitimate claims. Additionally, there are no provisions requiring the use of legal software in the Public Procurement Law. The BSA has proposed amendments to this law, and, along with IIPA, hopes the Government of Latvia, as promised in its meetings in 2011, will move to legal government software, and to amend the law to ensure fair competition in the procurement of software by government entities.

Last, the Copyright Law (Article 69.2) provides for the ability to claim damages in copyright infringement cases, but the amount of claimed compensation cannot exceed the amount of the license fee that the right holder would normally receive. This does not provide any deterrence against piracy, but instead encourages infringements, since infringers know that if they get caught they will likely not have to pay anything more than a regular licensing fee.

MOLDOVA

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

2012 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: IIPA recommends that the U.S. Government should actively monitor developments in Moldova during 2012 with respect to the issues discussed in this Special Mention report.

Executive Summary¹: Several copyright industries, including in particular, the business software industry and the motion picture industry, note significant enforcement problems in Moldova. In short, these industries report that there is little, if any, sustained and consistent IPR enforcement activity and not enough public awareness on the basics of copyright protections and rights; and, high piracy rates have remained a constant.

One of the hindrances to effective enforcement is the lack of IPR training and experience by the police, prosecutors, and judges, responsible for dealing with copyright enforcement matters. In 2011, the number and size of raids undertaken against suspected infringers decreased; most investigations (cases) were closed without a trial or conviction. This is due, in large measure, to the low priority given IPR enforcement, as well as the competence of the enforcement authorities. According to the Business Software Alliance (BSA), the software piracy rate in Moldova remains unacceptably high (it was 90% in 2010).²

In November 2010, the largest “national” torrent tracker responsible for copyright infringement in Moldova was taken “down” by the local enforcement authorities (it had a reported 270,000 users at the time). However, within a few weeks, the same service was up and running with virtually the same illegal content. To date, no criminal investigation or case has been commenced against either the owners or operators of this illegal service and site, and no administrative actions were taken either.

The BSA reported that in 2011, seven new criminal investigations for software piracy were commenced. Of this total, six are still under investigation, and only one was sent forward to trial, where it is pending in the court. BSA further reported, that of the 2010 criminal cases (seven total) commenced:

- Two cases were closed: one due to a final court decision (a fine was imposed of 20,000 Leu or \$1,691 USD); the other case was settled with rights holders.
- One case is still pending in a Moldovan court.
- Two investigations were terminated before cases could commence.
- Two are still under investigation.

¹For more details on Moldova’s Special 301 history, see IIPA’s “History” appendix to this filing at <http://www.iipa.com/pdf/2012SPEC301HISTORICALCHART.pdf>, as well as the previous years’ reports, at <http://www.iipa.com/countryreports.html>. For a summary of IIPA’s 2012 global issues, see our cover letter at <http://www.iipa.com/pdf/2012SPEC301COVERLETTER.pdf>.

² BSA’s 2011 software piracy statistics will not be available until after the filing deadline for this submission, but will be released in mid-May 2012, at which time piracy rates and U.S. software publishers’ share of commercial value of pirated software will be available at www.iipa.com. The 2010 statistics follow the methodology compiled in the Eighth Annual BSA and IDC Global Software Piracy Study (May 2011), <http://portal.bsa.org/globalpiracy2010/index.html>. These figures cover packaged PC software, including operating systems, business applications, and consumer applications such as PC gaming, personal finance, and reference software – including freeware and open source software. They do not cover software that runs on servers or mainframes, or routine device drivers and free downloadable utilities such as screen savers. The methodology used to calculate this and other piracy numbers are described in IIPA’s 2012 Special 301 submission at <http://www.iipa.com/pdf/2012spec301methodology.pdf>.



PRIORITY ACTIONS TO BE TAKEN IN 2012

IIPA recommends that the Government of Moldova should make the following its IPR enforcement priorities in 2012:

- Raise public awareness on the importance of IP protection and rights through joint educational and public relations campaigns between the government and rights holders. This would also include organizing conferences focusing on the value of IPR in general, and on the importance of enforcement to help local and foreign rights holders establish a legitimate marketplace in Moldova. One such program could follow up on the EU project called: “Support to Implementation and Enforcement of Intellectual Property Rights in the Republic of Moldova” (which commenced in November 2010).
- Increase the number of training programs for police, prosecutors, and judges on the basics of IPR protection and enforcement – including a focus on online piracy problems.
- Increase the overall number and size of raids and cases against IPR infringers.

Although the copyright industries generally report that the Moldavian IPR legal infrastructure is sound (and, for the most part, harmonized with European Union directives), implementation of its laws, and on-the-ground enforcement is lacking in overall numbers of raids and seizures, and criminal cases and convictions compared with other countries in the region.

In short, IPR protection is not a high priority for the Government of Moldova, and significant investments made by the copyright industries in past training programs for local law enforcement officials have not proven fruitful. Thus, despite the good relationships between right holders and the Anti-Fraud Police and IPR Crimes Department of the General Public Prosecutor’s Office, the number and quality of raids has decreased over the past few years. The police lack sufficient resources, equipment and expertise to effectively conduct raids, and the storage and inspection of seized pirated materials remain major concerns for rights holders. Moreover, the lengthy court proceedings mean that the copyright industries cannot secure effective enforcement and cannot get a strong foot-hold in a legal marketplace in Moldova. One suggested starting point for enforcement would be for the courts to issue civil injunctions in a matter of days (three days to three weeks is the average in Central Europe) against end-user and other pirates. In Moldova, this process currently takes longer than six months – just one indication of the overall weak enforcement climate in Moldova.

SINGAPORE

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

2012 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: IIPA recommends that USTR actively monitor developments in Singapore during 2012 with respect to the issues discussed in this Special Mention report, and urges that USTR heighten its bilateral engagement with Singapore on the following priorities.

Executive Summary:¹ While the copyright law and enforcement provisions of Singapore's Free Trade Agreement with the United States, which came into force in 2005, have been largely successful, several significant shortfalls must be addressed. Online piracy continues to threaten Singapore's market for copyright works, especially music, movies, and television programs. The government's response to date remains clearly inadequate, both in terms of its continued refusal to bring public prosecutions of online music pirates, and its failure to bring Internet Service Providers into a cooperative stance with rights holders to combat online piracy. Both these shortfalls also raise serious FTA compliance issues. Singapore also should join the global trend and outlaw camcording in its cinemas, before a festering problem becomes more serious, and should consider upgrading (to deterrent levels) its criminal penalties for trafficking in circumvention devices and services.

ACTIONS THAT THE SINGAPORE GOVERNMENT SHOULD TAKE IN 2012

- Fulfill its FTA obligations by bringing public prosecutions against significant instances of online music and audiovisual piracy.
- Engage with ISPs to make responsible repeat infringer policies a regular feature of the landscape, and otherwise to encourage cooperation with right holders to combat online piracy.
- Adopt a more aggressive stance in combating sales of pirate music at temporary trade fairs, and improve enforcement against imports of piratical music CDs.
- Adopt legislation specifically outlawing camcording in Singapore cinemas, and facilitate online enforcement by rectifying through legislation the deficiencies identified by Justice Woo in the *Odex* decision.
- Consider increasing criminal penalties for trafficking in circumvention devices and services such as "game copiers" and "mod chips" for game consoles.

COPYRIGHT LAW AND ENFORCEMENT ISSUES

2012 marks seven years since Singapore's landmark Free Trade Agreement with the United States FTA, and specifically since its copyright law and enforcement obligations came into force. For the most part this agreement has been a success for the copyright industries. Unfortunately, in some key areas, the full potential of this pact is far from being achieved. Singapore is also falling behind global anti-piracy trends in at least one other area not directly addressed by the FTA – camcording. IIPA urges the U.S. government to focus its efforts in the following areas during bilateral discussions with Singapore in 2012:

Active Engagement Needed in Enforcement Against Online Piracy. The recorded music marketplace in Singapore is under serious stress. Sales of physical product (CDs) is in free fall, with 2010 revenues less than half

¹For more details on Singapore's Special 301 history, see IIPA's "History" appendix to this filing at <http://www.iipa.com/pdf/2012SPEC301HISTORICALCHART.pdf> as well as the previous years' reports, at <http://www.iipa.com/countryreports.html>. For a summary of IIPA's 2011 global issues, see our cover letter at <http://www.iipa.com/pdf/2012SPEC301COVERLETTER.pdf>.



what they were just four years earlier. Many labels, both international and local, as well as the major international music publishers, have drastically cut back their Singapore offices, or ceased operations there altogether. The retail market has been decimated, and wholesale operations no longer exist in Singapore.

Of course, in Singapore more than in almost any other market, access to music online or via mobile device is a key factor in the demise of the hard-goods marketplace, as the household broadband penetration rate has soared from 42% in 2004, to just under 100% in 2008, to an unsurpassed 192% in 2010. Mobile phone penetration levels are similarly elevated (144% in 2010).² Unfortunately, the vast majority of that online or mobile access is to infringing material. In this highly connected, technologically savvy city-state, online music piracy is thriving, notably via infringing distribution hubs, illegal streaming sites, and BitTorrents and other peer-to-peer (P2P) file sharing. Online piracy has not only decimated the legitimate hard-goods market; it has also crowded out licensed download services and digital music stores.

The recording industry reports increasing P2P filesharing infringements via Bit Torrent (BT) networks. For example, in August 2011 there were over 500,000 unique visitors from Singapore to the top 10 Bit Torrent sites. Even more noteworthy is the fact that unique visitors from Singapore to the top three BT sites i.e., PirateBay, Torrentz.eu and Isohunt.com, accounted for about 12% of the total internet audience in Singapore. Furthermore, infringing distribution hubs (or cyberlockers) continue to account for a large proportion of online infringement in Singapore. From January through August 2011, over 44,000 links to infringing material stored in cyberlockers were tracked in Singapore by the recording industry. The top 10 cyberlockers were the destination for over 90% of these infringing links, which are causing irreparable damage to the recording industry.

Prevalent online piracy in Singapore also injures the audio-visual sector. The Motion Picture Association (MPA) reports that Singapore has the highest incidence of per-capita P2P infringement of motion pictures of any territory in Asia, and that illicit streaming sites located outside Singapore also attract large audiences for pirate performances. MPAA notes that Peer Media Technologies reported that during 2011, users initiated over 3.7 million downloads/uploads of unauthorized copies of major U.S. movie titles via certain P2P protocols in Singapore.³

The response to date of the Singapore government to these depredations can best be described as passive. In the online arena, the music industry has been filing complaints with the Intellectual Property Rights Branch (IPRB) of the Singapore police since 2005. These have led to the issuance of a handful of warning letters from government enforcement agencies, with no action whatever in the vast majority of cases. In fact, the music industry reports that the last public prosecution by Singapore authorities for distributing pirate digital files over the Internet arose from an arrest in 2005 and a conviction in 2006. There have been no prosecutions since then.

The IPRB informed the industry in July 2007 that it would not be taking any action on these complaints and suggested that “collaborative enforcement” was the best form of action. By that, the IPRB meant that the industry should take up private prosecution or civil proceedings. Following a meeting with IPRB in 2007 at which the authorities told the recording industry that it would consider enforcement actions in cases involving a “significant number” of music files, IPRB has never responded to industry requests to specify what level of infringement would qualify as “significant.” In June 2008, the industry lodged formal complaints with IPRB against two pirate websites hosted in Singapore, and provided extensive follow-up information to the authorities. Eight months later, IPRB told the industry that warnings had been issued, and the files were closed. The government has never responded to industry requests for an explanation of why the site operators were not prosecuted. In October 2009, a complaint was filed with IPRB against a forum site hosted in Singapore that featured infringement of music. When the recording industry asked about the status of the case in December 2010, IPRB claimed that they were “looking into the cases,”

²Source: InfoCommunications Development Authority of Singapore (IDA).

³For purposes of this study, a major U.S. movie is defined as a movie released in 1,000 or more theaters in the U.S., so these numbers reflect only a small subset of movie-related online piracy activity (since the study excludes non-major releases, including local titles; other peer-to-peer protocols; and non-peer-to-peer means of dissemination, such as websites, and streaming via other technologies).

but took no action before the site moved to another jurisdiction in February 2011. Other copyright sectors confirm this portrait of governmental passivity in the face of a serious threat from online piracy.

IPRB's consistent refusal to investigate online piracy complaints brought to it by industry, and its consistent direction that industry bring private prosecutions, is particularly disturbing because it marks a return to a practice that the FTA was specifically designed to discourage. Article 16.9.21.b of the FTA provides that "Each Party shall ensure that non-private criminal actions are the primary means by which it ensures the effective enforcement of its criminal law against willful copyright or related rights piracy. In addition, each Party shall ensure that its competent authorities bring criminal actions, as necessary, to act as a deterrent to further infringements." Seven years after the FTA came into force, Singapore's fulfillment of these commitments is open to serious doubt. The experience of the music industry, at least, is that private criminal actions, far from ceding primacy to government prosecutions, is virtually the only path open to it to combat criminal infringements online; and the government's failure to bring criminal actions is a significant part of the explanation for the indisputable fact that online music pirates are simply not being deterred in Singapore. Not only are private prosecutions more expensive, unwieldy and time consuming for copyright owners to pursue; it is much more difficult to investigate or compile evidence without law enforcement assistance, and far harder to achieve deterrent sentencing even if defendants are convicted.

The fight against online piracy is further hobbled by the widespread unresponsiveness of Singapore's Internet service providers (ISPs). The recording industry sends ISPs, on a weekly basis, notices of infringements carried out by their subscribers. ISPs continue to ignore requests from right holders to deal with repeat infringers found on P2P networks. In 2009-2010 alone, some 218 letters were sent, listing 3,787 IP addresses of infringing P2P users. Every six months, industry compiles these reports and identifies to the ISPs the apparent repeat infringers among their subscribers. These notices, and requests for the suspension of the accounts of repeat infringers, have been almost completely ignored. There is no evidence that any notices have been passed on to the infringing subscribers, nor that any ISPs even have a policy to do so. A number of ISPs have even refused to meet with the recording industry to discuss ways to cooperate to deal with digital piracy. The damage inflicted by online music piracy on Singapore's economy and culture, as well as on the interests of U.S. copyright owners, cannot possibly be addressed without cooperation from the ISPs whose facilities and services are being used to carry out infringements; yet that cooperation has been completely lacking.

The entertainment software industry experience with ISPs is similar. The Entertainment Software Association (ESA) in 2010 stopped sending notices to local ISPs regarding infringing activities of their subscribers detected by ESA's monitoring, as ISPs never responded nor gave any indications that they were taking any remedial actions.

Singapore's government has a responsibility to contribute to solving this problem. It pledged in its FTA with the United States to "provide ... legal incentives for service providers to cooperate with copyright owners in deterring the unauthorized storage and transmission of copyrighted materials." FTA, Article 16.9.22.a. Since no cooperation is occurring, any incentives the government is offering are manifestly inadequate. More specifically, the FTA clearly exhibits a policy to encourage ISPs to "adopt and reasonably to implement a policy that provides for termination in appropriate circumstances of the accounts of repeat infringers." Article 16.9.22.b.vi.A of the FTA makes such adoption and implementation a prerequisite for any ISP seeking to limit the scope of remedies available against it for infringements taking place on its network, including infringements as to which the ISP's liability arises only from its role in transmitting, routing or providing connections, or engaging in associated intermediate and transient storage. See Article 16.9.22.b.i.A. On paper, Singapore implemented this obligation in Rule 8 of the Copyright (Network Services Provider) Regulations 2005, requiring providers to implement repeat infringer policies. The fact that no Singapore ISP has even been willing to confirm publicly that they have adopted any such policies, much less implemented them, raises significant issues of FTA compliance.

IIPA urges USTR to press Singapore's government to step up to these problems. There are many steps, both formal and informal, that the government could take to encourage ISPs operating within its jurisdiction to begin

to cooperate with right holders as the FTA specifically directs. Cooperation must include, but should not be limited to, forwarding to subscribers any notices received from right holders regarding specific infringements detected, as well as making responsible repeat infringer policies a regular feature of the ISP marketplace in Singapore. Whether this is achieved through adoption and active enforcement of reasonable contractual terms of service for provision of Internet access, or whether it takes the form of a required “graduated response” program with appropriate due process safeguards before suspension or termination of user accounts, Singapore must move beyond the status quo if it is to make any headway against this well-entrenched and pervasive problem.⁴

As a further obstacle to enforcement against online infringement, Singapore law still makes no provision for agents or authorized representatives acting on behalf of copyright owners to apply for pre-trial discovery in order to identify online copyright infringers. This legislative deficiency, as measured against Singapore’s obligations under the FTA, was observed by Justice Woo Bih Li in the March 2008 *Odex* decision.⁵ Primary or subsidiary legislation needs to be enacted to fix this problem.

Limited progress against Hard Goods Piracy of Music, Movies and TV Programming. What remains of the legitimate market for music CDs has had to contend with pirate product, generally imported in counterfeit form from China under the guise of original parallel import products. These pirate products are usually sold from stalls at temporary trade fairs around Singapore. Because the fairs generally last only 3-5 days, it is expensive and cumbersome for right holders to file legal actions against the operators. While other avenues are being explored, it is notable that there has been very little support from the police for cracking down on these sales. Not a single raid was run by IPRB against pirate music product in 2011, down from 3 the previous year. The recording industry filed five new complaints involving four makeshift stalls selling pirated music products at Chinese New Year trade fairs and one retail stall on January 20, 2011. However, IPRB has responded that the industry should consider a “collaborative approach,” i.e., private prosecution, as the targets do not represent “the upper echelons of the syndicate.”⁶

MPA reports that Sim Lim Square remains an active market for pre-loaded media players (containing unauthorized copies of films and TV shows) and “dongle” devices that provide delivery of Internet streaming services. Approximately 5-10 different types are being sold in Sim Lim Square. These small Internet-accessible black boxes with USB and HDMI access ports connect directly to the television which is then routed to a variety of infringing online sites (typically Chinese) containing movies, TV shows, sports programming, etc. They sell for about S\$200 (US\$156) and are marketed as an “alternative to expensive monthly cable television bills.”

Finally, with regard to hard goods piracy of recorded music, the prevalence in the market of pirate product imported from China masquerading as legal parallel imports justifies a review of Singapore’s policies and practices in this area. In cases involving such importation, Singapore should reconsider its refusal to impose the burden of proof on the defendant to establish that the articles in question were legitimately made in the country of origin. (At a minimum, it should amend its Declaration for Censorship Submission forms to require applicants to indicate (in the form of a statutory declaration) the source of such acquisition, as industry has previously requested.) As it now stands, the law requires the plaintiff (or the prosecutor) to prove a negative – that the article was not made with the authority of the copyright owner anywhere in the world – as well as proving the defendant’s knowledge of the article’s piratical nature. This makes enforcement against piratical imports practically impossible. Singapore should also make more active use of its existing authority to detain shipments of suspected infringing CDs *ex officio*. While this authority is sometimes used with respect to items such as counterfeit alcoholic beverages or tobacco products, it is almost never invoked to enforce copyright protections against importation of pirate CDs.

⁴It is worth noting that Singapore’s two biggest ISPs, at a public symposium at the National University of Singapore in December 2011, voiced support for extending existing government site-blocking authority to cover off-shore rogue sites and pirate networks that consume inordinate bandwidth. Perhaps this will be a harbinger of increased cooperation in the future.

⁵*Odex Pte Ltd v. Pacific Internet Ltd* [2008] SGHC 35 (see paragraphs 31-37 of the decision).

⁶An unsatisfactory outcome was obtained from a 2010 case that targeted two shops and kiosks selling hard disks pre-loaded with karaoke videos. On appeal, the High Court ruled that the 24 hard disks, comprising over 8400 copies of infringing recordings, should be treated as only 24 “articles” for sentencing purposes, vacated the custodial sentence imposed at trial, and ordered the defendant to be fined S\$96,000 (US\$77,000), or about S\$11.38 (US\$9.10) per infringing work.

Outlawing Camcording. Although a number of Asian jurisdictions have joined the global trend toward outlawing the unauthorized camcording of feature films in cinemas, Singapore has not yet done so. While the problem moderated in 2011, past activity demonstrates the need for Singapore to take legislative action in this area. A specific criminal provision against camcording has proven to be a critical anti-piracy tool in many countries that have adopted it. Singapore should follow suit.

Deterring Trafficking in Circumvention Devices and Services. ESA reports that Singapore's government continues to have an excellent record of cooperation and partnership with the entertainment software industry on enforcement efforts against retail outlets for pirate games in hard copy format, which have driven this form of piracy down to low levels, and on educational initiatives aimed at increasing the public's awareness of the importance of protecting copyright. There is, however, a persistent concern with respect to the sale of circumvention devices, which enable the play of pirated games on consoles. Although Singapore police have undertaken some high-profile raids on targets engaged in the distribution of large quantities of circumvention devices, the eventual lenient sentences and penalties imposed on most defendants undermines efforts at curtailing the trade in circumvention devices.

In light of reductions in the availability of hard copy pirated entertainment software, the continued prevalence of modified consoles and circumvention devices in Singapore strongly suggests that existing legal sanctions are insufficient to create deterrence. Under Section 261C of the Copyright Act, the maximum penalty for trafficking in circumvention devices – two years' imprisonment or a fine of S\$20,000 (US\$16,000) – is far less than the penalties for the sale of pirate games – S\$10,000 per article up to S\$100,000 and/or imprisonment up to five years. Furthermore, since the fine authorized under Section 261C does not vary based on the number of circumvention devices, a high-volume distributor is exposed to the same maximum fine as a low-level distributor. The problem is further exacerbated by the Court's reluctance to impose meaningful sentences against defendants charged with selling circumvention devices or modified game consoles. Yet the sale and supply of modified consoles and circumvention devices inflicts far greater damage to the market than the sale and supply of pirate games. The buyer or user of a modified game console, or of game copier cards, may stop buying legitimate software altogether, instead downloading pirated games from the Internet to meet his or her needs, thereby fostering multiple acts of infringement.

Singapore should re-examine the current penalties for criminal violations of its technological protection measures provisions and consider revising them to bring them in line with the penalties for criminal copyright infringement. Moreover, judges should be encouraged to impose sufficiently stern criminal sentences to serve as a deterrent to future sales of circumvention devices.

MARKET ACCESS ISSUES

In August 2011, Singapore's Media Development Authority implemented the March 2010 amendments to its Code of Practice for Market Conduct in the Provision of Mass Media Service, which, in effect, unilaterally abolished exclusive licenses of content for subscription television programming. While MPA appreciates that some modifications in these so-called "cross carriage" rules were made in response to its concerns, it continues to believe the amendments were unjustified by market conditions, and represent an inappropriate governmental intervention into private contractual arrangements that may stifle further innovation in the packaging and delivery of new content to Singapore consumers. IIPA urges the U.S. government to monitor further developments closely, particularly with regard to the incorporation of the cross-carriage/ "must offer" approach in Singapore's Next Generation Interactive Media Services initiative (Project NIMS).

TAIWAN

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

2012 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: IIPA files this Special Mention report on Taiwan to highlight copyright piracy and enforcement issues, and recent developments calling into question the Taiwanese Government's continued strong commitment to address them.¹

Executive Summary: Internet piracy is the most urgent problem in Taiwan, and while physical piracy is generally under control, a major exception is the commercial photocopying of textbooks on or around university campuses. Unfortunately, several developments in the past couple of years raise newfound concerns over the Taiwanese Government's continued commitment to fight piracy in all its forms, and warrant this Special Mention report on Taiwan in the Special 301 process. We are deeply concerned by reports that the Taiwanese Government is considering diluting the role of the Intellectual Property Rights Police unit – the establishment of which was a contributing factor in Taiwan being removed from the Special 301 list. IP criminal cases apparently receive less attention because IPR crimes earn less credit for officers than other crimes, thus diminishing a police officer's chances for promotion. Evidentiary burdens on right holders in Internet and other piracy cases stifle their efforts at bringing complaints, and emphasize the need to establish copyright infringements, whether online or otherwise, as "public crimes." Campus enforcement against piratical activities remains difficult. The Taiwan Intellectual Property Office (TIPO) under its new leadership has not followed through with the needed push to address Internet and campus piracy, and appears to be moving in the wrong direction on copyright law reform.

There were great hopes that Taiwan would be a regional leader in addressing Internet piracy, through passage of the ISP liability law in April 2009, and through TIPO regulations adopted in November 2009, which clarified liability standards for ISPs. However, administrative guidelines still have not been issued with respect to key aspects of that law that were to deal with P2P and other online infringements, leaving a critical part of the law essentially inoperative. The ability for right holders to leverage much-needed cooperation from ISPs in combating such online infringements has therefore been stifled.

PRIORITY ACTIONS REQUESTED IN 2012

Enforcement Issues

- Confirm that the IPR Police (IPRP) will not be merged into general criminal task force or its responsibilities diluted, and ensure that both IPRP and the Joint Internet Infringement Inspection Special Taskforce (JIST) have increased manpower, equipment, and training.
- Increase the award budget for IPR cases including those involving Internet-based piracy, and ensure that no inappropriate criteria are applied for determination of such awards (e.g., physical seizures of pirated goods, equipment, and/or devices may be inappropriate criteria to judge the effectiveness of enforcement in Internet piracy cases).
- Improve enforcement against illegal photocopying on and near university campuses, especially during peak academic periods when unauthorized copyright is rife.
- Improve enforcement efforts against Internet piracy.
- Rationalize process of obtaining search warrants by making evidence-collection requirements and burden of proof hurdles more consistent.
- Extend coverage of new IP Courts to criminal copyright cases in Taiwan's courts of first instance, increase IP Courts' budgets to obtain latest tools, create Special IP Prosecutors functioning within the IP Courts, and provide informational seminars on Internet copyright issues for specialized judges and prosecutors.

¹For more details on Taiwan's Special 301 history, see Additional Appendix available at <http://www.iipa.com/pdf/2012SPEC301HISTORICALSUMMARY.pdf>. Please also see previous years' reports at <http://www.iipa.com/countryreports.html>.



Legislative Issues

- Pass amendment deeming crimes involving copyright infringements, including Internet infringements, public crimes to facilitate *ex officio* enforcement.
- Adopt administrative guidelines clearly detailing and implementing the ISP liability provisions of the copyright law to provide an effective and fair mechanism to address Internet infringement, including clarifying that ISPs lose all “safe harbors” under the new ISP Law if they do not have and implement a termination policy for repeat infringers.
- Amend the Copyright Collective Management Organization Act to remove unacceptable provisions empowering TIPO to set a “joint royalty rate” and appoint a “single window” for collection.
- Adopt legislation making it an offense to use (or attempt to use) an audiovisual recording device in a movie theater to make or transmit a copy of an audiovisual work, in whole or in part.
- Ensure draft copyright reform being considered by TIPO does not weaken protection for related rights, dismantle protections, or create other incompatibilities with Taiwan’s international obligations.
- Pass copyright term extension.

PIRACY AND ENFORCEMENT UPDATES IN TAIWAN

Internet Piracy Becoming More Severe: Over the past two years, the industry notes an increase in the severity of Internet piracy,² particularly in the use of P2P and BitTorrent services, blog sites, and “one-click hosting” sites,³ to infringe copyright in movies, music, software, games, and books and journals.⁴ Some of the most notorious piracy websites in the world are servicing the Taiwanese market.⁵ Due to stringent law enforcement in Taiwan, people in Taiwan often obtain unauthorized music and music videos from websites located overseas, particularly websites located in mainland China (due generally to their preference for Chinese language interfaces), such as *youmaker.com*, *verycd.com*, Xunlei’s Thunder (*xunlei.799.com.tw*), *koowo.com*, *streamdrag.com*, and *1g1g.com*. The music industry roughly estimates Internet piracy in 2011 at 88% with US\$135 million in estimated losses.⁶ The Taiwan Federation Against Copyright Theft initiated more than 150 criminal complaints against individuals responsible for unauthorized distribution of major motion picture titles by means of P2P networks, BitTorrent forums, and “one-click hosting” sites (cyberlockers). Although individuals have been arrested for their activities, the vast majority of convictions result in probationary sentences or non-deterrent fines. One exception is the welcome news in August 2011 of the conviction of the owner of EZPeer,⁷ but unfortunately, there appears to be a decreased commitment on the part of the Taiwanese Government to effectively address the Internet piracy problem. The Copyright Act should be reformed so that Internet-based piracy is deemed a public crime. It is critical that the Taiwanese Government take serious steps to address the problem, including through *ex officio* enforcement actions.

²Aaron Hsu, *Internet users hit record high in Taiwan*, Taiwan Today, January 31, 2012, at <http://taiwantoday.tw/ct.asp?xItem=185344&CtNode=413> (reporting that the number of Taiwanese Internet users over the age of 12 reached an all-time high of 14.78 million in 2011, up 320,000 from the year before, according to the Research, Development and Evaluation Commission. The report also indicated that the percentage of online citizens using mobile devices jumped from 53 percent in 2010 to 70.4 percent last year.

³In IIPA’s filing in response to USTR’s Notorious Markets Special 301 Out-of-Cycle Review, IIPA noted *Gogobox.com.tw* (Taiwan) as an example of a “one-click hosting site,” colloquially referred to as a cyberlocker, which provides access to infringing files. International Intellectual Property Alliance, *IIPA Written Submission Re: 2011 Special 301 Out-of-Cycle Review of Notorious Markets: Request for Public Comments*, 76 Fed. Reg. 58854 (September 22, 2011), Docket No. USTR-2011-0012, October 26, 2011, at http://www.iipa.com/pdf/2011_Oct26_IIPA_Notorious_Markets_Submission.PDF.

⁴Over 16.1 million Taiwanese use the Internet, or 70% of the population. An astonishing 95% of Internet users in Taiwan (roughly 15 million) have broadband connections, whether wired or wireless. See Budde.com, *Taiwan - Broadband Market - Overview, Statistics and Forecasts*, at <http://www.budde.com.au/Research/Taiwan-Broadband-Market-Overview-Statistics-and-Forecasts.html>.

⁵For example, *Sohu.com*, ranked 9th in China and 44th globally in terms of Internet traffic, and *Sogou.com*, ranked 25th in China and 123th globally, provide search functionality for infringing music files to the Chinese-speaking community in various countries in Asia, including Hong Kong, Taiwan, Singapore, Malaysia, Macau, Thailand and Indonesia, causing substantial damage to the music markets there.

⁶The physical piracy rate for sound recordings in 2011 was an estimated 12% with US\$8.5 million in estimated losses.

⁷On August 30, 2011, Taiwan’s Supreme Court ruled P2P file exchange service www.ezpeer.com was criminally liable for copyright infringement. The ruling marked the end of a long legal battle, and overturned decisions made in Taiwan’s lower courts and a previous Supreme Court ruling. Mr. Wu Yi-Dar, CEO of the company operating the website, Global Digital Technology Co. Ltd., was sentenced to 14 months imprisonment, suspended for three years. See Motion Picture Association, *Taiwan Court Holds Ezpeer Criminally Liable For Copyright Infringement*, August 30, 2011 (press release, on file with IIPA). In a previous development, on November 22, 2010, Taiwan’s specialized Intellectual Property Court upheld a lower court’s finding of copyright infringement against the notorious local file-sharing website Foxy (gofoxy.net). The Intellectual Property Court sentenced Ming-Hsien Lee, the owner of Foxy, to 18 months jail, suspended for five years. The Court also imposed a fine against the defendant company of NT750,000 (US\$24,500).

Improve Enforcement Against Illegal Photocopying On and Near University Campuses: Physical piracy phenomena, including illegal photocopying of books and journals on or near university campuses, continue to cause great harm to the publishing industry. In 2011, publishers continued to find numerous instances of unauthorized photocopying by campus photocopy centers and the majority of students using illegally photocopied texts in the classroom. Unauthorized photocopying (particularly of higher education and English language textbooks (ELT)) remains the most damaging problem for U.S. and Taiwanese publishers in 2011. There have been instances where the photocopy shop delivers cases of illegal copied textbooks to the campus mail room, and being unable to locate the intended recipients, the mail room actually delivered the pirated copies to the publishers (apparently relying on the publisher logos on the covers).

Law enforcement authorities remain reluctant to pursue actions against the copy shops that operate on campuses, and the Ministry of Education (MOE) has failed to date to take strong actions against campus infringement. In 2009, MOE prepared an action plan which covered illegal photocopying of academic books and journals. The plan involved a “self-assessment” by each university as to its compliance with copyright laws. However, there is no independent monitoring or audit mechanism through which the MOE conducts its own evaluation of whether the university is in fact complying with the action plan. This is a critical element to making an objective assessment of whether a university is undertaking the necessary steps to ensure that its various departments are addressing infringing activity occurring on its campuses. 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.

Confirm that IPR Police (IPRP) Will Not Be Merged Into Another Unit or Diluted, and Ensure that Both IPRP and Joint Internet Infringement Inspection Special Taskforce (JIST) Have Increased Manpower, Equipment and Training: IIPA finds it inconceivable that the Taiwanese Government is considering merging or diluting the Intellectual Property Rights Police unit – the establishment of which was a contributing factor in Taiwan being removed from the Special 301 list. Reports indicate the government intends to merge the IPRP into a more general criminal task force, to be made effective early 2012, and as such, the scope of IPRP responsibility will no longer be focused only on IPR infringement cases.⁸ The name and structure of IPRP will remain the same, reportedly, but the unit will be responsible for other crimes (possibly including homicide). This shifting of priorities should be seen in the larger context of IPR apparently becoming less of a priority to the Taiwanese Government than in the past – a troubling trend. IPR cases apparently earn less credit for police officers than other criminal cases, thus IPRP officers who run anti-piracy actions reportedly feel at a disadvantage with regard to promotions and career advancement opportunities.

Furthermore, TIPO has decided not to give any award with respect to an Internet piracy case which does not involve confiscation of physical equipment/devices used for such infringing activities. Yet, as is well understood, Internet-based cases in many cases will not involve seizure of physical goods, equipment, or devices, since the nature of Internet anti-piracy operations is to disrupt the flow of infringing activities, which in many cases are decentralized to begin with and do not revolve around a single piece of equipment or device. IIPA also understands that TIPO plans to cut the budget of the anti-piracy monetary awards payable to IPRP given the declining number of physical piracy cases in recent years. The budget was cut to NT\$3.5 million (US\$115,000) in 2012, compared to NT\$5 million (US\$164,000) in 2011 and NT\$20 million (US\$650,000) several years ago. This has severely affected IPRP police officers’ morale and their willingness to combat copyright piracy.

Given the serious damage being caused by Internet piracy in Taiwan, IIPA recommends that TIPO should raise the award budget for Internet piracy cases, and devote more resources, including manpower, equipment and trainings, to the IPRP. The Taiwanese Government should ensure that IPR cases are afforded proper weight within the IPRP force to make them more desirable among IPRP officers. In addition, the Joint Internet Infringement

⁸One report indicates that IPR police is going to be “upgraded” by the National Policy Agency as part of “Criminal Investigation Bureau.” Despite IPO’s insistence that the IPR police will continue to focus solely on IPR enforcement after the upgrade, it remains uncertain if this will be so. This organizational change is reportedly to take effect after 2013.

Inspection Special Taskforce (JIST), comprised of selected personnel with expert knowledge in computers, IT, and technology from the IPRP, should be enhanced with greater devotion of manpower, more and better equipment (including better broadband connections and computers) to investigate Internet infringements, and more training opportunities on investigation techniques in detecting and enforcing against growing online forms of infringement. In TIPO/MOEA's "Implementation Plan for Strengthening Internet Infringement Preventive Measures," JIST was given the exclusive responsibility for tackling Internet piracy. The IPRP is authorized to have 220 officers available for these enforcement duties. Presently it has only 184 personnel, while the proposed number has never been realized. The additional 36 officers are urgently needed.

Enterprise End-User Piracy of Business Software – Relatively Low Piracy Level But Increasing Value of Unlicensed U.S. Software: End-user piracy of business software remains an issue, and while the piracy rate has decreased over the years, the value of unlicensed U.S. software in Taiwan has increased along with the overall size of the software market.⁹

Ease Process of Obtaining Search Warrants by Relaxing Evidence-Collection and Burden of Proof Hurdles: Certain industries report difficulties in obtaining criminal search warrants due to burdens imposed upon right holders by courts regarding evidence collection and onerous burdens of proof. For example, the recording industry reports that certain prosecutors are requesting that they provide contracts between the artists and composers and the record companies to prove copyright ownership (and subsistence) in the sound recordings at issue. TRIPS requires a presumption of ownership. Requiring the production of contracts that are attenuated to the recordings themselves, and are unrelated to the rights contained in the sound recording (i.e., the rights of the producers), is unduly burdensome. Publishers also note a lack of consistency with respect to the evidence prosecutors consider sufficient to proceed with a criminal case. In addition to the actual pirated copy, copyright holders are often asked to produce, for instance, detailed receipts with book titles and ISBNs, audiovisual recordings of the crime in progress, names of witnesses, etc. Where the pirated copy is only a portion of a book rather than the entire book, it is also often dismissed as inconsequential and the prosecutor will refuse to use the information to apply for a search warrant. The business software industry has encountered courts that will not grant a search warrant based on the testimony of an informant, requiring instead evidence such as screen captures that generally could not be obtained without a warrant.

Extend Coverage of IP Courts to First Instance Criminal Copyright Cases, Increase IP Court Budgets, Create Special IP Prosecutors, and Provide Learning Seminars with Judges and Prosecutors on Internet Copyright Issues: The specialized IP Courts in Taiwan, which began hearing cases in July 2008, and as noted, have handed down some important decisions in the past couple of years, should also cover first instance criminal copyright cases to create a more effective and deterrent remedy in the court system. In addition, a division of specialized IP prosecutors should be created. The IP Courts and Prosecutors' offices are not properly funded to get up to speed with the latest technologies (such as Internet issues, TPMs and circumvention devices, etc.), and should be properly funded. Given the developments in the area of Internet infringements and other technological developments, it would further be timely to provide learning seminars for the specialized IP judges and, once created, the specialized IP prosecutors. Industry is willing to participate in such seminars in 2012, but apparently has not been invited to such seminars in the past couple of years, whereas they have participated in seminars held by Customs and the IPR Police from time to time, and, during those seminars, copyright owners have had an opportunity to speak on Internet copyright issues.

⁹BSA's 2011 software piracy statistics will not be available until after the filing deadline for this submission, but will be released in May 2012, at which time piracy rates and U.S. software publishers' share of commercial value of pirated software will be available at www.iipa.com. In 2010, the software piracy rate in Taiwan was 37%, representing a commercial value of unlicensed software attributable to U.S. vendors of US\$139 million. These statistics follow the methodology compiled in the Eighth Annual BSA and IDC Global Software Piracy Study (May 2011), <http://portal.bsa.org/globalpiracy2010/index.html>. These figures cover packaged PC software, including operating systems, business applications, and consumer applications such as PC gaming, personal finance, and reference software – including freeware and open source software. They do not cover software that runs on servers or mainframes, or routine device drivers and free downloadable utilities such as screen savers. The methodology used to calculate this and other piracy numbers are described in IIPA's 2012 Special 301 submission at <http://www.iipa.com/pdf/2012spec301methodology.pdf>.

COPYRIGHT LAW AND RELATED ISSUES

Despite a sound legal framework for the protection of copyright in Taiwan, some significant regulatory gaps and concerning legislative developments have emerged in the past couple of years. TIPO is working on amendments of the Copyright Act. Public information on TIPO's website indicates that TIPO held 15 internal meetings from February to November 2011 to discuss revisions to the Copyright Act. Although TIPO has not publicly released any draft amendments, suggested changes made in these meetings would further weaken copyright protection for sound recording copyright holders. The following are reportedly some of the suggested changes made to TIPO which would further weaken the copyright protection for sound recording copyright holders: 1) sound recordings would reportedly not enjoy any new rights giving due consideration to technology developments or other policy considerations; 2) a new type of right, translated as the "right of re-communication to the public" would be introduced as to all works, but not sound recordings and performances; if this right is akin to a retransmission right over the Internet, this would be a positive step, but must be extended to sound recordings and performances in order to ensure that sound recordings broadcast (or otherwise communicated) or performances cannot be made freely available on the Internet without authorization or payment; 3) works synchronized in an audio-visual work (music video or film), such as musical works but excluding sound recordings and performances, would reportedly be entitled to claim a public performance right; 4) the issue of parallel importation has apparently reappeared, and while the last time this issue was considered (in 2004), the act of renting, publicly displaying, or distributing a parallel import without consent of the right holder remained a crime, once again, the Taiwanese Government is considering decriminalizing these acts; and 5) there has been a proposal reportedly of introducing as an exception the communication to the public of content being publicly broadcasted through household loudspeakers or other equipment.

IIPA looks forward to having the opportunity to weigh in with TIPO on any proposed measures in public comments. In the meantime, and in consideration of the piracy problems discussed above and other policy decisions taken which could weaken the hand of creators in the country, the Taiwanese Government should ensure that any amendments do not result in weakened protection for copyright or related rights holders, or create new hurdles to adequate protection that might implicate Taiwan's international obligations.

Amend the Criminal Code to Deem Piracy a "Public Crime" Thereby Providing Police with *Ex Officio* Authority for Criminal Copyright Infringement Cases, Including Internet Cases: 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, and bolstered the legitimate markets for copyright materials. Given the vast increase in Internet piracy and its damaging impact on the legitimate market in Taiwan, plus the difficulties right holders have had in the Taiwanese market investigating Internet infringements and the help law enforcement involvement can provide in Internet piracy investigations, Taiwan's criminal provisions should now be further amended to include copyright piracy, especially Internet piracy, as a "public crime."

Adopt Administrative Guidelines Detailing and Implementing the ISP Liability Provisions of the Copyright Law to Provide Effective and Fair Mechanism to Address Internet Infringement: Taiwan's passage of Partial Amendments to the Copyright Law in April 2009 would, it was hoped, usher in a new era of leadership in Taiwan with respect to addressing copyright protection on the Internet. IIPA held out great hope that Taiwan would become a regional leader in addressing Internet piracy, through passage of these amendments and through the TIPO regulations that were to follow. The amendments set forth liability standards for ISPs, specifically clarifying that ISPs lose "safe harbors" under the new ISP Law if they do not have and implement a termination policy for repeat infringers. There was hope in particular that this law, by addressing non-hosted infringements (such as P2P, BitTorrent, blog sites providing links or otherwise indirectly leading people to infringe, etc.)¹⁰ would foster a new era of

¹⁰ As IIPA has reported in the past, 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. Subsequent to this important amendment, services like *Kupeer.com* and *Hip2p.com* closed immediately, demonstrating the deterrent impact the new law appears to have had.

cooperation between right holders and ISPs to combat infringement in the online space. However, the November 2009 regulations to implement the new law, while spelling out the notice and counter-notice obligations, did not set out the basic parameters of how ISPs should implement the new obligation set forth in the amended Article 90*quinquies* requiring ISPs to notify its users of its copyright protection policy and to implement it. As a result, this critical part of the law has remained essentially inoperative.

Industry attempted to forge a code of conduct with ISPs in Taiwan, as TIPO requested be done, but lacking sufficient support and leadership from TIPO (which asserts they lack sufficient authority to impose any type of code of conduct upon the ISPs), issuance administrative guidance to the ISP liability provisions of the copyright law is urgently needed, to provide an effective and fair mechanism to address Internet infringement including in the non-hosted environment, providing greater certitude with respect to liability standards for ISPs, and foster needed cooperation with right holders. IIPA continues to believe that TIPO involvement remains, and will continue to remain for some time, critical both to ensure the law as amended is fully implemented, and, to the extent possible, that right holders and ISPs can forge meaningful and workable voluntary arrangements to deal with the online infringement threat.

Amend The Copyright Collective Management Organization Act to Remove Unacceptable Provisions Empowering TIPO to Set a “Joint Royalty Rate” and Appoint a “Single Window” For Collection: On January 12, 2010, the Legislative Yuan adopted amendments to the Copyright Collective Management Organization Act. That legislation unfortunately leaves in place overbroad authority in TIPO to fix royalty rates for the broadcast of music and sound recordings and allows for delays in fixing the rate, thus interfering with the ability of right holders to collect royalties. The amendments as passed establish a four month time limit on TIPO approval of these rates and requires TIPO to reconstitute a special rate setting committee to include right holders as well as users and experts. The Act should be modified to favor a freer market approach, remove delays, allow for the use by right holders of agents to collect royalties, and do away with the possibility of a single licensing window.

The amendments also did not make changes to allow right holders to use agents to collect royalties. One of the major objectives of right holders is to ensure that their collecting societies minimize overhead and other administrative costs while ensuring that commercial uses are licensed appropriately. In the area of public performance, these cost savings are achieved in part through the use of commissioned agents. Collecting societies around the world depend upon the use of agents to reach commercial users who publicly perform recorded music; to educate them on the need to obtain a license; and to issue relevant licenses. In Taiwan, the producers' collecting society used to retain commissioned agents to assist in covering different geographical locations more effectively. However, a 2008 TIPO ruling denied agents the ability to continue this practice. The inability to use agents for licensing purposes has a direct negative impact on right holders' licensing activities. It reduces the amount of remuneration collected and results in a large number of businesses operating without a license, denying right holders remuneration to which they are entitled, and undermining the rule of law. There is no justified reason to prevent right holders from using agents for licensing and royalties collection, and the policy underlying the decision against using commissioned agents is unclear. Any concerns relating to licensing practices can be addressed more effectively by, e.g., establishing an industry code of conduct on public performance licensing. Such agreed sets of rules would ensure that the system is not abused and that users' interests are maintained.

Unfortunately, in addition, the tariff rate approved by TIPO is set far too low. For example, the collecting society for the sound recording industry, ARCO, proposed a tariff rate for public performances of recorded music on the subway and by rail/high-speed rail of NT\$600 (US\$20) per carriage per year, which TIPO cut to NT\$200 (US\$6.50). Similarly, the tariff rate for public performances on highway and tour buses was proposed at NT\$2,000 per bus per year, which TIPO cut to NT\$550 (US\$18). Though the new law (CCMO Act) does not require a collection society to apply for tariff review in advance, it allows users to challenge the tariff proposed by collection. The CCMO Act also entitles users to apply for a tariff review with TIPO. A more reasonable tariff review process is very important to collection societies.

A significant concern of the amendments is that they provide for a single society to collect royalties for right holders of different categories. Article 30 of the Act which grants TIPO the authority to designate a “single licensing window” and set the joint royalty rate, cannot be justified. Experience has shown that licensing markets function effectively where rights holders remain free to find the most efficient way to administer their rights. Freeing the market from any restrictions means that competition between different players in the market is maintained, and market powers can determine the best solutions for both right holders and users. To ensure that these conditions exist in Taiwan, right holders should be allowed to determine for themselves which collecting society to join and entrust their rights, and whether or not to collect jointly with other right holders. Restrictions on the ability of right owners to collectively manage their rights through different collection societies are ineffective and threaten the development of the licensing market. In particular, an obligation on all right holders to collect their performance rights jointly will result in conflicts on both collection and distribution of royalties. Such conflicts would impede the proper functioning of the market and negatively impact on users’ ability to obtain licenses. The majority of countries in the world leave it for rights holders to decide how to license their rights. Experience has shown that in most countries, right holders of the same type prefer to administer their rights under one collective management organization, but again, this freedom to decide whether to join a particular organization, or establish a new one, should be maintained.

Taiwan Should Adopt an Anti-Camcording 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. Illegal camcording destroys entire windows for distribution of audiovisual works, and camcording pirates do not discriminate between domestic or foreign films, and do not care that they are harming the local cinema businesses. Several countries in the region, as well as other previous hotspots of camcording piracy, have enacted statutes outlawing the use (or the attempt to use) an audiovisual recording device in a movie theater to make or transmit an audiovisual work (in whole or part). Taiwan should swiftly amend its law to address this problem which is causing increasing harm throughout the region and locally in Taiwan.

Pass Copyright Term Extension: 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. Countries in the OECD region who have extended terms also have increased production in audiovisual materials. Extending term in Taiwan will also ensure that its older works are not discriminated against in countries which have extended term but do not follow the “Rule of the Shorter Term.”

APPENDIX B: METHODOLOGY

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2012 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

BUSINESS SOFTWARE

The Business Software Alliance'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, Ipsos Public Affairs surveyed more than 15,000 business and consumer PC users. In 2011 the surveys were conducted, online or in-person, in 32 markets¹ that make up a globally representative sample of geographies, levels of IT sophistication, and geographic and cultural diversity. Respondents were asked how many software packages, and of what type, were installed on their PC in the previous year; what percentage were new or upgrades; whether they came with the computers or not; and whether they were installed on a new computer or one acquired prior to 2010. 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-

¹The 2011 survey covered 12 mature markets (Australia, Canada, France, Germany, Italy, Japan, the Netherlands, Spain, Sweden, Switzerland, the United Kingdom, and the United States) and 20 emerging markets (Argentina, Brazil, Chile, China, Colombia, Czech Republic, India, Indonesia, South Korea, Malaysia, Mexico, Nigeria, Poland, Russia, Saudi Arabia, South Africa, Thailand, Turkey, Ukraine and Vietnam).

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. The included adjusting for OEM and channel-loaded software, as well as software from local suppliers. ASVs were gathered in the appropriate currency depending on how the country analysts collected software revenues.

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

BSA's 2011 software piracy statistics will not be available until after the filing deadline for this submission, but will be released in mid-May, at which time piracy rates and U.S. software publishers' share of commercial value of pirated software will be available at www.iipa.com. The 2010 statistics reported in the country appendices follow the methodology compiled in the Eighth Annual BSA and IDC Global Software Piracy Study (May 2011), <http://portal.bsa.org/globalpiracy2010/index.html>. These figures cover, as discussed above, packaged PC software, including operating systems, business applications, and consumer applications such as PC gaming, personal finance, and reference software – including freeware and open source software. They do not cover software that runs on servers or mainframes, or routine device drivers and free downloadable utilities such as screen savers.

ENTERTAINMENT SOFTWARE

In select countries, the Entertainment Software Association (ESA) provides rankings to demonstrate anecdotally the growth of online game piracy through the use of linking and hosting sites to make unauthorized copies of particular ESA member game titles. The methodology underlying these estimates is as follows:

Vendors for ESA's online enforcement program monitor for connection activity involving approximately 230 of ESA members' leading game titles on major public P2P networks. The data is broken down, by country, based on the country of operation of the ISP.

This data is only a subset of the overall downloading activity occurring during the monitoring period, as it accounts only for file sharing connections made through certain P2P protocols (BitTorrent, eDonkey, Gnutella, Ares) for purposes of sharing particular game files. ESA's reporting on P2P activity does not take into account downloads of these titles that occur directly from hosted content, such as games found on "cyberlockers" or "one-click" hosting sites, which appear to account each year for progressively greater volumes of infringing downloads.

Because it is premised on a selection of ESA member game titles, this methodology does not take into account piratical activity involving unmonitored member titles and titles of non-member publishers. In addition, this methodology likewise does not take into account piratical activity for unverified copies of titles being shared on P2P networks.

MOTION PICTURES

In select countries, the Motion Picture Association of America has provided estimates regarding activity around unauthorized copies of major U.S. movies on major peer-to-peer protocols during 2011. The methodology underlying these estimates is as follows:

Peer Media Technologies utilizes a network of scanning and monitoring technologies to report unique instances of a user attempting to download or upload an unauthorized copy of a major U.S. movie on a given day, across the most heavily trafficked online peer-to-peer networks (BitTorrent, eDonkey and Ares). A major U.S. movie is defined as a movie released in 1,000 or more theaters in the U.S. The file is identified based on filenames that a reasonable person would believe are associated with a specific release and the country is recorded from the country of origin of the user's IP address.

These estimates reflect only a subset of movie-related piracy activity occurring during the monitoring period, as it accounts only initiated downloads or uploads of major U.S. films through the listed P2P protocols. It does not include (1) downloads/uploads of unauthorized copies of movies that are not major U.S. releases, including local titles, through these P2P protocols; (2) downloads/uploads of unauthorized copies of any movies via other P2P protocols or through non-P2P technologies (e.g. websites); or (3) streaming of unauthorized copies of any movies via any technologies. Also, since local language title versions for scanning – particularly in non-Roman characters (e.g. Japanese, Chinese or Korean) – are not always available from established sources, and access to foreign language BitTorrent sites may fluctuate, results in certain countries are likely underrepresented. Finally, these estimates do not cover any activity related to television content.

RECORDS AND MUSIC

The Recording Industry Association of America (RIAA) has in various markets data from the local industry or from executives with responsibility for the particular territory. Any estimates contained within the country appendices to this Submission are based on local surveys of the market conditions in each territory. Each submission is reviewed against a range of sources:

- Market surveys by anti-piracy personnel and/or third parties;
- Optical disc industry and CD-R burning data provided by third-party consultants;
- Legitimate sales;
- Enforcement data and anti-piracy developments;
- Historical piracy estimates;
- Where possible, economic indicators, professional surveys and academic studies of piracy or counterfeit goods.
- Where possible, legitimate revenue from online and mobile networks.

Any monetary figures as to harm to the music industry in most cases reflect estimates of the level and value of pirate sales of U.S. repertoire. This does not take into account downstream (or value chain) losses from high piracy levels acting as a drag on the economic development of legitimate markets. Where possible, losses and piracy rates occurring via online and mobile networks are reported and would be so designated in the text of the country report.

USTR 301 PLACEMENT
(as of April/May of each year)

COUNTRY	IIPA Recommendation February 2012	2011	2010	2009	2008	2007	2006	2005	2004	2003	2002	2001	2000	1999	1998	1997	1996	1995	1994	1993	1992	1991	1990	1989
Albania	SM																							
Algeria		PWL	PWL	PWL	WL																			
Argentina	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	WL	PWL	PWL	WL	WL	WL	WL
Armenia											WL	WL	WL											
Australia														WL	WL	WL	WL		WL	PWL	PWL	PWL		
Austria															OO	OO								
Azerbaijan								WL	WL	WL	WL	WL	WL											
Bahamas							WL	WL	PWL	PWL	WL + OCR	OCR	OCR											
Bahrain															WL	WL	WL	WL						
Bangladesh																								
Belarus	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	OO									
Belize						WL	PWL	WL	WL															
Bolivia		WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	OO	WL	OO							
Bosnia and Herzegovina																								
Brazil	WL	WL	WL	WL	WL	WL + OCR	PWL	PWL	PWL	PWL	PWL	WL	WL	WL		WL	WL	PWL	OO	PFC	PWL	PWL	PWL	PWL
Brunei	WL	WL	WL	WL																				
Bulgaria	SM						WL	WL	WL						PWL	WL	OO	OO						
Burma (Myanmar)																								
Cambodia																								
Canada	PWL	PWL	PWL	PWL	WL	WL	WL + OCR	WL + OCR	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	OO		WL	WL	WL	WL
Chile	PWL	PWL	PWL	PWL	PWL	PWL	WL + OCR	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL
China (PRC)	PWL + 306	PWL	PWL	PWL	PWL	PWL	PWL + 306	PWL	306 + OCR	306	306	306	306	306	306	306	PFC	WL	PFC	WL	WL	PFC	PWL	PWL
Colombia	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	PWL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL
Costa Rica	PWL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL + OCR	PWL	WL	WL	WL	WL	WL	WL						
Croatia							WL	WL	WL	WL														
Cyprus																OO	OO	OO	WL	WL	WL	WL		
Czech Republic			WL	WL	WL	OCR							WL	WL	WL	OO								
Denmark													WL	WL	WL	WL								
Dominican Republic		WL	WL	WL	WL	WL	WL	WL	WL	WL	PWL	PWL	PWL	PWL	PWL	WL	OO							
Ecuador		WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	PWL	PWL			WL	WL			
Egypt	WL	WL	WL	WL	WL	PWL	PWL	PWL	PWL	WL	PWL	PWL	PWL	PWL	PWL	PWL	WL	WL	WL	PWL	PWL	WL	WL	WL
El Salvador																	WL	WL	WL	WL	WL			
Estonia															OO									
European Union							WL	WL + OCR	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL		
Fiji				OCR																				
Finland		WL	WL	WL																				
Georgia												OCR												
Germany															OO	OO	OO	OO	OO		WL	WL		
Greece	WL	WL	WL	WL	WL						WL	WL	PWL	PWL	PWL	PWL	PWL	PWL	WL	WL	WL	WL	WL	WL
Guatemala		WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	PWL	PWL	PWL	WL	WL	WL	WL	WL	WL			
Honduras															WL	WL	OO	OO	OO					
Hong Kong	SM													OCR	WL	WL	OO							
Hungary	SM			WL	WL	WL	WL	WL	WL	WL	PWL	PWL	WL	WL	OO	OO				PWL	PWL	WL		
Iceland																								
India	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PFC	PFC	PFC	PWL	PWL

USTR 301 PLACEMENT
(as of April/May of each year)

COUNTRY	IIPA Recommendation February 2012	2011	2010	2009	2008	2007	2006	2005	2004	2003	2002	2001	2000	1999	1998	1997	1996	1995	1994	1993	1992	1991	1990	1989
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	WL	WL								WL	WL	OO				WL	WL	WL	WL	WL	WL
Sri Lanka																								
Sweden														WL	WL	WL								
Switzerland	WL																							
Taiwan	SM				WL (then OFF due to OCR)	WL	WL	WL	PWL + OCR	PWL	PWL	PWL	WL	WL			OO	WL	WL	PWL	PFC	WL	WL	PWL
Tajikistan	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL											
Thailand	PWL	PWL	PWL + OCR	PWL	PWL + OCR	PWL	WL	WL	WL	WL	WL + OCR	WL	WL	WL	WL	WL	WL	WL	PWL	PFC	PFC	PFC	PWL	PWL
Tunisia															OO									
Turkey	WL	WL	WL	WL	WL	PWL	PWL	PWL	PWL	WL	WL	WL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	WL	WL	WL
Turkmenistan	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL											
UAE												WL	OCR	WL	WL	WL	WL	WL	WL	WL	WL	WL		
Ukraine	PWL + GSP/OCR	WL	WL	WL	WL	PWL	PWL	PFC + OCR	PFC	PFC	PFC	PFC	PWL	PWL	WL									
Uruguay								WL	WL	WL	PWL	PWL	WL	WL	OO	OO								
Uzbekistan (GSP)	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL											
Venezuela		PWL	PWL	PWL	PWL	PWL	PWL	PWL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL
Vietnam	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	OO	OO						
Yemen																OO								

- PFC: Priority Foreign Country
- PWL: Priority Watch List
- WL: Watch List
- OO: Other Observations (an informal listing formerly used by USTR).
- SM: Special Mention
- OCR: Out-of-Cycle Review to be conducted by USTR
- GSP: GSP IPR review ongoing, except in Ukraine and Indonesia where GSP IPR review requested in December 2011.
- DS: Dispute Settlement